

Committee Secretary  
Senate Legal and Constitutional Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

**Private & Confidential**

Dear Sir

**RE: Family Law Legislation Amendments (Family Violence and Other Measures) Bill 2011**

With reference to the Family Law Legislation Amendments (Family Violence and Other Measures) Bill 2011 consultation paper I would like to make the following comments for your consideration.

While the proposed amendments go some way to overcome the severe inadequacies in the law to project a child's best interest I do not believe that the changes go far enough. In any case of separation, a child is the innocent party who needs to be protected, and their best interests should be paramount. Parents, as the adults, are able to voice and protect their own interests, however a child in these cases is the most vulnerable party, unable to promote their own interests, and therefore the law needs to protect the child's interest above all else. The current law in reality does not appear to consider this as at all, but rather seems to put a parent's rights ahead of a child's best interest with the presumption of shared parental responsibilities being equal to the best interest of a child, rather than putting the emphasis on protecting what is in a child's best interest. The fact that parents have to go to court to make decisions about a child can be an indication that one of the parents does not in fact have the child's best interest in mind, but rather a self serving motive or desire to have more access to a child against the child's best interest. In such cases, to automatically grant such a person the presumption that shared parental responsibility is in the child's best interest is paradoxical.

The proposed amendments go some way in correcting the flaws in the current law by prioritising the safety of the child. However, the only way to completely overcome the inadequacies of the current law is to repeal the presumption of shared parental responsibility or at least give it less weighting than it currently has. The primary consideration should only be what is in the child's best interest. This is not to say that shared responsibility is not in the child's best interest, it may well be, however this position should be arrived only once due consideration has been given to what is in the best interests of the child. Shared parental responsibility should not be the starting point of the analysis, it should be the end point reached once all factors are considered, however this can never be the case when shared parental responsibility is

a primary consideration as it is in the current law. This therefore needs to be amended.

If shared parental responsibility is to be presumed as the starting point, there needs to be further amendments made in the law to allow for rebuttals to the presumption. Currently the law with the proposed amendments provides that the only time shared parental responsibility is not upheld is in cases of severe neglect or abuse. There are no provisions allowing the presumption to be refuted where one parent is not morally, mentally or emotionally stable, or responsible enough to provide a secure environment to support the best interests of the child. In my view if shared parental responsibility is going to be presumed more consideration needs to be given to circumstances relating to the parent's actual parenting ability to ensure that they are capable of promoting the best interest of the child, and if they are not, the presumption should be overruled. Consideration also needs to be given to the impact that shared parenting arrangements have on a child, the current rule assume that shared parenting is in the best interest of the child, however no consideration is given to the fact that children need stability in their day to day life and making them move between parent every week or weekend does not provide any sense of stability at all. In addition research indicates that shared parenting can only really be effective when there is no conflict between the parents, the mere fact that parents are in court to determine how much time the child is to spend with each parent means that there is a high level of conflict between the parents, to therefore assume that share parenting going to be effective in prompting the best interests of the child fundamentally flawed.

My understanding is that the basis for applying equal and shared parental responsibility and time is to ensure that the child is able to have a meaningful relationship with each parent which is considered to be in the best interest of the child.

This concept therefore assumes that there is a direct correlation between how much time people spend together and how meaningful their relationship is. I do not believe that this is the case, a meaningful relationship will develop based on the quality of time spent together, not the quantity. If a child is anxious due to the instability caused by being required to have two homes, living with one parent during the week and another on the weekends, as forced upon them by the application of the shared parenting rule, how will this promote a meaningful relationship between the parent and child? The fact that the child and parent are spending a significant amount of time together will not result in a meaningful relationship if the child is not comfortable with the arrangement, it will in fact result in the opposite. On the other hand if the child lives solely with one parent and spends time with the other parent, although the hours spent together are less they will result in a more meaningful relationship as during the time that the child is spending with the other parent the child feels safe and secure and can therefore enjoy the time with the other parent which will in turn foster a more meaningful relationship between the child and the other parent.

I do believe that the broadening of the definition of family violence is a good first step in protecting the best interests of the child, however as mentioned I do not feel that these measures go far enough to ensure the protection of a child, as there are other factors besides family violence that can cause harm to a child. These other factors, such as the emotional stability of the parent, the ability of the parent to adequately nurture and care for a child, the parent attitude towards the other parent and family

members need to be given full consideration in determining the welfare of a child, and this should be very clear in the legislation.

I am happy that the complete repeal of section 60CC(3)(c) is no longer contemplated in the current bill as was the case in the exposure draft but rather is to be substituted so that the following factors are to be considered by the court:

- The extent to which each of the child's parent has taken or failed to take the opportunity to participate in making decisions about major long term issues in relation to the child, to spend time with the child and to communicate with the child.
- The extent to which each of the child's parents has fulfilled or failed to fulfil the parent's obligations to maintain the child.

I believe it is important that the courts are required to consider relevant factors that demonstrate the relationship that each parent has with the child as well as with each other in order to determine whether or not it is appropriate for one parent to have a greater level of access to the child. Although the proposed amendments to section 60CC(3)(c) go some way to do believe that it is also very important to consider the extent to which the one parent has facilitated a meaningful relationship with the other. The current amendments only look at whether a parent has taken steps to participate in the child's life and not the steps the other parent takes to facilitate it.

One thing that seems to be completely lacking in the current and proposed laws, is a requirement to look at the relationship between the parent and child before separation. If prior to separation one parent spent little time with the child, and put other priorities ahead of being a parent, it seems inconsistent that post separation such a parent gets more access to the child in excess of what time they spent with the child while together with the other parent simply because the law allows it. Often the motive of one parent in seeking to have shared parental responsibility is to gain some sort of control over the other parent, they often do not actually want to spend more time with the child and do not have the best interests of the child in mind when seeking shared parental responsibility. However the current legislation allows a parent to use the law as a means of satisfying their desire for control as they see that this law gives them the right to do so. Therefore it is vital that the courts consider the motive of the parent and why they believe spending more time with the child is in the child's best interest. In considering this the courts need to look at the relationship the parent and child had prior to separation and whether or not the parent had a significant role in the child's up bring both prior and post separation.

Furthermore it appears in many cases one parent believes that the family law exists to preserve their rights, however this should not be the case, the family law should only exist to protect and preserve the rights and best interest the children. I find it interesting, reading some of the submissions already published on the Parliament of Australia website, that the tone of some of the submissions made rejecting the proposed amendments (which I would like to add are in the minority) to be far more aggressive compared to those in favour. This to me emphasises the fact that such groups believe the family law system exists to set out their rights a parent rather than the child's rights and as a result they view these changes as taking away some of their rights that exist under the current legislation rather than viewing changes as a means

of protecting the best interests of a child to ensure that not child is subjected to family violence.

The final comment I will leave you with is that I consider a child's wellbeing to be the most important consideration in any situation and they need to be protected above all else and I feel that the current law dose not adequately do this. The proposed amendments do go a small way in the right direction to improve the inadequacies of the current law, however more needs to be done to ensure all children are protected as too often it appears that a parent can be given rights in accordance with the law to the detriment of a child's welfare. The best way I feel to do this is make the proposed changes and also remove the presumption of shared parenting. There should be no presumption when determining what is in a child's best interest, each child and their circumstances are unique and therefore so too should be the assessment and determination of the arrangements made to care for the child to ensure the child's best interests are served.

I hope that you will take the above comments into consideration prior to finalising the Family Law Legislation Amendments (Family Violence and Other Measures) Bill 2011.

Yours faithfully