National Child Protection Alliance

in association with the National Council for Children Post Separation

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SUBMISSION TO THE
AUSTRALIAN CHILDREN'S RIGHTS COMMISSIONER

The National Child Protection Alliance of Australia [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

My professional credentials are that I was engaged in child protection social work services in the UK for over 25 years, where after I have been involved in child and family advocacy for a further 25 years. During my social work career, I was appointed for a period of ten years, as an External Examiner/ Assessor to the social work qualifying courses at St. John Moore University Liverpool, the University of Central Lancashire, and the University of Sunderland respectively. For an eight-year period I acted as an expert witness in child protection proceedings in Court cases in England, Scotland, New Zealand, and in Australia. I have made presentations at national and international conferences across the world, and have had many articles and Papers published.

1. Foreword
For over two decades, there has been significant and increasing concerns among charitable and voluntary organisations and among academic researchers in Australia, regarding the practices of Australian Family Courts in ordering children and young people to have contact with parents against whom there was clear and convincing evidence that they had abused their child(ren), either directly to the child or in the course of violent assault upon the other parent.
Such disregard for the safety and protection of children from harm and exploitation has led to many thousands of Australian children being subjected to continuing abuse and in some instances has led to their deaths at the hands of such parents. E.g. Darcey Freeman, Luke Batty, three Farquharson boys, Yasmin Acar etc.

2. Children and Young People, Children's Rights, and the Law

The Australian government ratified the U.N. Convention on the Rights of the Child, {UN C.R.o.C.] in 1991 but has not embodied such rights in national legislation, until 2012 when it was included in amendments to the Family Law Act as the primary consideration "in the best interests of the child". There is no evidence in Court cases since its implementation that such primary consideration is being constantly and consistently applied.The legal status of children in Australia can only be described as a mass of inconsistencies.

A. Application of Article 12 [UN CRoC] i.e.

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In giving effect to this Article, the Australian Family Law states:

60CD How the views of a child are expressed

(1) Paragraph 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.

(2) The court may inform itself of views expressed by a child:

(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or

(b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or

(c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Note 1: Paragraph (a)—subsection 62G(3A) generally requires the person giving the report to ascertain the child's views and include those views in the report.

Note 2: Paragraph (b)—paragraph 68LA(5)(b) requires the independent children's lawyer for the child to ensure that the child's views are fully put before the court.

60CE Children not required to express views

Nothing in this Part permits the court or any person to require the child to express his or her views in relation to any matter.

Such framing of the legislation can hardly be claimed to be "providing an opportunity for children to be heard in the proceedings", and to be encouraging and enabling children to participate in the important decision-making process which will determine their future care, welfare, and safety.

The Family Law Act provides for children to bring actions in the Family Courts i.e.

The Family Law Act 1975 provides that children can apply for a Parenting Order in their own right. i.e.

65C Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or

(b) ***the child****; or*

(c) a grandparent of the child; or

(d) any other person concerned with the care, welfare or development of the child.

However, no record can be found of this ever happening and attempts by NCPA advocates to enable children who wished to take such action, have been met by considerable resistance by legal representatives.

The legal presumption in the Courts of Australia is that children and young people are competent witnesses and that the evidence given by children is reliable and truthful. This is embodied in various ways in the Evidence Acts of the Commonwealth and the respective States and Territories. The

presumption is not rebuttable and only a judicial officer can determine whether the evidence given by a particular child or young person may not be reliable in a particular case.

This is best expressed in the New South Wales Evidence Act 1995 which states:
Children giving evidence

> ***165A Warnings in relation to children's evidence***
> *(1) A judge in any proceeding in which evidence is given by a child before a jury* ***must not do any of the following****:*
> *(a)* ***warn the jury, or suggest to the jury, that children as a class are unreliable witnesses****,*
> *(b)* ***warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,***
> *(c)* ***give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child.***

A similar caution is expressly stated in the Queensland Criminal Law (Sexual Offences) Act 1978 and the Criminal Code which "prohibits any judicial suggestion that a class of persons(child) are unreliable witnesses".

Children can also be joined as parties to the proceedings under the Family Law Rules 2004. i.e.
FAMILY LAW RULES 2004 - RULE 6.03
Adding a party

> *(2) A party may add another party after a case has started by amending the application or response to add the name of the party.*

Again no evidence can be found that this has ever occurred in Family Law Proceedings and in fact the following provision is likely to be a strong disincentive for such to occur, i.e.

FAMILY LAW RULES 2004 - REG 15.02
Restriction on child's evidence

(1) A party applying to adduce the evidence of a child under section 100B of the Act must file an affidavit that:
> *(a) sets out the facts relied on in support of the application;*
> *(b) includes the name of a support person; and*
> *(c) attaches a summary of the evidence to be adduced from the child.*

Note for the procedure for making an application in a case, see Chapter 5.

