

**RESPONSE TO
PUBLIC CONSULTATION PAPER &
EXPOSURE DRAFT**

**FAMILY LAW AMENDMENT (FAMILY
VIOLENCE AND OTHER MEASURES) BILL
2017**

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RESPONSE TO PUBLIC CONSULTATION PAPER

FAMILY LAW AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2017

SUBMISSION BY “THE FORGOTTEN VICTIMS OF FAMILY VIOLENCE”.

1 EXECUTIVE SUMMARY

This document is a response commissioned by the organisation “The Forgotten Victims of Family Violence” an organisation formed to make submissions to the recent Victorian Royal Commission on Family Violence. This document has been prepared by L. G. Yves Michel & Co who are a law firm operating out of Springvale Victoria. This document is written in response to the public consultation paper of the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.¹

The authors of this paper agree with the authors of the bill in that

“Currently, families experiencing violence and conflict are often required to engage with multiple courts to address their legal needs—including state and territory criminal courts, family law courts and children’s courts.”²

The authors agree that all of the proposed amendments should be accepted, however there are three additional amendments to the *Family Law Act*³ that are essential to prevent systems abuse.

Specifically these additions state that

1. A court of summary jurisdiction making a family violence order the Court must consider making an interim family law order in certain circumstances and
2. Where a court of summary jurisdiction has made an interim family law order the matter must be transferred to the Federal Circuit Court upon application of the parties or at the initiation of the court.

The specific proposed amendments are described in section 3 of this document. The rationale for these amendments are described in section 4.

Provided there is the ability for family law matters that are initiated in a court of summary jurisdiction to be transferred into the Federal Circuit Court we see that the ability to make family law orders in a court of summary jurisdiction could improve the administration of justice. If this ability is not added

¹ Commonwealth, Amendments to the Family Law Act 1975 to respond to family violence Public Consultation Paper, (December 2016), < <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx>>, p 4

² Commonwealth, Amendments to the Family Law Act 1975 to respond to family violence Public Consultation Paper, (December 2016) < <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx>>

³ 1975 (Cth)

to the bill then there is the potential for the administration for justice to be down graded by allowing for court that are less equipped to handle family law matters making family law orders.

With respect to the proposal in the Public Consultation paper to assist the courts to exercise family law jurisdiction⁴ through the *National Domestic and Family Violence Bench Book*,⁵ the authors state the proposed bench book in its current form is prima facie unlawful, being subject to administrative error, potentially unconstitutional and contrary to Australia's human rights commitments. A discussion of these deficiencies is included in section 5.

2 THE NEED TO LIMIT SYSTEMS ABUSE

The National Domestic and Family Violence Bench Book⁶ draws to the attention of judges that *recourse to legally available processes, when used by a party with improper intent or purpose, could amount to malicious prosecution, abuse of process or a criminal offence.*⁷ The potential for systems abuse in family law and family violence law underpins one of the sections of the bench book, and some of the proposed amendments in the *Family Law Amendment (Family Violence And Other Measures) Bill 2017*.

We agree with the public consultation paper that it is essential that the amendments are drafted so as to minimise the potential for systems abuse.

The proposal to invest state courts with the jurisdiction to make interim family law orders has the potential to remove the primary way in which family violence intervention orders can be abused.

Our experience is that the most common way to abuse legal systems so as to obtain a tactical advantage in parenting proceedings is to obtain an ex-parte family violence order by making a false or exaggerated claims of domestic and family violence. Such orders can be made without evidence, and without the respondent having the right of reply, until a contested hearing which will only occur after several months. Children can easily be included in the application, or even if they are when the affected family member is the parent with whom the children live, the other parent is usually prevented from having contact with the children, by way of being prevented from having contact with their parent. If the family violence order is bona fide this is desirable but if it is made for an improper purpose or without a proper basis then this amounts to systems abuse. If the respondent chooses to defend the application in court, and wins then there is no opportunity for the court to make an order that orders contact between the respondent and the children, even where the court has held that the order was vexatious and amounted to systems abuse. As a result we propose that the family law act be amended so that a new section 68U is added which includes a subsection that states

If as a result of a contested hearing the court is not is satisfied, on the balance of probabilities, that a final family violence order is necessary then the court must consider whether it should make an interim Part VII order with respect to the child.

