



# National Child Protection Alliance National Child Protection Alliance

in association with the National Council for Children Post Separation

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## **SUBMISSION TO THE PARLIAMENTARY COMMITTEE INQUIRING INTO THE FEDERAL FAMILY LAW SYSTEM**

The National Child Protection Alliance of Australia [NCPA] wishes to thank the Committee for this opportunity to submit evidence as a contribution to its inquiries into those matters set out in its terms of reference.

### **1. The National Child Protection Alliance of Australia [NCPA];**

NCPA is a non-profit organisation dedicated to ensuring the protection of Children and Young People from abuse, neglect, and exploitation.

The NCPA was formed by researchers, academics, child welfare/protection professionals, advocates for children, Children's lawyers, Parents, and Children and Young People of Australia to promote the Rights of Children under the U.N. Convention and in particular :

- The Rights of Children and Young People to be protected from Harm and Exploitation
- The Rights of Children and Young People to express their own views in any judicial and administrative proceedings, and for their views to be given full account in decisions affecting their lives.

NCPA has over 200 Members in Australia and over 500 supporters and followers on its Facebook page and Internet website.

### **2. The Work of NCPA**

The work of the NCPA in recent years has largely been in providing legal and paralegal advice and information to many thousands of children and parents who have been engaged in Family Court and Children's Court proceedings, providing pro bono legal representation, counselling and associated support services. We have also established a group of Protective Mothers and the Young Survivors Against Child Abuse group [YSACA] who assist us from their experiences of the Family Courts and the effects of the outcomes on their lives.

### **3. Domestic Violence in Australia**

The Committee will no doubt have been provided with the statistics on the incidence of domestic violence in Australia, which is among the highest incidence in the world.

We would however wish to bring two elements to the Committee's attention which are that

- a) Police statistics show that the police attend over 240,000 incidents of domestic violence per year which (estimating an average of two children per family) means that half-a-million children are being abused in some form during such incidents. Research has particularly shown that domestic violence bears a strong correlation with child rape and sexual abuse);

- b) The Family Courts deal with approximately 22,000 Family Law cases per year of which 54% relate to the future care, welfare, and safety of children. On an assumption of two children per couple, then Family Courts are making such decisions in respect of 24,000 children per year;
- c) That 79% of Family Law cases involve allegations of Domestic Violence and inherently, the abuse of children – Legal Aid Commission – 2014/15.

#### 4. Domestic Violence, Child Abuse, and the Family Courts

The first and most relevant point we wish to make is that the Family Courts of Australia do not have the statutory powers, nor the expertise, nor the resources to investigate domestic violence and the inherent abuses of children.

This point was made by the Parliamentary Committee in 2003 [Every Picture Tells a Story], and more recently by the Chief Justice Diana Bryant (Brisbane 2009) when she stated that:

***[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.***

In our view, such deficits in their function make Family Courts an entirely unsuitable forum in which to make immensely important decisions regarding where children will live and their future care, welfare, and safety.

Such deficit is grossly exaggerated by such decisions being an outcome of often aggressively hostile and acrimonious adversarial contests in those Courts, where parents are polarized into high-conflict positions and dramas by the nature of such proceedings. Those reasons form the basis of our support for the recommendation of the 2003 Parliamentary Committee that such proceedings should be dealt with by a Tribunals of Inquiry model of proceedings.

Although it is claimed that domestic violence and child abuse cases are referred to the State Government Departments to investigate, this occurs in only approximately 25% of instances and are mainly referred by the parent making the allegations rather than the Courts. Even if such allegations are substantiated by those authorities, the Family Courts can, and frequently do, disregard their findings.

State Government Departments and State Police do not give much importance to Family Court cases and frequently carry out only cursory and inadequate investigations often little more than a one hour interview of the child and a telephone call to the allegedly abusive parent. Their denial ends the matter at that point. We also have evidence in some cases that children are bullied and threatened by police officers and told they are lying about the abuse or have been coached by the alleging parent. In one instance two three year old twins were told by a police officer when they disclosed they had been sexually abused by their father that “Well all little girls dream about having sex with their Daddies!”

It is extremely disquieting that a Senior Family Court Judge in the UK has made a public statement to the effect that “**Even paedophiles have a right to a relationship with their children**” and this seems to be a prevailing belief and attitude of many Family Court judges in Australia.

It was evident for example in the recent case of Jarvis & Beaumont 2017, where a father with convictions for child sexual abuse was given supervised contact with his small daughter. The supervision was a very lax arrangement whereby a female relative, who believed he was innocent of the child sexual abuse charges, was to be the supervisor. In our experience, such supervised contact lasts only six months at the most and is then changed to unsupervised contact and is then extended time with overnight stays.