(2) If the court makes an order in relation to an application mentioned in subrule (1), it may order that:
> *(a) the child's evidence be given by way of affidavit, video conference, closed circuit television or other electronic communication; and*
> *(b) a person named in the order as a support person be present with the child when the child gives evidence.*

Note Subsections 100B (1) and (2) of the Act provide that a child (other than a child who is, or is seeking to become, a party to a case) must not swear an affidavit and must not be called as a witness or remain in court unless the court otherwise orders.

In effect, although there is provision in the Family Law Act 1975 and the Family Law Rules 2004 for children to bring an application to the Family Court and to be a party in any proceedings, there are significant obstacles to this occurring. The last traceable occasion on which a child was permitted to give their views and evidence to a Family Court also occurred in 1991. [Pagliarella 1991], the same year as the UN.C.R.o.C. was signed by Australia.

The **Australian Law Reform Commission** [ALRC] summarised the situation in 1995 Inquiry stating:
Representation of children in family law and care and protection
Representation in the Family Court
13.22 The *Family Law Act 1975* (Cth) (Family Law Act) allows children to commence proceedings in the Family Court.1331 Even where the child has commenced proceedings in this way, the Family Law Rules allow the court to

appoint a next friend where it is satisfied the child does not understand the nature and possible consequences of the proceedings or is not capable of conducting the proceedings directly.1332
In practice, children rarely litigate in family law either directly or by a next friend.1333 More commonly, children the subject of disputes in the Family Court are separately represented by a child's representative, if they are represented at all
.1334 The Family Court can appoint a child's representative wherever it appears to the court that a child ought to be separately represented.1335 The court may make an order on its own initiative or on the application of any other person including the child.1336 Representatives are required to advocate in accordance with their assessment of the child's best interests and do not act upon the child's instructions or advocate their wishes.
Seen and not heard – 1995 A.L.R.C.

ALRC - **Children as reliable witnesses**
Assumptions of unreliability
14.15 The common law in Australia has traditionally viewed children as unreliable witnesses. The perception has been that children are prone to fantasy, that they are suggestible and that their evidence is inaccurate. The following statement by a prominent legal scholar typifies the prejudices and assumptions about children's evidence.
First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.1609
This view was reflected in rules of evidence that limited children's competence to give evidence and required corroboration and judicial warning in relation to children's evidence.
14.16 Traditionally, rules of competence required that a child possess sufficient understanding of the nature and consequences of an oath before being able to give sworn evidence.1610 The common law approach demanded that the child demonstrate a belief in God and divine vengeance, a formulation arising from eighteenth century cases.1611 This approach effectively discriminated against children who did not have any particular religious beliefs or who adhered to religious beliefs that did not include a single deity or punishment for wrong-doers.
14.17 In addition, until recent amendments to the rules of evidence, the law in all States and Territories required that, where the child was incapable of giving sworn evidence, any unsworn evidence of the child had to be corroborated before a criminal conviction could be sustained.1612 A child's unsworn testimony was capable of corroborating another child's sworn testimony but the unsworn testimony of one child could not corroborate the unsworn testimony of another child.1613 This rule meant that several young children abused by one person could not give unsworn evidence to corroborate each other.
14.18 The law in all Australian jurisdictions until recently also required that judges warn juries that it was dangerous to convict on the uncorroborated evidence of a child, even when the child witness was deemed capable of giving evidence under oath.1614 Warnings of this kind had the effect of labelling children as an unreliable class of witnesses.1615 Juries were likely to take the warning as a hint from the judge to acquit where, as often happens when a child is the victim of abuse, the child was the only witness to the incident.1616

Children as witnesses: recent research
14.19 Recent research into children's memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued.1617 At the same time other research has demonstrated that adult testimony is not always reliable, showing that mature witnesses' memories can be equally fragile and susceptible to the distorting influences of suggestion and misinformation.1618 The presumed gulf between the reliability of evidence from children and that from adults appears to have been exaggerated.1619
14.20 Children, including very young children, are able to remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful.1620 However, children, and adults to a lesser degree, have significant memory loss after long delays. They recall less correct information over time while maintaining as a constant the inaccurate information.1621 Studies demonstrate

that ability to remember and describe an event accurately, both at the time of questioning and at later dates, can be dependent on interviewing method.

