

**SUBMISSION TO THE AUSTRALIAN LAW REFORM  
COMMISSION INQUIRY INTO THE AUSTRALIAN  
FAMILY LAW SYSTEM**



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## EXECUTIVE SUMMARY

The adversarial nature of the existing Family Law Act 1975 (Cth) (**FLA**) is a legacy of the former Matrimonial Causes Act 1959 (Cth). The A Better Family Law System To Support and Protect Those Affected by Family Violence Report (2017) has highlighted the high levels of criticism associated with the use of adversarial practices in family law.<sup>1</sup> Families who struggle to reach a resolution in their matters through alternative processes (i.e. family dispute resolution) are left with no other option but to engage in the Court process. This is problematic as, it can be argued, an adversarial approach that isolates parties is not conducive to a resolution in the child's best interests. Furthermore, an adversarial system overall is an inappropriate means for dealing with the complexities of Australian family relationships.<sup>2</sup> There are a number of indicators of the ineffectiveness of the existing adversarial Family Court system such as:

- First, the Court's frequent application of the Presumption in favour of Equal Shared Parental Responsibility, even in cases involving family violence,<sup>3</sup> and the problematic practical realities this produces for Australian families;<sup>4</sup>
- Secondly, the disjointed approach taken by the Family Court in dealing with families with complex needs. This is evident in the

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<sup>1</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, A better family law system to support and protect those affected by family violence (2017) 50.

<sup>2</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, Every Picture Tells A Story (2003) 65.

<sup>3</sup> Regina Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13 Theoretical Inquiries in Law 257; Ruth Weston et al., 'Care-time Arrangements after the 2006 Reforms' (2011) 86 Family Matters 29; Kate Funder, The Child's Right to Know Both Parents (December 1992) Australian Government: Australian Institute of Family Studies <<https://aifs.gov.au/publications/family-matters/issue-33/childs-right-know-both-parents>>.

<sup>4</sup> Ibid.

disconnectedness of services available to these families and the resulting counter-productive outcomes;<sup>5</sup>

Finally, the out-dated nature of the FLA in contemporary society is evident due to the lack of provisions preventing perpetrators of sexual assault and family violence are enabled to cross-examine their victim in court proceedings. This practice causes the victim to be re-traumatised and highlights how the balance between testing evidence and protecting the victim is skewed.<sup>6</sup>

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<sup>5</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 69.

<sup>6</sup> New South Wales Law Reform Commission, Questioning of complainants by unrepresented accused in sexual offence trials, Report 101 (2003) 45.

## **RECOMMENDATIONS**

- 1) In order to move away from the adversarial approaches of the current family law system, a “Families Tribunal” should be established with statutory power to decide shared parenting disputes, make future parenting arrangements (in the best interests of the child/re) and property matters. The Tribunal would include various family law professionals (similar to the Collaborative Law approach) – moving away from the traditional adversarial judge and lawyer approach.**
  
- 2) Instead of having only having one mandatory alternative process before proceedings can commence (Family Dispute Resolution (FDR)), the FLA should offer a range of less adversarial processes that could be used (like collaborative law) – as long as one is undertaken and a genuine attempt has been made. For parties who do not meet the criteria for exemption certificates and FDR is not suitable, there should be other processes they can utilise.**
  
- 3) It is recommended that Family Relationship Centres are given more statutory powers and more Centres are established. This would then give Centres the opportunity to become more than just a facilitator in the family law system.**
  
- 4) Rather than entirely removing the concept of ESPR,<sup>7</sup> it is recommended that the suggestive wording, specifically**

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<sup>7</sup> Helen Rhoades et al., ‘Another Look at Simplifying Part VII’ (2014) 28 Australian Journal of Family Law 138.

**'presumption',<sup>8</sup> that ESPR is in the child's best interests be removed;<sup>9</sup>**

- 5) It is recommended that s 61DA(2) be re-drafted to include evidence of high inter-parental conflict as a rebuttal to the presumption;<sup>10</sup>**
- 6) It is recommended that members of the Family Court judiciary undergo mandatory specialist training on family violence to educate judges on the complexities of this type of violence.<sup>11</sup>**
- 7) It is recommended that if the Magellan Program was expanded to involve families who suffer from drug and alcohol issues this could be done by implementing features from the Family Drug Treatment Court (FDTC) which is located within the Children's Court, Victoria.<sup>12</sup>**
- 8) It is recommended that the FASS program should expand by implementing an independent family safety service which provides risk assessments in order to determine the relevant services for the parent's particular needs.<sup>13</sup> A service like this would have embedded services such as drug and alcohol**

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<sup>8</sup> Family Law Act 1975 (Cth) s 61DA(1).

<sup>9</sup> Rhoades, above n 7, 138; Australian Government: Attorney-General's Department, Family Courts Violence Review (November 2009) 128.

<sup>10</sup> Chisholm, above n 9, 136.

<sup>11</sup> Australia's National Research Organisation for Women's Safety, 'Judicial Education for Domestic and Family Violence: State of Knowledge Paper' (2015) 1 Landscapes 7.

<sup>12</sup> No to Violence Men's Referral Service, Submission No 82 to Standing Committee on Sexual Policy and Legal Affairs, Parliamentary Inquiry into a better family law system to support and protect those affected by family violence, 19 May 2017, 6; Children's Court of Victoria, Family Drug Treatment Court (n.d.) Children's Court of Victoria  
<<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>.

<sup>13</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A better family law system to support and protect those affected by family violence (2017), 147-148.

**services, mental health services, and specialist family violence staff available.<sup>14</sup>**

- 9) It is recommended that the FLA enacts laws which restrict un-represented litigants accused of family or sexual violence from directly cross-examining the complainant, where it extends to persons who are deemed to be a protected witness.**
  
- 10) It is recommended conditions are to be enacted which concern that if the court finds that the witness may be harmed by the cross-examination, then they will be exempt from being directly cross-examined by the un-represented litigant.**
  
- 11) It is recommended that a counsel assisting role should be introduced in the family law court to assist un-represented litigants accused of family or sexual violence during the cross-examination process.**

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<sup>14</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 120.





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**SUBMISSION 1 – CHRISTIE FITZPATRICK**

## ADVERSARIAL APPROACHES IN THE FAMILY LAW SYSTEM

As with many of the practices under the FLA, the approaches used by the Courts to resolve matters that arise in family settings is an area in critical need of reform.

The Terms of Reference of the March 2018 Review of the Family Law System Issues Paper (**Issues Paper**) reiterate that “despite profound social changes and changes to the needs of families in Australia over the past 40 years, there has not been a comprehensive review of the FLA since its commencement in 1976”.<sup>15</sup> Serious consideration needs to be given to whether an adversarial system is the most effective system to use for family matters concerning children and property disputes especially. This part of the Submission will consider why the adversarial system is not appropriate and will also provide evidence of non-adversarial models that could potentially offer a better way to resolve family law matters within the best interests of the child/ren. It will also consider how the FLA’s current less adversarial processes could be improved.

### **Adversarialism and the FLA**

As early as 1976, the first Chief Justice of the Family Court identified the “inappropriateness” of an adversarial system for family law.<sup>16</sup> But even at this time when the FLA was first passed, the primary intention was to repeal the Matrimonial Causes Act 1959 (Cth) and introduce new legislation that would govern the end of a marriage (removing the notion of fault-based divorce) and associated matters.<sup>17</sup> There was no clear priority on a less adversarial approach to family law matters and there was certainly no discussion on family

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<sup>15</sup> Australian Law Reform Commission, Review of the Family Law System, Issues Paper No 48 (2018) 3.

