

29 April 2011

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

Dear Sir

### **Family Violence and Other Measures Bill 2011**

I am pleased that the amendments proposed have the objective of prioritising the safety of children. However, I believe that the law itself should clearly be predicated on an analysis of all the risks versus the benefits of acknowledging parental rights; and only where the benefits to the child clearly outweigh the risks should the rights of a parent be recognised. This is the only way to ultimately protect the interests of the child as the first and foremost priority.

The onus should be on the non resident parent to prove how the best interest of the child will be better served in trying to exercise parental rights ascribed by the law rather than merely challenging arrangements as a result of the rights that appear to be automatically afforded by the law.

In fact, it is my view that the law still does not have enough regard to the parenting ability of the parent in protecting the best interest of the child, and will continue to ascribe rights based purely on biology. The amendments do a lot to overcome the deficiency in respect of abuse *that can be proven*, but unfortunately there are many other risks that compromise the welfare of children that can be subjective but nevertheless need to be considered. Such risks must be weighted against the benefits of a meaningful relationship with a parent **as a consideration rather than a priority**, in order to ensure the interests of the child are being protected.

Basically, if a child would not be placed in the unsupervised care of an individual because the potential risks associated with such a placement exceed the potential benefits, then this conclusion should not be affected in any way by an individual seeking to exercise parental rights based on biology. In fact, it is really the parenting ability rather than an acknowledgement of parental rights that should be the overriding factor as it is the parenting ability of an individual that has a direct impact on the welfare of the child and whether a meaningful, **positive** relationship may be pursued, without risk. In this regard, the criteria and processes need to be as vigorous as those applied when placing a child with adoptive parents, with a zero tolerance for risk.

It is not enough to protect from proven situations of abuse or family violence, but parents who pose any potential risk or who do not exhibit the characteristics of a responsible and dedicated parent should similarly not be granted parental rights in excess of what they have displayed or sought to exercise without the assistance of law. This is especially the case where individuals are seeking to exercise parental rights out of spite or vengeance, or in order to minimise child care payment obligations, rather than in order to promote a meaningful relationship or the best interests of the child.

A further concern for me therefore arises with the removal of former sections 60CC(3)(c), s60CC(4) and (4A). I acknowledge that whilst some parts of the provisions have been reinstated following the first round of consultation, the current substitution is still inadequate in my view. The extent to which one party has facilitated a meaningful relationship with the other should be taken into account. Given that when custody matters end up in court it is undeniably as a result of conflict and a difference of opinion in the parenting roles to be filled by each party, the ability of one parent to still facilitate a positive relationship between the child and the other parent is something that should be **highly regarded** by the courts. Rather than seeing this as a negative limb in the law, it should be seen as an important aspect where it is clearly something that has been achieved to the benefit of the children.

To address my concerns, I consider section 60CC(2)(a) needs to have clear reference to the best interest of the child as per section 60B(1)(a), for example:

(2) The primary considerations are:

(a) The benefit to the child of having a meaningful relationship with both of the child's parents; ***taking into account the extent to which each parent is able to maintain or promote the best interests of the child:***

Such an amendment makes it clear that parenting rights will only be acknowledged where it is clearly beneficial to the child, and specifically requires the parenting ability of the individual to be considered. In addition, I suggest that all of the factors in former sections 60CC(3)(c), s60CC(4) and (4A) should be reinstated as considerations relevant in assessing the respective parenting ability of parties.

### **My personal experience to date**

I also wish to take the opportunity to provide additional personal context which I hope can be taken into consideration in reforming the law.

In recognising the need for my children to have a meaningful relationship with their father, I have promoted his relationship with our children more than he has himself. My children are simply too young to protect themselves and even though they have themselves expressed that they are happy with the current arrangements of their father visiting or having family outings, they are similarly considered too young for weight to be given to their own wishes. However, even though I have accommodated and promoted my children's relationship with their father (albeit in a supervised context in order to counter potential risks) this will not be taken into account under the current or proposed laws. Furthermore, consideration of their fathers' parenting ability and his own ability to promote and maintain the welfare of our children will also still be overridden by his parental rights, rather than being a paramount factor in allowing the exercise of those parental rights in an unsupervised context.

To this end, in reading Submission No 6. I broke down in tears because the child raised in a form of shared parental care has expressed that in hindsight her preference would have been visits from her father – exactly the situation that my children currently have and are very happy with. I would love for my family to be part of a long term study to challenge the notion that overnight stays are necessary for children to have a meaningful relationship with a non resident parent. This is clearly not the case as anyone who has had a very strong relationship with a grandparent without sleepovers can attest to. I firmly believe that I am doing everything I can to promote a positive and meaningful relationship between my children and their father. I consider that overnight stays in our circumstances would expose the children to unnecessary risks, unnecessary anxiety, unnecessary instability and disruption to their otherwise happy lives where they know that their father loves them, but because their mother and father are separated, dad visits rather than lives with them. It is that simple for my children.

I acknowledge that if my children were older and expressed a desire to have overnight stays with their father then at some point the risks associated with overnight stays may need to be accepted or mitigated in other ways in order to ensure that the best interests of my children are being met. A court process would not be necessary for me to recognise this. However, this is very different to our current situation where overnight stays are being sought purely to serve the interest of a non resident parent without measurable benefits accruing to the children. As I have stated above, I believe that the onus should be on the non resident parent to prove how the best interest of the child will be better served in trying to exercise parental rights ascribed by the law rather than merely challenging arrangements as a result of the rights that appear to be automatically afforded by the law.

In seeking to prescribe parental time – remembering that in the context of court proceedings this is always in circumstances where the parents are incapable of themselves agreeing on how the best interest of the children can or should be met – the importance of stability, minimising anxiety and risks, promoting the child's well being (emotional, psychological and physical) and respecting the child's own desires should be paramount, **especially when a meaningful and positive relationship with both parents is not otherwise impeded.**

I appreciate that the realm of family law is extremely difficult and it is impossible to achieve an ideal outcome in every circumstance. Justice in all areas of society is predicated on truth and unfortunately the truth is often difficult to verify and it becomes one person's word against another. However the **parenting ability** and the **extent to which the parent is able to maintain or promote the best interests of the child without risk** must be considered if the best interest of the child is to be prioritised over and above parental rights.

I am left in the position of being required to spend thousands of dollars in legal fees in order to try to protect my children, but at the end of the day regardless of the risks I perceive, the courts will prescribe parenting rights based on biology rather than being in a position to appreciate what is actually in the best interest of my children. There is no question in my mind that no one would willingly leave their children in the unsupervised care of my former partner.

However, he is able to use the law and argue away risks at the expense of the children's best interests – and the only way that I can protect my children is when it is too late and they are proven to be harmed in some way.

My wish is simple, that where one parent is clearly able to meet the child's needs and promotes a positive relationship between the child and the non resident parent; then allowing the law to afford overnight custody based purely on biology is unsound. Real benefits need to be proven to counter all of the instability and anxiety that shared parenting in the context of court ordered arrangements necessarily entails; that is, in circumstances where implicitly the parties cannot agree on the best interests of the child and therefore invariably shared parenting creates more issues than it resolves.

In conclusion, I hope that the ultimate amendments to the family law lead to decisions which are in the best interest of the child, and in doing so afford me the right to protect my own children.

Yours faithfully