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FAMILY LAW REFORM IN AUSTRALIA

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ABSTRACT:

This submission is looking at how the family law system in Australia is currently supporting parents through their separation issues, and *is it* doing so in the best interests of the children? There are two areas which I am exploring, the first is the FLA (family law act), and looking at how the legislation is worded from a legal perspective with a view to guiding parents to be future focused for their children. The second area is around the options available to parents when all else fails, and the parents are unable to negotiate an outcome, how does the current family law system support parents, and how can it improve to provide a better quality of support overall?

Introduction:

One does not have to look far to find a parent willing to offer an opinion about their experience with the current family law system, and how it has influenced their lives including the lives of their children. As an accredited family dispute mediator (FDRP), from my personal experience within the family law network the majority of opinions disclosed by separated parents are of a negative nature with regards to the process. Due to confidentiality, I am not able to provide official statistics to support this submission, and in general the purpose of my submission is purely to identify the general issues parents identify as being the main obstacles their families are experiencing under the current family law system. Based on personal observation over 9 years as an FDRP as well as 7 years as a Parenting Orders Program facilitator/ educator, my submission is purely anecdotal. For the majority of parents it may be years of clogged up trauma and stress which is finally brought to the surface for the first time since separation. During an intake it is not about statistics, it is usually about emotional trauma.

If there is to be a family law reform, when will it be is not as important a question as what will it be? It seems like history is passing us by at a fast rate of knots, and still nothing of any significance has been introduced in Australia since for the last 40 years. Yes some band aid approaches by way of minor adjustments have been implemented over the years, but they are not the reform or

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rehabilitation that is drastically required to stop the emotional carnage to families experiencing the post separation system in this country. It may not be as drastic as re-inventing the wheel, but when looking at the situation from a logical perspective there could be better ways through various initiatives that may provide parents with a more positive outcome for their children and ultimately, themselves. Society hasn't just commenced raising the issues about the current system, parents have been crying out for a better system for decades, and sadly for many it is too late.

From time to time we read in the press or through other forms of social media, some politicians are willing to express their views with regards to the Government implementing changes to better support Australian families who have separated. This view is not with politicians alone, there are other professionals in the social- work field, that have direct contact with post separated families such as accredited family dispute mediators, counsellors social workers etc. The real truth with regards to the impact of the current family law system is expressed through the opinions and stories of the parents who are caught up in the system as we know it. The information that is shared with practitioners is highly confidential, and for the most part is not statistically based. The FLWG (Family Law Web Guide) on line, and other forums have been a support mechanisms for parents by allowing them to voice their concerns and as with the FLWG, members can request support and advice from other members. Post separation families are hurting under the enormous stress of the defunct system, and as a Family Dispute Mediator I hear distraught parents share their frustrations all too often.

There are professionals who are willing to share their knowledge they may have acquired over many years. Those professionals may have devoted a lot of their valuable time and expertise compiling suggestions and ideas on how changes could be applied. Many of them make absolute sense, however there are many mountains to climb for a reform to be achieved, so why, after all the suffering parents and children have experienced so far, the family law system is still stuck and truly stagnant. There does not seem to be a willingness on behalf of the very people who can make a difference to do something positive moving forward. A band aid on a bullet hole approach is not the answer I feel, reform and or rehabilitation does make sense, closing the gate after the horse has bolted does not.

Hypothetically all that might be required, is for the government of the day to accept the responsibility, and take up the challenge to move forward with purpose. That is easy to say, however to put something of this magnitude into action is another story, and potentially it would

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take a huge shift from what we know as the current system to what appears to be the preferred option of removing the adversarial system that has been in place for too long. From past experience when a government has applied a kneejerk approach to a problem that urgently requires change, there can be negative results. They may not get it right the first time but at least give any change fair consideration for the sake of Australian families. To be frank I am astounded that something has not been done much sooner because in reality it is causing trauma to hundreds and thousands of parents and children. If parents in the past had been given better support through a non-adversarial system, perhaps the families of today might be experiencing a more fruitful and enjoyable life. On a very sad note some of these children are without fathers today because of tragic circumstances that cannot be undone. *"According to Australian statistics, males aged 25-44 are most at risk of suicide. Research shows that relationship breakdown - exacerbated by experiences with the family law system - have been identified as major trigger factors," Dr Newman said.*

The statistics mainly target the fathers who have suicided as a result of divorce and family breakdown where children are involved, and the subsequent family law court system that exists is all there is to offer parents when all else fails. It would be naïve to suggest that mothers do not suffer as a result of family breakdown and divorce. When researching the subject of suicide due to family breakdown there is more information available regarding fathers, and how the family law system impacts them and their children. There does not seem to be much statistical research related to suicide rates in mothers due to separation, and family breakdown regarding children. Research has shown that women are more likely to seek emotional help than men, and that may contribute to there being less mothers who suicide due to post parental separation. In my experience as an FDRP the words that are predominately used by parents dealing with post separation issues are, they feel helpless, and the system does not support them.

Best interests of the child

The [Family Law Act 1975](#) focuses on the rights of children and the responsibilities that each parent has towards their children, rather than on parental rights. The Act aims to ensure that children can enjoy a meaningful relationship with each of their parents, and are protected from harm.