<sup>16</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, A better family law system to support and protect those affected by family violence (2017) 48.

<sup>17</sup> Honourable Kep Enderby, ‘The Family Law Act: Background to the legislation [1975] 1 UNSW Law Journal 10, 16.

violence or promotion of family matters being resolved in the best interests of the children.

The Family Law (Shared Parental Responsibility) Amendment Act 2006 (Cth) (**Amendment Act**) brought the most significant changes to the family law system since the FLA's enactment in 1976.<sup>18</sup> This Amendment Act introduced less adversarial approaches, including (but not limited to):

- “an emphasis on private resolution of parenting issues including an expansive new system of compulsory family dispute resolution;
- change in focus from court-based services to family services provided by community-based organisations;
- new roles for family consultants in family law cases; and
- new importance for home-grown ‘parenting plans’”.<sup>19</sup>

The policy objectives of these changes to the FLA were introduced for parties to focus on the best interests of the child/ren and to utilise alternative dispute resolution services – rather than turning to litigation.<sup>20</sup> Despite these promising changes being introduced, families will still end up in court if they are unable to resolve their issues through FDR or other alternative processes.<sup>21</sup> The SPLA Report<sup>22</sup> highlighted that there was, a high level of criticism aimed towards the use of adversarial approaches in family law matters.<sup>23</sup> Some respondents to this report held the opinion that the manner in which family law matters are dealt with, under the current adversarial system and model, “creates further trauma to victims” and “invites parties to fight to the bitter end”.<sup>24</sup> This finding is in direct conflict with some of the objectives of the FLA, including the

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<sup>18</sup> State Library New South Wales, Chapter 4d: Changes to family law in 2006, Find Legal Answers <<http://legalanswers.sl.nsw.gov.au/family-law-and-divorce/changes-family-law-2006>>.

<sup>19</sup> Ibid.

<sup>20</sup> Australian Government Institute of Family Studies, Evaluation of the 2006 family law reforms (December 2006) E1 <<https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/executive-summary>>.

<sup>21</sup> As discussed further below.

<sup>22</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 13.

<sup>23</sup> Ibid 50.

<sup>24</sup> Ibid.

paramountcy principle that parenting orders/arrangements must be made within the “best interests of the child”.<sup>25</sup>

### **Why family law requires a less adversarial approach**

It is overwhelmingly clear as to why an adversarial approach to family law is not working and this is predominantly due to an adversarial system not being able to deal with the emotion of family law matters.<sup>26</sup> The breakdown of a relationship can be a very difficult time for all who are affected and sometimes the law is incapable of providing all the answers to a complex family law matter. Where there is a shortfall of the law, the end result is a decision that is not in the best interests of the children concerned.

In the Committee’s report<sup>27</sup> the observation was made that the “dynamics and emotions of family separation make adversarial litigation inappropriate”.<sup>28</sup> The resolution is “predicated on a win/lose outcome”.<sup>29</sup> This can seriously contradict the overarching paramountcy principle of the FLA. Overall, the adversarial approach makes it extremely problematic for the parties to reach an amicable agreement as “the adversarial ethic is to pit people against each other”.<sup>30</sup> Consequently, it pushes families further apart at a time when they should be working together to find a solution that is in their children’s best interests.<sup>31</sup>

### **Current less adversarial practices**

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<sup>25</sup> Family Law Act 1975 (Cth) s 60CA; Alexandra Hedland, Donna Cooper, Zoe Rathus, Renata Alexander, Family Law Principles (Thomson Reuters, 2<sup>nd</sup> ed, 2015) 255.

<sup>26</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 13, 160.

<sup>27</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 13.

<sup>28</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, Every Picture Tells A Story (2003) 65.

<sup>29</sup> House of Representatives Standing Committee on Family and Community Affairs, above n 25, 66.

<sup>30</sup> Ibid 75.

<sup>31</sup> Ibid.

Part of the mandatory processes under the FLA for parenting and property cases is Family Dispute Resolution (**FDR**). FDR is considered to be a less adversarial approach to assist parties in reaching an agreement outside of the court, with the best interests of the child/ren in mind. It is a requirement that parties must make a “genuine effort” to resolve their dispute, before they commence proceedings in a family court.<sup>32</sup> Some families have success using FDR, but it has been heavily critiqued as to whether it achieves its purpose as a less adversarial approach to family law matters.<sup>33</sup> ADRAC<sup>34</sup> have noted that some parents will be disadvantaged by participating in FDR and victims of family violence in particular may feel compelled to undertake FDR when other mechanisms would be more appropriate for their situation.<sup>35</sup> There are also reportedly long waiting times associated with FDR as it is a court-mandated process, which means there are many families waiting to access FDR in order to resolve their disputes.<sup>36</sup> The FLA already recognises that some cases need to be exempt from FDR<sup>37</sup> but there should be other approaches that could be used instead of only just having mandatory FDR. One option could be collaborative law. This is explored further below in the recommendations.

The 2006 amendments established “Family Relationship Centres” (**Centres**) which offer many services to families such as counselling, FDR, and educational programs.<sup>38</sup> The Centres were established to “encourage parents to make their own decisions about their children, rather than seeking a judicial determination”.<sup>39</sup> They can offer advice on parenting plans, child-friendly services for families in conflict, referrals’ to other services etc.<sup>40</sup> However, they are merely a facilitator that encourage families to resolve their dispute outside of the court room – they do not have the power to make any binding decisions

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<sup>32</sup> Family Law Act 1975 (Cth) s 60I(1); Alexandra Hedland et al, above n 22, 121.

<sup>33</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 13, 50.

<sup>34</sup> Australian Dispute Resolution Advisory Council.

<sup>35</sup> ADRAC, Family Dispute Resolution (18 September 2016) <<http://www.adrac.org.au/adr-mapping/family-dispute-resolution>>.

<sup>36</sup> Alexandra Hedland et al, above n 22, 127.

<sup>37</sup> Family Law Act 1975 (Cth) s 60I(9).

<sup>38</sup> Ibid 86.

<sup>39</sup> Ibid.

<sup>40</sup> Relationships Australia, Family Relationship Centres (2017) <<https://www.relationships.org.au/what-we-do/family-relationship-centres>>.

on parties. There were also concerns that the encouragement to use these dispute resolution services has, in some instances, led to some parties engaging in FDR even though there were serious concerns about violence and safety.<sup>41</sup> Potentially, if the Centres did have more powers and increased in numbers, they could become more than just a facilitator in the family law system.

## **Recommendations for reform**

### **Families Tribunal**

In the 2003 inquiry report into child custody arrangements after family separation, the Committee<sup>42</sup> recommended that the Commonwealth Government establish a national, statute-based “Families Tribunal” that would be given the statutory power to decide shared parenting disputes, make future parenting arrangements (that are in the best interests of the child/ren), and property matters by agreement.<sup>43</sup> This Families Tribunal would “be child inclusive, non adversarial, with simple procedures that respect the rules of natural justice, appointing members to this Tribunal from professions that are working in the family relationships area, and, moreover, the Tribunal should first attempt to conciliate the dispute”.<sup>44</sup> The Committee held high hopes for this Tribunal to achieve real change over the “current domination of lawyers and courts in family disputes” by establishing a tribunal of this type.<sup>45</sup> Unfortunately, the federal government did not agree with this particular recommendation stating, “it considers the Committee’s objectives can be better met through the new network of Family Relationship Centres and through changes to court processes. Through the new centres, separated couples will be able to access a non-adversarial way of resolving disputes at a much earlier

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<sup>41</sup> Alexandra Hedland et al, above n 22, 87.

