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Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

This submission

The following is a submission by the LFAA to the Senate Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

General comments

The LFAA opposes this Bill.

Proposed legislation is gender-biased and anti-shared parenting

Together with other fathers' and children's groups, the LFAA opposes the proposed "radicalisation of the Family Law Act and any attempt … to roll back children's rights and the rights of parents to enjoy their lives together … (via) attempts at Government interference to re-impose a regime and culture of separation, segregation and alienation of children and parents suffering through the family law system and courts" (SPCA 2011).

A primary purpose of the original 1976 Family Law Act was to avoid the bitterness caused between separating couples as a result of accusations of marital misbehaviour made in order to gain an advantage in terms of custody and property settlements. The proposed Bill would bring back many of the abuses, e.g., concocted or inflated claims about "physical" and "mental cruelty", which were intended by Parliament to be removed in 1976.

The "Hull" (HORISP) Inquiry 2003

As noted by the SPCA, "The House of Representative Inquiry into Shared Parenting (HORISP) found that children and parents had a proper expectation to live shared lives together equally or as near to this as practicable after separation or divorce.

"(The proposed new) legislation is set to elevate unproven and untested violence allegations above the best interests of the child to enjoy an equal relationship with both parents after separation and divorce (*see pb1491, attached*).

"… the 'say so' of one parent should (not) be used to drive the other parent out of the child's life when such allegations are made in the heat of divorce and contested adversarial court proceedings.

“Parents had understood the HORISP report findings and recommendations, and the former Government had written this into the letter and spirit of the 2006 Family law Amendments (and accompanying explanatory memorandum) to positively encourage shared parenting and reduce obstructions for fit and willing parents wanting to continue their parenting. The encouragement of shared parenting in the best interests of the child was and continues to be the essence of the 2006 legislation.

“Comments to the effect that parents held unrealistic expectations of equal time parenting fly in the face of the spirit of the law and its intended outcomes. Whilst a presumption of equal time was not enacted, the judge is required to consider equal time in the first instance. There is no confusion as to the intent of the law, contrary to public statements made inferring that parent’s rightful expectation to shared parenting time is not supported. The shared parenting amendments of 2006 were enacted to always consider first up and place the highest value on, the child’s continuing rich relationship with both parents.”

Winding back shared parenting

The 2006 legislation was sensible, moderate, humane, and effective, and brought about a major reduction in both litigation and complaints to MPs (in the case of the latter by about 80%). In large measure it has been successful in achieving its purpose.

By contrast, the 2010 Bill is one-sided in a gender-ideological way and if implemented would increase litigation and complaints and have widespread damaging effects on Australian families (*see pb1496, attached*).

Prior to 2006, the effect of the Family Law Act, as implemented by the family court system, had been to remove a large number of children from the love, care, and guidance of their fathers There was as a result a very large increase in the number of single parent families, most of them headed by women, and a correspondingly large increase in taxpayer funding devoted to financially assisting these women.

The pre-2006 arrangements in practice gave women a dominant position in relation to custody of children and property settlements upon divorce or separation. Women's rights groups had (and have) a vested interest in maintaining those arrangements.

The present Bill is, in essence, a backdoor way of winding back shared parenting arrangements, using the safety of children as an excuse.

It reflects a loose alliance of interests between:

- ideologically motivated academics and women's groups concerned to re-establish a dominant position for women in family law via a return to the former *de facto* maternal sole custody regime,

- a legal profession with a keen interest in receiving substantial and increased income from the practice of family law, via increased litigation,

- members of Parliament who calculate (not necessarily correctly) that legislation of this gender-biased kind will win them additional votes from women, and

- judges and magistrates who habitually take an overly cautious approach as a result of a lack of proper feedback on the longer-term consequences for children of their gender-biased custody decisions.

The Bill, if enacted, would:

- *encourage resident parents and the family law system generally to ignore the fundamental rights of children to be raised by both their parents (see International Convention on the Rights of the Child),*

- *increase the number of children whose relations and contact with non-resident parents (usually the father) is terminated, postponed, reduced, or curtailed due to false or exaggerated claims of family violence,*

- *increase the chances for success of manipulative parents,*

- *increase friction between the parties,*

- *increase the potential for actual violence between the parties where previously there would have been little or none,*

- *hamper the courts' ability to identify real and acutely dangerous situations, and*

- *increase the number of suicides by non-residential parents.*

As noted by the SPCA, "the (Minister) must have known that such laws would increase litigation … when he radically increased funding for the Family Court and wound back funding for Family Relationship (mediation) Centres".

Maintaining a suitable model of shared parenting

Other countries are building on the initiatives taken in Australia to encourage shared parenting. For example, in the UK:

"In a far-reaching initiative announced today, the … Shadow Secretary of State for the Family pledged to end the misery of the family courts. Unveiling a strategy for radical institutional change, Theresa May said: 'We …recognise what the experts and common sense have always told us: that the best parent is both parents. It is time for a family court system that protects children and respects parents.

