

## **Submission on Family Violence amendments to *Family Law Act***

The following submission is made on behalf of the Eeny Meeny Miney Mo Foundation. We would have liked to present a more detailed and considered submission, however the timeframe for submitting comments on the exposure draft and proposed amendments was a limiting factor.

### **1. Contact denial is not recognised as family violence**

Denial of contact between a child and the non-custodial parent post separation **must** be recognised as a form of coercive and controlling behaviour, and emotional and psychological abuse towards both the former partner and, more significantly, the child, and must be dealt with appropriately by the *Family Law Act* and the courts.

The *National Domestic and Family Violence Bench Book* only fleetingly mentions “restricting the victim’s contact with family” and “sabotaging the victim’s means of communication” as abusive behaviour, but it does not go into any detail about a parent withholding all contact with the children from the other parent without any valid reason, or on the basis of unsubstantiated allegations against the other parent, which may or may not give rise to an interim protection order.

Contact denial/parental alienation is “characterised by a pattern of abusive behaviour involving a perpetrator’s exercise of control over the victim, often for an extended period,” as Domestic and Family Violence is defined in the Bench Book, yet contact denial is nowhere discussed in any detail.

The Bench Book states:

Parents and caregivers who perpetrate domestic and family violence are far more likely than other parents and caregivers to also perpetrate direct forms of child abuse and engage in negative parenting practices.

Parents who unreasonably withhold contact with children are engaged in pathogenic parenting practices associated with attachment-based “parental alienation”. They are more focused on hurting the other party than on the best interests of the child, regarding the child as a “prize” in the conflict.

Through a process of distorted parental communications by the alienating parent, the child is led to adopt the “victimized child” role within a trauma re-enactment narrative of the alienating parent. The child’s role of the “victimized

child” then imposes the reenactment role of “abusive parent” onto the targeted parent, and the coveted and idealized role of the all-wonderful “protective parent” is adopted by the alienating parent and displayed to the “bystanders” in the trauma reenactment. <sup>1</sup>

The Bench Book also states:

A child’s exposure to domestic and family violence at any age may result in a range of poor psychological, behavioural and physical outcomes including depression, anxiety, trauma symptoms, increased aggression, antisocial behaviour, temperament and mood problems, impaired cognitive functioning, learning and schooling difficulties, low self-esteem, pervasive fear, peer conflict, loneliness, increased likelihood of alcohol or substance misuse, and vulnerability to unemployment and homelessness. It is also possible that domestic and family violence -exposed children may as adults exhibit attitudes and behaviours that reflect their childhood experiences.

This is especially true of children who have been subjected to pathogenic parenting practices and parental alienation. Parental alienation is not simply a child custody issue, it is a child protection issue. It is perpetrating harmful and damaging family violence against children, and is abusive.

Withholding contact with children can illicit the most uncharacteristic and extreme responses in the targeted parent, who may otherwise be a rational and peaceful person, but who becomes incited to taking extreme measures to try and maintain contact with their children. By reacting badly they leave themselves open to allegations by the alienating parent of domestic violence related “stalking”, “harassment”, “intimidation” and the like, and often being the recipient of a protection or intervention order, despite actually being a victim of the real perpetrator (the alienating parent) and their controlling and abusive behaviours. Meanwhile the harm to the child is ignored while the focus is on the conflict between the parents, especially if the conflict becomes physical.

## **2. The prevalence of false allegations of DV in family law matters**

In his submission to proposed amendments to the *Family Law Act* in relation to Domestic Violence allegations in 2011, Professor Patrick Parkinson wrote:

The view that some family violence order applications are unjustified appears to be shared by state magistrates in New South Wales and Queensland. Hickey and Cumines in a survey of 68 NSW magistrates concerning apprehended violence

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<sup>1</sup> Childress, C.A., *Foundations: An Attachment-Based Model of Parental Alienation*, Oaksong Press, 2015.

orders (AVOs) found that 90% agreed that some AVOs were sought as a tactic to aid their case in order to deprive a former partner of contact with the children. About a third of those who thought AVOs were used tactically indicated that it did not occur 'often', but one in six believed it occurred 'all the time'. A similar survey of 38 Queensland magistrates found that 74% agreed with the proposition that protection orders are used in Family Court proceedings as a tactic to aid a parent's case and to deprive their partner of contact with their children.

90% of surveyed NSW Magistrates agreed that AVOs were sometimes or often sought as a tactic in order to deprive a former partner of contact with the children.

In research that our research team recently published on the views of 40 family lawyers in NSW, almost all solicitors thought that tactical applications for AVOs occurred, with the majority considering it happened often.

