

Response to Review of the Family Law System; more particularly in response to disability and Autism Spectrum Disorder.

Submitted by Melanie Harris – ASD Family Legal (formerly Better Legal)

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This paper will not go into the disorder or each specific question raised by the issues paper in detail as the appendicised paper attached to this submission; “ASD, Family Law and the need for reform” gives more specific information about the disorder and issues faced by families affected by ASD.

In preparing this submission; expert on ASD and Aspergers Syndrome, Professor Tony Attwood was interviewed for input and ASD specific advice regarding the issues raised in the issues paper. He is quoted herein from that interview. Subject to permission from Professor Attwood a copy of the interview can be provided.

Objectives and Principles

The family law system is predicated on principles announced in Section 43 of the Family Law Act 1975. The principles remain sound in this modern day and age. There are numerous complaints from professionals and clients of the Family Law System for various reasons. The guiding principles do provide a fair guide as to what should be achieved in resolving family law disputes.

At the essence of every conflict in family law is conflict whether it is communication, differences in behaviour, beliefs. In some cases mental health can be a source of the conflict. What the current legal principles and court system lack is the ability to get parties to address the source of the conflict.

The family law system is faced with families with broad ranging needs. Generally where a family presents to court with substance abuse, family violence or mental health issues, the court has an obligation under its principles to investigate and bring to light the way these issues are affecting the family and take necessary steps to force the parties to take responsibility to their issues. In a lot of cases particularly where there are mental health issues the court should require parties to provide evidence of compliance with management and treatment to ensure that the possibility of ongoing conflict and the best interests of the children are being met. The family court is not referring parties to specialists and/or other relevant professionals required to assist parties to take responsibility or get assistance they need to reduce the conflict that is preventing them from making decisions or reaching settlement about their family.

When it comes to certain disorders and disabilities the presumptions made by the Family Law Act 1975 is in conflict. This paper will refer more specifically to the interaction or lack of between families affected by Autism Spectrum Disorder or Aspergers Syndrome (otherwise known as ASD) and the family law system. In its current form the Family Law Act 1975 is at odds with ASD.

The concept of equal time and ASD

The Family Law Act maintains that the child is entitled to a meaningful relationship with both parents and starts with equal time between parents. If we refer to one week with one parent and one week with the other parent in whatever day/split format, this is difficult for a child not affected by ASD.

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When we look at a child on the spectrum or affected by ASD the diagnosis criteria as stated in the DSM-V¹ these children do not cope with change².

Professor Tont Attwood says;

“Even of the change is to that of a preferred activity it is the mere concept of change very difficult to cope with. So even if you have a child going between two houses with the same style and approaches, you are still going to make ASD worse”

Professor Attwood also mentions that there is now scientific findings that conflict between parents makes ASD worse³.

The DSMV diagnostic criteria spells out that these children cannot adapt and do not cope with changes to routine or habits and that their symptomology can become more traumatic for them and their carers. Yet we have a Family Law Act that dictates that the best interests of the child is paramount and that the child is entitled to a meaningful/equal time relationship with both parents. If the child is diagnosed with being medically unable to cope or adapt to change resulting in increased symptomology, this fails to adequately consider the needs and in particular special needs of ASD families and children.

The Family Law Act 1975 contains 3 exceptions to the equal or significant time with each parent principle. In short these factors are; abuse, neglect or family violence. In the cases that come before the court that are affected by ASD, the majority consist of high conflict with the reasons for the conflict broad ranging. Reasons can range from denial by one parent of the disorder, argument regarding treatment, one parent may be affected themselves but not diagnosed, one parent may not comply with treatment, symptomology of the child and its effects on the family, financial problems due to having to care for the child and more.