<sup>42</sup> House of Representatives Standing Committee on Family and Community Affairs.

<sup>43</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, above n 25, xxiv.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 66.

stage in their separation, before conflict has escalated and disputes become entrenched”.<sup>46</sup>

To the contrary, a Tribunal would actually be better equipped to deal with family law matters and could even potentially bypass family court proceedings if they had the power to decide on certain matters. As considered above, Centres have a limited scope as to how much assistance they can offer and if a dispute is unable to be resolved within the Centre or any other associated services, it will be referred to the courts. Furthermore, the Tribunal panel would include various family law professionals such as child psychologists, mediators, a legally qualified member/counsel or other accredited experts as required,<sup>47</sup> - moving away from the traditional judge and lawyer approach. This type of approach is already underway and is known as “Collaborative Law” but it is not commonly used like other alternative approaches. Some of the benefits of collaborative law include: “an alternative to litigation without the associated costs, delays and emotional hardship”.<sup>48</sup> It has extraordinary success rates internationally which could be replicated in Australia, if utilised properly.<sup>49</sup>

In summary, the recommendation here is that the original proposal from 2003 regarding establishment of a Families Tribunal be reconsidered.

## **Other**

As briefly touched on above, instead of having only having one mandatory alternative process (FDR), the FLA should offer a range of less adversarial

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<sup>46</sup> Australian Government, A new family law system: Government response to Every Picture Tells A Story (2005) 12.

<sup>47</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, above n 25, xxiv.

<sup>48</sup> Queensland Association of Collaborative Practitioners, What Are the Benefits of Collaborative Practice (2017) <<https://qacp.org.au/benefits-collaborative-practice/>>.

<sup>49</sup> Federal Circuit Court of Australia, Collaborative and Creative approaches to family dispute resolution: perspectives from the Bench (November 8<sup>th</sup> 2011) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2011/speech-pascoe-frsa-2011>>.



processes that could be used (like collaborative law) – as long as one is undertaken and a genuine attempt has been made by the parties.

The role of lawyers in the family law system also contributes to the traditional adversarial approach. Lawyers ethically have a duty to ensure they act in the best interests of their clients – which might not be the overall best outcome for the family and the children that are involved. This can occur in family violence cases, where a child still may end up with the abusing parent due to a lawyer zealously advocating for their client. Hence, in certain matters, (non-legal) experts may be better suited at determining what really is in the best interests of the parties. This issue could potentially be resolved through the concept of a Families Tribunal that has a panel of various family law professionals.

## **Conclusion**

Although, there are less adversarial approaches that have been adopted such as FDR, establishment of Family Relationship Centres and so forth, the outcomes from these processes do not always promote safety from family violence and the best interests of the child/ren. These processes do not have the capacity to solve a complex family law matter and often the parties end up in court anyway. A new approach that could fundamentally change the processes in the family law system would be the establishment of a Families Tribunal. A Tribunal would be better equipped with a range of family law professionals (similar to Collaborative Law), whom would have the power to make decisions regarding parenting and property arrangements.

Notwithstanding this, there is also reform that could be made to current less adversarial practices of the FLA, such as FDR and the operation of the Centres.

**In conclusion, it is clearly evidenced in multiple ways that the adversarial system of the Family Court is inappropriate for dealing with the complexities of Australian family relationships. Another indicator of this**

**not yet addressed, is the manner in which the Court applies the Presumption in favour of Equal Shared Parental Responsibility and the practical realities this produces for Australian families.**

## **SUBMISSION 2 – JELENA DMITROVIC**

### **APPLICATION OF THE PRESUMPTION IN FAVOUR OF EQUAL SHARED PARENTAL RESPONSIBILITY**

The presumption established in s61DA(1), namely that the Family Court (the Court) must apply a presumption that it is in the best interests of the child to make an Order granting Equal Shared Parental Responsibility (ESPR), should be reformed.<sup>50</sup>

In 2006, the Family Law Act 1975 (Cth) (FLA) underwent significant reforms and the ESPR presumption was inserted into the Australian family law system by way of the Family Law Amendment (Shared Parental Responsibility Act 2006 (Cth) (SPR Act)).<sup>51</sup> Parliament introduced the ESPR presumption as a response to the lengthy lobbying campaigns by father's rights groups who felt wronged by the system and demanded an equal time presumption and for the Courts to 'redouble their efforts to make shared-care work'.<sup>52</sup> Furthermore, considering the intersection of social science and law in Australia, the ESPR presumption was arguably introduced as a means of validating parental identity and mitigating the negative consequences of family breakdown as identified in the literature namely.<sup>53</sup>

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<sup>50</sup> Family Law Act 1975 (Cth) s 61DA(1).

<sup>51</sup> Rae Kaspiew et al., 'Evaluation of the 2006 family law reforms' (Evaluation Report, Australian Institute of Family Studies, December 2009) E1.

<sup>52</sup> Helen Rhoades et al., 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36(3) Federal Law Review 280, 281.

<sup>53</sup> Zoe Ratus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence' (2013) 36(2) UNSW Law Journal 359, 389; Edward Kruk, Equal Parenting Presumption: Social Justice in the Legal Determination of Parenting after Divorce (MQUP, 2013) 149.

- Preventing the onset of Post Traumatic Stress Disorder;<sup>54</sup>
- Dispelling the stigma and shame associated with not having access to one's children;<sup>55</sup> and
- Preventing the devaluation of the parental role.<sup>56</sup>

The overarching aim of the ESPR-based reforms was to ensure the utmost protection of children and their best interests.<sup>57</sup> The ESPR presumption was to achieve this aim by encouraging joint parental involvement in decision-making and cooperative parenting,<sup>58</sup> promoting parental resolution through less-adversarial avenues like family dispute resolution processes,<sup>59</sup> and encouraging 'real-life relationships between children and their parents'.<sup>60</sup>

Arguably, the practical effects of the ESPR presumption are inconsistent with the aim of the reforms in a number of ways, with the following empirical research demonstrating the realities of ESPR orders in some cases:

1. Primarily ESPR orders have consistently exposed some children to harm by placing them in situations of conflict and abuse.<sup>61</sup> ESPR is being ordered in cases where judicial intervention is required to achieve resolution, namely those involving inter-parental conflict and family violence histories, consequently perpetuating the risk of harm posed to children;<sup>62</sup>
2. The success rate of ESPR arrangements in families reporting very high to extreme levels of conflict (83 families on average) and reporting very

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<sup>54</sup> Kruk, above n 51, 148.

<sup>55</sup> Ibid, 149.

<sup>56</sup> Ibid.

<sup>57</sup> Kaspiew, above n 49, E1.

<sup>58</sup> Jennifer McIntosh, 'Legislating for Shared Parenting: Exploring Some Underlying Assumptions' (2009) 47(3) Family Court Review 390.

<sup>59</sup> Kaspiew, above n 49, E1.

<sup>60</sup> McIntosh, above n 56, 390.

<sup>61</sup> Regina Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13 Theoretical Inquiries in Law 257; Ruth Weston et al., 'Care-time Arrangements after the 2006 Reforms' (2011) 86 Family Matters 29.