Chris Rikard-Bell is a psychiatrist in private practice in Sydney and one of the Family Court's most prolific single experts. He says he's written roughly 2,000 reports in just 25 years, which amounts to 80 reports per year. On Radio National's *Background Briefing*, he was candid about his attitude towards child sex abuse allegations in the Family Court. "I think in the Family Court, there are a lot of false allegations," he said. "In my experience, about 90 per cent are unfounded."

The proposals for summary dismissal of applications or orders that are "malicious, frivolous, vexatious, or an abuse of process" is, on the surface, an appropriate move forward. However, care must be taken to avoid a gender-biased approach to consideration of summary dismissal, for instance an assumption that any protection order taken out against a woman must be malicious or vexatious. Emotional and psychological abuse is often undetectable as far as physical evidence, yet can often be more harmful and long lasting than physical abuse and equally deserving of recognition and protection.

### **3. Gender bias in the National Domestic and Family Violence Bench Book**

The Bench Book is written in gender-biased terms including statements such as:

Where domestic and family violence occurs in families with children, the victim is most likely to be the perpetrator's *female* intimate partner and the *mother* of the children. A perpetrator in these circumstances is also highly likely to directly abuse the children or otherwise expose them to violence. These children are also victims of domestic and family violence.

Statements such as this again ignore the pathology of contact denial/parental alienation, because it is not acknowledged as a form of family violence, at least

not until the targeted parent is incited into reacting emotionally and inappropriately, giving the perpetrator the opportunity to blame the victim and involve police and seek a protection order against the targeted parent (typically the father).

Under the heading 'People with Children' in the Bench Book it specifically mentions this kind of behaviour, but only in the context of a male perpetrator:

A perpetrator may use a range of tactics to undermine or destroy the relationship between *mother* and child. Depending on the child's age, the perpetrator may deliberately abuse the victim in front of the child so as to induce fear in the child or a sense that their *mother* is weak and unable to protect *herself*. The perpetrator may discredit the victim's *mothering* skills by accusing *her* of being a bad *mother*, or *he* may coach and recruit the child in the perpetration of the violence, or isolate the victim and children from family, friends and other sources of support and care. Over time these corrosive and manipulative behaviours may increasingly restrict and control all aspects of the everyday lives of victims and their children, including their sense of reality and their capacity to act competently and assertively; and may ultimately impair their physical, emotional and mental health and wellbeing.

Nowhere in the Bench Book is it acknowledged that a woman or mother is equally capable of perpetrating similar abuse against a father. This tends to indicate a presumption of guilt against accused males and a general perception that fathers are second-rate and disposable parents, which is unacceptable.

#### **4. Dealing appropriately with contact denial/parental alienation**

Children deserve a childhood free from the stress of their parents' conflict, and parents deserve to love and be loved by their children.

Children and families evidencing attachment-based parental alienation represent a special population requiring specialised professional knowledge, training and expertise to appropriately diagnose and treat. There are currently no minimum standards for a single expert. They are not required to have clinical expertise or training in domestic violence, child abuse, or forensic interviewing and are largely unaccountable for what they write in their reports for the court.

A child's rejection of a relationship with a normal-range and affectionally available parent represents a foundational distortion to the functioning of a child's attachment system.<sup>2</sup>

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<sup>2</sup> Ibid

In Family Court proceedings it is essential that any Family Consultant appointed be appropriately educated and trained for professional competence in child and family therapy, specifically:

- Attachment Theory;
- Personality Disorders; and
- Family Systems Theory.

Contravention applications can take up to a year to be heard, during which time a contact denying/alienating parent can cause great damage to the relationship between a child and the other parent. Legislation criminalising breaches of contact orders is urgently needed.

## **5. Issues of resourcing and jurisdiction**

These amendments propose to shift some of the burden of family law proceedings onto Local and Children's Courts. This is a 'band aid' approach to a critical underfunding and under resourcing of the Family Courts.

Family Court Chief Justice Diana Bryant says her court does not have the resources it needs to protect parents and children from violence and admits it may be failing some families. She has urged the federal government to provide an extra \$20 million to the court for extra family consultants and registrars to triage the most serious disputes involving domestic violence.<sup>3</sup>

She said Family Court and Federal Circuit Court judges do not have the resources they need to keep children safe. "If you are really serious about deaths of children, because that's what this is about, and having a proper, viable system, we really do need to look at funding the courts properly," she told *The Australian*. "This is about understanding that if as a society we are really serious about protecting our children, we should properly fund and support the institutions that lie at the heart of the decision-making about them and give them the best tools and enough judges to do the job we expect them to do," she said.

Chief Justice Bryant has said that judges are faced every day with the dilemma of what contact orders to put in place between parents and children or whether contact should be cut altogether. "Risk assessment is vital at the beginning," she said. However, she said the court did not have the resources to do that properly.

