

A Better Framework for the Federal Courts (Family Law Services)

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1. Credentials of the Collator of this Document

My name is Charles Pragnell and I have been an independent Child/Family Advocate in the U.K. and Australasia for the last 18 years after a long career in child protective services in the U.K., and have been providing advice, advocacy, and representation for children and their families on a pro bono basis in matters relating to child protection.

In the U.K. my role was largely to act directly as an advocate and representative on behalf of children in Complaints Procedures which were embodied in legislation. Here in Australia my role has largely been advice giving to children and parents who become the subject of custody and contact disputes in the Family Courts or in Care Proceedings.

In cases in Australia, New Zealand, England, and Scotland in the Civil Courts and a case of criminal proceedings of murder against a mother, in which I have been asked to provide evidence as an Expert Witness on child protection matters, I have been in the privileged position of being able to examine all evidence including reports, submitted by both the prosecution and defence counsels and State agencies responsible for child protection matters and those of other expert witnesses appointed by the Courts.

2. Family Law and its implementation and application in the Federal Courts.

There are a multitude of issues arising from the framing of family law legislation and their application in the Family Courts and which impact on principles of human rights, particularly those related to the right to a fair trial, so it is proposed to confine assertions and comments in this submission to the Rights of Children and specifically to two of the key rights of children under the United Nations Convention on the Rights of the Child. [CRoC].

Australia became a signatory to the U.N. Convention on the Rights of the Child in 1991.

There is however little evidence that Australia has actively sought to embody such rights in Federal or State legislation relating to children or in promoting the rights of children in the implementation and application of such legislation. The rights of children are given little prominence in public or governmental discourse and in this regard Australia lags far behind European countries.

The two particular Rights of Children under the U.N CRoC which will be addressed in these comments are :-

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Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

3. Are these human rights currently sufficiently protected and promoted?.

The extent and degree of child abuse in Australia has reached proportions which even to the most casual observer, can only be described as horrendous. Annually there are hundreds of thousands of children in all States and Territories who are subjected to physical, sexual, and emotional abuse and neglect and any country which has such a level of the deliberate infliction of pain and torture on its children would have great difficulty in claiming to be a 'civilised' country.

Of particular concern is the horrendous numbers of children who are sexually abused in Australia and who thereafter suffer serious and long-lasting emotional harm, often affecting their future capacities for forming meaningful relationships and requiring therapeutic interventions, when they are available. Abuse of children by adult Internet predators and by paedophilic strangers tend to receive the most publicity and public prominence, yet they form only a small proportion of the statistical records of child sexual abuse, the vast majority of child sexual abuse being committed on children in their own homes and by adults known to the child (usually males) or in institutions such as schools or Care Homes where they are committed by the responsible appointed adults, or in recreational or leisure groups which the child may attend.

State Child Protective Agencies are constantly overwhelmed by the size of the task they face and must make often extremely difficult decisions regarding which cases to investigate and which they can 'screen out' as not warranting any interventive action. Allegations of the sexual abuse of children, especially those under seven years of age, are rarely investigated by police and child protection agencies as they tend to focus their interventions on cases involving serious physical harm where evidence is much easier to obtain.

There is an unconscionable number of children in Australia who are identified as having been killed each year by their parents, mostly fathers, some in quite horrendous circumstances such as being driven in a car into a dam by their father (Victoria) or two children killed by their father on Bribie Island Queensland, or being dropped from a high road bridge into a river (Melbourne - 2009). Many of these child deaths had a high element of predictability and were foreseeable and preventable, but uncoordinated child protection and domestic

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violence system could have been foreseen and probably prevented. Fathers with a prior history of violence have been able to exploit this situation of uncoordinated services and the rights they have been given under the Family Law and the Courts.

The family of the dead girl in the latest example of a child death in Melbourne, have already stated that they felt that they had been failed by the Australian judicial system.

"For the past 2 years, the various authorities have been made aware of our fear for the safety of the children and unfortunately no one would listen, We feel the judicial system has failed our family and will continue to fail other families until someone in authority starts to take action."

