

Review of the Family Law System; Discussion Paper Response and Submission

Ms Mishka Hudson Dip.ed.,Bsc.,M.ed,
Program Director F.A.C.A.A

Quotes from
children affected
by the family court
and connected
systems;

"Why won't anyone
listen to me?" 11
year old girl

"I told nan I
would wait
for her in
heaven" 7
year old boy

"They treated
me like I
wasn't alive"
8 year old boy

"I'm scared.."
13 year old girl

I would kill
myself if I
had the
courage"
17 year old
boy

"I just want
to go
home" 14
year old girl

"Don't give
up on me"
17 year old
girl

"I get flashbacks
when I remember"
17 year old girl

"I told him to stop and he kept
going" 5 year old girl

"They stole my
sister" 9 year old boy

Please send me to jail
so I don't have to go
with him" age
unknown

"why won't
the police do
anything?"
15 year old
girl

"Sometimes when I'm staying at his
house I wished I was dead and buried
10ft under the ground. Sometimes the
cord that connects our hearts together
is very stretched mum".

"Mummy why did
the police call me a
liar? You know I
didn't lie" 8 year
old boy

Email:
secretary@para-legal.org.au
Website: <https://faca.us.org/>

"He will kill all of us, you
Mollie (cat), Kenji, (dog), me
and Jaidyn" 5 year old girl,
(names changed)



Executive Summary

Over 70% of parents enjoy amicable separations, however the remainder who use the family law system usually have complex family violence, anti-social behaviors and mental health issues as a factor¹. This paper will focus on the ALRC discussion paper proposals which surround family violence and abuse, as the priority for safety throughout reforms is paramount. An Audit by National Legal Aid² found that family violence was a factor in 79% of legal aid family law matters in 2014-2015.

The evidence from the *parliamentary inquiry into a better family law system to support and protect those affected by family violence*, (2017), supported that the family law system was not adequately supporting or protecting families affected by violence³. This inquiry reported that the system should be more equitable and responsive to the safety needs of families. It is sensible that the recommendations from this inquiry would be prioritized, due to the sheer quantity and demographic of family law cases with complex safety concerns.

The gaps in the family law system identified in the parliamentary inquiry, (2017)⁴, surround the adversarial nature, jurisdictional issues, inappropriate, cost, (the exorbitant cost of family reports), complexity and responses of the family law system. A concerning omission from the discussion paper is that it also does not adequately address the critical need identified by this inquiry⁵ to improve the quality, reliability and expertise of family reports. In addition, the safety concerns surrounding the presumption in the *Family Law Act 1975* (Cth) of equal shared parental responsibility, require further comprehensive consideration, with safety clearly prioritized. These pertinent issues raised through the inquiry⁶, unfortunately do not appear to have been adequately addressed throughout the ALRC discussion paper.

It is reassuring that the discussion paper has recognised the inquiries recommendation to expand the Family and Advocacy Support Service, in addition to training and accreditation for legal professionals. However, these reforms require further clarification regarding accountability, independence, depth of specialization in regards to training, oversight and review.

¹ Kaspiew. Rae, Australian Institute of Family Studies, *Separated parents and the family law system: what does the evidence say?* (3/8/2016) Sourced at <https://aifs.gov.au/cfcevidence/a/2016/08/03/separated-parents-and-family-law-system-what-does-evidence-say> on 14/11/2018.

² Article by David Webber published on 18th April, 2016, ABC, *National Legal Aid calls for more funding after new figures reveal domestic violence a factor in 79pc of family law cases* sourced at <https://www.abc.net.au/news/2016-04-18/domestic-violence-a-factor-in-79pc-of-family-law-cases:-audit/7333368> on 14/11/2018

³ Parliamentary inquiry into a better family law system to support and protect those affected by family violence, © Commonwealth of Australia 2017 ISBN: 978-1-74366-728-6 sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report/section?id=committees%2freportrep%2f024109%2f25153 on 14/11/2018.

⁴ 'ibid'

⁵ 'ibid'

⁶ 'ibid'

Protective parents and their children often flee violence and abuse, only to end up in the family court. This is often an environment where their experience is commonly not believed, and their children are inadequately protected. This is usually due to a lack of independence, specialist expertise, risk management, safeguards, or use of evidenced based research surrounding family violence and child sexual abuse. This inadequate practice is conducted in a confrontational environment, which requires improved accountability and oversight.

Parents affected by trauma, often report to advocacy groups that they cannot access meaningful assistance or oversight for their family law complaints from government bodies. This is largely due to the 'separation of powers' doctrine⁷, and legislation, (section 121⁸), that prevents parents from discussing their cases. The recommendations concerning section 121 in the ALRC discussion paper, are extraordinarily conservative. The limitations of this commonly termed 'gag order', is raised throughout submissions to this review. This restraint affects the perception and administration of due process. It should be revisited and expanded, to permit a much broader freedom for parents and advocates to access justice. Safety and *best interests of the child*, are often affected by the capacity of parties to freely discuss their concerns when seeking oversight.

If protective parents persist with highlighting the risks to their child, they are often deemed the 'unfriendly parent'. Despite amendments to the family law legislation that came into effect in 2011⁹, this stigma appears to be proficiently used in current practice, and contributes to a protective parent being accused of making false allegations.

It is unfortunate that this review did not investigate the myths surrounding false allegations¹⁰. This is a major issue of contention between stakeholders. It has permitted a misappropriation of misunderstood alienation theories applied to genuinely protective parents. It has also fuelled a plethora of conferences on forced reunification. The Australian Institute of Criminology found that "*child abuse allegations made in the Family Court were no more frequently false than abuse allegations made in other circumstances, with false allegations being found to be 9 per cent*"¹¹. It is critical that evidenced based research is promoted through training. This is required to correct a culture which has adopted myths that dangerously influence decision making.