The corollary to this relating to financial abuse is our proposed addition section 68U(4) which states

⁴ Commonwealth, Amendments to the Family Law Act 1975 to respond to family violence Public Consultation Paper, (December 2016), < <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx>>, p 5

⁵ <<http://dfvbenchbook.aija.org.au/contents>>

⁶ <http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>>

⁷ Baron v Walsh [2014] WASCA 124

If the court is satisfied, on the balance of probabilities, that a family violence order is necessary then the court must consider whether it should also make an interim Part VIII family law order with respect to the parties.

Our proposed additions accommodate for those types of scenario that the proposed amendments target. Specifically these amendments reduce the need for those who have required the urgent need of a family violence order, who have already discharged their burden of proof in a court of law from having to repeat the same litigation in a second court to obtain necessary family law orders. In addition however they are also accommodate for the scenario where a respondent has been the victim of systems abuse, who have already discharged their burden of proof in a court of law from having to repeat the same litigation in a second court to obtain necessary family law orders.

We also propose similar orders to accommodate Part VIII family law orders at the conclusion of family violence order cases involving financial abuse. Victims who are forced out of their houses as a result of physical abuse and are unemployed may find themselves in the circumstances where they are unable to maintain contact with their children because they cannot obtain accommodation suitable for children to stay with them. This is particularly the case for male victims.

3 PROPOSED ADDITIONAL AMENDMENTS

3.1 AFTER SECTION 68T

FAMILY LAW ACT 1975 - SECT 68U

Court must consider making an interim Part VII order in certain circumstances

1. This section applies if an application is made for a family violence order where
 - a. The respondent is not to communicate, approach or spend time with a child or a parent or guardian of a child and
 - b. the respondent is a person who may apply for an order under section 65 with respect to that child.
2. This section applies whether or not there is an existing Part VII family law order that applies to the child
3. If the court is satisfied, on the balance of probabilities, that a final family violence order is necessary then the court must consider whether it should also make an interim Part VII family law order with respect to the child.
4. If as a result of a contested hearing the court is not is satisfied, on the balance of probabilities, that a final family violence order is necessary then the court must consider whether it should make an interim Part VII order with respect to the child.
5. If an interim family violence order has been made ex-parte then the respondent must be given an opportunity to respond to the ex-parte application at the first court appearance and upon doing so the court must consider
 - a. whether an interim Part VII family law order should be made and
 - b. whether the interim order should be varied or discharged.

FAMILY LAW ACT 1975 - SECT 68V

Court must consider making an interim Part VIII order in certain circumstances

1. This section applies if an application is made for a family violence order where
 - a. The applicant is seeking a remedy for economic abuse and
 - b. The applicant has standing to initiate Part VIII proceedings.
2. In this section economic abuse is as defined in sections 4AB (2)(e), 4AB (2)(g) or 4AB (2)(h).
3. This section applies whether or not there is an existing Part VIII family law order that applies to the parties.
4. If the court is satisfied, on the balance of probabilities, that a family violence order is necessary then the court must consider whether it should also make an interim Part VIII family law order with respect to the parties.
5. If an interim family violence order has been made ex-parte then the respondent must be given an opportunity to respond to the ex-parte application at the first court appearance and upon doing so the court must consider whether the interim order should be varied or discharged.

3.2 ADDITION TO SECTION 46.

(2AA) Where proceedings for a family violence order have commenced in a court of summary jurisdiction and an interim order is made under this act then upon application by either one or more of the parties or at the initiation of the court the matter must be transferred to the Federal Circuit Court.

4 WHY THE ADDITIONAL AMENDMENTS ARE REQUIRED

4.1 INTERVENTION ORDERS ARE THE MOST COMMONLY USED METHOD OF RESOLVING PARENTING MATTERS IN VICTORIA

Statistics show that the family law courts are no longer the court of choice by lawyers and their clients in resolving family law matters in Victoria.

