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12 April 2011.

Committee Secretary,
Senate Legal and Constitutional Affairs Committee,
PO Box 6100,
Parliament House,
CANBERRA. ACT. 2600.

Dear Sir

Re. Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

We thank the Senate Legal and Constitutional Affairs Committee for giving our organisation the opportunity to make a submission to the Inquiry into the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*

The *Bill* seeks to significantly expand the definition of family violence. At the same time, the intent of the *Bill* is to elevate the issue of (unproven) family violence to above that of the right of children to be cared for by both their parents.

We see that this is as being fundamentally wrong.

We are opposed to the *Bill* and the underlying intent of the *Bill*

The reasons for our opposition are provided in more detail below.

1. Schedule 1. Part 1. "Item 1. Section 4(1). Definition of Abuse"

1.1 Wrongful Formalisation of the Current Approach to Contact Orders

The proposed definition of “abuse” in the Bill uses the words “serious psychological harm”. We have often wrongly seen children removed from one of the parents as a result of assumptions of “serious psychological harm”.

The current usual procedure in either the Family Court or Federal Magistrates Court is as follows

- Allegations of either sexual abuse or family violence are made at the interim application stage of proceedings involving child contact. (This is often after an unsubstantiated family violence order has been made in the state-based local or municipal court – commonly called AVO’s, restraining orders, intervention orders, etc depending upon the State)

- Contact orders are then either suspended (if existing) or not made at all (if not existing). No other evidence other than what is provided in affidavits is allowed by the court at this stage.

- There is then a time frame of approximately eighteen (18) months to two (2) years for the hearing of the final application for contact. During this period of time, the non-custodial parent is not allowed contact with the children.

- When the final application for contact is heard, the previous unsubstantiated allegations of sexual abuse or family violence are dropped. In their place, allegations of “serious psychological harm” are made. This is because the children have not seen the non-custodial parent for eighteen (18) or two (2) years.

- As a result, contact orders are then either permanently suspended (if existing previously) or not made at all (if not existing previously).

If passed by Parliament, the resulting *Family Violence and Other Measures* legislation would wrongly formalize the above unfortunate approach.

1.2 Lack of Objectivity in the *Bill*.

In the above approach to removing children from both parents, evidence is provided that the children could be "psychologically affected" if orders for contact were made by the judicial officer.

This decision is based on subjective evidence provided by a family court counselor or court-appointed psychologist (or person as defined as an "adviser" as now proposed in new Section 60D and as referred to in our item 5 below).

This evidence is a result of a very short meeting between the children and a counselor, psychologist or other "adviser".

There is no objectivity provided in the *Bill* of what would constitute "serious psychological harm".

The definition of "abuse" should include words similar to "unless there are proven mitigating circumstances that would not be genuinely in the children's best interests".

2. Schedule 1. Part 1 "Item 8. Section 4AB. Definition of "Family Violence"

2.1 Definition of Family Violence is too broad.

If passed by Parliament, the proposed definition of "Family Violence" contained in the *Bill* would accommodate anything that is remotely related to family violence.

There would be then no restraint on a judicial officer making any type of subjective decision that he or she wants to. There is no objectivity in the current proposed legislation (i.e. there is a lack of "restraint" on wrongful decisions by judicial officers – refer item 1.2 above)

The proposed definition of family violence is too broad.

2.2 No Requirement to Provide Evidence

In addition to the unreasonable broadness of the proposed definition, the words "or causes the family member to be fearful" means that there is no need to provide evidence to back up a claim of family violence.

As proposed in the *Bill*, if the second person simply states that there is family violence, then this statement has to be accepted. This is without any proof whatsoever.

This type of action is unfortunately happening every court day in the local and municipal courts across Australia (refer our point 1 in item 1.1 above).

As a result, if this Bill is passed as it is currently proposed, the children from separated families would be at an increasingly significant risk of loosing contact with the other parent and also that part of the children's family.