"'Children who go through divorce - 146,914 of them in 2001 - have already lost out. We must not add to their distress with a court system that means they forfeit one of their parents as well. Under the next government, there will not be another generation of parents without children, and children without parents. Everyone - including the lawyers - accepts the time for change is overdue.'

"Theresa May underlined that the programme was a practicable reality in advanced discussion within the legal profession, child development experts and parenting groups. She said: 'Too many families have been torn apart by divorce and separation. Not just because

the adults' relationship has ended, although that is painful enough. But because the bond between parent and child, or grandparent and grandchild has been broken. Our Country deserves a better system of family justice: one that is open, fair and accountable; that protects children and respects parents; but above all, that recognises that *the best parent is both parents*.'"

The "twin pillars" in the 2006 Australian legislation

The need to deal with the huge problem of fatherlessness in Australia was recognised as the first of two "twin pillars" in the 2006 legislation.

The 2006 legislation was not primarily about tying up the resources of the family court system in pursuing every minor claim by one parent about the behaviour of the other in an attempt to gain an advantage in divorce settlements. Opposition by women's groups to shared parenting, however, resulted in lobbying with a focus on family conflict, based on the (incorrect) claim that violence in families is "overwhelmingly" caused by the male parent. This lobbying activity resulted in the incorporation in legislation of the second "pillar" principle, namely, concern about family violence.

It was not the intention of Parliament that the second of the "pillar" principles should overrule the first. Given the overall intention of the 2006 legislation, namely encouragement for shared parenting, the second "pillar" was in the nature of a caveat to the first. Elevating the second principle to a position of dominance over the first principle would have the effect of subverting the intention and purpose of the 2006 legislation.

Need for bipartisan support

The history of family law in Australia indicates that significant legislation in this area will not pass unless it receives strong bipartisan support. Both the HORISP Report of 2003 and the 2006 legislation based on that Report received that type of strong support. The same thoroughgoing bipartisan support will not be obtainable for the 2011 Bill. The Bill will be opposed by hundreds of thousands of fathers and their female relatives and friends (mothers, sisters, daughters, cousins, second wives, and friends).

Reports commissioned by the Government on domestic violence

The Consultation Paper on the Bill referred to a number of reports commissioned by the Government into the way in which the family law system responds to family violence.

The AIFS report commissioned by the Government on the effects of shared parenting legislation made it clear that a very large majority of Australians, both men and women, support the policy of shared parenting. The AIFS was unable to find evidence that families with shared parenting were any more violent than other families. The AIFS report was based on a careful review of the facts, and summarised a very substantial and credible body of research.

The same, regrettably, cannot be said about the reports by Professor Chisholm or the ALRC. Those reports were evidently commissioned on the basis that the views of the authors were already known (*see pb1371, 1378, and 1399, attached*).

Professor Chisholm had previously given evidence to a Parliamentary inquiry into the proposed 2006 legislation that shared parenting should not be identified as a primary objective, and should not have been commissioned at public expense to write a report attacking shared parenting.

The authors of the ALRC report comprised 26 women and 7 men, evidently including a strong component of feminist activists. The ALRC's attitude to family law questions is indicated by its earlier recommendation in favour of criminalising men who attempt to establish, via a DNA test, whether the children they are financially supporting are their own. Our members have no confidence in the ability of the ALRC to make competent and unbiased recommendations in this area.

Legal problems with the Bill

There are a number of fundamental legal problems with some of the proposed amendments – see below.

Definition of domestic violence

The claim that there should be an extensive broadening of the definition of "domestic violence" confuses three different types of conflict, namely

- physical *violence*,
- non-physical *abuse*, and
- *differences of opinion* of the kind that naturally arise from time to time in family life.

A dictionary definition of the word "violence" is "involving great physical force; illegitimate use of force". The effect of including almost anything and everything in "domestic violence" is to devalue real physical violence, with the result that cases of such violence will not be taken as seriously as they should be.

As the LFAA and the SPCA have pointed out, "Real family violence would be trivialised by the proposed new definition". "Expanding, as the new legislation does, the definition of family violence according to the radical Duluth feminist model would mean that operatively almost any unsocial behaviour could be deemed by the court to be "violence". This flawed approach gives far too much discretionary power to a pro-feminist judiciary who have a 30 plus year dark history and track record of running a de facto sole mother custody standard in their courts with precious little regard for children residing with their fathers."

"The new laws leverage off the discriminatory gendered approach to domestic violence that treats men as abusers and women and children as their victims despite evidence that more than one in three men are actual victims www.oneinthree.com.au . These male victims are without a voice as they have no State or Federal domestic violence programs to support and raise awareness of their plight. The absence of balanced debate and one-eyed policies targeting males only, had allowed the long term abusive practice of the Family Court to apply a gendered approach to removing children from their fathers without needing to resort to gender specific wording in the legislation."