In another case, two girls were ordered into a Shared Parenting arrangement with their father who had convictions for child sexual abuse, but that his convictions had been for abusing small boys, so the girls should be safe in his care.

In a similar case of a father having convictions for child sexual abuse, two small girls were ordered into a Shared Parenting with their father and told to the effect that, as long as they stayed together and locked their bedroom door on a night, that they should be safe from him.

We have experience of numerous other Family Court cases where It seems that no matter what heinous crimes some parents have committed, their right to contact and even custody of their children is treated as paramount and inalienable.

Some Family Court judges have refused to view, read or hear evidence which is crucial to the safety and wellbeing of a child i.e., physical or sexual abuse, or accept thoroughly investigated and substantiated reports from the Joint Investigation Response Team ( JIRT) and then gone on to give the custody of children to the perpetrators of their abuse.

At a hearing witnessed by the NCPA Secretary, the Crown Solicitor produced evidence of a father's history of sexual abuse of children of a previous marriage to which the judge responded, " That is historical and not relevant to my orders," and returned the child to the custody of his abuser.

When a parent has been forced to undergo a psychological examination by a Single Court Appointed Expert and is found to be sufficiently unstable mentally to have the children removed from their custody, and that victim produces reports from other experts all agreeing there is no mental abnormality, the judge has the power (and does exercise it) to refuse to accept such evidence on the grounds that he has chosen the expert and that is the only opinion the Court will accept into evidence. This happens because the judge does not have to apply the normal Rules of Evidence thus protecting his transparently obvious predetermination of the outcome of the Hearing supported by a dishonest and inaccurate report.

In an appalling case that has been discussed with the office of the Federal Attorney General, the Mother had a single consultation with a Court appointed psychiatrist that lasted a mere 40 minutes out of which he produced a report recommending that the child be placed in the custody of her abusive Father and stated, "... the difficulty for the court is that there appears to be a strong position from the Police and JIRT supporting the allegations of sexual abuse." It must be asked why substantiation of serious sexual abuse of a young child by the State Authorities with the statutory powers to investigate, would present the court with a " difficulty" unless the best interests of the child are of no interest to the court.

The situation is now such that numerous parents inform us that their solicitors and barristers advise them **"Do not raise allegations of Domestic Violence and Child Abuse, or you will lose your children"** and that is very often the outcome when they do so. Such is the pervasive nature of this predictive outcome that some parents are not raising allegations of domestic violence and child abuse either in mediation, nor in the Courts and are merely accepting that the abusive parent will gain a Shared Parenting arrangement and even a sole parenting Order if they were to do so.

Mothers are highly conscious of the dangers of leaving abusive relationships. They are aware that 70% of female murders occur during the first year of separation from a violent and abusive

ex-partner, as acts of vengeance against them. Too often children are murdered for the same reason. E.g. Darcey Freeman, Farquharson boys, Luke Batty, Yasmin Acar and many more.

They are also aware that such abusers use the Family Courts processes to continue to maintain control over them and their children, often accompanied by stalking and harassment in their homes, outside schools, and on the streets and they have little, if any, protection. DVOs etc. are mere pieces of paper and are no deterrent to a determined violent abuser. In some instances, DVOs have been breached on numerous occasions and reported to the police but no action has been taken.

They are also aware that mentioning DVOs in Family Courts are either derisively dismissed, ignored, or disregarded by Family Court judges and often act against the Domestic Violence victim as the Court takes that as an indication that the parent will be unwilling to co-parent and engage in a Shared Parenting arrangement with the violent abusive parent. In such circumstances, the latter parent is then given custody of the children in a perverse reversal of custody, and the protective parent is accused of being deluded regarding the violence and abuse, or of having a non-specific Borderline Personality Disorder by unethical and unprofessional practices of Court Consultants, who fail to recognize, or completely ignore the Complex Post Traumatic Stress in the victims of violence and abuse.

We encounter many parents who are suffering from Post-Traumatic Stress after suffering several years of violence and abuse by their male partners and this closely resembles the PTSD experienced by combat troops after military engagements. The PTSD often acts as a considerable disadvantage to them when they are instructing lawyers and giving testimony to the Family Courts, yet is frequently unrecognized and untreated and no allowance is given by the Family Courts that domestic violence victims are suffering such disorders, and frequently leads to a denial of a fair hearing and trial.

In this context, several items of disinformation presented and promoted by Father's Rights groups have become pervasive and highly influential in the mindset of judges, lawyers, and court consultants and reporters.