To correct the problem, the definition of "Family Violence" should include the words "unless proven mitigating circumstances that would not be genuinely in the children's best interests".

3. Schedule 1. Part 1

Item 13. "At the End of Section 60B"

3.1 Is the Inclusion of the *Convention* a mere Selling Point?

At the end of Section 60B, it is proposed to "give effect to the United Nation's *Convention on the Rights of the Child"*.

(Details of Item 13 and the relevant extract from the Explanatory Memorandum are provided in the Appendix to this submission).

We would ask the question of the Senate Committee – Is the inclusion of the UN *Convention* a mere selling point?

The Explanatory Memorandum (refer Appendix) to the *Bill* states:

> *"This provision is not equivalent to incorporating the Convention into domestic law."*

We would also refer the Senate Committee to the Full Court of the Family Court's decision in *Re : B and B: Family Law Reform Act 1995* [1997] FamCA 33 (9 July 1997).

This is particularly with respect to the previous non-inclusion of the UN *Convention* in the *Family Law Act 1975*.

The Full Court of the Family Court then said that:

> *"10.2. Unlike the United States and continental legal systems, where the entry into treaties or conventions creates self executing law, the English and Australian position is that such treaties do not enter into domestic force unless and until there is a legislative act*."

Australia was one of the 160 countries that signed the United Nation's *Convention on the Rights of the Child* in 1989. Australia has never included this document into legislation up to this time.

We would ask the Senate Committee - Is the UN *Convention* is part of the proposed legislation or it is not part of the proposed legislation?

If the *Convention* is to be an effective part of the proposed legislation then the above quoted comment in the above paragraph 1 (of our item 3.1) that has been taken from the Explanatory Memorandum is meaningless.

If the UN *Convention* is not incorporated into domestic law, as also stated in the Explanatory Memorandum above, then one could conclude that the inclusion of the UN *Convention* is part of another agenda.

That is, its inclusion at the end of Section 60B could be considered to be a mere "selling point". This is to obtain acceptance by the public and the media. If this is indeed the case, then both the public and the media have been wrongly misled.

3.2. Conflict between Article 7.1 of the *Convention* and the Family Violence Provisions.

The *Bill* proposes to elevate the issue of (unproven) family violence to above that of the right of children to be cared for by both their parents.

Article 7.1 of the UN *Convention* states that "*the child shall … have the right, as far as possible, to be cared for by his or her parents*"

We submit to the Senate Committee that there is a conflict between Article 7.1 of the UN *Convention* and the family violence provisions in the *Family Violence and Other Measures Bill*.

3.3 Conflict between Best Interest Principle contained in the Family Law Act 1975 and the *Family Violence and Other Measures*.

Under the current *Family Law Act 1975*, it has been well established that only the children have rights; parents and other relatives have no rights whatsoever. (refer *Re : B and B: Family Law Reform Act 1995* [1997] FamCA 33 (9 July 1997)

At present "the best interests of the children are paramount" – that is, they are determinative.

However the Explanatory Memorandum (refer Appendix) states that:

> *One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making.*
>
> (underlining added)

Article 3 of the UN *Convention* does state that the "best interests of the child shall be a primary consideration".

Prior to 1995, the *Family Law Act* had stated that the "welfare of the child shall be a paramount consideration". During legislative changes made in 1995, the Australian legislators only adopted the words "best interests" from the wording of Article 3 of the UN *Convention.*

At the same time, the then legislators left out the word "primary".

The difference in the meaning of the words “paramount” and “primary” is important.

A more complete analysis is contained in the Full Court of the Family Court decision. *Re : B and B: Family Law Reform Act 1995* [1997] FamCA 33 (9 July 1997) at paragraphs 3.30 and 3.31.

With the inclusion of the word “primary”, parents and other relatives would have rights in family law proceedings involving children.

We submit that if the Senate Committee is going to allow the inclusion of the UN *Convention* to remain in the *Bill*, then you should change both the priorities in the *Bill* with respect to (unproven) family violence and you should change the definition of what is the “*best interests of the child*”.