14.21 Interviews, if skilfully conducted, can help both child and adult witnesses to consolidate and retain their memories.1622 However, using misleading and suggestive questioning techniques during an interview adversely affects young children's ability to recall an event accurately, just as to a somewhat lesser degree it adversely affects older children and adults.1623 Repeating a question within a single interview session can also lead to young children changing their answer to that question, perhaps because they interpret the repetition of the question as an indication that their first answer was wrong.1624 In addition, when young children are asked to recount, in a free recall narrative, everything they remember, they typically remember less detail than older children or adults, although the information they do recall is generally just as accurate.1625 More details of the events can be recalled during questioning that provides non-leading cues to memory for those details not spontaneously supplied.1626

14.22 Recent studies have also examined whether children are able to distinguish fact from fantasy or whether they have a propensity to lie deliberately about events that did not occur. This research has found that children are often as accurate as adults at discriminating the origins of their memories.1627 In addition, there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings1628 or that children are more likely to lie than adults.1629 Indeed, research suggests that children may be actually more truthful than adults. Certainly, the research on children's beliefs about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses.1630 When children do lie to an adult, the adult is usually well able to discern this, particularly with younger children.1631

14.23 Ironically, research indicates that the major problem with children's evidence is not the risk of a child making false allegations, although this is still a possibility. Rather the major problem is their significant level of false denials and retractions. While children can be encouraged to say that an event occurred knowing full well that it did not, this is difficult to do. When children do make false statements at the encouragement of others, the statements are often not very credible and these children rarely persist with their made up story.1632 On the other hand, to avoid punishment, to keep promises not to tell or to avoid revealing embarrassing information, most children will deny knowing information about an event that they know occurred.1633

14.24 Difficulties can also arise when children are questioned about particular times and dates. This is particularly problematic for younger children who have not yet learned to tell time on a clock, who may

After considerable discussion of the inadequacies of the Family Court system in regard to children, the ALRC went on to recommend the following model procedures:

Recommendation 70. Clear standards for the representation of children in all family law and care and protection proceedings should be developed. Among other matters, these standards should require the following.

- In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.
- Every child should be seen except in those rare instances where it is physically impossible for the representative to see the child. The representative should see the child as soon as possible and, in most instances, well before the first hearing.
- The representative should meet with a verbal child at least before any substantive proceeding or event at which important decisions are being made regarding the child or which are relevant to the representation of the child.
- Contact with the child should occur where and when it is comfortable for the child not merely where and when it is convenient for the representative.
- Even where the child is non-verbal, the representative should at least see the child, preferably in the child's living environment.
- The lawyer should use language appropriate to the age and maturity of the child.
- The representative should employ appropriate listening techniques and provide non-judgmental support.
- Preference should be given to face to face communication with the child rather than

communication by telephone or in writing.

Implementation. Legal professional bodies, including the Law Council of Australia, law societies or institutes, bar associations and legal aid commissions should convene a working group to develop appropriate standards in consultation with young people and relevant youth agencies. The Family Court, children's courts and OFC should be consulted in the development of these standards.

Recommendation 71. The standards should make the following provisions where the child is able to communicate and expresses wishes about the direction of the litigation.

- Sufficient time should be devoted to each child to ensure that the child understands the nature of the proceedings and that the representative has established the child's directions.
- The representative should meet with the child often enough to maintain and develop the lawyer/client relationship.
- When discussing the case with the child, the representative should use concrete examples and provide the client with a 'road map' of the interview and the legal process.
- Younger children who wish to direct the litigation may be clear about their views on one or more issues to be decided but be unwilling to express a view on other matters. In such cases, the representative should make procedural decisions with a view to advancing the child's stated position and should elicit whatever information and assistance the child is willing to provide.
- Representatives should seek the assistance of appropriate social scientists to assist them to ascertain the wishes and directions of younger children where necessary.

Recommendation 72. The standards should make the following provisions where the child is unable or unwilling to provide direction on the litigation.

- Where a child is unable or unwilling to set the goals of the litigation, the representative should ensure that the court is aware of the fact and understands that the representation is to be on the basis of the best interests of the child.
- Under no circumstances should the representative proceed if he or she is uncertain of the basis of representing the child.
- Standards should specify functions of a representative acting in the best interests of a child. They should include
    - — to ensure that all relevant evidence, including any evidence that may contradict the assessment of the representative, is placed before the court
    - — to investigate all relevant facts, parties and people
    - — to subpoena all documents
    - — to retain experts as needed
    - — to observe the child in the caretaker's setting and formulate optional plans
    - — to advocate zealously for the legal rights of the child including safety, visitation and sibling contact
    - — to challenge the basis for experts and agency conclusions to ensure accuracy
    - — to ensure that all relevant and material facts are put before the court.

It requires that a child capable of forming his or her own views has the right to express those views freely in all matters affecting the child and that they be given due weight in accordance with the child's age and maturity. Further, it requires that the child be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child - this being either directly or through a representative or appropriate body.