- a) "Most allegations of domestic violence and child abuse are false" – this has been repeatedly disproven by research studies which show that only 9% of such allegations to Family Courts are 'false' and of these 55% of false allegations are made by fathers, and 45% are made by mothers e.g. Monash University – Thea Brown et al.
- b) "All children lie about being abused" – again this has been disproven by research studies which show that in regard to disclosures/ reports by children that they have been and are being sexually abused, then in 96% of instances the children are being truthful;
- c) "Children are coached into reporting abuse" – children can be influenced by adults but such counter-allegations do not take into account the often detailed accounts which children give of such events and their often graphic descriptions of body parts and the circumstances, which they would find difficulty in remembering with such detail and precision if they had been coached;
- d) "The parent is trying to alienate the children from the other parent" – such counter-allegations are frequently made in Family Courts and tend to be accepted at face value with little supportive or corroborative evidence, simply the children's attitudes towards the rejected parent. It is never considered that the abusive parent may have self-alienated the children by their violent and abusive behaviours towards the other parent. In fact, children often reject a parent if that parent has rejected them, or is indifferent to their needs, or has constantly abused them. Such possibilities are however never explored by Family Courts.

The beliefs and attitudes of Family Court Judges can be seen in the case from 2016.

Extract from a Newspaper Report – April 2016

‘A violent man was granted sole custody of his son because he was deemed to be more capable than the boy's mother, who was rebuked for allegedly trying to turn the child against his father.

Among the reasons the Family Court gave for choosing the father to be sole carer is because he was unemployed and, therefore, could "devote all his time to the care of the child", compared with the mother, who worked part-time.

In an extremely unusual case, Judge Stewart Austin found the parents were so toxic towards each other that it was in the child's best interests to eliminate one from his life entirely.

Judge Austin chose in favour of the father, despite the man having numerous domestic violence convictions, and said the mother's relationship with the boy, who was 10 at the time of the judgment, could be "revived" later in life.

The chief executive of the Victims of Crime Assistance League, Robyn Cotterell-Jones, said the Family Court was so out of touch with the effects of domestic violence that a royal commission was needed.

"It makes a farce out of all things supportive if the Family Court sides with the perpetrator and awards the children one tried to protect to the perpetrator," she said.

"When a woman leaves a man because his behaviour ... is unacceptable or criminal, they think they are doing what's right and almost always have naive assumptions that society will support them to be safe." <http://www.smh.com.au/nsw/family-court-ruling-violent-father-given-sole-custody-of-child-20160405-gnz3pr.html>

In April 2017 Royal Commissioner The Hon Justice Peter McClellan AM, raised issues regarding the failure of judges and prosecutors to do their jobs properly and therefore fail victims of child sex abuse. The Child Abuse Royal Commission has documented facts and figures which cannot be disputed that demands action with judicial reform and a broader enquiry into the Australian judiciary.

## 5, National Domestic Violence and Family Violence Bench Book

***‘Research has also recognised that a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party. These tactics may be referred to in legislation and other bench books and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process.***

***Perpetrators of domestic and family violence who seek to control the victim before, during or after separation may make multiple applications and complaints in multiple systems (for example, the courts, Child Support Agency, Centrelink – (Cameron 2014)) in relation to a protection order, breach, parenting (Kaspiew 2005), divorce, property, child and welfare support and other matters with the intention of interrupting, deferring, prolonging or dismissing judicial and administrative processes, which may result in depleting the victim's financial resources and emotional wellbeing, and adversely impacting the victim's capacity to maintain employment or to care for children (Laing 2013).***

***In the court system, this tactic is known as ‘burning off’, and is prevalent where, on the one hand, a victim lacks the financial resources to engage legal representation (and is therefore forced to self-represent), and on the other hand, the perpetrator is either financially well-resourced or prepared to incur significant debt (and is therefore able to engage solicitors and counsel, and fund multiple actions over extended periods – (Hunter 2002)).***

***Where the perpetrator is aware that the victim may be in a financial position to engage legal representation, the perpetrator may use a different tactic known as ‘conflicting out’, which involves seeking preliminary advice from multiple lawyers (this is a particular concern in regional, rural and remote communities) so as to deny the victim access to legal representation on the basis of conflict of interest.***

A 2015 evaluation of the 2012 Family Violence Amendments to the Commonwealth Family Law Act 1975 (Kaspiew et al 2015) refers to the persisting 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. This is despite the fact that it is more likely that women will be reluctant to raise allegations for fear of having her motives questioned (Laing 2008), and that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators (Jaffe et al 2010).

