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This submission addresses the Attorney-General’s Terms of Reference¹ and incorporates the questions released through the issues paper², regarding consideration of whether, and if so what, reforms to the family law system are necessary or desirable, in particular in relation to the following matters:

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* Key: **Bold**= Attorney-General’s Terms of Reference³

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¹ Attorney General Terms of Reference for the ALRC Family Law Review
<https://www.alrc.gov.au/publications/terms-reference-22> sourced on 05/05/2018

² Questions, PDF accessed via <https://www.alrc.gov.au/publications/questions-3> on 01/05/2018

³ Attorney General Terms of Reference for the ALRC Family Law Review
<https://www.alrc.gov.au/publications/terms-reference-22> sourced on 05/05/2018

⁴ Questions, PDF accessed via <https://www.alrc.gov.au/publications/questions-3> on 01/05/2018

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⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 28 April 2018]

⁶ <http://www.community.nsw.gov.au/parents,-carers-and-families/for-young-people/are-you-in-care/charter-of-rights>

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Introduction

The *Australian Paralegal Foundation*⁷ undertakes research and provides legal information and case support, addressing a wide range of aspects regarding advancing social or public welfare and the promotion of human rights. We are a highly collaborative charity and this has catalysed our considerable insight and expertise into how to improve the family court system.

This submission aims to promote truth and safety in legislative interpretation, so that this accuracy can facilitate protective judgements, made in the child's best interests.

Many proposals throughout this submission are founded on globally accepted published literature, inclusive, (with full permission), of the latest research and common sense legislative proposals of Barry Goldstein, the research director at Stop Abuse Campaign⁸. He is an international leader in family court reform, expert domestic violence researcher and speaker. His ground-breaking legislation; *Safe Child Act*⁹, has recently been unanimously passed by the Utah House Judiciary Committee, (Utah HB 427), and is currently tabled for consideration in Minnesota and Hawaii. This Act is informed through findings from modern research, including peer reviewed meta analysis, focusing on how domestic violence affects children, inclusive of the

⁷ Australian Paralegal Foundation, (APF), *Promotion of legal research and advocacy*. D.Jovica Chairman, M.Hudson Secretary/Educator, Woody Sampson Treasurer, sourced at; www.para-legal.org.au on 01/04/2018.

⁸ Stop Abuse Campaign website <http://stopabusecampaign.org/> accessed 22/4/2017 at [6.17].

⁹ Safe Child Act; http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, sourced on 30/04/2017, created and submitted to The House of Representatives, 29th legislature, 2017, State of Hawaii, H.B. no: 697 researched and designed by B. Goldstein.

Adverse Childhood Experiences, (ACE study)¹⁰, from the Centre for Disease Control and Prevention, in addition to breaking research referred to as the Saunders' study¹¹, from the Department of Justice¹².

This submission, by nature, also addresses the Royal Commission into Family Violence Summary¹³, where recommendations for including a victims voice in reform process were made. The author's survivor status and advocacy leadership, inclusive of a presentation at the National Family Violence Summit¹⁴, (2017), achieved through the group structure of the APF¹⁵, local and international collaboration with family violence advocates, expert leaders, legislators, ministers and other survivors of the violence, abuse and the family court system satisfies this criteria.

The nuances highlighted throughout this paper which identify gaps in the family court and interconnected child protection system, highlight an insightful interpretation informed through experience, supported with verifiable knowledge and underline the requirement for the key recommendations listed at the end of this paper.

This paper contributes to the Royal Commission's¹⁶ recommendation to the States to facilitate specialisation to determine standards,

¹⁰ Sourced at https://www.cdc.gov/violenceprevention/acestudy/about_ace.html on 01/05/2017

¹¹ Saunders et al., *Saunders study*, U.S dept of Justice, (2012), sourced at <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> on 01/05/2017

¹² Sourced from <https://www.domesticshelters.org/domestic-violence-articles-information/the-safe-childact#.WQX4RmcRXIW> on 01/05/2017.

¹³ Royal Commission into Family Violence Summary, sourced online at <http://www.womenslegal.org.au/files/file/SUMMARY%20RECOMMENDATIONS.RC.ALLSUBS.pdf> on 24/04/2017

¹⁴ National Family Violence Summit, (2017), NFVS, held in Canberra, 28/02/2017 and 01/03/2017, facilitated by the Tara Costigan Foundation and sponsored by BaptistCare, <http://nfvs Summit.com.au/the-summit/the-program/> and <http://nfvs Summit.com.au/about/the-summit/>

¹⁵ Australian Paralegal Foundation 'APF', *Promotion of legal research and advocacy*. D.Jovica Chairman, M.Hudson; Secretary/Educator, Woody Sampson Treasurer, sourced at; www.para-legal.org.au on 01/05/2017.

¹⁶ Royal Commission into Family Violence Summary, sourced online at <http://www.womenslegal.org.au/files/file/SUMMARY%20RECOMMENDATIONS.RC.ALLSUBS.pdf> on 24/04/2017

accreditation and an understanding of jurisdictional powers in the family court and child protection systems. The author critically analyses gaps in the systems, and aims to promote excellent practice throughout the family report writers' risk assessment framework. This is guided through providing informed direction to improve expertise, methodology, interpretation and validity of information, transparency and accountability required for a more accurate and protective process. The author provides efficient and credible recommendations to facilitate higher quality family reports to inform the Judge, and their implementation will consequently improve the management of family violence and abuse. This submission is also informed with promising international legislative incentives namely the Safe Child Act¹⁷ which has been included where relevant.

This submission proposes, with regards to the request of by the Royal Commission into Family Violence Summary¹⁸, (as stated by WLSV, 2016), to enhance the participation of victims in influencing reform, that the State and territories facilitate a powerful and efficient advocacy peak advocacy network led by survivors who have insight into the gaps in the system to catalyse meaningful and protective, respectful liaison. This author, and associated network of advocates and stakeholders are willing and able to assist with the implementation of this recommendation.



¹⁷ Goldstein, Barry, (2017), The Safe Child Act, sourced at http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, for further information; <https://www.domesticshelters.org/domestic-violence-articles-information/the-safe-child-act#.WNX4lr2FFNG> sourced on 30/04/2017.

¹⁸ Royal Commission into Family Violence Summary, sourced online at

<http://www.womenslegal.org.au/files/file/SUMMARY%20RECOMMENDATIONS.RC.ALLSUBS.pdf> on 24/04/2017



A Consideration of Critical Family Law System Reforms

The appropriate, early and cost-effective resolution of all family law disputes;

The tribunal based parental management hearings panel system

The tribunal based parental management hearings¹⁹ panel system, (PMH), promotes an inquisitorial, rather than adversarial system. This reduces conflict and promotes a better evidence based solution to issues. Courts should provide greater opportunities for parties involved in cases involving violence and abuse, to be diverted to the PMH or Child Advocacy Centres²⁰, with adequate integration of support services, to facilitate an earlier resolution of disputes. This must be facilitated through the use of specialised expertise. This is also a cost effective remedy, as it permits a much improved risk management approach, inclusive of an early identification of risk which better facilitates safeguards, supports and earlier remedy to complex cases. This is a more effective method to promote a safer community, than the conventional family court approach. A safer community has notable associated economic benefits.

The PMH model as it stands requires refinement. While it facilitates a panel of; “family lawyers, psychologists, social workers and child development experts to assist parents in resolving disputes relating to

¹⁹ Parental management hearings (PMH), sourced at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/Bud_getReview201718/ParentingHearings on 26/04/2018

²⁰ For example, the Bravehearts Child Advocacy Centre as discussed by Ms Hetty Johnston in the Sunday Mail, 06/05/2018

the care of their children”²¹. The current proposal has not resolved a remedy to safely navigate cases involving family violence and abuse. These are the exact cases which require an alternative model, such as the PMH, as the family courts have repeatedly demonstrated that they do not have capacity to adequately manage these issues, as seen through issues raised through the parliamentary inquiry²². I attempt to present sound approaches to applying the PMH model to these cases which I believe will most benefit.

A refined and improved PMH will provide an opportunity for specialist independent experts to inform more protective orders, and can prioritise the child’s paradigm. I will present sound reasoning for this approach. This will alleviate many of the gaps in the current system which at present are counterproductive to protective determinations.

An improved PMH for cases involving family violence and abuse

The safety of parents can be protected via the PMH through the use of mediation via video-link. A more accurate assessment of risk will be supported through the insight of independent specialists, such as family violence, sexual abuse and drug and alcohol and mental health experts. It would be useful to include a neuroscience perspective, as this study of behaviour adds great insight into relevant behavioural traits and responses that a standard counsellor cannot achieve. A reliance on relevant peer reviewed, meta-analysis, can help to inform process and decision making. This will assist the tribunal in determining the difference between an unsafe and/or manipulative parent and one with high parental capacity.

²¹ ‘ibid’

²² Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 8, sourced at; https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

The current family law system often employs family consultants who lack relevant specialist expertise, use poor methodology and are not trained to validate their subjectivity. Thomas Kuhn, (1922-1996), the founder of sociology, highlighted that observations may be influenced by prior belief and experiences, this results in varied translation, and meaning of information to inform conclusions. He further stated that; “*resisting falsification is precisely what every disciplinary matrix in science does*”. He described a widespread failure to recognise inadequate methodology as follows;

*“the fault in empirically acquired information and anomaly of inadequate variables cast doubt on the underlying theory”*²³.

He described this situation as a **crisis**, (Kuhn, 1970a, 66-76²⁴). The current consensus in family law, interconnected child protection legislation and court culture to endorse scientifically unsound investigative methods, which result in the collation of often unverifiable information to inform judgements, is the aetiology of the current crisis in the family courts.

This poor investigative technique is largely the reason that inadequate determinations are made, as the family report is weighted heavily in most judgements. It is widely overlooked, yet absolutely pertinent, that rigorous investigative technique is employed, to inform and give integrity to family reports. One suggestion is to triangulate specialist opinions, which are founded on evidence based research. It is critical that the PMH pilots use an improved standard of investigative validation, based on accepted scientific methodology, to inform accurate conclusions. It will be cost effective to replace family consultants altogether, (in the family court and in a refined PMH), with actual independent specialist experts pertaining to the issues raised, who can contribute reports with more insight and validity. If these experts are

²³ Stanford, (2013)., Stanford Encyclopaedia of Philosophy., Thomas Kuhn, First published Fri Aug 13, 2004; substantive revision Thu Aug 11, 2011, sourced online at <https://plato.stanford.edu/archives/fall2013/entries/thomas-kuhn/#4.2> on 13/04/2017.

²⁴ Kuhn, Thomas, (1962), pg, 197a, 66-76, (1970), pg, 202., *The Structure of Scientific Revolutions*, International Encyclopaedia of Unified Science, ed. Neurath and Carnap.

sourced from the general community, as opposed to the court system, it is also reasonable to anticipate that reports are more likely to reflect independence, community standards and expectations.

The lifelong work of Emeritus Professor Freda Briggs²⁵ has also been influential in the authors' contentions. Freda was an internationally respected child protection expert. Her achievements include the Inaugural Australian Humanitarian Award 1998, Senior Australian of the Year 2000, and Officer of the Order of Australia. Freda focused on the efficiency of the family court and child protection systems in managing abuse and domestic violence prevention, child protection programmes, and highlighted gaps in the system addressing the terms of reference of this review.

Freda proposed a model which can conform with the PMH;

“You need a court that can investigate in much the same way as a coronial inquiry; it can investigate all the evidence and it's even been suggested that you don't need lawyers and judges, you could have people who are experts in child abuse, assisted by a legal officer which paradoxically is the system I worked with in London a long time ago, with the child's needs taking priority”²⁶

It has been suggested by some stakeholders, that the PMH cannot be effective for cases involving family violence and sexual abuse. I strongly reject this contention. I suggest that with the correct safeguards and specialist experts in place, who base their decisions on evidence based research and meta-analysis, a refined PMH can present an opportunity for a brilliant emergent system which works.

The practice of family court ordered family dispute resolution, is not a congruently non-adjudicative dispute resolution processes. Litigants do

²⁵ Frieda Briggs, sourced at https://en.wikipedia.org/wiki/Freda_Briggs on 26/04/2017

²⁶ Kirk, A, (2012), Royal commission should pave way for new court to deal with child abuse: Dr Freda Briggs. Interview with Freida Briggs, sourced at <http://www.abc.net.au/pm/content/2012/s3631918.htm> on 26/04/2017.

not control the process or outcome. They are not permitted to record, or have an advocate present, consent is often coerced, and parents have reported to advocates that they have been asked to answer closed questions by the practitioner. The practitioner limits discussion, and often negotiation. They certainly often influence and have great control of the outcome, based on largely unsupported subjective views. This method could improve with a consistently held code of ethics and accountability to such could improve the integrity of this role. However, issues surrounding discreditable conduct, conduct prejudicial to the administration of justice, diminished public confidence, discrimination, exorbitant fees and bias, has as threaded through the parliamentary inquiry²⁷, brought the legal profession into disrepute. It is necessary to rescind this role and replace family consultants with specialist experts to help remedy the issue at hand.

Current dispute resolution processes can be modified to provide effective low-cost options, (such as online negotiations overseen by an impartial legal practitioner/mediator), for resolving small property matters by using conciliation conferences. These are best suited to property matters and not complex cases involving violence and abuse. The latter is vulnerable to a power imbalance surrounding coercive control and risk, which limits compromise and safety and which require specialist experts. If a litigant also has safety concerns the PMH or Child Advocacy Centre²⁸ and/or State justice courts, should be used in the first instance, to determine risk and implement safeguards and supports, prior to property being resolved through the family court. Past chief justice Bryant has publically acknowledged that the family court does not have capacity to investigate matters surrounding child protection. The family court is not the correct jurisdiction nor does it

²⁷ Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 8, sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

²⁸ Bravehearts Child Advocacy Centre as discussed by Ms Hetty Johnston in the Sunday Mail, 06/05/2018

possess professionals with adequate expertise to understand the nuances of abuse and trauma. The court's process increases conflict and inflicts devastating secondary system abuse on victims. The family court is absolutely not fit for the purpose of determining protective orders, in the best interests of children affected by violence or sexual abuse. Legally-assisted family dispute resolution processes should play a minimal role in the resolution of disputes involving family violence or abuse. These processes should be led by specialist experts with the legal practitioners involved only to contribute legal accuracy and drafting of paperwork.

It will take time for the PMH model to become a mainstream remedy. Therefore parties who have experienced family violence or abuse must be better supported at court through the provision of a less stressful environment. It is necessary to provide at least two separate comfortable rooms, exclusively for party's determined to be victims of violence or at risk. The need for two safe rooms is necessary where there is doubt over the differentiation of perpetrator and victim. There should be automatic admittance to those with permanent intervention orders.

It is critical that there is a stringent method employed to exclude anyone found to be making vexatious allegations, those with a criminal history which indicate risk or those facilitating systemic abuse. The system must address misuse of process as a form of abuse in family law matters, by facilitating a voice for victims who believe they are affected. This can be in the form of a simple questionnaire, with supporting documentation, which addresses historic factors, timeline of events and the character of each party. The merits of such can be identified and critically analysed by a family violence/trauma specialist in conjunction with a professional trained in neuropsychology, who is best placed to analyse behavioural traits of a vexatious litigant. A finding of probability can then be raised to help identify system abuse.

These rooms should include information on victim support services, impartial counsellors, basic food, fruit, tea/coffee/water, and comfortable chairs, a television, and reading material. The day long stress of waiting to be heard, and the court process itself, adds to the

anxiety many litigants experience. There is a need for this room to be attached to a free, supervised childcare centre with age appropriate activities for children. It is certainly not in the best interests of teenagers, for example, to be held all day in rooms with little more than colouring in paper. It is a decent gesture to provide reasonable comfort which can also assist with the mental health of victims, minimising secondary system abuse. These rooms can offer a dual function to also promote the wellbeing of family law professionals by facilitating a more comfortable work environment.

If family court must be used for matters involving violence and abuse, lawyers, or representative advocates, nominated calm family members, in conjunction with specialist trauma experts, may facilitate team arbitration between litigants, with the victim's representative walking from this safe room to the other party and back, with written negotiable proposals, before the hearing commences and during breaks if necessary. It is reasonable that family is involved and recognised with weight, in the decision-making process, as family is often privy to details and nuances that can assist the accuracy and any risk surrounding litigant claims. The input of credible relevant family and community references should also play more of a role in fact finding during hearings. This has potential to find remedy for points of contention and may consequently free up time used in the courtroom. This approach will also alleviate much of the stress and time that judicial officers have noted surrounds complex cases. The author reiterates however, that cases involving family violence and abuse should ideally be managed at State level, using the PMH²⁹, Child Advocacy Centre³⁰ model or similar. Family Court Judges will experience reduced stress if their workload involving complex cases was reallocated in this manner.

²⁹ Parental management hearings (PMH), sourced at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201718/ParentingHearings on 26/04/2018

³⁰ For example, the Bravehearts Child Advocacy Centre as discussed by Ms Hetty Johnston in the Sunday Mail, 06/05/2018

The protection of the best interests of children and their safety

Changes are required to be made to the provisions in Part VII of the *Family Law Act* to produce the best outcomes for children

Professor Rhoades³¹ has insightfully noted that some judicial officers have criticised the Act's narrow interpretation of family seen through, (*Knightley & Brandon* [2013] FMCAfam 148) and, reflected the Full Court's view that "*it is not parenthood which is crucial to the best interests of the child, but parenting*" (*Yamada & Cain* [2013] FamCAFC 64, [27]), illustrating a need for reform. This is a pertinent nuance in the consideration of 60CC where protective considerations should hold greater weight than a meaningful relationship³².

An urgent need for independent specialists to accurately interpret *best interests*

An absolute pertinence is that family violence and abuse issues must be managed by family violence and abuse specialists, independent of the court system. It is not reasonable or acceptable that conventional practice permits these issues to be managed by legal professionals.

"We have, you know, lots of cases where we can show that the Family Court is not protecting children. And of course the Family Court itself does not have the capacity to investigate allegations of child abuse which now fill a lot of its time, and of course the people in the Family Court are lawyers and you don't have people making decisions who are experts in child abuse or child development", (*Freda Briggs*).

³¹ Professor Helen Rhoades, Children, families and the law A view of the past with an eye to the future, sourced online at <https://aifs.gov.au/sites/default/files/fpl17.pdf> on 05/05/2018

³² Family Law Act, (1975), 60CC, 2A

The concept of ‘*best interests*’³³ must be improved to prioritise, and be inclusive of congruent *safeguards* as a primary consideration.

The FLA, (1975), prioritises the *best interests* of the child to be a paramount consideration³⁴, in relation to the making of a parenting order. It details how the court determines best interests, with greater weight applied to protection from harm, or exposure to abuse or family violence than parental responsibility including contact³⁵. The **interpretation** and **application** of the *best interests* consideration is absolutely critical in contributing to a judgement which is protective, and does not cause further harm in matters involving family violence. Due to many high risk determinations reported to advocate groups and requiring protective intervention post final orders, it appears that 60CC, 2A³⁶ is not adequately respected in practice.

Improvements to best interest’s considerations must legislate so that 60CC, (2b) is congruently weighted in practice for all children. This should include educational considerations, safeguards, recognition of the primary parents influence on child development, substantial consideration of the child’s views and rights and our obligation to the UNCRC. Reforms must also deter from unsound myths surrounding alienation theories where there is a genuinely protective parent. These issues should be substantially mandated, to help catalyse the best outcomes for children and are discussed as follows;

³³ Family Law Act, (1975), 60CC

https://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html

³⁴ Family Law Act, 1975, (best interests are the paramount consideration), section 65 AA and 60CA.
http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65aa.html

³⁵ Family Law Act, 1975, (how the court determines best interests), section 60CC, sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html on 30/04/2017

³⁶ Family Law Act, (1975), 60CC, 2A

Capacity of the court to provide the educational component surrounding best interests of the child, through proceedings involving family violence and abuse

One major gap that has been grossly overlooked, when considering the best interests of the child, is the child's educational considerations. This is an important need irrespective of the family's structure and close scrutiny must be facilitated in particular, while managing cases involving family violence and abuse through the court system. The resilience and recovery of a trauma-affected child must be supported through the courts, where the child is the subject of proceedings which involves family violence and/or abuse. One way to facilitate this is to support the child's educational development.

At present there is minimal capacity for the court system to provide this important function. There is much significant sound research available which supports that a trauma affected child, has specific learning needs, responses, capacity and requires intensive, individualised attention³⁷. The management and quality of a child's education must be included as a significant factor in the child's *best interests* and needs in the FLA, (1975), to contribute to the *whole* development of the child.

This must be addressed through the appointment of a teacher, (who specialises in child development, and is trained in family violence, abuse and trauma responses), called an **Integrated Educational Manager**, in the Family and Children's courts and/or within any Parental Management Hearing Model. This position will permit the much needed specialised and informed liaison with schools, to promote the educational support and welfare needs of violence affected children³⁸. This role could oversee the ability of court affected students who are victims of violence and abuse, to access relevant school based supports. It is relevant that the Education system requires trauma-informed teachers across the board and learning assistance for all

³⁷ Research supporting individualised educational needs of a trauma affected child, sourced online via; <http://traumasensitiveschools.org/wpcontent/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf>

³⁸ <https://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf>

students that are victims of violence and abuse. The Family Court and Education systems need to collaborate to provide relevant funding to be directed towards this goal.

The importance of the primary attachment figure; a ‘best interests’ consideration;

An improved response to cases involving violence and abuse issues, whether managed in the family court or PMH, must respect the importance of the primary attachment figure. The *best interests* considerations of the child **must** consider the influence of meaningful contact and attachment³⁹ with a primary caregiver. A fundamental concept is that the quality of caregiver behaviour and whether this is the primary caregiver, determines healthy psychological development in child attachment⁴⁰.

Bowlby⁴¹, focused on the disorganized reactions of children, experiencing prolonged separation or parental loss. Disorganized infant attachment has also been observed among maltreated children⁴². Disorganized attachment has been closely related to later psychopathy⁴³, (Carlson, 1988). An understanding of disorganized attachment helps to understand the origins of psychopathology in children.

The primary caregiver is the parent that has been most engaged in the caring for the child during his/her life. Primary attachment is an absolute safety issue, which must be prioritised in best interests considerations, as children separated are at increased risk of depression,

³⁹ Ainsworth et al, 1978. Patterns of attachment, Hillsdale, NJ, Erlbaum. (Note 4 patterns of attachment; secure, avoidant, resistant and disorganized).

⁴⁰ Bowlby, J., (1969). *Attachment and loss: Vol. I. Attachment*. New York: Basic Books.

⁴¹ ‘ibid’ and Bowlby.J.(1944),Forty-four juvenile thieves: Their characters and homelives. Internal journal of psycho-analysis, 25, 19-52.

⁴² Spieker, S.J., & Booth, C.L., (1988). Maternal antecedents of attachment quality. In J.Belsky & T.Nezworski (Eds.). *Clinical implications of attachment*, (pp 95-135). Hillside.NJ:Erlbaum.

⁴³ Carlson.E.A., (1998). A prospective longitudinal study of attachment disorganisation/disorientation. *Child development*,69, 1107-1129.

low self esteem and suicide later in life⁴⁴. It is critical that the family courts recognise which parent is the primary attachment, and which parent may be maltreating the child, if relevant, to avoid contributing to disorganised attachment.

This insight can assist decision makers in understanding the priority of the influence of a quality primary caregiver. It can help decision makers avoid catalysing mental health conditions and psychopathology in children, through poor family court determinations.

“Contrary to popular misconceptions, children do not need both parents equally. They need their primary attachment figure more than the other parent, and they need the safe parent more than the abusive one. This last statement is an objective conclusion based on valid scientific research while the misconception is based on subjective opinion uninformed by current research. There is, of course a benefit for children to have both parents in their lives, but this benefit is negated if the parent engages in domestic violence or child abuse”,(Goldstein, 2017⁴⁵).

Research strongly supports that the maintenance of an on-going relationship with an abusive parent, is highly detrimental to the child⁴⁶.

Safeguards

An improved response to cases involving violence and abuse issues, whether managed in the family court or PMH, must also prioritise and meaningfully facilitate adequate safeguards.

⁴⁴ Susan Goldberg, *Attachment Part Three: Attachment Across the Life Span* (Nov. 2004), <http://www.aboutkidshealth.ca/En/News/Series/Attachment/Pages/Attachment-Part-Three-Attachment-across-the-life-span.aspx>.

⁴⁵ Goldstein, 2017 sourced at http://www.huffingtonpost.com/entry/the-safe-child-act-when-a-parent-does-more-harm-than_us_58b84bc1e4b051155b4f8c7f on 02/05/2017.

⁴⁶ Canton-Cortes D, Canton J, „Coping with Child Sexual Abuse Among College Students and Post-Traumatic Stress Disorder: The Role of Continuity of Abuse and Relationship with the Perpetrator“ (2010) *Child Abuse and Neglect*, Vol. (34), Issue 7, pp. 496-506.

The FLA, 1975, (60CG), asks the court to consider the risk of family violence consistent with the best interests of the child which; *'(a) is consistent with any family violence order; and (b) does not expose a person to an unacceptable risk of family violence'*⁴⁷.

This includes the capacity to include **safeguards** in respect of 1b. However this legislation is not adequately protective, as it leaves this safeguard as a broad **option**. It also does not detail or recommend a sound guideline for appropriate safeguards under **varied** circumstances. Safeguards must be a mandatory inclusion if a family violence order is active, or there is evidence of any risk, historic or as identified through the risk assessment process.

To help facilitate accurate and protective judgements for families affected by family violence, Goldstein's following provisions as adapted from his *Safe Child Act*⁴⁸, must be included in the definition of appropriate *safeguards* in 60CG, and mandatorily applied throughout the construct of family court orders, (full permissions granted to the author). The FLA, 1975, *Best Interests* considerations must include the following safety inclusions;

To Improve the Safety of Children involved in Child Custody Cases; (Safeguards)

1. The paramount concern of all child custody decisions must be to provide complete safety when determining the best interests of the children.
2. Whenever domestic violence or child abuse is raised as an issue either during or before a child custody matter is litigated, any professional who provides advice or recommendations to the court must have substantial training and experience about family violence and child

⁴⁷ FLA, 1975, 60CG, Court to consider family violence, Sourced online at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cg.html at 30/04/2017

⁴⁸ Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act> on 02/05/2017

abuse. This is inclusive of a comprehensive understanding of safety issues, including behaviours that are associated with higher lethality or injury risks; domestic violence dynamics; effects of domestic violence on children; ability to recognize domestic violence and research about victim narratives.

3. A post graduate degree in mental health such as psychology, psychiatry or social work absent specialized and approved training shall not be considered proof of domestic violence expertise. A court shall not refuse to qualify an individual as a domestic violence expert because the witness does not possess a post graduate degree, if the witness can demonstrate expertise based upon training and experience.

4. In any custody case where either domestic violence or child abuse is raised during the litigation process, even where a court may have already heard and determined there is not significant enough domestic violence or abuse, to warrant a restraining/protective order, and in which there is no substantial basis to believe the parties or children have a significant mental health impairment likely to interfere with parenting ability, courts should not order a mental health evaluation. The court may appoint a relevant and independent, specialist trauma expert, to help the court understand the significance of evidence related to domestic violence and abuse, and must permit parties to present evidence from this expert.

5. Courts shall look to current, valid scientific research concerning domestic violence or abuse, to help inform its decisions in all cases where domestic violence or child abuse is raised during the course of custody. Where there is conflict between research, it is appropriate to seek validity and integrity of information, through meta-analysis. Courts shall not permit practices or approaches that do not have scientific bases, and are not accepted practice within the specialized field of practice of domestic violence and child abuse. Professionals who engage in practices based upon such unscientific beliefs shall not be qualified to participate in custody cases where domestic violence or child abuse is raised.