The Inquiry was told that about 70 per cent of children over the age of about 12 with a separate representative in family law matters express wishes as to the outcome of a matter. In most cases those wishes are sufficiently developed for them to form the basis of submissions on the best interests of the child.[8]

The needs of children differ to such an extent that there can be no single model appropriate for all children. However, the basis of the representation and the roles and functions of the representative should be clear to the court, the representative and the child concerned. This requires clear ethical and practical standards for all representatives to ensure that there is appropriate participation of an engagement with the child.

The need for standards

No detailed standards have been developed by the legal profession for representation of children in any Australian jurisdiction. The Federation of Community Legal Centres noted an ad hoc approach to the representation of children. Furthermore, differences are emerging between jurisdictions in the roles and functions of representatives.

The Inquiry heard evidence of different advocacy approaches in the various jurisdictions.
The legal profession needs to determine the ethical basis and corresponding rules and standards for the representation of children in the Family Law jurisdiction covering both the situation when the child wishes to participate and that when the child is not able or willing to participate.
The Inquiry recommended that clear standards for the representation of children in all Family Law proceedings should be developed. Among other matters, these standards should require:

- *In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.*
- *The representative should meet the child as soon as possible and, in most instances, well before the first hearing.*
- *The representative should meet with a verbal child at least before every substantive proceeding or event at which important decisions are being made regarding the child or which are relevant to the representation of the child.*
- *Contact with the child should occur where and when it is comfortable for the child not merely where and when it is convenient for the representative.*
- *Even where the child is non-verbal, the representative should at least see the child, preferably in the child's living environment.*
- *The lawyer should use language appropriate to the age and maturity of the child.*
- *The representative should employ appropriate listening techniques and provide non-judgmental support. Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing.*

The standards should make the following additional provisions where the child is able to communicate and expresses wishes about the direction of the litigation:

- *Sufficient time should be devoted to each child to ensure that the child understands the nature of the proceedings and that the representative has established the child's directions.*
- *The representative should meet with the child often enough to maintain and develop the lawyer-client relationship.*
- *When discussing the case with the child, the representative should use concrete examples and provide the client with a 'road map' of the interview and the legal process.*
- *Younger children who wish to direct the litigation may be clear about their views on one or more issues to be decided but be unwilling to express a view on other matters. In such cases, the representative should make procedural decisions with a view to advancing the child's stated position and should elicit whatever information and assistance the child is willing to provide. Representatives should seek the assistance of appropriate social scientists to assist them to ascertain the wishes and directions of younger children where necessary.*

The standards should make the following additional provisions where the child is unable or unwilling to provide direction on the litigation:

- *Where a child is unable or unwilling to set the goals of the litigation, the representative should ensure that the court is aware of the fact and understands that the representation is to be on the basis of the best interests of the child.*

- *Under no circumstances should the representative proceed if he or she is uncertain of the basis of representing the child.*

Standards should specify functions of a representative acting in the best interests of a child. They should include:

- *to ensure that all relevant evidence, including any evidence that may contradict the assessment of the representative, is placed before the court*
- *to investigate all relevant facts, parties and people*
- *to subpoena all documents*
- *to retain experts as needed*
- *to observe the child in the caretaker's setting and formulate optional plans*
- *to advocate zealously for the legal rights of the child including safety, visitation and sibling contact*
- *to challenge the basis for expert and agency conclusions to ensure accuracy*
- *to ensure that all relevant and material facts are put before the court.*

The Family Law Act 1975 and subsequent amendments are solely concerned with the rights of parents and children and young people are treated merely as their "Goods and Chattels" (as under 19th Century laws) to be divided up as the Courts may choose. This preponderance on the ownership rights of parents with little thought for the separate and on occasions conflicting, rights of children is exemplified in the Act by:

61DA Presumption of equal shared parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Children's Rights to give their views - Children and young people under the age of 18 years are not permitted in Australian Family Courts to participate in proceedings as a party in their own right and their views, wishes, and feelings are treated as irrelevant. An Independent Children's Lawyer ("ICL") is appointed, however only to give his/her views to the Court of what he/she considers to be in the best interests of the child. The ICL is not required to place the children's views, wishes and feelings before the Court nor even to speak with the children before doing so.

Independent Children's Lawyers

The Family Law Act supplants the right of children to be heard in Family Law proceedings by providing for the appointment of an Independent Children's lawyer but although such lawyers are claimed to represent the child, they are not required to speak with the child and obtain the child's views therefore they cannot represent the child's wishes and feelings. It is very rare for such Independent Children's Lawyers to speak with children.

In effect, this subverts the spirit and intent of **Article 12**

68L Court order for independent representation of child's interests

(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court:

(a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and

(b) may make such other orders as it considers necessary to secure that independent representation of the child's interests.

The Role ascribed to the Independent Children's Lawyer is described in the Family Act as:

68LA Role of independent children's lawyer

When section applies

(1) This section applies if an independent children's lawyer is appointed for a child in relation to proceedings under this Act.