Despite this statistic we have Judges who, (despite child disclosures and child protection formally notifying the court that there was risk), have made ex-parte orders in his chambers stating "*I don't believe the sexual abuse on balance is likely to have occurred ... this has been more the anxiety of the*

⁷ Parliamentary Education Office, Separation of powers: Parliament, Executive and Judiciary, sourced at <https://www.peo.gov.au/learning/fact-sheets/separation-of-powers.html> on 23/11/2018

⁸ Family Law Act, section 121, sourced at http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s121.html on 14/11/2018

⁹ Friendly parent provision repealed through the *Family Law Amendment (Family Violence and other Measures Act) 2011(Cth)*

¹⁰ Family Law Reform Council, Myths and facts about child abuse and family law, sourced at <https://www.facebook.com/familylawreformcouncil/> on 14/11/2018

¹¹ Australian Institute of Criminology, Child abuse and the family court, vol.91, ISBN 0 642 24078 7 (June, 1998)

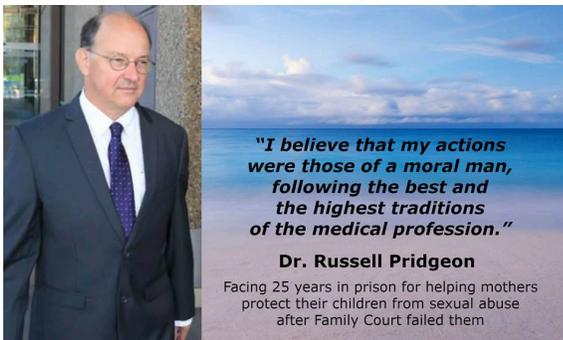
mother which has been projected onto the children. I believe the only alternative now is for the children to be placed with the father. I recommend this happen immediately and without notice”, as reported by Jess Hill, (2015)¹². Decisions such as this are not founded on reliable research or reason.

Parents usually lose access, sometimes total access, if they continue to highlight abuse. Many highly capable protective parents have lost their children to their perpetrators. The risk, harm and system betrayal, and life-long trauma inflicted on these children is unacceptable.

An exponentially rising public demographic have stepped up to protect children against perceived unsafe family court orders. Some of these citizens are now facing federal offences, despite a provision in the Family Law permitting a reasonable excuse for contravening an order¹³. This is contrary to government endorsed training packages¹⁴ which state that; *“It’s entirely appropriate not to force children to do something they do not wish to do, even with a contact order in place”*.

The family court system employs discretion, which does not consistently endorse the training recommended for participating stakeholders, identify risks or required safeguards, consequentially, it commonly escalates risk for survivors of violence and abuse.

The recent arrests of civilians across Australia surrounding parents fleeing due to what they strongly perceive as unsafe orders made in this system¹⁵, demonstrates that the status quo of this system does not meet community standards or the safety considerations of the child¹⁶. The family law system fails to meet the promises made, and intention, of the recent apology to survivors of institutional abuse.



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Today, as a nation, we confront our failure to listen, to believe and to provide justice. And again today, we say sorry.

To the children we failed, sorry. To the parents whose trust was betrayed and who have struggled to pick up the pieces, sorry.

To the whistle-blowers who we did not listen to, sorry. To the spouses, partners, wives, husbands and children who have dealt with the consequences of the abuse, cover-ups and obstruction, sorry.

PM Scott Morrison’s National Apology to the survivors of child sexual abuse, (22nd October, 2018) <https://www.businessinsider.com.au/scott-morrison-national-apology-child-sexual-abuse-2018-10>

¹²The Monthly, Suffer the children, Jess Hill, (Nov, 2015), sourced at

<https://www.themonthly.com.au/issue/2015/november/1446296400/jess-hill/suffer-children> on 14/11/2018

¹³ Family Law Act, sec 70NAE, sourced at http://www5.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s70nae.html

¹⁴ Risk assessment, two day program found in the multidisciplinary training package known as *AVERT- Addressing Violence: Education, Resources, Training; Family Law System Collaborative Responses to Family Violence* (AVERT), developed by the Commonwealth Attorney-General’s Department in collaboration with Relationships Australia, (S.A).

¹⁵ Gumshoe News 01/11/2018, Dee McLchlan, sourced at <https://gumshoenews.com/2018/11/01/a-letter-from-dr-pridgeon-the-man-who-fulfilled-the-pms-promise/> on 14/11/2018

¹⁶ CRIMINAL CODE 1899 - SECT 286, Duty of person who has care of child, sourced at

http://www5.austlii.edu.au/au/legis/qld/consol_act/cc189994/s286.html?fbclid=IwAR3PC5nIXMNmIPRFBDG5Q07sjkHwxzpNkBo5XU0ChbHRRSih8Ec8dBvW4c on 11/11/2018.

¹⁷ Gumshoe News ‘ibid’

"...we can promise a country where we commit to hear and believe our children, to work together to keep children safe, to trust them and, most of all, to respect their innocence."

PM Scott Morrison's National Apology to the survivors of child sexual abuse, (22nd October, 2018) <https://www.businessinsider.com.au/scott-morrison-national-apology-child-sexual-abuse-2018-10>

Response from Advocacy groups;

The current review, in its current form, does not provide enough scope to identify and provide remedy, for many of the gaps in the system currently causing unprecedented controversy. For example, it does not examine the differentiation between genuine parents who withhold for safety concerns, and the much smaller percentage who withhold for possibly vexatious reasons¹⁸. This review, while appreciated, is therefore not comprehensive enough to mitigate the current crisis. A Royal Commission into the family law and interconnected systems, is critically required¹⁹.

A rising number of charities, advocates and survivors of abuse, are calling for a Royal Commission to facilitate a congruent, comprehensive and impartial review²⁰.



