SUBMISSION

To the Public Consultation Paper on Amendments to the Family Law Act 1975 to respond to family violence

1. Family Law matters to be resolved by State and Territory courts as appropriate

a) It is submitted that the amendments to the *Family Law Act 1975* ("the Act") should expressly define the meaning of "appropriate cases" and that the meaning should include any matter where there is evidence relevant to child protection including domestic and family violence and risks to the welfare of children.

b) It is submitted that where matters are initiated in a state or territory court and move onto the family law jurisdiction, the Act should include a provision that pursuant to section 118 of the Federal Constitution, an order for the previous 'custody' or 'access' made in the family law jurisdiction must not be made where it will be in conflict with a child protection or domestic and family violence order already made by the State or Territory Court. Section 188 states that:

> *All faith and credit shall be given, throughout the Commonwealth to the law, the public Acts and records, and* ***the judicial proceedings of every State.*** (writer's own emphasis)

2. Assisting the courts to exercise family law jurisdiction

a) The National Domestic and Family Violence Bench Book-it is submitted that while this is a meritorious attempt to raise judges' awareness of evidence in domestic and family violence, it is important to note that the High Court has made clear how evidence from the social sciences should impact the law. For instance, in *Aytugrul v Queen*,[1] the majority stated:

> …absent the proof of such facts and opinions (with the provision of a sufficient opportunity for the opposite party to attempt to controvert, both by evidence and argument, the propositions being advanced) a court cannot adopt such a general rule based only on the court's own researches suggesting the existence of a body of skilled opinion that would support it.

Furthermore, in his Honour Justice Heydon's decision, his Honour wrote:

> Another possibility is to treat the expert material as a matter of "common knowledge".The courts have relied on legislative facts as being within matters of "common knowledge" in a sense much wider than that used in s144. That is, they have resorted to legislative facts even though they could not be said to be "not reasonably open to question" because minds differ about them. However, the level of technical sophistication involved in the material on which the appellant relied is so great that it would not be

[1] *Aytugrul v the Queen* [2012] HCA 15, at paragraph 22.

> satisfactory for this Court to take it into account without the assistance of expert witnesses who had been cross-examined. It would be very difficult for this Court, without that aid, to resolve any controversies which may arise. Vo borrow the words of Judge Frank speaking about psychiatry, it would be dangerous for the Court "to embark – without a pilot, rudder, compass or radar – on an amateur's voyage on [this] fog-enshrouded sea. The appellant submitted that the respondent had not made "any significant challenge to the research" relied on. Even if this is so – and the respondent disagreed – if the expert material were to be taken into account, it was highly preferable that it be presented through expert witnesses, preferably during a pre-trial hearing to determine admissibility. The admissibility and weight of the expert material could then be considered publicly and critically.

b) The wisdom of having expert material from the social sciences publicly and critically considered during court proceedings rather than judicial training 'extra curiam' is revealed due to the probability that extra curiam judicial training has led to the current culture of denial of child sexual abuse that exists in the family law system. For example, the National Domestic and Family Violence Bench Book, under 'Purpose and limitations' and the 'Key literature' tab, contains an article titled 'Social Science and Family Law – From fallacies and fads to the facts of the matter' and states that:

> A second example relates to Gardner's (2004) concept of parental alienation syndrome (PAS), in which a child repeatedly denigrates and belittles one parent, without justification. Emery, Otto, and O'Donohue (2005), among others, questioned the scientific studies of this concept and concluded "that it is blatantly misleading to call parental alienation a scientifically based 'syndrome'" (p. 10), especially given Gardner's admission that he regarded his single study as the only one that had been statistically based. While others may disagree, given the state of the "evidence", I would err on the side of caution in the use of such a construct and would not use the term "syndrome" when discussing **alienation**. Clearly, a definitive conclusion on the topic awaits much further research (Warshak, 2001). (writer's own emphasis)

c) The fact is that to the present date even 'alienation' or 'parental alienation' (PA) is still a highly contested and disputed term among researchers and the published literature. For example, Meier reports that:

> [this] article concludes that PA is too closely tied to PAS to be an adequate improvement. It, too, is used crudely in court to defeat abuse allegations, it continues to rely on speculations about mothers' purported unconscious desires and their effects on children, and, more subtly than PAS, minimises abuse and its effects on mothers and children. At root, although even PA researchers have found it to be a real issue in only a small minority of contested custody cases, courts' and evaluators' extensive focus on it in response to mothers' abuse allegations continues to privilege false or exaggerated alienation concerns over a

valid concerns about abuse.[2]

It is submitted the Australian family law system continues to use the term alienation as an undisputed fact most commonly in cases where there are allegations and evidence of child sexual abuse including the child's disclosures and even cases where there is medical evidence corroborating a case for a finding of risk of sexual abuse.

