



# National Child Protection Alliance

## National Child Protection Alliance

in association with the National Council for Children Post Separation

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## **THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE IN AUSTRALIA**

### **SUBMISSION BY THE NATIONAL CHILD PROTECTION ALLIANCE OF AUSTRALIA IN ASSOCIATION WITH THE NATIONAL COUNCIL FOR CHILDREN POST SEPARATION**

The National Child Protection Alliance [NCPA] was formed in 2011 by a group academics, researchers, lawyers and child advocates, some of whom have been engaged in child advocacy work with abused children for several decades and who are concerned regarding the unconscionable incidence of child sexual abuse in Australia, and more specifically the numbers of children who are being placed in high risk situations of abuse and exploitation following determinations regarding parental custody and contact with children by Family Courts.

We are most grateful to the Commissioners for permitting this submission and for giving our evidence due consideration among their very extensive other considerations.

Since the formation of NCPA there has been a constant and increasing number of inquiries by parents and children regarding Family Law and Child Protection matters and there are daily requests for emotional/psychological support, counselling, general advice, and legal advice required of our group of pro bono advisers and lawyers. We do not yet have the financial resources to set up a statistical database, but a reasonable estimate of current cases would be in excess of 300 active cases, mostly involving highly complex situations with many more contacting us for specific advice or at irregular intervals. Our advisers/advocates are receiving referrals at a rate of 15 – 20 per week of new referrals or inquiries regarding ongoing cases and our legal advisers/advocates are similarly under intense pressure in preparing and presenting cases in the Courts.

## **CHILD SEXUAL ABUSE IN AUSTRALIA**

### **INTRODUCTION**

Research studies, statistics of State Child Protection authorities, and the experience of voluntary child protection associations such as NCPA, show very clearly that the sexual abuse of children by persons closely related or otherwise known to them, has reached pandemic proportions in Australia and is a matter requiring urgent and comprehensive attention by both Federal and State governments. If child sexual abuse were a communicable disease, then there would be an immediate National Emergency declared by Health Authorities.

In consideration of the limitations placed on the terms of reference of the Royal Commission, we shall contain our evidence to an examination of the institutional responses to child sexual abuse by those agencies which carry statutory responsibility for the safety and protection of children and their inter-relationship in carrying out their statutory duties.

**Specifically:**

1. **State Child Protection Authorities;**
2. **State Police Authorities;**
3. **The Federal Family Courts.**

Our concerns on these matters are far from isolated. Many other voluntary organisations concerned with child sexual abuse share similar concerns and members of the Family Court judiciary have publicly expressed similar concerns e.g

“Community confidence in the Family Law system in Australia is reportedly at an all-time low. This is due in part to its perceived inadequacies in dealing with the sexual abuse allegations made by or on behalf of children against one or other of their parents in the Family Court”. Hon Justice Tim Carmody – Speech in South Africa 2005

Hon Justice Alastair Nicholson [Lecture – 2005],

“We have no less than eight sets of child protection laws with fundamental differences in such critical matters as:

- how abuse or maltreatment is defined;
- the systems through which abuse notifications are investigated”.

**THE INCIDENCE, NATURE, AND EFFECTS OF CHILD SEXUAL ABUSE IN AUSTRALIA**

There is a pandemic of child rape and sexual abuse of children in their own homes in Australia by persons who are parents, close relatives, or friends of the family. If there were such an epidemic of children suffering measles, or mumps, or chicken pox, then Medical Officers would quite rightly declare a national emergency and there would be an immediate government campaign to eradicate such diseases. Yet child rape and sexual abuse continues unabated. The investigations of such child sexual abuse is, in many cases and at the least, primitive and prosecutions of perpetrators are extremely rare relative to the large numbers involved. It is common for children disclosing or reporting sexual abuse to be met by disbelief by investigators or even worse, to be immediately accused of lying (despite research showing that children are truthful in 96% of such cases and in law they must be treated as competent witnesses and their evidence accepted as reliable and credible – Evidence Act 1995).

Or the reporting parent, usually the *mother*, is accused of lying or of ‘coaching’ the child. To ‘coach’ a child in abuse allegations and all of the detail reported by the child is almost impossible and would have to be conducted by someone highly trained and skilled in such techniques and over a very considerable period of time.

Interviews of children occur in stark, Spartan police interrogation rooms or in offices, or even in police vehicles, and without an adult present to provide the child with re-assurance and support. Rarely is a forensic paediatrician asked to examine the child for physical evidence to corroborate the allegations nor a forensic clinical psychologist to examine the child for emotional/ behavioural signs of abuse.

There are rarely witnesses to child sexual abuse but often there are indirect witnesses who the child has disclosed/ reported the abuse such as teachers/ doctors/ neighbours/ other adult relatives and even other children. Yet sworn witness statements are never taken from such persons as corroborative evidence.