These issues combined with litigation when high conflict is already entrenched are ingredients for worsening the situation and potentially putting the child at risk. Where these problems are already present, imposing orders that exacerbate the symptomology of the child is only going to result in further litigation such as contravention applications. An order for equal or significant time between parents for an ASD child can result in further meltdowns which are traumatic in themselves and can be physical. An example is where a child is due for changeover and does not cope with the transition and starts to meltdown; either in getting to changeover resulting in lateness or after changeover resulting in further grievance/resentment/hard work/stress by the other parent. In these situations the Family Law Act has not achieved its objectives and not provided the best outcome for the child or the family. It has imposed an ongoing sentence of high conflict and stress on a family that had already broken down.

¹ DSM V criteria per Professor Attwood– A copy of the DSMV criteria specific to Autism is provided at the end of this paper.

² Professor Tony Attwood in an interview between Melanie Harris and Professor Tony Attwood.

³³ Professor Tony Attwood in an interview between Melanie Harris and Professor Tony Attwood quotes Michelle Garnet and her PHD study on children affected by ASD.

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Principles to guide the redevelopment of the family law system

In relation to ASD there should be ASD specific principles.

In an interview with Professor Tony Attwood several points were made;

- whether there is any transition, disharmony or conflict in the home should be one of the key questions asked of an expert by the court in these cases
- Impact of a change of residence, try to ensure as much as possible that going backwards and forwards does not worsen ASD.
- Empathic attunement - ASD kids are thought impervious to conflict when they are in fact over sensitive to it.
- One parent becomes the primary parent. One parent may become the parent to the exclusion of the other parent so it needs to be determined (in the eyes of the child) who the primary care giver is or who the preferred parent is..the one who reads the child's emotions, nurtures and protects them.
- An Aspie reaction to the family law system – the person affected by Aspergers requires closure, more typically an Asperger parent and they will not stop until they are proven right. Even if common sense says they are going to lose and that court makes orders, they are still not going to accept it.
- Difference in child between parents i.e.: dad puts child in front of computer and dad is on computer and dad is babysitting with minecraft. Mum interferes and puts in place boundaries.
- Parents with diagnosis were more eager to learn parenting skills whereas parents without diagnosis but presenting symptoms were more resistant.
- A properly qualified expert in ASD should be able to pick a parent that presents characteristics but is not diagnosed and communicate in a style that will resonate.
- An expert should be employed by the court not one of the parties because the court requires independent accurate information rather than the adversarial one side or the other....the court needs information based on diagnostic criteria.
- Minds and hearts clinics specialise in Autism - there are 2 to three in each capital city. Modern technology can assist in regional areas. The pool of expertise is increasing. The court needs to go to a centre of excellence rather than rely on pure conjecture.
- Mums with Aspergers have a different profile to dads with Aspergers. They tend to be protective and protect their child from bullying and teasing, however they do not necessarily have intuition.....and may be unconventional in parenting. Some of these mums have had their child taken away due to unconventional parenting. The family court needs to ask whether the parent is capable of parenting. Parents affected by Aspergers can require guidance. However it is a new area with limited research. This is where the court needs advice. She may be unconventional but still capable of parenting.
- The assumption is in court that medical practitioners are Gods. However, some psychiatrists and psychologists that have as little as one hours training in Aspergers.

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Therefore the training and knowledge of ASD needs to be demonstrable. Whenever a professional is involved their experience needs to be demonstrable.

- Neurotypical kids coping with an Aspie parent. This is a new area and there is no research on it, yet.
- In terms of domestic violence and ASD behaviour, violence can be hard to define. Anger management is needed in ASD cases. People with Aspergers are quick to explode and quick to calm down whereas the Neurotypical (non ASD) is slow to explode but slow to calm.
- Aspergers parents can have a favourite child. Without realising it.
- 4 reactions can occur to litigation - depression, opposite to depression, Sherlock syndrome, unable to see the others point of view refusal to negotiate wear the other person down until they win. Abuse depends on how the other person feels in response the behaviour.
- Should it be mandatory in Orders that the entire family attend ASD counselling post orders? Yes the entire family should attend because it affects the dynamics in the family. It could prevent issues reoccurring issues and litigation.
- The reason for addiction in ASD is either to engage or disengage.
- Whatever expert does the assessment needs to do it with expertise to see behind the mask that can present with ASD.
- Whenever a family law matter has an ASD diagnosis it should be mandatory that the experts are called in.