6. In cases in which allegations of domestic violence and abuse are supported by substantial and reasonably verifiable evidence, the safe or safer parent shall receive sole custody, absent clear and convincing proof that the parent creates an imminent and significant safety risk to the children. The parent who has committed violence shall be permitted only supervised visitation pending a risk assessment by a domestic violence/child abuse professional. In order for the abusive parent to obtain unsupervised visitation, the parent must complete at least a six month accountability program, accept full responsibility for past abuse, commit to never abusing the children or future partners, understand the harm the abuse caused and convince the court that the benefit of unsupervised visitation outweighs any risk. Termination of all contact should be considered upon proofs of failure to comply, as it will present the children with a known dangerous circumstance.

7. A parent shall not be penalized for making a good faith complaint about domestic violence or child abuse.

8. Courts shall not use approaches developed for “high conflict” cases designed to encourage parents to cooperate in any contested custody case, if there have been allegations of domestic violence and or child abuse, which have been supported with a specialist expert report opining there is a reasonable risk to children, and shared parenting shall not be permitted in these cases, absent voluntary consent of both parties. Consent must be determined to be without coercion or undue pressure.

9. In cases in which there are allegations of domestic violence or abuse, a history between the parties that includes restraining orders, criminal charges or other evidence of possible domestic violence, early in the proceeding is provided to the family assessor or other neutral professional in the court, (or PMH as proposed). This is for the purpose of conducting an evidentiary hearing to determine if one of the parties has engaged in a pattern of domestic violence or abuse. If the court finds domestic violence and/or sexual abuse, and the non or less abusive parent is safe, the court shall award custody to the safe parent. If appropriate, supervised visitation is permitted with the abusive parent,

in consideration of conditions in point 6. A finding denying the allegations of domestic violence shall not prevent the court from considering additional evidence of domestic violence later in the case.

10. In any case in which the trial judge engaged in or tolerated gender biased practices or permitted practices or approaches based on myths, stereotypes or other bias, an appellate court shall not defer to the judgment of the trial court.

11. In any case involving allegations of child sexual abuse, any professionals asked by the court for a risk assessment or evaluation must have specialized training and experience of a minimum of two years working with children in child sexual abuse. This expert must conform with accepted research which confirms that 98%⁴⁹ of child disclosures are true, and start inquiries from the default position of believing the child, if disclosures have been consistently made to various independent professionals.

12. Investigators shall take sufficient time to develop a trusting relationship before expecting the child to speak about the allegations. It shall be recognized that children frequently recant valid allegations of child abuse, so a recantation shall not by itself be treated as absolute proof the allegations were false. All interviews, (inclusive of child protection, police and family consultant meetings), conducted with the child must have an impartial family violence and/or abuse specialist present. They must also be recorded on audio and/or video. A full un-redacted transcript must be provided to the protective parent within 5 working days, without the unnecessary inconvenience of an FOI request or subpoena. This transcript must not be provided to the alleged perpetrator, unless the specialist determines that the content of the transcript will not put the child or other parent, at risk in any way.

⁴⁹ Dymphna House, (1990), Dymphna House, (1990), Facing the unthinkable. Haberfield, (NSW). Dymphna House. Also; children's statements were found to be true, in 98% of all child abuse cases reported to officials., (NSW Child Protection Council, cited in Dymphna House, 1998)

13. No negative inference(s) may be drawn from a decision by a prosecutor or child protective agency not to file charges against a named perpetrator of domestic violence or child abuse and shall not be treated as proof the allegations are untrue. Given the difficulty of proving valid complaints about child sexual abuse, judges who make a finding that the allegations were deliberately false, must demonstrate they considered not only if the allegations are true but other common circumstances such as violation of boundaries, influencing variables and environment, and inadequate information to determine the validity of the allegations and mistaken allegations made in good faith.

14. In cases in which a court determined sexual abuse allegations cannot be proven, the court shall consider new evidence in the context of the evidence previously considered. No decision shall be made by a court absent a full evidentiary hearing, using a probability standard, with the parent having a right to have an appropriate number of specialist experts of their choosing heard by the court.

15. No preference and no deference shall be given to any expert selected by the court, and identical standards of review and credibility shall be applied by the family court.

* These provisions are designed to correct common present practices that have been shown to work poorly for the protection of children. This seeks to encourage family court professionals to look to current, valid, scientific research to inform their decisions, and to cease using outdated and discredited practices, such as parental alienation syndrome against genuinely protective parents, as described in the legislative history. The use of such flawed practices in prior decisions shall be considered a change of circumstance, that entitles the parties to request the court to reconsider arrangements that were created based upon flawed practices.

Family law services, including (but not limited to), dispute resolution services

A refined PMH involving specialist experts is an improved system to manage complex cases involving family violence. The accessibility of the family law system can be improved for Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, people with disability and people who identify as LGBTIQ to simply include a specialist advocate expert in the relevant demographic, to contribute to the PMH model. People living in rural, regional and remote areas of Australia can be assisted via an online PMH where video-link can alleviate the issues surrounding distance.

It is noted that the PMH does not currently anticipate hearing cases involving sexual abuse, therefore these cases should be determined through use of the Bravehearts Child Advocacy Model⁵⁰ or similar, rolled out throughout the States.

The Queensland government is supportive of Ms Hetty Johnston's (AM),⁵¹ Child Advocacy Centres. Ms Johnston explained that these centre's; *“hold the key too much reform to the family law system, if adopted with the child at the heart of its purpose and if it is supported by all government's state and Federal”*. She describes that these centres will prioritise the best interests of the child in a trauma-informed supportive environment, involving an advocate, away from the artificial setting of a police station.

Ms Johnston stated that this approach is an improved method to identify and differentiate between any false allegations or coaching with genuine disclosures of children. Protective parents will be given an outcome, and

⁵⁰ Bravehearts Child Advocacy Centre as discussed by Ms Hetty Johnston in the Sunday Mail, 06/05/2018

⁵¹ Ms Hetty Johnston AM <https://bravehearts.org.au/who-we-are/founder-chairman/>

also be supported with protective safeguards, if required. The outcome of the interview may include criminal or civil proceedings⁵².

The PMH, Child Advocacy Centres and similar State tribunal models, require interconnected supports to facilitate, resilience, recovery, safety and justice. A proposal for this collaboration is provided through the following *First Responder Proposal*. This permits scope for solving decision-making processes, developed within the family law system to help manage risk to children in families with complex needs.

First Responder Proposal:

An immediate trauma informed response to Family Violence, within interconnected systems.

A Trauma-Informed response comprehends and responds to the impact of trauma. It promotes the holistic safety, physical, psychological and emotional for survivors and support people. It also creates opportunities for survivors to gain control, resilience and empowerment to facilitate recovery⁵³.

DRNOHARM: This Acronym represents a trauma-informed response aimed to support people who experience family violence and abuse

D Danger

There is a need for police to conduct criminal record and welfare checks on involved parties, possible intervention order history/status,

⁵² 'ibid' 45

⁵³ Blue knot Foundation, Trauma informed practice in domestic and family violence service, sourced at <https://www.blueknot.org.au/Home/Front-Page-News/ID/46/Trauma-informed-Practice-in-Domestic-and-Family-Violence-Services>., as relayed from Hopper, E. K., Bassuk, E. L., & Olivet, J. (2010). 'Shelter from the storm: Trauma informed care in homelessness services settings', *The Open Health Services and Policy Journal*, 3, 80–100

weapons or children involved. This must be factored in to this response and the approach determined accordingly. Information from a (proposed), National Database of Domestic Violence and Abuse Record, which should include past child protection reports, is also checked on the approach to the incident.

The first step is to eliminate danger. Determine who has been harmed and who is at risk of further harm. Separate the abuser from the victim/s. This step must include an appropriately qualified trauma specialist from a police family violence unit, treating any immediate physical and/or psychological injury. This may be done through police and emergency workers facilitating required medical aid, and calling in a friend or family member the victim is comfortable with for support.

The abuser is treated for any injury and/or attempts at self-harm, then immediately detained at the closest police station. This medical determination is at the discretion of the police and/or ambulance personnel, who may decide to instruct the abuser to go the doctors with prompt subsequent reporting to the police station. This medical may also involves drug and alcohol testing at the discretion of the police if erratic behavior shows cause for concern. This must be followed by a mandatory one night detention of the abuser at the station, to allow both parties to calm down and also to reduce further conflict.

R Record

Police should record the incident with a full history on the (proposed) National Database. This database includes any interim, full, past and present, intervention orders, hospital admissions due to domestic violence, and any child protection interventions and recommendations. A detailed, rigorous, visually and audio recorded police interview, (with

a transcript), must be conducted with the abuser as soon as possible after the assault. This should be provided as soon as possible to the victim with the incident number.

It is recommended that mandatory reporters notify the latter for intervention, ONLY if the children are at immediate significant risk. For example, if the victim intends to continue a relationship involving domestic violence. Child Protection, where notified, must fulfill a supportive, non intrusive role that genuinely supports the victim.

If the victim has clear intent to leave the relationship immediately or the relationship is already over and they reasonably comply with support services, then child protection should not be removing the children unless there is significant risk of harm.

Police must actively protect the victim from unwarranted child removals and desist from endorsing unsupported claims from child protection. The responding police must contribute their views on the merits of any application made to a court by a child protection department for a court order for child removal. It must be mandated that the judge must substantially consider these views, and any by family doctors or trauma experts, prior to the authorizing of any court order for removal. This adds a much needed layer of accuracy surrounding risk and accountability.

Intervention orders should be reasonably applied for via the police or specialist family violence and abuse experts, where family violence and abuse has occurred and any future risk of harm is identified. Police must be educated regarding the use of the 68R amendment in the Family Law Act, (1975), which intends to bridge the gap between inconsistent intervention orders and family court orders in the State magistrate court. Police should support the management of child

protection issues at the constitutionally correct State level, rather than refer victims back to family court.

N Notify

Notify victim-nominated family members and/or friends who can provide additional support to the victim. This ends the isolation, silence and minimizes the element of fear in the victim. This step permits the victim to confront the issue of violence with substantial support. If the victim is not ready to speak up, a specialist family violence or sexual abuse support worker can be used at this point, to help the victim build up confidence and self-esteem, with the goal of creating a family/friend inclusive support network.

It is proposed that an Educational Liaison Manager, (who is a family violence, abuse, trauma and child development specialist), can assist the flow of communication and understanding between the family, school, and if necessary, courts, parental management hearing, central advocacy centre or child advocacy centre. Each case should be assigned to an Educational Manager who has capacity to support individual families. This manager can update the school counselor and teachers with relevant information and facilitate services to help best support the child's needs and recovery.

Teachers are often excellent informed resources to help contribute to a risk management approach and support safeguards. They are often an early point of child disclosures, and can offer valuable insight into an individual child's development and progress. They can also provide affected children with a trauma-informed approach to support recovery. It is vital that government funding is provided for a newly established Educational liaison Manager Role and also for trauma-

informed professional development for teachers, to help them best respond to child victims of violence and abuse.

O Options

Children, with the victim's consent, may be placed with close family or friends that the victim chooses for **one to two days**, to allow the assaulted parent to recover. This is **NOT** a time for child services to remove children, (unless facilitating suitable temporary kinship care), as this will further traumatize the children. Extended friends and family **must** be prioritized to provide a place of temporary recovery for children exposed to violence and abuse.

If social support is not immediately available, a Central Advocacy Centre, (similar to the *Bravehearts Child Advocacy Centre*), with specialist family violence and abuse staff, could provide temporary emergency respite housing in fully equipped comfortable rooms, for both the affected parent and any children. This is a proposed purpose built, appropriately accredited and safe respite haven which has around the clock security. This is proposed to be funded by local Council, State and Federal governments. Victims who do not require the emergency accommodation may also visit and benefit from the facilities and support services.

The Central Advocacy Centre can provide victims with counseling, reassurance, entertainment, food, a safe, welcoming trauma informed environment. Children are given an age appropriate understanding of the circumstances. Victims are given the capacity to understand risk factors concerning their safety.

Relevant legal information and options for further support, such as an understanding of the Victims of Crime process and contacts to pro-

bono lawyers who can best facilitate claims. Additional support can include a direct 24hr phone line for legal advice and counseling support, run by newly accredited lawyers or trauma specialists, who may use this volunteer work and experience towards professional development credits. The victims should be given instructions on how to best record future incidents and how to notify police for intervention order breaches. It is valuable to provide contacts and phone numbers to organizations or programs that can assist with physical material needs such as school supplies, food and clothing, to temporarily support the family through the transition to recovery. A voucher program funded by the government can also support this need.

The Bravehearts Child Advocacy Centre model is inclusive of a forensic psychologist who can interview and record the circumstances for use in criminal or civil proceedings. It also includes an advocate to help with police liaison surrounding sexual abuse matters. This is a brilliant initiative, however is currently only piloted in Queensland.

The other States should immediately implement a Central Advocacy Centre, possibly as a further extension of the Bravehearts model, which can focus on both family violence and abuse issues. This would include trauma informed child developmental specialists, who also understand neuropsychology, and can differentiate between normal and abnormal psychological development, and has insight inclusive of perpetrator behaviors and victim responses. This role in conjunction with a forensic psychologist, will help illuminate nuances that a single assessor may miss, and will add rigor to critical analysis and transparency throughout investigations. Where conclusions may differ, evidenced based research and meta-analysis can be relied upon. These roles, in conjunction with expert family violence and/or sexual abuse advocates and an educational liaison manager, (as described), will greatly

improve current responses and recovery of victims of violence and abuse.

The assessment process is conducted in close liaison with family violence trained police, who together assist an identification of risk level and required safeguards, including protective orders as required. Central Advocacy Centre reports should be uploaded to the proposed National database with the police incident reports. To assist the police workload the courts should recognize an application for a protective order by these specialist experts, with the same weight as an order applied for by the police.

The family violence and sexual abuse advocate acts as a case manager and can offer oversight. They could also facilitate supports from external connected services such as trauma informed staff at legal aid, external counselors, the Y.M.C.A or further education providers, dependant on the individual circumstances.

It is important to include an appropriate number of trauma informed lawyers within each centre, who can assist with legal advice and the preparation of any legal documents required to be prepared for court purposes. Ideally issues surrounding contact with children would best managed through a parental management hearing. This hearing would use appropriate safeguards such as video-link to protect victims. The specialist family violence and abuse experts employed through the Child Advocacy Centre could provide the victim with consistency, investigative accuracy, and comfort by also supporting the victims through the PMH pilots.

H Housing

The Central Advocacy Centre is proposed to offer immediate and temporary respite after medical needs have been attended to. Its purpose is to coordinate supports and services. The victim is supported by the advocate specialist case manager and kept informed of the details and options throughout the process. The victim is assisted with options for affordable safer housing. If the victim chooses to remain at their personal residence, staff from the advocacy centre can help facilitate safeguards with external services such as locksmiths, lighting and alarm specialists to increase home security. Throughout this process, the victim's voice is continued to be heard, inclusive of needs, wants and fears. The victim is provided with education regarding risks and breaking the cycle of violence. Further local support networks and recovery aiding programs, (possibly run through, for example the Y.M.C.A), are explained and offered.

A Assessment

Assessment of the incident's impact on victims, inclusive of any children, is carefully recorded with details inclusive of the police incident number, contacts of involved responders, assessed risk and safeguards required. This assessment is conducted by a forensic psychologist and/or experienced family violence and abuse specialist at the Victims home or ideally at the proposed Central Advocacy Centre. This involves a family and/or friend support person that may choose to contribute insight to the discussion. This assessment also details the victim's level of awareness and motivations to comply with assistance offered, and notes steps to strengthen this as required.

Assistance and information should be provided to the victim regarding understanding any court process instigated from the domestic violence

incident. This should detail the proposed *Parental Management Hearing* pilots or similar *Child Advocacy Centre's*, if relevant. The advocate can facilitate follow up and liaise with police involved. This may be used to help police with accurate record keeping and review, which can inform improved process. This is also put into the file by police on the national database.

It is important that the victim is also provided a copy of the record of history and events for future use, if required. This may be facilitated through the provision of phones with an inbuilt risk management app, such as the following designed by Ms Sarah Thomson, CEO of Society for kids;

‘The Digital Advocate’ App uses technology to support victims. This helps the community navigate the Australian System and Laws by supplying instant information. A few of the many great features are; a service locator, a 24hr counselling service, information of all regulations for each state and territory, full and easy to understand rights for parents children and extended family involved, full breakdown of the laws in each state and territory, basic support and information of any requirements one may need. It also includes a secure location, where an individual will be able to save information, put in notes, and collates any supporting evidence that may be required. This promotes a national approach to sound child protection, and offers trusted, consistent information and advice. Consequently, this can highlight, mitigate and prevent trauma, to the children and families. The victim is supported with a fact based stance to use throughout the court and recovery process.

R Response

Responses of community groups to build the victims resilience can help manage post- traumatic stress/anxiety/health issues, and assist recovery. Liaison and connection with various specially funded community groups, can be used to build on social connections, confidence and skills. The Central Advocacy Centre should be government funded for the provision of short term financial support, to help victims with practical needs such as educational tutoring for affected children, and practical help with school uniforms, books, extra-curricular activities such as sport, clothing, and nutritional support to facilitate a healthy body and mind. There is a need to offer counseling of the victim's choice. This should include helping affected children and parents understand, that they are not to blame for the perpetrators behavior, safe boundaries and the value of being heard. Intervention orders must be initiated where required and supported by expert advocates and police.

M Mandatory Attendance (details added to file on a National database)

Immediately after an incident which elicits fear, an interim intervention order should be completed. Perpetrators should be informed by police to undergo voluntary anger management, an appropriate behavioral change program, and parenting class, as assessed and directed by the forensic psychologist, and family violence specialist from the Child Advocacy Centre, who have also assessed the risk of the victims. This direction must become mandated, by court order, if the full intervention order is granted.

Victims should participate in a mandatory one hour a week educational support program, surrounding an understanding of risk and to promote

empowerment. This is conducted to help break the cycle of violence and abuse, and to facilitate recovery, with other victims. This should be mandatory for a month, then optional for up to a year. On condition of this attendance, victims are to be funded with programs and training, if interested, aimed to rebuild resilience, and skills for an independent life. This may include, (for example), a weekly Y.M.C.A yoga class, or funded training/skills development sessions for up to a year.

This aims to promote the formation of supportive friendships, shared resources, information, resilience and recovery. This sets goals to promote the holistic capacity of the victim to positively engage in the community. The building of educational skills is aimed towards employment which will support independence. The social skills gained through the resilience classes can also facilitate recovery and healthy social networks, to promote a safer future for the family.

*All details regarding the proposed National Database of Domestic Violence and Abuse records, should be provided for substantial consideration for risk factors, and required safeguards, in any family law or proposed Parental Management hearing or similar advocacy tribunal model, involving the victim and/or abuser.

*Funding should be directed by both tiers of government. It can also be supported by local council funding allocation.

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Family violence and child abuse, including protection for vulnerable witnesses

There is a critical need to implement a much more effective risk management approach through the family court, PMH, and any proposed advocacy tribunals, to enhance the victim's recovery.

The author supports the contention by Sudermann and Jaffe, (1999)⁵⁴, who state that;

“assessing the risk surrounding the parental relationship is more conducive to effective domestic violence management in family law reform, than telling victims to disregard the past”.

The Family Court and Child Protection Systems are not adequately protective in practice. The current family violence management lacks informed insight and rigorous evidence based methodology, for risk assessment and protective practice.

The best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes

Decision making must initiate with the default status of the child's safety, with respect to the child's views and needs, and the application of due weight of such, in accordance with the age and maturity of the child. Decision making must not be limited with only the views of the child, but also must substantially recognise and uphold the rights of the child, which has been unfortunately overlooked through the Attorney-General's Terms of Reference⁵⁵. I strongly state that the relevance of the child's rights must be considered, to concur with the intent of the

⁵⁴ Sudermann, M. and Jaffe, P. (1999), *A handbook for health and social service providers and educators on children exposed to woman abuse/family violence*, Family Violence Prevention Unit, Health Canada, Ottawa.

⁵⁵ Attorney General Terms of Reference for the ALRC Family Law Review
<https://www.alrc.gov.au/publications/terms-reference-22> sourced on 05/05/2018

congruent rigorous process of this review. The child's views are influenced by their own agency and autonomy, therefore their rights strongly influence the weight of their views, and must be considered for inclusion.

Decision making must also consider the rights and duties of safe parents, to provide direction to the child, in the exercise of the right to freedom of thought, conscience and religion. The weight of the status of a safe parent, is contingent to any risks identified through a risk management approach.

The *Safeguards*⁵⁶ previously discussed through this paper, and inclusion of the child's rights through the United Nations Convention on the Rights of the Child⁵⁷, (UNCRC), must be understood by legal professionals and specialist experts. They must be immediately implemented into the Family Law Act, (1975), (60CG), and upheld, to protect children involved in family law proceedings which involve family violence and abuse.

It is essential that a timeline chronology illustrating parental history and surrounding influences. These factors should include an assessment of the capacity of extended family, details of past intervention orders, who has been the most empathetic and primary attachment figure, and willing provider. These should be critically and impartially analysed by specialist family violence and abuse and child developmental experts. This assessment must be informed through verified evidenced based research, and where necessary, meta-analysis. This approach will facilitate an identification of risk, informed with behavioural expertise, which may flag nuances of any sociopathic behaviour, such as coercive control. It will also help inform decisions that respect the child's views

⁵⁶ Safeguards found through Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act> on 02/05/2017

⁵⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 28 April 2018]

and rights, and minimise trauma caused through unwarranted removal from a safe primary attachment figure. This will enable an efficient risk management approach, and facilitate appropriate safeguards to be implemented.

It is also critical that an *Advocate Case Manager/Educational liaison Manager* role is developed. This professional can relay and facilitate the *best interests*, safety, and trauma-informed holistic development of children, affected by parental separation, with all stakeholders, including the child's teachers in their school environment. This role must be filled by a family violence and abuse and child developmental specialist, who has capacity to understand how to mitigate trauma responses, and facilitate the supports required to facilitate the child's developmental, academic and well-being needs necessary for resilience and recovery.

Decision-makers must also understand the how to apply the proposals in the family law rules of procedure and evidence, and to respect the proposals for the *Principles, Standards, and Safeguards*, discussed further in this submission. This includes a reliance on the use of relevant meta-analysis and evidenced based peer reviewed research, such as the ACE⁵⁸ and Saunders⁵⁹ study.

The Federal Attorney General's office has insightfully commissioned the Australian Institute of Family Studies⁶⁰, (AIFS), to conduct the *Children and Young People in Separated Families Project, ...to develop a better understanding of the experiences of children and young people after the separation of their parents and the extent to which their needs are met by the existing family law system services*⁶¹. The AIFS noted the

⁵⁸ Adverse Childhood Experience study, (A.C.E), Sourced at https://www.cdc.gov/violenceprevention/acestudy/about_ace.html on 01/05/2017

⁵⁹ Saunders et al., *Saunders study*, U.S dept of Justice, (2012), sourced at <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> on 01/05/2017

⁶⁰ Australian Institute of family Studies sourced at <https://aifs.gov.au/> on 03/05/2018

⁶¹ Australian Institute of family studies sourced at: <https://aifs.gov.au/projects/children-and-young-people-separated-families> on 03/05/2018

consistency of providing children with the opportunity to voice and reflect on processes that affect them, with Articles 3 and 12 of the UNCRC.

Article 3 supports the primary consideration of best interests. Article 12 supports the child's rights and adequate opportunity to have a voice and be heard, in all matters concerning them, including in judicial and administrative proceedings, where appropriate. The AIFS⁶² pertinently highlighted the UN General Comment, (paragraph 43, 2013), on Article 3, where it is stated that this, "*cannot be correctly applied if the requirements of Article 12 are not met*". A rigorous consideration and public release of these views is certainly in the child's best interests to be heard. Justice McClellan has recommended that participation of children is an important element of what makes an institution safe for children⁶³. Children feel safer when afforded opportunities to be believed⁶⁴.

The AIFS has informed public members that they are awaiting advice as they have stated; "*as to whether, and if so, when, the research will be publicly released*"⁶⁵. It is anticipated that this research will illuminate, meet the terms of reference, and inform many questions surrounding the child's experiences and perspectives explored through this review. The author requests that due to the exceptional relevance of the AIFS's conclusions, these are substantially considered, in accordance to the intent of this comprehensive review. This insight may then inform legislative reform, to facilitate an improved decision making process, which promotes the best interests, views and rights of children.

⁶² AIFS, (PDF); more detailed explanation of the project, titled Current AIFS research into children and young people's experiences of family law system services in Australia sourced at <https://aifs.gov.au/projects/children-and-young-people-separated-families> on 05/05/2018

⁶³ McClellan, P., (2016), Presentation to the Association of Children's Welfare Agencies Conference, (15/08/2016), As relayed in 'ibid' <http://www.childabuseroyalcommission.gov.au/media-centre/speeches/association-of-children's-welfare-agencies-conference>

⁶⁴ AS relayed in 'ibid' 50.; Moore, T., McArthur, M., Noble, Carr, D., & Harcourt, D., (2015). *Taking us seriously*, children and young people talk about safety and institutional responses to their safety concerns, Inst. of Child Protection Studies: Australian Catholic University, (Melbourne)

⁶⁵ With permission from the authority of Ms Karin Pridgeon B.A.(psych).

Children's experiences of participation in court processes can be improved by listening to their views and improving process based on research and review. It is pertinent that their rights in accordance to the UNCRC are mandated, and required safeguards are implemented. They have internationally understood rights to be informed in an age appropriate manner, regarding outcomes which affect them. It is important that prior to any change of residence or life-altering decision, that the child is formally given opportunity to voice their views of the proposed outcome. These views must be factored in to the final decision and if weighted enough, (in accordance to capacity and safety considerations), must be endorsed, and should be permitted to justify a variation to orders. Accordingly, the views of children must be included in any PMH or proposed Advocacy Centre model.

Mechanisms to support the child's views can be through permitting their independent views to be submitted in written or diagram form. This may be assisted by the help of an independent school counsellor or teacher, who can then forward this directly to the court. An easy way to assess a child's paradigm is for the child to keep a formal diary, provided by the court to the school counsellor or teacher, which the child may contribute to at anytime they feel the need. This has additional therapeutic benefits to assist the child's emotional health. This diary should include a template to encourage the child to write or draw any need and wants that are desired, as well as any safety concerns. These notes after a nominated period of time, are then provided directly to the court. It is important that these are constructed impartially and freely to safeguard any potential pressure from either parent. It is recommended that parents are not permitted to view these at any stage, and the child is informed of such, so the child can write freely. The judge/tribunal adjudicator, in liaison with a specialist trauma expert, can view these at submission stage, but must not relay the contents of such to the parents.

It is also important at this stage that an independent relevant specialist, (such as a forensic psychologist, child developmental and trauma expert, trauma informed teacher, medical specialist or cultural inclusion professional), speaks to the child, and separately to the individual

parents regarding any cultural or additional needs for consideration. An assessment of parental capacity to support these needs, may be conducted by the specialist and submitted to file.

The continued use of the child's diary may also be used as a monitoring and review mechanism for an extended time, as a condition of final orders. This will help to safeguard the child's continued best interests. The content of such may be monitored by the school counsellor, who can mandatorily report risks or welfare concerns to the family psychologist for management.

The Child's Views

To improve children's experiences in the family law system and best learn from children and young people who have experience of its processes, it is essential that stakeholders and legislators listen to their views, through proceedings, the recommended diary method, and ongoing research. This insight should be used to inform reforms, aimed at improving their safety and experience.

It is critical that the child's paradigm is given more weight, throughout decision making in the family court, PMH, and other proposed Advocacy Centres. This will help to respect their agency, promote the child's felt input, and sense of control into decisions affecting their lives. It is also important as their views can illuminate truth, as research supports that in 98% of cases, children's statements about sexual assault are found to be true⁶⁶. Facilitating and substantially using the child's views to inform matters, will have beneficial effects for the child's long-term well-being, development and recovery, if relevant. The current application of the legislation does not adequately support this.

⁶⁶ Dympna House, (1990), *Facing the unthinkable*. Haberfield, (NSW). Dympna House. Also; children's statements were found to be true, in 98% of all child abuse cases reported to officials., (NSW Child Protection Council, cited in Dympna House, 1998)

The current Family Law Act, 1975 outlines how the child views are intended to be respected. This is inclusive of the availability that a child's interests *may* be represented by an independent children's lawyer, (ICL)⁶⁷. It is detailed in 68L, (5)⁶⁸, that this ICL may, under specified order, find out the child's views. The legislation affords excessive discretion where it states that the ICL has an *option* of listening to the child, and also where child's views are subservient to their *interests*⁶⁹. The legislation inadequately represents the intent of 60CC,(3),(a)⁷⁰, which highlights a consideration of the child's views.