General nature of role of independent children's lawyer

(2) The independent children's lawyer must:

(a) form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child; and

(b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.

(3) The independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

(4) The independent children's lawyer:

(a) is not the child's legal representative; and

(b) is not obliged to act on the child's instructions in relation to the proceedings.

Specific duties of independent children's lawyer

(5) The independent children's lawyer must:

(a) act impartially in dealings with the parties to the proceedings; and

(b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and

(c) if a report or other document that relates to the child is to be used in the proceedings:

(i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and

(ii) ensure that those matters are properly drawn to the court's attention; and

(d) endeavour to minimise the trauma to the child associated with the proceedings; and

(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

The Chief Justice of the Family Court has acknowledged at a Melbourne Conference in 2014 that children are not being allowed to participate in Family Court proceedings in accordance with the U.N. C.R.o.C. i.e.

Children should have more say in family disputes, says top judge *by: SUSIE O'BRIEN*
Reporter Herald Sun July 30, 2014

> ***CHILDREN do not have enough say over what happens to them in the Family Court, the court's chief said.***
> *Family Court Chief Justice Diana Bryant told an Australian Institute of Family Studies conference in Melbourne on Wednesday that children needed to be better represented in the court.*
> *"In my view, this is critical," she said.*
> *Chief Justice Bryant said there was a need to change practices to ensure independent children's lawyers (ICL) routinely met with children unless there was a good reason not to. Judges should be encouraged to enquire whether the ICL had met with the children and "if they haven't, to ask why?".*
> *It is estimated only half the designated children's lawyers meet children face-to-face.*

Family Consultants

(3A) A family consultant who is directed to give the court a report on a matter under subsection (2) must:

(a) ascertain the views of the child in relation to that matter; and

(b) include the views of the child on that matter in the report.

Again it was reported from the Melbourne Conference 2014:

> *``….. new evidence suggests there is a system-wide lack of confidence in the children's lawyers.*
> *An Australian Institute of Family Studies study of more than 500 children's lawyers, judges, children and other lawyers found there were "few wholly positive experiences with the ICLs", and some experiences were "very negative".*
> *"All … are concerned about competence of some practitioners," researchers Dr Rae Kaspiew and Dr Rachel Carson concluded.*

Only 46 per cent of other lawyers surveyed said independent children's lawyers were well able to identify when children were at immediate risk. And only one in four other lawyers said they could identify if a child or parent was at risk of suicide or self-harm.
Chief Justice Bryant said it was important there be an "open mind about hearing children's views".
"Shortcomings have been identified and we are addressing them," she said.
But she did not suggest all judges should interview children, saying: "You can't expect all judges to be skilled interviewers".
"What does the judge know of the pressures that the child may be under, or the family dynamic?" she said.
She also said some judges may have an "unconscious bias", and that such interviews may give children "heightened expectations".

But Chief Justice Bryant said judges should be able to meet with children where appropriate.
http://www.heraldsun.com.au/news/law-order/children-should-have-more-say-in-family-disputes-says-top-judge/story-fni0fee2-1227007728726

Rules of Evidence

Some observers have likened the Family Courts of Australia to Star Chambers. i.e. a single judge, who is not completely bound by the rules of evidence, and has variable discretion regarding the evidence which will be permitted into the hearing and the weighting applied to such evidence. i.e.

69ZT Rules of evidence not to apply unless court decides

(1) These provisions of the Evidence Act 1995 do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).

(3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:

(a) the court is satisfied that the circumstances are exceptional; and

(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

Conclusion: It is our considered view, based on several hundreds of cases, that children are being actively denied the opportunity to exercise their right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and

maturity of the child by the provisions of the Family Law Act and by the Family Courts in the implementation of such legislation.

B. Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

The principal difficulties in the application and administration of family law in Australia is that 79% of such cases presented to the Family Courts involve allegations of domestic violence and the inherent abuse of children and the direct physical, emotional, sexual abuse of children and their neglect. [Legal Aid Commission Audit 2014-15].

Australia has a high prevalence rate of child sexual abuse compared to other countries – 38 per cent of females and 13 per cent of males. 41 per cent of sexual assault victims are children under 15 years (AIHW 2011). Only 10 per cent of child sexual abuse cases are perpetrated by strangers.

Child sexual abuse perpetrated by a parent are conservatively estimated at 15 percent of the general population (ABS 2005), with rates as high as 20 percent for female victims.

Most parental child sex offenders are men in a father–child relationship with their victim and whilst non-biological fathers pre-dominated (55%), biological fathers perpetrated 45% of such child sexual abuse. Non-biological parents were stepfathers, foster fathers or de facto spouses of the non-offending parent. Extensive analyses demonstrated that differences between biological and non-biological fathers were negligible (Titcomb, Goodman-Delahunty & Waubert de Puiseau 2012).