It is small wonder that so many disclosures by children of sexual abuse are ‘unsubstantiated’ and there are so few prosecutions.

There have been several cases where residence has been given by Family Courts to fathers with convictions for child sexual abuse. In an Adelaide case in 2010 a father was awaiting sentencing as a child sex offender but was awarded contact with a small child. Another father in [REDACTED] who had

HIV/AIDS and had no experience of child rearing and parenting was awarded shared care of a female child. Mother refused to permit such contact so the father was given sole parental responsibility and residency of the child. Some years later she reported that she was being sexually abused by her father but the judge dismissed this claiming she had been “trained by the mother” who she hadn’t seen for several months. There was no evidence to support such a contention and finding.

There are also at least two cases where mothers who had been brutally raped by their former partners, have been awarded compensation from the Criminal Injuries Compensation Scheme which assesses cases on a balance of probabilities, yet the respective Family Court Judges refused to accept such evidence, as evidence of intimate partner violence. One of the mothers was imprisoned for refusing to accept a ‘Shared Parenting’ arrangement with the father because of his brutality towards her and the children.

A Judge in the [REDACTED] is reported as stating to a group of University students that “mothers’ allegations of child abuse are always false”. In fact research by Monash University has shown that less than 9% of allegations of child abuse and family violence made to Family Courts are ‘false’, and such false allegations are made by fathers 55% of such cases and 45% by mothers. Obviously such research findings have not yet permeated into the Family Court processes and the mythologies of ‘False Allegations’ promoted by Father’s Rights groups are still a part of the mindset of those involved. In NSW alone, the most recent figures indicate that there are 126,000 reports of domestic violence every year leading to 36 deaths, including four children, and serious injuries to many thousands of others, both adults and children. Multiply those figures across Australia and there is a highly alarming situation of violence against individuals. Such violence affects every social group in our society, no matter what their social status, and carries a very high cost to the individuals who are victims of such violence and which is frequently lifelong and seriously debilitating. There is also has a very high cost to our society with health and medical costs, absence from employment, mental health and social services.

There are 286,000 notifications of child abuse every year in Australia, and involving the physical, sexual and emotional abuse of children and neglect of their basic needs. Following investigation by police and State Child Protection Authorities, approximately 50,000 of these notifications of child abuse are found to be substantiated.

Research has shown however that such statistics do not reflect the full extent of child abuse in Australia as many people are reluctant to report such incidents if seen, the private nature of such incidents, the difficulties for children in disclosing such abuse and being believed when they do so, and serious problems in obtaining corroborative evidence to support the children’s disclosures.

In addition to the under-reporting of abuse and neglect, system issues may also contribute to the underestimation of the number who are abused or neglected. Child protection data also exclude cases where the abuse or neglect was not perpetrated by the parent and the parent is protecting the child (e.g., child sexually abused by a non-family member who lives in the community). These cases are generally considered to be a police and not a child protection matter.

Neither do such figures include the many children who are abused nor is such abuse video-recorded by paedophiles in order gain membership to Internet-based child pornography sites and the very considerable financial rewards they gain from providing such material. Child exploitation and abuse in this manner is now a worldwide concern and the subject of a great deal of activity by law enforcement agencies. We have encountered several such cases where children have reported that they have been sexually abused in such circumstances.

It is reasonably estimated from studies of adults who disclose that they were sexually abused during their childhood, that approximately one child in five disclose that they have been sexually abused.

Such figures that are known are therefore likely to be a very considerable underestimation of the number of children who are abused or neglected in Australia.

**Australian Institute of Criminology - `STRANGER-danger is a myth and a "plague" in the anti-paedophile debate that ignores the dangers posed by biological fathers, the Commissioner for the Victims of Crime Michael O'Connell has warned.**

Mr O'Connell was commenting on a study by the Australian Institute of Criminology of 213 parental child sexual offenders, which found despite a belief that predator stepfathers were more likely to commit offences, there was little difference between them and paedophile biological fathers.

Almost half of the Australian offenders studied were biological fathers, the researchers found.

It is estimated that between 10 and 15 per cent of child sex offending is committed by a parent.

"The study debunks the stranger-danger myth that too often plagues the debate on sex offences and sex offenders," Mr O'Connell told *The Advertiser*.

"It also challenges the notion of the family as a safe-haven - it is not for too many children."

Mr O'Connell said the findings of the study were very important because children who informed on their biological fathers were often not believed.

Also, only 7 per cent of the predators, less than one in ten, abused people outside the family, making it difficult for them to be caught.

"Child-victims need to be heard and believed but also never blamed," Mr O'Connell said. "They need to be told that they are believed, although there might be some changes in their family's life thereafter.