The definition of *interests* is broad and must be specified. The assumption that the ICL has expertise to conduct these functions, is misplaced and not supported. An ICL, specialises in law, not child development and behaviour, and consequently, does not have capacity to adequately interpret a child's view. The inclusion of the ICL in regards to presenting a child's view, should be limited to legal reasoning.

The weighting of the child's views should be assessed by an independent child developmental and behavioural specialist. This may be a trauma informed teacher, counsellor, doctor, forensic psychologist, neuropsychologist, or similar. These professionals have much higher capacity and expertise, than ICL's, family consultants or court report writers, to determine influencing factors, which may contribute to the child's view. Issues surrounding domestic violence and trauma must be delegated to trauma informed professional that can produce a report for

⁶⁷ Family Law Act, 1975 (child's interests represented by a independent children's lawyer), Section 60CD,(2b), sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cd.html on 30/04/2017

⁶⁸ Family Law Act, 1975, 68L(5) court order for independent representation of the child's interests,sourced at http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68l.html

⁶⁹ 'ibid' 68L, (2b)

⁷⁰ Family Law Act, 1975, Section 60CC, relevant views of the child to be given weight, according to capacity. (3a), sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html on 30/04/2017

the Court. The child's views may also be supported by a letter from the family's teacher or school counsellor to be provided to the court.

Goldstein's Safe Child Act proposal⁷¹, prioritises an inclusion of the following, in concurrence the Gillick competence test; "*If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to preferred residence shall be considered and be given due weight by the court*"⁷². This contention is supported by the author for inclusion into section 60CC,(3),(a)⁷³.

Similar concerns surrounding the employment of an ICL to determine *best interests* apply to all unspecialised legal professionals. They simply do not have the specialist capacity required, to meaningfully interpret trauma affected responses, or child developmental stages which influence the child's views. This supports that 68LA, (2b)⁷⁴, where the ICL must act in relation to what he/she believes to be the best interests of the child is redundant and should be revoked. This inadequacy limits the ICL's ability to adequately determine *best interests* or required protective decision making.

The term 'interest' is defined as including a *prospective* or *contingent* interest and includes *expectancy*⁷⁵. Expectancy is defined as an outlook,⁷⁶ a want/desire⁷⁷, hope⁷⁸ and in this context is a view.

⁷¹ Goldstein, Barry, (2017), The Safe Child Act, sourced at http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, for further information; <https://www.domesticshelters.org/domestic-violence-articles-information/the-safe-child-act#.WNX4lr2FFNG> sourced on 30/04/2017.

⁷² Gillick v West Norfolk and Wisbech AHA [1985] UKHL 7". British and Irish Legal Information Institute. 1985. Retrieved 19 February 2017 – Commonly referred to as the 'Gillick Competence Test'.

⁷³ Family Law Act, 1975, Section 60CC, relevant views of the child to be given weight, according to capacity, (3a), sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html on 30/04/2017

⁷⁴ Family Law Act, (1975), 68LA, (2b), sourced at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68la.html, on 04/05/2018

⁷⁵ Definition of *Interest* in the Family Law Act, (1975), Sec 90 (MD), sourced at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#interest, on 04/05/2018

⁷⁶ The Free Dictionary Thesaurus, <https://www.thefreedictionary.com/expectancy> sourced on 05/05/2018

The expectancy theory of motivation is proposed by Vroom⁷⁹ to be a conscious choice and paradigm among alternatives. It is a cognitive process, where individuals have capacity to consider internal motivations to preference value and perceptions, towards attaining an better outcome for self interests⁸⁰. Expectancy is the child's efforts and motivations and perception, weighted on past experiences, personality, and confidence and current emotional state. The hopeful, outcome of expectancy, and its layered conscious choice, can be considered a cognitive method of describing the child's views.

If the child's view is interpreted in this manner to have congruent meaning with *expectancy*, then the child's views are already an explicit element of the *interests* consideration. This has obvious implications surrounding the interpretation and application of *best interests* considerations.

The legislation surrounding that the ICL “*must* ensure that *any* views expressed by the child in relation to the matters to which the proceedings relate are *fully* put before the court.”⁸¹ is contradicted by subsection 7 of 68LA⁸² which permits the ICL's discretion to disclose the child's views, *if* the ICL believe it to be in the child's best interests. Putting aside the ICL's lack of capacity to adequately determine as such, the *expectancy* element to *interests* mandates that a child's views *must* be heard. Therefore in all cases where this has not applied the rule of law has not been followed. The question now surrounds whether litigants should be afforded due process and remedy, where this has affected the outcome?

⁷⁷ Management study guide, expectancy theory of motivation, sourced at www.managementstudyguide.com/expectancy-theory-motivation.htm

⁷⁸ Legal dictionary sourced online at <https://legal-dictionary.thefreedictionary.com/Expectancy>

⁷⁹ Leadership central.com, Expectancy theory of motivation, by Vroom, H.V., Yale School of Management in 1964. sourced at [http://www.leadership-central.com/expectancy-theory-of-](http://www.leadership-central.com/expectancy-theory-of-motivation.html#axzz5G7mHKM00)

[motivation.html#axzz5G7mHKM00](http://www.leadership-central.com/expectancy-theory-of-motivation.html#axzz5G7mHKM00) on 05/05/2018

⁸⁰ ‘ibid’ 77

⁸¹ Family Law Act, (1975), 68LA, (5b), sourced at

http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68la.html

⁸² ‘ibid’ subsection 7

There is a provision in 60CD, (2c)⁸³, for the Court to consider the child's views by other means it deems appropriate. The latter should promote and detail, corroborative evidence such as using a child's diary and/or drawings and mandate the use of relevant specialists.

Inclusion of the Child's Rights

There is an evolving trend in the Family Court, to acknowledge what is in a child's best interest, and the capacity of children to hold a right to self-determination⁸⁴. Farson, (1974)⁸⁵, asserted that the child's right to self-determination is fundamental to all other rights. This right must be respected throughout all decision making in the family court, PMH and proposed Advocacy tribunals.

The United Nations Convention on the Rights of the Child⁸⁶, (UNCRC), is not interpreted in practice, as being substantially or adequately implemented into Australian law unless it is specifically incorporated into State legislation. Parliament must uphold its duty and responsibility under its external affairs power in Section 51(xxix) of the Australian Constitution, to officially write the UNCRC, as agreed to and ratified by government in 1989, into State legislation.

Despite an Australian court ruling that ratification of the UNCRC requires ministers to follow its provisions in relevant circumstances (Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh, High Court of Australia, April 7, 1995), the UNCRC is not adequately considered in practice in the Family Court, despite repeated requests from insightful parents.

⁸³ Family Law Act, 60CD, (2a), sourced at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cd.html

⁸⁴ *Gillick v West Norfolk and Wisbech Area Health Authority*, (1986), AC 112; RE:Jamie (2013) FLC93-547, (2013), FAMCAFC 110; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 and RE:Martin (2015) FAMCA 1189.

⁸⁵ Farson, R. (1974). *Birthrights*. New York: Collier Macmillan.

⁸⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 28 April 2018]

The inalienable natural rights of children must be more than a fleeting glimpse of humanity in family courts. They should not be unreasonably modified, repealed, or restrained, and require a congruent and meaningful legal response through the implementation of the UNCRC into State legislation.

The Committee on the Rights of the Child, (2005), requested the State;

(...strengthen its efforts to bring its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies will be always available in case of violation of the rights of the child'.)

Article 4 clearly requests that States implement the rights set out in the UNCRC; *'to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'*

I strongly propose that the UNCRC is ratified into State legislation as an amendment to the Family Law Act, 1975, relevant child protection and PMH or advocacy centre pilot, legislation, to uphold international obligations⁸⁷ and the rights of the child. This will facilitate a more rigorous investigative process and accountability, which can inform more accurate findings. It is also in the *best interests* of the child, and will support review or redress of decisions made.

The UNCRC, Committee's General Comment (No. 12), on 'The right of the child to be heard' clarified the States obligation to review or amend their legislation to provide children with; 'access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress'.

⁸⁷ International assistance is noted as an important obligation under the Convention, as seen in General Comment no.5, by the Committee on the Rights of the Child through the 'General measures of implementation' (2003).

Articles 12-17 articulate rights of participation and self-determination, the right to be heard (including in judicial and administrative proceedings), to freedom of expression, freedom of thought, conscience and religion, freedom of association and of peaceful assembly, to privacy, and access to information, which must be given more weight through all relevant proceedings involving children.

The views of the child are restricted to be ‘*given due weight in accordance with the age and maturity of the child*’. However, current legislation certainly does not congruently respect this where it stipulates, that States; ‘*shall respect the rights and duties of the parents ... to provide direction to the child*’ in the exercise of the right to freedom of thought, conscience and religion’. The rights to freedom of expression and association are not restricted, (except where necessary to protect public order or the rights of others), and should not be in decision making involving a child of reasonable competence, as reiterated in Article 5, as follows;

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Children’s rights principles are often used by NGO’s and organisations involved in planning and implementing programs. This approach is known as ‘Children’s Rights Programming’ (CRP). According to the International Save the Children Alliance (2005)⁸⁸, these programs;

- Integrate the framework and employ the principles of the UNCRC

⁸⁸ The International Save the Children Alliance report, (2005), <https://resourcecentre.savethechildren.net/node/5070/pdf/5070.pdf>

- Work collaboratively and engage with duty bearers, and diverse partners who are identified, supported and held to account.
- Use evidence-based advocacy and critical review of urgent and long term violations with measurable impact of children’s rights.
- Employ participatory, analytical and empowering processes.

A refined PMH model, any proposed advocacy tribunal model, the Family Law Act, 1975, and relevant child protection legislation, must include the child’s rights with a CRP paradigm. This will benefit children through recognising them as whole people with dignity and evolving capacities, with a clear focus on promoting their rights, strengthening accountability, and reducing violations⁸⁹.

NSW Charter of Rights

In my view, it is often overlooked that the UNCRC has already been legislated into NSW State law through the *Charter of Rights*⁹⁰

The *Charter of Rights*⁹¹ is designed so that children in substitute care could receive the benefit of the UNCRC provisions. It is upheld through the Children and Young Persons (Care and Protection) Act 1998, Section 162, (3), (CPA)⁹². This states that the minister **must** ensure compliance by any designated agency and authorised carer to uphold the conferred rights. It states that under Section 162(3), of the CPA Act,

⁸⁹ Thomas, N 2011, 'Children's rights' policy into practice', *Centre for Children and Young People: Background Briefing Series*, no. 4. Centre for Children and Young People, Southern Cross University, Lismore, NSW, Australia.

⁹⁰ <http://www.community.nsw.gov.au/parents,-carers-and-families/for-young-people/are-you-in-care/charter-of-rights>

⁹¹ OCG, (2014), Office of the children’s guardian, Information sheet 1, standard 1., sourced online at; www.kidsguardian.nsw.gov.au/ArticleDocuments/451/Informationsheet1.pdf.aspx on 21/04/2017.

⁹² Section 162 (3) of the Children and Young Persons (Care and Protection) Act 1998, provides that each designated agency and authorised carer has an obligation to uphold the rights conferred by the Charter of Rights

authorised carers and designated agencies are obliged to uphold the rights outlined in the Charter'⁹³as follows;

Section 162 Rights of children and young persons in out-of-home care

- (1) Within 12 months after the commencement of this Chapter, the Minister must prepare a Charter of Rights for all children and young persons in out-of-home care.
- (2) The Minister must promote compliance with the Charter of Rights by all designated agencies and authorised carers.
- (3) Each designated agency and authorised carer has an obligation to uphold the rights conferred by the Charter of Rights.

Accordingly, all designated agencies and authorised carers under the supervision of the NSW Minister, **must** uphold the UNCRC for children and young persons' in out of home care. The enactment of this State legislative provision gives the UNCRC active status for the whole nation, and **must** be applied accordingly in court decision making.

The UNCRC is currently treated in family courts as a mere consideration. This is not consistent with the above claim. A complaint could be requested through this review, to be remedied through the Human Rights and Equal Opportunity Commission, (HREOC), process.

The creation of FACS was stated in an Attorney General commissioned report to be federal initiative to respond to the “*need for Federal leadership in issues relating to children and families*”⁹⁴. The Federal governments' State operated initiative, should possibly be reviewed by HREOC under this objective. If HREOC find practices that are inconsistent with the intent of the Federal initiative to the detriment of the UNCRC, they can facilitate a report to the Federal Attorney General, to table for parliament. Due to constant inquiries and media reports highlighting the inadequacies in the FACS system, The author suggests

⁹³ Sourced online at <http://www.community.nsw.gov.au/parents-carers-and-families/for-young-people/are-you-in-care/charter-of-rights> on 29/04/2018

⁹⁴ Quoted from Australia's combined second and third reports under the Convention on the Rights of the Child, published by the Attorney General's Department, Robert Garran Offices, Barton, ACT, 2600, March, 2003, ISBN 0 642 21063 2

that the Federal government's initiative for State leadership of these issues requires urgent review.

Australia's combined second and third reports under the Convention on the Rights of the Child, (2003), underline an intent that;

“High levels of effort and resources are committed to ensuring that Australian children are able to reach their full potential and that the rights to be found in the Convention are available to them”.

Articles 6, 23, 24, 27, 37 (b)-(d), and 30 of the UNCRC, in particular, need to be reinforced by the Federal AG's department and enforced into improved legislation, and applied in many family court cases.

The Human Rights and Equal Opportunity Commission Act, (1986), gives HREOC the authority to investigate complaints surrounding inconsistencies with the Convention. If conciliation fails, HREOC should inform the Federal Attorney-General, who must table the report in Parliament⁹⁵.

Legislative compliance, risk assessment, accuracy, promotion of the child's voice and rights, provided through the *Charter of Rights*, and UNCRC should be mandated through a compulsory National assessment protocol, which must also apply to the PMH and proposed advocacy tribunals.

There is an internationally recognised obligation to uphold the *Charter of Rights*, so that children benefit from the UNCRC provisions. This will increase rigor and validity of investigations through the inclusion of a child's voice. This must be included in all relevant protective legislation involving youth, inclusive of **all** legislation listed in the

⁹⁵ Australia's combined second and third reports under the Convention on the Rights of the Child, published by the Attorney General's Department, Robert Garran Offices, Barton, ACT, 2600, March, 2003, ISBN 0 642 21063 2

Child protection legislation in all Australian States and Territories, **and** the Family Law Act, (1975).

An age appropriate brochure, highlighting the *Charter of Rights*, such as the one found in FACS, (2015), should be provided to children experiencing the Family Court System, and each child in care, and explained by a legal representative.

A national inclusion of the *Charter of Rights* into Australian legislation through the Family Law Act, will provide a more humanitarian response to children who have experienced violence or other abuse. This in turn will promote the Child's rights, help the child feel heard, and will consequently support resilience and recovery from trauma.

Collaboration, coordination, and integration between the family law system and other Commonwealth, State and Territory systems, including family support services and the family violence and child protection systems;

Collaboration and information sharing between the family courts, State and Territory child protection, and family violence systems can be improved by amending relevant legislation to differentiate and identify the abusive from protective parent. This should also be amended for use within the proposed PMH, and advocacy Centres, as discussed through this paper.

Critics of the PMH have opined that this model cannot offer the weight of a family court order. This may be easily remedied through modification of relevant child protection legislation. Relevant 'failure to protect'⁹⁶ State legislation, such as the Children, Youth and Families Act, 2005, (Section 162)⁹⁷, as seen below, is one example which should

⁹⁶ 'failure to protect legislation', CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 162

Sourced online at http://www5.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s162.html on 26/04/2018

⁹⁷ Children Youth and Families Act, 2005 S.162.

be modified to differentiate between the abusive parent and the protective parent. Simply removing the plural term ‘*parents*’ and replacing with ‘*parent*’, will permit this legislation to support a PMH or advocacy tribunal summary document, with the relevant force of law.

Where it is deemed that there is an *unsafe* parent, through the improved investigative process offered through a refined PMH, relevantly amended failure to protect legislation can give weight to a PMH summary document. This document will outline exactly which parent presents risk. If risk factors persist, and the abusive parent is non-compliant to directions given in the summary document, then failure to protect legislation may be used to support criminal charges to be pursued under State legislation already in force. The State is, after all, the correct jurisdiction to manage child protection. For convenience I will add this statute here;

CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 162

When is a child in need of protection? (1) For the purposes of this Act a [child](#) is in need of protection if any of the following grounds exist—

- (a) the [child](#) has been abandoned by his or her [parents](#) and after reasonable inquiries—
 - (i) the [parents](#) cannot be found; and
 - (ii) no other suitable person can be found who is willing and able to [care](#) for the [child](#);
- (b) the [child](#)'s [parents](#) are dead or incapacitated and there is no other suitable person willing and able to [care](#) for the [child](#);
- (c) the [child](#) has suffered, or is likely to suffer, significant harm as a result of physical injury and the [child](#)'s [parents](#) have not protected, or are unlikely to protect, the [child](#) from harm of that type;
- (d) the [child](#) has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the [child](#)'s [parents](#) have not protected, or are unlikely to protect, the [child](#) from harm of that type;
- (e) the [child](#) has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the [child](#)'s emotional or intellectual [development](#) is, or is likely to be, significantly damaged and the [child](#)'s [parents](#) have not protected, or are unlikely to protect, the [child](#) from harm of that type;

(f) the [child's](#) physical [development](#) or health has been, or is likely to be, significantly harmed and the [child's](#) [parents](#) have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic [care](#) or effective medical, surgical or other remedial [care](#).

S. 162(2) amended by No. 48/2006 s. 12.

(2) For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.

S. 162(3) inserted by No. 52/2013 s. 6.

(3) For the purposes of subsection (1)(c), (d), (e) and (f)—

(a) the [Court](#) may find that a future state of affairs is likely even if the [Court](#) is not satisfied that the future state of affairs is more likely than not to happen;

(b) the [Court](#) may find that a future state of affairs is unlikely even if the [Court](#) is not satisfied that the future state of affairs is more unlikely than not to happen.

In regards to 3a and b, this section does not pass the reasonable man test, is potentially an abuse of process and must be revoked to restore due process and public faith in the interconnected systems.

An amended version of this legislation into a refined PMH, or similar tribunal based State model, will be further simplified, by enforcing uniform 'failure to protect' legislation across all States.

Changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children. The Family Law Council's interim and final reports on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, (2015 and 2016), highlighted the safety concerns regarding separate Federal family Law and State and Territory Family Violence and Child Protection jurisdictions. The Family Law Council reconsidered their recommendation of using one court, (documented in 2002 in their report; *Family law and Child protection*), and inferred that the complexities, inclusive of the shared parenting amendments in 2006, family violence amendments in 2012, and increased FVO's and CPS issues were too extensive for one jurisdiction.

To alleviate this complexity, a direct way to simplify jurisdictional issues and promote safety is to apply, in practice, the 68R⁹⁸ amendment through State and Territory courts, which now have the capacity to share this power with the family courts. This will simplify the court process for victims of violence, with the added potential to end further court action.

It is suggested by the author that the 68R amendment should extend to give application to an automatically corresponding State Child Protection Order. Mandating a uniform legislative statute, such as the Child Youth and Families Act, 2005, (Sec 162)⁹⁹, which is suggested through this paper, (with discussed amendments, differentiating between the abusive and protective parent), to add weight to a parenting order, made through the PMH or advocacy tribunal model. There is legislative provision for this in the Family Law Act, Sec 111CZ, (3b)¹⁰⁰, where the family court may invest State Child Protection with Federal jurisdiction to apply with the 68R amendment if necessary to align State and Federal orders.

To eliminate gaps in the system it is essential that the tribunal models are used, and where relevant, in conjunction with the *First Responder Proposal*¹⁰¹, immediately after family violence and abuse incidents. This will facilitate an improved decision-making risk management process.

Oversight for breaches of Children's Rights

It is important that the Children's Commissioners in each State and nationally, are given legislative power to investigate breaches of

⁹⁸ Family Law Act, (1975), (68R) sourced at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68r.html

⁹⁹ CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 162
Sourced online at http://www5.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s162.html on 26/04/2018

¹⁰⁰ FAMILY LAW ACT 1975 - SECT 111CZ, (3a), Regulations to implement the Convention, sourced online at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cz.html

¹⁰¹ First Responder Proposal Discussed at page 26 of this paper.

children's rights in individual cases, and are given the capacity to recommend and enforce remedial action. At present, Commissioners are informing parents that they are limited to only resolving systemic issues. All Children's Commissioner roles also require evaluation and review, of outcomes for improved progress towards implementing children's rights.

Further, an *Office of Youth Affairs* in all States is required and should be a much more active central coordination agency, to prioritise the correct application of policy and used as a monitoring mechanism in relation to young people. All departments must have the capacity to use screening powers of all opinion and decision makers, including family court consultants and child protection workers. This may be one avenue to seek and resolve complaints about investigations and services for young people.

Royal Commission into the Family Law System

To help facilitate the above mentioned issues, it is essential that a Royal Commission is conducted on how the interconnected State and Federal Systems can better manage issues, relating to the safety and well-being of children. A Royal Commission into the Family Law System has been requested through the unity of many NGO's and Charities as seen in the Bravehearts media release¹⁰² in 2017. In this release Ms Hetty Johnston most accurately stated, in reference to the past Chief Justice;

"Diana Bryant continues to deny that systemic issues within the system are putting children at serious risk. This culture of denial must shift, and new leadership which focuses on the best interests of the child cannot happen soon enough."

¹⁰² Bravehearts media release on 29/09/2017 sourced at <https://bravehearts.org.au/family-law-royal-commission-unites-groups/> on 01/05/2018.

I strongly suggest that the interconnectivity of the Family Law and Child Protection Systems and the implementation of the UNCRC, are prioritised through the Terms of Reference of any such Royal Commission.

An opportunity for a less adversarial system

The adversarial court system does not support the safety of families or resolve matters in the best interests of children. The PMH and proposed advocacy models, provide opportunity for a less adversarial resolution of parenting and property disputes.

Laing, (2000)¹⁰³, states that victims of violence may be re-victimised by the legal system, while attempting to escape the abuse. The financial and emotional damage inflicted through poor systemic management of family violence, is often visible through collateral homeless, mental health and societal issues. Charities such as Anonymous X¹⁰⁴, a homeless support service, Sole Fathers and Sole Mothers United¹⁰⁵, Berry Street¹⁰⁶ and numerous other charities and NGO's, carry this burden. These issues often flow on to effect the children's optimal development, including education and well-being.

The author observes that western family court and child protective practices are struggling globally, with similar complex issues surrounding the identification and protective management of family

¹⁰³ Laing, (2001), Director Australian Domestic and Family Violence Clearinghouse, *Domestic Violence-Emerging Challenges*, Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses convened by the Australian Institute of Criminology, Canberra.
http://www.aic.gov.au/media_library/conferences/outlook4/laing.pdf

¹⁰⁴ Anonymous X an NGO sourced at <https://www.facebook.com/AXMelbourne/> 16,682 members as at 26/04/2016.

¹⁰⁵ Sole Fathers United, https://www.facebook.com/pg/SoleFathers/about/?ref=page_internal, a not for profit community group with over 6143 followers as at 26/04/2017. And 9 Sole Mothers United, sourced at <https://www.facebook.com/Sole-Mothers-United-1387483861472202/> on 26/04/2017, an online community support group

¹⁰⁶ Berry Street provision of pilot program teaching educators how to support trauma affected students in the northern suburbs of Victoria, 2017. Sourced at <http://www.childhoodinstitute.org.au/EducationModel> on 26/04/2017.

violence. The repercussions of the western family court parental separation paradigm have been echoed through Sir Paul Coleridge's observation¹⁰⁷ that,

“Families do not recover from the fundamental shock it administers”.

This High Court Judge also stated that;

“Children dragged into such cases may never recover from the emotional upset, and the cost to society of clearing up the mess is calamitous”.

It is reasonable to state that the current western system is adversarial. In complex matters involving family violence, it has on occasion, proven to be deadly.

The PMH discussed above is an excellent emergent system which offers an inquisitorial remedy for many of the gaps in the system, identified through the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*¹⁰⁸.

Mechanisms for reviewing and appealing decisions

Accountability and Complaints Process surrounding family reports

Concerns about professional practices that exacerbate conflict and fail to accurately identify the paramount risks and issues, can be addressed through improving the accountability and complaints process. It would be beneficial to remove court conferred immunity to promote accountability and review of practice. Specialist expertise, and mandated transparent standards, with registration accountable to the Australian Psychological Association and AHPRA, would also improve the practice of family consultants, and report writers.

¹⁰⁷ Phillips, M, (2012), *Hallelujah, A Family Court Judge has told the truth about the damage divorce wreaks on children*, sourced at <http://www.dailymail.co.uk/debate/article-2137076/Hallelujah-A-family-court-judge-toldtruth-damage-divorce-wreaks-children.html> on 30/04/2017

¹⁰⁸ *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, submission 8, sourced at <https://www.apf.gov.au/fvlawreform>, on 20/04/2018

The current process regarding the quality of reports constructed by family court report writers, is grossly inadequate. As these reports are heavily weighted in contributing towards the judges' life altering decision, it is imperative that they are accurately informed, interpreted and neutrally presented to the judge. If this process is questioned then in the interests of justice and procedural fairness, a transparent and accessible complaints and accountability process must be available to court participants during proceedings, without leave of the court. The latter should not be required as Judges are not experts in the assessment of family consultant practices.

There is an urgent need for improved mandated training to promote specialist expertise in report writers. In a submission to AHPRA by a representative of the Australian Psychological Society, (APS), it was noted that "*It is well recognised that the family court arena poses specific challenges that are outside the expertise of most psychologists*"¹. It may be beneficial to mandate that voluntary work experience in a family violence or substance abuse shelter or similar, to help report writers gain valuable insight into the nuances of these issues.

It is appropriate that transparency, accountability, review and improved oversight is facilitated through the standard health model used outside the family court where psychologists are required to be registered. This model has been developed to protect the public. It aims to ensure that sure that; '*only practitioners who have the skills and qualifications to provide safe care and psychological services to the Australian community are registered to practise in the psychology profession*'.² It follows that to exempt report writers/family consultants, from the condition of registration, puts public safety at risk.

¹ Submission by the Australian Psychological Society, (APS), APS Family Law and Psychology Interest Group, on behalf of members, (2011), to the Senate Standing Committee on Finance and Public Administration References-Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency, (AHPRA)

² As stated on the psychology board of Australia webpage sourced at <https://www.psychologyboard.gov.au/registration.aspx>

This process could assist in the promotion of evidenced based decision making, through mandating specialised training. It would minimise the impact of a practitioner's pre-conceptions and prejudices, such as, (for example), the belief that many parents are vexatious or are fabricating allegations for advantage during disputes. (This is contrary to evidenced based research presented by the Australian Institute of Family Studies, which highlights an analysis of 10 years of sexual assault reports found that the actual figure of false reports to be around 2-10%. The higher percentage included inconsistencies in data collection, including police reports where crime was detected but not proceeded with). This process could help report writers understand how to differentiate between vexatious alienation and parents who genuinely withhold to protect. This is a critical issue which urgently requires a specialised, evidenced based focus.

Report writer complaints should be impartially screened by a professional with forensic investigative experience, and specialisation into the issues raised, in an independent and separate complaints process to court proceedings, through the APS and AHPRA.

Full transparency should be given to clients of report writers with an absolute understanding conferred to the report writer's clients, of their obligations to the court. Due to the plethora of report writer issues raised in the recent parliamentary inquiry into a better family law system for victims of family violence, it is essential that all contact with the report writer/consultant is audio recorded and provided to the client at no cost to the parent. A more impartial process for parents, inclusive of an option to use an external psychologist, supports that the administration of justice is not brought into disrepute through perceptions of bias.