Some instances of sexual abuse of infants occurred, but most victims of parental sexual abuse are young children of primary school age. More than three-fifths of the victims were under the age of 10 years at the time of disclosure of the abuse. (Au Inst. Of Criminology.)

CHILD SEXUAL ABUSE – WHY CHILDREN SHOULD ALWAYS BE BELIEVED.

Jones and McGraw examined 576 consecutive referrals of child sexual abuse to the Denver Department of Social Services, and categorized the reports as either reliable or fictitious. In only 1% of the total cases were children judged to have advanced a fictitious allegation. Jones, D. P. H., and J. M. McGraw: Reliable and Fictitious Accounts of Sexual Abuse to Children. *Journal of Interpersonal Violence, 2,* 27-45, 1987.

In a more recent study, investigators reviewed case notes of all child sexual abuse reports to the Denver Department of Social Services over 12 months. Of the 551 cases reviewed, there were only 14 (2.5%) instances of erroneous concerns about abuse emanating from children. These consisted of three cases of allegations made in collusion with a parent, three cases where an innocent event was misinterpreted as sexual abuse and eight cases (1.5%) of false allegations of sexual abuse. Oates, R. K., D.P. Jones, D. Denson, A. Sirotnak, N. Gary, and R.D. Krugman: Erroneous Concerns about Child Sexual Abuse. *Child Abuse & Neglect 24*:149-57, 2000.
Research with children whose sexual abuse has been proven has shown that children tend to minimize and deny abuse, not exaggerate or over-report such incidents.
http://www.leadershipcouncil.org/1/res/csa-acc.html

Yet the Family Law Act which determines the future care and welfare of children after parental separations is a federal enactment Court and are the jurisdiction of the federal Family Courts which do not have the STATUTORY POWERS, EXPERTISE, nor THE RESOURCES to investigate such allegations. (Federal Parliamentary Committee Report `Every Picture tells a story' – 2003 and Chief Justice Diana Bryant – Brisbane Speech 2009). i.e.
Chief Justice Bryant

> *"[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.*

Such child protection powers are a State function and they have the skilled personnel to conduct such investigations. However, they are involved in less than 25% of such Family Court cases and it is commonly but incorrectly and wrongly believed by such State authorities, that the Family Court powers exceed their own in such matters. Consequently, in such cases where they do become involved, they only perform a perfunctory and cursory investigation and commonly leave the Family Courts to decide on whether children are at risk if ordered into contact with and even the shared parenting of allegedly abusive parents.

In the absence of a statutory investigation or sometimes despite such an investigation, the Family Courts appoint Family Consultants/ Report Writers drawn from psychologists, psychiatrists and miscellaneous others, to give opinions on whether the children are at risk of abuse if ordered to have contact with or to live with allegedly abusive parents. Such appointees to not have the necessary expertise, nor the time to conduct investigations into child abuse allegations and usually allocate periods of time between 45 minutes and two hours in interviewing the parents and sometimes the children in an office and base their opinions on whatever information they can extract from those parties during such limited time. They do not seek nor consider any corroborative and supportive evidence from independent sources to confirm or otherwise, the abuse allegations.

When such Court reports are studied, there is a consistently repetitive narrative that dismisses the allegations of child abuse, accusing the children of lying or of being `coached' by the protective parent who is commonly then `diagnosed' as having a non-specific Borderline Personality Disorder. Recommendations are that the children are ordered into contact with the abusive [parent and if the protective parent objects or refuses, then residency of the children is given to the abusive parent.

Family Report Writers are supposed to provide a balanced view of both parents and produce an objective assessment as to which parent will provide living arrangements that best cater for the physical, emotional and developmental needs of the child. However, such objectivity and impartiality is rarely evident in their reports.

As a consequence of this confused and inadequate system of investigation, children are being Court Ordered to live with or spend time with parents who abuse them, essentially amounting to state sanctioned child abuse and endangerment.

The net effect of this is children having to live in abusive environments suffering physical abuse and / or emotional abuse and/or psychological abuse and / or sexual abuse. The flow on effects from this are high youth suicide rates, drug usage, mental illness issues and a heavy burden being placed on society to support these children as they become **adults u**nable to work or contribute effectively to society.

The problems for children are further exacerbated when their voices carry no weight, their views and wishes are ignored and in many cases they are being alienated from their primary carer by the Courts. It is not unusual to have cases where the Judiciary has disallowed evidence to be used in Family Law proceedings concerning custody and welfare of children where physical, emotional, psychological and sexual abuse of children has been proven and can be demonstrated through Medical, Department of Community Services, Police and Criminal Records e.g. For sexual assault, paedophilia, domestic violence and other criminal acts.