The same evaluation recognises that parties to proceedings in the Family Court of Australia may use those proceedings as a means of perpetuating harassment of the other party. For example, a father who is also a perpetrator of domestic and family violence may use this tactic, while he or his lawyers state to the court that he 'just wants to see his children (Laing 2010).'

## **6. The Shared Parenting provisions of the Family Law Act**

It is our view, based on the many hundreds of Family Law cases dealt with by our experienced advocates, that the Shared Parenting provisions of the Family Law Act have been a disaster for many hundreds of children, who have been ordered into contact with and even to live with, parents who are violent, abusive, toxic, and dangerous to their health and wellbeing.

The Family Law Act focuses almost exclusively on the respective rights of parents and particularly their rights to ownership and possession of children, and gives little account to the Needs, Wishes, and Rights of the children involved, especially their rights to be protected from harm and exploitation.

Professor Belinda Fehlberg is at Melbourne University's Law School writes regarding her own research and the research carried out by the AIFS.

*"Family law reforms in 2006 were aimed at encouraging separated parents to share the responsibility and care of their children more equally and without going to court if this was safe. In reality, shared care means more time for children with fathers, not instinctively a bad thing. Now – three years down the track – we have detailed reviews about how the reforms are working and the scorecard is not good."*

In 2010 Professor Fehlberg summarized the consistencies between;

*"the reports by the Australian Institute of Family Studies (AIFS), a former Family Court judge, Professor Richard Chisholm, and the Family Law Council. My own research at the Melbourne Law School involves in-depth interviews with separated parents.*

*The consistent message is that shared parenting is sometimes being used in a way that is harmful to children.*

*The first key consistency (between these reports) is that fathers have been encouraged to seek shared care and more mothers now feel pressured into it.*

*Shared care isn't the norm but it is increasing, especially among litigating parents (up from 2 per cent to 13 per cent). This is worrying as litigating parents often aren't good at managing day-to-day negotiations and interactions needed for successful shared care*

*The legal starting point is in fact equal shared parental responsibility or major decision-making. Factors including the risk of violence, or that shared responsibility isn't in the child's best interests, make it non-applicable and when this happens the courts don't have to consider ordering shared time.*

*The current misconception of parental rights to equal time has led some fathers to seek more time with children to reduce child support payments rather than out of a wish to care for them. Separated mothers are receiving less of the family property than pre-2006, worsening their more disadvantaged financial position.*

*The reports consistently find that shared parenting reforms discourage mothers from raising family violence concerns due to the emphasis on facilitating the child's relationship with the father, and the perception that family courts will order shared care anyway.*

*The second key consistency is that a more diverse group now uses shared care*

*Pre-2006 research showed shared care was used by co-operative, child-focused parents.*

*Fathers had been involved in children's care pre-separation. There was little legal involvement in reaching post-separation parenting arrangements. Shared care still works well for this group.*

*Post-2006, the reports show shared care parents include a substantial minority with high parental conflict, substance abuse and/or mental health issues and concerns for their children's safety. Shared care is not working well for this group.*

*Yet worryingly, the reports contain consistent evidence of shared care occurring where it is not in children's best interests.*

*The evidence includes emotional and psychological harm in high-conflict families, as well as risks to children arising from constant disruption, parental neglect, violence, mental health or substance misuse issues.*

*AIFS found that "there is a significant minority of children in shared care time arrangements who have a family history entailing violence and a parent concerned about the child's safety, and who are exposed to dysfunctional behaviours and interparental relationships".*

*Shared care is inappropriate where there are these safety concerns. Yet AIFS found that parents with safety concerns were just as likely to have shared care as parents without such concerns. This shows our system's failure to distinguish between families for whom shared care is appropriate and those for whom it is not.*

*Finally, the reports clearly show that we need to change the "message" so the emphasis is on what works best for each child, rather than a "one-size-fits-all" emphasis on equal time. To correct this situation we need to change the law. Chisholm rightly suggests that equal parental responsibility needs to be distinguished from shared time. We need to make clear that there is no preferred parenting arrangement, and re-focus on which of the available options is in the particular child's best interests. We need to amend the legislation so that victims of family violence are not deterred from disclosing it.*

<http://www.smh.com.au/federal-politics/political-opinion/reports-show-shared-care-needs-fixing-20100203-nd7a.html>

Professor Patrick Parkinson also commented regarding `Shared Parenting that:

`University of Sydney family law expert Patrick Parkinson agrees that the notion of equal time can give a false sense of entitlement to parents.

"It's only one of many options that can work, depending on the circumstances," he told AAP, noting in many cases sole custody arrangements are needed.

