**Review of the Family Law Court – ALRC Discussion Paper**

There are elements in the Discussion paper which raise red flags with respect to the way in which language and narrative is easily read as being skewed and implies that harm to children emanates only from fathers. Further, there is a presenting risk that such a narrative continues to obscure and fail to address the substantial disadvantages which are inherent in the current legal and enforcement processes which cause harm to children. This response to the Discussion Paper is not intended to gloss over positive proposals but rather to highlight where they fall short to ensure that these failures are not simply ignored and swept out of view.

I draw on my research examining the trial transcripts of 62 cases heard by the Family Court of Australia from 2012-2016 in which allegations were made of child sex abuse by the male parent in the context of contentious prior marital breakdown. (Those cases otherwise resolved without a Family Court determination were not accessible.) Analysis of the transcripts of these cases revealed a pattern of applicants making such allegations being responsible for systems abuse and emotional abuse of children. In fact in over 40% of cases it was found that the applicant (the maternal parent) had primed and coached children to make allegations. For some 36% of such cases it was found that there was a deliberate effort to support a false allegation and deny parental access by the other parent. Further it revealed the risk and harm arising from children being subjected to multiple risk assessments coming from different agents with different roles and responsibilities as well as different disciplinary perspectives. Finally in all of the cases in which risk was **not** found (risk of some nature was found in 5 cases or 3%), there were no ramifications for the applicant while significant harm was done to the children as well as the accused. This case review highlighted significant issues that are not considered in the Discussion Paper which has adopted a narrative that serves to obscure the issues. I outline these below.

1. No attention is given to the specific problem of the lack of continuity of across risk assessments or determinations across services. There is an apparent assumption that service agencies with different roles or responsibilities or disciplinary perspectives are going to agree with each other.

The case review found that there was inconsistency in the way in which risk is assessed and determinations made by police, child protection services, family report writers and Magistrate Court. The ‘joining up service delivery’ does not acknowledge this problem and the consequences. For example, in 25 cases interim protection orders were granted by police denying children access to a parent. In, only 4 cases was any form of risk subsequently found by police or the Court. That is, in 84% of cases a child was denied any access or solely supervised access to a non-offending parent until the Family Law Court had made a determination (in many cases years). Relevantly, in some cases Magistrate Court was unwilling to remove an interim protection order even there is no reliable evidence and neither police nor child protection found that risk exists or support the allegation but leave to the Family Court to make an order. Again this can take months if not years to resolve. There is no protection in this scenario for the subject of false or unproven allegations (whether or not malicious) or the children. To make this unequivocal, there is no indication that this situation persists or strategies being provided to those who are facing the challenge of a system that presumes guilt.

With reference to proposal 4.5 there is an unrecognized issue with respect to appointing yet another person to do a risk assessment within the FASS. Given the acknowledged problem arising from the lack of robust evidence of the reliability of risk assessment processes, particularly where allegations of child sex abuse are made, and the lack of consistency in assessment processes employed by police, child protection services and appointed report writers, adding another player and process will not serve to resolve this problem

1. Family Violence list

If one is to make a list of cases which should demand priority, it is critical that such a list not be limited to allegations of physical violence by a parent, but equally recognize the significant emotional damage done to a child when a relationship to a parent is deliberately obstructed. There is absolutely no recognition in the discussion of family violence of the harm done by such actions. As noted by the Discussion Paper, and citing Relationships Australia, there a potential risks which arise from more than a more circumscribed understanding of family violence.

Greater clarity is needed to acknowledge the violence in the form of false allegations made against a parent. The failure to acknowledge the problem is not one of definition but rather perception of what constitutes family violence. Where one parent seeks to ostracize the other parent having a relationship with a child, where such efforts are compounded by the making of unproven allegations (as assessed by police, child protection, family report writers) and particularly involving allegations of child sex abuse, where the child is subjected to emotional abuse including coaching and priming to make such allegations, there has been virtually no acknowledgement this as violence – against the child and the innocent accused.