When a child reports such abuse, it is often said to have been coerced or coached by the mother, despite independently collected and verifiable evidence to the contrary. Further compounding this problem is the use of Court appointed consultants, protected by legal immunity, whose reports are biased and fabricated towards a result favoured by the party prepared to pay the consultants fees. It is well known throughout the legal community that Lawyers and Barristers will seek out and recommend specific consultants towards achieving an outcome in favour of their client as opposed to what is in the best interests of the children.

Family Courts have created their own barriers to proving child sexual abuse allegations in Family Law proceedings. Firstly, by viewing such allegations as **`grave'** (a provision in the Evidence Act for criminal offence allegations borrowed from a UK case in 1938 of allegations of adultery, but which did not involve children and is no longer a marital `offence'- Briginshaw Principle).

Secondly Family Courts have created a Third Standard of Evidential Proof of their own volition for such allegations of child sexual abuse which is `Towards the extreme end of the scale' [M & M 1988]. There is no scale between the civil standard of proof and yet the criminal standard is almost applied by Family Courts, acting therefore as quasi-criminal courts. (see Krach & Krach 2009 for judicial explanation).

It is a highly dangerous precedent for any legal system to create and apply a different and higher standard of proof to meet particular situations, particularly when litigants are frequently unaware of such higher standard.

In view of the high prevalence of child sexual abuse involving child rape and molestation, and the indications that biological fathers are responsible for a significant proportion of such abuse, it is difficult to understand how Family Courts remain so ignorant of such research findings and fail to apply them in proceedings.

State Child Protective Agencies are constantly overwhelmed by the size of the task they face and must make often extremely difficult decisions regarding which cases to investigate and which they can `screen out' as not warranting any interventive action. Such decisions are error-prone and as a consequence children continue to suffer.

A great many children in Australia each year are killed by their parents, mostly fathers, some in quite horrendous circumstances such as being driven in a car into a dam by their father (Victoria) or being thrown from a high road bridge into a river (Melbourne) and other similar shocking scenarios. (In 2007 there were 117 children killed in New South Wales who were previously known to statutory child protection agencies.).

But of most concern are circumstances which other writers have referred to as `Court-Ordered Child Abuse'. That is, where the custody or contact with a child is granted by a Court to a parent despite the fact the child has alleged abuse by that parent or where the parent has a known record of violence, criminal conduct, drug abuse, rape, murder, and/or alcohol abuse.

Courts would no doubt argue that they are bound to make such decisions as the Family Law Act 2006 gives primacy and paramountcy to the rights of parents and in particular, the right to `Shared and Equal' parenting and the parental right to have a `Meaningful Relationship' with the child, and there appears to be no reasonable exceptions to these provisions which are available to the Courts unless it can be proven that the parent presents an unacceptable risk to the child. The barriers to convincing Courts of such an unacceptable risk are formidable, particularly for parents who may be suffering Complex Post Traumatic Stress Disorder following years of violent assault and/or oppressive controls over them by the other parent.

Where Courts tend to err is however in giving insufficient consideration and weight to the wishes and feelings of the child concerned. There are cases in which Family Reporters have been alleged to have not bothered to see the child or have devoted very little time and lacked the necessary skills in talking with the child. Or the FR has completely dismissed the child's allegations of abuse by the parents seeking custody or contact and have failed or lacked the knowledge and skills, to investigate the child's allegations.

Yet such Family Reporters have an immense influence on Courts and the ultimate decisions of Courts in such proceedings. In one case a young person was so dissatisfied that the Family Reporter had completely misrepresented his views and wishes, that he drafted an affidavit and presented it to the Family Court – the Judge summarily dismissed the affidavit as inadmissible. Such action typically illustrates the attitudes prevalent in the Courts of those representing the parties involved and of those dispensing `justice'.

What is often also alarmingly apparent in the reports and other submissions to Courts of Court-appointed experts is the degree of prejudice and bias of such experts. Theories and ideologies of such experts are boundless and often have little or no basis in scientifically-conducted research and have no authoritative support by national or international bodies representing the professions involved.

Psychiatry and psychology are the most outstanding examples of such disregard for professional integrity and ethics and are notable for the inventions of mental conditions which pay little heed to science and authoritative support and more to fanciful speculation and the prejudiced practices of the author.

Many of these professional practitioners have also failed to avail themselves of the latest scientific research into their subjects or choose to ignore national and international disputes within the relevant professions concerning the subject and fail to inform Courts of such disputes. Examples which particularly affect children and which have immense currency in Court Proceedings at the present time, include

Parental Alienation Syndrome, Dissociative Disorder, Repressed Memory Syndrome, Satanic Ritual Abuse, Histrionic Personality Disorder, Fabricated and Induced Illness in Children (Munchausen Syndrome By Proxy), Shaken Baby Syndrome, etc etc.