These recommendations could extend to other disabilities or disorders particularly mental health. ASD is a disorder on a spectrum which in itself encompasses a broad range of symptoms and treatment. There is no one particular situation when it comes to ASD. In the paper appended to this one, family law cases were analysed demonstrating the differentiation in familial circumstances that came before the court. They all required differing outcomes.

Recommendations

Given the wide ranging definition and symptomology of the disorder , family law professionals dealing with these cases should be specifically trained and have at least 5 years experience working with and diagnosing Autism. Family law professionals includes solicitors, barristers, report writers, social workers, psychologists and any other professional that has a significant impact or bearing on the outcome of the ASD affected child or family.

In ASD affected family law matters the following should be applied to these cases;

1. Pre-filing procedures that should be made mandatory;
 - a. Referral of all parties (the family) to the dispute should be referred to a suitably qualified Autism expert skilled in diagnosing and treating Autism. The purpose of the referral is to investigate the extent of the disorder, the issues faced by the family and the child without bias. Experts called by a single party as an expert witness are clearly expected to support the party's case even though that is not the intended purpose. An

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appropriately skilled professional can make recommendations for the court independently and without bias. An Appropriately skilled professional can/could also devise a plan for parenting/treatment for the parties to implement prior to engaging in further litigation thus saving the family expense and stress of trial or litigation.

- b. Legal professionals – solicitors, barristers and other legal professionals handling these matters should have specialised knowledge and experience with the disorder. The reason for legal professionals particularly lawyers needing to have knowledge is that taking in instructions from a client in an ASD affected family law matter (or other areas of law) requires more specific and detailed question asking. There are far more considerations in ASD affected matters than the standard set of questions that lawyers ask when taking instructions. The questions asked at the outset can affect what evidence is gathered, presented, investigated and impact what orders get made.
 - c. Where ASD family law matters are being affected by child protection, those practitioners dealing with the family should have no less than 5 years experience and knowledge dealing specifically with ASD affected matters.
2. The second guiding principle should include ASD as an automatic rebuttal to the overarching presumption that the child has a meaningful relationship with both parents and equal time. The diagnostic criteria and the presumption by definition are at clear odds and contradict each other and cannot work together in ascertaining what is in the best interests of the child. The rebuttal should be made to reflect that the child is entitled to relationship with both parents to the extent that diagnosis and symptomology permit.

Parenting issues

There is often a discrepancy between parents of ASD parents in relation to parenting particularly where one parent has Aspergers. It is accentuated and amplified in ASD affected families⁴ Sometimes parents can have autism characteristics but not be diagnosed, yet ASD specific counselling techniques need to be applied despite not having diagnosis.

Questions 3 through 6. Access to the Family Law System

Families affected by ASD have special and specific needs. Some may be more comfortable accessing the internet websites and others may need more specific guidance. Given the needs of these families are specific yet broad ranging they need to be handled by agencies that have the specific skill and knowledge of the disorder.

It is recommended that a specific part of the Family Law Courts website be created for ASD affected families referring them to agencies and legal practitioners that are knowledgeable of family law processes and requirements specifically in relation to ASD.

⁴ Professor Tony Attwood in an interview between Melanie Harris and Professor Tony Attwood.

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It is recommended that the Family Law Act designate a panel of agencies;

1. In relation to family law information and processes that a department be set up that is Autism specific and has the ability to refer ASD affected clients to relevant agencies, panels and lawyers.
2. That the Family Law Act designate a panel of experts (defined by actual ASD experience) being psychologists and psychiatrists for clients to be referred to for advice and assistance as pre-filing requirements.