The expanded definition of domestic violence would comprehend a large amount of behaviour which is quite normal in separating families. Family courts must be permitted to take a sensible and humane attitude to such matters where emotions are running high and there is (as in many cases) an imbalance of power between the parent "leaving" and the parent "left".

Extent and gender-distribution of domestic violence

The combination of detailed government plans and legislation to overemphasise domestic conflict *and at the same time* disseminate incorrect information about the extent and distribution of domestic violence, designed to gender profile men as abusers, is toxic to men and their children.

As international research (including in Australia) has made clear, when allowance is made for the fact that men are much less likely to report violence against them and often dismissed or persecuted if they do, there is little difference between the rates at which men and women abuse their partners. Family violence is not essentially a gendered phenomenon, but rather one of capability and opportunity like any other form of violence (*see pb1298, attached*).

About half of family violence amounts not to attacks exclusively by one partner on the other, but mutual brawling where both partners are violent to each other. "Predominant aggressors" are just as likely to be females as males.

While approximately 50% of all family violence and abuse is perpetrated by women only a much smaller proportion of persons convicted of domestic violence offences are women (for example, 8% in the ACT). This indicates a very extensive bias in favour of women in the criminal justice system (*see pb687, attached*).

Decline in child homicides since 2006

Information from the Australian Institute of Criminology indicates that in 2006-07 child victims of homicide by assault included *11* children killed by their mothers, *5* killed by their biological fathers, and another *5* killed by other male partners of the children's mothers.

The belief that encouragement to shared parenting has led to an increase in the extent of lethal danger to children has no statistical basis. NSW Child Death Review Team Annual Reports for recent years indicate that there has, in fact, been a *sharp fall* in the number of fatal assaults on children since 2005. This sharp downwards trend followed a long period prior to 2006 in which there was no trend movement. It is very likely that the 2006 legislation was a major factor in reducing lethal violence against children.

Details from the Annual Reports as follows:

2005

In 2005, *twelve* children and young people (5 males and 7 females) died by fatal assault …

Consistent with the age profile of fatal assault deaths (for the previous) year, the majority of deaths were of young children aged four years and younger.

The overall rate of death for fatal assault in 2005 was 0.8 deaths per 100,000 children and young people aged 0 to 17 years. This rate has shown little variation since the Team began reporting.

2007

In 2007, *nine* children and young people aged 0–17 years died by assault. The directly standardised mortality rate in 2007 was one of the lowest observed over the period 1996–2007 (0.56 deaths per 100,000 children and young people).

This decline may be due to the variability in the number of deaths that occur from year to year. A drop for any particular year need not indicate an improvement, just as an increase in any particular year need not indicate a worsening: rather they may reflect the erratic nature of such deaths.

2009

In 2009, *seven* children aged 0–17 years died by assault in six incidents. The directly standardised mortality rate in 2009 was 0.42 deaths per 100,000 children aged 0–17 years. Four of the seven fatal incidents occurred in the context of familial relationships, inflicted by parents, spouses, domestic partners or other family members. This year a history of mental illness was evident in two of the families and one child died in the context of family breakdown. At the time of reporting, murder or manslaughter charges had been laid in relation to five incidents.

Child abuse

It should be noted that information from the Australian Institute of Health and Welfare indicates that the likelihood of children being victims of abuse is *10 times* higher in a single-parent family headed by a female than in an intact family.

Domestic violence publicity campaigns

The unequal treatment of men in relation to family violence is strongly encouraged by misleading family violence publicity campaigns, a near-total failure by government to provide suitable assistance (including in the form of refuges) for men suffering domestic violence against them, and illegal gender profiling of men via government/gender-ideological propaganda.

Governments should appreciate that without an honest and accurate publicity campaign about domestic violence the community will not trust the Government (or the judiciary) to implement legislation relating to domestic violence in a just and effective manner.

Key failing of the Bill in relation to controlling behaviour

The most serious failing of the proposed new legislation is its failure to deal with the principal unfinished business resulting from 2006 legislation – namely the failure/refusal of

the family courts to uphold their own orders, particularly access orders. Withholding contact between fathers and the children they love is one of the most serious and damaging forms of controlling behaviour and domestic abuse, and must be recognised as such.

There are also other important areas of legal/administrative abuse, not addressed by the Bill, in which persons use legitimate services in a way that abuses the rights of others, e.g., through making false accusations, maliciously inciting breaches of AVO's, and other vexatious actions of various kinds. These are also major areas of controlling behaviour.

If the Bill were to deal effectively with these issues it would actually be doing something seriously useful.