4. Schedule 1. Part 1 “**Item 17. ‘After Subsection 60CC(2)’.”**

This sub-section states that:

(2A) If there is any inconsistency in applying the considerations set out 6 in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

This effectively means that potentially erroneous family violence accusations would become paramount when deciding whether or not children are to have contact with both parents.

We disagree with the significance placed on the intention to give greater weight to these unproven allegations of family violence.

The words “unless proven mitigating circumstances that would not be genuinely in the children’s best interests” or similar should be included in the *Family Violence and Other Measures Bill.*

5. Schedule 1. Part 1. “**Item 22. Section 60D “**

The heading of Section 60D is “Adviser’s obligations in relation to best interests of the child”.

The above "greater weight' consideration from Section 60CC(2) is also repeated under this proposed Section 60D. This is with regard to advisers (i.e. a legal practitioner; a family counsellor; a family dispute resolution practitioner; or a family consultant).

Again, the above comments with regard to the inclusions of the words "unless proven mitigating circumstances, etc" should apply to this Section 60D.

6. <u>Schedule 1. Part 1.</u>

<u>Item 29 Section 67ZBA</u>

The heading for Section 67ZBA is "Where party to proceedings makes allegation of family violence".

Section 67ZBA states that:

> *This section applies if an interested person in proceedings for an order under this Part in relation to a child <u>alleges</u>, as a consideration that is relevant to whether the court should make or refuse to make the order, that:*
>
> *(a) there has been family violence by one of the parties to the proceedings; or*
>
> *(b) there is a risk of family violence by one of the parties to the proceedings.*
>
> (the word "alleges" has been underlined for emphasis).

We again submit that the words "unless proven mitigating circumstances etc" or similar should be included in Section 67ZBA.

8. <u>Conclusion</u>.

We do not support the *Bill*.

This is because of the broadening of the definition of family violence and the serious consequences of that decision.

We also do not support the *Bill* due to the fact that family violence is elevated above the need for children to have (significant) contact after separation.

The *Bill* has proposed that "Item 13 ….. is to give effect to the United Nation's *Convention on the Rights of the Child*" in the new legislation.

As stated above, Article 7.1 of the UN *Convention* states that "*the child shall … have the right, as far as possible, to be cared for by his or her parents*".

If there is a genuine attempt to include the UN *Convention,* we submit that there is then an obvious conflict between Article 7.1 of the UN *Convention* and the intent of the *Family Violence and Other Measures Bill*. This is particularly where you propose to elevate the issue of (unproven) family violence to above that of the right of children to be cared for by both their parents.

Thanking you for the opportunity to make this submission.

Yours faithfully

Roland Foster
Secretary,
Fairness In Child Support.
(F.I.C.S.)

(Appendix is attached)

APPENDIX

SOME EXTRACTS OF RELEVANT INFORMATION AS PROVIDED BY THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE.

Schedule 1. Part 1 of the *Family Violence and Other Measures* Bill

13 At the end of section 60B

Add:

(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Extract from the Explanatory Memorandum

Item 13: At the end of section 60B

23. Item 13 inserts a new subsection into section 60B of the Act to provide that a further object of Part VII of the Act is to give effect to the United Nations *Convention on the Rights of the Child* (the Convention). The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.

24. Australia ratified the Convention in 1990 and, in doing so, committed to protecting and ensuring children's rights. The Convention contains the full

range of human rights – civil, cultural, economic, political and social rights. These rights can be broadly grouped as protection rights, participation rights and survival and development rights. One of the main principles on which the Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in decision-making. Part VII of the Act is based on this same principle; although the best interests of the child are elevated to 'paramount' status in several provisions. The reference to the Convention in section 60B does not adversely affect these provisions in Part VII or dilute the meaning of 'paramount consideration'. Nothing in the Convention prevents Australia enacting stronger protections for the rights of the child than the Convention itself prescribes.

25. The note provides the reader with a reference for accessing the Convention in accordance with current drafting practice.