<sup>62</sup> Ibid; Kate Funder, The Child's Right to Know Both Parents (December 1992) Australian Government: Australian Institute of Family Studies <<https://aifs.gov.au/publications/family-matters/issue-33/chilids-right-know-both-parents>>.

low co-parenting levels (88 families on average) has been found to be as low as 16 per cent one year on from the date the ESPR agreement was reached.<sup>63</sup> Similarly, 45 per cent of 141 children subject to an ESPR order reported wanting to change their arrangements 4 years on from the date the ESPR agreement was reached.<sup>64</sup> The ESPR presumption may lead the Court to make orders causing a significant change in the circumstances of the family, as occurred in the case of *Rosa & Rosa*,<sup>65</sup> and this may arguably bear some correlation to the lower success rates of ESPR arrangements;

3. Family law practitioners have also expressed the opinion that the ESPR presumption is placing children in harmful situations more frequently than before the reforms took place.<sup>66</sup> 79 per cent of respondents to the 2008 Family Law Survey (FLS) agreed that the ESPR-based reforms have resulted in more children being placed in high-conflict shared-care arrangements and 40 per cent of respondents strongly agreed with this proposition.<sup>67</sup> Furthermore, academics have argued that ESPR orders should not be the starting point when making parenting orders for young children as shared-care can pose significant development challenges for infants and pre-school children;<sup>68</sup>
  
4. Respondents to the 2008 FLS further suggested that the focus of ESPR-based litigation has shifted from children's best interests and increasingly become focused on 'parent's rights'.<sup>69</sup> Similarly, 57 per cent of respondents disagreed with the proposition that the ESPR-based reforms have benefited children in most cases, with 19 per cent of respondents strongly disagreeing with this statement;<sup>70</sup>

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<sup>63</sup> McIntosh, above n 56, 394.

<sup>64</sup> *Ibid.*

<sup>65</sup> [2008] FamCAfam 427.

<sup>66</sup> Kaspiew, above n 49, 229.

<sup>67</sup> *Ibid.*, 219.

<sup>68</sup> Bruce Smyth et al., 'Research into parenting arrangements for young children: Comment on Cashmore and Parkinson' (2011) 25 *Australian Journal of Family Law* 264.

<sup>69</sup> Kaspiew, above n 49, 216.

<sup>70</sup> *Ibid.*

5. Research has further identified a misconception within the community engaging with the family law system on the difference in meaning of ESPR and equal time arrangements.<sup>71</sup> Academics argue that the FLA is structured like a 'lego-bridge'<sup>72</sup> insofar as the suggestive terminology found throughout the FLA, like 'meaningful involvement'<sup>73</sup> and 'meaningful relationship',<sup>74</sup> causes litigants to think that an order granting ESPR will invariably lead to an order for equal time.<sup>75</sup> The practitioners who were consulted in Professor H. Rhoades et al., research looking into simplifying Part VII of the FLA reported that they are routinely required to educate their client's on the meaning of ESPR due to the continuing confusion within the community on the meaning of this provision;<sup>76</sup> and
  
6. Research has indicated a belief on the part of family law practitioners that the ESPR-based reforms have favoured fathers over mothers, with an average of 61.5 per cent of respondents to the 2006 and 2008 FLS agreeing with this premise.<sup>77</sup> Resulting from the belief that the Court favours the father over the mother, parents in some cases have refrained from disclosing histories of family violence to the Court for fear of being viewed as the 'unfriendly parent'.<sup>78</sup> Academics have argued that this perceived favouritism is further evident insofar as 'Australia continues to legislate in ways that seem designed to respond to fathers' rights groups concerns'.<sup>79</sup>

In addition to these research findings, a number of social science-based arguments can be made as to how the practical realities of the ESPR

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<sup>71</sup> Ibid, 229.

<sup>72</sup> Zoe Rathus, 'Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) QUTLJJ 171.

<sup>73</sup> Family Law Act 1975 (Cth) s 60B.

<sup>74</sup> Ibid s 60CC(2)(a).

<sup>75</sup> Rathus, above n 70, 171-172.

<sup>76</sup> Helen Rhoades et al., 'Another Look at Simplifying Part VII' (2014) 28 Australian Journal of Family Law 137-138.

<sup>77</sup> Kaspiew, above n 49, 219, 230.

<sup>78</sup> Graycar, above n 59, 257.

<sup>79</sup> Ibid 262.

presumption have fallen short of achieving the aims of the 2006 reforms, which are highlighted as follows:

7. Balancing rights and responsibilities, in parenting proceedings where ESPR is probed, the question of whether or not to apply the presumption has become a contest between children's rights and parent's responsibilities.<sup>80</sup> These proceedings tend to focus on the notion of a parent's rights and fairness to parents,<sup>81</sup> resulting in practitioner's reporting that the reforms have focused on favouring parents over children.<sup>82</sup> It is arguable that the notion of a parent's rights originated from the case of M and K,<sup>83</sup> specifically the dicta of Altobelli FM, in which His Honour considered the obligation to balance the best interests of the child as well as the benefit to be gained by the parent in being enabled to actively parent their child.<sup>84</sup> However, in order to give effect to the aim of the 2006 reforms, it must be recognised that 'children have rights, whilst parents have responsibilities'.<sup>85</sup>
8. Cases involving family violence, the application of the presumption enables the parent who is the perpetrator of the violence to maintain control over the victimised parent and as such perpetuates cycles of family violence.<sup>86</sup> Through ESPR the perpetrating parent is able to implement strict regimes into the child's life, with which the victimised parent is forced to comply so as not to breach the parenting order, and as such maintain a pathway through which to assert control over their former partner post-separation.<sup>87</sup> The challenges faced by the Court in balancing the duty to protect children from family violence whilst also

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<sup>80</sup> Kaspiew, above n 49, 230.

<sup>81</sup> Graycar, above n 59, 268.

<sup>82</sup> Kaspiew, above n 49, 230.

<sup>83</sup> [2007] FMCAfam 26.

<sup>84</sup> M and K [2007] FMCAfam 26, 48 (Altobelli FM).

<sup>85</sup> Graycar, above n 59, 250.

<sup>86</sup> Weston, above n 59, 20.

<sup>87</sup> Ibid.

encouraging a meaningful parent-child relationship are evident in the dicta of Brown FM in *Ackerman v Ackerman*,<sup>88</sup> stating:

Nor does it mean that the Court must disregard the benefit of a child having a meaningful level of relationship with both parents, even in cases where there are concerns pertaining to family violence.<sup>89</sup>

Justice Strickland and Lawyer K. Murray interpret this to mean that the requirement of protection from violence does not necessarily outweigh the apparent benefit to be gained from a meaningful parent-child relationship.<sup>90</sup> Similar sentiments have been echoed in other social science literature arguing that, even in cases of established child abuse, the encouragement of a positive parent-child relationship must remain a goal.<sup>91</sup> Furthermore, social science argues that evidence of high inter-parental conflict cannot be used to justify restrictions on ESPR and research suggests this to be in accordance with Parliament's intentions.<sup>92</sup> It is understood that Australia's family law system is influenced by social science;<sup>93</sup> arguably, it is with regard to the aforementioned social science arguments that we should heed Professor Z. Rathus' caution on the way in which social science language is implemented into family law.<sup>94</sup>

9. Legal researchers further argue that the ESPR presumption is built on three (3), perhaps misinformed, assumptions: First, that ESPR is practicable and sustainable even in cases involving inter-parental conflict.<sup>95</sup> Secondly, that parental cooperation is enabled and improved

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<sup>88</sup> [2013] FMCAfam 109; Lisa Young et al., 'Child Sexual Abuse Allegations and s 60CC(2A): A New Era?' (2014) 28 Australian Journal of Family Law 259.