¹⁸ Family Law Reform Council, Myths and facts about child abuse and family law, sourced at <https://www.facebook.com/familylawreformcouncil/> on 14/11/2018

¹⁹ Radio 4BC1116, Mark Braybrook interview with Hetty Johnston, (Bravehearts) Calls for a Royal Commission into the Family Law System sourced at; <https://www.4bc.com.au/podcast/calls-for-a-royal-commission-into-family-law-system/?fbclid=IwAR0DTIfOuU0OqghXfuSr2owLRcqFDKzHn0oNwOTtSUIYnSgOiwK4Mb1pWkM> on 14/11/2018

²⁰ Advocacy groups stand united for Royal Commission into Family Law System, (17/09/2017), at <https://bravehearts.org.au/family-law-royal-commission-unites-groups/>

Four Step Plan (Bravehearts)

It is submitted that the Four Step Plan for a Safer Family Law System (similar to that developed by Bravehearts, 2018), will provide an excellent response to manage family law cases which have violence and child sexual abuse as a factor. This is inclusive of;

1. A Royal Commission into the family law system and interconnected child protection and police responses surrounding family violence and abuse.
2. An application of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse to the family law system
3. Establishment of the National Child Advocacy Centre to independently identify risk through specialist expertise, to also facilitate the child's voice, and prepare a report for use in criminal court or family law proceedings. This may also support the implementation of required safeguards.
4. Review of Cases, provision of accountability and oversight by the National Child Advocacy Centre

A Public Health Model

A public health approach to the management of family violence and abuse through the family law system is strongly supported. On page 59, at 1.64, the ALRC discussion *paper stated in the executive summary that a health approach is necessary; "Applying a public health approach to guide the family law system's interventions, it is clear that at a broad level they should operate to mitigate these risk factors by: · not exacerbating financial disadvantage; · reducing children's exposure to conflict and abuse; · enhancing the capacity of parents to adopt parenting behaviors that are consistent with positive wellbeing outcomes for children; and addressing behaviors that negatively affect parental care"*.

The Adverse Childhood Experiences Study²¹ (ACE Study), initiated in 1995 with long term follow up, by Kaiser Permanente and the Centers for Disease Control and Prevention in the USA, demonstrated an undeniable association of adverse childhood experiences (ACEs/trauma)) with lifelong health and social issues. This notable landmark in epidemiological research, and has produced many scientific articles and conference and workshop presentations that examine ACEs. The findings of this study should inform the ALRC family law review to minimize health and social impact of abuse on Australian children.

In summary this research found that childhood abuse and family dysfunction, contribute to health problems decades later. It strongly supported that adverse childhood experiences were strongly correlated with

²¹ Felitti, Vincent J.; Anda, Robert F.; Nordenberg, Dale; Williamson, David F.; Spitz, Alison M.; Edwards, Valerie; Koss, Mary P.; Marks, James S. (1998). "*Adverse Childhood Experiences*". *American Journal of Preventive Medicine*. 14 (4): 245–258. doi:10.1016/S0749-3797(98)00017-8.

life-threatening health risks, such as substance abuse, promiscuity, obesity, depression, heart disease, cancer, chronic lung disease and reduced lifespan²². The World Health Organization supports that it is reasonable to expect that these trends are applicable in other countries²³.

Accurate screening for adverse childhood experiences can facilitate healthy child development. It can help professionals better understand, and provide, a more effective trauma informed approach to behavioral problems. This should be considered as part of any family report and relevant training.

Family Advocacy and Support Service (FASS)

The FASS is an initiative closely linked to legal aid. It lacks the independence, and therefore accountability, of a transparent advocacy support service. The standards of specialist family violence and abuse expertise have not been provided through this discussion paper, and clarification is required. If the level of expertise only reaches that required of the current family consultants, with no independent oversight body, then it is foreseeable that similar issues, repeated through submissions to this review, that surround report writer independence, capacity to identify risks and endorse safeguards, will arise.

The proposed *Parental Management Hearings* or *Child Advocacy Centers*, (as proposed by Bravehearts), are a preferable alternative, due to the independence and specialized expertise proposed. It is constitutionally more appropriate to return issues of child protection to a State jurisdiction.

Proposal 4-4 surrounding the Families Hubs is positive and the locality of these throughout communities is insightful and practical. However, clarification regarding their independence, accountability and oversight should be included in the final report to this review.

The proposed Community based Families Hubs, (described on page 60 at 1.68), which are to complement an expansion of the Family Advocacy and Support Service (FASS), has great potential to create a new case management model, with specialist advice and assistance from family violence and legal services. It is strongly suggested that this model must be inclusive of informed advocates with ‘lived experience’, to congruently help prevent families from ‘falling through the gaps’ to facilitate safety and mental health. The inclusion of advocates will be helpful during collaboration with police who are notorious for their inadequate management of family violence. It is critical that family law

²² Felitti, Vincent J; Anda, Robert F; et al. (May 1998). "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study". *American Journal of Preventive Medicine*. 14 (4): 245–258. doi:10.1016/S0749-3797(98)00017-8. PMID 9635069

²³ World Health Organization; International Society for Prevention of Child Abuse and Neglect (2006). *Preventing child maltreatment: a guide to taking action and generating evidence (PDF)*. Geneva, Switzerland. p. 12. ISBN 978-9241594363.

reforms recognize and provide reasonable solutions to improve police training, empathy and responses to trauma.

The proposed family law system information package, (discussed in chapter 2), should be developed and include the significant wisdom of informed, experienced advocates, survivors of abuse, and teachers who are specialists in the gaps in the system and child development, a combination of these essential skills would be ideal. Subsequent advice should be implemented throughout the education system in addition to the family law system.

It appears that independent family violence and child sexual abuse specialists and advocates have been excluded from consultation and development of the information package in proposal 2-8 where it states ; “ *Proposal 2–8 The family law system information package should be: · developed with reference to existing government and non-government information resources and services; · developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organizations; and · user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.* It is critical that any working group, must prioritize the inclusion of independent family violence and child sexual abuse specialists and advocates.

The discussion paper encourages, (at 2.34); “*a working group of government and non-government organizations*”, however this broad descriptor does not indicate whether any of these groups will present an independence from the family court system, or the specialization required to manage family violence and abuse issues. It is critical that this working group substantially includes the insights of grass roots advocacy and survivor groups, independent specialists, and widely accepted evidenced based research. These working groups should not use controversial or biased research, through its decision-making process.

Parents and children affected by violence and abuse require more than the provision of information. They need congruent and meaningful support services. They need independent family violence and abuse specialists around them to help identify risks and implement safeguards and a facilitation of recovery.

Legal professionals have inadequate capacity to meet this critical need. The discussion paper states at 2.32 that; “*National Legal Aid are also developing a resource, including a website, with information to help people navigate between the family law, family violence and child protection systems*”. A clarification is required by the ALRC committee to clarify what capacity, if any, legal aid may present, to support that they understand how to identify risk, implement safeguards, support and protect victims of violence and abuse.