In 2012 there were 26% less cases regarding children going to the family law courts than in 2004.⁸ A large portion of this reduction coincided with the introduction of compulsory mediation and the allocation of federal funding to Family Relationship Centres to offer subsidised compulsory mediation in 2006. This gives the false impression that mediation is gradually replacing litigation in the family law courts as the preferred method of resolving conflict between parents that resolve residence and contact with children. This is not the case. Between 2007 and 2012 there was a 24% decline in family law mediation and a 35% decline in regional family law mediation at family relationship centres.⁹ However between 2008 and 2013 there was a 47% increase in the use of intervention orders.¹⁰ In the 2013/2014 financial year there were 65,737 intervention orders issued in Victoria (including 20,152 interim orders).¹¹ The number of interim intervention orders issued has increased every year

⁸ Rae Kaspiew, Lawrie Moloney, Jessie Dunstan and John De Maio, *Family law court filings 2004–05 to 2012–13* (Research Report No. 30, Australian Institute of Family Studies, 2015), 8-9

⁹ The Allen Consulting Group, *Research on Family Support Program family law services* (May 2013) <<http://www.ag.gov.au/Publications/Documents/ResearchOnFamilySupportProgramFamilyLawServices/research-on-family-support-program-family-law-services-may2013>>, 24

¹⁰ The Magistrates Court of Victoria, *Annual Report 2013/14* (22 October 2013), 3

since 2008.¹² The Magistrates Court of Victoria does not publish what percentage of intervention orders are made between parents with resident children. However if we assume that 25% of family law matters occur in Victoria¹³ and that 45% of intervention orders involve parents of children,¹⁴ then it can be seen that intervention orders are most likely the dominant method for settling conflict between parents of children in Victoria, with outcomes that affect residence and contact with children. There are most likely six times as many interventions order made as there are parenting orders made in the family law courts.

Dispute Resolution Method	Year	Estimated # Cases
Intervention Orders (Households with Children, Victoria) ¹⁵	2011/2012	24,892
FRCs (Victoria) ¹⁶	2011/2012	21,585
Family Court & Federal Circuit Court (Victoria) ¹⁷	2011/2012	4,260

4.2 WHY IVOs ARE MORE OPEN TO SYSTEMS ABUSE THAN FAMILY LAW ORDERS

Over the past few decades the legal safeguards regarding family violence laws have gradually been eroded. It is considerably easier to get an urgent hearing in an IVO matter than on a Family Law Act matter on the same facts. This is due to deliberate efforts on the part of law makers to make obtaining family violence orders simple and easy.

There are two ways in which family violence orders are applied for in Victoria. One is by way of police intervention and the other is by way of private application. If the applicant cannot persuade police to intervene on their behalf then private application is an option available to them. We do not submit that there is a correlation between the merits of an application and whether it was initiated by police or private application.

Private application involves the applicant going to the Magistrates Court and making a complaint. This involves giving a verbal or written statement to the court. This can involve organizing a time with the courts to make the application. No corroborating evidence is required.¹⁸ Approximately 45% of intervention orders initiated in 2013/14 were initiated this way (private application) as opposed to being issued by police. The median hearing time for each uncontested application is three minutes.¹⁹ Cross examination of the applicant is usually limited to confirming the content of written applications. Almost no exploration of the grounds for the application takes place.²⁰

¹¹ The Magistrates Court of Victoria, Annual Report 2013/14 (18 September 2014), 90

¹² Ibid p 6

¹³ Population of Australia in 2011 was 21,507,717; Population of Victoria was 5,354,040; Australian Bureau of Statistics, 2011 Population of Australia (May 17 2015)

<<http://www.abs.gov.au/websitedbs/censushome.nsf/home/data?opendocument&navpos=200>>

¹⁴ 45 % of households in 2011 had children under 18 living in them; Australian Bureau of Statistics, *Table 65. Family Households With Own Children Under Age 18 by Type of Family, 2000 and 2010, and by Age of Householder, 2010*

<<http://www.census.gov/compendia/statab/2012/tables/12s0064.pdf>>

¹⁵ The Magistrates Court of Victoria, *Annual Report 2013/14* (22 October 2013), 90

¹⁶ The Allen Consulting Group above n 55, 24

¹⁷ Rae Kaspiew, Lawrie Moloney, Jessie Dunstan and John De Maio, *Family law court filings 2004–05 to 2012–13* (Research Report No. 30, Australian Institute of Family Studies, 2015), Figure 2.3 & Figure 2.4; 14452 children’s matters and 2662 combined children and property matters

¹⁸ Family Violence Protection Act 2008 (Vic) s 43

¹⁹ Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: the Implementation of Feminist Reforms in Civil Proceedings* (2008), at 77, 81–2.