A risk management approach should be used, where subjects of complaints are stood down during proceedings. This is a similar process to that reasonably employed in many professions. The government has a duty of care to insist that accepted professional practice is upheld.

The author strongly recommends that the APS, AHPRA and anyone conducting a formal investigation into report writer conduct, are exempt from section 121 under the Family Law Act, (1975), and any relevant legislation in the family court rules, (2004)¹¹⁰. This will facilitate rigor in their investigations of court report writers, and anyone performing a similar function. AHPRA and the APS must also be given automatic powers to investigate family consultants during proceedings, as their reports absolutely have potential to influence the direction of the case.

There is a genuine requirement for oversight of psychological services employed in the family court and child protection system. In *Seymour v Psychology Board of Australia* (2012), VCAT 1942, a review of a decision of professional performance and standards, under the Health Practitioner Law, (Vic) Act, (2009), it was found that conflict of interest was a factor in services provided. Reported misconduct, lack of specialist expertise and verification, has often influenced interim orders to the detriment of truth and safety. It is equitable that litigants are offered due process and an avenue for remedy.

Accountability and sanctions are a community expectation and should be written into legislation for efficient reform. This request is in the interests of natural justice, to facilitate decisions that are truly in the best interests of the child, which contribute towards judgements which reduce the risk of violence and abuse.

We support *HelpFamilyLaw's*¹¹¹ views that the Australian Health Practitioner Regulation Agency, 'AHPRA', must efficiently improve

¹⁰⁹ Family Court Rules, (2004) http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/sourced online on 28/04/2017

¹¹⁰ sourced via collaboration with founder Ms A. Kelly *HelpFamilyLaw* <https://helpfamilylaw.net/on> 07/05/2017

their complaints process. *HelpFamilyLaw* is a leading advocacy, which independently assesses and critiques family reports. It is strongly recommended this respected agency or similar, is used as an intermediary step, prior to AHPRA investigations.

This author adds that *AHPRA* urgently must implement a combined family violence advocacy and abuse department, integrated with trauma trained lawyers, impartial investigators, and relevant liaison with independent experts, such as *HelpFamilyLaw*. These must collectively critically analyse and conduct the process of court report writer/consultant complaints, and help facilitate review and remedy.

This collective must regard high transparency and accountability with sanctions taken against below standard court report writers. This must be inclusive of any professional performing a similar function, or in wilful compliance with the report writer, inclusive of independent children's lawyers.

If report writers knowingly use inadequate reports to support their contention, and do not highlight disagreement with poor practice or unsubstantiated conclusions, they must be made accountable and sanctioned and provide a compensatory scheme developed for litigants, if negligence, bias, procedural errors or any misconduct is found.

The current status quo regarding the absence of scrutiny, capacity and methodology during proceedings, suggest that there appears to be absence of acceptable community standards, accountability and ethics, which would not pass any objective *reasonable man*¹¹² test. In the interests of restoring public faith in the family court justice system all court conferred immunity pertaining to family court report writers and any person facilitating a similar function, inclusive of child protection workers, must be revoked.

¹¹¹ Law Teacher, the essay professionals, *Negligence-breach of duty*, sourced at <https://www.lawteacher.net/lecture-notes/tort-law/negligence-breach-lecture.php> on 28/04/2017

It is not acceptable or constitutional that report writers are afforded court conferred immunity as they are not judicial officers. Their anonymity must also be revoked as these two factors limit due process and accountability where misconduct occurs. It is also pertinent that the Family Court Rules¹¹³ are amended to remove immunity and anonymity and to include permissions to record all interviews with family consultants and reporters, for transparency, validity and accuracy throughout hearings, and to protect the legal rights of parents.

Families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness

An integrated services approach is proposed through the *First Responder Proposal*¹¹⁴ where relevant, in conjunction with the State PMH and other tribunal advocacy models proposed. This can improve the safety and assistance required by client families with complex needs.

A critical question involving cases with complex needs, is whether these factors affect parental capacity to provide for the *best interests* of the child. Parental support or resolution of current or past substance abuse issues are pertinent variables, and surrounding risk is often not adequately considered through best interests considerations. The risks to the child's best interests posed by these influencing factors, would be best determined by independent specialists, with insight into the particular type of substance abuse or mental health condition under scrutiny. It is not reasonable or safe that legal personnel offer subjective opinions in relation to these issues.

The family and children's courts have failed in their opportunity to adequately protect families from violence. The health and safety of victims of violence has not been adequately prioritised or interpreted

¹¹² Family Court Rules, (2004) http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/sourced online on 28/04/2017

¹¹³ First Responder Proposal, as described from page 26 of this paper.

through potentially protective legislation. This is partially due to the lack of independent specialist expertise, accountability, and language, affording discretion, used throughout much Family Law legislation. This discretion seen in the use of the word *should* instead of *must*, throughout the *Principles*¹¹⁵ and *Standards*¹¹⁶, has left victims unprotected through orders.

Access to information about family law and family law related services, including family violence services, can be improved through the development of a funded framework, to assist active online advocacy groups to fulfil this need.

A developing trend for self-represented and legal aid recipient parents, is that they join online community support groups. These are administered by insightful dedicated volunteers; many have specialist capacity to assist with complex issues surrounding the family court. These groups often permit much advocacy, empathy, mental health and social support, and commonly, also access to further support services and legal information. It would be helpful if the government substantially funded a central advocacy community, where parents going through separation, could be further supported with required expertise, and where accuracy and standards could be monitored. Notable groups who currently highly collaborate, and have actively led this online advocacy are the Child Protection Party¹¹⁷, (South Australia). The Australian Paralegal Foundation¹¹⁸,(Victoria), Bravehearts¹¹⁹ (Queensland), the National Child Protection Alliance¹²⁰ and F.A.C.A.A¹²¹, (New South Wales).

¹¹⁴ Bryant, et al, (2016), The Family Violence Best Practices Principles, 01/12/2016, revision of 3.2, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violencebest-practice-principles>, sourced online on 14/04/2017. ISBN 978-1-920866-02-0

¹¹⁵ Australian Standards of Practice for Family Assessments and reporting, February 2015.

¹¹⁶ Child Protection Advocacy stream of the Child Protection Party. www.childprotectionparty.com.au

¹¹⁷ Australian Paralegal Foundation, (APF), *Promotion of legal research and advocacy*. D.Jovica Chairman, M.Hudson Secretary/Educator, Woody Sampson Treasurer, sourced at; www.para-legal.org.au on 01/05/2018.

¹¹⁸ Bravehearts <https://bravehearts.org.au/>

¹¹⁹ National Child Protection Alliance, NCPA, Chair Nikki Dean, Vice chair Charles Pragnell, <http://www.ncpa.org.au/>

These groups have provided a life-line, in particular, for many self-represented parents. Legal Aid does not fill this need as they provide legal support, yet do not manage welfare needs, inclusive of mental health support, the benefits of informed social connection, or nuanced awareness of ground level issues. These online advocacy services address and streamline critical holistic needs commonly observed, of self-represented parents and legal aid recipients that the system does not currently remedy. It is important that further groups are formed to cover all States and Territories. It is pertinent that the Federal and State governments seriously consider funding and provide assistance to the vital network of large advocacy groups to further develop this critical support service.

Issues Surrounding the Current Management of Family Violence and Abuse in the Family Court

It is critical that the management of family violence and abuse is informed through evidence based research which is applied by decision makers. This will promote safety, help differentiate between a protective and abusive parent, promote an understanding of the importance of listening to child disclosures and their voice, and minimise risks caused by persisting myths such as the misappropriation of alienation theory. These factors will support an improved risk management approach.

An AIFS longitudinal study¹²² reported that approximately **20%** of parents were initially worried about their own and their children's safety as a result of continued contact with the other parent. The recent *parliamentary inquiry into a better family law system to support and protect those affected by family violence*¹²³, has highlighted that parents

¹²⁰ Fighters against child abuse Australia, <http://www.facaaus.org/>

¹²¹ AIFS, (2014), Australian Institute of Family Studies in the Longitudinal Study of Separated Families, *Post-separation parenting, property and relationship dynamics after five years*. Canberra: Attorney-General's Department. Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J.

¹²² Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 8, sourced at

cannot realistically expect appropriate support from the State to substantiate their claims once they enter the Family Court jurisdiction. The AIFS research¹²⁴ demonstrated that 6.2% of parents still held safety concerns during a third survey, 5 years after separation, (wave 3), and that 2.3% of fathers and 7.6% of mothers, had attempted to limit contact with the other parent with reports of safety concerns at wave 3 in their study, (AIFS, 2014¹²⁵).

Freda Briggs, AO, Emeritus Professor in Child Development, University of South Australia, summarised her research involving cases of abuse and stated that; *“Quite simply state services don’t want to get involved when there is a case in the Family Court or a court order exists”...“The consequence is that if no one at state level is confirming that abuse is occurring, the mother is labelled as delusional, suffering from Borderline Personality or Compulsive Disorders – she is then ordered to have treatment (even though she usually isn’t mentally ill) and the children are handed to the father, who they reported for abusing them”*¹²⁶.

Despite the 67Za provision under the Family Law Act, 1975¹²⁷, that the State may investigate abuse and family violence, such claims are not prioritised. This is largely due to the uncertain residential arrangements involved in the family court proceedings and uncertain time period of child protective orders¹²⁸. This action is also hindered by the reluctance

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

¹²³ AIFS, (2014), Australian Institute of Family Studies in the Longitudinal Study of Separated Families, *Post-separation parenting, property and relationship dynamics after five years*, (table A6 in the appendix). Canberra: Attorney-General’s Department. Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J. (table A6 in the appendix).

¹²⁴ ‘ibid’

¹²⁵ Dr. Freda Briggs The Silenced Epidemic Interview, Interview by Brook Hunter, sourced at <https://www.femail.com.au/dr-freda-briggs-the-silenced-epidemic-interview.htm> on 03/05/2017

¹²⁷ Family Law Act, 1975, 67za sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s67za.html on 01/05/2017

¹²⁸ Family Law Council, Prof. Patrick Parkinson, paper presented at the child sexual abuse; *Justice response or alternate dispute resolution conference*, convened by the Australian Institute of Criminology, ,

of State magistrates to invoke their protective powers of 68R in the Family Law Act. Consequently family violence and abuse issues are investigated by inexperienced, inadequately educated court personnel.

The Full Family Court of Australia, held that “... *if there were a positive finding of abuse, only in the most extraordinary cases would contact with the perpetrator not be seen as exposing the child to an unacceptable risk of abuse. It was also held that supervised contact may still provide an unacceptable risk of disturbance, whether physical, emotional or psychological, to a child who is compulsorily brought into contact with a parent who has sexually abused him or her, or who the child believes to have sexually abused him or her, and the court has the obligation to protect children from such harm, (B and B, 1993)*¹²⁹ .

Freda Briggs, AO, Emeritus Professor in Child Development, University of South Australia. described that there is a need to either remove cases of abuse from the family court or increase the expertise of family report writers and remove the position of the independent children’s lawyer, or else the prospects for involved children will be bleak, “..as there is a high correlation between sexual abuse and later mental illness, suicide, drug abuse, relationship breakdown and of course some of the children will become sex offenders and create another generation of victims¹³⁰”. Freda discussed sexual abuse in this instance; however similar concerns apply to family violence investigations. There is a clear concern that an accurate assessment surrounding protective orders are necessary for the safety of children in family court matters.

Adelaide, 2003. Sourced at http://www.aic.gov.au/media_library/conferences/2003-abuse/parkinson.pdf on 01/05/2017

¹²⁹ (B and B, 1993), as discussed by Author Suzanne Jenkins, private practice, *Are Children Protected in the Family Court? A Perspective from Western Australia*, Paper presented at the Child Sexual Abuse: Justice response or Alternate Resolution Conference, convened by the Australian Institute of Criminology, Adelaide, May 2003, (Address for correspondence: PO Box 300, Scarborough WA, 6922; s_jenkins@iprimus.com.au).

¹³⁰ Dr. Freda Briggs *The Silenced Epidemic Interview*, Interview by Brook Hunter, sourced at <https://www.femail.com.au/dr-freda-briggs-the-silenced-epidemic-interview.htm> on 03/05/2017

The most dangerous high risk cases are where contested cases are used to control and punish the protective parent, as an extension of violence by an abusive parent. These cases need to be managed much differently to consented proceedings, if we are to efficiently protect against family violence.

The family courts are in current crisis, because current practice often regards myths and opinions, over sound research and verifiable practice. Current protocol and culture limits the meaningful identification and interpretation of the truth and risks of the matter.

To remedy this situation it is important that reforms end the practice of unsupported and persisting myths, which colour decision making. All family court training surrounding the management of family violence and abuse must reinforce sound practice, and not persisting myths which have infiltrated its culture. One in particular, is the myth of false claims surrounding alienation, which have coloured decision making and catalysed many unsafe judgements.

A Persisting Myth Surrounding Alienation

A persisting myth is that many parents make false allegations of abuse to vexatiously prevent contact with the other parent. The culture of the family court needs to change and understand that evidence based research¹³¹ supports that in the vast majority of cases, protective parents do not alienate, they protect. However due to court practice of accepting unsound subjectivity, myth and a lack of expertise in the nuances of violence and abuse, (in particular, coercive control), the inferences of alienation are the most successfully manipulated approach to facilitate an abusive parents secondary system abuse. This practice greatly

¹³¹ Australian Institute of Family Studies sourced at <https://aifs.gov.au/publications/true-or-false-contested-terrain-false-allegations/export-on-02/05/2015> The AIFS highlighted an analysis of 10 years of reports of sexual assault (Lisak et al), and found the actual figure of false reports to be around 2%-10%. The higher percentage included inconsistencies in data collection, including police reports where crime was detected but not proceeded with.

escalates risk and is consistently harmful to the best interests of children.

It is the perpetrators of abuse who use the family court system to endorse domestic violence by proxy, against the protective parent. Decision-makers in family court do not have specialist expertise in psychopathic behaviours and trauma responses, to differentiate between which parent is protecting, and which is preventing contact to continue coercive control. In this scenario an independent family violence and child developmental specialist, is best place to identify the accuracy of allegations.

Promoters of parental alienation syndrome, and watered down versions of such, presented to the court under the guise of *alienation*, have manipulated the American Psychiatric Association's DSM-5 inclusion of the *parent-child relational problem* symptoms to falsely support this discredited theory. For example, the child's perception of an alienated parent "may include negative attributions of the other's intentions, hostility toward or scapegoating of the other, and **unwarranted** feelings of estrangement."

Using the DSM-5 definition fails to fit the behaviour of a protective mother as this parent is acting on reasonable belief often with supportive child disclosures. Therefore the estrangement is not *unwarranted*.

In *R v KC*, Justice Sheppard adopted these words¹³²: "*The parental alienation syndrome (PAS) is a childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. **When true parental abuse and/or neglect are present, the child's animosity may***

¹³² Baylis, M., (2016), Parental Alienation Legal Definition: A form of emotional child abuse where a custodial parent belittles or vilifies the other parent to the child
<https://madisonelizabethbaylis.wordpress.com/2016/08/09/parental-alienation-legal-definition/> sourced on 22/04/2018

be justified and so the parental alienation syndrome explanation for the child's hostility is not applicable."

It is noted that this Justice used the term PAS instead of alienation. It is widely understood that the term PAS is not accepted to be credible to be used in our court system. Canberra Family Law stated that;

*"The concept of "parental alienation" remains a controversial subject in family law in Australia, and is sometimes confused with "Parental Alienation Syndrome". While the former is regarded as a valid concept, the latter has been widely discredited and is not considered credible in our court system"*¹³³.

Parental alienation syndrome and alienation is used interchangeably in culture and practice, throughout the family courts, and inferences of such, are equally unsound when applied to a genuinely protective parent.

Alienation is defined as an unwarranted and unjustified denigration of the other parent. It must never be used by unscrupulous litigants as a counter strategy, against a genuinely protective parent. This unethical and common perpetrator defence misleads the court, and catalyses determinations that escalate risk without adequate safeguards. However, in practice, this occurs so much that protective parents are often warned against disclosing abuse. Any legal practitioner found to be falsely enabling such unprofessional and unsound practice, should have his/her licence reviewed for endorsing this dangerous misconduct.

¹³³ Preston, J, (2015) sourced online at <http://www.familylawincanberra.com.au/canberra-family-law-parental-alienation-vs-parental-alienation-syndrome-whats-the-difference/> on 22/04/2018.

Reforms must support differentiation between a protective parent that does not allow contact to prevent further harm, and a perpetrator who alienates for control;

A predictable pattern has evolved in the family courts where protective parents who allege abuse and family violence, (often with substantial collaborative evidence), are then accused with claims of coaching and alienating the children. Truth is ineptly sought through the appointment of a family report writer and often an independent children's lawyer, (ICL). These professionals are not specialist trauma experts.

On a regular occurrence it only takes approximately a one hour interview with each parent and child, to determine that the abuse did not occur, as the child did not disclose the abuse in the artificial court environment with a stranger.

Standard Family Court practices encourage parents to cooperate with each other. Any perceived alienation is regarded as poor co-parenting, deemed to be so offensive it often justifies a change of residence, often straight to the abusive parents home.

The protective parents' mental health status is often depreciated, and abuse claims are met with novel diagnosis of borderline personality disorders, depression, bipolar, etc., which are commonly inferred or cemented. The ICL rarely meets with the children. They are not adequately trauma informed or insightfully trained in the effects of family violence on child development and behaviour, and usually concur with the family reporter. This results in judgements which are not protective.

This pattern has been highlighted in past submissions¹³⁴ and is so prominent in the family courts that many lawyers are often quietly

¹³⁴ National Child Protection Alliance, NCPA, (2015), Charles Pragnell-Chairman, web; <http://www.ncpa.org.au/>, submission to the Family Law Council Inquiry; Families with complex needs and the intersection of the family law and child protection systems, Sourced at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/FLC-submissions/National-Child-Protection-Alliance.pdf> on 01/05/2017

informing their clients not to disclose abuse. It is shocking that the concerns previously raised through the 28 year advocacy of the National Child Protection Alliance, NCPA¹³⁵ (involving a body of academics, researchers, child protection experts, child advocates, lawyers, judicial officers, and protective parents), are still unresolved. The ignorance of surrounding issues has directly contributed to the current crisis and inability to manage family violence and abuse in the family court systems.

Perpetrators alienate for control and to 'win'. They manipulate the court system to inflict secondary abuse on the parent who they abused during the relationship. The perpetrators are often narcissistic and lack empathy. They may present in a more socially acceptable calm manner than the abused parent, as they have finely tuned their skills to mislead their audience. An appropriately detailed questionnaire, in conjunction with an interview with a skilled neuroscientist and family violence, abuse or trauma expert, using an insight of evidence based research, will help to flag this personality type.

The parent who has been abused by the perpetrator may be anxious, or exhibit signs of a trauma response throughout interviews. This can include the fight, flight, freeze response. An independent specialist, who understands healthy and unhealthy behavioural traits, should be included in all consultations with each parent to identify behavioural traits that indicate risks. This expert can then support appropriate safeguards.

Understanding the misappropriation of alienation

Under colour of law, an endorsement of the meaning of PAS has been permitted to be applied to the term alienation in our family courts. Parental Alienation is the act of a parent in trying to alienate the other parent where as the discredited PAS theory, describes the negative effects that PA has had on the children as a syndrome, and it is only

¹³⁵ 'ibid'

then that they are suffering from Parental Alienation Syndrome. The problem with family courts is that they treat PA as if it presents the elements of the discredited syndrome of PAS.

The reasons PAS was discredited are significant, and should be understood by all decision makers. This hypothesis was invented by American psychiatrist Dr Richard Gardner. He claimed that parental alienation is caused by parental behaviour which apparently causes a supposed subsequent disorder in the child.

Gardner's (1999), spiteful fable of the 'parental alienation syndrome'¹³⁶, (PAS), which is not supported by research, has been used to support the concept that this type of alienation, (and watered down versions of its inferences, such as *alienation* in practice), is used through methods such as fabricating allegations for advantage in disputes. This is NOT supported by the reality and research, in most cases where domestic violence and abuse allegations are claimed by the parent accused of alienation. The author states that where the estrangement is a protective measure, it is reasonable to state that this protective parent is acting in the best interests of the child.

Gardner controversially argued that in 90% of cases women maliciously brainwashed their children into manufacturing allegations of sexual abuse based on his subjective opinion. Gardner's work has since been widely discredited as a 'junk science'. His claims that paedophilia was the norm and should be accepted, has also contributed to an accepted consensus among his peer of his lack of integrity and credibility.

Gardner made these claims despite accepted research to the contrary highlighting that if a child makes disclosures, that child is overwhelmingly statistically telling the truth. Research confirms that children rarely lie about or imagine sexual assault. In 98% of cases their

¹³⁶ Parental Alienation Theory, (PAS), The Judge's Journal, American Bar Association, sourced at http://www.americanbar.org/publications/judges_journal/2015/summer/parental_alienation_syndrome_30_years_on_and_still_junk_science.html on 02/05/2017

statements are found to be true, (Dympna House, 1990¹³⁷). Bala and Schuman (1999)¹³⁸, found that only 1.3% of mothers' allegations of abuse by their children's fathers were deemed by civil court judges to be intentionally false, in contrast to 21% of cases in which fathers had made such allegations against mothers. Meier, (2009)¹³⁹, reports that it is a mistaken belief that mothers' allegations in child custody proceedings that fathers have sexually abused their children are usually false. The National Domestic and Family Violence Bench Book, released by the Australasian Institute of Judicial Administration, also informs the judiciary that; "*the making of false allegations is much less common than the problem of genuine victims who fail to report abuse*".

It would be beneficial if all decision makers involved in cases with abuse allegations could understand the implications of this research, so they could act more protectively. It follows that if a child is making consistent disclosures to independent professionals, then that child must be believed, and *safeguards*¹⁴⁰ must be implemented by the court.

Despite the exceptionally high probability that the child is making a true disclosure, 31% of Australians would not believe children if they reported that they were being abused. (Australian Childhood Foundation, 2006¹⁴¹). This figure appears to be much higher with court personnel, if the norm is dictated by Justice Collier's infamous misleading remarks¹⁴²; "*Allegations of child sexual abuse are being increasingly invented by mothers to stop fathers from seeing their children*", and those made by perpetrators themselves.

¹³⁷ Dympna House, (1990), Facing the unthinkable. Haberfield, (NSW). Dympna House. Also; children's statements were found to be true, in 98% of all child abuse cases reported to officials., (NSW Child Protection Council, cited in Dympna House, 1998)

¹³⁸ Bala, N., & Schuman, J. (1999). Allegations of sexual abuse when parents have separated. *Canadian Family Law Quarterly*, 17, 192–243.

¹³⁹ Professor Meier. J.S., & Dickson, S., research; "Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation," George Washington University Law School, research paper, 2017-43, sourced at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999906

¹⁴⁰ Documented through this paper.

¹⁴¹ Australian Childhood Foundation, (2006), Out of sight-out of mind. Ringwood, (Vic).

¹⁴² Alexander, Harriet, 6th July, 2013 Justice Collier's interview, sourced at <https://www.smh.com.au/national/false-abuse-claims-are-the-new-court-weapon-retiring-judge-says-20130705-2phao.html> on 23/04/2018.

These statistics are critical and highlight one of the major gaps in the current family law system; 98% of children make true disclosures, yet 31% of Australians would not believe the children. The overall culture of Family Court in its paradigm of abuse victims, clearly needs to catch up with reality.

The myth of false claims has coloured the discretion employed throughout a majority of contested cases. These are part of a cultural paradigm which supports the ability of abusive parents to commit further family violence through access. Collier's assumption, and those of other court personnel with underlying bias, puts the safety of children at risk by ignoring red flags and promoting access arrangements which favour an abuser and provide a high risk level of contact with the child. Such views encourage the silencing of protective parents and children, regarding reporting family violence and abuse. This has resulted in orders which are not adequately protective.

Collier's view is not aligned to research done by the Leadership Council in the USA, which has consistently shown that false allegations of sexual abuse are rare and that children tend to understate rather than overstate the extent of any abuse experienced.

Another common term many Family Court Report Writers use against protective parents is *enmeshment*¹⁴³. Here it is inferred that a protective parent is limiting the healthy functioning and compromises the individual autonomy of the child. It is reasonable to suggest that the protective parent is being appropriately vigilant, a common response to exposure to violence. These ridiculous labels need to cease and the Family Court needs to stop clutching at myths and opinions, and start using sound trauma-informed research if it wants to get serious about managing family violence and abuse appropriately.

¹⁴³ Enmeshment as sourced at <http://psychologydictionary.org/enmeshed-family/> on 02/05/2017

Goldstein¹⁴⁴,(2017), stated that; *“the myth of protective parents making false claims of abuse is not supported in verifiable research, as supported in the Ace¹⁴⁵ and Saunders’ research^{146”}. Goldstein continues; *“Court professionals were taught that contested custody involved “high conflict cases in which the parents were angry with each other and acted out in ways that hurt their children...these mistaken assumptions have been disproven by highly credible scientific research, but most courts continue to rely on these outdated and discredited practices that place children in jeopardy” and “The lack of training in post-separation violence leads courts to assume the risk ends when the relationship ends, and that older incidents of abuse do not matter. The lack of training in risk assessment means that courts have trouble recognizing the danger that victims face”¹⁴⁷.**

Goldstein¹⁴⁸, discussed that the discredited parental alienation syndrome, (PAS), and any watered down version of its name, limits the family court from protecting children from violence. He stated that; *“PAS by any name has caused courts to fail to believe true reports of abuse and therefore place children in jeopardy”...and “Significantly, PAS is not used for any purpose other than helping abusers win custody or defeat reports of abuse”.*

Goldstein strongly promoted the quality and reliability of the replicated, medically sound, ACE study¹⁴⁹, (adverse childhood experiences), and Saunders’ study¹⁵⁰, which combined focus on how domestic violence

¹⁴⁴ Goldstein, 2017 sourced at http://www.huffingtonpost.com/entry/the-safe-child-act-when-a-parent-doesmore-harm-than_us_58b84bc1e4b051155b4f8c7f on 02/05/2017.

¹⁴⁵ Sourced at https://www.cdc.gov/violenceprevention/acestudy/about_ace.html on 01/05/2017

¹⁴⁶ Saunders et al., *Saunders study*, U.S dept of Justice, (2012), sourced at <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> on 01/05/2017

¹⁴⁷ Goldstein, 2017 sourced at http://www.huffingtonpost.com/entry/the-safe-child-act-when-a-parent-doesmore-harm-than_us_58b84bc1e4b051155b4f8c7f on 02/05/2017.

¹⁴⁸ Barry Goldstein, Why Family Courts can't protect children, ACE v PAS, National organisation for men against sexism, (Nomas), Task Group Presentation on Child Custody, sourced at <http://nomas.org/family-courtsprotect-children-ace-vs-pas/> on 01/05/2017

¹⁴⁹ Sourced at https://www.cdc.gov/violenceprevention/acestudy/about_ace.html on 01/05/2017

¹⁵⁰ Saunders et al., *Saunders study*, U.S dept of Justice, (2012), sourced at

affects children and the management by the court systems, over PAS theories.

He acknowledged that alienating behaviour is *bad* parenting, (if separation is promoted *without safety concerns*), however stated that alienation should not be managed through the courts as a diagnosable mental illness, and to treat it as such ignores the real issue of the abuse allegations. He highlighted that judges presented with this information had been favourable to a more sound researched based approach. Goldstein urgently requested the court system to adopt a credible research approach, he stated ;

*”The courts must develop practices to review patterns to the outcomes of their cases so they can know when common approaches are failing to protect children. **They also need to work with professionals working in the outside world and not just custody who can make the courts aware of valuable new research and approaches.** We now have a specialized body of knowledge and expertise concerning domestic violence and child abuse. The failure to access this information is not neutral. The failure creates a bias in favour of abusers, makes it harder for victims to leave and shortens the lives of our children. No court that gives credence to PAS and ignores ACE research can accomplish their job of protecting children”.*

The promotion of determinations significantly informed through the discredited PAS theory, and watered down inferences through other labels, is a major gap in the system which limits effective court driven family violence reform.