<sup>89</sup> *Ackerman v Ackerman* [2013] FMCAfam 109 at p 72.

<sup>90</sup> Young, above n 86, 13.

<sup>91</sup> Kruk, above n 51, 154.

<sup>92</sup> *Ibid*, 162; Rhoades, above n 50, 290.

<sup>93</sup> Rathus, above n 51, 359, 364.

<sup>94</sup> *Ibid* 389.

<sup>95</sup> McIntosh, above n 56, 389.

through ESPR, consequently preventing parental alienation.<sup>96</sup> Thirdly, that encouragement of cooperative co-parenting allows children to maintain a relationship with both parents which in turn optimises their development and minimises their exposure to parental conflict.<sup>97</sup> Arguably, the empirical research contradicts these assumptions and evidences the realities of ESPR in practice.

### **Recommendations for Reform**

It can be argued that the ESPR presumption promotes a 'one size fits all approach'<sup>98</sup> insofar as the judiciary appears to be employing a prospective approach in presuming that a meaningful parent-child relationship already exists.<sup>99</sup> However, 'the presumption is not a reflection of common experience'<sup>100</sup> with research further suggesting that the practicability of ESPR arrangements decreases where a parent has had minimal or inconsistent involvement in the child's life.<sup>101</sup> The making of ESPR orders in such circumstances consequently causes the onset of negative psychological effects for the children involved.<sup>102</sup>

As such, reform to Part VII of the FLA is required to re-draft s 61DA(1). The following are potential options for reform:

- **Rather than entirely removing the concept of ESPR,<sup>103</sup> it is recommended that the suggestive wording, specifically 'presumption',<sup>104</sup> that ESPR is in the child's best interests be removed.<sup>105</sup>**

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<sup>96</sup> Ibid; Kruk, above n 51, 154.

<sup>97</sup> McIntosh, above n 56, 389; Kruk, above n 51, 166.

<sup>98</sup> Graycar, above n 59, 255.

<sup>99</sup> Donna Cooper, 'Continuing the Critical Analysis of Meaningful Relationships in the Context of the Twin Pillars' (2011) 25 Australian Journal of Family Law 51-52.

<sup>100</sup> Rathus, above n 70, 180.

<sup>101</sup> Kaspiew, above n 49, 222.

<sup>102</sup> Ibid.

<sup>103</sup> Rhoades, above n 50, 138.

<sup>104</sup> Family Law Act 1975 (Cth) s 61DA(1).

<sup>105</sup> Rhoades, above n 50, 138; Australian Government: Attorney-General's Department, Family Courts Violence Review (November 2009) 128.



This will serve to remove the notion that the making of an ESPR order is the starting point in parenting proceedings and thus will acknowledge that an ESPR order may not be suitable in all cases.<sup>106</sup>

- **Alternatively, it is recommended that s 61DA(2) be re-drafted to include evidence of high inter-parental conflict as a rebuttal to the presumption.**<sup>107</sup>

This would expressly highlight judicial concern for the harmful effects of inter-parental conflict on children rather than being an implied factor for consideration under FLA s60CC(3)(m).<sup>108</sup> Furthermore, it would recognise that an ESPR order may only serve to exacerbate such pre-existing conflict and thus may not be suitable in particular cases.<sup>109</sup>

- **Finally, it is recommended that members of the Family Court judiciary undergo mandatory specialist training on family violence to educate judges on the complexities of this type of violence.**<sup>110</sup>

This will serve to inform judicial decision-making in family violence cases and assist judges in understanding the practical outcomes produced by the application of the ESPR presumption, particularly in family violence cases.<sup>111</sup>

However, it may be argued that such changes are dependent on broadly reforming societal views towards accepting the notion that parenthood is dissoluble, which may prove challenging.<sup>112</sup>

Conclusively, it is evident from the above arguments that the current approach to the application of the ESPR presumption is falling short of ensuring the best

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<sup>106</sup> Smyth, above n 66, 264; Ratus, above n 70, 180.

<sup>107</sup> Chisholm, above n 103, 136.

<sup>108</sup> Graycar, above n 59, 257; Weston, above n 59, 29; Rhoades, above n 50, 289.

<sup>109</sup> Weston, above n 59, 20.

<sup>110</sup> Australia's National Research Organisation for Women's Safety, 'Judicial Education for Domestic and Family Violence: State of Knowledge Paper' (2015) 1 Landscapes 7.

<sup>111</sup> Ibid.

<sup>112</sup> Patrick Parkinson, 'Violence, Abuse and the Limits of Shared Parental Responsibility' (2013) 93 Family Law Matters 7.

interests of all children are upheld. Whilst ESPR arrangements may be working for some children, it is evident that it is not a suitable arrangement for all children and therefore, change is needed to ensure that any parenting arrangements put into place are centred on protecting children from harm.

**The Family Court's disjointed approach to dealing with families with complex needs is a further indicator of the ineffectiveness of the existing integration of services in the present in the system.**

## **SUBMISSION 3 – CARA HOOPER**

### **FAMILIES WITH COMPLEX NEEDS IN THE FAMILY COURT**

Many families who experience the family law system exhibit a range of non-legal support needs.<sup>113</sup> Families with complex needs may access the following services whilst going through the family law system: counselling; housing; health and financial services; childcare; and drug and alcohol rehabilitation services.<sup>114</sup> It has been found, however, that a more integrated approach to providing these services to families with complex needs would be advantageous as the current system is disjointed and provides counter-productive outcomes.<sup>115</sup> The system is disjointed as non-legal and legal services usually have to refer parents who may exhibit a range of the fore-mentioned complex needs to a number of different services which can create an overwhelming situation for the family.<sup>116</sup> The disjointed system has shown to be time consuming as various services are located in different places/areas; and the lack of information sharing (information gathered from these services for example, instances of family violence) between services can lead to inconsistent outcomes.<sup>117</sup> Therefore it is pivotal that reform takes place where a new integrated approach is implemented within the family law system to ensure that families with complex needs are adequately catered for.

#### Current Integrated Services Models

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid; COAG Advisory Panel on Reducing Violence against Women and their Children, Parliament of Australia, Final Paper (2016) 106.

<sup>115</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 69.

<sup>116</sup> Ibid.

<sup>117</sup> COAG Advisory Panel on Reducing Violence against Women and their Children, Parliament of Australia, Final Paper (2016) 106.

There is already some various types of integrated service models that exist, currently in operation within the family law system. These types of services models include: the collaborative model; court-based integrated services model; and family relationship sector coordinated services approach model.<sup>118</sup> The following models are examples of current models in Australia which have potential to be reformed.

### The Collaborative Model

The Magellan program is a collaborative model which operates in a number of registries of the Family Court of Australia.<sup>119</sup> After a relationship breakdown where children are involved, the family is required to attempt to resolve the matter through Family Dispute Resolution.<sup>120</sup> However, if there has been family violence, or a risk of family violence then a family is not required to resolve the matter through that method.<sup>121</sup> If a parent applies for a parenting order and lodges a 'Notice of Child Abuse, Family Violence, or Risk of Family Violence' form, the Court must determine whether the parenting order is to be refused or approved.<sup>122</sup> In order to address these allegations as quickly and efficiently as possible, the Magellan program was developed to manage Family Court cases which involved allegations of serious sexual or physical child abuse.<sup>123</sup> The Magellan program brings together a number of services to resolve the case such as, the Family Court, the child protection department,

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<sup>118</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 71.