The committee should include collaboration with independent family violence and child sexual abuse specialists in conjunction with legal aid, in the implementation of all resources requiring the development of documents guiding a navigation of the intersection of the family courts, child protection and family violence systems.

It is concerning that the requirement for relevant independent child sexual abuse specialists, such as clinical psychologists and professionals with backgrounds in neuroscience, child development and health, has been overlooked in this ALRC summary paper. One of the major gaps in the family law system, is that the issue of child sexual abuse is poorly managed, as echoed throughout many submissions to the recent *parliamentary inquiry into a better family law system to support and protect those affected by family violence*.

Flaws of a specialized court

The ALRC committee has overlooked a pertinent flaw in the system evident through this discussion paper. The problem is that the family court is a specialized court. This approach has failed. It has produced a dangerous institution that cannot adequately identify risk, or implement appropriate safeguards. It is therefore not fit for purpose, in the context of the paramount *best interests* or safety considerations.

Many families have experienced tragic consequences due to the management of their separation through this court. This is particularly evident where those families where family violence and child sexual abuse is alleged to be a factor. The family court needs to be a court which follows transparent evidentiary rules, with appropriate oversight and accountability. It must be a court where the legal professionals manage the principles of law, case law, regulations, rules and practice and not subject matter outside their capacity. **It needs to be a court where the judge is the arbitrator of fact**, or at least a realistically probable scenario. Judges need to consider what is presented not influence what is presented with their own subjectivity. Judges are not appropriate specialists in the subject content, and beyond a working legal knowledge, do not need to be, this must be the left to the insight of independent specialists. The family court must be a court where independent specialists are used for the subject matter requiring scrutiny, whether that is family violence, abuse, culture, identity or disability, and the judge maintains a status of impartial arbitrator.

The biggest flaw in the current system is the assumption that legal professionals and judges, have the capacity to understand the nuances and complexities of specialized knowledge. The latter gap has perpetrated a culture, where evidenced based research is often disregarded in favor of subjective views and unsound theories, such as Gardner's discredited *Parental Alienation Syndrome*, and watered-down versions of such. It is not appropriate that unsound theories are often perpetrated amongst legal and

court connected psychological conferences, without consideration of the validity and reliability of the research.

There is a critical urgency in the need to appropriately, scientifically and accurately produce and disseminate, independent reliable and evidenced based research. This must include a congruent trauma informed understanding, inclusive of supported facts and nuances surrounding family violence and abuse, normal and abnormal child development, victimology, perpetrator behavior, risk identification safeguards, family resilience and recovery, to inform professionals that are to be considered specialists in the family violence, abuse, disability, culture and identity sphere.

Amendment to 60CA

The proposal (page 86, at proposal 3-3), that *best interests* should incorporate the word *safety* is a strongly supported improvement to the current Act. However, the interpretation of *best interests* in the Family Law Act, 1975, (60 CA), is currently excessively broad and open to ill-informed discretion. I submit that the wording in 60CA is revised to *health and safety* as follows;

Child's health and safety paramount consideration in making a parenting order

*In deciding whether to make a particular parenting order in relation to a child, a court must regard the **health and safety** of the child as the paramount consideration.*

The definition and interpretation of these words must be congruent with accepted Australian health and safety standards, and not the subjective interpretation of legal personnel. The word *health* should be interpreted as conditions which nurture and facilitate the academic, physical, psychological and social wellbeing of the child's optimal development. The word *safety* must include standard definition of what is considered acceptably and reasonably safe, that support the psychological, physical and environmental safety of the child. This definition should significantly weight the child's consistent and independently voiced perception of their safety.

All references to *best interests* throughout the Family Law Act should be amended to the words and meaning of *health and safety* accordingly.

Part V11 Parenting arrangements and cultural inclusion, (60B)

Proposal 3-4 is a welcome improvement where it states that; "*arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety..*"

However, in the instance where there is reasonable probability that a carer may be exposed to violence, I submit that it is also not acceptable that the potential perpetrator of violence is given unsafe access to the child. A reasonable probability, would be the presence of a final protective or intervention order, where the risk has been tested in a court.

I strongly submit that **all** children “..maintain a connection with family, community, culture and country (of origin), and have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of that culture...” not just those who identify as Aboriginal or Torres Strait islander, as mentioned in proposal 3-4. There are many cultures that children identify and benefit from and it is in the interests of their holistic development to enjoy an endorsement of their cultural connections.

Proposal 3-5 relating to Section 60CC

The guidance in the Family Law Act 1975 (Cth) for determining the arrangements that best promote the child’s safety and best interests need to, as mentioned be amended to the child’s health and safety, not the broad interpretation of best interests.

It is critical that the factors considered in 60 CC are considered by **independent specialists** in the matters in question, be it family violence, child sexual abuse, cultural, disability or identity questions. It is paramount that these specialists do not gain any unreasonable form of benefit from their contributions or submissions. It is abhorrent that current practice permits many court report writers and family consultants, to obtain unreasonably high financial benefits from their engagement with this system.

Any report writer/consultants, close proximity and often social relationships with legal professionals, unacceptably opens the system to dangerously subjective misconduct. This unacceptably promotes a diminished public perception of due process and brings the administration of justice into disrepute. This practice must immediately cease. I strongly propose that parents and carers, are provided the first option to choose an independent specialist, who is appropriately specialized, for their family reports. It would not be difficult to list minimal qualifications for this purpose, and professionals from outside the court should be preferred, to maintain independence. The standards listed in the *Australian Paralegal Foundation* submission (sub. no 228, pages 19-25), propose detailed standards for specialists used in cases where family violence and abuse are raised. This will promote a culture of integrity and raise the professional standards of specialists that are engaged.

The independent specialist employed should be truly independent, impartial and have no financial incentive to support either party. Transparency and impartiality should be prioritized to minimize conflicts of interests and to uphold an equitable administration of justice.

It is critical that specialists up-date their education using evidenced based research and current therapeutic paradigms such as trauma informed practices.

F.A.C.A.A propose a system where the independent specialist is found to be incompetent in their particular field (for example, as demonstrated by a NSW circuit ICL who believes that children will “nearly always lie about being abused”, and regularly interviews abused children in the same room as people convicted of abusing them), then they should be excluded for consideration, from all future cases.