It is pertinent that reforms increase the use of evidence based research, and promote verifiable information and improved methodology to inform family reports, and promote protective judgements.

The Australian Institute of Family Studies, (AIFS),¹⁵¹ highlighted an analysis of 10 years of reports of sexual assault (Lisak et al), and found the actual figure of false reports to be around 2%-10%. The higher percentage included inconsistencies in data collection, including police reports where crime was detected but not proceeded with. Protective parents are often not believed because the police did not pursue or achieve a conviction. However, considering only 17% of disclosures of sexual assault resulted in a conviction in 2003, according to the Queensland Crime and Misconduct Commission¹⁵², and 90% of reported sex assaults do not end up in convictions, according to Fitzgerald, (2006)¹⁵³, this should not be relied upon as a substantial indicator of a ‘true’ allegation.

An endorsement of Gardner’s PAS syndrome colours the discernment of many family court judges who are untrained to make an educated psychological assessment. In the ‘Reasons for Judgement’, (E and R, 2001)¹⁵⁴, the judge stated; *‘It may well be that the concept of parental alienation is the subject of ongoing debate between psychologists. In my view, whether there is or is not a syndrome described as “Parental Alienation Syndrome” is not the critical issue. The critical issue is whether in this particular case, the wife by her conduct consciously or unconsciously has, or is likely to alienate the child from the husband so that the relationship between them, if not destroyed, has been or will be severely damaged’*”.

¹⁵¹ Australian Institute of Family Studies sourced at <https://aifs.gov.au/publications/true-or-false-contestedterrain-false-allegations/export> on 02/05/2015

¹⁵² Queensland Crime and Misconduct Commission, (2003). Seeking Justice: An inquiry into the handling of sexual offences by the criminal justice system. Brisbane: Crime and Misconduct Commission.

¹⁵³ Fitzgerald, J.,(2006). The attrition of sexual offences from the NSW Criminal Justice System. Sydney. (NSW). NSW Bureau of crime statistics and research, 2006.

¹⁵⁴ E and R, 2001, as discussed by Author Suzanne Jenkins, private practice, *Are Children Protected in the Family Court? A Perspective from Western Australia*, Paper presented at the Child Sexual Abuse: Justice response or Alternate Resolution Conference, convened by the Australian Institute of Criminology, Adelaide, May 2003, (Address for correspondence: PO Box 300, Scarborough WA

This illustrates, contrary to Colliers opinion¹⁵⁵, and authors such as Byrne¹⁵⁶, (1991), that in practice, an abuse allegation is not a useful ‘weapon’, to impede contact with the other parent in Family Court.

These judges often rely on the inferences of the also inadequately informed family court report writer’s opinions such as the one which disregarded the child’s views, used in the above case. The court appointed expert, in his report, stated;

‘I do not think it is feasible to consider a three year-olds’ wishes in relation to contact. At that age the child has no concept of what is best for him. He will only be repeating back what he feels those around him want him to say.’

This judge, and family report writers consensus in the case study detailed is challenged in, Wallerstein & Tanke¹⁵⁷, who advise;

*” children at a very young age have powerful feelings that do not necessarily reflect the feelings of the adults in their lives... **the courts and the legal profession in America have been overly committed to an implicit perspective of children as passive vessels of parental attitude and interest”**.*

Understanding the Implications of Child Disclosures

An unreasonable and high risk consequence of not adequately believing a protective parent and falsely labelling this parent as an alienator, is that the child is also not believed.

¹⁵⁵ Alexander, H,2013, Gippsland Times *False abuse claims are the new court weapon, retiring Judge says*, sourced at <http://www.gippslandtimes.com.au/story/1620380/false-abuse-claims-are-the-new-court-weapon-retiring-judge-says/> on 02/05/2017

¹⁵⁶ Byrne, K., 1991. Allegations of Child Sexual Abuse in Family Law Matters: Use and Misuse of Expert Evidence in Family Law Amendment Act 1991 and The Expert Witness in Family Law. Leo Cussen Institute.

¹⁵⁷ Wallerstein, J. S. & Tanke, T., 1996, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, Family Law Quarterly, 30, 2: 305,307,332.

It is critical that the Family Court opinion and decision makers understand that disclosure to family, friends, and the justice system often magnifies the effects of abuse. It is psychologically harmful to the child to not believe a child's disclosures of abuse. This results in a secondary assault to the child, catalysing the already negative effects of the original abuse. (Summit, 1983¹⁵⁸).

“Acceptance and validation are crucial to the psychological survival of the victim¹⁵⁹”.

It is unethical, inaccurate, unlawful and psychologically harmful to the child, to allege that a genuinely protective parent has used *alienation*, if this is supported by independent child disclosures. This is especially notable, considering that the definition of parental alienation involves turning the child against the other parent based on **unwarranted beliefs** of e.g harm. This leads to the unfair presumption that a protective parent is alleging false allegations of harm, despite all statistical probability of the child speaking the truth. This also presents a missed opportunity to protect the child from further trauma, absolutely contrary to *best interests*.

Pynoos et al¹⁶⁰, (1996), describe the effects of traumatic experiences on the child which can diminish expectations about the world, and limits the child's very integrity and safety and security of interpersonal life. Tebbutt, Swanston, Oates & O'Toole described the persisting dysfunction of the trauma affected child where they reported that;

“Any contact at all with the abuser between the 18 month and the final follow up was associated with significantly higher depression scores

¹⁵⁸ Summit, R., (1983). The child sexual abuse accommodation syndrome. *Child abuse and neglect*, 7:177-

¹⁵⁹

¹⁵⁹ 'ibid', p.179.

¹⁶⁰ Pynoos, R. S., Steinberg, A. M. & Goenjian, A., 1996. *Traumatic Stress in Childhood and Adolescence: Recent Developments and Current Controversies*. In B. Van der Kolk, A. McFarlane & L. Weisaeth (Eds), *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society*, NY, Guilford, pg 332

and lower self-esteem ...This finding highlights the need for parents and therapists to remain sensitive to the possible effects of the presence of the abuser even after a period of 5 years”,¹⁶¹

(These conclusions are evident in the impartially accessed case study provided at the conclusion of this submission).

An improved risk management approach

To significantly minimise the risks that surround family violence and abuse, the courts must listen to the victims and investigate thoroughly with sound methodology and trauma informed professionals, to inform verifiable findings, respect the child’s voice and promote protective orders. They must not inform their views with myths, and unsound research.

The culture and education of court personnel must improve to reflect verified research surrounding complex issues. Reforms must also promote research into court practices and outcomes. Research should be inclusive of, (for example), how to support differentiation between a protective parent that does not allow contact to prevent further harm, and a perpetrator who alienates for control. It should investigate the appeals process and find methods to streamline this and look at patterns and the consequences of decision making on children, at various time intervals.

The PMH pilots have great potential to mitigate these myths and gaps in the system through highlighting risks and implementing safeguards, if impartial specialist family violence and abuse experts are used separate to the formal court system. It must be recognised as a legislative consideration, that a protective parent may prevent contact due to genuine concerns regarding family violence or sexual abuse.

¹⁶¹ Tebbutt, J., Swanson, H., Oates, R. K. & O’Toole, B. I., (1997). *Five Years after Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction*, Journal of the American Academy of Child and Adolescent Psychiatry, 36, 3: 330–338.

Surrounding investigations must be verified to a reasonable standard, and informed with sound evidenced based research.

If the family court must be used to determine matters involving family violence and abuse, it is pertinent that court personnel are educated with trauma responses and surrounding abuse issues, and work in collaboration with independent abuse specialists. The court must implement improved *Principles*¹⁶², *Standards*¹⁶³ and *Safeguards*¹⁶⁴ through more protective legislation. Reports must be informed with verified research, using meta-analysis where required, and sound unbiased methodology. Myths should not inform decisions. Only then will the family court hold some capacity, to accurately identify family violence and abuse risk factors, and be able to facilitate protective judgements.

Rules of procedure, and rules of evidence, that would best support high quality decision-making in family disputes

Mitigating the negative effects of parental separation on children must be the primary objective of the family law system, in matters involving children. A primary role, objective and principle of the family law system that urgently requires reform, is to responsibly remedy the inherent tension between the right to contact and to protect from harm. This is threaded throughout family law and child protection legislation. Decision-makers must have an understanding of relevant peer-reviewed and evidence based research to assist in forming high quality opinions and decisions regarding contact and safety;

In *Donaghey v Donaghey* (2011), FamCA 13, his Honour Murphy at 57 stated that:

¹⁶² Bryant, et al, (2016), *The Family Violence Best Practices Principles*, 01/12/2016, revision of 3.2, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violencebest-practice-principles>, sourced online on 14/04/2017. ISBN 978-1-920866-02-

¹⁶³ Australian Standards of Practice for Family Assessments and reporting, February 2015.

¹⁶⁴ Safeguards found through Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act> on 02/05/2017

*At the very least, it seems to me, when issues as serious as child abuse arise, the introduction of such research as evidence should come about (as the Full Court effectively suggested in McCall) by means of an independent expert who possesses the requisite training, expertise and experience in dealing forensically with cases in which sexual abuse of young children is alleged, and who, crucially, as part of that expertise, is also familiar with relevant peer-reviewed research. Crucially, that training, expertise and experience should permit them to properly posit particular pieces of research within the scientific mainstream*¹⁶⁵.

The expert report writer in this case testified that he had access to peer-reviewed journals relevant to child abuse or domestic violence, but did not subscribe to them. He stated that he was not an expert in domestic violence or child sexual abuse and only had “some knowledge” of the topic.

It is therefore not lawful or ethical that the court relies on this expert, as he is not an expert witness who “*possesses the requisite training, expertise and experience in dealing forensically with cases in which sexual abuse of young children is alleged, and who, crucially, as part of that expertise, is also familiar with relevant peer-reviewed research*”¹⁶⁶.

The inherent weakness of using court reporters and others performing a similar function, without specialist expertise, was noted in *Dasreef Pty Ltd v Hawchar* (2011), HCA 21, Heydon J, where the judge pointed out that:

The judicial constraints on tendentious expert testimony are inherently weak because judges (and even more so juries...) lack training or experience in the relevant fields of expert knowledge.

¹⁶⁵ Sourced from https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FamCA/2011/13.html?context=1;query=donaghey;mask_path= on 23/04/2018.

Sourced with appreciation, via the expertise and submissions of counsel P. Merkin.

¹⁶⁶ With appreciation via the expertise and submissions of counsel P. Merkin

The Family Law Act must mandate that experts consider and refer to widely accepted, evidence based, peer reviewed research. Professor Parkinson stated that;

*Social science evidence of this kind may assist the Court in understanding the significance of the evidence which is being presented*¹⁶⁷.

Professor Parkinson further stated that this will facilitate safer decision making in the best interests of the child which is;

“not based upon incorrect assumptions about the welfare of children, anecdotal evidence about what promotes their wellbeing, and beliefs about children which have no basis in scientific research...”

This is further supported through the professor’s contention that Judges should also extend their relevant expertise in evidenced based social science research;

*The Family Court is a specialist court exercising a discretionary jurisdiction in which legal rules have a very limited role to play. If judges are not encouraged to read and cite the relevant social science literature, whether or not it is presented to them in evidence, then **the dangerous alternative** is that decisions will be based upon incorrect assumptions about the welfare of children, anecdotal evidence about what promotes their wellbeing, and beliefs about children which have no basis in scientific research*¹⁶⁸.

There will be accepted central insights from the research however, where varied or disputed knowledge arises within a specialised field, this may be remedied by the words of His Honour Murphy J who stated;

¹⁶⁷ Parkinson P, „Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse“ (1999) *Melbourne University Law Review*, Vol. 23, at p. 357. Sourced with appreciation, via the expertise of Counsel P. Merkin.

¹⁶⁸ Parkinson P, „Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse“ (1999) *Melbourne University Law Review*, Vol. 23, at p. 357. Sourced with appreciation, via the expertise of Counsel P. Merkin.

“It is for that reason, together with the very rapid rate of development in that body of knowledge, that greater comfort is given to judges if regard can be had to meta-analyses – that is, the product of a highly-qualified researcher in the relevant area examining the entire respected and recent literature and attempting to synthesise the findings”¹⁶⁹.

The use of meta-analysis can assist in placing the research in context of variables, and mitigate any internal discord within peer-reviewed literature.

The use of sound research will also address the asymmetry between the power imbalance, inherent in the parent-child relationship, between one which favours the word of an accused adult and a child. This will minimise the occurrence of child being falsely accused of being alienated or coached¹⁷⁰.

There is support in legislation for the discretionary use of the social sciences where the Family Law Act states¹⁷¹;

Court's general duties and powers relating to evidence

(1) In giving effect to the principles in section 69ZN, the court may:

(e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.

This may include “any recommendation, finding...of [a] body of any kind mentioned in any of the subparagraphs (a) (i) to (iii).

A common complaint by parents is that independent specialist experts were not accepted by the court. There is an unfortunate reliance on a family consultant report which cannot offer the same rigor, validity or expertise. It is strongly suggested that for complex cases, reforms remove all judicial discretion surrounding Section 69ZX (1), (e) detailed above. The endorsement of independent specialist experts should be

¹⁶⁹ *Donaghey v Donaghey* [2011] FamCA 13, at 57-58

¹⁷⁰ Context with appreciation from the expertise and submission of Counsel, P. Merkel

¹⁷¹ Family Law Act 1975, s69ZX (1), (e).

mandated into legislation, on parental request for a more accurate and informed presentation of issues and risk factors.

The underlying substantive rules and general legal principles in relation to parenting and property;

The provisions in the *Family Law Act* governing property division, spousal maintenance, & binding financial agreements to improve the clarity, comprehensibility and fairness of the law for parties to promote better outcomes could be best managed in the family law courts, to free up the proposed State tribunals for the more complex cases.

If spousal maintenance or child support issues also involve family violence and abuse issues, these issues should be determined through the State tribunal, prior to any property matters being heard in the family court.

Australian Standards of Practice for Family Assessments and Reporting (*Standards*¹⁷²)

The family courts collectively developed and released the *Australian Standards of Practice for Family Assessments and reporting*¹⁷³, (*Standards*). The language throughout this report highlights an unacceptable level of broad expectations to assessors. The *Standards* do not apply to preliminary assessments by Family Court report writers, such as child inclusive conferences, mediation or case assessment conferences.

This presents an immediate issue as these early observations are used to inform judges and ICL's during proceedings. This supports the contention that an incomplete report is acceptable to the family court. This report has the objectionable potential to pre-empt, and possibly

¹⁷² Australian Standards of Practice for Family Assessments and reporting, February 2015.

¹⁷³ 'ibid'

inaccurately inform the considerations of the Independent Children's Lawyer, (ICL), and Judge.

These standards permit excessive discretion of experts¹⁷⁴ through using the word '*should*'. For example, this is used regarding practitioner's eligibility with the Australian Association of Social Workers or registration with the Australian Health Practitioners Regulation Authority, (AHPRA), and to meet respective requirements¹⁷⁵.

In any case all family court writers whether registered or not with AHPRA are covered under the Health Practitioner Regulation National Law (Victoria) Act 2009¹⁷⁶ and can be prosecuted in VCAT (In Victoria or similar tribunals in other states) by the Psychology Board of Australia for breaches of this national law.

To suggest a practitioner *should* meet appropriate standards instead of *must* meet professional standards is irresponsible, and does not afford reasonable duty of care to court participants. This creates a situation where the Court relies on reports that could be sub-standard and the participants only recourse now is to take action against the report writer separately in a tribunal for breaches of their code of conduct, in the meantime the damage is done and the outcome is the Court has considered, (and heavily weighted), unreliable evidence in making its decisions which could be characterised as an error of law.

The same issue applies where the standards suggesting that practitioners *should* commit to *accuracy* and *objectivity*¹⁷⁷. It also applies where they *should* conduct interviews with children away from influential adults.

¹⁷⁴ For example, reports by family consultants employed by the Family Court as well as reports by other experts and report writers: *Family Law Rules 2004* (Cth) pt 15.5; *Family Law Regulations 1984* (Cth) reg 7. Relevant experts: Ch 15 expert, Reg 7 report writer not employed by Court, family consultant employed by court.

¹⁷⁵ Ibid at Principles for family assessors S.2(c).

¹⁷⁶ Health Practitioner Regulation National Law (Victoria) Act 2009 Sourced at http://www.austlii.edu.au/au/legis/vic/consol_act/hprmla2009517/ on26/04/2017

¹⁷⁷ Ibid at Conducting Assessments S.11(a).

The *Standards* would be improved with the word ‘**Must**’ throughout the total report. There is notably no professional court directed disciplinary procedure or transparent accountability for practitioners who do not follow the standards. These absolutely *must* be added.

The *Standards*¹⁷⁸, suggest that family reporters *may* consider whether there are unresolved criminal or state welfare proceedings. Historic proceedings are not included in the principles at all.

This absolutely ignores the significance of historic violence and relevant character traits that would highlight risk factors. This is a major gap in the family court system and legislation should be amended immediately, to mandate significant weight to historic violence or significant welfare risks. Situations where the past violence has significantly affected the other parent or any children, must be more weighted than shared responsibility. While the Act provides, for this, (through 60CC), the current patriarchal culture, demonstrated through the unequal application of alienation for example, does not.

Once more this can be characterised as compromising the rule of law and denial of natural justice¹⁷⁹, when the Court is considering (and heavily weighting), unreliable evidence and ignoring relevant evidence. Whether the legislation intended this or it is the outcome, the validity of such decisions and even constitutionality of them is cast into doubt.

When a statute empowers a public official to adversely affect a person’s rights or interests, the rules of procedural fairness regulate the exercise of the power unless excluded by plain words¹⁸⁰

¹⁷⁸ Ibid at S.27. Where family violence is identified as an issue in a matter, the assessor must conduct an expert family violence assessment as part of their report. They should use commonly accepted interpretive frameworks for family violence.

¹⁷⁹ Australian Broadcasting Tribunal v Bond(1990) 170 CLR 321, 342.

¹⁸⁰ Annetts v McCann (1990) CLR 596 at 598.

“...if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that Statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to afford procedural fairness, the officer exceeds jurisdiction, in a sense necessary to attract the prohibition under s75(v) of the Constitution¹⁸¹.”

Granting *gratia arguendo* that a judge of the Family Court¹⁸², or a justice of the Federal Court of Australia, is not an officer of the Commonwealth¹⁸³ merely highlights the irregularities that occur in the Family Law arena.

Family Violence Best Practice Principles

Directives for family reporters to consider, the *Family Violence Best Practice Principles*¹⁸⁴, (*Principles*), or the Policies of the Western Australian Family Court are grossly inadequate, as these guidelines also do not address the nuances of violence.

A committee of Judges, Justice’s and a family consultant revised abovementioned *Best Practice Principles*, to guide court personnel in cases which involve children and claims of abuse. This is merely a voluntary checklist tool that family reporters *may* consider, if they wish.

The inadequacy of these *Principles* may be consequential to the fact that domestic violence advocacy groups or victims of violence were not invited to help revise and directly help write these revisions.

¹⁸¹ Re Refugee Review Tribunal; Ex Parte Aala (2000) 204 CLR 82 at 101 [41].

¹⁸² *Judiciary Act 1903* (Cth), s 39B(2)(b).

¹⁸³ Re Jarman; Ex parte Cook (No. 1) (1997) 188 CLR 595.

¹⁸⁴ Bryant, et al, (2016), *The Family Violence Best Practices Principles*, 01/12/2016, revision of 3.2, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violencebest-practice-principles>, sourced online on 14/04/2017. ISBN 978-1-920866-02-0

The consideration that court personnel ‘may’ get a family violence expert to conduct a report (as stated in the principles option 34), is manifestly inadequate. These experts **must** be employed to accurately assess risk factors surrounding all allegations, to conduct an informed investigation. Family reporters, without sufficient expertise make grave errors in their interpretation of fact. In addition, it must be mandatory that family violence and mental health advocates are permitted to participate in report writer interviews and support any party where abuse allegations are raised.

The *Principles* lack insight into issues surrounding violence and are misleading in their stereotyping of victims. For example; they state that a consideration in testimony could be that victims may present as unemotional and flat and have difficulty with recall. This distracts the court personnel from what could also be a cold, detached, narcissistic, controlling perpetrator who has developed a capacity to lie and occasionally trips up on fabrications.

There is a plethora of research rebuking the assumption in the *Principles* which state that “*Diminished parenting capacity for adult victims of family violence is not uncommon*”. It is actually supported that children commonly do not view their victimised parent as diminished in capacity¹⁸⁵, and are often viewed by children as their greatest source of support¹⁸⁶. This highlights the lack of insight the family court hold in relation to family violence issues, through its own recommendations.

This author imagines that Judge Hughes, Justice Bryant and the other co-creators of these *Principles*, may agree that when the court interprets the personality types and capacity incorrectly, and the perpetrator successfully pretends to be the victim, there is an unacceptable room for error.

¹⁸⁵ Levendosky, A. A., S. M. Lynch, et al., (2000), “*Mothers’ Perceptions of the Impact of Woman Abuse on their Parenting*” *Violence Against Women*, 6,(3): 247-271.

¹⁸⁶ Blanchard, A., F. Molloy, et al., (1992). “*I Just Couldn’t Stop Them*”. Western Australian Children Living with Domestic Violence: A study of children’s experiences and service provision. Perth, The Curtin University School of Social Work for the WA Government Office of the Family.

The latter consideration supports an inclusion of neuropsychology throughout the family court investigatory process. Most family court workers do not possess the required depth of neuroscience, and often empathy, to apply meaningful interpretation to the motivations or behaviour behind parental conflict. They often lack the insight required to determine the accuracy of accusations. They lack capacity to accurately interpret the consequential trauma affected behaviours of victims and the narcissistic often sociopathic vexation of perpetrators.

The current approach predictably contributes to the family reporter employing inappropriate, highly inaccurate, scientifically unfounded, subjective opinions. These workers commonly postulate suggestive, speculative conjecture, in the form of a null hypothesis with little pre-determined significance. Their standard of evidence barely obtains a level of a working hypothesis or accepted scientifically sound theory. The standard of probabilities supports this unethical investigatory method through a lowered evidential burden compared with a criminal court or even State civil court.

The rules of evidence in the family court are often considerably lower than even contained in the Civil Procedure Act¹⁸⁷. In fact, the *Principles*, highlight that the court doesn't require independent confirmation, (via for example, police or medical reports or corroborative evidence) of family violence abuse allegations, to accept that it occurred.

This low standard is applied where parental alienation is alleged against, as the research supports¹⁸⁸, mostly protective parents who are not making false allegations¹⁸⁹. The use of this tactic by many perpetrators successfully misleads decision makers in the contemporary court

¹⁸⁷ Civil Procedure Act, (2016), Vic.

¹⁸⁸ Childress, Attachment based alienation, <https://drcraigchildressblog.com/2014/12/11/false-allegations-of-parental-alienation/>

¹⁸⁹ Australian Institute of Family Studies sourced at <https://aifs.gov.au/publications/true-or-false-contestedterrain-false-allegations/export> on 02/05/2015

system. Consequently, abused children have often been placed in the hands of their abusers.

The Family Courts, in practice often also apply a third, much higher standard of evidential proof to allegations of child sexual abuse “*Towards the extreme end of the scale*”, M&M, (1988), i.e. almost the criminal standard. This is also applied in practice to many cases involving family violence. There is actually no *scale* of evidential proof between the civil standard and the criminal standard and to have introduced an additional standard is a corruption of basic jurisprudence.

Courts can also no longer award costs against a party who knowingly fabricated evidence. This environment is not conducive to truth and disadvantages the integrity of proceedings when it is misled.

The *Principles* are contradictory where they quote a case where the full court of the family court stated that abuse victims do not have to “...*subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted*”, Amador & Amador (2009)¹⁹⁰.

This is inconsistent with family court practice directions when the court orders medical examinations and psychiatric evaluations of allegedly abused children and adults. It also increases the possibility of false allegation and vexatious claims being used by the actual perpetrator to further control the real victim. In this sense the court system may inadvertently or neglectfully endorse the abusers, coercive controlling violence to induce compliance and submission in the real victim. There are no protective measures for this scenario listed in the *principles*, (Bryant et al., 2016), which identify this commonly reported issue by advocate bodies.

The author’s view is that the *principles*, compound risk assessment issues through, for example, not adequately differentiating to court

¹⁹⁰ Amador & Amador, (2009), (43 FAMLR 268).

personnel the difference in weighting expected between untested interim orders and permanent protective orders.

The skills, including but not limited to legal, required of professionals in the family law system

It is important for the safety of children and parents, that the capacity of all family law professionals including judges, lawyers, registrars and family consultants, is dramatically strengthened in relation to matters concerning family violence and abuse.

A critical skill required by family law court experts and family consultants, is to impartially select relevant evidence to inform family reports and support their conclusions. An ability to source, interpret and critically analyse this information, with an understanding of development and behaviour, informed with sound evidenced based social and medical research, is pertinent for accuracy and to provide the judge as adjudicator, a sound and balanced presentation of issues. It is beneficial that the Judiciary also possess a working knowledge of the issues to be resolved to assist understanding of the gravity of presented reports. If these skills are not available to the report writer or ICL, it is necessary that these skills and insights are obtained from relevant independent specialist experts.

Skills required for the selection of evidence, to inform family reports;

In response to community and stakeholder concerns, such as those discussed at the National Family Violence Summit, (NFVS, 2017)¹⁹¹, and also the Royal Family Violence Commission, (recommendation 189¹⁹²), the Victorian Education Department has directed an increased focus on considering how family violence and trauma affects behaviour.

¹⁹¹ National Family Violence Summit, http://www.taracostiganfoundation.com/2017_nfvs, on 05/05/2018

¹⁹² 139 Family Violence the plan for change, the 227 Recommendations, sourced at [http://www.vic.gov.au/familyviolence/recommendations.html#filters\[SearchKeywords\]=189](http://www.vic.gov.au/familyviolence/recommendations.html#filters[SearchKeywords]=189) on 28/04/2017

The *Respectful Relationships*¹⁹³ program promotes positive attitudes and behaviours, includes professional practices, culture, and community liaison with the goal of preventing family violence. Professional training, support and learning has been funded in pilot programs in some schools, to provide an insight incorporating an understanding of violence prevention and surrounding neuropsychological factors¹⁹⁴. This also improves the professional practice of educators teaching the respectful relationships program. They have welcomed domestic violence support and advocacy services, (such as Berry Street¹⁹⁵, White Ribbon¹⁹⁶, and Sole Fathers United¹⁹⁷), who liaise with and inform educators to provide insight into how professionals may best understand and respond to trauma responses and promote respectful relationships with trauma informed teaching and learning capacity.

Family court and child protection service report writers would benefit from a similar trauma informed approach, as their nature and function involves understanding and appropriately responding to the dynamics of violence prevention, the neuropsychology of trauma affected or violent/abusive behaviour and parental capacity, in particular the ability to learn new positive behaviours where necessary.

Often decision makers are misled, and children are sent to live with abusers who allege alienation against a genuinely protective parent. It would greatly benefit report writers to gain insight in research

¹⁹³ 'ibid'

¹⁹⁴ Bidita Bhattacharya, (2013), Bengal Journal of Psychiatry, Vol. 19, No. 1, Neuropsychological factors; *Neuropsychological assessment: An Overview*, Sourced from http://bengaljournalpsychiatry.org/wpcontent/uploads/2015/09/Bidita-Bhattacharya_04.pdf (inclusive of trauma responses, behavioural analysis), sourced on 28/04/2017

¹⁹⁵ Berry Street provision of pilot program teaching educators how to support trauma affected students in the northern suburbs of Victoria, 2017. Sourced at <http://www.childhoodinstitute.org.au/EducationModel on 26/04/2017>.

¹⁹⁶ White Ribbon Schools Program <https://www.whiteribbon.org.au/stop-violence-against-women/whatwhite-ribbon-does/schools-program/>

¹⁹⁷ Sole Fathers United, https://www.facebook.com/pg/SoleFathers/about/?ref=page_internal, a not for profit community group, provision of respectful behaviour class discussions, at local schools in north-west Victoria, 26/04/2017.

surrounding authentic child detachment. This detachment overrides the child's natural survival instinct conferred by the parent-child bond, and is ONLY seen in cases involving sexual assault, prolonged family violence and occasionally substance abuse¹⁹⁸. A report writer who could identify the clinical indicators, of narcissism and lack of empathy, and who could differentiate between authentic and inauthentic displays of the attachment system, may be able to more accurately inform reports. However, the status quo supports that this is not the case and independent, specialist abuse experts must be used for this task.