<sup>119</sup> Ibid 72.

<sup>120</sup> Family Court of Australia, Child abuse allegations (3 May 2016) Family Court of Australia <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/>>.

<sup>121</sup> Ibid; Family Law Act 1975 (Cth) s 60J.

<sup>122</sup> Family Law Act 1975 (Cth) s 67ZBB.

<sup>123</sup> Family Court of Australia, Child abuse allegations (3 May 2016) Family Court of Australia <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/child-abuse-allegations/>>.

and LegalAid, the case is managed by a Registrar, judge, and a family consultant.<sup>124</sup>

The Magellan Program has been noted to be a successful coordinated approach which involves a number of services to provide a more efficient process for families who have been victims of violence.<sup>125</sup> Criticisms of the Magellan Program include that the program does differ in each jurisdiction making outcomes for similar cases different therefore; there must be greater national uniformity.<sup>126</sup>

### The Court-based Integrated Services Model

The Family Advocacy and Support Service (FASS) is an example of a court-based integrated services model. FASS was developed to combat the disjointed nature of the various services within the family law system which families with complex needs utilise.<sup>127</sup> The FASS was launched in 2017 and is currently in a 'pilot' phase across 23 family law court registries within Australia.<sup>128</sup>

The model provides a multi-disciplinary approach in order to support families who have been impacted by family related violence.<sup>129</sup> The program involves duty lawyers and family support workers which prepare legal advice; initial risk assessments; and referrals to non-legal services such as counselling and drug and alcohol services.<sup>130</sup> The FASS brings together a number of services in the

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<sup>124</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 73.

<sup>125</sup> Ibid; Daryl Higgins, Cooperation and coordination: An evaluation of the Family Court of Australia's Magellan case-management model (Family Court of Australia, 2007) 122.

<sup>126</sup> Daryl Higgins, Cooperation and coordination: An evaluation of the Family Court of Australia's Magellan case-management model (Family Court of Australia, 2007) 156.

<sup>127</sup> Australian Law Reform Commission, Review of the Family Law System, Issues Paper No 48 (2018) 71.

<sup>128</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A better family law system to support and protect those affected by family violence (2017) 144.

<sup>129</sup> Australian Law Reform Commission, Review of the Family Law System, Issues Paper No 48 (2018) 70.

<sup>130</sup> Ibid, 71; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A better family law system to support and protect those affected by family violence (2017) 144.

Family Court that include: family violence specialists such as, triage officers, a information referral officer who conducts the initial risk assessment, a duty lawyer, and non-legal support services which can refer parents to counselling or drug and alcohol services.<sup>131</sup> Although in its early stages, it has been noted that the FASS program has the potential to be reformed to become a more comprehensive service model.<sup>132</sup>

## **Recommendations**

It has been noted that two of the above mentioned services which are currently operating within the family law system - the Magellan Program and the FASS Program, can be improved in order to offer a more integrated approach.

### **1. Expand the Magellan Program**

Due to its success it is submitted that the Magellan Program should be extended to additional complex needs such as, parents who have mental health issues, and or drug and alcohol problems.<sup>133</sup> The success is attributed from the cooperation between all the services involved in the program.<sup>134</sup>

- **It is recommended that if the Magellan Program was expanded to involve families who suffer from drug and alcohol issues this could be done by implementing features from the Family Drug Treatment Court (FDTC) which is located within the Children's Court, Victoria.**<sup>135</sup>

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<sup>131</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A better family law system to support and protect those affected by family violence (2017) 145.

<sup>132</sup> No to Violence Men's Referral Service, Submission No 82 to Standing Committee on Sexual Policy and Legal Affairs, Parliamentary Inquiry into a better family law system to support and protect those affected by family violence, 19 May 2017, 6.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid; Children's Court of Victoria, Family Drug Treatment Court (n.d.) Children's Court of Victoria <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>.

The FDTC aims to assist parents who suffer from drug and alcohol to recover from their addictions. Currently, in order to be eligible to participate in the FDTC the parent must have one child three years or younger, or a child who has been removed from their care within the last six months, their child(ren) must be subject protection application or order, and the child(ren) has been placed in out-of-home care due to parental substance misuse.<sup>136</sup> If eligible for the program, the parent will enter into the program for 12 months where they will be assisted by drug and alcohol clinicians and a dedicated social worker who will create a Family Recovery Plan for the participating parent.<sup>137</sup> They will also have access to other services such as, housing, parenting programs, and mental health counselling.<sup>138</sup> Each person involved in the FDTC will have their Family Recovery Plan managed by FDTC child protection coordinator whose role is to facilitate with information sharing, assist with case plan decisions, and provide feedback in clinical meetings and in the FDTC.<sup>139</sup> The main feature of the FDTC is that there is a dedicated Magistrate which presides over the case for its entirety. This feature is to improve consistency in decisions made throughout the program.<sup>140</sup>

Having a designated Magistrate in the Magellan program will therefore improve consistency in decision making which is currently lacking. This type of program could be implemented within the existing Magellan Program however, in order to do this in order to provide a more integrated approach so that it can manage multiple complex needs within the one program.

## **2. Expand the FASS Program**

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<sup>136</sup> State Government of Victoria, Family Drug Treatment Court (9 August 2017) State Government of Victoria <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/court/family-drug-treatment-court-advice>>.

<sup>137</sup> Children's Court of Victoria, Family Drug Treatment Court (n.d.) Children's Court of Victoria <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>; State Government of Victoria, Family Drug Treatment Court (9 August 2017) State Government of Victoria <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/court/family-drug-treatment-court-advice>>.

<sup>138</sup> Children's Court of Victoria, Family Drug Treatment Court (n.d.) Children's Court of Victoria <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>>.

<sup>139</sup> State Government of Victoria, Family Drug Treatment Court (9 August 2017) State Government of Victoria <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/court/family-drug-treatment-court-advice>>.

<sup>140</sup> Ibid.

A number of organisations have also recommended that the FASS program has the potential to expand in order to provide a more integrated service for families with complex needs. The FASS program currently focusses on families who have been impacted by violence and provides them with legal and non-legal support services in selected Family Court registries.<sup>141</sup> It has also been submitted by Family and Relationships Australia and No to Violence/Men's Referral Service that the scope of the program should be widened so that it can provide a range of services to families who exhibit other complex needs.<sup>142</sup>

- **It is recommended that this could be achieved by implementing an independent family safety service which provides risk assessments in order to determine the relevant services for the parent's particular needs.<sup>143</sup> A service like this would have embedded services such as drug and alcohol services, mental health services, and specialist family violence staff available.<sup>144</sup>**

The Family Law Council notes that the FASS model could be expanded to emulate the United Kingdom's Children and Family Court Advisory Service (Cafcass) or the Canada's the Integrated Threat and Risk Assessment Centres (ITRAC).<sup>145</sup> Cafcass is non-government organisation and operates under the Criminal Justice and Court Services Act 2000 (UK).<sup>146</sup> If a parenting order application is submitted, the form will be sent to Cafcass to be reviewed where they conduct police check and child protection department check where are

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<sup>141</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A better family law system to support and protect those affected by family violence (2017) 144.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid, 147-148.