"It may actually prevent judges from making the hard calls they ought to."

An evaluation of the reforms by the Australian Institute of Family Studies found 70 per cent of male and female lawyers surveyed believed they had favoured fathers over mothers and 62 per cent that they favoured parents' rights over children's needs. Professionals often said

perceptions of the act had "created fear and apprehension among separated mothers". One senior member of the bar said "a lot of women are desperate to settle because they're so frightened of what might happen if they go to court".

Professor Parkinson points out that Australia is lagging behind other developed countries when it comes to shared parenting arrangements. But he says the barriers are not legal, but social and economic.

"A lot of people try shared care but it doesn't last longer than a year," he said, explaining parents often need to find cheaper accommodation away from their children.

A second report on family violence and the family law system by a former Family Court judge, Richard Chisholm, recommended amending the legislation to end confusion about parents' rights to shared care.

The National Council for Children Post-Separation expressed concern at the apparent reluctance of the Attorney-General, Robert McClelland, to adopt the recommendations of the Chisholm report. Mr. McClelland indicated at a news conference that the Government favoured education over legal changes.

The council said it felt "vindicated that three separate reviews have upheld our concerns that the current system is failing children ... parents have been forced to send their children to abusive and violent parents as part of court-ordered custody visits".

The findings of NCPA regarding Shared Parenting include the week on/week off parenting of a child, is seriously affecting the health and well-being of children in shared parenting arrangements.

Even when both parents are equally good parents it is unfair to place the burden of adjusting to the arrangement on a small child. The weight of trying to adjust to a problem caused by adults is now expected of child/ren in shared parenting arrangements and is proving to have a damaging effect on the brains of these young victims.

For the vast majority of children in shared parenting cases, their childhood is spent accepting that the happiness of their parents is their responsibility and learning how to appease both.

It is very common for one or the other parent to make the child feel sorry for them with words such as, "You don't want me to live alone, do you?" ...."I miss you so much when you're not here". In some cases, a child has been heard to say that they don't want to leave their pet, as that parent often hurts the animal and/or threatens not to feed it when the child leaves.

All this places an enormous distress and unhappiness onto the child who cannot help the parent complaining of loneliness and is unable to look after their pet they must leave without food, as threatened by that parent.

Children in Shared Parenting arrangements have frequently been referred to as 'Ping-Pong children' bouncing between respective parental houses living out of backpacks. As one child has stated, "I live in two houses but I don't have a home"..

In a particular case a child was forced to sleep in four beds a fortnight, three of these when he was forced to live alone with his father who worked nightshift and was on call at odd hours. The mother tried to have this addressed however the authorities and lawyers were disinterested and so no one acted to help this child who frequently slept on a mattress on the floor or a couch during the school week. Now, aged 15 years the child told our NCPA advocate that he is not allowed to choose which parent he wanted to live with, because he felt he would upset one of them. In several cases fathers have refused to get Wi-Fi and the teenage children very often have to rush to school in the morning to complete homework or



walk to the library the day before. The fathers in these cases were in well-established employment and financially well off.

This boy was advised by the NCPA advocate that he should raise the issues with his father and explain that for this reason of the internet connection, he needed to live in his mother's home. The boy told the advocate he's not allowed to live where he would want to because of court orders.

It's very clear that orders of the court have resulted in this young man losing his ability to express his wishes. Children like him have learned that 'acceptance' of his situation is easier than facing confrontation with a parent who won't understand and who will play on his emotions to change his mind.

Now, at nearly sixteen years of age, his weekly turnaround continues with him carrying the responsibility for the happiness of his parents at the expense of his school progress, his social life and, indeed, his entire happiness throughout his childhood and continues. In this case, (as in a great many others) the father advised the court that he would be living with his own mother and that she was willing to help him care for the child. However, this was conveniently arranged to suit the moment when shared parenting orders were made. Soon afterwards, the paternal grandmother moved out and this child was left to fend for himself as a 'latch key' child. This occurs in a great many cases when the fathers are given equal shared 'time' which doesn't fit in with their full-time work.

When asked about his home by a psychiatrist when aged around seven years, the boy replied, angrily and in frustration, "which one – I have millions of houses". His despair was noted and reported by the expert but was ignored and the meaningful relationship with both parents was shown higher priority. As a result, the resentment has built up over the years and he has stepped aside from both parents emotionally, but is still forced to do the weekly arrangement, yet is nearly sixteen years of age. This is a denial of basic human rights.

Thousands of children now grow up carrying this weight throughout their childhood, with lack of sleep, constantly having to sleep in different places, regressing both in school work and socially unable to blend.