The setting up of specific agencies and professionals provides access to the Family Law system in different ways;

1. It provides family law information specific to ASD.
2. It directs families to a pre-filing process that would;
 - a. Assist in overcoming communication barriers and sensory issues that these families can face which can affect their ability to receive information.
 - b. Receive information that is specific to the families' needs that the current generic family law system cannot provide.
 - c. Has the ability to automatically refer clients for assessment with a professional that can make recommendations for the family and/or court and potentially reach resolution without the need for litigation. At the same time relevant and imperative information is being gathered that can be presented to the court in the event of litigation that is;
 - i. Independent
 - ii. Relevant
 - iii. Specific to the issues and needs of the family and child.
 - iv. Medically qualified.
 - v. Cheaper and more accessible to families.
3. Legal professionals are able to present precise and relevant information to Judges potentially resulting in less litigation and less costly proceedings.

Question 7 People with a disability

Please refer to the Appendicised paper “Autism, Family Law and the need for reform” by Melanie Harris attached to this submission. The paper raises the issues referred to in paragraphs 73 through 84 of the issues paper.

ASD is a disorder with broad ranging diagnostic criteria. As previously stated there is no one particular situation that applies to a family affected by ASD. Accordingly, the legal issues for an ASD affected family are equally broad ranging with differing needs, requiring different degrees of information intervention and different specialists. There is no broad brush to apply to these families and no one situation to accommodate them. Each family law matter affected by ASD must be looked at individually by expert qualified in ASD to ensure that all relevant issues are investigated.

The incidence of high conflict and domestic violence in ASD matters is high.

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As stated before the only way the Family Law system can adequately and appropriately deal with ASD affected family law matters is to have family law professionals specialised in ASD deal with them before and during litigation.

Question 13 The court environment

The court environment presents obstacles and significant issues for people on the spectrum. Sensory processing issues and communication issues can make oral evidence and witnesses inaccurate, give wrong impressions and distort the issues. Additionally, for the person affected by ASD it can be traumatic. The issues faced by ASD affected people are canvassed in the paper appended to this submission.

Ideally, being cross examined in court should be a last resort.

It is recommended that video link be a readily available option to people affected by ASD.

Guidelines should be formulated for counsel and Judges to adhere to in cross examining witnesses being examined in court.

Warnings of differences in communication should be given to Judges particularly in regards to interpretation of evidence and behaviour of witnesses.

Evidence should ultimately be gathered from an expert psychologist or psychiatrist as to the issues faced by the family, reducing testimony by the parties to facts of incidents that have occurred in the matter.

Remaining questions in the Issues Paper

The issues facing families affected by ASD in the family law system is not the current policies and objectives of the Family Law Act but rather the processes and the professionals used to achieve the objects of the Act.

The family law system must recognise that the needs of the family affected by ASD are very different to the needs of the family not affected by ASD. The reasons the Family Law system is not achieving its objectives is because it is using professionals that;

1. Lack awareness of ASD and the unique issues each case has;
2. Are applying ASD unfriendly practices and processes to families affected by ASD.
3. Are formulating parenting orders that do not adequately reflect the ASD specific needs of the child and/or family.
4. Do not consider in property proceedings the financial implications ASD families face in having to provide special needs care to the child for the remainder of its life.

The only way to ensure ASD families receive the best outcome can only be achieved using legal, social and medical professionals who understand the intricacies and complex needs of the disorder. This applies in the context of Family Violence, conflict, parenting needs, property decisions, sexual

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preferences, substance abuse, mental health conditions etc. ASD does not discriminate it affects all sectors of the community.

ASD diagnosis is increasing and accordingly, the number of families coming into the system are increasing.

The Family Law system must recognise and accommodate the fact that ASD affected families cannot be put through the same processes as the non ASD affected family. ASD must be individually recognised and given specific processes mentioned above and professionals to deal with in order to ensure the best outcome is achieved for family and child.

Until such time as ASD families are assisted by ASD appropriate professionals the situation just simply will not change and the objectives of the Family Law Act will not be met.