1. Triage, Risk Assessment and fact finding

There are key challenges when consideration is given to what is consider ‘facts’ and what evidence is relied upon to determine ‘what should happen next’. This is problematic because the case review referred to above suggests strongly that rarely are there ‘facts’ presented in such circumstances, but rather there is a reliance upon allegations and a subjective interpretation made by those responsible for making a risk assessment. Further, as complementary research has shown, there is little confidence by those working as legal practitioners in the assessments made when allegations are made that a parent has sexually abused a child in the absence of reliable evidence (O’Neill, A. Bussey, K. Lennings, C. & Seidler, K. (2018). This decision making based on early fact finding is fraught with risks where there actually is only a he said, she said form of evidence. Reliance on such early interpretations can result in a denial of access to a child without substantive evidence with significant harm to the innocent accused and the child.

Alternatively, however, there is the problem of long delays in which a subject of allegations is denied access to a child without evidence and even where assessments have found little risk. The consequence is that there is no easy answer. However there is an urgent need to resolve the problem in which assessments made by those external to the Court, police and child

It is noted that considerable attention in the Discussion Paper has been given to the standards for those undertaking risk assessments. While this is a positive step, the lack of consistency across disciplines in terms of the reliability of various methods needs to be acknowledged. How this will be resolved and by whom is a risk itself determined by an elite number of individuals who have a current stake in promoting a particular weight or approach as preferred. This was observed in the reviewed cases where multiple assessors (psychologists, family report writers, police and children’s services) all claimed expertise but were not consistent in their conclusions. In the absence of any factual evidence, to date there is no empirical proof of the efficacy or reliability of assessments intended to determine risk in terms of the best interest of the child, nor the long term outcomes for the wellness of the child when such assessments underpin custody decisions (Zumbach & Koglin, 2015; Parkinson, 2015)

1. A Right to Be Heard –

It is relevant to reiterate the concerns expressed by others and noted in the Discussion Paper that participation processes should not require a child to ‘take sides’ nor to be drawn into an acrimonious battle between parents. It is essential to be cognizant that children, especially young children, can be subjected to priming and coaching, which will distort their memory and ability to differentiate between what they are told and what they experience. The extent to which it is possible for young children to be emotionally harmed as a consequence needs to be considered when determining the value and efficacy of engagement in the family law process

Further the case review mentioned above strongly indicates that expert witnesses may spend minimum time, speaking to children in foreign environments. The extent to which this is sufficient to enable children to comfortably and confidently participate in such processes is questionable. Additionally for young children subjected to systems abuse through multiple interviews by police, by child protection, by family consultants, adding yet another person wanting to interview the child is likely to simply add to the emotional harm.

1. A Question of Consequences

Under the current frameworks, and those that are proposed, there is no recognition of the need for consequences for the making of false allegations and for the harm done to children as a result of the processes which ensue. There are no disincentives but rather there are positive incentives to make allegations, to obtain a protection order and effectively condemn the accused to be treated as guilty. Proving one’s innocence becomes the onus of the accused rather than requiring substantive evidence of offending. During this period, the accused is subjected to professional, mental health and emotional harm. At the same time the child is subjected to the harm accruing from the process and the loss of relationship with a caring parent. There is a need for any revisiting of the Act to consider what consequences should be made clear and be exercised where relevant.

1. A Question of Numbers

It may be argued by some that the quantum of cases which are heard by the Court are too small to be concerned with. This is to suggest that in the absence of quantum than the injustice is irrelevant. The counter argument here is that this Review is an opportune time to recognize that these issues exist. That experts are not infallible, the methods of assessment are not science, that those advising the review have their own agendas which preclude other considerations, is evident. The next step needs to move beyond the prevailing narrative and recognize that victimization occurs in many forms and if the Family Law Act and the Courts are designed to protect children than this demands recognition of these harmful risk also need to be addressed.