Added to the burden for these '50-50' children are the extra responsibility that they must remember to take, from one house to the other every week, whatever it is they may need at the other parent's house.

If they forget then they are blamed for the mistake and suffer humiliation at school when they don't have the right shoes, hat, books, or left their homework at the other house, forgetting to take their sports gear to the other parent's house. Problems are endless for these children as are the unfair and serious responsibilities never considered by most adults who make the orders.

It is very apparent that in the clear majority of cases, the mothers are much more helpful than fathers. For example:

In cases of Shared Parenting:

- Helping the child remember what he/she must pack for the week with the other parent.
- Providing a nourishing lunch pack.
- Sending them off with clean underwear and good clothing.
- Attending to worn shoes, clothes, ill health.
- Teaching proper cleaning of teeth and how to wash themselves.
- Most mothers are expected to buy the child's clothes, usually with little likelihood of reimbursement from the father, for half the costs.

In cases where the father has, or is likely to be granted sole custody and the mother has alternate weekends and half holidays:

- Fathers send children to school in clothes much too small for them, with seams splitting and with soles flapping off shoes and no laces. (Evidence available)
- Fathers seem unable to organize costumes for school dress up days and ask the mothers to do this or not bother about these special days at all, causing the child/ren to suffer humiliation being the only children not wearing a costume. (Evidence available.)

Far too many children have been forced to give up their favourite sport. A teenage boy lost contact with friends because his father refused to travel to the location for practice. In one case the boy was excellent at his sport. His mother would take him whenever she had her son with her. The rules were that if a child missed sessions they could be barred and this child was then barred. It was favouritism by other parents that the coach allowed one boy to break the rules and save his place on the team, and forced him to put another child on the team instead.

Equal shared parenting 'time' was never included in the amendments of 2005-2006, A NCPA child advocate attended a conference at this time and reported that this upset the Father's Rights groups around Australia. The advocate reported that in the Lone Father's Conference in Canberra in 2010, the Executive Secretary of the Father's Rights alliance group, the Shared Parenting Council expressed this using words very similar too, "We didn't get what we wanted in the new amendments re 50-50 shared time.....however we managed to plant the perception".

## **7. The Involvement of children in Court Proceedings**

The Family Courts deal with over 22,000 cases every year under the Family Law Act and 54% of those cases involve children. If a reasonable estimate of two children per case is taken then Family Law proceedings affect the lives of over 24,000 children and young people every year.

Children and young people often have vital evidence which they could provide directly to Family Courts regarding incidents of domestic violence and the inherent abuse of those children, yet they are never called to give such evidence, and parents are not allowed to bring them forward or are at least strongly dissuaded, from calling them as witnesses. The case of Queensland State government & Garning 2010 and the subsequent appeal is a perfect illustration of the prejudices of the judiciary against children. Four children in their early teens and pre-teens were repeatedly refused the opportunity to address the Family Court and the Appeal Court regarding their intended deportation to Italy.

With the assistance of certain parts of the Family Law Act, the Family Courts have effectively barred children and young people from testifying in Family Courts and from having their views made known to the Courts with the strength and clarity which children feel in such matters as their future care and welfare. The normal practice is for a psychologist to advise a lawyer of such matters and for the lawyers then to interpret them to the Court as part of their opinions regarding "the best interests of the child". It is entirely unconscionable how such professionals have been allocated such a complex task that is not within their professional area of expertise.

Although the Family Law provides for children and young people to bring legal proceedings to obtain a Parenting Order and to be joined as a separate party in any ongoing proceedings, we can find no evidence that this has ever occurred.

In fact, the last traceable occasion on which a child or young person testified in a Family Court was in 1991 [Pagliarella] which ironically was the year in which the Australian Federal government signed the U.N. Convention on the Rights of the Child. In effect, the Family Courts have denied children and young people their human rights to participate in legal and administrative proceedings regarding their care, welfare, and safety.

As an added irony, the Evidence Act 1995 states that, as a class, children are competent witnesses and their testimony must be treated as credible and reliable.

**Section 121 (3) "Without limiting the generality of subsection (1), an account of proceedings, or any part of proceedings, referred to in that subsection shall be taken to identify a person if :**

**(c) in the case of a broadcast or televised account or an account by other electronic means - it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires."**

Acting under the guise of protecting the identity of participants, it is used to apply a gag to dishonest psychologists' reports and prevent the media from reporting the outrageous practices endemic in the FCA. This is because of a meme developed and encouraged by the courts that they may not be investigated nor can any debate be conducted. Section 121 certainly prevents specific cases being discussed and places a gag on examination of the conduct of specific cases but it says absolutely nothing that prevents an examination of procedures. The modus operandi of the FCA and its systemic failings and corruptions may, and should, be publicly discussed and examined.