This author proposes that the investigatory process and subsequent family reports, exhibit a striking apathy to the comprehension of neuropsychology required, in formulating a conclusive report. An application of this science, namely a study of the brain's integration with behaviour¹⁹⁹, is pertinent to improving an understanding of which parent holds the highest capacity to fulfil the child's best interests²⁰⁰. As family reporters are partially tasked with assessing behaviour relating to the capacity of parents, a solid comprehension of the neuropsychological branch of neuroscience influencing behaviour is pertinent.

Francis Martin, a cognitive psychologist, recognised the limitations of using a singular cognitive approach in understanding brain function and its influence on cognition. She stated that using additional fields, inclusive of neuroscience focused on neuropsychology and physiology, will provide;

¹⁹⁸ Dr Childress Attachment-based parental alienation, Sourced online at <https://drcaraigchildressblog.com/2014/12/11/false-allegations-of-parental-alienation/> on 05/05/2018

¹⁹⁹ UNC, (2016), UNC School of medicine, *The Department of Neurology*, University of North Carolina Chapel Hill, sourced online at, <https://www.med.unc.edu/neurology/divisions/movement-disorders/npsycheval>

²⁰⁰ 'ibid'

“an improved interpretation of body, brain and mind”. She followed with, *“..Until this happens, I suspect that there will be little real progress in this field”*²⁰¹.

The inclusion of specialised behavioural neuropsychology, is superior to a basic therapeutic or singular cognitive approach as it facilitates a more accurate identification of the evaluation of cognitive and behavioural functional capacity, as stated by Martin, (2017). The therapeutic approach is merely a responsive service which may help individuals understand and learn skills to control their actions²⁰². The latter focuses on altering behaviour where an inclusion of neuropsychology permits meaningful interpretation of behavioural analysis.

This promotes insight into the influence of language, attention, memory, perception, motivation, mood, life quality and personality styles on the participants thinking process, emotional responses and cognition which drive reasoning and behaviour. It includes a baseline for subsequent evaluations for comparison of capacity relative to peers for the rigor required through verification. A neuropsychological approach to family reports can also provide an understanding of whether proposed remedies and treatments may affect mental health and behaviour. The latter approach is best suited to the function of an accurate family report.

Required knowledge in contested cases, such as an adequate comprehension of the automatic responses of the primitive brain²⁰³, influencing the automatic fight, flight, freeze responses and behaviours of perpetrators and victims alike, are noticeably absent from family reports. Family reporters rarely offer informed insight, regarding the

²⁰¹ Martin, Francis., (2017), *Working in Cognitive Psychology*, Australian Psychological Society, sourced at <https://www.psychology.org.au/Content.aspx?ID=3824>, on 25/04/2017.

²⁰² Manning, (2009), *What is Therapeutic counselling?* ., Manning Psychological Services. Sourced online at <http://www.manningpsych.com/TherapeuticCounseling> on 25/04/2017

²⁰³ Karen Saakvitne, K, (2013), Fight, flight, freeze response, <http://trauma-recovery.ca/impaceteffects-of-trauma/fight-flight-freeze-responses/> sourced on 28/04/2017

interconnectivity of the reptilian brain with the limbic system within the mammalian brain, linking emotions, and behaviour, which may also reveal relevant psychotic symptoms or cognitive defects in parents under scrutiny.

Family reporters do not sufficiently consider the conscious neocortex, which controls purposeful behaviour, executive decision making and is responsible for voluntary action. The structural health and any presence of disease regarding the interconnectivity and functions of these systems are relevant.

The subconscious drivers which influence emotions, thoughts and resultant voluntary action can highlight the motivations and behaviours of parenting capacity, abuse allegations, and flag historic and potential risk factors. It could also assist in the identification and proposed management of underlying trauma.

An inclusion of neuropsychology in family reports can contribute more valuable information for assessment pertaining to various conditions, such as clinical depression, schizophrenia, autism, anxiety, risk taking and violent behaviour and drug and alcohol abuse. The identification of some factors may influence parental capacity and highlight a need for consideration of protective measures.

An approach mandating that family reporters (and experts performing similar functions), possess substantial and scientifically sound neuropsychological based and trauma informed qualifications and experience, will provide the judge with a higher quality and more accurate assessment for consideration.

Critical Analysis Skills required for a Meaningful Interpretation of Information

It is insufficient to merely improve the neuropsychological content and include quantitative verifiable methodology without considering the interpretation of this information.

Mandating a requirement for court report writers to obtain post graduate skills in the critical analysis of information and research, to meaningfully interpret evidence, will promote insightful accuracy through reducing inaccuracies in discretion or bias.

A family reporter should present an account which underlines the validity and verification of the contentions made. They must avoid interpreting meanings in language merely to focus a *fit* to a predetermined idea. An awareness to critically consume information with evidence based critique is conducive to quality research; its credibility is influenced by the amount of bias²⁰⁴.

Presentation skills- Visible Integrity of Reports

There is room for a subjective interpretation during a family reporters' address where body language may be an indicator of the writer's confidence and integrity, regarding understood or presented *truth*.

Some reporters have exhibited commonly accepted visible indicators of misleading conduct and/or lack of conviction, through their body language during their address. This includes visible shaking, stuttering, flustered, diminished congruence and demeanour, contradictory to verbal accounts. There has been witnessed in particular, a notable lack of eye contact. To uphold transparency in the content and adequate weight of communicated information, report writers, (and anyone performing a similar function such as the independent children's lawyer), should approximate some time to physically face the party's and the judge during any address.

A judge with a trained eye should note the standard of confidence, integrity and delivery, in the weighting of any report. Reforms should mandate this inclusion as a note in the reasons for judgement. Whether the reporter congruently believes in what is relayed to the court is

²⁰⁴ Fitzgerald, T., (2011). La Trobe University, Bundoora. EDU5RME. Semester two. Lecture delivery.

relevant. The presentation of unbiased truth, is a skill surrounding professional integrity, yet to be developed by many report writers, as reported in the recent parliamentary inquiry²⁰⁵. A body language analysis outsourced independent expert report could also be helpful to assess the reporter's congruence, during a court address.

Judicial Skills

State and territory Judges are reluctant to use the protective power of '68R'²⁰⁶, in their capacity to protect victims from family violence and abuse.

The Family Law Council's response to the coroner²⁰⁷, Judge Gray, relating to the findings of the investigation into the death of Luke Batty²⁰⁸, acknowledged that the Family Law Amendment, (Financial Agreement and Other Measures Bill, 2015²⁰⁹), included the 68R²¹⁰, provision in the FLA²¹¹, (affecting 68T²¹²), to allow State and Territory courts to vary or suspend an interim intervention order, without the previous automatic 21 day expiry.

²⁰⁵ Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 18 by Helpfamilylaw, sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

²⁰⁶ Consolidated Acts, Family Law Act, 1975, (68R), http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68r.html

²⁰⁷ Family Law Council response to Coroner, Judge Gray, sourced at http://www.coronerscourt.vic.gov.au/resources/47cb7c59-0f09-4411-b927-ae6e5b0b3b34/20140855+response+family+law+council_luke+batty.pdf on 26/04/2017.

²⁰⁸ Gray, (2015), State Coroner, Judge Gray, Coroners Court of Victoria, finding-085514 Luke Geoffrey Batty, Sourced at <http://www.coronerscourt.vic.gov.au/home/coroners+written+findings/findings-+085514+luke+geoffrey+batty> on 25/04/2017

²⁰⁹ Financial Agreement and Other Measures Bill, 2015, <https://www.legislation.gov.au/Details/C2015B00201>

²¹⁰ Consolidated Acts, Family Law Act, 1975, (68R), http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68r.html

²¹¹ Family Law Act, 1975, sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/ on 26/04/2017.

²¹² Consolidated Acts, Family Law Act, 1975,(68T), http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68t.html

This excellent provision, which protects the safety of the people listed on the order, until a time noted by the court or until a further court order is made, is often unfortunately not yet understood, or regarded in practice by many State and Territory magistrates.

I hold a copy of an interim order where the magistrate simply did not know what to put on the State intervention order regarding this amendment, and left the relevant area of the intervention order blank. The protected person had requested that this Judge suspend the family court order. The judge verbally told the protected person to go back to family court. She did not make a clear inclusion on the intervention order detailing whether the family court order was revoked or suspended, or any clear expiry pertaining to such. This left the protected person in limbo and senior police involved in this case who read the intervention order, were unsure of whether this order had indeed suspended or varied the family court order. 68R²¹³ offers a provision in the law, which offers a level of protection and bridges the gap between protective orders and Family court orders, which is unfortunately rarely utilised.

State and Territory judges must be provided with a guidebook outlining capacity under their jurisdiction to exercise the FLA, 68R amendment and should be encouraged to support victims of violence through including this direction, where appropriate, on intervention orders. This may potentially reduce repeated proceedings in family court if the State or Territory protective order is not contested.

The *Safe Child Act*²¹⁴ currently under consideration in Hawaii leads the way to provide effective Australian legislation in relation to how family courts should manage family violence and abuse. This trauma-informed

²¹³ Consolidated Acts, Family Law Act, 1975, (68R),

http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68r.html

²¹⁴ Safe Child Act; http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, sourced on 30/04/2017, created and submitted to The House of Representatives, 29th legislature, 2017, State of Hawaii, H.B. no: 697 researched and designed by B. Goldstein.

Act is a new approach, based on current sound research and designed by Barry Goldstein²¹⁵.

This Act as described by Goldstein²¹⁶; “ includes a provision for an early hearing just for these most dangerous abuse cases which is limited to evidence concerning reports of abuse. Abusers routinely use a variety of less important issues to distract attention from domestic violence and child abuse. Their issues do not matter if reports of abuse are true because the harm to children from exposure to domestic violence and direct child abuse is so much greater. If the court or PMH finds abuse, there is no need to proceed on the case because the research is clear that the safe parent must have custody so the children can receive necessary treatment and abusers should initially be limited to supervised visits until they can prove to the court that they have changed their behaviour. Since deliberately false reports by mothers occur less than 2% of the time, this early hearing that is likely to take only a few hours or less will resolve most cases that now take many months or years”.

This submission strongly supports a rigorous promotion of the protective powers of 68R, through mandating appropriate use in permanent protective orders. The author also suggests an adoption of the *Safe Child Act*²¹⁷, where contested cases flagged with family violence concerns are first considered in a State court PMH tribunal, limited to the allegations of abuse and domestic violence. This is secondary to a final intervention order hearing where complex matters and findings of fact can be thoroughly investigated further with a more defined focus on

²¹⁵ 69 Barry Goldstein, Director at Stop Abuse Campaign website <http://stopabusecampaign.org/> accessed 22/4/2017 at [6.17].

²¹⁶ Barry Goldstein, Director at Stop Abuse Campaign website <http://stopabusecampaign.org/> accessed 22/4/2017 at [6.17].

²¹⁷ Safe Child Act; http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, sourced on 30/04/2017, created and submitted to The House of Representatives, 29th legislature, 2017, State of Hawaii, H.B. no: 697 researched and designed by B. Goldstein.

the *safety* as well as best interests of the child. The findings from this case can then inform a protective direction of family court judgements.

The benefit of this process is that it facilitates an accurate assessment of family violence and abuse risk factors. This has the potential to reduce the time and costs involved in family court proceedings, as cases can commence with a foundation of findings of facts provided by the State court. It can reduce costs for parties and enable their finances to be better directed towards the children, promoting their best interests. The most important benefit will be the reduction in family violence and abuse through its facilitation of protective judgements.

Any judge who hears a case involving the issue of domestic violence and/or child abuse as part of judicial responsibility, must receive specialized training regarding family violence and abuse. These informed practices can facilitate an extensive understanding of for example, why parental alienation theory must not be applied to any parent holding a reasonable belief that violence and abuse has occurred. If judges understood that this theory is unsound when applied in this context, and has actually escalated risk, they will be empowered to make more protective judgements concurring with the congruent intent of 60CC, which lists safety issues as a primary consideration.

Family Violence experts such as Goldstein strongly state that Judges and Independent children's lawyers, (if they must be appointed, contrary to Freda Briggs and the authors contentions), must also receive specialized ongoing family violence training. This is inclusive of a comprehensive understanding of the following *six critical areas of knowledge*²¹⁸ found in the Safe Child Act²¹⁹. This will enable them to identify risk factors surrounding family violence to facilitate more accurate and protective judgements;

²¹⁸ Critical areas of knowledge, Goldstein, 2017 sourced from <http://barrygoldstein.net/importantarticles/safe-child-act> on 02/05/2017

²¹⁹ Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act> on 02/05/2017

*Six critical areas of knowledge*²²⁰

1. Knowing what behaviours are associated with higher risk of lethality or injury;
2. Domestic violence dynamics;
3. The effects of domestic violence on children;
4. Recognizing domestic violence; (including the PAS research discussed through this submission).
5. Victim narratives.

This education must be presented by domestic violence advocates and/or other specialist experts knowledgeable about the safety practices described herein and should be founded on current scientific research.

6. Where discrepancies exist between accepted research then meta-analysis should inform training.

The State should provide additional funding to domestic violence agencies and informed advocates, to serve as domestic violence experts in court, to provide an integrated educational manager discussed elsewhere in this paper, and to help train court professionals with the *six critical areas of knowledge*.

There is an urgent need to update the family violence bench-book²²¹, with adoption of the inclusion of Goldstein's provisions²²², (detailed as *Safeguards* and *Critical areas of knowledge* in this submission). All relevant family court staff should also receive retraining concerning prior inadequate practices, mislead cultural presumptions and myths.

Research Informed Skills and Practice to drive Reform

Judges are limited in their capacity to reflect on the protective success of judgements to inform improved practice. The State Government must

²²⁰ Critical areas of knowledge, Goldstein, 2017 sourced from <http://barrygoldstein.net/importantarticles/safe-child-act> on 02/05/2017

²²¹ Family Violence bench book sourced at <http://www.dfybenchbook.aija.org.au/contents> on 02/05/2018

²²² 'ibid'

create a national data collection and evaluation framework that can assist departments, courts, police, services and programs to review, monitor and measure and improve their impact in addressing and responding to family violence and abuse. This could be implemented through the Australian Institute of Family Studies or similar.

This review will facilitate a discussion to compare the risks and benefits of possible outcomes. This will limit the risks endorsed through the current subjective process. This will also improve accountability of any subjective opinion used, as these should be expected to align with the conclusions of the evaluations. Insufficient accountability of Judges directly impacts the critical analysis, reflection and discussion required to improve practice and facilitate protective judgements.

Issues surrounding the skills and capacity of Family Reporters²²³

A major gap which hinders the courts ability to congruently uphold its *paramount consideration* surrounding the child's best interests as stated in the Family Law Act 1975 (Cth) 'FLA' S.60CA²²⁴, in matters concerning family violence and abuse, is the quality of family reporters and their reports. The author aims to highlight areas of concern which limit the courts capacity to determine and consequentially protectively act efficiently on the gravity of all abuse and family violence allegations.

The capacity of family reporters is limited through their expertise, to the detriment of the integrity of the interpretation required, to inform reports.

²²³ For the purposes of this report, 'Family Reporters' or 'family consultants' are inclusive of the following titles; Family court Report Writers/Dispute Practitioners/ Family reporters/assessors /practitioners/consultants or performing a similar function such as a child protection worker.

²²⁴ Family Law Act, 1975 (Cth) 'FLA' S.60CA.

The assumption that family reporters²²⁵ are experts in determining and providing accurate reports on the best interests of the child, and level of parenting capacity that provides for the child's emotional and psychological needs, is flawed. This is a critical acknowledgement where family violence and abuse is an issue. The current process often results in judgements made which are not adequately protective. This public safety issue and perception has been repeatedly reinforced through horrific cases, inclusive of Luke Batty²²⁶ and Tara Costigan²²⁷.

The effective function of a family reporter is limited through their capacity, legislated requirements and conferred immunity, to fulfil their responsibilities to an acceptable standard. Their reports are often inadequate and not fit for purpose, where they are formulated through a subjective investigatory process, and consequently do not assist the judge to make accurate decisions²²⁸.

This is a consequence of the lack of the informed, unbiased investigatory rigor and expertise required to adequately consider the nuances of family dynamics, participant behaviour, relevant and complex issues, (such as family violence, mental health, substance abuse, child welfare developmental stages and needs), and therefore family reporters are not, 'experts' at adequately determining what factors or inferences are to be drawn from their investigation for the children's best interests²²⁹.

²²⁵ For the purposes of this report, 'Family Reporters' or 'family consultants' are inclusive of the following titles; Family court Report Writers/Dispute Practitioners/ Family reporters/assessors /practitioners/consultants or performing a similar function such as a child protection worker.

²²⁶ Gray, (2015), State Coroner, Judge Gray, Coroners Court of Victoria, finding-085514 Luke Geoffrey Batty, Sourced at <http://www.coronerscourt.vic.gov.au/home/coroners+written+findings/findings-+085514+luke+geoffrey+batty> on 25/04/2017

²²⁷ Rv Rappel, (2016) ACTSC 295, decision date 07/10/2016, file no.SCC204 of 2015.

²²⁸ Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 18, sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

²²⁹ 'ibid'

The family report quality has been witnessed by advocates as lay opinion, coloured by the descriptive, emotional state, of the often professionally and experientially under qualified, family reporters' fragmented understanding of conflict, trauma or relevant neuroscience, in particular, the brains pathological influence on abusive behaviour²³⁰.

Repeated complaints by collective advocates²³¹, have echoed a lack of thorough unbiased, investigative method and disregard of recommended court and professional codes and practices. This often includes an insufficient consideration of the influence of the extended family, historic abuse and cultural, physical, mental health of all parties, or the educational and social issues, affecting involved children. These complaints include perceived biased and/or manipulated evidence, surrounding the quality, omission and/or addition of evidence.

The interpretation of hearsay during proceedings is often reported as fact, by the family writer, as reported to numerous advocates for reform. Family reports have commonly been reported to numerous advocates to lack the validity, created through verifiable science methodology, throughout their assessment of participant behaviour and consequential determined capacity.

This creates a public perception that some family reporters 'cherry pick' the inclusion of subjective evidence. Many reports contain subjective notions of parental care recommendations, despite the contrary directed in similar reports through the "*Case management in the Care Jurisdiction*" report by Mitchell CM, in 2007²³².

²³⁰ Parliamentary inquiry into a better family law system to support and protect those affected by family violence, Submission 8, sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FV1awreform/Submissions

²³¹ 'ibid'

²³² Mitchell, CM, (2007)., Scott Mitchell CM, 'The Children's Court of New South Wales Practice Direction No. 28: Case management in the Care Jurisdiction' (12 September 2007).

These recommendations, often informed via a conduit of discrepancies and grossly incomplete investigations, potentially colouring the judges' discretion, resulting in orders which further enable abuse and are not adequately protective.

*HelpFamilyLaw*²³³, has raised similar concerns in their recent submission to the Prime Minister. The founder Ms Annie Kelly states;

“In all of my client’s cases, I am able to establish that the assessments written by these ‘experts’ are inaccurate, incomplete and misleading...”

HelpFamilyLaw's²³⁴ refuted the expertise of report writers to have a sufficient understanding of family violence and their observations were further supported by providing relevant case studies.

The author supports *HelpFamilyLaw*'s²³⁵ recommendations to provide an unedited audio visual recording of participant interviews to each party. In addition, we strongly concur with *HelpFamilyLaw*'s recommendation to substantially raise the report writer's approved standard of family violence training and experience to include a higher standard of continuous, specialised knowledge.

A regular, voluntary, professional development exercise conducted at a domestic violence shelter, advocacy or similar support group must be mandatory for anyone in the role of assessing and/or considering abuse issues, including Judges and ICL's. This will assist in the development of consistent valuable insight and guidelines for Judges to consider pertinent to investigations and determinations.

²³³ sourced via collaboration with founder Ms A. Kelly *HelpFamilyLaw* <https://helpfamilylaw.net/on>
07/05/2017

²³⁴ sourced via collaboration with founder Ms A. Kelly *HelpFamilyLaw* <https://helpfamilylaw.net/on>
07/05/2017

²³⁵ sourced via collaboration with founder Ms A. Kelly *HelpFamilyLaw* <https://helpfamilylaw.net/on>
07/05/2017

This author adds that an insight of neuropsychology and relevant meta-analysis research must be included in this training and guidelines developed for Judges, as detailed in further in this report. The Royal Australian & New College of Psychiatrists²³⁶. (*RANZCP*), submitted to the recent family violence commission, that the low standard of training limits optimal management with family violence issues by medical and psychiatric professionals.

Skills, Standards and Methodology required to improve the integrity and accuracy of family reports, and those conducted through the PMH and advocacy tribunal pilots

The legislation highlights the ‘paramount consideration’ of best interests, however in practice, the best interests of the child are not protectively upheld due to insufficient standards, principles and methodology and interpretation of risk assessment of family reporters, in addition to mentioned lack of specialist expertise, resulting in judgements which may cause further harm.

When provided with information, it is critical that a family reporter possess the skills to employ a consistent methodology which validates the gathered knowledge.

The *Standards*, should not endorse the substandard scientific method used throughout parent-child observations, without insisting on critical analysis and replicated results, as detailed in Spradley²³⁷. These views fail to meet a scientifically sound test for valid conclusions, as observations are not measured against a control situation, nor consider extensive variables, (such as an artificial court environment and increased court-induced stress in participants), which cannot be adequately measured or replicated through a solely qualitative approach.

²³⁶ The Royal Australian & New College of Psychiatrists, ‘RANZCP’, Victorian Branch Submission, Sub: 0395.001.0001, sourced t <http://www.rcfv.com.au/getattachment/563D575B-0370-4BFD-BDDF-9387E9805F7D/Royal-Australian-and-New-Zealand-College-of-Psychiatrists> on 26/04/2017.

²³⁷ Spradley J., (1980), Participant Observation, Fort Worth.

The acceptance of an excessively and incompletely applied qualitative method used to conduct the family report is an inadequate means to obtain an accurate portrayal of the family dynamic.

The *Standards* do not address the appropriate delivery or responses of questions asked during a practitioner's interview. The writer is aware that some parents have been directed to answer strictly with closed answers; (i.e, yes or no responses). An improved approach would be for parents to be given a standard document, including a questionnaire to complete. This document must be created by an experienced family violence and abuse advocacy association in conjunction with a police response specialised unit. This will remove the verbal interaction between family reporters and the family involved and will improve evidence standards, transparency, and accountability and minimise the risk of an inexperienced assessor from employing inaccurate discretion.

A mixed methodology is recommended for the collation of information to improve interpretive accuracy. The collaborative triangulation and peer review that Creswell²³⁸, describes, adds reliability to subjective information. This is not currently promoted in family courts information gathering. The required level of interpersonal skills and sensitivity required for this type of data collation, as described in Jorgensen²³⁹, is also not mandated for in the *Standards*. This flawed method reduces the credibility of the conclusions and therefore shouldn't be generalised²⁴⁰.

The current method has little value to help formulate an accurate hypothesis by the practitioner, and encourages a subjective opinion. This potentially inaccurate opinion has an unacceptable probability of

²³⁸ Creswell J.W., and Miller DL. (2000), Determining Validity in Qualitative Inquiry. *Theory Into Practice*, Vol:39: 124-130.

²³⁹ Jorgensen D. (1989), *Participant Observation; a methodology for human studies*, Newbury Park, Calif.: Sage Publications.

²⁴⁰ McCall G and Simmons J. (1969), *Issues in participant observation; a text and reader*, Reading, Mass.: Addison, Wesley Pub. Co., LeCompte, M and Goetz J. (1982), *Problems of Reliability and Validity in Ethnographic Research*. *Review of Educational Research*, Vol: 52: 31-60.

misleading the judge, influencing an order which is not adequately protective.

Restriction on publication of court proceedings

Section 121²⁴¹ of the Family Law Act, 1975 is not fit for purpose. While it was designed to protect the litigants privacy, its function in practice, limits public knowledge and review regarding the activities of the family court.

There is much debate and ambiguity surrounding the force of the duration of this legislation. The public and affected parties must be clearly informed of the time frame to which Section 121 applies. It is not understood whether this section ends after final orders, after the children turn 18, or if this has a lifetime force. If it is indeed lifetime then justification of this timeframe must be critically analysed, in the context of our constitutional right to freedom of speech and due process. It is not reasonable in a democratic society that legislation indefinitely restricts a party's right to redress. If Section 121 is indefinite, this may be prejudicial to the course of natural justice and may possibly be unconstitutional.

Section 121 exposes victims of violence and abuse to further harm, through preventing a transparent capacity for gaps in the system to be addressed. It limits the public capacity to identify and repair inadequate legislation or the application of such. The current status permits perpetrators to manipulate legislation to commit further harm.

This section also limits the judiciary's capacity for informed reflection and improvement of practice, in managing proceedings involving family violence and abuse.

²⁴¹ FLA, 1975, section 121, sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s121.html on 02/05/2017.

In the interests of natural justice and to support due process, section 121 must be amended to permit participants in family law proceedings to responsibly publish and transmit all information pertaining to family court proceedings, including the children's ages and case number.

This should only be permitted where the communication is not vexatious, and is congruently believed by the author and supported by a reasonable view, to be factual. It should be permitted only where it is transmitted to any authorised government organisation, and any non government organisation, (including advocacy groups) registered with the *Australian Charities and Not for Profits Commission*, ministers, commissioners, professional or specialist expert, including advocates working out of a registered body. This should be permitted only in circumstances where remedy is genuinely and actively sought, or where there is a public interest in systematic trends and errors that require reform. This action should be endorsed in legislation in particularly, where orders are supported by documentation from a registered psychologist or doctor, to support that the outcome of any proceeding, is likely to have significantly risked the welfare of a child.

Section 121 should be amended to permit media scrutiny and review of cases where outcomes reasonably appear to not conform to community standards, and those which can contribute to improved system process. The media must not use actual names or photographs of parents and children, schools, places of employment, or suburb locations of affected parties. It is acceptable to detail the state location that the proceeding was conducted in.

Strict restrictions must apply so that places of employment are not given details of proceedings, (excluding protective State intervention orders, and those with a 68R provision), without the other party's explicit written permission. Safeguards such as using an alias for the parties and reinforced rules surrounding the integrity of only using accurate information, details of location should be limited to State, These safeguards will help to protect the privacy of families and children.

In contrast, any professional such as a report writer or independent lawyer must be permitted to be named. This will endorse transparency and accountability for effective review of practice. This approach will be valuable for the promotion of effective and protective judgements, surrounding family violence and abuse issues.

Improving the clarity and accessibility of the law

Crystal clarity regarding the application and enforcement of the United Nations Convention of the Rights of the Child and conferred rights in State legislation is pertinent.

The Australian Paralegal Foundation has identified a gap between the ability of parents to access legal representation and those that qualify for legal aid. The Parent Management Pilots partially address this gap however, these self represented parents would greatly benefit through an Advocate Case Manager who can oversee the entire process and ensure that the needs of the child, with conferred UNCRC rights, and those of the parents are not overlooked. These needs include easy access to legal information and also a legislative framework and new role to implement the rights of the child to substantially access required healthy developmental supports.

This role cannot be effectively fulfilled by a single advocate alone. It involves paralegal/teacher skills to help complete and edit documents, such as a chronology of events to ensure that history and relevant variables are taken into account, emotional support, informed direction to supports such as parenting classes, anger management, drug and alcohol, trauma recovery and resilience classes. It must also include substantial liaison between the child's school to facilitate the child's wellbeing and best interests.

A specialist Advocate Case Manager role may include the responsibility of an Education liaison manager, if a separate role for this function is not created. This responsibility would include liaison between the PMH

and the child's school to help teachers understand how to best respond to the individual needs of a child involved in the PMH or Family Court process. This should involve a trauma informed approach for students affected by family violence and abuse.