Greater weight to *Protection from harm* as a primary consideration

At 3.56 this discussion paper acknowledged that AIFS amongst other submissions stated that “...*despite s 60CC(2A), which provides that greater weight must be given to the protection from harm than to a meaningful relationship with both parents, lawyers and non-legal professionals are not confident that appropriate weight is being given to protection from harm, and analysis of judgments shows that the provision has limited effect*”. In effect the long-term misinterpretation of 60CC (2A), highlights much of the etiology, behind the plethora of outrage exhibited by affected families, due to family court judgements founded on an inadequate interpretation of 60CC(2A). The lack of correct application of 60CC (2A) is the catalyst behind the increased risk and inadequate safeguards that children are exposed to. The ALRC approach to suggest that this is too complex for the learned judiciary to understand is not reasonable. It is written in plain English that safety must be the greater weighted primary consideration. i.e; “Primary considerations (2) The primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence”²⁴.

There is an explanatory note to help those that may be confused, i.e; “(2A) In applying the considerations set out in subsection (2), the court is to give **greater weight** to the consideration set out in paragraph 2(b)”.

The ALRC has proposed inadequate considerations to identify risk required to facilitate required safeguards in the proposed reconfigured s 60CC, seen on page 95 at 3.59. It is disappointing that instead of building the courts capacity to present an accurate status of the family dynamic, the ALRC has unfortunately missed the nuances required, to identify and facilitate safeguards for the child. To omit a mandatory and substantial consideration of factors that can affect the child’s safety such as; parental history, who has been the primary carer, the health effects of separation-specifically from the primary carer, the influence of victimology, perpetrator behavior, criminal and health records, integrity of participants, and an understanding of the differentiation of genuinely protective withholding,

²⁴ Family Law Act, (60CC) sourced at http://www.familycourt.gov.au/wps/wcm/connect/a242adbd-684b-4d83-a97b-e6593595903f/Consent_orders_Parenting_orders_legislation_070612.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-a242adbd-684b-4d83-a97b-e6593595903f-lhReQVH on 16/10/2018

compared with vexatious hindering of the other parents time, as suggested throughout submissions, is unreasonable and elevates risk through decision making.

The watered-down approach to safety at 3.59, does little to close the gaps repeated throughout this systemic crisis. This leads the author to wonder whether **all** submissions have been impartially and adequately considered. The cited references throughout the discussion paper, indicates that this committee has failed to adequately weight the presentation of multiple family violence and abuse advocacy and grass roots charity groups, against the conservative paradigms of legal bodies. This raises the question of whether the current crisis is too complex for the ALRC to impartially and accurately manage enough, to suggest reasonable solutions for the gaps in the system. A Royal Commission into the family court and connected systems, may well be the only sensible way forward.

Evidenced based resources

The discussion paper's proposal 3–9, and 3.86, surrounds the provision of experts to collaborate and create evidenced based information resources. This proposal fails to provide a mechanism for the independence, validity, accountability and oversight bodies required to ensure that accurate information is disseminated. 3-9 appears hastily constructed. It does not take into consideration submissions which request that sound, reliable evidenced based research is shared, and an impartial review of such research is conducted.

The assumption that generalized *social science* informs, and accurately contributes to the dissemination of valid information, is a major reason the family court has not adequately protected children and families. The current focus on controversial and misleading alienation theories, perpetrated by many working within the family law system, is a prime example of the influence of poor decision making based on discredited and cherry-picked information from the social science arena. The multitude of issues noted in the recent parliamentary inquiry²⁵ and many submissions to this family law review, surrounding the lack of independence, specialist expertise, empathy, experience, accountability and oversight of report writers, (who are largely social workers, often without adequate specialization, independence or empathy), appears to have been ignored.

It is possible to gain more meaningful and accurate information from independent clinical and forensic psychologists, neuroscientists and other behavioral specialists, teachers, who actually do have

²⁵ Parliamentary Inquiry into a better family law system to support and protect those affected by family violence sourced at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions

insightful experience, surrounding the development and holistic capacity of children. Medical professionals, such as family doctors, family violence police units, and independent trauma-informed practitioners and independent advocates involved in services which promote resilience recovery from trauma, are also valuable contributors to any proposed information package. The use of the latter will better identify risk and facilitate required safeguards.

An additional note in relation to proposal 3-9 is the possible omission through collaborative process of a child sexual abuse specialist. It would be helpful if the ALRC could clarify whether they are including child sexual abuse, under the descriptor of family violence.

Discretionary power

The discussion paper infers at 3.91, that the family courts broad powers to make any order it deems appropriate, is reasonably kept in check through the subjective consideration of equity. In practice, the legal principles more often than not *should* be followed as opposed to *must*. To pretend that this immense discretionary power provides appropriate accountability and oversight is gravely misleading.

At 3.95 the discussion paper noted that victims of violence tend to get a diminished share of the property pool, then at 3.96 acknowledges that this is consistent with other research. It would be helpful for the ALRC to elaborate with a solution rather than mere commentary on this issue.

The authors suggestion is that the perpetrator of violence and abuse, (supported by a final protective order), should receive a mandatory and substantially decreased share of the property division. The victim should not be exposed to secondary system abuse by having to re tell lived experience. Accordingly, the conditions and weighting noted in the discussion paper at 3.111 should be significantly lowered. This will catalyze a beneficial message to society, and awareness of such should be widely promoted through a government funded campaign. This will help to decrease the exponential harm caused by violence and abuse, affecting society.

Educational liaison officer

Proposal 4.41 touches on the inclusion of liaison with the Education system. The author respectfully requests that the committee seriously considers the proposals of an Educational liaison officer to ensure that children do not fall through the gaps, are heard and their needs are met. The Hub coordinator mentioned in 4.42 will not be specialised to complete this role, and there should be a specific appointment of a liaison officer for school issues. This is discussed in ALRC submission 228.

“The management and quality of a child’s education must be included as a significant factor in the child’s revised *best interests (proposed to be health and safety)* and needs in the FLA, (1975), to contribute to the *whole* development of the child²⁶.