The current framing of the Family Law Act treats children as mere possessions of the parents, to be divided up with other `Goods and Chattels' as they were under 19th Century legislation. The rights of parents to equal and shared parenting and to have a meaningful relationship with their child is treated as inalienable by the Courts, even if a parent has never previously had such a `meaningful' relationship, or has treated the child with indifference, or has not participated in the care of the child or the child's interests, or even if the parent has maltreated the child. These are all matters which Courts fail to take into consideration or choose to ignore in their decision-making processes.

There are case examples whereby women and children have left relationships due to issues associated with domestic violence and sexual abuse. There is one such example whereby the father of a young girl had a criminal record for paedophilia and was HIV positive. When the mother attempted to use these facts to gain full custody of the child, the evidence was dismissed, with the mother being seen to be alienating the father, with full custody being Court Ordered to the father. Consequently, the child suffered 12 + years of Court Ordered physical and sexual abuse at the hands of her HIV Positive, paedophile father and step brother.

Children's Rights to be protected from Harm and Exploitation - In implementing the Family Law Act, the Courts are determined to ensure that parents rights to shared parenting, custody and control over children, and contact with their children are paramount and inalienable. Accordingly, evidence of domestic violence (inherently involving the abuse of children), child abuse including sexual abuse, drug addictions, criminal behaviours and convictions, parental mental illness (particularly Anti-Social Personality Disorder, Narcissistic Personality Disorder & other similar disorders) are dismissed or disregarded and excluded from consideration of the best interests of the child. In consequence many thousands of children are suffering continuing parental abuse and neglect and if they disclose / report such further abuse the Courts order that it must not be reported to the statutory State Child protection authorities. Further, the Courts systematically fail to order that the children receive psychological counselling, despite the severity of the emotional/ behavioural disorders they suffer as a consequence of the continuing abuses.

Secrecy of Family Law proceedings makes public awareness of Family Court orders, challenges and problems very difficult. Without public awareness, there is no accountability and no opportunity to implement positive change.

Another issue is judicial discretion in Family Law matters. In particular, this creates issues when it comes to evidence that will or will not be considered. There are plenty of cases where very relevant hard and fast facts, including criminal records are simply dismissed. Legal immunity of Court appointed consultants introduces opportunities for corrupt practices and manipulation.

The adversarial nature of the legal system is not conducive to outcomes in the best interests of children. The legal system, including law enforcement, does not take into account the realities of families separating as a result of domestic violence and sexual abuse. The system does not provide any real protections for the parent / children who are victims to the abuse after separation from violent and abusive relationships, nor does it provide any support to the perpetrator of the abuse.

The legal system, including the Child Support Agency, does not take into account the impacts of vexatious litigants who perpetuate litigation unnecessarily, on the Respondent, typically the mother and the children. Litigation creates an adversarial environment that is not conducive to the wellbeing of children, or any of the parties involved. It consumes the primary caregivers time and resources, making life

unnecessarily difficult for the children. When you consider that many litigants are spending vast sums of money, typically in the order of $150,000+ on actions that would best be dealt with via mediation. Many fathers will not make child support payments stating that they have no money. Yet they are able to afford to pay large amounts of money in legal fees.

7.1.2 Flow on effects
The problems cited above result in children being forced under Australian law to live in violent and abusive situations. This leads to children growing up with psychiatric disorders, addiction issues and being unable to make a positive contribution to society.

In situations where families separate as a result of domestic violence, violent partners are seeking retribution against the party who initiated the separation. In recent times there has been a spate of women being murdered as a result.

When mothers leaving violent relationships report issues of domestic violence or sexual abuse, they are typically accused of alienating the father, typically resulting in the Judiciary ordering custody of the child subject of child abuse allegations (even when it can be proved) be given to the party who perpetrated the abuse.

CONCLUSION
It is our considered view based on an examination of many hundreds of cases over more than two decades, that the Family Courts are failing in their duty and responsibilities to protect children from harms and potential harms and are thereby contravening the provisions of the U.N. Convention on the Rights of the Child.

In recent weeks, Professor Patrick Parkinson, an eminent academic who assisted in the framing of the 2006 Family Law amendments, has stated that the “Family Courts are entirely dysfunctional”. We would wholly agree with Professor Parkinson and would add that they are completely unsuited for their purpose. It is our further considered view that the future lives, welfare, and safety of children is far too important to be determined in an antagonistic, acrimonious adversarial process such as exists in Family Courts and should be determined by Families Tribunals, as recommended in the 2003 Parliamentary Committee Report, `Every Picture Tells a Story’

Prepared for and Signed on Behalf of the NCPA Membership,

Charles Pragnell
Executive Chairman