The effects of parental separation alone, even without complex factors, may require the child's teachers to be aware of a need to approach the child with empathy, and a tailored supportive response in the classroom.

It has been very obvious to the author, as an educator, that many teachers are oblivious to the status of many children experiencing the parental separation process. This situation has often caused students to be punished due to perceived inappropriate classroom behaviour, when they may actually be trauma affected and require a more empathetic management. It is important that the Education department creates and delivers professional development to help teachers to best respond to trauma affected students.

These students may present in class as withdrawn, defiant, or disassociated, may be more vulnerable to bullying and require more support to holistically succeed at school. Students experiencing parental separation are more vulnerable to bullying issues, due to their diminished sense of stability due to separation, family violence and abuse and trauma responses. The economic cost of bullying recently published by the Alannah and Madeline foundation is 2.3 billion dollars²⁴². A preventative risk management approach through the employment of a Advocate Case Manager who can support the child's holistic developmental needs, safety and recovery, will help to reduce this significant strain on the government finances due to bullying issues and the child's trauma responses caused and influenced by parental separation.

²⁴² Report- The economic cost of bullying in Australian schools, released on 20/03/2018, sourced through <https://www.ncab.org.au/research/the-cost-of-bullying/> on 07/05/2018

Affected children may require external supports such as extracurricular activities and tutoring to build resilience and recovery. This support may include counselling and practical assistance with school uniforms and books. This is necessary so that children experiencing family separation do not suffer through the reallocation of parental resources, which may be strained due to various parental separation factors. The support and nurturing of the child's healthy development should be a significant *best interests* consideration. Collaboration with a case manager or education liaison officer and the child's teachers can significantly assist the development of these children in school during and after the PMH or family court process, as required.

This role must be implemented into legislation to facilitate the child's *best interests*, and is best suited to a retired or casual teacher who understands trauma responses and developmental behaviour and must be allocated significant funding, to identify and facilitate the welfare, academic and safety needs of the child.

Other matters related to these Terms of Reference.

Further Skills and legislative improvements required;

One area where gaps in the system can be improved is an understanding of the interpretation of what constitutes *significant harm*, and how this is viewed and applied in Family Law and Child Protection law. The child protection system views protection issues and the Family Law System views child welfare in the context of parental contact. These present differentiated responses towards a child caught up in either system. It is better for a child's safety to fall under the child protection paradigm due to the vagueness of the Family Law Act's broader welfare scope which factors in variables which do not necessarily promote safety.

It is proposed that the interpretation of significant harm in child protection legislation and the definition of unacceptable risk used in

family law, are sensibly amended to protect children without unwarranted intervention and streamlined for relevance in proceedings.

There is a notable gap in the child protection system where the agreed policy definition of *significant harm as seen in NSW* 'MRG'²⁴³, for example, is not adequately contextualised compared with the recognition of identifying the *risk of significant harm*, considering a number of factors, as determined through the Children and Young Persons (Care and Protection Act), (CPA,1998, no.157) 'CPA'²⁴⁴.

The agreed policy definition of *significant harm* means to a significant extent, serious enough to warrant a response by a statutory authority. It is further clarified as; '*not minor or trivial*'. It is also defined as reasonably expected to cause a *substantial* and *demonstrably* negative impact on the child's welfare or safety. This definition must be considered in context of whether a parent or both parents are willing and able to implement adequate protective measures.

The Queensland CPA²⁴⁵, states that to reasonably suspect that a child is in need of protection, there is a probable, (not possible), expectation of harm²⁴⁶, and that there is no parent available that is able and willing to protect the child from harm. The Australian Institute of family studies supports this where they state; "Further, it is common for a child to be defined as being "in need of protection" **only** if they do not have a parent "able or willing" to protect them", (AIFS, 2016). This needs to underline all considerations of whether a child should be deemed in need of protection.

²⁴³ NSW; MRG, (2017), Childs Story Reporter, Mandatory Reporter Guide sourced online at <https://reporter.childstory.nsw.gov.au/s/> on 21/04/2017.

²⁴⁴ Children and Young persons (Care and Protection Act), (CPA, 1998, no.157).

²⁴⁵ Children and Young persons (Care and Protection Act), (CPA, 1999, section 10, part 3, Div 1 (10).

²⁴⁶ Qld, (2015), Practice guide: The assessment of harm and risk of harm, pg 3 sourced at <https://www.communities.qld.gov.au/resources/childsafety/practice-manual/pg-assess-risk-of-harm.pdf> on 26/04/2017

This same act also states;“(d) the *child or young person* is living in a household where there have been incidents of domestic violence and, as a consequence, the *child or young person* is at risk of serious physical or psychological harm.”²⁴⁷

The latter must be amended with the inclusion that this must **only** be applied if the parent **has not** commenced adequate protective measures in agreement with police, (not based on child protection determined protective measures)and is not able or willing to protect. It is critical the protective measures are informed and approved by a specialised domestic violence advocacy or police unit. These bodies are best placed to add impartiality to the child protection process.

The policy definition alone doesn’t consider protective factors and a directive to consider these with adequate interpretation of the *CPA*²⁴⁸. The defined *possibility* of significant harm used alone without consideration of protective factors listed in the Act, may produce a contrary prediction. These factors are significant variables, which when absent, nullifies the hypothesis through lack of procedural rigor, as supported by *Kuhn*²⁴⁹

The risk assessment may be improved through highlighting the willingness and ability of the parents through its inclusion in local agency assessment and protocol definitions.

Parental willingness and ability is also relevant where a Care and Treatment Order for a Child²⁵⁰, is enforced by a designated medical officer. The risk assessment practices must be substantially reviewed to assess if medical intervention is immediately required. This decision must be made by an impartial health regulator and consider prior

²⁴⁷ Children and Young persons (Care and Protection Act), 157, Ch3, part 2, sec 23, (1d).

²⁴⁸ ‘ibid’

²⁴⁹ Kuhn, Thomas. (1962), pg, 197a, 66-76, (1970), pg, 202., The Structure of Scientific Revolutions, International Encyclopaedia of Unified Science, ed. Neurath and Carnap.

²⁵⁰ ‘ibid’.

judgements made through courts, parental capacity, availability and genuine consideration of sound research and medical history supporting the parents knowledge and beliefs, and detail conditions applicable if the child is to be deemed ‘at risk’.

If there are no pending criminal charges it is reasonable that viable options should be provided to the parents and discussed prior to any removal from parental care.

In addition, if a designated medical officer reasonably suspects harm or risk of harm to a child and is likely to leave the facility and suffer harm if immediate action is not taken, the legislation²⁵¹ instructs that this officer must inform and if requested, provide a copy of the Order to the parents as soon as possible, this designated officer must also tell parents they can go to a doctor chosen by the parents²⁵², (unless the parents may be charged with a criminal offence in relation to the child or this provision may expose the child to harm). This is often not happening in practice.

The Queensland Child Protection Act, (1999)²⁵³, or any child protection act, should not prevail over this order, as they are not the medical experts, nor should it be used to avoid producing the Care and Treatment Order to the Child Protective Services.

This current status quo provides excessive authority to the Child Protective Services, which does not allow for correct checks and balances. It is relevant that in one case a judge had previously determined that there would be no need for a child protective order, prior to the hospital involved obtaining custody of the child. The Child Protection department shortly reapplied to another judge, successfully.

²⁵¹ Public Health Act, 2005, ‘ibid’, Div 6, s200, 1a, 1c

²⁵² Public Health Act, 2005, Div 6, s197, sourced at

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubHealA05.pdf> on 29/04/2017

²⁵³ Child Protection Act, 1999,

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ChildProtectA99.pdf>

These issues were publicly discussed in the case of a child with very capable parents, subject to the Amber alert by the Queensland Police Service in early 2017. It was disappointing to see that the hospital involved in this case were extremely adversarial, and removed the child, despite been provided with evidence to the contrary of their allegations. Services did not adequately support the family unit, and even dictated which advocate the parents could use for mediation. The hospital refused to provide names of staff of a designated medical officer, (breaching the Public Health Act, 2004, (204)²⁵⁴, or provide a Care and Treatment Order, including reasons for an extension of this order.

The perceived misconduct in this case has greatly undermined public confidence in the system. This was exacerbated by a 100K signature petition for the child's return, ignored by government. This illustrates that it is pertinent that Child Protection Act's do not contain clauses that can be maliciously interpreted to hinder and prevent disclosure to the parents, especially where disclosure doesn't affect the validity of proceedings. Media scrutiny of child protection cases, should be sensibly endorsed in the public interest, with non-identification safeguards, to promote a more transparent, accountable and genuinely protective system.

Full disclosure is in the best interests of the child, restoration of public faith in the system, and to satisfy a democratic expectation of due process and natural justice. These Acts, and similar legislation urgently require sensible amendment if conducted with insight, they have potential to support a PMH model.

The Child Protection and Family Law legislation must be amended to reflect that parents are the *Competent Child Authority*²⁵⁵ with their children's matters. They have never conferred jurisdiction to the State or

²⁵⁴ Public Health Act, 2005, part 3, div 6, (204).

²⁵⁵ Competent Child Authority as defined in the international Child Protection Convention definition as seen in the Family Law Act, 1975.

Family Law Courts. This status quo must return to the parents to hold jurisdiction as this authority, unless evidence is supplied to a criminal standard that credible reasons are provided and accepted in a court of law, that the parent/s have had their status revoked.

Constitutional Issues

Issues, relating to the absence of State conferred powers, in the FLA, 1975, (111,CG),²⁵⁶ which permit the family court to assume child protection jurisdiction, must be further investigated and amended to comply with our constitution as required.

The provision to regulate the implementation of the Child Protection Convention, (CPC),²⁵⁷ within the Family Law Act, (1975), may affect the operation of State and Territory law, contrary to the intent of section 111CZ, (2a)²⁵⁸. While the CPC provides for foreign protective measures, the assessment of State child protection matters is, in practice, often applied throughout family consultant investigations. The constitutionality of reporter opinions or judicial determinations based on protective matters requires review.

The Rules of Court, (Sec 123²⁵⁹), support foreign protective powers as seen in the *aims of the child protection convention* on the Federal Attorney General's website. Here it states; "...a certified copy of an order that is a protection measure made under the Family Law

²⁵⁶ Rules of Court, Family Law Act, 1975, (sec 123), sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cg.html on 30/04/2017

²⁵⁷ Family Law (Child Protection Convention) Regulations 2003
<https://www.legislation.gov.au/Details/F2003B00077>

²⁵⁸ FAMILY LAW ACT 1975 - SECT 111CZ sourced online at; http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cz.html where it states; *Regulations to implement the Convention, 2a) provide that the regulations do not affect the operation of laws of a State or Territory that relate to the implementation of the Child Protection Convention*

²⁵⁹ Public Health Act, 2005, Div 6, s197, sourced at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubHealA05.pdf> on 29/04/2017

Act 1975”²⁶⁰, and that; The Family Law (Child Protection Convention) Regulations 2003²⁶¹, (CPC,), made under the *Family Law Act* 1975, provide processes for the following actions under the Child Protection Convention; A ‘foreign measure’ includes child protection measures and child property measures.

The provision to regulate the implementation of the Child Protection Convention may affect the operation of State and Territory law, contrary to the intent section 111CZ, (2a)²⁶².

The CPC, (3a), regulations also state the court may confer jurisdiction on a Federal court (other than the High Court), for protective matters under the convention. The jurisdictional issues surrounding a Federal court determining international child protection matters, and conference of a power it doesn’t hold, must be reviewed for constitutional compliance.

The Family Law Act’s child welfare power, inserted into 67ZC of the Act in 1983, may not support capacity to support the making of what may be considered child protective orders by the family courts. This directly enables the capacity of judges to work within a child protective framework.

The inclusion of the word ‘protect’ in 60CC, (2b)²⁶³, underlines that the family court is acting in a protective capacity, outside its constitutional jurisdiction²⁶⁴. The Family Law Act intends to protect children but

²⁶⁰ Attorney General’s department webpage sourced at <https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/Internationalchildprotection.aspx>

²⁶¹ FAMILY LAW ACT 1975 - SECT 111CZ , (3a), Regulations to implement the Convention, sourced online at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cz.html

²⁶² Family Law Act, 1975, section 111CZ, (2a), sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cz.html on 30/04/2017

²⁶³ How a court determines what’s in a child’s best interests, Family Law Act, (1975), 60CC, (2b).

²⁶⁴ Acknowledgement and appreciation for the expertise of Counsel Patricia Merkin.

cannot constitutionally enact this power, this renders this legislation invalid.

The absence of State conferred powers, in the FLA, 1975, 111CG²⁶⁵ which allow the family courts to assume child protection jurisdiction should comply with our constitution.

There have been many cases where the family court has disregarded the conclusions of child protection investigations during proceedings. The following highlights a notably common systematic culture where this occurs.

In a case where the judge received a child protection report based on allegations from a perpetrator and made against a victim of violence and rape, which had an unsubstantiated outcome, the Judge told her audience that; “*Child protection often get it wrong*”. She then chose to rely on the perpetrators hearsay and family consultant’s alignment with such, to make harsh subjective interim directions, contrary to child protection’s conclusions, against the falsely accused victim.

This caused a substantial loss of primary parent contact, and a reversal of living arrangements, where children were sent to reside with the perpetrator. This judge did not adequately consider the weight, expertise, jurisdictional issues or actual extensively documented risk, surrounding the perpetrator parent. An empathetic lawyer, raised welfare concerns regarding the children’s views, and was bluntly informed by the judge that these children were “*collateral damage*”. When the primary protective parent protested and raised the issues of extreme risk, this same judge said, “*time will tell*”.

The outcome after coerced consent orders was tragic. The perpetrator parent, who benefitted from the judges apathy, and court endorsed

²⁶⁵ Family Law Act, 1975 sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s111cg.html on 30/04/2017.

secondary abuse, ending up on the highest risk level of a family violence police unit, due to repeated life-threatening attacks on not only the original primary parent, but also the children. During consequential State protection intervention orders, police stated that this parent was “*extremely high risk and offending across the board*”. The author strongly states that cases such as these, where child protection, specialist expertise and jurisdiction is ignored, high risk judgements are facilitated.

The constitution directly affects the capacity of judges to work within a child protective framework and reforms must include a comprehensive review. All cases involving protective issues should be directed to the State magistrates court and/or PMH or Child Advocacy Centres. This will reduce the workload and financial expenses of the family court. This will also offer opportunity to use a risk management approach using specialist expertise under the correct and constitutionally sound jurisdiction.

Failure to protect legislation; A Gap in the System which requires modification to support the emergent pilot models.

The Family Law *Standards*, do not outline a detailed structure or scientifically sound basis to adequately determine whether abuse has occurred, by which parent or to what extent and under what conditions. This is also evident in Child Protection legislation found in Child Youth and Families Act²⁶⁶ commonly known as the ‘*failure to protect laws*’.

This legislation does not clarify, act or direct local agencies to manage investigations in accordance, to the objective standard of the *reasonable man* test, or accepted community standards, to what extent or conditions alleged emotional, medical neglect, or the often misused *failure to protect* reasoning, is deemed significant enough to require change of child residence arrangements. It broadly directs report writers to interpret general frameworks without specifying an exact procedure to

²⁶⁶ Child Youth and Families Act 2005 , S.162, SS.1c-f.

follow or adequate consideration of protective circumstances already implemented by the protective parent. (This is discussed further in the *interpretation of significant harm* section of this submission).

The child protection system commonly misuse this legislation against vulnerable protective parents who have experienced violence, this includes past relationships which have ended. Child protection workers commonly use this legislation for often unsubstantiated *clairvoyance* via its ability to also *predict* violence or neglect. These '*predictions*' are often enough to separate protective parents from their children.

The *failure to protect laws* and similar legislation is being applied contrary to intent and must be amended immediately so that they are not used against protective parents who have taken genuine measures to leave a violent relationship or have a historically violent past relationship. It would be more conducive to support a parent through this process than removal. This legislation is often cited as the reason why victims often do not seek support for family violence issues from the welfare system.

The differences between how a legal body or child protective service compared with a domestic advocacy or shelter view family violence protective measures and assess *risk* are vastly differentiated. An advocacy usually supports a trauma-affected family and encourages resilience and resolve from trauma. Child protection services, (CPS), in practice, offer little support, if any, are intrusive and commonly aim to remove children affected by family violence, instead of genuinely supporting the family. If funding was directed to support the families prior to removal where appropriate, rather than after, this would prevent much trauma to the family unit.

In stark contrast to State investigations, it is common knowledge that CPS often fail to intervene in a substantially protective capacity when a case is in the family court where they consider that the child has one *safe* parent. Keeping cases involving family violence and abuse in a State jurisdiction through the PMH or Child Advocacy Centre will help facilitate investigative expertise and rigour.

A more efficient and humanitarian approach, in consideration of UNCRC²⁶⁷, would be for the family courts and child protective service to support a protective parent and uphold the child's rights, in leaving the risk situation and in rebuilding the **intact** family, not removal of children from their primary protective carer, which inflicts extensive further trauma for all involved. It would also be beneficial if CPS willingly offered their resources to assist in identifying which parent is the safe parent in family court matters instead of leaving victims of violence and abuse on their own, as is often reported by victims. More specific protective direction is urgently required through amending the *failure to protect* legislation such as the Children Youth and Families Act, (sec, 162), 2005²⁶⁸.

Child protective services and family courts must be proactive in using and interpreting legislation which helps victims break the cycle of violence. One recommended amendment to the Children Youth and Families Act, 2005²⁶⁹, is that it should permit a separate identification of the protective and the abusive parent, if applicable, so that protective parents of victims of violence are not subjected to unreasonable child removals.

Lang, (2000), supports that effective management of domestic violence in the child protection system promotes empowerment of the protective and victimised parent, and to resist separating the child from this parent as this parent understands the trauma children face²⁷⁰. This parent is

²⁶⁷ UNCRC, (1989b) Article 3 of the United Nations Convention on the Rights of the Child (UNCRC), UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 21 April 2017] ratified in Australia in 1990, Section 9 of the Children and Young Persons (Care and protection Act, 1998), NSW.

²⁶⁸ Children Youth and Families Act, 2005 S.162.

²⁶⁹ Children Youth and Families Act, 2005 S.162, (c), (d),(e), & (f).

²⁷⁰ Laing., L (2000), "*Progress, trends and challenges in Australian responses to domestic violence: a background paper to the Issues Paper Series.*" Australian Domestic Violence Clearinghouse.

best placed to assist in the child’s recovery and legislative reforms should support this.

The failure to protect legislation, if insightfully modified with discussed considerations, can then be used to support family court decisions and alternatively if the pilot model is used, a PMH summary report. This can add weight to parenting orders made through the PMH and if contravened may be used to pursue criminal charges at State level.

Immediate changes required to be made to the family law system; in particular, by amendments to the *Family Law Act* and other related legislation-Summary

The Parliamentary Inquiry

All 33 of the recommendations from the final report regarding the Parliamentary inquiry into a better family law system to support and protect those affected by family violence²⁷¹, should be immediately implemented. This urgency was highlighted by the Australian Parliament’s Social Policy and Legal Affairs Committee who requested “*swift and urgent improvements*”. They also reiterated concerns regarding the “*adversarial nature of the family law system, inappropriate responses to reports of family violence, and the disconnect between state, territory and federal jurisdictions*”. Sarah Henderson MP, (Committee Chair), stated that; “*it is clear that the family law system is not providing adequate support to and protection of families experiencing family violence. In many cases, the safety of families, particularly children, is being compromised*”. It is pertinent that this inquiry’s recommendations are immediately given legislative force.

²⁷¹Final Report for the Parliamentary inquiry into a better family law system to support and protect those affected by family violence, sourced at

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVI_awareform/Report © Commonwealth of Australia 2017

ISBN: 978-1-74366-728-6 on 01/05/2018, (detailed specifically in the media release of **07 Dec 2017**: Committee calls for major overhaul of the family law system to address family violence)

An improved risk management approach through parental management hearings²⁷² panel system, (PMH), in collaboration with State-wide Child Advocacy Centres based on the *Bravehearts* model, will promote more accurate and safer judgements, in accordance with the intent and purpose of the Family Law Act, 1975²⁷³ and protective concerns.

This must include *safeguards*²⁷⁴, the *six critical areas of knowledge*²⁷⁵, and supports such as video-link where necessary. Scientifically sound investigative methods must be used, with reliance on verifiable peer reviewed, research and meta-analysis, for complex issues, to help to inform a more rigorous process and sound decision making. Unsupported subjective views and persisting myths, (such as misaligned alienation or enmeshment directed towards genuinely protective parents), and secondary system abuse, must not be endorsed by family consultants or independent children's lawyers as this approach has facilitated high risk determinations. Ongoing research and review must also be conducted to highlight family law system gaps and facilitate improved practice and sound determinations.

Collaboration and legislative concurrence must be refined, in particular, through the language of the Family Court *Standards* and *Principles*, and also the '*failure to protect*'²⁷⁶ child protection statute. The definition²⁷⁷

²⁷² Parental management hearings (PMH), sourced at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201718/ParentingHearings on 26/04/2018

²⁷³ Family Law Act, 1975, sourced at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/ on 26/04/2017.

²⁷⁴ Safeguards as adapted from Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act> on 02/05/2017

²⁷⁵ Critical areas of knowledge, Goldstein, 2017 sourced from <http://barrygoldstein.net/importantarticles/safe-child-act> on 02/05/2017

²⁷⁶ 'Failure to protect legislation', CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 162 Sourced online at http://www5.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s162.html on 26/04/2018

²⁷⁷ NSW; MRG, (2017), Childs Story Reporter, Mandatory Reporter Guide sourced online at <https://reporter.childstory.nsw.gov.au/s/> on 21/04/2017.

and risk²⁷⁸ of *significant harm* needs to be streamlined across jurisdictions, contextualised, amended and understood, to ensure that children are not removed from parents for minor and insignificant issues, which can often be remedied with support. Children must not be removed where a victim of violence has actively sought adequate support. The corresponding child protection legislation²⁷⁹ requires urgent amendment. It is critical that support for affected families is provided to help break the cycle of violence and promote recovery. An understanding of the traumatic effects on the child of removal from a primary protective parent, is absolutely critical for all child protection workers and family violence and abuse specialists. It is also pertinent that language surrounding *probable* and *possible* harm, is refined to consider parental capacity inclusive of protective factors and actual risk level. This nuance presents significant variables which may produce a contrary and inaccurate prediction to child protection/specialist reports. This has resulted in unwarranted removals, catalysing extreme trauma to the child and whole family unit, and requires urgent legislative scrutiny and reform.

Parents in most circumstances have legislative grounds to seek further medical advice²⁸⁰ for their children. Public outrage has followed nationally and internationally, where medical officers and child protection officers, have applied to the court to override the parents' rights to additional medical opinions or treatment. I strongly state that Child Protection legislation must not limit a capable parents rights to choose appropriate medical care from a registered medical practitioner. Where there is a medical issue, not a primarily a protection issue, the

²⁷⁸ Children and Young persons (Care and Protection Act), 157, Ch3, part 2, and Qld, (2015), Practice guide: The assessment of harm and risk of harm, pg 3 sourced at <https://www.communities.qld.gov.au/resources/childsafety/practice-manual/pg-assess-risk-of-harm.pdf> on 26/04/2017

²⁷⁹ Children and Young persons (Care and Protection Act), 157, Ch3, part 2, sec 23, (1d).

²⁸⁰ Public Health Act, 2005, Div 6, s197, sourced at

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubHealA05.pdf> on 29/04/2017

impartial expertise of medical specialists must be prioritised. Simply the very survival needs of the child must be paramount before perceived safety issues. Family Law reforms must offer clarity through clear legislation regarding the status of the State and parents in this situation to restore public confidence in the justice, child protection and health systems.

The views, needs and rights of the child must also be mandated, (with Commissioner and a *Youth Affairs Office* for oversight), to uphold humanitarian and international treaty obligations. There is a pertinent need to support widespread awareness with a guidebook to support use of the 68R²⁸¹ amendment, This must be facilitated between the interconnected family court, child protection and justice system to illuminate risk, support safety and welfare and uphold justice.

In cases involving family violence and abuse, it is critical that independent specialist experts are used. An additional specialist must also include an Independent *Advocate Case Manager/ Educational Liaison Manager*, for court liaison with kindergartens and schools. This will support a trauma informed approach surrounding the child's welfare and academic needs. The appointment of this role, in collaboration with expert trauma specialists, in the current family court and emergent pilot systems, will help facilitate the best interests of the child's holistic development, resilience and recovery from family violence.

All expert specialists, court reporters, and ICL's, must have capacity to source, and critically analyse relevant information. This must include a specialised understanding of normal, trauma affected and perpetrator, development and behaviour. Impartial specialist managers, with an understanding of neuropsychology and/or forensic psychology should also be available to the court, PMH and Child Advocacy Centre, to

²⁸¹ Consolidated Acts, Family Law Act, 1975, (68R),
http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68r.html

provide support, review and oversight to facilitate accuracy and meaningful interpretation.

Any court conferred immunity afforded to family consultants and legal practitioners must be revoked. Litigants must be offered the opportunity to have a support person present through any interviews and must also be permitted to take notes and audio record this interview to protect their legal interests. A transparent and impartial complaints and accountability process, (through AHPRA, Youth Affairs Offices, Children's Commissioners and the legal services board and similar), must also be easily accessible, and not be dependent on Judicial permission, to family court and PMH participants.

Section 121 must be amended to facilitate any investigation into these complaints. It is also critical that the ALRC provide clarity on the timeframe that Section 121 applies, in accordance with constitutional obligations.

It is absolutely pertinent that a strict end date for reasons for judgement and the final orders, is provided for parents at the conclusion of their case. The current status of an undefined timeframe, which leaves parents in limbo for months, and in some cases years, after the final hearing is unacceptable. This situation adds unnecessary stress to litigants and children over a long period and contributes to diminished mental health. The current status has an unreasonable risk to the child where in the interim period safeguards are not adequately facilitated. If the family court is to be considered fit for purpose, all cases should be resolved within two weeks of the final hearing. If a judge cannot fulfil this requirement then the family court should not be used for any parenting matters involving children. As, suggested, cases involving children should be resolved using a State tribunal model with specialist experts. This is the correct jurisdiction to use if we are to adequately protect our children.

The PMH and proposed Advocacy Centre pilots appear to offer much promise for effective management of complex cases. If these are inclusive of specialist experts, who rely on evidenced based research meta-analysis and common sense, these emergent models are anticipated to offer much remedy to current issues in the family law, justice and interconnected child protection systems. The *First Responder* proposal provided through this paper, will help close the gaps and gel interconnected systems. This should be used in collaboration with the proposed advocacy tribunal models as described. Further recommendations for a more protective interconnected system are provided in the appendix.

Case studies from the view of a child and protective parent are also provided in the appendix, and inform the author's conclusion that the family court may be best suited to only managing cases where both parties freely consent, and simple property matters.

The issues raised in this paper, in addition to the intent, interconnectivity and efficiency of the Family Law, Child Protection, Justice and emergent pilot systems, should be prioritised and reviewed, through the Terms of Reference of a well overdue Royal Commission.

Appendix

Key Recommendations;

(*inclusive of required interconnected child protection legislative reform, to support investigative accuracy, identification of risk factors, and safeguards in the family law system)

1. Refine the language to mandate compliance in the *Australian Standards of Practice for Family Assessments and reporting* (Family Courts, 2015). Use language to legislate for **exact** expectations for family reporters, (and anyone performing similar functions), which they are accountable to and appropriate sanctions will be enforced if these are not complied with. All the language in the *Standards* stating '*should*' must be changed to '*must*', in particular, where *accuracy* and

objectivity are mentioned and where interviews with children are to be held away from potentially influential adults.

2. The FLA must include a significant consideration of professional character references, and relevant community participation history in family reports.

3. The FLA must include consideration of the influence of the extended family, historic/current violence, sexual abuse and cultural, physical, mental health and integrity of all parties, and the educational and social issues, affecting involved children in **all** family reports.

4. Family reporters **must** request and consider a report from the school year level coordinator relating to each parents involvement and support of the child's education and known extra- curricular activities. This must also be provided for in relevant educational welfare legislation.