Specific comments on the Bill

The Bill purports to place increased emphasis on the safety of children, while failing to give any attention to *the medium to longer term benefits to the children* of an ongoing relationship with both their parents, or to recognise the dangers and disadvantages to children from living in single-parent families, mostly headed by female parents.

Item 1 of the Bill proposes a new definition of child abuse, in effect counting most domestic violence offences *twice*, via provisions about the child "being exposed to violence".

Item 8 in the Bill e*xpands the definition of family violence* (section 4AB) to include just about anything that anyone - but given the focus on "violence against women" particularly a woman - might decide she/he felt "fearful" of. The definition will not be restricted to physical or mental abuse but will be completely open ended. It will include any behaviour a party claims makes them feel threatened "irrespective of whether that behaviour causes harm". Such fears need not be reasonable but are instead to be totally subjective, based only on the complainant's state of mind. The normal legal standard of the reasonable person test will not apply, and it will be almost impossible for an accused person to refute such claims. The subjective nature of the proposed revised definition of family violence as "being fearful;" is incompatible with any sensible notion of justice.

To characterise a cry for help by someone contemplating taking their own life as "family violence" is both ridiculous and outrageous. It should be realised that approximately 300 male "clients" of the CSA actually do take their own lives every year.

Item 13 in the Bill would confirm that the Act gives effect to the UN Convention on the Rights of the Child (section 60B), but there is a clear conflict between that Convention and the provisions of the Bill – which latter ignores the fundamental right of children to be raised by both their parents. Overcoming this inconsistency (rather than just having the Bill override the Convention) would require amending the Bill.

Item 17 of the Bill would amend section 60CC(2) to direct courts to give *greater weight* to (purportedly) "protecting the child from harm". This would effectively overturn the "twin pillars" approach that was argued out in Parliament over a period of years and which formed the basis for the 2006 reforms (see above).

Items 18 and 20 would remove the "*friendly parent"* provisions 60CC(4) and (4A). Leading family lawyer practitioners have stated that these provisions have not in practice discouraged

parents from providing information about family violence where that has been a significant issue. The federal Attorney General stated at one stage that any misunderstandings of provisions (such as this one) in the Family Law Act could/should be overcome by informing and educating the public. The removal of the "friendly parent" provision will effectively prohibit the court from giving consideration to the extent the parents have fulfilled their obligation to encourage a healthy relationship between the children and the other parent.

Item 19 of the Bill would remove the requirement that a family violence order must be final or contested. It would stipulate that in future courts must give "appropriate" weight to these orders, even if they are only interim and (as yet) uncontested.

Items 21 and 38 of the Bill propose new obligations on both courts and advisers to trawl for information alleging family violence. This will encourage a presumption that family violence and abuse of children customarily exist in contested matters before the court.

Item 34 would require parties making allegations of child abuse or family violence to file a notice with the court.

Item 42 would provide immunity from cost orders against State welfare authorities. It *would pick up on the kind of anti-male thinking* currently found in some of the activities of State child welfare authorities

Item 43 would remove the mandatory cost order provision for false allegations - in spite of the fact is that they serve a fundamentally important purpose at present in discouraging false accusations. The Family Court will not have criminal penalties for perjury, despite false testimony having the potential to create enormous wrongs, injustice, and damage. The court's reputation will be damaged by those knowingly making false allegations or statements in proceedings. The proposed change reveals a diminished view of the importance of maintaining a healthy relationship between both parents and the child, and exposes the true intent of the amendments. Section 117 of the existing Act is largely ineffective.

This would greatly enhance the likelihood that some parents would engage in parental alienation and denial of access, with consequent psychological damage to their children. It would also lessen incentives to public servants to act responsibly in providing and assessing information.

Under Item 47, a person would not be prevented from seeking a rehearing of a children's matter where he or she had "failed to disclose child abuse or family violence that is a material concern relevant to the best interests of the child". The courts will reconsider parenting arrangements when material circumstances were not disclosed when the original orders were made. This would allow open slather to reopen cases decided years before, on the basis of belated allegations of family violence under the grossly expanded new definition of family violence.

Further comments

It is planned to make more detailed comments on the Bill at a later stage.

Supporting material

Attached, for information and perusal, are copies of the following papers:

pb687	Comments by LFAA on Protection Orders Legislation Review (ACT) (-/5/04)
pb1149	Australian law reform and the issue of domestic violence (9/5/08)
pb1298	Some reported cases of domestic violence by female perpetrators resulting in attempted or actual homicide (24/7/09)
pb1371	Submission to Family courts violence review (27/10/09)
pb1378	Supplementary submission to Family courts violence review (19/11/09)
pb1399	Professor Chisholm's family courts violence review (14/4/10)
pb1491	Is this the face of the new domestic violence laws? (20/11/10)
pb1496	Comments on the ACT draft statement on domestic violence (9/11/10)

Please contact us if you have any questions about any of the above material.

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