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APPENDIX ONE – DSM –V CRITERIA

Social (Pragmatic) Communication Disorder 315.39 (F80.89)

Diagnostic Criteria

A. Persistent difficulties in the social use of verbal and nonverbal communication as manifested by all of the following:

1. Deficits in using communication for social purposes, such as greeting and sharing information, in a manner that is appropriate for the social context.
2. Impairment of the ability to change communication to match context or the needs of the listener, such as speaking differently in a classroom than on the playground, talking differently to a child than to an adult, and avoiding use of overly formal language.
3. Difficulties following rules for conversation and storytelling, such as taking turns in conversation, rephrasing when misunderstood, and knowing how to use verbal and nonverbal signals to regulate interaction.
4. Difficulties understanding what is not explicitly stated (e.g., making inferences) and nonliteral or ambiguous meanings of language (e.g., idioms, humor, metaphors, multiple meanings that depend on the context for interpretation).

B. The deficits result in functional limitations in effective communication, social participation, social relationships, academic achievement, or occupational performance, individually or in combination.

C. The onset of the symptoms is in the early developmental period (but deficits may not become fully manifest until social communication demands exceed limited capacities).

D. The symptoms are not attributable to another medical or neurological condition or to low abilities in the domains of word structure and grammar, and are not better explained by autism spectrum disorder, intellectual disability (intellectual developmental disorder), global developmental delay, or another mental disorder.

Autism Spectrum Disorder 299.00 (F84.0)

Diagnostic Criteria

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive, see text):

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1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Specify current severity:

Severity is based on social communication impairments and restricted repetitive patterns of behavior (see Table 2).

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns or verbal nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

Specify current severity:

Severity is based on social communication impairments and restricted, repetitive patterns of behavior (see Table 2).

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C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

Note: Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder.

Specify if:

With or without accompanying intellectual impairment

With or without accompanying language impairment

Associated with a known medical or genetic condition or environmental factor

(Coding note: Use additional code to identify the associated medical or genetic condition.)

Associated with another neurodevelopmental, mental, or behavioral disorder

(Coding note: Use additional code[s] to identify the associated neurodevelopmental, mental, or behavioral disorder[s].)

With catatonia (refer to the criteria for catatonia associated with another mental disorder, pp. 119-120, for definition) **(Coding note:** Use additional code 293.89 [F06.1] catatonia associated with autism spectrum disorder to indicate the presence of the comorbid catatonia.)

Table 2 Severity levels for autism spectrum disorder

Severity level	Social communication	Restricted, repetitive behaviors
Level 3 "Requiring very substantial support"	Severe deficits in verbal and nonverbal social communication skills cause severe impairments in functioning, very limited initiation of social interactions,	inflexibility of behavior, extreme difficulty coping with change, or other restricted/repetitive behaviors markedly interfere with functioning in all spheres.

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	and minimal response to social overtures from others. For example, a person with few words of intelligible speech who rarely initiates interaction and, when he or she does, makes unusual approaches to meet needs only and responds to only very direct social approaches	Great distress/difficulty changing focus or action.
Level 2 "Requiring substantial support"	Marked deficits in verbal and nonverbal social communication skills; social impairments apparent even with supports in place; limited and reduced or abnormal responses to social overtures from others. For example, a person who speaks simple sentences, whose interaction is limited to narrow special interests, and who has markedly odd nonverbal communication.	Inflexibility of behavior, difficulty coping with change, or other restricted/repetitive behaviors appear frequently enough to be obvious to the casual observer and interfere with functioning in a variety of contexts. Distress and/or difficulty changing focus or action.
Level 1 "Requiring support"	Without supports in place, deficits in social communication cause noticeable impairments. Difficulty initiating social interactions, and clear examples of atypical or unsuccessful response to social overtures of others. May appear to have decreased interest in social interactions. For example, a person who is able to speak in full sentences and engages in communication but whose to-and-fro conversation with others fails, and whose attempts to make friends are odd and typically unsuccessful.	

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APPENDIX TWO – Autism, Family Law and the need for reform by Melanie Harris of ASD Family Legal (formerly Better Legal).

Note:

The writer consents to the publishing of material.