<http://www.adelaidenow.com.au/news/south-australia/criminology-study-finds-focus-should-be-on-paedophile-fathers/story-fni6uo1m-1226811544275>

Childhood abuse, neglect, and exposure to other traumatic stressors which are termed [adverse childhood experiences](#) (ACE) are common. In one study almost two-thirds of the participants reported at least one ACE, and more than one of five reported three or more ACE. The short- and long-term outcomes of these childhood exposures include a multitude of health and social problems.

The ACE Study uses the ACE Score, which is a count of the total number of ACE respondents reported.

The ACE Score is used to assess the total amount of stress during childhood and has demonstrated that as the number of ACE increase, the risk for the following health problems increases in a strong and graded fashion:

- |  |                                       |
|--|---------------------------------------|
| • Alcoholism and alcohol abuse         | Chronic obstructive pulmonary disease |
| • Depression                           | Foetal death                          |
| • Health-related quality of life       | Illicit drug use                      |
| • Ischaemic heart disease (IHD)        | Liver disease                         |
| • Risk for intimate partner violence   | Multiple sexual partners              |
| • Sexually transmitted diseases (STDs) | Smoking                               |
| • Suicide attempts                     | Unintended pregnancies                |
| • Early initiation of smoking          | Early initiation of sexual activity   |
| • Adolescent pregnancy                 |                                       |

**The Economic and Financial Costs of Child Abuse** - "Child sex abuse is the biggest health problem in Australia given its relevance to mental illness, drug addiction, suicide etc." (Dr. Bill Glaser, Melbourne Uni.). Monash University found that **child abuse costs up to \$30 billion a year.**

## **FAMILIES WITH COMPLEX NEEDS & THE INTERSECTION OF THE FAMILY LAW AND CHILD PROTECTION SYSTEMS**

**Family Courts do not have the powers, expertise, and resources to competently investigate domestic violence and child abuse, nor do they have the powers to order the State Child Protection authorities to investigate such allegations.**

Chief Justice Diane Bryant in a speech in Brisbane in 2009, stated:

*“[Australian] family courts are not forensic bodies. They do not have an independent investigatory capacity or role when violence or abuse is alleged ... Family courts are reliant upon other agencies, particularly child welfare departments and police, to undertake investigations into matters that may be relevant to the proceedings before it. And although the Court can make directions as to the filing of material and can issue subpoenas compelling the production of documents, it cannot order state agencies to undertake inquiries into particular matters. It is hardly an ideal situation but in the absence of the Commonwealth assuming responsibility for child protection from the states, that will continue to be the reality.”*

The House of Representatives Committee on Family and Community Affairs has reported “Every Picture Tells a Story” [2003] that;

- 4.22 Evidence about investigations by state authorities, if any, may or may not be available to courts deciding matters under the FLA, depending on the priority given to the case by the state authorities. Often no report of an investigation by state authorities is available to assist the court. States are responsible for child protection and each State and Territory child welfare authority has responsibility to investigate allegations of abuse. If an allegation is made in the context of a family law dispute there is a requirement for notification to the State body under section 67Z and 67ZA of the FLA. As has been highlighted in a number of previous reports, including the Family Law Council’s report on Family Law and Child Protection of September 2002<sup>18</sup>, many of these cases are not investigated or only to a preliminary stage. The Council’s report has noted:

State and Territory child protection authorities need to prioritise also because in many jurisdictions, the numbers of child abuse incidents reported to the authorities are far greater than their

capacity to handle. ... A child protection investigation is intrusive and worrying. It should not be initiated unless there are sufficient concerns about the safety or well being of a child. Even among the cases which do meet this threshold of seriousness, child protection authorities are often reported to be overwhelmed by the numbers of reports and must establish criteria for allocating investigatory resources.<sup>19</sup>

- 4.23 Often when the child protection authority is aware that matters are proceeding in the Family Court they will decide not to investigate, leaving the question to that court to decide on the issues.<sup>20</sup> However, the Family Court is not resourced to investigate such matters. The children involved then fall through the jurisdictional gaps.
- 4.24 The Family Law Council has considered this split of jurisdiction in its Report and made a number of recommendations for addressing the consequences. In evidence the Family Law Council said:
- ... the split of jurisdiction between the states and the Commonwealth over child and family law matters. We have taken as a given that that split will continue ... We regard the split in jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children ...<sup>21</sup>

It is our experience that this is a continuing problem which has not been resolved as the vast majority of cases of domestic violence and child abuse which are reported to the Family Courts are not referred to the State authorities for investigation and of those which are referred, only a small proportion are investigated and even then, only in a very rudimentary manner which cannot be described as thorough or painstaking in any respect.

From our enquiries with State authorities even State government ministers and Chief Executive Officers of Child Protection Services, there appears to be a widespread but mistaken belief that police and social workers are not allowed to intervene once there is a case of child abuse reported to the Family Courts, and that Family Law takes precedence over State Laws in such matters. As is shown above.