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<sup>3</sup> <http://www.theaustralian.com.au/business/legal-affairs/family-court-chief-justice-diana-bryants-funding-plea/news-story/c9d5d6b8128f4e4010a12f56fd1dac85>

“We may be failing some families and children and we need to be able to do better.”

Federal Circuit Court Chief Judge John Pascoe used his Australia Day honours acceptance to highlight how he says the court system is leaving children at risk. He agreed that family law matters involving children should take no more than a year to resolve. In Wollongong, the wait for a final hearing for a family law matter in the Federal Circuit Court is now more than three years. Three years is an awfully long time in the life of a child. “The best outcome for children is for cases to be dealt with, within hopefully six months of filing so they can be in and out within a 12-month period,” Judge Pascoe said. “I think prolonged conflict is not in the best interests of children.”<sup>4</sup>

NSW Law Society president Gary Ulman and NSW Bar Association president Noel Hutley SC have written to Malcolm Turnbull requesting a review of court resources, saying they are “extremely concerned” about the impact of delays on families. “The importance of the timely resolution of high-conflict disputes between parents and children cannot be overstated, particularly where there are allegations of family violence,” they say. The distress and disruption caused by these delays have disastrous and long-term consequences for families and their children.<sup>5</sup>

The Family Law Practitioners Association of Queensland, in a letter addressed to the Attorney-General Senator George Brandis QC, said the strain on current judges is significantly impacting family court proceedings. “Judges do their best to manage but it is a losing battle without more resources. Resolving a case quickly is in the best interest of children and families and will best protect them from risk, particularly when family violence is involved,” FLPA president Clarissa Rayward said.<sup>6</sup>

Richard Foster, stepping down as CEO of the Family Court after a tenure of 16 years, said, “I think it’s dreadful the time people have to wait for a decision. The system has to go through some transformation. We can’t continue to pour money into a system that doesn’t necessarily meet its core objectives or standards. There are a whole range of issues that need to be looked at.” His biggest concern

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<sup>4</sup> <http://www.abc.net.au/news/2016-01-25/family-law-judge-australia-day-honours-system-failures/7113840>

<sup>5</sup> <http://www.theaustralian.com.au/business/legal-affairs/plea-for-family-court-resources-this-is-about-the-deaths-of-children/news-story/27965229c586e6cbf67e8f28537d3557>

<sup>6</sup> <http://www.lawyersweekly.com.au/news/19488-debate-intensifies-over-family-court-system>

is for those coming into the Family Court system. “The system is letting kids fall through the cracks,” Foster said. “It’s shameful.”<sup>7</sup>

All of these pleas for funding are falling on deaf ears and there is a critical shortage of judicial resources available in the family courts. Families are waiting years for cases to be heard, often facilitating severe cases of contact denial/parental alienation and harming children.

This government, and in particular the Attorney-General, are doing nothing to resolve these urgent issues. This current proposed amendments will do nothing but dilute the jurisdiction of the Family Court, confuse litigants and cause even greater delays when matters initiated in the Local and Children’s courts ultimately need to be transferred to the Family Court to be dealt with due to complex and/or protracted proceedings. Local court magistrates are not sufficiently experienced or skilled in family law to be taking up the slack for an overburdened and under resourced Family Court and Federal Circuit Court.

## **6. Consideration of human rights and the rights of the child**

The *United Nations Convention on the Rights of the Child* clearly states, relevantly, in article nine that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

Articles 19 is also relevant in the context of contact denial/parental alienation:

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

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<sup>7</sup> <http://www.theaustralian.com.au/business/legal-affairs/family-court-veteran-richard-foster-calls-for-system-overhaul/news-story/ee2bafcaa6734f37dafa4b752d380f23>

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.

## Conclusions

The federal government needs to urgently address the crisis in family law in this country, and will not resolve it by buck passing to the state courts and obfuscating in relation to domestic and family violence with an unfairly gendered approach and continually broadening the definitions of domestic violence.

The appointment of significantly more Family Court judges nationwide are required to deal with the increasing backlog of cases that need to be dealt with urgently.

The *Family Law Act* requires comprehensive and substantive review, with specific focus on the impacts on children of contact denial/parental alienation, appropriate diagnosis of symptoms of these abusive behaviours and the establishment of appropriate penalties, remedies and therapies.

Contact denial/parental alienation needs to be recognised as controlling and coercive behaviour, emotional and psychological abuse, and as a form of family violence against the child and targeted parent.

Family therapists engaged by the courts require appropriate training and expertise to identify and deal with pathogenic parenting and parental alienation.

If a custodial parent will not facilitate a relationship between the child and the other parent then the court should enforce a protective separation and reverse the residency of the child to live with the parent who will facilitate a relationship with the other parent.

The rights of the child to maintain personal relations and direct contact with both parents on a regular basis must be taken into account at all times.

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On behalf  
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20 January 2017