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The wording may be of some comfort for the parents in general, for example "that it is the child's right to have both parents in their lives", however when emotion is in motion for the parents the children can fall through the cracks. This is repeated time after time when a parent believes they are right over the other parent. They may also use the children as a means to get back at the other parent, and at times take a judgemental stance for reasons known only to them. The base line in some high conflict cases is that one parent might think the other parent is not able to parent in a proper manner, using the words "not in the children's best interests" as their purpose behind their actions. When the relationship is at this point it can be the turning point for the parents, whereby they enter dangerous waters, the *adversarial abyss* through the family law court system. There are so many things that can go wrong for the parents at this point onwards where pride and a judgemental attitude in conjunction with a strong desire to win could be the preferred means of dispute resolution for them. In many cases it is not unusual for parents to feel helpless because instead of receiving the necessary support they are potentially preparing for battle over the children, and paying for it with hard earned money that could be spent more wisely.

The current family law system has been described to me by some clients as being a hypocrisy. The family law legislation dictates to parents the rights of the children, and the responsibilities of the parents. They are offered mediation which can provide the parents support in coming to an agreement for the children, however if the mediation process does not work the only other alternative is for the parents to do nothing, and continue doing what they have always done since separation. The other alternative is to enter the adversarial system, and do battle in the family law court, with a Judge deciding the outcome for their children. I have not yet experienced a parent say to me that the family law court process was supportive for the family. The adversarial system promotes the parents to go into battle over the one thing they have left in common, and that is the children they conceived and love, although not together. Perhaps if the family law system spent more time to assist parents to defuse their anger instead of aggravating the situation through adversarial means, children could have a better upbringing with both parents in their lives. This may be achieved through a pro-active approach rather than re-active.

The family law court has its place in society and there are some post separation matters that *have to be dealt with* through the court because of the serious level of domestic violence and entrenched conflict that may have a negative influence on a resolution from a safety perspective.

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Let us not forget there has been a public outcry for what seems like an eternity, so it is nothing new, and it may be hard to accept that politicians are not aware of the ongoing concerns that parents have had to endure for decades in this country. The fact is the current system as we know it, is definitely not working, and how much longer do parents have to wait before the system changes for the better, in supporting parents and children as against tearing them further apart. To be realistic most parents end up in the family law court as a result of a relationship breakdown, and communication has ceased or has become toxic. I have heard some parents describe the process makes them feel like criminals. The problem has become generational so the message that resonates with the children has potential to be passed down through the family structure...is that what we want for our kids in the future?

The *failings within the current family law system* have failed to provide positive support to Australian Families. A system where a parent is guilty until proven innocent, and to lie is not necessarily challenged by the system per se. The abuse of domestic violence orders issued for the sole purpose of gaining the upper hand may not be justified, however duty of care and the benefit of doubt has to be acknowledged in all cases. In some instances clients have identified to me that the DVO issued against them was purely a ploy to gain the advantage in an adversarial scenario at trial. Occasionally respondent clients have reported they have challenged the validity of their DVO with a positive outcome. (There may be untapped statistics there). On the other hand I have been informed by clients, predominately fathers that they have chosen to agree to the conditions of the DVO so they have a better chance of seeing their children even though they consider the allegations to be false, and that they have been held to ransom by the other parent.

Families have been crying out for something better for decades, literally hundreds of thousands of men women and children have suffered at the mercy of governments who pay lip service to the Australian public on family law matters. I have followed with interest the political journey of some politicians who have shown their disgust in the current family law system. They have identified in the media their recognition of the importance of change to support the Australian people, (their constituents) leading up to an election, but when the election is over what then? Does the importance fade into insignificance after the political race has been won? It might be comforting for Australian families to know that when politicians are not chasing votes they are actually still working behind the scenes, maybe with little recognition but still doing the best they can for Australian families.

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I feel it is imperative for the people who have the power to make the changes decide to act. Any change will not happen overnight, and a transition may take years but it has to start with the first step...who is prepared to make a difference? It is interesting to note that there are other alternatives to the adversarial system out there in family law land.

The family law system as we know it is adversarial, "The adversarial system works well in the criminal law arena. But it should never have been applied to family law. We have gone down the wrong path. Unlike criminal law, in matters after separation we are concerned with the *truth*, the truth about the nature of future parenting that will best provide for the *care, welfare and development* of the children." (Green, 1998, p. 204).

One proposal put forward "The suggestion that there be established a new body (let's call it the *Family Commission* for the want of a better name), quite separate from the court, is not a new one but is a proposal worth considering....." Green, 1998, p. 205). The author continues saying, "This family commission would have *Family Centres* in accessible locations and they would be made up of mediators, arbitrators, counsellors and social workers. No representation would be permitted except in special circumstances. Separated men and women would approach the Commission in person, explain their problems and be given appropriate assistance by a team of professionals...." (Green, 1998, p. 206).

In conclusion I feel the terms of reference listed in the Review cover some very valid and worthwhile changes for parents, and if introduced may be a means to encourage parents to choose to support each other, rather than denigrate one another. If this was the case there may very well be a more positive outcome and future for our children. There may be many thoughts on how to improve the current family law system, however from my experience the common denominator as far as opinions go is that the system is *not fair*. There are probably a lot of scenarios that could be associated with that statement, but two that I hear a lot as an FDRP covers matters such as one parent having to pay child support, and still not having access to their children.

References:

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