<sup>144</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 120.

<sup>145</sup> Ibid, 37.

<sup>146</sup> The Children and Family Court Advisory and Support Service, About Cafcass (2017) The Children and Family Court Advisory and Support Service <<https://www.cafcass.gov.uk/about-cafcass/>>.



report is then submitted to the court.<sup>147</sup> ITRAC is similar to Cafcass in its process of risk assessment however in addition to this they provide safety planning services and referrals to mental health and drug and alcohol agencies.<sup>148</sup>

It has been noted that building upon the FASS program by broadening its scope to complex needs such as drug and alcohol abuse and mental health issues is a longer term strategy whereby the government would be required to grant significant resources and time to streamline and build-upon the FASS program.<sup>149</sup>

### Conclusion

It is evident that families with complex needs struggle with the current disjointed nature of services within the family law system. Even though there are a number of service models available within the family law system which can be utilised by families which exhibit complex needs further improvements can be made in order to provide better integration of these services. It is recommended that the ALRC should consider how the Magellan program and the FASS program can be expanded to accommodate the various complex needs families who go through the family law system may demonstrate.

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<sup>147</sup> Family Law Council, Parliament of Australia, Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child protection Systems - Final Report (June 2016) 37.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid, 121.

**Perhaps the most apparent indicator of the Family Court's shortfalls in dealing with family relationships is the lack of protections offered to alleged victims of family and sexual violence in the family law court.**

#### **SUBMISSION 4 – ELLA HOOPER**

##### **CROSS-EXAMINATION IN THE FAMILY COURT**

Another significant term of reference which the Australian Law Reform Commission (ALRC) has taken heed to family violence and child abuse, including the protection of vulnerable witnesses. In relation to this, there is concern on how the family law system could address the misuse of court processes as a form of abuse. The ALRC have found that patterns of violence involving of multiple types of abuse are associated with the court's processes, particularly by self-represented litigants. This is owing to there being an opportunity for litigants to cross-examine alleged victims about family violence and sexual abuse allegations, along with other sensitive issues. This submission will consider: relevant justifications concerning why reform is

required in the Family Law Act (FLA); restrictions imposed on alleged perpetrators for sexual and family violence matters; the existing measures for child related proceedings; and the issues surrounding the Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth) (FVB). Many stakeholders have contended that there is a dire need to reform laws concerning cross-examination by self-represented litigants who fall within the scope of alleged sexual or family violence offenders. It is accepted that amendments must be made in order to place safeguards to prevent alleged family or sexual violence offenders from cross-examining their alleged victims.

### Concerns over the current legal framework with the FLA

Twenty-six per cent of matters in the Family Law Court in 2016-2017, at least one party self-represented.<sup>150</sup> Conversely, fifteen per cent of matters held in the Family Law Court found that both parties were without legal representation.<sup>151</sup> Additionally, in 52 per cent of Family Circuit Court matters one party was self-represented.<sup>152</sup> Here poses the issue in contention of this submission, the high number of self-represented litigants causes a problem especially when those litigants are the alleged aggressor in family violence or sexual abuse matters.<sup>153</sup> The current legal framework under the FLA permits self-represented litigants to cross-examine their opponent.<sup>154</sup> Evidence suggests that due to the lack of restrictions imposed on self-represented litigants who are alleged offenders of family or sexual violence in the Family Law Court, they are given the opportunity to re-traumatise the alleged victim through cross-examination.<sup>155</sup> The case of *Cameron v Walker* [2010]<sup>156</sup> demonstrated the

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<sup>150</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, *A better family law system to support and protect those affected by family violence* (2017) 129.

<sup>151</sup> *Ibid.*

<sup>152</sup> House of Representatives Standing Committee, above n.150, 130.

<sup>153</sup> Family Law Council, 'Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Final Report, Family Law Council, June 2016) 114.

<sup>154</sup> *Ibid.*

<sup>155</sup> Cleland, 'Hearing and Understanding? Child Witnesses and the Evidence Act' [2008] *New Zealand Law Journal* 425; Ver Steegh, N, and Dalton, C, 'Report from the Wingspread Conference on Domestic Violence and Family Court' (2008) 46(3) *Family Court Review* 454.

lack of protections available to the Court. The alleged victim was prevented to give evidence via video link and was subject to direct cross-examination from her alleged abuser. The proceedings needed to be adjourned multiple times in order for the alleged victim to re-gain composure.

Additionally, reform was introduced in New South Wales regarding the ability of self-represented litigants from cross-examination if they are accused of violent crimes due to high profile rape cases. These cases sparked debate across New South Wales regarding the ability of un-represented alleged perpetrators of violent or sexual crimes to cross examine their victims. In light of the controversy, the New South Wales Law Reform Commission noted in their report that the central issue is whether or not the law strikes a balance between the accused entitlement to test all relevant evidence and the need to reduce the potential distress and humiliation caused from being personally cross-examined by the un-represented accused.<sup>157</sup> The majority of the Commission decided that the law did not strike such a balance. Ultimately, the laws in New South Wales were reformed.

New South Wales has a prohibition from directly cross-examining their alleged victim under the Criminal Procedure Act 1986 (NSW) if they are not represented by a legal practitioner.<sup>158</sup> This was a notable reform in New South Wales due to two prominent cases concerning two gang rape trials where the perpetrators were able to cross-examine their victims under the old framework. While this example concerns criminal matters in New South Wales, however, similar provisions now exist in all jurisdictions preventing the defendant to cross-examine a complainant or applicant of in sexual violence.<sup>159</sup> Victoria has enacted laws under the Family Violence Protection Act 2008 (Vic) which prevent un-represented perpetrators in family violence proceedings from cross-examining their alleged victim.<sup>160</sup>

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<sup>156</sup> Cameron v Walker [2010] FamCAFC 168 [10].

<sup>157</sup> New South Wales Law Reform Commission, Questioning of complainants by unrepresented accused in sexual offence trials, Report 101 (2003) 45.

<sup>158</sup> Criminal Procedure Act 1986 (NSW) s 294A(2).

<sup>159</sup> House of Representatives Standing Committee, above n.150, 134.

<sup>160</sup> Family Violence Protection Act 2008 (Vic) s 70(3).

The Victims of Crime Commissioner of Victoria argued that the current legislative framework is insufficient as the Family Law Court nor Family Circuit Courts does not have the power to prevent direct cross-examination from self-represented litigants who are accused of family or sexual violence.<sup>161</sup> The Queensland Domestic Violence Service Network found that the lack of restrictions imposed on alleged family and sexual violence offenders to be unacceptable, as they also contend that the process further traumatises the victim whereby it is another mechanism to intimidate and abuse the alleged victim.<sup>162</sup> The Australian Capital Territory Human Rights Commission goes further to assert that the current legal framework is insufficient as it does not adequately protect victims from the effects of the cross-examination process by their alleged perpetrator.<sup>163</sup> Another impact is that there is a possibility that a victim may agree to unsafe consent orders, or abandon the hearing all together.<sup>164</sup>

Considering the Victorian legislation along with the general prohibition within all jurisdictions<sup>165</sup> in criminal matters, it is argued that reform within the FLA should be enacted to be representative of the current legal frameworks within Australia. The Productivity Commission argued that the Australian Government, in consultation with the family law courts, should amend the FLA to include provisions restricting direct cross-examination by those alleged of

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<sup>161</sup> Victims of Crime Commissioner, 'Prohibition on Self-Represented Litigation the Family Court Personally Cross-Examining the Victim of Family Violence', (Issues Paper No. 3, Victims of Crime Commissioner, August 2015) 3.