Children sacrificed to the paramountcy of 'shared parental rights' and the interpretation of the Family Law Act that parental contact with children after separation supersedes all other considerations. The legislation does not specifically require this, but its interpretation and application in the Courts and the unsubtle but convenient changes in the lexicon of domestic violence whereby it is now termed 'entrenched violence', which infers that the victims are willing participants. The victims are encouraged by Courts "to get over" their traumatic experiences and "to learn to trust" their violators and perpetrators of the violence.

In 2005 the deaths of 117 children in New South Wales were reviewable because 109 of those deaths had been the subject of a report to Child Protective services in the preceding three years.

The State Child Protective authorities seem error-prone in many serious cases of child abuse and some operate under the premise that the Federal Court should investigate allegations of child abuse in cases before them in disputes over residency and contact, yet the Family Law Council stated in its report in 2002 that the Federal Family Law Courts do not have the resources nor do they have the expertise to conduct such investigations—consequently most cases of children alleging abuse by a parent which reaches the Federal Court are seriously lacking in the evidence to prove the child's allegations. Consequently children are handed over to their abusers.

But of most concern are circumstances which other writers have referred to as 'Court-Ordered Child Abuse'. That is, where the custody or contact with a child is Ordered by Court to a parent despite the fact the child has alleged abuse by that parent or where the parent has a known record of violence, criminal conduct, drug abuse, and/or alcohol abuse. This has even occurred in circumstances where there has been a positive finding of abuse by the State Child Protective Authorities when they have chosen to investigate, but the Federal Court has still ordered contact with the confirmed perpetrator after weighing the evidence ***"Against the (subjectively perceived) 'benefits' of contact"***.

When mothers have protested against such decisions by the Federal Law Courts and have refused to enable or participate in such contact arrangements, they have suffered severe punishments by the Courts such as having the children

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removed from their care into the care of the abuse perpetrator, denial of any form of contact, and in an estimated over 20 cases, the imprisonment of the mother concerned. There are increasing numbers of mothers who have fled overseas or Interstate with their children to find sanctuary for the safety and protection of their children away from the harsh regimes of the Family Courts of Australia. They and their children then have to live a life of constantly being hunted under unsympathetic International laws (Hague Convention) enabling the abuse perpetrator to pursue them and order their return. The interpretation and application by Courts of the Hague Convention does not examine the circumstances or reasons why a mother would abduct her children to another country and to seek protection and sanctuary, but is concerned only that the States law has been broken and flouted. Punishments for such mothers have been exceedingly harsh.

Courts would no doubt argue that they are bound to make such decisions as the Family Law Act 2006 gives primacy and paramountcy to the rights of parents and in particular, the right to 'Shared Parental Responsibility' and the parental right to have a 'Meaningful Relationship' with the child, and there appears to be no reasonable exceptions to these provisions which are available to the Courts, although some Justices may claim that they do give weighty consideration to child safety. In Australia there is little, if any, recognition that domestic violence and child abuse are a part of the same set of dynamic behaviours and are interrelated. The facts of child deaths and abuse in post-Family Court determinations of residency and contact circumstances, would however deny the validity of such a claim.

Courts and related services in Australia tend to give little consideration to the direct evidence of children, especially in instances of alleged domestic violence and there is no obligation or principle which requires Courts to give any degree of consideration and weight to the wishes and feelings of the child concerned.

The reasons include Family Reporters [FR] who spend insufficient time in establishing the child's wishes and feelings or trivialise what the child says or ignore their expressed fears, experiences, and concerns. Where such enquiries begin with an assumption of the imperative that contact will occur, then it is easier to speculate that the mother has 'indoctrinated' the child with the abuse allegations in order to alienate the child from the other parent and prevent contact – current social science research into such contentions shows such notions are untenable but they nevertheless are frequently apparent in the attitudes and reports of FRs.

There are a number of Court-appointed Experts [C.E.] against whom complaints have been made of such misconduct and have been found proven, yet such CE's have still been allowed to continue to practice. As in the case of one CE who was found by the Court of Appeal to have acted beyond the boundaries of his expertise and had acted as an advocate for the father. The CE continues to practice and has continued to practice in the same biased and ill-informed manner.