²⁰ Hunter, *ibid* 84–8.

Unlike in Family Law Proceedings, in Family Violence Proceedings the benefit of a child of having a meaningful relationship with both of the child's parents is not a factor that the magistrate must consider.²¹ This leads to a *better safe than sorry approach* to granting interim orders, in which orders are often granted in circumstances under which they would never be granted in the Family Law Courts. This is why we propose that where interim intervention orders are granted the court should consider at the first return date whether an interim family law order should be made.

It should be noted that the family law courts have resources available to them that the state courts do not. For instance the family law courts often have child inclusive conferences²² in the views of the children are obtained. It is our experience that these interviews can result in a complete change in the understanding of cases. There is no equivalent to the child inclusive conference in family violence order proceedings.

After the application has been made, then court then makes an order on the spot in 42% of applications,²³ without the respondent being made aware of the allegation or having a right of reply until a final hearing. Since changes to the law in 2014 this has dropped to 30%.²⁴ When the matter returns to court for the first return only 5 minutes will be allocated to the matter. There is no guaranteed procedure by which an interim order can be contested at the first return date.

This interim order is meant to be interim. A proper trial is meant to follow, but there is no guarantee that the respondent will get a trial.²⁵ A contested hearing takes many months.

At the final hearing the court does not need to apply any of the long held methods of examining evidence. It can inform itself in any way it sees fit.²⁶ For instance it can rely upon hearsay although it should be noted that hearsay is also admissible in proceedings under the Family Law Act.

In Victoria the respondent to an intervention order cannot cross exam the applicant if they are self-represented.²⁷ It states in the act that at section 71(4)“...*if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application the subject of the proceeding, neither the respondent nor the respondent's witnesses may give evidence about those events*”. Although the court must issue them with a legal aide lawyer if they request, they can be charged for that lawyer.

In addition, the threshold of what determines family violence is very low and can be highly subjective.²⁸ It includes all of those things that most people would identify as violence, including physical assaults and threats to kill, but it also includes anything that harasses a person or something that they find offensive.²⁹

Where an application has been made for an improper purpose, for instance to evict someone from a house or to prevent them having contact with their children, if the respondent wins their case in reality

²¹ *Family Violence Act 1975* (Cth) s 60CC(2)(a)

²² *Family Law Act 1975* (Cth) s 11F

²³ The Magistrates Court of Victoria, Annual Report 2012/13 (18 September 2014), 83

²⁴ The Magistrates Court of Victoria, Annual Report 2013/14 (22 October 2013), 90

²⁵ They may have no option other than to consent to the order (see below)

²⁶ *Family Violence Protection Act 2008* (Vic) s 55

²⁷ *Ibid* s 71(4)

²⁸ *Family Violence Protection Act 2008* (Vic) s 7

²⁹ *Family Violence Protection Act 2008* (Vic) s 7

they cannot re-enter their house nor resume contact with their children, without court orders or consent of the prior applicant. This is because to do so would be grounds for a new order being made. This is why we propose our amendments that in these circumstances the court must consider making an interim family law order.

The status quo without these proposed amendments, is the most logical approach for a respondent that has been issued an vexatious intervention order is to consent without admission, and to initiate proceedings in the family law courts for parenting and property matters. Failure to do so ties the respondent up in long expensive court proceedings that cannot give the respondent what they need.

In circumstances where a client would in the absence of the family violence proceedings be applying for a family law, for instance where the family violence order application is vexatious, we advise clients to initiate concurrent proceedings in the family law courts. Where the client has limited resources it is often in their best interests for them to consent to the family violence orders without admission because the same facts can be addressed in the family law courts, and at the conclusion those proceedings family law orders can be made that override the family violence orders. However this option puts the applicant at risk of being vexatiously charged for breaches, particularly in light of the fact that Victorian Police officers do not receive adequate training in the relationship between family law orders and intervention orders and a large portion do not know how they interwork.