<sup>162</sup> Queensland Domestic Violence Services Network, Submission No. 30 to Standing Committee on Social Policy and Legal Affairs, Parliamentary Inquiry to a better family law system to support and protect those affected by family violence, 2017, 4.

<sup>163</sup> ACT Human Rights Commission, Submission No. 33 to Standing Committee on Social Policy and Legal Affairs, Parliamentary Inquiry to a better family law system to support and protect those affected by family violence, 3 May 2017, 2.

<sup>164</sup> Victoria Legal Aid, Submission No. 60 to Standing Committee on Social Policy and Legal Affairs, Parliamentary Inquiry to a better family law system to support and protect those affected by family violence, May 2017, 18.

<sup>165</sup> Criminal Procedure Act 1986 (NSW) s 294A(2); Criminal Procedure Act 2009 (Vic) s 356; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38D; Evidence Act 1977 (Qld) s 21N; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 5; Evidence Act 1906 (WA) s 25A; Evidence Act 1929 (SA) s 13B; Evidence (Children and Special Witnesses) Act 2001 (TAS) s 8A.

family or sexual violence, on the lines of the existing provisions enacted across Australian States and Territories.<sup>166</sup>

### Existing Measures for Child Related Proceedings

Under the FLA there are measures to protect a child during a cross-examination. The Court is required under the FLA to consider the needs of a child and how the court process may impact the child in order to determine how to conduct the proceedings.<sup>167</sup> Additionally, the Court is obliged to conduct the proceedings in a way that will safeguard a child from being subject to, or exposed to re-traumatisation.<sup>168</sup> The Court has the ability to limit direct cross-examination to a child as the court sees fit. The court is able to use remote witness facilities, whereby the court may consider dealing with the matter without the physical attendance of the parties.<sup>169</sup> Victoria Legal Aid(VLLA) noted that these measures are employed inconsistently and is ultimately up to the discretion of the judge.<sup>170</sup> VLA further contend that the process within the FLA is unpredictable owing to the discretionary nature and argue that it is limited as it only applies to children.<sup>171</sup> The FLA fails to protect all persons who are impacted by family and sexual violence under these provisions, and therefore a fundamental re-think of the legislation needs to be considered. There have been attempts by the Australian Parliament to pass laws concerning family and sexual violence and cross-examination as recently as last year by way of the Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth) (the Bill). The Bill however, was ultimately not passed.

### Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth)

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<sup>166</sup> Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report, No. 72, Productivity Commission, 15 September 2014) 865.

<sup>167</sup> Family Law Act 1975 (Cth), s 69ZN(3).

<sup>168</sup> Ibid s 69ZN(5).

<sup>169</sup> Ibid s69ZQ(e), (h).

<sup>170</sup> Victoria Legal Aid, above n.164, 19.

<sup>171</sup> Ibid.

There have been attempts to reform the FLA by way of the Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (the Bill). The Bill introduced provisions that prevented cross-examination by self-represented litigants who are accused of family or sexual violence.<sup>172</sup> Under the Bill, an appointed person of the court will be required to cross-examine the witness during the proceedings.<sup>173</sup> Many stakeholders welcomed the provisions introduced by the Bill where they confirmed the Government's initiative to introduce much needed reform in the FLA to completely prohibit self-represented litigants who are alleged perpetrators of family or sexual violence from the ability to cross-examine.<sup>174</sup> One of the main concerns of the Bill was that a complete ban derogates from the common law rights and poses procedural fairness issues. Under the Bill there were also concerns over the court appointed person who would act on behalf of the self-represented litigant, as under the Bill they were mere intermediary with no formal legal qualification requirement.<sup>175</sup> Additionally, cross examination is a means of testing evidence to give the Court confidence it needs to make informed findings.<sup>176</sup> Cross examination is an integral feature of the adversarial system whereby it is used to confront and undermine the other party's case to the court.<sup>177</sup> Procedural fairness was a significant concern in relation to passing the Bill. This is an issue for the current reform which is being discussed.

## Recommendations

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<sup>172</sup> Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth) s 102NA(2)(a).

<sup>173</sup> Ibid s 102NA(2)(b).

<sup>174</sup> Women's Legal Service, Submission No. 39 to Attorney-General's Department, Exposure Draft - Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth), 25 August 2017, 5; Victoria Legal Aid, Submission No. 36 to Attorney-General's Department, Exposure Draft - Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 (Cth), September 2017, 4-5.

<sup>175</sup> Attorney-General's Department, 'Proposed Amendments to the Family Law Act 1975 (Cth) to address direct cross-examination of parties in family law proceedings involving family violence' (Public Consultation Paper, Attorney-General's Department, July 2017) 6.

<sup>176</sup> Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report, No. 72, Productivity Commission, 15 September 2014) 864.

<sup>177</sup> Australian Law Reform Commission, Uniform Evidence Law, Report No. 102 (2006) 141.

**It is recommended that the FLA enacts laws which restrict un-represented litigants accused of family or sexual violence from directly cross-examining the complainant.** This will bring the FLA in line with similar prohibitions which are enacted cross-jurisdictionally within Australia. To combat the issues raised concerning procedural fairness, **it is recommended that the prohibition should be extended to persons who are deemed to be a protected witness.** Under Victorian legislation there is a prohibition to persons who are deemed as a protected witness from being personally cross-examined un-represented litigants who are accused of family violence.<sup>178</sup> **It is recommended conditions are to be enacted which concern that if the court finds that the witness may be harmed by the cross-examination, then they will be exempt from being directly cross-examined by the un-represented litigant.** This ensures that there is not a blanket prohibition for all matters concerning family or sexual violence.

Notably, reform introduced must balance the need of the accused to test all relevant evidence to the court and the need to reduce further trauma to the complainant. **It is recommended that a counsel assisting role should be introduced in the family law court to assist un-represented litigants accused of family or sexual violence during the cross-examination process.** The Family Law Council noted that a Counsel Assisting role would enable that all evidence is collated and relevant issues will be expressed to the court in a clear and coherent manner.<sup>179</sup> Additionally, the court appointed person must be legally qualified, and have experience in the area of family law.<sup>180</sup> This is similar to the provisions under the Criminal Procedure Act 1986 (NSW) whereby a court appointed person is utilised for the purpose of cross-examination whereby they are prohibited from giving legal advice.<sup>181</sup> These provisions are only available to a complainant of prescribed sexual offences.

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<sup>178</sup> Family Violence Protection Act 2008 (Vic) s 70(3).

<sup>179</sup> Family Law Council, above n.154, 134.

<sup>180</sup> House of Representatives Standing Committee, above n.158, 137-138.

<sup>181</sup> Criminal Procedure Act 1986 (NSW) s 294A(1) – (4).



Similar provisions are recommended to be enacted into the FLA to extend to family violence matters.

## Conclusion

The FLA lacks provisions to assist persons who are vulnerable, whereby the current legal framework only exacerbates the abuse process. It is not acceptable that the FLA remains silent on this issue. It is recommended that a prohibition be introduced that restricts persons who have allegedly performed acts of family and sexual violence from cross-examining their alleged victim whereby a court appointed legal representative should be utilised in order to reduce procedural fairness issues.

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