Family Reporters have an immense influence on Family Courts and very often determine the course of the ultimate decisions of Family Courts in such proceedings. In more than one case a young person has been so dissatisfied that the Family Reporter had completely misrepresented their views and wishes, that they have drafted sworn affidavits and presented them to the Family Courts –

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but Judges have summarily dismissed the affidavits as inadmissible. Such action typically illustrates the prevailing oppressive and insensitive attitudes in the Family Courts of those representing the parties involved and of those in associated areas of the `justice' system toward the importance and relevancy of children's rights and the contribution of their opinions.

What is often alarmingly apparent in the reports and other submissions to Courts of Court-appointed Experts [C.E.] is the compliance with the favoured views and opinions of such `Experts' and the degree of prejudice and bias against victims of violence of such experts. Theories and ideologies of such experts are boundless and often have little or no basis in scientifically-conducted research and have no authoritative support from national or international bodies representing the professions involved, yet their reports are accepted without question.

Psychiatry and psychology are the most outstanding examples of such disregard for professional integrity and ethics and are notable for the inventions of mental conditions which pay little heed to science and authoritative support and more to fanciful speculation and the subjective and prejudiced practices of the author. Their individual and subjective beliefs regarding `Good Parenting' is simply accepted and unchallenged, however unreasonable and irrational.

Many of these professional practitioners have also failed to avail themselves of the latest scientific research into their subjects or choose to ignore national and international disputes within the relevant professions concerning the subject and fail to inform Courts of such disputes. Examples of the misuse and ignorance in Australian Courts that particularly and detrimentally affect children, include Parental Alienation Syndrome, Dissociative Disorder, Repressed Memory Syndrome, Satanic Ritual Abuse, Histrionic Personality Disorder, Fabricated and Induced Illness in Children (Munchausen Syndrome By Proxy), Shaken Baby Syndrome, etc etc.

A similar problem has existed in British Courts for the last three decades but after a case in recent years exposed the flaws and faults in the expert testimonies of world-renowned and respected medical witnesses, the British High Court has ruled that:-

"The Court must always be on guard against the over-dogmatic expert, the expert whose reputation or Amor propro' is at stake, or the expert who has developed a scientific prejudice"

The `Hired Gun' approach to the appointment of Expert Witnesses with particular professional preference and prejudices in Court has been severely condemned in the U.K. Courts, yet there appears to be a similar issue to be addressed in Australian Courts.

The current framing of the Family Law Act treats children as mere possessions of the parents, to be divided up with other `Goods and Chattels' as they were under 19th Century legislation and in particular that fathers are placated so Courts cannot be accused of bias towards mothers or unfairness towards fathers, no matter how inadequate, irresponsible, or dangerous such fathers may be. There are a great many good fathers who wish only to act in the best interests of their children, but too often their intentions and goodwill are capitalised on by other fathers who lack such goodwill and intentions. An excuse is often given in

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the Courts for such unsuitable fathers that, "perhaps he is ready to be a good Dad now!"

The rights of parents to equal and shared parenting and to have a meaningful relationship with their child is treated as inalienable by the Courts, even if a parent has never previously had such a 'meaningful' relationship, or has treated the child with indifference, or has not participated in the care of the child or the child's interests, or even if the child has witnessed a parent maltreating the other parent or a parent has maltreated the child. These are all matters which Courts fail to take into consideration or choose to ignore in their decision-making processes or otherwise give insufficient regard.

The drafting of the Family Law Act was clearly and strongly influenced by the demands of the Father's Rights Groups and their claims that Courts were biased against them. Women's Rights Groups have also had influences and both groups find it difficult to admit that there are some from their own gender who may be inadequate or dangerous parents and they are unwilling to embrace such a view. The 'Gender Wars' continue and children's rights are obscured or misused and not adequately represented in either the framing of the legislation, nor the application of such legislation in the Family Courts.

Children's rights and needs were clearly not properly represented and were overlooked. There is nothing in the Act that suggests very strongly that it is the children's rights to safety and protection as a basic right, which should have been held paramount, only weak references to 'In the child's best interests' which is an undefinable and mutable concept that is susceptible to whatever interpretation is chosen by the person making the decision and their individual idiosyncrasies, biases, and prejudices.