5. Mandate for a significant consideration of **historic** violence and historic criminal history inclusive of current status, throughout family reports and proceedings.

6. Corroborative evidence must be included in the *FLA*, 1975, as a minimum standard for evidence of abuse claims.

7. Apply *standards*, (referenced above (1)), to preliminary assessments.

8. Permit party's to answer either open and/or closed answers during interviews.

9. Permit interview participant's to complete a written detailed questionnaire in lieu of a formal verbal interview as an option. A copy will be immediately provided to each party and will be the only communication relied upon for that particular interview.

10. A family violence/abuse advocate provided at the courts cost, or any independent family violence/abuse advocate of the participant's choice. This person must be permitted to attend and record relevant notes throughout all report writer interviews, if family violence, neglect or sexual abuse allegations are raised.

11. A mental health advocate must be provided at the court's cost, to assist any participant who requests emotional support during family report writer interviews.

12. Each Family Court must employ a sufficient number of family violence and mental health advocates to adequately support and manage the daily hearing list.

13. The document referred to in (9) is to be created by experienced impartial advocacy associations, (for example; Berry Street, White Ribbon, the Australian Paralegal Foundation, Fighters against child abuse Australia, (FACAA²⁸²), or the Child Protection Advocacy²⁸³), in conjunction with a specialised police domestic violence unit, and one trauma-informed legal representative.

14. All participants in verbal interviews with the family consultant/court reporter, are to be provided with, or permitted to record an unedited visual and/or auditory recording of participant interviews to be retained by participants for transparency, and to protect the participants' legal interests.

15. Refine language, (to mandate compliance, accountability and protective measures for victims of violence, inclusive of significant consideration that the victimised parent are often viewed by children as their best source of support and valuable for the child's recovery), throughout the *Family Violence Best Practice Principles*, (Bryant et al, 2013., 2016), and the relevant Policies of the Western Australian Family Court

16. Revoke court conferred immunity for Family Reporters and anyone performing a similar function.

17. There must be full disclosure of possible conflicts of interest to be listed clearly under the heading of any family reporter's report, inclusive of past relations with legal personnel involved in proceedings.

18. A list must be created of appropriate sanctions for Family Reporters who do not comply with the abovementioned *standards* and *principles*, inclusive of a three strike rule. The creation of a professional court directed disciplinary procedure, with transparent accountability and sanctions, must be implemented for practitioners who do not follow the *standards*.

19. All family reporters and similar practitioners must meet AHPRA and respective professional registration requirements. This is exclusive

²⁸² Fighters against child abuse Australia, further information found at www.facebook.com/facaaus as sourced online on 21/04/2018

²⁸³ The Child Protection Advocacy, www.childprotectionparty.com.au, Elizabeth, S.A.

of independent, specialist family violence and abuse workers who may rely heavily on evidence based experience and insight.

20. Family reporters, and anyone performing a similar function, must conduct further education. This includes an understanding of relevant neuropsychology in relation to family violence, and includes gaining an insight of domestic violence through regular voluntary work at a domestic violence shelter or professional development from an independent family violence support group. A thorough understanding of quality, reliable, replicated, medically sound, ACE study,²⁸⁴ (adverse childhood experiences), and Saunders' study²⁸⁵ research, which focus on how domestic violence affects children and the management by the court systems, should be mandated. The reasons Parental Alienation Syndrome, (PAS), has been discredited also needs to be understood. The differentiation between protective and alienating behaviour when abuse is alleged, must be absolutely understood. These experts must also gain additional training in relation to critical analysis of information, and interpretation of information, in particular, with a demonstrated understanding of what bias is. In short all court report writers and independent specialist experts must have an understanding of relevant peer-reviewed and evidenced based research, including sound relevant meta-analysis, to assist in forming opinions and decisions.

21. Family court and child protection social workers and psychiatrists must not personally diagnose or inference, any participant with a **new** mental health disorder that was not documented to be significantly indicated or present prior to court proceedings.

22. Independently obtained, medical, psychiatric, educational, sporting records, character references and criminal or substance abuse records, obtained from relevant professionals to be combined and reflective of status quo prior to proceedings to carry at minimum 75% of the weight of a family reporters conclusions.

²⁸⁴ ACE Study Sourced at https://www.cdc.gov/violenceprevention/acestudy/about_ace.html on 01/05/2017

²⁸⁵ Saunders et al., *Saunders study*, U.S dept of Justice, (2012), sourced at <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf> on 01/05/2017

23. An independent family violence advocacy group in liaison with a police family violence unit and one legal representative to create an exact checklist of appropriate, qualitative home study requirements, provided to each party, where if a party meets these need the home must be deemed satisfactory regarding the best interests of the child.
24. Any ordered home study investigation must meet specific criteria, (inclusive of an independent expert witness from a domestic violence advocacy), created and documented by the creative stakeholders, (listed in 23) pertaining to a genuine requirement to conduct a home study.
25. Any conclusions drawn from a home study investigation, (see 23), must be agreed to by the independent domestic violence/abuse advocacy witness to be considered valid.
26. Home study investigations must not occur twice within a 6 month period, unless there is a significant reason for an exception. These reasons are to be documented by the creative stakeholders, (listed in 23).
27. Family report writers, (and any person performing a similar function), must present conclusions which can be verifiable and reasonable, (according to the accepted standard of the reasonable man test), and in consideration of trauma and family violence informed insight the report writer must possess.
28. A mandate for the inclusion of an independent advocacy department led by *Family Law Net*²⁸⁶, or a similar impartial advocacy group, to examine and critically analyse family reports, to encourage validity, (accountability, impartiality, transparency and justice regarding humanitarian, legal, sound consistent methodology and professional expertise). This assessment is submitted with the family report for the courts consideration.
29. Revoke the costly and inefficient inclusion of independent children's lawyers in all family court proceedings.
30. In respect of (29), the family courts should document and make publically available, an evidenced based fact website including information such as, the number of unsubstantiated and substantiated allegations, and the percentage of cases where the independent

²⁸⁶ Expert analysts in family court reports sourced at <https://helpfamilylaw.net/> on 21/04/2018

children's lawyer has concurred with the report writer's recommendations in relation to who the child lives with.

31. The family court should employ impartial research personnel, to conduct reflective, impartial longitudinal, verifiable research, using a questionnaire after 1, 2 and 5 years, surrounding the quality of the child's welfare regarding protective judgements. This research must be independently analysed to improve practice.

32. There is a need to sensibly amend section 121, without permitting the use of names, or addresses, to permit public discourse and accountability. There is a need to permit exemptions for *AHPRA* and advocacy bodies for investigations.

33. Removal of the derogatory, subjective, language in the *Family Violence Best Practice Principles*, (Bryant et al, 2013, 2016), which claims that adult victims of family violence commonly have a diminished parenting capacity, is critical. This scientifically unsound consideration, must be replaced this with the contention that any proven violent abuser has a diminished capacity to parent.

34. The definition of an abusive, neglectful or violent parent (for the purposes of 30), needs to be substantially defined, and put into the FLA, (1975), inclusive of a minimum evidentiary standard for purposes of classification.

35. Protective parents are to be recognised and defined as the *competent child authority* in accordance with the international *Child Protection Convention* provisions described in the FLA, (1975), in relation to the status of their child/children. This status should not be revoked unless there is a verifiable evidence that such parent has committed an act or behaviour, which significantly affects the child's best interests according to *community standards*, (see 33).

36. **Community standards** must be included in the FLA, (1975), as pertaining to the reasonable expectations and standards of the general public. Findings and judgements may be tested in proceedings, through an independently, randomly selected voluntary sample of 12 members of the public.

37. **Community standards**, (as described in 36), must have significant jurisdiction and weighting in the judges' consideration, over a report writer and also a child protection authorities stance if they conflict.

38. The status of the long-term primary care-giver and/or protective parent to be clearly defined and detailed in the current Family Law Act, (1975). This status should be given significant weight in family reporter's considerations, relating to decisions regarding residence of the child.

39. It should be mandated in the current Family Law Act and associated *Principles*, (see 29), that a change of school and/or extra-curricular activities, that is not agreed to by the child, is not in the best interests of a child and this should be avoided unless there are significant risk issues.

40. It should be mandated in the Family Law Act and associated *Principles*, (mentioned in (29)), that the child's relationships with extended family members and cultural considerations must be considered and given appropriate weight when determining residential arrangements.

41. The affect and body language and verbal delivery of a family report writer or any person conducting a similar purpose should be considered towards weighting of any associated report.

42. Australian Health Practitioner Regulation Agency, (AHPRA), must efficiently improve their complaints process using an integrated family violence advocacy led department, (as described in this response to the terms of reference), to hold report writers and child protection workers accountable to the family law act and relevant child protection legislation, inclusive of mentioned *standards* and *principles*, and relevant protocols and procedures with corresponding court conferred immunity removed from relevant legislation.

43. A compensatory scheme must be initiated in a similar manner to VOCAT. This is independent from the court, informed, but not funded via AHPRA. It may be each states designated equal opportunity and human rights commission, (such as VEOHRC in Victoria), as recommended through the Royal Commission into Family Violence, (2016). This will have a separate department, specifically for court participants who have experienced further violence, or have been significantly deprived of their natural parental rights, or rights to spend time with their parent/s, as a consequence of grossly inaccurate family

reports, where for example; significant negligence, bias or procedural disregard, is established. This must be a transparent process, independent of the court appellant system at no cost to the applicant. This may be funded through the removal of the independent children's lawyers throughout the family court system.

44. There is a critical need to amend the Child Youth and Families Act, (2005), (Sect 162, (1c, 1d, 1e,1f), to reflect the words mother or father, not parents (plural), and not both, *mother* and *father* in one point either, (as the CPS legal department have stated to the author that they can't use discretion to amend their files to reflect one parent as this statute presently stands. This determination may directly affect family court determinations surrounding welfare.

45. Child protective services and the Australian State and Federal Courts must be explicitly instructed, through clear legislative provisions, that they are not to apply the Child Youth and Families Act, 2005, (Sect 162), (1c, 1d, 1e, 1f.), to victims of physical, emotional or psychological violence who have taken adequate measures to protect the children, leave the risk situation and/or did not facilitate any alleged abuse.

46. *Protective parent* must be defined in Child Protection Legislation to concur with no.35, of these recommendations.

47. Protective parents must not have their children removed by child protective services unless reasoning is evidence based and meets a community accepted standard of abuse or neglect, (see point 36). This contention must also be supported by an independent specialist in family violence /or abuse, and supportive measures have been unsuccessful where appropriate. It must be proven beyond probability, that this parent does not have capacity to adequately care for the child. In these cases kinship care must be prioritised, unless it is deemed inappropriate via community standards.

48. Child protection services must financially and psychologically support trauma/family violence affected families, instead of prioritising the removal of children. This financial support will extend to educational and food/clothing resource support, short-term respite for the whole family and parenting resilience classes.

49. There is a need to legislate mandatory training for all family reporters and child protective workers which must include a two hour video of the impact of violence on protective parents and children, inclusive of methods to support resilience and recovery of victims. This video must be created from the victim/survivor perspective. The creation of this video is to be directly and equally funded by the Family Courts, Family Circuit Court and Child Protection Services and must be created by an independent, victims support network.

50. The obligation to nationally include the *Charter of Rights*²⁸⁷ so that children benefit from the UNCRC provisions, and to increase rigor and validity of investigations through the inclusion of a child's voice, must be included in all relevant protective legislation involving youth, inclusive of all legislation listed in the *Child protection legislation in Australian states and territories, (AIFS,2),2014*, and the Family Law Act, 1975,(cth).

51. A national inclusion of the *Charter of Rights*²⁸⁸ will provide a more humanitarian response to children who have experienced violence or other abuse and this in turn will support resilience and recovery from trauma. An age appropriate brochure such as the one found in FACS, (2015), must be provided to each child in care and clearly explained by a legal representative.

52. The Children Youth and Families Act, (2005), S.162, (c), (d), (e), & (f) must be amended, to differentiate between a protective parent and/or an abusive parent. This part of the Act must never be applied to a protective parent, as noted in the draft considerations of this act. This statute should not use the plural term **parents** if this is not applicable. This statute must not be applied to a victim of violence or his/her children if this person is actively working protectively and cooperating with police measures initiated or in place.

²⁸⁷ OCG, (2014), Office of the children's guardian, Information sheet 1, standard 1., sourced online at; www.kidsguardian.nsw.gov.au/ArticleDocuments/451/Informationsheet1.pdf.aspx on 21/04/2017

²⁸⁸ OCG, (2014), Office of the children's guardian, Information sheet 1, standard 1., sourced online at; www.kidsguardian.nsw.gov.au/ArticleDocuments/451/Informationsheet1.pdf.aspx on 21/04/2017.

53. A child should be defined as being *in need of protection* **only** if he/she is proven to a reasonable standard, (community standards as defined in 36 or a civil standard), that they do not have a parent with the capacity or intent to protect them. This must underline all considerations of whether a child should be deemed in need of protection. This must be nationally inserted into all child protection legislation and the Family Law Act 1975, (cth).

54. There is a critical urgency to repeal the legislation in the Children Youth and Families Act, (2005), Section 162 (3) inserted by no.52/2013, s.6, where the court can predict events to occur or not occur, even where the court is not satisfied that these predictions will or will not occur.

55. In reference to 54, legislation must be included into the Children Youth and Families Act, (2005), Section 162, (3), which clearly states that courts must be satisfied to a civil standard, that events may or may not occur.

56. This submission proposes, with regard to the recommendation by the Royal Commission into Family Violence Summary²⁸⁹, that the State and Territories facilitate a powerful and efficient advocacy peak advocacy network led by insightful survivors who have insight into the gaps in the system to catalyse meaningful, protective, respectful liaison.

57. State and Territory Judges must be further educated regarding their capacity to vary or suspend family court orders and encouraged to appropriately use these measures when **interim** intervention order is active, without the previous 21 day expiry, in accordance with the Family Law Act, 68R amendment, 2015.

58. State and Territory Judges must be further educated regarding their capacity to vary, suspend or revoke family court orders, and mandated to appropriately use these measures when a **permanent** intervention order is active, without the previous 21 day expiry, in accordance with the Family Law Act, 68R amendment, 2015.

²⁸⁹ Royal Commission into Family Violence Summary, sourced online at <http://www.womenslegal.org.au/files/file/SUMMARY%20RECOMMENDATIONS.RC.ALLSUBS.pdf> on 24/04/2017

59. Contested family court cases flagged with family violence concerns must be first considered in a State court hearing, (PMH), which is limited to the allegations of abuse and domestic violence. This is secondary to a final intervention order hearing, where complex matters and findings of fact can be thoroughly investigated further with a more defined focus on the *safety* as well as best interests of the child, in accordance with the *Safe Child Act*²⁹⁰. The findings from this PMH case can then inform a protective direction of family court judgements, if orders are contested.

60. The Family Law Act amendment in 68R, 2015 must extend to orders made by the County Court, Supreme Court and all Ministerial orders relating to child protection. State and Territory Judges are to be given capacity to vary or suspend **child protection orders** and encouraged to appropriately use these measures during proceedings where parents have evidence of abuse, arising from the *parens patriae*²⁹¹ jurisdiction of the state including child protection services or carers where there is a need to protect the child from abuse.

61. The intervention of the key recommendation 60, should facilitate new investigations/proceedings, determining the validity and need for a child to be deemed in need of protection by Child Protection Services, and/or removal by the state. The safety and best interests of the child should then be weighted between the state and a return to the parent/s home, with the insight of independent specialist family violence and abuse experts, where relevant.

62. The risk assessment practices where a Care and Treatment Order²⁹² for a Child, is enforced by a designated medical officer, must be substantially reviewed to assess if medical intervention is immediately required. This decision must be made by an **impartial** health regulator and consider prior judgements made through courts, parental capacity,

²⁹⁰ Safe Child Act; http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, sourced on 30/04/2017, created and submitted to The House of Representatives, 29th legislature, 2017, State of Hawaii, H.B. no: 697 researched and designed by B. Goldstein.

²⁹¹ 163 Cornell University Law School, Sourced at https://www.law.cornell.edu/wex/parens_patriae on 30/04/2017

²⁹² 164 Public Health Act, 2005, Div 6, s197, sourced at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubHealA05.pdf> on 29/04/2017

availability and genuine consideration of sound research and medical history supporting the parents knowledge and beliefs, and detail conditions applicable for the child to be deemed ‘at risk’. If there are no pending criminal charges it is reasonable that viable options should be provided to the parents and discussed prior to any removal from parental care.

63. Where a Care and Treatment Order²⁹³ for a Child, is enforced by a designated medical officer, legislation²⁹⁴ instructs that this officer must inform, and if requested, provide a copy of the Order to the parents prior to the child’s removal from the parents custody. This designated officer **must** also tell parents they can go to a doctor chosen by the parents²⁹⁵, (unless the parents are reasonably likely to be charged with a criminal offence in relation to the child, or this provision may expose the child to harm). It must be mandated that parents receive a hard copy of the Care and Treatment Order²⁹⁶, and are formally informed in writing of the provision to use a preferred doctor, prior to any removal of the child into the designated medical officers’ care or anyone performing a similar function and purpose.

64. There is a need to review all Child Protection Act’s surrounding open disclosure to parents, concerning any information requested pertaining to their child. There is a need to revoke legislation such as the Child Protection Act, 1999, (ch, 6, div 3, 191), where the potential to maliciously avoid disclosure is unacceptable, and open to corrupt behaviour not in the best interests of the child. If it is deemed that disclosure to parents would not be in the best interests of the child, this needs the oversight of a detailed police report made in conjunction with a trauma specialist, explaining reasons for this determination.

65. There is a need to revoke the Family Law Act, (1975), Section 60CD, (2b,).

²⁹³ ‘ibid’

²⁹⁴ Public Health Act, 2005, ‘ibid’, Div 6, s200, 1a, 1c

²⁹⁵ 167 Public Health Act, 2005, ‘ibid’, Div 6, s200, 1e

²⁹⁶ Public Health Act, 2005, Div 6, s197, sourced at

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubHealA05.pdf> on 29/04/2017

66. There is a critical urgency to amend the Family Law Act, 1975, Section 60CD, (2c), to be a mandatory consideration for determining a child's views.

67. There is a need to amend the Family Law Act, 1975, Section CE to mandate an invitation for the child to provide views weighted with developmental and emotional intelligence considerations.

68. There is a need to mandate for the use of safeguards in the FLA, 1975, (60CG), in all instances where a family violence order is active, or there is evidence of any risk, historic or as identified through the risk assessment process. It is not appropriate that safety is currently just an option.

69. There is an urgency to detail and recommend sound flexible guidelines for appropriate safeguards, (using Goldstein's safeguards, discussed through this paper as a foundation), for inclusion in the FLA, 1975, (60CG). These must be created in conjunction with domestic violence shelters, specialised domestic violence police units and legal representatives.

70. The State Government **must** create a national data collection and rigorous evaluation framework that can assist departments, courts, police, services and programs to review, monitor, measure and improve their impact in addressing and responding to family violence.

71. It should be mandated that subjective opinions used in any family report or child protection report, must concur with the conclusions of the evidenced based evaluations, (detailed in key recommendation 70), to be considered valid.

72. Goldstein's provisions²⁹⁷ as adapted from the *Safe Child Act*²⁹⁸, must be included in the definition of appropriate *safeguards* in the Family Law Act, 1975, (60CG), and mandatorily applied throughout the

²⁹⁷ 169 Barry Goldstein's Safe Child Act Provisions sourced at <http://barrygoldstein.net/important-articles/safechild-act-on-02/05/2017>

²⁹⁸ Safe Child Act; http://www.capitol.hawaii.gov/session2017/bills/HB697_.HTM, sourced on 30/04/2017, created and submitted to The House of Representatives, 29th legislature, 2017, State of Hawaii, H.B. no: 697, researched and designed by B. Goldstein.

construct of family court orders, where family violence and/or abuse is an issue.

73. The appointment of an *Integrated Education Manager* to liaise between schools and the family court, is overlooked and absolutely necessary.

74. The education department must train teachers with strategies to teach and assess trauma/family violence affected students. These teachers can then liaise with a case manager, namely an Integrated Education Manager, and parents, and help support affected student needs more effectively. This will help facilitate recovery from family court managed family violence issues.

75. There is a need to eliminate the terms and inferences of *alienation* and *enmeshment* from all family reports, as their misuse has commonly contributed to judgements which are not protective.

76. Much of the above would not be necessary if the PMH pilots were rolled out across Australia, and these evidence-based hearings used independent family violence and abuse specialists. They should also rely on meta-analysis of current accepted research to inform views. The family court cannot adequately protect victims of violence and sexual abuse and should not be determining cases involving these factors at all. The PMH is an opportunity for an improved management of these issues after parental separation. A risk management trauma informed approach, using methodology which verifies facts, would suit this model. Appropriate safeguards such as video-link could be implemented. A rigorous critical analysis of risk factors, including historic behaviour and character should also be used with this approach. This could also provide opportunity to offer the victim supports to facilitate recovery and resilience. The weight of modified 'failure to protect' legislation, as discussed through this submission, can complement a PMH summary report where non-compliance can support criminal charges.

Case Studies

The following case studies highlight gaps in the system which are catalysed through issues discussed throughout this submission;

Case study 1-Reflection by a Protective Parent;

The current status quo endorses significant and unacceptable gaps in the family court system, evident in the following case study...

A highly credible protective parent relayed that during interviewing both parties and children on the morning prior to a hearing, the family reporter stated to the protective parent that she was “*confused and didn’t know what to think*”. (It is relevant to add that this protective parent was strictly informed to only answer with closed answers; that is, strictly yes or no responses. The parent’s reflective perception is that the family reporter was struggling with her conscience, rather than the balance of probabilities at this point.

The protective parent was employed in stable employment, volunteered in the community, had provided extensive evidence of high capacity parenting, while successfully completing academic studies as a sole parent for years, was the long term primary carer, had no DHS or criminal record, and had rebuilt much resilience after separating from the perpetrator of abuse many years prior to proceedings.

Compare the above with the other party. There was undisputed extensive, police documented violence with historic substance abuse issues and a serious criminal record, acknowledged by the court. This parent had remarried. Despite the character of the ‘historically abusive’ other party, his hearsay of the protective parent’s accused neglect was admitted as fact, although not substantiated by the proceeding court invited DHS investigation. The Judge had stated words to the effect that that; *DHS gets it wrong a lot of the time.*

This same family reporter was **absolutely adamant**, (verbally at least but not physically in her body language), later in the day, after lunch, with no further discussion, or much time for deliberation, that the protective party she originally expression confusion to, should lose rights to have the children live with her full time. The independent children’s lawyer concurred.

This successfully influenced the judge to **reverse** residence arrangements for the children, inclusive of their long-term school and sporting commitments. This occurred despite a separate independent, unbiased report by a specialist, much more experienced, trauma informed, behavioural child psychologist, strongly providing an

extensive report with **significantly** contrary conclusions to the family reporter, with recommendations in favour of the protective parent. When the Judge was reminded that the father had only originally put in a residential reversal motion for one child, and that the two younger children involved had indicated that they were happy to stay with the protective parent, this judge used the exact description; “**Collateral damage**” to describe the status of the younger siblings.

The new residential parent attempted to kill the protective parent and attacked the children within a year of this “**unprecedented order**”, as the Judge called it, while also noting the gasps of horror from the public in the courtroom. There are now long term intervention orders in place.

The protective parent and children are still recovering from the missed opportunity the family court had to protect them all. The father continued his destruction later severely attacking his own wife, then pouring petrol on himself threatening to ignite it, in the presence of children. She now also has a protective order. It has been confirmed to the specialised, police domestic violence unit managing him, that he is addicted to ice. He continues to drive a semi-trailer, as part of his employment in our community. The protective parent is busy repairing the ‘Collateral Damage’ that the family court inflicted on the children.

(Case no. is available to be forwarded to the Attorney-General if requested).

CASE STUDY 2 – A CHILDS VIEW

A child, (who very recently turned 18years), gave her views to an independent legal professional in an impartial interview. As her now adult status is new, her recollection of her experience is still fresh and viewed with a youthful perspective. This is a valuable, reflective insight, as it directly corresponds with the accompanying, previous case study, reported by the protective parent.

This young person’s voice’, highlights the family courts inadequate capacity to effectively manage family violence issues in contested cases. It demonstrates the ripple effect of decisions which decreased the child’s quality of life, sense of security and increased the level of risk and harm that eventuated.

The *discretion* used by the Judge in this case has resulted in this young person requiring intensive trauma-informed counselling. The author is optimistic this review will be a conduit to amend legislation to significantly encourage and promote a child’s voice through proceedings. This is reasonable as the decisions made and consequences of such, directly affects their life...

A Child Victim of the Family Court system

At the time her parents split up, *Kat* (15years old) was a happy child, doing well in school, having positive self esteem and good relationships with friends and family. She was feeling stressed from the break-up of her parents and was told she had to meet with a family report Court writer for an assessment. This assessment took a total of 10 minutes, ten minutes that changed her life forever. Prior to the day of meeting the Family report court writer, her father had coached her with what she had to say...

"He was brainwashing me, trying to get me to say all this bad stuff about mum which wasn't true" and "...when I met with the family report court writer she diagnosed me with depression after 5 or 10 minutes".

That was *Kat's* only meeting with anyone for an assessment. *Kat* believed she did not have an Independent Child's lawyer to represent her interests, (as he had not spoken to her), and based on that 10 minute meeting the Family report Court writer made a recommendation that *Kat* live with her father.

The outcome of that changed *Kat's* life forever, once she was there with her father his abusive character came to the surface and the abuse her mum experienced, now *Kat* witnessed the domestic violence on a regular basis between her father and his new wife. Often *Kat* would try to intervene between her father and his wife to prevent further physical abuse. This resulted in her being assaulted and *"thrown into the wall"*. This happened *"every couple of days"*. *Kat* experienced guilt from what she was coached to tell the family court report writer about her mum. This resulted in anxiety and for the first time *Kat* was feeling really depressed. I told my father I was thinking of harming myself and did not want to live anymore.

On top of the domestic violence, *Kat* was exposed to her father and his wife's drug addiction problem, they were on *"ice"*. As a result *Kat* and the other children in the household were neglected, they were not given dinner and had to fend for themselves. They *"were not parenting at all"*, and *Kat* would drink alcohol excessively and get drunk to forget what was happening at home.

As a result of the abusive environment *Kat* found herself in, she told her father she wanted to go back to be with her mother, he would not let her, he became abusive towards her. *Kat* was too frightened to go see her mother or even talk to anyone about the predicament the Courts had placed her in.

Kat now has difficulties with relationships and finds it hard to trust people, as the trust she placed in her father and the Courts was abused to the point she found herself living in this nightmare, suffering with anxiety and depression, *Kat* now 18 years of age, an adult, cannot bring herself to have a meaningful relationship.

Reflecting back now, **BUT FOR the decision of the Court**, *Kat* feels she “*would have finished school, had a car now...I would have been happier ...I wouldn't have anxiety all the time, I wouldn't be scared, I can't even walk around by myself I'm too scared.*” It wasn't till the last incident of domestic violence when the ambulances came and 7 police cars turned up, that *Kat* finally found the courage to tell her father she wanted to go, her father grabbed her and threw her into the wall and resumed his physical attack on his wife, the scene was so traumatic that it finally became *Kat*'s chance to get out and go home to her mother.

The adjustment back with her mum, even with counselling has been difficult. It was comforting to see her brothers and mum living a normal life, a happy family, a sense of family, a home where her and her siblings are nurtured, loved and encouraged. As wonderful as it was, it was also heartbreaking for *Kat* to remember the abuse and neglect she had suffered at her father's hand. This has replayed in her mind through flashbacks and extreme anxiety attacks. *Kat* felt, **BUT FOR** those 10 minutes with that family Court report writer, she could have had a normal life.

Now as an Adult, *Kat*, if she could, she would pursue legal action against the family court report writer and the Court for the decisions that were made for her as a minor that have left her torn and broken with depression and anxiety she faces today, but with her mothers' love and support and specialist family violence trauma counselling she is trying hard to live a normal life again.

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