Even in the small percentage of cases where the State authorities conduct an investigation and find the allegations to be 'substantiated', Judicial officers in exercising their discretion regarding the admissibility and weighting of such evidence, frequently disregard such evidence, preferring instead to rely on the opinions of their appointed Consultants.

Our expert advisers and child advocates in examining numerous cases, have found a clearly discernible pattern of events in such cases and which are as follows:

1. *The mother alleges domestic violence and presents the children's disclosures of abuse, often with the support of independent persons and professionals to whom the children have disclosed or complained about the abuse;*
2. *The father (and his lawyers) counter-claims that the mother is deluded, is also abusive, and has coached' the children in the abuse claims in order to 'alienate the children from him. (Often despite clear and convincing evidence that he has 'alienated' the children from himself by his violence and abuse towards them);*
3. *In order to resolve the dispute the Court appoints an Independent Children's Lawyer [ICL] who then engages a Family Report Writer/Consultant. Such CRWs/Consultant frequently do not have training nor experience in child abuse investigations and usually rely only on a one hour interview with the child and a similar interview with the father (who of course denies the violence and abuse), before pronouncing that the abuse did not happen because the child did not disclose the abuse to the CRW/Consultant;*
4. *If the Consultant is a psychologist/psychiatrist they usually it most common that they pronounce that the mother is mentally ill (e.g. a non-specific Borderline Personality Disorder or is delusional, and again only on the basis of a one hour office interview);*
5. *An Independent Children's Lawyer is appointed to give an opinion on what s/he considers to be in the best interests of the child. (Lawyers may be well trained in the law and legal procedures but have no expertise in child development or the needs of children, nor the skills necessary for talking with traumatised children). It is usual for ICLs not to talk with the children to obtain their views or on the rare occasions when they do, they frequently disregard what the child says and invariably recommend contact or custody for the father. Australia's Family Law supports children's relationships with admitted/convicted child sex offender parents. See for example **Murphy & Murphy [2007] FamCA 795 Justice Carmody***

*"The consequences of denying contact between the abusive parent, usually the father, and the child may well be as serious as the risk of harm from abuse. 85. Thus, in D'Agostino<sup>[46]</sup> a father who was convicted of sexually interfering with his 11 year old daughter was not denied contact either with her or her two younger sisters but was allowed contact on condition that all three children were together at the same time and another adult was also present."*

6. *Even where the State police and child protection workers may have investigated the abuse and domestic violence allegations (and they do so in less than 25% of cases), and find the allegations to be substantiated, this is often ignored and disregarded by the Courts. Both the police and the State CP departments are highly reluctant to become involved in Family Court disputes over custody/contact and so their investigations are often cursory and perfunctory. This is confirmed in research by the Australian Institute of Family Studies who reported that there is a widespread belief (within the Family Court system) that the father has the right to parent his children regardless of allegations of abuse or the quality of the relationship between the father and the children. In the recent Coroner's Inquest in South Australia into the death of Chloe Valentine, the Coroner expressed the firm view that children are still treated within the legal system, merely as items of property ;*

7. *When evidence of domestic violence and child abuse can be readily disregarded and dismissed by Family Court judges, who are not bound by the requirements of the Evidence Acts, then it becomes virtually impossible to establish that child abuse and family violence has occurred and the father's violent and abusive behaviours follow a consistent pattern;*

8. *When there are allegations of child sexual abuse, then the Evidence Act/Briginshaw Principle is applied (i.e. it is viewed as a grave matter) and a much higher standard of evidential proof is required (towards the extreme end of the scale – see 2. following).*

Such Consultants are appointed by the Judicial officers to assess and evaluate the mental functioning of the parties, although in reality it is only the alleging parent who is assessed in such manner and not the allegedly abusive parent. Results of such assessments invariably find that the alleging parent has a Borderline Personality Disorder or is 'delusional' or has 'coached' the child(ren) in making the allegations in order to 'alienate' the child from the allegedly abusive parent. No evidence is provided nor requested to support such opinions and they have no basis in theoretical constructs accepted by the relevant professional community. There is now a very distinct pattern in Family Court proceedings which follow this trajectory. So the alleging parent is labelled with a Mental Health disorder without a formal mental health assessment and which stigmatises them for the rest of their lives and affects every subsequent Court hearing, thereby causing continuing prejudicial bias.

For a more detailed explanation and understanding of this phenomena, please examine:

Madness in the Family Law: Mothers' Mental Health in the Australian Family Law System, Psychiatry, Psychology and Law, DOI:20.1080/13218719.774688 Dr. Elspeth McInnes AOM (2013) i.e.