The consequence of these shortcomings of the FLA and the corrupt application of its provisions has resulted in thousands of Australian children being denied a happy, carefree and loving childhood and, instead, seen them condemned to a childhood of hurt, torment, abuse and misery that has a devastating impact on the quality of their lives forever. Most child abusers were themselves abused as children so the system as is currently extant is creating a whole new generation of abusers.

## **8. Shared Concerns regarding Family Courts**

We have already given the concerns of several eminent people who have sincere and deep concerns regarding the Family Courts and their treatment of children, who are abused during acts of Domestic Violence, and these concerns are encapsulated in the following extracts from responses by the Children's Commissioner Megan Mitchell during an interview with a journalist: i.e.

Children's Commissioner: Family Court concerns widespread  
Bridget Brennan reported this story on Thursday, February 25, 2016

ELEANOR HALL: The National Children's Commissioner has warned that the Family Court must prioritise the safety of children over the rights of parents.

*Commissioner Megan Mitchell has told The World Today that she's had children raise concerns with her directly. And she is recommending that the court to introduce training so that staff have a better understanding of children's welfare.*

*Children do contact me about their experiences in the Family Law Court. Many of them say they feel disempowered, that they feel they have no rights and that they're not believed or listened to.*

*They also say that they don't understand what's going on and that often there is not enough effort made to explain to them why decisions were made and what will happen to them.*

*And the kinds of concerns that were raised included a lack of understanding, skills and knowledge to be able to appropriately identify and respond to family and domestic violence by those working in the family law system.*

*Also raised was a concern about the conflict or perceived conflict between the right of parental contact and the right and best interests of the child.*

*Children need to be safe, whether they have a relationship with a parent or not. That's the bottom line for me.*

*At the end of the day, for me, the best interests and safety of the child should be the primary consideration in these decisions and how we treat children.*

*I mean, after all, these decisions are being made about their lives and what happens to them and so we really need to prioritise the safety of children over and above the needs of the parents.*

<http://www.abc.net.au/worldtoday/content/2016/s4413491.htm>

## 9. Child Abductions

One of the major consequences of the Family Courts being less than competent in dealing with domestic violence and child abuse allegations, has been the numbers of children abducted by Protective Parents, determined to protect their children when Family Courts have failed to do so.

In 1997 the then Attorney General estimated that there were between 80 and 100 child abductions a year to and from Australia to Hague Convention countries, and that **internal abductions could be as high as 500 a year**. Such numbers will be much higher today.

In 2008. 67% of the 'taking' parents were mothers and 91 per cent of these were the primary carers of the child. In comparison only 25% of the taking fathers were the primary carers.

A significant proportion of the submissions to the Senate Inquiry in International Child Abductions established in 2011, **emphasized the role of domestic violence and child abuse in women's decisions to abduct their children overseas**.

## 10. Recommendations

### a) Child-Centred Family Law

In practice, the current Family Law gives paramountcy to the absolute rights of parents, to ownership and possession of their children and treat such rights as almost inalienable, and in disregard of how that parent has met the child needs in the past, their existing relationship, with the child, and whether they may have abused the child, either directly or indirectly during incidents of domestic violence.

We propose that the Family Law Part VII relating to children should be Child-Centred and should focus on:

- a) The assessed physical, emotional, psychological, and social and future developmental needs of each child Needs, the expressed Wishes and Feelings of the child, and the Rights of the Child as set out in the UN Convention on the Rights of the Child;
- b) Each parent's existing relationship with the child and how they have respectively met those needs during the child's development to the date of separation of the parents;
- c) That the living accommodation of each parents be assessed as to how it meets each child's needs and the educational, social, recreational, and leisure facilities available to the child;
- d) Whether the parent has caused the child significant harm at any point during the child's life, whether directly or indirectly in the course of domestic violence.

**b) State Children's Courts or Tribunals of Inquiry** – It is our view that the Family Courts are dysfunctional and entirely unsuitable for making the crucially important decisions regarding the future care and welfare of children, due to their lack of statutory powers, the necessary expertise in such matters, and the aggressively adversarial nature of such proceedings. We would prefer that such matters are dealt with by a Tribunals of Inquiry model as envisaged by the 2003 Parliamentary Committee (Every Picture Tells a Story) or are

mandatorily referred for decisions by the State Children's Courts who have the resources of the statutory child protection authorities and the police to assist them in such matters. It would be for such Tribunals or the State Children's Courts to determine where children will live and what contact should be granted to non-resident parents;

- c) Evidence Act 1995** – Family Courts are not bound by the provisions of the Evidence Act 1995 and it is entirely at the discretion of the judge to decide what evidence they consider to be admissible, the importance of such evidence, and the ultimate weighting they give to such evidence. In effect this is judicial licence and is leading to wide variations in what evidence is permitted in Family Courts and how that evidence is treated.