d) The very fact that PAS has even entered into the mindset and culture of the family law jurisdiction remains a case in point as to the mistakes that have been made when "educating and training" the judiciary extra curiam. On 18 February 2007, Background Briefing presented a program on the topic of 'Parental Alienation'. In that program, the following exchange took place:

> **Jane Shields:** Freda [Briggs] says she's contacted regularly by mothers, as well as fathers, who say they've lost custody of their children after raising allegations of sexual abuse against the children during custody cases.
>
> 'Parental Alienation Syndrome' arrived in Australia in 1989, in the form of an article published in *The Australian Family Lawyer*. The article, 'Brainwashing in Custody Cases: parental alienation syndrome', was written by an American, Dr Kenneth Byrne, who had come with his family to live in Australia and establish the Australian Institute of Forensic Psychology, of which he remains the Director. Dr Byrne no longer gives medical testimony, but works as a consultant forensic psychologist in Melbourne.
>
> *Background Briefing* telephoned him to ask if he still supports Gardner's work.
>
> **Ken Byrne:** Yes, I do. I support the notion that parental alienation syndrome does exist.
>
> **Jane Shields:** As a syndrome? Because it has been discredited, it's not in the diagnostic manual and it's been discredited by legal and psychological and psychiatric and medical associations in America.
>
> **Ken Byrne:** Well, I don't know what discredited means. The fact that it's not in the diagnostic and statistical manual doesn't trouble me. There are many things that were not in that manual and later were in the manual. Gardner has specifically written about that issue of it not being in the DSM-IV.
>
> **Jane Shields:** A legal review, published in the *American Children's Rights* journal, found that PAS did not meet the common standards of scientific acceptance. But Dr Ken Byrne says he's frustrated with arguments over whether PAS is technically a syndrome. He says these debates ignore its usefulness in determining custody cases.

[2] Meier J S, 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) *Journal of Child Custody,* vol 6, 3-4, pp 232-257.

Jane Shields: In 1990, a year or so after his article on PAS was published, Dr Byrne was asked to present his views **to the Annual Conference of Australian Family Court judges, at the invitation of the then Chief Justice, Alastair Nicholson.** (writer's own emphasis)

On the phone from his hotel room, he explains why the Family Court judges asked Dr Byrne to speak.

Alastair Nicholson: At that time we took the view that we should get presentations from different experts in the field, he being one of them. And I therefore approved of his giving the presentation. The fact that we permitted it to happen doesn't mean it was an endorsement of it. I think that judges need to be aware of different views and trends that are operative in these areas, and that was just one of them. As I say, it had some vogue at the time and I thought it was worth considering.

Jane Shields: Alistair Nicholson.

The talk Dr Byrne gave was one of many he gave to judges, lawyers and psychologists and psychiatrists during the '90s. And the ideas showed up in a 1997 appeal to the Family Court, when a husband raised the suggestion that his former wife had PAS. Here is a reading from the judgment at that time.

Reader: In a case where there have been obvious contact difficulties between the parties, the possibility that the child has either been brainwashed, or indoctrinated by one of the parents, must be a relevant consideration. Dr Byrne's article leave us in no doubt that 'Parental Alienation Syndrome' is a very real psychological phenomenon which the husband, in our opinion, was entitled to investigate and put to the relevant experts called in the course of the trial.

Jane Shields: That was in 1997, and since then there has been increasing evidence that the ideas are bogus and unhelpful to the Court. Former Chief Justice Alastair Nicholson says it's now proven to be psycho-babble. He cites a Family Court case of five years ago that effectively dismissed PAS as having no substance. However, he does acknowledge there is some lingering influence.

Alastair Nicholson: I think one of the things that happen is that it is dredged up from time to time.[3]

e) It is submitted that the proper and legally principled way for the theoretical and empirical published literature to impact judicial reasoning is for it to be considered publicly and critically in the court room. By way of example, it is submitted the effects of PAS and PA continues to have significant deleterious outcomes for children in the family law system. The notion that a court is 'specialised'[4] imbeds a perception that judges need additional specialisation in their role as decision-makers. However, judges are supposed to be specialised in law, and the principles

[3] http://www.abc.net.au/radionational/programs/backgroundbriefing/parental-alienation/3392436#transcript

of evidence law determine the admissibility or otherwise of hearsay evidence including the opinions by specialised experts. It is for that reason also that section 659ZT should be removed from the Act, and the principles articulated in the Evidence Act 1995 (Cth) should be also enacted in the relevant State and Territory evidence acts, given the proposal that State and Territory courts may now hear family law matters.

f) Extra curiam judicial training has not been shown to be the panacea it was and is thought to be in addressing the deeply disturbing cases of child sexual abuse and family and domestic violence. Furthermore, it is a gateway for dangerous and unscientific ideas to make it into the minds of important decision-makers with regard to highly vulnerable children. Another case in point is the decision in *Murphy and Murphy* where a judge referenced paper given at an Annual Conference of Family Law Judges, and despite the paper not referencing a single piece of literature on the topic of child sexual abuse and seeing that the expert's CV reveals Dr Varghese is specialised in euthanasia- not child sexual abuse, it is very concerning that a section of the paper has been repeated in a family judge's Reasons for Judgment. In the Reasons, his Honour wrote:

> In an unpublished University of Queensland paper entitled "Psychiatry in the Family court - Mad, Bad, Sad or Fad?", Dr Frank Varghese* identifies some of the characteristics suggesting false allegations as:
>
> - Indications of envy on the part of the mother about the closeness of the child's relationship with the father.
> - Retrospective accounts of the meaning of certain events and observations which at the time meant little but is now of great significance.
> - The interpretation of normal child behaviour as abnormal and indicating sexual abuse and nothing else.
> - Inability to recognise that one's own behaviour has contributed to the abnormal behaviour.
> - Attributing to the child's statements that are age appropriate.
> - Escalation in the nature of the allegations over time.
> - Refusal to be reassured by opinions of people who have investigated the allegations, indicating a string need to believe that the sexual abuse has occurred.
> - A curious lack of emotion about what they say has happened to the child.
> - Reliance on photographs or videos often taken by the accuser which were of no significance at the time but subsequently takes on great importance.[4]
> - Reliance on non-specific drawing or writings of the child.
> - Reliance of smells of the father or finding hair of the father on the

[4] [4] For example, see Family Court of Australia, Annual report, 2012, 2013; "As Australia's **specialist** superior family court, determine cases with complex law and facts, and provide national coverage as the appellate court in family law matters." at page 10, (writer's own emphasis).

child's clothing as indicative of sexual abuse.

- Insisting that sexual abuse has occurred even during supervised contact.
- The involvement of a therapist who reinforces the belief system.
- Escalation of the accusations can sometimes be traced to the beginning of "therapy".
- Focus on the father's sexual behaviours towards the mother during the relationship as indicative of a tendency to sexual abuse.
- Focus on a verbal statement which is sometimes an inappropriate comment by the father about the child.
- A willingness to accept that child sexual abuse has not occurred but insisting that it will occur on the basis that the child is being "groomed" for sexual abuse as indicated by various behaviours.
- An "apophanous" experience where various strands both past and present suddenly come together to indicate sexual abuse.
- A history indicating chronic underlying low self-esteem and fear that the child would prefer the father or the father's new partner.

*Footnote- Dr Varghese gave expert psychiatric evidence in the trial.- Paper delivered September 2004.[5]

g) Finally, it is submitted that in fact any training in relation to child protection matters including a proper understanding of the evidence of child sexual abuse, child abuse and the family and domestic violence should be directed to the legal practitioners and in particular barristers. It is their job to become 'experts' so to speak in a particular field of practice such as child protection, and it is their job to develop the law in these areas through cross-examination and submissions. This has not occurred in the family law jurisdiction, and has led to the jurisdiction that is tainted by myths about sexual abuse and domestic violence.

3. Strengthening the powers of the court is to protect victims of family violence

a) It is submitted that currently, the Family Court is not able to effectively identify and then protect victims of family violence. Again, this is related to the problem referred to above in that there is a persistent notion or myth of family and domestic violence is primarily an offence that leaves physical evidence. To properly develop the law both at a Federal, State and Territory level, it is submitted that practitioners need to receive appropriate basic training to properly begin to understand and evaluate cases of genuine violence.

b) It is submitted that all practitioners who appear before any court in relation to matters that affect the welfare of children, such as child abuse, child sexual abuse and family and domestic violence, they all should be required to attend preliminary

[5] [5] *Murphy & Murphy* [2007] FamCA 795, at paragraph 154.

basic training and continuing professional development as part of the requirements of continuing registration to practice in these jurisdictions. Great injustices can occur when victims both female and male are not properly identified and given the proposed amendments to criminalise breaches of personal protection injunctions, it is important to properly identify genuine cases versus spurious allegations.

c) It is submitted that there is a danger in increasing the power of the court to dismiss unmeritorious claims, given the family law jurisdiction's track record that includes the death of at least 26 children and for protective mothers in the circumstances where orders were made by consent or otherwise. It is also submitted that it is critical that the law is properly developed in State and Territory courts and the Federal jurisdiction if there be any hope to properly address the problems seen thus far.

4. Section 121

a) It is submitted that contemporary society has moved past the social norm where child sexual abuse and domestic violence are considered stigmatising factors for their victims. For that reason, it is submitted that is section 121 be amended so that the identification of victims remains a choice for stakeholders. Children that disclose and victims that speak out should be applauded and hailed as heroes and the secrecy surrounding child sexual abuse has not helped its victims. The secrecy of any institution can only lead to serious human costs for the most vulnerable. The Royal Commission into the Institutionalised Responses to Child Sexual Abuse has shown how secrecy, in the name of "victim protection" has actually instead protected the perpetrators. Section 121 therefore should be amended to remove the strict provision regarding identification of parties.

Patricia Merkin, 19 January 2017