**This article explores the legal and clinical processes underpinning gender differences in Australian Family Court statistics which show that mental illness is the primary reason for limiting mothers' contact with their children. Analysis of a sample of published judgments from 2009 to 2011 featuring mental illness and outcomes of limited child contact identified that allegations of child sex abuse were a common feature of cases in which mothers' child contact was limited. Four illustrative cases are presented with a focus on the processes used in the identification of mental illness. The data indicate that there are different patterns of response to cases where a party has a previously diagnosed mental illness and cases where mental illness is invoked as a possible explanation for child sex abuse allegations. These identified patterns of differentiated response provide a possible explanation for the gender disparity in Family Court reasons for limiting child contact on the grounds of mental illness.**

**Keywords:** child sexual abuse; Family Law; mental illness

If the alleging parent opposes or even refuses to accept a contact arrangement, often with reasonable cause, then the children are placed in residence with the allegedly abusive parent and the alleging parent is banned from contact for periods up to one year, "In order for the resident parent to cement their relationship with the child(ren)."

Even criminal court convictions for child sexual abuse, violent assault, and rape of the other parent have been disregarded by some Family Courts. E.g. Aligante & Waugh 2008.

The pattern and process are so well known that solicitors and barristers are now known to be advising parents not to mention incidents of family violence or child abuse, in the knowledge that such allegations will severely damage their case. This is a violation of the principles of natural justice and procedural fairness and in many cases is denying Judicial Officers the right to be triers of fact.

The Motion which is placed before the Family Court is: 'Has this child suffered any form of abuse and/or exploitation and is there therefore an unacceptable risk to the child in the future?' and that is the motion which the Court is required to address. Yet Family Courts, as stated above, cannot and do not investigate such allegations and such are the processes of the Family Court that the Motion is therefore changed to: 'Is this parent making these allegations on behalf of the children, of sound mind'. The Courts and their appointed Consultants are not therefore addressing the primary Motion

In consequence of such processes, many hundreds of children in Australia are suffering continuing physical, emotional, psychological, and sexual abuse by abusive parents.

### **PARENTS AND CHILDREN WHO ARE INVOLVED IN FAMILY COURT PROCEEDINGS AND CHILD PROTECTION SYSTEMS**

Those who suffer most in such processes are the children and young people involved.

Despite provisions in the Family Law Act for children and young people to apply for a Parenting Order [Sect 60C] or to be brought into proceedings as a party by one of the existing parties, [Family Court Rules – Para. 6.03], and that children must be seen as competent witnesses and their evidence treated as reliable and credible [Evidence Act 1995], they are completely excluded from Family Court proceedings. Neither are such legal principles applied in investigations of child abuse allegations.

It is our view that children and young people should have an automatic right to be directly involved in giving evidence and their views in Family Law proceedings if they so wish, and the position of Independent Children's Lawyers should be dispensed with. Children and young people should have the right to appoint a legal representative and/or a Lay Child Advocate of their own choosing, to whom to give their instructions. Voluntary organisations could be encouraged and funded to provide such Lay Child Advocates. Facilities should be available for children to give direct testimony either screened from the parental parties or by video-link. Again they can be accompanied in doing so by a Lay Child Advocate of their own choosing for support and comfort if distressed.

A major problem is encountered by parents and children in cases of alleged child sexual abuse. In such Hearings, Judicial officers invoke the provision in the Evidence Act 1995 which relates to the 'grave' nature of the allegation (see Briginshaw Principle – U.K. 1938) whereby it is seen as a slur on the reputation of the alleged abuser, although there may be no criminal charges as such and the alleged abuser is not on trial, nor can any of the proceedings be publicised or be made known to the public. (Family Law Act 1975 Sect 121).

This is further compounded when Judicial officers then apply a Third Standard of Evidential Proof to such cases "At the extreme end of the Scale" i.e. almost the criminal standard. (see M & M 1988). This Judge-made Third Standard of Evidential Proof is an immense barrier to overcome in any proceedings involving allegations of child sexual abuse and why such allegations are so frequently dismissed. (see for example Krach & Krach 2009). This Third Standard of Evidential proof does not exist in any other area of civil or criminal law

This digression from civil law and the evidential standard of proof was referred to by Deputy Chief Justice John Faulkes in a speech in October 2010 that,

*"Allegations of family violence and abuse in the context of family law litigation need to be established in accordance with two seemingly contradictory constructs. The first is that whether*

*or not family violence or abuse has occurred needs to be made out on the civil evidentiary standard on the balance of probabilities, not beyond reasonable doubt. In a judgment I recently gave (Kings & Murray) I identified the difficulty inherent in navigating the evidentiary standard of proof (at paragraphs [8] & [9]):*

*Proof on the balance of probabilities involves, among other things, a consideration of what is more likely to have occurred than not. However, it has been well known for some time (and the Evidence Act 1995 (Cth) provides for this) that where what is being sought to be proved is a grave and serious matter, or put in more blunt terms, if what is sought to be proved might be a criminal action, then the Court must apply what has been loosely described in the past as the *Briginshaw v Briginshaw* standard of proof. In that decision, their Honours (Latham CJ, Rich, Starke, Dixon and McTiernan JJ) considered whether the matter required to be proved (which related to whether adultery on the part of one of the parties had occurred or not) was to be proved on the civil standard of proof or some other standard”.*

However in *Krach & Krach 2009*, the judicial officer recorded and exposed the considerable ambiguities in applying the standard of evidential proof in child sexual abuse cases i.e.