This should be addressed through the appointment of a teacher, (preferably one who specializes in child development, and is trained in family violence, abuse and trauma responses), called an Integrated Educational Manager, in the Family and Children’s courts and/or within any Parental Management Hearing Model. This position will permit the much needed specialized and informed liaison with schools, to promote the educational support and welfare needs of violence affected children²⁷. This role could oversee the ability of court affected students who are victims of violence and abuse, to access relevant school-based supports. It is relevant that the Education system requires trauma-informed teachers across the board and learning assistance for all students that are victims of violence and abuse. The Family Court and Education systems need to collaborate to provide relevant funding to be directed towards this goal”.

The Family Court and Interconnected Systems

At 4.59 the discussion paper stated that “The ALRC notes that the FASS legal services currently address fragmentation between the family law, family violence and child protection systems by providing clients with advice and advocacy in relation to state family violence orders and state child protection orders, and their interaction with the family law system. This work should continue in the expanded FASS model”.

This family courts interaction with connecting systems requires more than a token mention as it is one of the major flaws in the current system. Safety throughout family law proceedings is paramount. It is therefore required and expected that this Family Law Review provide comprehensive evidenced based workable approaches, and congruent oversight to assist advocates and parents who encounter common situations, inclusive of the following;

- 1/ where police and child protection refuse to investigate allegations of family violence and child sexual abuse, due to a lack of a criminal level of evidence but where it is probable abuse has occurred.
- 2/ Where police fail to enforce protective order contraventions.

²⁶ Research supporting individualised educational needs of a trauma affected child, sourced online via;
<http://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf>
<https://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf>

²⁷ <https://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf>

3/ Where child protection workers only interview the alleged perpetrator and his family and fail to speak with those who made genuine notifications of risk, or have relevant supportive evidence that abuse has occurred.

4/ Where child protection workers are dismissive of multiple notifications by independent professionals.

5/Where police and child protection have connections with the alleged perpetrator, such as the alleged perpetrator also being a police informer.

6/ Where judges have created a perception of bias, such as stating words inclusive of; “I’ll be speaking to that court report writer”.

7/ Where report writers lack specialist expertise, use subjective views or unsound research which misleads the court

8/ Where report writers fail to comply with their obligation to provide a complaints mechanism, as stated on the attorney general’s website²⁸.

9/ Where a child consistently discloses abuse, it should not matter who that child disclose to. The qualifications the recipient of that disclosure has, should not prevent police or child protection from seriously investigating further.

The content of such disclosure should take priority. All disclosures, (including those presented to the family court), should be referred to appropriate professionals. They should be investigated with rigor, and with independent specialists, (such as a clinical psychologist and developmental behavioural specialists), in conjunction with specialised police units.

10/ Where independently obtained audio/video should be seriously investigated by police and specialised child protection workers

11/ Where there are Family Court injunctions placed by Judges, preventing a protective parent from seeking further external State investigation, or support for the child to assist recovery, for allegations of abuse.

12/ Where section 121 or evasive harmful action such as nonfeasance, is applied by the court or ministers, to independent advocates, assisting parents, and seeking further collaboration and assistance in a family court matter.

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13/ Where a protective parent finds that police and child safety refuse to investigate due to the current family court proceedings and/or that parent is considering withholding in accordance to Sec 70 NAE.

14/ Where State judges, police and legal professionals, do not understand the Family Law Act, 1975, 68R amendment.

15/ Where lawyers lack integrity and have proven credibility issues, according to community standards, and should not be involved in cases involving children as follows;

KMB v Legal Practitioners Admission Board (Queensland)²⁹

This is a recent appeal judgment to allow a convicted criminal two counts of unlawful sodomy and 2 counts of indecent treatment of a child under 16 to be admitted as a lawyer in Qld. The appeal was successful – he was deemed a fit and proper person to be practising law in Qld. From our lawyers our judges are chosen.

16/ Where police fail to support families with initiating protective orders despite a reasonable probability of risk.

17/ Where the accountability and oversight bodies for police and child protection are not independent, have a vested interest in the outcome and/or fail to adequately investigate complaints.

18/ Where the fees requested by contact centres are excessive, and the parents do not have financial capacity to pay this.

19/ Where the parent wants to choose their own independent family consultant outside the courts common list.

20/ Where there is a need to record interviews such as family conference meetings.

21/ Where family consultants and independent children’s lawyers, offer opinions outside their area of expertise.

22/ Where a family court order places the child at risk of harm against the child’s wishes. It is noted that on the Federal attorney General’s Website. The *Avert* two day risk assessment training manual, (Family Violence collaborative responses in the family law system), is provided and endorsed on the Attorney General’s Department website. This resource includes the following wording: “*It is entirely appropriate not to force children to do what they do not wish to do, even with a contact order*”. While

²⁹KMB v Legal Practitioners Admission Board (Queensland) sourced at [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2017/76.html?context=1%3Bquery%3DKMB%20v%20Legal%20Practitioners%20Admission%20Board%20\(Queensland\)%3Bmask_path%3D](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2017/76.html?context=1%3Bquery%3DKMB%20v%20Legal%20Practitioners%20Admission%20Board%20(Queensland)%3Bmask_path%3D)

this is encouraged in the training manual, genuinely protective parents who follow this instruction, are often sanctioned by the court, and surrounding safety concerns are not adequately managed.

23/ Where the above best practice, (mentioned in 20), has been ignored, and has resulted in many protective parents being charged with child stealing. Public members, who have, under a belief of duty of care, supported these vulnerable parents are currently charged with serious federal offences inclusive of the Crimes Act, 1914, sec, 42/1, law part code 74231 surrounding conspiring to pervert the course of justice of the Commonwealth. . . , namely orders made in the Federal Circuit Court of Australia. These members of the public appear to be attempting to protect children that have suffered at the hands of a system that fails in its capacity to adequately protect children.

24/ Trauma-informed service delivery and training and experience in dynamic risk assessment was briefly noted at 6.94. The discussion paper did not present a comprehensive response to how the education system, may play a more significant role in supporting a child affected by violence or child sexual abuse.

25/ There must be immediate consideration, intervention and reasoning, to exonerate public members who have genuinely acted out of necessity, integrity and duty, to protect children from a very inadequate interconnected family law, child protection and justice system, in particularly a Family Law System that is so broken and unfit, that citizens have been forced to act against the oppressive practices, that simply do not adequately protect children.