We are not aware of the exact percentage of orders that are settled by consent, but believe that the majority of orders are issued by the respondent consenting without admission, as had been reported elsewhere.³⁰

4.3 HOW BIG A PROBLEM ARE FALSE ALLEGATIONS(SYSTEMS ABUSE)?

In 2007 The Australian Institute of Family Studies (AIFS) undertook an exploratory study into allegations of family violence and child abuse in family law children's proceedings.³¹ The report stated "*fathers' groups frequently claim that separated mothers routinely make false accusations of family violence and/or child abuse for revenge or to gain a tactical advantage in child custody disputes, with the aim of reducing their former partner's involvement in their children's lives or of cutting them out altogether.*" In reality false allegations of wrongdoings are an age old problem and are not limited to made only by one gender. In 2015 submission to the Victorian Royal Commission on Family Violence, Dads in Distress stated "*While reported to be largely gender biased, we have seen false allegations in many cases and have witnessed the practice to not be gender exclusive.*"³²

The AIFS study examined random samples of family law cases filed in specific family law registries in 2003. The key findings of the report included that

1. More than half the cases in the family law courts contained allegations of adult family violence and/or child abuse.
2. There is little evidentiary material to support allegations. When all the pieces of evidence were taken together, most individual allegations of spousal violence across the courts and samples received no corroborative evidence.

³⁰ Prof. Patrick Parkinson, University of Sydney, Family Law Legislation Amendment (Family Violence) Bill 2011, Submission to Senate Committee on Legal and Constitutional Affairs (April 2011)

³¹ Allegations of family violence and child abuse in family law children's proceedings A pre-reform exploratory study, AIFS Research Report No. 15 – May 2007

³² dads in Distress Submission to the Victoria Royal Commission on Family Violence.

3. Allegations of spousal violence or parental child abuse accompanied by evidence of strong probative weight appeared to influence court orders. Without such evidence, allegations did not seem to be formally linked to outcomes.

Prima facie, high rates of allegations of violence that are not corroborated by evidence of strong probative weight is consistent of high rates of false allegations. On this basis the empirical data from the AIFS supports the hypothesis that false allegations are widespread in Australia. The observation in the AIFS report that findings that violence or abuse existed only when there was evidence of strong probative weight, is a positive finding that should imbue the general community with faith in the legal process.

Never the less family law is a highly polarized and politicized area of public policy which is highly entwined with gender politics. Good law should be immune to this. The AIFS report was not. The report contained statistics relating the gender distribution of those who made and who responded to the allegations. This is understandable given that the report was in part considering a gendered hypothesis of false accusations. Notwithstanding that we do not repeat the gendered findings of the AIFS report here, because in our opinion such statistics are not relevant to how the law should be reformed.

In response to the collection of data that was consistent with the hypothesis that false accusations were common place in family law courts in Australia, the authors of the report stated "*we can make no claim to understand adequately the circumstances, thinking, motivation or advice that led the majority of litigants to make so many non-specific allegations which, in turn, often elicited no response.*" The authors offered explanations for how the data could be read to be consistent with low rates of false accusations such as "*the difficulties experienced by those who have been in a victim role in breaking free, asserting their rights, detailing the nature of the violence or abuse and gathering evidential support are well recognised*". We assert that such convoluted interpretations of the data are unscientific and inconsistent with the scientific principle known as Occam's razor, which states that given two explanations for an occurrence, the simpler explanation should be preferred.

There also exists other Australian research that suggests that false accusations of family violence and/or child abuse are common place. This research includes surveys of magistrates,³³ surveys of lawyers,³⁴ surveys of family law litigants³⁵ and surveys of the general community.³⁶ These studies show that there is a common belief amongst the respondents that false accusations are regularly used for tactical advantage.

Never the less it is often reported that no empirical data exists that supports the hypothesis that false accusations are wide spread. For instance in the Chisholm Report³⁷ Professor Chisholm misquotes the AIFS report stating that the hypothesis of large scale false allegations is '*now largely debunked by the research community*'. Although Professor Chisholm has misquoted the AIFS report, which does not

³³ J Hickey and S Cumines, *Apprehended Violence Orders: A Survey of Magistrates*, Judicial Commission of New South Wales, Sydney, 1999; B Carpenter, S Currie and R Field, 'Domestic Violence: Views of Queensland Magistrates' (2001) 3 *Nuance* 17 at 21.

³⁴ Parkinson, P, Cashmore J and Webster A, "The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation" (2010) 24 *Australian Journal of Family Law* 313.