*36. In assessing the evidence, I apply the balance of probabilities as the standard of proof. The practical application of the balance of probabilities was discussed by Lord Nicholls in *Re: H & Ors*[17]. Relevantly, His Lordship stated:*

*Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise various serious issues, but so do other forms of civil proceedings.*

*The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*

*Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.*

*37. As was observed by Carmody J in *D and D* [2005] FamCA 356, the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. [18] The balance of probability standard takes account of the instinctive judicial feeling that even in civil proceedings a court should be surer before finding serious allegations proved than when deciding less serious or trivial matters. There are degrees of probability but, when the law talks about "the balance of probabilities", it envisages a degree of probability to the point that a court can be satisfied that the alleged fact in issue is more likely than not. There has to be something more than mere conjecture or suspicion. A proposition is proved on the balance of probabilities in a circumstantial case when the combined weight or preponderance of the totality of the available evidence favours it as the most likely explanation. The more information consistent with one of a number of competing hypotheses, the more probable that explanation becomes. I agree with those observations.*

38. *In these reasons, statements of fact constitute findings of fact.*

*“In summary, the law is well settled as to the standard of proof required to make a positive finding of sexual abuse, and that such a finding should not be made unless a trial judge is satisfied to the highest standard, on the balance of probabilities abuse has occurred. We accept, as a matter of practice, a trial judge will almost inevitably be required in a case where sexual abuse allegations are raised to consider whether abuse has been proven on the balance of probabilities as well as considering whether or not an unacceptable risk of abuse exists.*

26. *While Dixon J’s classic discussion in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-363 of the operation of the civil standard of proof may appositely express the considerations which s 140(2) of the Evidence Act 1995 (Cth) requires a court to take into account, the correct approach (as recently observed by Branson J (with whom French and Jacobson JJ agreed) in *Qantas Airways Ltd v Gama* [2008] FCAFC 69; (2008) 247 ALR 273, at para. 139 is that :*

*. . . references to, for example, “the Briginshaw standard” or “the onerous Briginshaw test” . . . have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s.140 of the Evidence Act provides.*

27. *Similarly, in *Johnson & Page* (2007) FLC 93-344, at 81,891, the Full Court of this Court expressly agreed with the “view that reference to the Evidence Act, rather than Briginshaw, is appropriate”.*

28. *Section 140 is as follows :*

*(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.””*

With such ambiguities, uncertainties, and contradictions among the judiciary regarding the application of a standard of proof of a ‘Balance of Probabilities’, it is little wonder that such cases have become virtually impossible to prove.

In regard to family violence during which children inevitably experience abuse and are frequently left traumatised and with Post Traumatic Stress Disorder, Family Courts appear to give little regard to evidence of such violence.

Professor Peter Parkinson wrote of Family Violence Orders in his submission to the Senate Committee on Legal and Constitutional Affairs in 2011;

**“Family Violence Orders have absolutely no evidential value in the vast majority of (Family Law) cases. This is because, in the vast majority of cases, they are consented to without admissions” and “It is hardly surprising the judges in Family Law cases draw no inferences from the mere existence of a family violence orders. This has been a clear view of family lawyers for the last 15 years.”.**

The commonly held belief that Family Violence Orders and Apprehended Violence Orders are obtained to obtain some kind of advantage in Family Court proceedings, is therefore entirely without foundation, when Family Courts give little, or no regard to such Orders. Although Family Courts should be examining in detail for themselves the evidence of what has occurred during incidents of family violence, this rarely occurs. Or at the least, the details submitted to obtain the FVOs as they are sometimes obtained by the police after particularly dangerous and continuing incidents and where the lives of the victims, including the children, may be at risk.

Professor Patrick Parkinson (Melbourne Speech 2012) states:

***“The need to protect women and children from violence and abuse deserves to be taken very seriously as an issue. Many women and children are at risk from male violence and abuse***

*before, during, and after separation. It is appropriate that an absolute priority be given to the safety of victims of violence and their children when there is a risk of serious harm.*

*How can the protection of victims of violence be given an absolute priority when the law in general promotes the indissolubility of parenthood? Is there a case for a presumption against a parent having unsupervised contact with the children where there has been a history of violence, as is the case in New Zealand?."*

### **Discussion:**

In essence, there has to be a much simpler means of resolving the issue of allegations of child abuse, particularly child sexual abuse, and domestic violence which are currently not competently dealt with by the Family Courts.