In an article on the matter of the injustices which occur in the Family Courts of Australia, the Age newspaper stated,

"The (Family) Court processes are traumatising for children. The most significant institution in our land is working against the protection of children"

4. How can Australia be better served by the Family Law Courts?.

We recommend that in order to fully uphold and promote the rights of children as required of Australia under the U.N. Convention [C.R.o.C] are as follows :-

- 1. Review of the Family Law Act and amendments** - That a full review is carried out into the Family Law Act 2006, its wording, implementation, and application across all States and Territories and that the Act is re-drafted giving primacy and paramountcy to the safety and welfare of children and to their rights. There are already children's groups and organisations which are bringing to public attention their sufferings after inappropriate decisions of Courts regarding their custody and contact arrangements - such groups should be given primacy of place in such consultations as are necessary to obtain this perspective. In such redrafting the State duty to protect the child should be given full prominence and paramountcy over all other considerations.

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In any Proceedings under the Family Law Act, children should have the inalienable right to attend any Hearings they may wish and to present their views and wishes directly to the Court. After all, it is their present and future life which is being decided. They should have the right to appoint their own legal counsel and advocate if they are dissatisfied with those appointed by the Court.

2. **The Child's Right to bring legal proceedings** - Children should have the right under law, to appoint their own legal counsel and to bring legal proceedings in their own right, as in Great Britain. Such proceedings should include the right to bring a civil action against any public body or individual who fails to exercise their duty and responsibility to uphold and implement the child's rights under the U.N. Convention or have violated those rights.
3. **Complaints Procedures for Children** - All legislation relating to children, including Health, Education, and Child Protective Acts, should contain a procedure whereby children and/or their advocates, can bring complaints where they consider the quality or quantity of service provided by the respective State body or agency is not of a sufficient standard and quality. Such complaints should be dealt with under administrative machinery with the State Ombudsman as the final arbiter with the powers to award damages to a child where the child has suffered from maladministration and injustice. Such Complaints procedures have existed in Great Britain since 1990.
4. **Inquisitorial Panels** - We are aware that a form of Inquisitorial Hearings are currently being piloted in some Family Law proceedings in Australia and we would wish to add our support for this approach and its development although with some modifications. The vast majority of cases of disagreement or dispute over child residency and contact can be resolved under the dispute resolution services and the Federal Family Court system, but in cases where child abuse and or violent assault in domestic environments is involved, then such matters should be referred to a more specialised form of proceedings. It is suggested that such proceedings should be investigative and inquisitorial in their processes and should have the powers to order a full and comprehensive investigation by State Child Protective authorities and for those authorities to report on the risks and dangers to the safety of children in any future residency and contact arrangements based on their findings in regard to past maltreatments perpetrated on the children and of violence perpetrated by one partner on the other, and taking into account the lifestyles of each partner e.g. drug abuse, criminal convictions, mental disorders, alcohol abuse etc.

Such proceedings should also give paramountcy to the wishes and feelings of the children involved in weighting their considerations and decision-making and give pre-eminence to the respective prior fulfilment of their parental roles as care-givers by each of the parties. Each child's relationships with other family members e.g. grandparents, siblings, aunts and uncles, and the friendships with other children in the locality, and their engagement in sporting, leisure and other recreational activities in their locality must also be given high regard in any residency and contact arrangements.

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5. **Role and Composition of Inquisitorial Panels**

Inquisitorial Panels should be comprised of an independent and eminent member of the legal profession of at least barrister-at-law status, and two eminent members of the caring professions with knowledge, training, and experience in child protective work.

On conclusion of its investigations and inquiries, the Inquisitorial Panel should then duly report to a Justice of the Family Court for final decision making, when legal counsel for the respective parties can engage in adversarial contests if they seek to question the decisions and recommendations of the Inquisitorial Panel.

However this process should largely dispense with the services of Family Reporters, Expert Witnesses, Psychological assessments, and legal counsel in the early stages and most importantly, avert the adversarial and often bitter contests between the respective parties which so greatly mar current proceedings to the detriment of due consideration of the 'best interests of children'.

This process was favoured by the Chief Justice Nicholson prior to his retirement when he stated that, ...*"the FCA is not set up to hear child abuse cases and there should either be a separate court staffed by child experts or cases should be in the youth courts where they are accustomed to working with children"*.

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SIGNATORIES

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