This becomes a major hurdle in the presentation to Family Courts of evidence of domestic violence and child abuse and why such evidence can be readily dismissed, ignored, or disregarded virtually at the whim of the Family Court judicial officer and those who advise them.

We recommend that Family Court judges should be bound by the Evidence Act 1995, unless it can be shown that exceptional circumstances warranted a disregard for an element of that Act.

**d) Court Consultants, Court Reporters, and Independent Children's Lawyers**

These appointees of the Court currently have complete legal immunity from any civil action being brought against them in civil proceedings for 'Tort'. e.g. negligence, misfeasance in office, malpractice etc. Litigant parents are frequently infuriated by the fabrications, embellishments, and distortions of information by these Court Advisers and their misrepresentations and misunderstandings of events and circumstances which are often far beyond misperceptions. Yet Family Courts have absolute loyalty to their appointees to these positions and defend them and excuse them.

Such immunity from legal proceedings should be removed from Family Court appointees.

We would also favour the setting up of a body to be titled, 'The Citizen's Family Law Advisory (or Complaints) Council' to which parties in a case can make a complaint and provide evidence and to which Expert Witnesses would be answerable. Should evidence of inaccurate, distorted, and unprofessional reporting be sufficient to raise reasonable doubts that an injustice may have occurred, the Citizen's Council could request a re-hearing.

- e) Imprisonment of parents** there have been several occasions known to us in which parents have been summarily imprisoned solely by Family Court judges and in complete secrecy, when such parents have not been criminally charged, nor had the option of trial by jury. Their sole 'offence' has been to contravene an Order of the Court in Family Law proceedings. Most commonly this occurred when protective parents have fled with their children to protect them from the violent abusive parent, after Family Courts have decided to order the children into contact with or the custody of the violent abusive parent.

We consider that in such circumstances a parent should have the right to trial by jury or before a non-Family Court Judge.

- f) Child rape and sexual abuse** are frequently concomitant with domestic violence. When allegations are made of child rape or sexual abuse in Family Courts they are immediately accorded a status of being a 'Grave allegation' and a Third and higher Standard of Evidential proof is required "Towards the extreme end of the scale" i.e. almost the criminal standard [M & M 1988]. This is in reference to the Briginshaw Principle which was adopted from an English case in 1938 and referred to 'adultery' as a 'grave' allegation in divorce proceedings. It was embodied into the Evidence Act 1995 to apply in criminal cases, yet ironically is probably the only element in the Evidence Act which is consistently applied in Family Courts although they have no criminal jurisdiction. Adultery is no longer a marital offence and there is no 'Scale' between the civil standard of evidential proof and the criminal standard.

Nor should Family Court judges have been permitted to create a Third Standard of evidential proof - it is a civil court and the civil standard should apply in all matters before the Court. An example of the application of the Briginshaw Principle can be found in Krach and Krach 2009.

We consider that the Family Law Act requires amendment to prevent the further use of this element from the Evidence Act 1995 which is used to protect and defend violent abusers and the removal of the Third Standard of Evidential Proof (towards the Extreme End of the Scale) that has been applied since M & M 1988.

## **9. The Writers**

This document has been prepared by:

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Charles was engaged in child protection services in Britain for over 30 years and at the end of his career was the head of the Research and Management Information Section for a large local government child protection department. He has since been variously engaged in work as a child care consultant, expert witness in Family Law and Child Protection Law proceedings in Courts in England, Scotland, New Zealand and Australia, and for the last 25 years has been a voluntary advocate for the rights of children and young people and their families.

Charles has been the elected Chairman of NCPA since its inauguration in 2011 but has recently had to step down from such position due to ill-health. He has now reversed positions with the Vice Chair and continues as an expert advisor to NCPA.

Nicolette (Niki) Norris A.M.

Niki has been an advocate for children and young people and their families for over a decade and has also been the Vice Chair of NCPA since its inauguration and her specialist area of responsibility within NCPA has been in Parliamentary Liaison and the setting up of groups of children and young people, and parents to advise NCPA and to provide an opportunity for them to publicise their experiences in the Family Courts. Niki has now stepped up to the position of Chair of NCPA.

Niki received the A.M for her work for NCPA in the 2017 Australian Honours List.