One means would be to see a simple provision added to State Child Protection laws which enable a protective parent or the State authorities, to apply for a Protective Order, and if proven prevents the allegedly abusive parent from having any contact with the child, and removes the right of such parent to apply to the Family Court for such contact or residence of the child.

State Children's Courts are far more knowledgeable and experienced in matters relating to child abuse and family violence and its impact on children, and have far wider powers concerning disposals. E.g. committal of the child into the care of the State authorities if neither parent were considered to be capable of performing their parental duties in a responsible manner.

The parent who had their rights to contact and residency of the child nullified in such a way, could of course have the right to appeal to a higher State Court but only on specific grounds, e.g. that their acts and conduct which led to the removal of the exercise of their rights could be clearly proven to no longer apply.

This would properly bring allegations of child abuse, including those arising during incidents of family violence, properly and fully within the legislative remit of State authorities where it currently rests and would end the current confusing duplication of functions between Children's Courts and Family Courts, where there are allegations of child abuse.

It would thereby eliminate any need for a sharing or collaborative relationships between the respective Courts. The protection and safety of children would properly be dealt with by the Children's Courts and Family Courts would exercise those other distinct functions currently undertaken under the Family Law Act.

It would also importantly ensure that the vexed questions of contact with and residence of the child and Child Support are dealt with quite separately as they tend at the moment to be a motivator in many cases for parents to apply for contact and residency when they have no genuine wish to have such contact or residency.

To the independent observer, it appears that the Family Courts of Australia still adhere to a mantra which was so eloquently expressed almost 25 years ago:

***"Father's Rights will be protected, no matter what the cost to the children, mother, and to society".*** Pagelow.M.D.(1990), Effects of Domestic Violence on children and their consequences for custody and visitation arrangements. Meditation Quarterly,7,347-363

### **SHARED PARENTING**

Shared Parenting is an ill-conceived concept and an inappropriate approach to determinations of the future care and welfare of children by Family Courts. It may be appropriate for some parents who continue in an amicable relationship after separation and are able to work out the best arrangements for their children in a reasonable and responsible manner in consideration of their lifestyles and work arrangements, and do not involve matters relating to family violence and child abuse. These are the vast majority of post separation cases and which do not require the Family Courts to resolve disputes or at most, simply to confirm Consent Orders.

But it is entirely inappropriate in Family Law proceedings which by their nature are adversarial and combative and immediately casts parents into polarised positions, requiring that they fight each other across court rooms, rather than resolve their disputes in a conciliatory and negotiating manner in an atmosphere of arbitration.

The presumption of Shared Care of children has led to many of the situations where children have suffered abuse and even death.

The presumption of Shared Care of children is not in the best interests of the vast majority of children. It does not involve any assessment of a parent's previous engagement with the child(ren) nor whether that parent has satisfactorily met the child's physical, emotional, psychological, social and intellectual needs in the past and therefore the likelihood as to whether or not, they can meet such needs in the future.

Many years of research study into children's developmental needs show clearly that children need constancy, consistency, certainty, and security in their lives in order that they have stability and surety in their personalities and can develop to their full potential.

'Shared Care' of children carries the stigma of Victorian laws whereby children were treated as the 'Goods and Chattels' of the parent, and 'Sharing the child' in this way treats the child as an inanimate object and merely a parental possession, to be divided up in whatever way they or the Court may choose and as it does with the family finances, house, cars etc. In consequence of the Shared Care arrangements children are being ordered to spend week-about and month-about time in different households, living out of suitcases and with differing standards of care and different rules for their behaviours. Sometimes this can involve children travelling considerable distances (e.g. a three year old travelling alone monthly between Dubai and Sydney). Children frequently have to travel long distances for two hour contact with a parent. Such children have become commonly known as 'Ping-Pong' children in the media.

Children have also been ordered to live many thousands of miles away from their homes, close friends and relatives, and familiar neighbourhoods in order to provide shared care for a parent who may have moved for reasons of work or from choice. Such relocations have caused children extreme anxiety and distress.

Although such a presumption is rebuttable, on the grounds of domestic violence and child abuse, in reality it has become virtually impossible for a parent who has been a victim of domestic violence and the inherent abuse of children, to prove to a Family Court that such events have occurred.

#### **FAMILY COURT DETERMINATIONS REGARDING CHILDREN**

When allegations of domestic violence and the inherent abuse of children are made to a Family Court, the Court must be obliged to refer these matters for investigation by the statutory child protection authorities in regard to safeguarding the welfare of the child and to the police to investigate as to whether there is evidential proof sufficient to warrant criminal charges. Court Reporters, Independent Children's Lawyers, and Expert Witnesses are not the appropriate persons to report to the Courts and

give opinions on such matters and in most cases are failing in their mandatory duty to report such matters to the statutory authorities.