The Family Law System was inappropriately excluded in the recent Royal Commission into institutional child abuse. It is now time for an impartial Royal Commission. This must examine the capacity of the interconnected justice and child protection systems, inclusive of the congruent safety, holistic wellbeing and health of children.

Proposals 4.5-4.8 are positive however there has been no suggestion of what body is to provide independence, accountability, oversight and review. It would be beneficial to compile a comprehensive annual report into the FASS service to provide statistics and research to monitor and improve process.

I strongly support the suggestion raised by the Peninsula Community Legal Centre, which provides FASS legal services in the Dandenong registry of the FCCA in Victoria. The *navigator* suggested in proposal 4.7 should have lived experience and an understanding of victimology, perpetrator behaviour, normal and abnormal holistic child development. They should have a proven capacity to make independent, evidenced based decisions, that are beneficial for the resilience and recovery the victims to facilitate survivors. They should be given the capacity to provide an advocacy and possibly case manager role. If this navigator also has an educational background then this person would be ideal to use as a liaison between the child's teachers and school welfare personnel. The schools that the child attends must be permitted access to relevant family court information surrounding the child's experience, to understand how to provide trauma informed teaching and individualised support to an affected child.

I support The Fitzroy Legal Service and Darebin Community Legal Centre's observation of the fragmentation of courts mentioned at 6.37. I suggest that possibly the above-mentioned *navigator/advocate/case manager* role could help with the continuity and flow of information and collaboration between State and Federal Courts, child protection agencies and police.

Proposal 4.51 Suggests that one-off duty legal service is provided by FASS before legal aid eligibility tests are used. One free service is not enough at least 5 should be free. This removes the incentive of some lawyers to unnecessarily drag out cases and minimises the financial costs that victims of violence incur. I suggest that the presentation of a low income pensioner concession card or health care card should be enough to satisfy the criteria for the legal aid eligibility tests. It is not appropriate for legal aid to request excessive bank records. To force a violence affected person to fill out excessive and unnecessary documentation wastes time and uses up the diminished emotional reserves and stamina of a victim. A low income card should be enough, and would save time and stress through the application process. This would also assist the legal practitioner, through the use of less paperwork, with a reduction in billable hours.

In line with community expectations, it is suggested that previously convicted perpetrators of violence and abuse, should not get legal aid at all, for any future cases involving further allegation surrounding these issues. Accordingly, employers should not be paying for family violence leave, for people that are affected by violence if they have past convictions where they have been found guilty of violent crimes, including child sexual abuse.

The statement by Domestic Violence Victoria, describing that the adversarial model at point 6.54 being that the Family Law System; “advantages perpetrators of family violence and disempowers survivors...” is strongly supported.

At 6.56, The SPLA Committee, insightfully added that the adversarial system ‘must be restructured and redesigned so safety and accessibility are central’. I believe, as the majority of cases presenting to these court have violence as a factor, that this is the most pertinent flaw in the Family Law System. The inclusion of *safety* with *best interests* considerations, and *problem solving* court mentioned at 6.64, to effect behavioural change, in conjunction with use of a Parenting Management Hearings Panel (PMH Panel), and implementation of the Bravehearts four step system discussed, will help mitigate these issues to some extent.

The observations by The Australian Human Rights Commission who promoted the inclusion of the child's views, as it is the children who are affected by orders are strongly supported. The child's views must be significantly weighted and considered by independent developmental and trauma specialists, where relevant.

The notion of legally trained independent children's lawyers, or generalised social workers determining issues surrounding abuse, is fanciful and dangerous. These professionals may not have adequate specialisation or independence to determine any family violence or abuse issues, inclusive of

congruent insight into how the child feels and in what environment this child is safe, Family violence and abuse issues must be determined by independent specialists.

The importance of an independent and specialised children's advocate cannot be highlighted enough, as noted in 7.77. The weighting of this advocates expertise should be prioritised above an independent children's lawyer and family consultant, as they are best placed to identify risk and required safeguards, in consideration of the child's view. This advocate could help the child complete a report similar to the 'Voice of the Child Reports' have been introduced in 2018 in Ontario, Canada, (noted at 7.94).

The multidisciplinary body is a positive step, however issues surrounding the protection of children should be managed at the State level, in accordance to our constitution. The Child Advocacy Centres, proposed by Brave-hearts would be brilliant to facilitate this. Issues involving the safety of children should be determined by independent specialists at State level, prior to any determinations in the Family Court.

The concerns surrounding any impartiality and parental influence can be mitigated through interviewing children in their school environment with the support of their welfare teacher or school counsellor. It may also be beneficial for the child to keep a diary with the school counsellor, if applicable. This diary can support that the child's views are made with their own agency. The previously discussed court *Navigator* can also play a role. In this the navigator can liaise and inform educators, as required, regarding supporting a trauma-informed approach where the child is supported to express their views, and participate in proceedings which significantly affect the child.

The child's views should be compared with what evidenced based developmental research supports are conducive to that child's safety and well-being. Professionals, such as teachers and Doctors who know the child, should also contribute to whether they feel the child's views are genuine, safe and in the interests of optimal development. This will facilitate the capacity of children being catalysed to thrive, as opposed to merely survive, throughout the Family Court process. This combined information should play a significant role throughout all decision-making affecting this child.

The Children and Young People's Advisory Board, proposed at 7.13, is a brilliant idea to support the needs and rights of children. It would be beneficial to apply capacity to this body, to facilitate significant research and review to improve process. This board should have capacity to provide oversight and an independent, transparent pathway for any complaints, accountability and resolution of issues.

The definitions of family violence which may constitute child abuse are noted at 8.40. It is critical that these definitions are not applied to the affected victim parent of the child, where the violence was out of the control of the victim. The importance of this is seen through the commonly termed *failure to protect* legislation, such as that seen that seen at in section 162 of the Child Youth and Families Act, (2005)³⁰. It is not acceptable that Child Protection agencies have commonly misapplied this legislation.