³⁵ Parkinson P, Cashmore J and Single J, 'Post
Sydney Law Review (2011, in press).

³⁶ Taylor, N., & Mouzos, J. (2006). *Two steps forward, one step back: Community attitudes to violence against women*. Melbourne: VicHealth. p 24

³⁷ Chisholm Report p 48

say this at all, the phrase '*now largely debunked by the research community*' is contained in a paragraph in the AIFS report that may have been deliberately written so as to mislead the reader.

5 WHY THE PROPOSED DOMESTIC AND FAMILY VIOLENCE BENCH BOOK IS UNLAWFUL

We submit that the use of the proposed domestic violence and family violence bench book would be unlawful as conduct related to the making of judicial decisions in family violence matters. This is because use of the book would lead to real or apprehended bias in all proceedings in which the judge or magistrate had relied upon the hand book in making judgments. As is stated in the handbook itself domestic and family violence occurs in all sectors of society irrespective of gender.³⁸ Both men and women can be either victims of perpetrators. Whether or not a party is a perpetrator or victim is a matter of fact to be determined on the evidence before the court. The gender of the parties should not be relevant particularly in light of Australia's commitment to human rights and gender equality. This should be self-evident to any reader of this report, however it is clear from the majority of public discourse on this matter that it is not self-evident to many. For that reason we argue the case for why gender based statistics should have no place in any lawful benchbook by way of analogy.

Indigenous Australians account for around 25% of Australia's prison population, despite accounting for only 2.3 percent of the population.³⁹ Never-the-less fact that a party to a matter is an indigenous Australian should have no bearing upon a finding of guilt or otherwise of the party. Similarly statements such as that found in section 4.1 of the bench book that *predominantly, women are the victims and men are the perpetrators of this form of violence* is highly prejudicial against men while offering absolutely no probative value whatsoever.

As stated above this fact has no probative value because the gender of a party should have no bearing on the outcome of the case.

The relative frequencies of different genders perpetrating violence as presented in the benchbook is highly prejudicial however because it suggests that a man is more likely to be a perpetrator by way of his gender. It might lead a judge to presume that a female that is unlikely to be the perpetrator, and that a male is more likely to be a male. Similarly in cross applications it might lead a judge to presume that the male is the primary aggressor.

A more sinister example is evident in section 3.1.11 where it states *More broadly, as identified in the Western Australian Court of Appeal decision Baron v Walsh [2014] WASCA 124, recourse to legally available processes, when used by a party with improper intent or purpose, could amount to malicious prosecution, abuse of process or a criminal offence.*

This tone of the section denotes that systems abuse is a serious problem that needs to be dealt with. It then goes on to state, *there is an unsubstantiated belief among some sections of the community, including some lawyers and non-legal professionals, that women often make false or exaggerated claims of domestic and family violence to obtain a tactical advantage in parenting proceedings.*

The only conclusion that can be drawn from these combined statements is that there is a serious issue with systems abuse by men, but not by women.

³⁸ Benchbook section 4.1

³⁹ 2006 census: Person characteristics, Australian Bureau of Statistics, 27 June 2007, accessed 11 November 2010.

The benchbook then goes on to examine the issue of *cross applications for domestic and family violence protection orders*. It states that *This tactic may also be seen as an extension of the violence itself*. The bench book is instructing the decision maker to presume that the cross applicant is a perpetrator of violence, and some aspects of the public consultation paper relating to summary dismissal appear to be targeted against

As a result the gendered nature of the bench book, a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the case when they have been instructed by the bench book.

The sheer number of such gendered statements are too numerous to include in this submission given the time in which we have had to prepare it.

We note however that the Victorian Family Violence Benchbook is more extreme in its gender bias, instructing judges to consider where a man alleges to be a family violence victim that he is actually a perpetrator of violence.⁴⁰

As a result of the apprehended bias that would be derived from the use of the bench book we also conclude that the use of the bench book could be unconstitutional because it would undermine the integrity of a court that could be invested with the powers of a Chapter III court, similar to the rule in *Wainohu v New South Wales* (2010) 242 CLR 181.