### **COURT APPOINTED EXPERT WITNESSES**

There is very considerable concern that Family Courts are appointing Expert Witnesses, Independent Children's Lawyers [ICLs], and Court Reporters who do not have the necessary expertise to undertake the tasks for which they are being engaged.

There are many Court Reporters who do not appear to have the necessary training and experience in working with children and young people.

Lawyers are not trained nor experienced in gaining the trust and confidence of children in order to talk openly and honestly with children and are frequently giving opinions to Courts when they have not even spoken with the child or have given only a 15 minute office interview to the child. The ICL then presents their own opinion to the Court on what they consider to be 'In the best interests of the child' and which is not founded on research studies of children's developmental needs, their wishes and feelings, and with little regard for the rights of children under International Conventions.

Psychiatrists and psychologists are frequently appointed by Family Courts to give opinions on matters related to domestic violence and child abuse, yet they have no training nor experience in the investigation of such allegations. In many cases they give opinions which are 'outside of their area of expertise' yet Courts are failing to rule such evidence as inadmissible or even challenge the validity or utility of their evidence. It has become a repetitive practice amongst psychiatrists and psychologists to label mothers who make allegations of domestic violence and child abuse as 'deluded' or to have 'Borderline Personality Disorders', because they cannot competently investigate the allegations.

### **NCPA CONCLUSIONS AND RECOMMENDATIONS**

It is our view that the current Family Law is seriously flawed and defective in its emphasis on parental rights, to the almost total exclusion of the Needs, Wishes, and Rights of Children and Young People and that the Family Courts are grossly dysfunctional in the administration of the Family Laws. This view is supported and confirmed by a great deal of the evidence which was submitted in the several reviews ordered by the government into the Family Law and its administration and as we have illustrated above.

This situation has led to many hundreds of Australian children suffering serious impediments to their growth and development and attainment of their full potential, and in many cases to their physical, sexual and emotional abuse, neglect, and sadly in some instances to their deaths.

### **Recommendations for Reform**

1. **Royal Commission** - As a matter of urgency establish a designated Royal Commission to examine the handling of child abuse-related and family violence cases by Family Courts, giving a voice to victims, parents and professionals;
2. **Federal Child Protection Law** - there should be a single Commonwealth Child Protection Law administered by the States and Territories under Federal oversight, to remove the variations in the existing laws of the State and Territories. Such reform has been recommended in several previous examinations of child protection matters;

3. **Child-Centred Approach** - It is our view that the **Family Law should be CHILD-CENTRED** and must place a primary focus on, and give paramountcy to the **NEEDS, WISHES, AND RIGHTS of children and young people**;

4. **'Best Interests of the Child'** - Decisions regarding children and young people should be **DEMONSTRABLY and MEASURABLY** to the benefit of the child or young person and not merely a vague notion of what is in the "Best interests of the Child", which has no commonly agreed criteria and is therefore a highly subjective determination and dependent on the individual beliefs, values, and attitudes of the person making such a determination ;

5. **Families Tribunal** - legal matters regarding children and young people should be heard by a **TRIBUNAL OF INQUIRY MODEL**, as recommended in the Parliamentary Committee Report (2003) and on which it was originally intended the other recommendations for Shared Parenting would be based. We would envisage such a Panel as being comprised of a Judicial Head aided and assisted by experts in child development, domestic violence, and child protection would be far more appropriate. Such a Tribunal to be assisted by a leading legal counsel acting for the Tribunal in the questioning of witnesses and the examination of their testimony. No other legal representatives to be permitted and only witnesses to matters of fact to be allowed, and not of opinion;

6. **The RIGHT OF CHILDREN AND YOUNG PEOPLE TO PARTICIPATE IN FAMILY LAW PROCEEDINGS**

We would consider this to be by far, the most important and urgently needed reform of the Family Court and legal processes.

Children and young people whose future care and welfare are being determined by a Court should have an automatic right of audience in the Court and to be involved in the proceedings, according to their wishes and choices and to exercise choice as to how they present their evidence (Personal appearance/Sworn Statement/ Video link) and to have the right of choice of a legal or lay representative to assist in the presentation of their evidence. .

In particular children and young people should be enabled to bring proceedings for application for a Parenting Order as is their right under Sect. 65C of the Family Law Act 1975, and to be joined as a party to proceedings as is their right under Sect. 6.03 of the Family Law Rules 2004.

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Cecelia Haddad – Media Consultant and Parent Maurice Kriss – Barrister at Law

And others engaged in voluntary child welfare organisations regarding specific issues.

5 June 2015.