³⁰ Child Youth and Families Act, 2005, (section 162) sourced at http://classic.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s162.html on 13/11/2018

This department has often determined that a victim parent of violence is guilty of child abuse, where that victim was attacked by the other parent. These, *failure to protect* laws have been applied by the department even where a parent victim has been attacked during Family Court ordered contact, where violence was outside of the victims control to prevent. It has been applied to victim parents who have taken every possible measure in their capacity to keep their children and themselves safe. This legislation has been used to remove children from capable parents, consequently causing immeasurable life-long trauma to the parent victim, and children affected. Any amendments to the definition of violence in the Family Law Act, must prevent similar actions being facilitated against parent victims and children. Substantial research, inclusive of the Saunders Study³¹ and Adverse Childhood Experiences Study³² supports that removal of the *safe* parent from a child's life, causes immense harm to that child, and reforms must avoid this at all costs.

The proposals at 8.86 are sensible and substantial weight should be provided to facilitate the safety and best interests of children, and the impact of proceedings on the other party where they are the main caregiver for the children involved. This proposal requires further detail, and should not be left solely to judicial discretion. This proposal must provide protections which safeguard the child, and any relevant carer who has also been exposed to violence by the other party. These safeguards should facilitate resilience and holistic recovery of those affected by trauma.

In relation to costs orders discussed from 8.88-8.93, I submit that it is not appropriate to request costs from a party who reasonably object to the use of an independent children's lawyer or family consultant. It is not reasonable that parties are requested to incur costs for a service that they did not consent to. These individuals should be offered the option to use an independent and appropriately qualified family consultant of their choice, outside of the family court. All costs incurred through the use of independent children's lawyers and family report writers, should be dramatically restricted and reasonably capped.

Proposal 8.97 lacks the language to make this suggestion fit for purpose. The court must do more than simply *consider* records which highlight risk, the courts should actively encourage and insist on the collation of relevant evidentiary material.

Question 11.14/11.17 asks what documents and advocacy, child protection services should provide to the family court, after a parent has been referred to obtain parenting orders. I strongly suggest that the department remains closely involved with the referred parent throughout the entire family court proceeding. The department should absolutely freely provide the reasons that they have directed the parent to the family court. The department should also provide evidenced based reasoning for a determination of the parenting capacity of both parents, any identifications of risk, and suggested

³¹ Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations, Author: Daniel G. Saunders, Ph.D., Kathleen C. Faller, Ph.D., Richard M. Tolman, Ph.D. Document No.: 238891, (June 2012).

³² Adverse Childhood Experiences study, sourced at <https://www.cdc.gov/violenceprevention/acestudy/index.html> on 13/11/2018

safeguards. The department should allocate extensive advocacy and relevant resources, to congruently support a carer and child affected by violence and abuse.

The child protection department should liaise with the family consultant and schools where relevant, to provide a more accurate identification of any risk. The State is, after all, best placed to determine issues surrounding child protection. This has a significant relevance to the best interests and safety of the child. It is also required that schools have appropriate formal procedures in place, to protect their legal rights in relation to section 121, and the privacy and consideration of parents, where family law orders are required.

Proposal 11.75 is beneficial as it supports the inclusion of police documentation and will help identify risks to a child or carer. This should be provided by the police to the court file, immediately after all initiating applications are received. It should be freely accessible and available to be recorded by both parties via court file. It is critical that any police who may be subpoenaed are appropriately trained in family violence matters. To assist with this the police force should appoint specialists who are readily available and familiar with the family court process.

Proposal 12.2 surrounding the implementation of a Family Law Commission to provide oversight is positive however, the independence of such, and alignment with community expectations, and capacity to meaningfully advocate for surrounding safety and justice, must be prioritised to restore public confidence into the Family Law System.

The ALRC refinements to the privacy provisions, are extremely limited. This is concerning considering the greater number of submissions requesting a greater transparency of proceedings, than those requesting privacy. Section 121 should not apply to media or social media where the names of the parties have been altered, there are no clear accompanying photographs showing the faces of those involved, where reports made are not vexatious and false or where both parties agree to publication. Any further restriction greatly affects the public perception of the administration of justice. There is an urgent requirement to detail clear provisions for the sharing of material with schools. This will provide schools with important information such which parent is permitted access and similar.

The Family Law Reform Commission has proposed at 12-2 to self-nominate the responsibility to accredit and provide oversight of professionals in the family law system. There are practical limitations on the ALRC's home page where it is stated "The ALRC does not offer legal advice or handle complaints. It cannot intervene in individual cases and does not act as a 'watch-dog' for the legal system or the legal profession". As the ALRC are a government agency within the Attorney-General's portfolio, it is not clear how the ALRC proposes to not offend the separation of powers or can congruently offer the role of providing oversight without limiting its primary research function.

Conclusion

The conservative paradigm of many legal bodies restricts the capacity of this review to facilitate the reforms required and cultural change, to create a system that is fit for purpose. A culture which

endorses rigorous evidence-based research, independence, transparency, accountability, oversight and review, is critically required.

Reforms must proactively protect the majority of its participants who are affected by violence and abuse. It is critical that this review impartially considers the enormity of the gaps and dysfunction in this system, which currently escalates risk without adequate safeguards.

The life-long trauma facilitated by current process, often breaches humanitarian considerations, diminishes the quality of life, well-being and safety of participants³³.

The Bravehearts Four Step Plan for a Safer Family Law System discussed, will provide an appropriate risk management and response, to manage family law cases which have violence and child sexual abuse as a factor.

A Royal Commission into the Family Law System, as supported by the current and incoming Chief Justices, multiple advocacy groups and parents, and is pertinent for congruent reform.

Ms Michelle Saminaden Bsc.Dip.ed.M.ed

Advocacy Title: Mishka Hudson

Program Director Fighters Against Child Abuse Australia (F.A.C.A.A),

Specialisation in Neurobiological Behaviour and Development

And

Mr Adam Washbourne Dip Counselling, Sports Coaching (specializing in martial arts) and Welfare

Founder and President Fighters Against Child Abuse Australia (F.A.C.A.A).

Child trauma counsellor specializing in non traditional methods of healing traumatized clients

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Gumshoe News, McLachlan, Dee, Family Court Survey, parts 1-4, sourced at <https://gumshoenews.com/> November, 2018.