Instructing judges to decide matters of fact in family violence orders would also be contrary with section 26 of the Sex Discrimination Act 1984 (Cth) which states

It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

The Family Law Act is considered to have been drafted in relatively gender neutral terms but Section 60CC(3)(g) of the Family Law Act does state that *... in determining what is in the child's best interests, the court must consider ... the ... sex... of either of the child's parents*. Notwithstanding this we submit that section 60CC(3)(g) does not apply to findings of facts based upon evidence.

Similarly we also allege that the bench book is contradictory to *the International Covenant on Civil and Political Rights* [1980] ATS 23 treaty as follows

- Article 14 (1) All persons shall be equal before the courts and tribunals...
- Article 23 (4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution....
- Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁴⁰ <http://www.judicialcollege.vic.edu.au/eManuals/FVBBWeb/index.htm#34579.htm>

6 OTHER COMMENTS

There is a risk that this bill could be seen as a method of pushing family law courts into state courts reducing the load on the family courts. There is also the risk that matters might be heard in state courts that are not properly equipped to hear family law matters. It is our submission that provided that there is the ability to transfer family law matters into the federal circuit court any such limitations will be overcome.

To gain the maximum benefit of the changes procedures should be put in place transfer the family violence matter into the Federal Circuit Court under accrued jurisdiction of section 76(iv). To the best of our knowledge this should be possible under law today, but there are no procedures to do this.

Overall the procedure should result in less matters before the courts because of reduced duplication of matters.

In addition we are of the opinion that it is not uncommon for family violence orders to be sought by way of false or exaggerated claims to gain tactical advantage. The proposed amendments plus the additional amendments we recommend have the potential to reduce systems abuse overall, as the outcome of a family violence proceeding may result in the respondent having family law orders made in their favour to spend time with children. It should be noted that the proposed additions do not mandate such family law orders being made, only that courts should consider making them.

7 CONCLUSION

We support the proposed amendments but submit that the additional amendments in this document should also be included.

We submit that the proposed bench book is unlawful and should be drastically altered or otherwise not used in its current form.

8 THE FORGOTTEN VICTIMS OF FAMILY VIOLENCE

The Forgotten Victims of Family Violence is an association formed to make a submission to the Victorian Royal Commission on Family Violence. The organisation is made of people who are either

- Male victims of family violence,
- Those who have suffered family violence at the hands of women and/or
- Those who have suffered false accusations of family violence.

We're comprised primarily of separated fathers. Some of our members have been involved in providing support services for parents and have been involved with hundreds of cases, but the views represented in this document are the views of the individuals and do not necessarily represent the views of any other organisation.

We humbly seek that the commission keep our names confidential, as we expect that we and our children will suffer personal and professional consequences if our names were associated with a group that campaigns on the matters listed herein. We have however provided a contact email for anybody wishing to correspond with us.

It is for this reason we make this submission in our personal capacity (legal entity), with our names provided, rather than as an unincorporated association. We have not incorporated so as to maintain our anonymity. As separated men we are a much-marginalised portion of the community and routinely suffer discrimination.

The purposes of the association "The Forgotten Victims of Family Violence" are—

1. To publicly participate in discussion surrounding family violence, so that the discussion includes issues faced by:

- Male victims (where the perpetrator is male or female),
- Victims of violence perpetrated by females (whether the victim is male or female)
- Victims of false accusations of family violence (whether male or female)

2. Public participation includes raising awareness, participating in royal commissions or other public inquiries, lobbying, consulting with other interest groups, taking legal action including administrative or judicial review or any other similar act.

3. The association is committed to the prevention of family violence and support for victims.

4. The association is committed to human rights, but in particular

- a. the right to security of person and a culture of non violence,
- b. the right to a trial and proper legal process, and
- c. gender equality including the absence of gender vilification.

7. Membership is limited to any person who supports the purposes of the association provided they

(1) Have not been convicted of a crime of violence or dishonesty. Individuals who have been falsely accused of a crime of violence or dishonesty and have

- i. been acquitted, or
- ii. have had charges dropped, or
- iii. have consented to an order without admission

are eligible to be a member provided they not have made a prior admission of such an act.

(2) Agree to be bound by the rules of the association.

(3) Do not act and have not acted in such a way as to bring the association into disrepute.

(4) Respect the confidence of the organisation and do not speak on behalf of the organisation without the authority of the committee.