NATIONAL COUNCIL FOR CHILDREN POST SEPARATION

1.Role and Purpose

The role and purpose of the National Council for Children Post Separation (NCCPS) is to represent children's' welfare in separation cases in particular where there is risk of harm and abuse. Through our Expert Advisory Panel which consists of former magistrates, lawyers, child abuse experts and other professionals we provide consultation with:

- professionals who work both within and outside of the Family Court
- parents and children in cases where children are at serious risk of harm
- government bodies, politicians and associations representing children
- media for commentary in cases where children are at risk or harm

Established over 2½ years ago, the NCCPS has seen hundreds of cases where children have been placed in abusive custody arrangements and who are suffering physically and psychologically as a result.

2. The Family Law (Domestic Violence and other Measures) Amendment Bill 2010

We are most grateful to the Senate Committee for inviting public comment on this proposed legislation and for the opportunity to make such a response. The NCCPS welcomes and supports the Bill and its provisions and hope it will be the first of a number of major reforms which are urgently needed to the Family Law and the administration of the law by the Courts.

3. Pre-amble

Based on our very extensive knowledge of the difficulties faced by children and young people following parental separation and engaged in the Family Court processes, it is our view that there are several very serious flaws in the Family Law Acts and its interpretation and implementation by the Family Courts is erratic and at times unconscionable. The dysfunctionality of the Family Law Act, the Family Courts and its process has led to many hundreds of children being placed in residency or ordered to have contact with, parents who are dangerous and toxic to the health and wellbeing of their children, and which has resulted in many hundreds of children suffering physical, emotional, and sexual abuse and neglect, and sadly on some occasions to their deaths.

4.The Family Law and the Family Courts

a)SHARED PARENTING - this is an unnecessary term and provision within the Act. When parents separate, both parents retain all legal rights and responsibilities towards their children.

b)SHARED CARE - the presumption of Shared Care of children is not in the best interests of the vast majority of children. Many years of research study into children's developmental needs show clearly that children need constancy, consistency, certainty, and security in their lives in order that they have stability and surety in their personalities and can develop to their full potential.

`Shared Care' of children carries the stigma of Victorian laws whereby children were treated as the `Goods and Chattels' of the parent, and `sharing the child' in this way treats the child as an inanimate object and merely a parental possession, to be divided up in whatever way

the Court may choose and as it does the family finances, house, cars etc. In consequence of the Shared Care arrangements children are being ordered to spend week-about and month-about time in different households, living out of suitcases and with differing standards of care and different rules for their behaviours. Sometimes this can involve children travelling very considerable distances (e.g. a three year old travelling alone monthly between Dubai and Sydney). Children frequently have to travel long distances for two hour contact with a parent. Such children have become commonly known as `Ping-Pong' children in the media.

Children have also been ordered to live many thousands of miles away from their homes, close friends and relatives, and familiar neighbourhoods in order to provide shared care for a parent who may have moved for reasons of work or from choice. Such relocations have caused children extreme anxiety and distress.

The presumption of Shared Care of children has led to many of the situations stated above where children have suffered abuse and even death.

Although such a presumption is rebuttable, on the grounds of domestic violence and child abuse, it has become virtually impossible for a parent who has been a victim of domestic violence and the inherent abuse of children, to prove to a Family Court that such events have occurred.

This was openly acknowledged by the Chief Justice Diane Bryant in a speech in Brisbane in 2009, when she stated:

"[Australian] *family courts are not forensic bodies. They do not have an independent investigatory capacity or role when violence or abuse is alleged … Family courts are reliant upon other agencies, particularly child welfare departments and police, to undertake investigations into matters that may be relevant to the proceedings before it. And although the Court can make directions as to the filing of material and can issue subpoenas compelling the production of documents, it cannot order state agencies to undertake inquiries into particular matters. It is hardly an ideal situation but in the absence of the Commonwealth assuming responsibility for child protection from the states, that will continue to be the reality."*

In effect Chief Justice Diane Bryant was stating that Family Courts do not have the powers, expertise, and resources to competently investigate domestic violence and child abuse, nor do they have the powers to order the State Child Protection authorities to investigate such allegations.

c) A BALANCE OF PROBABILITIES

Further to the comments of Chief Justice Bryant, this serious defect in the administration of the Family Law was further compounded by the case of Briginshaw & Briginshaw, which determined that in allegations of child sexual abuse that the standard of proof of a `Balance of Probabilities' should be at the extreme end of the scale. A Balance of Probabilities means `more likely than not" (that the incident took place) or that it is only necessary that it is 51% proven.

There are, in any event, problems in attempting to prove child sexual abuse in the Family Court which goes beyond having to satisfy the Briginshaw standard. The strict laws of evidence also restrict the evidence which is admitted or the use to which certain evidence may be put in proving the allegation of abuse. This is illustrated by the Full Court's decision in *WK v SR (1997) FLC 92-787.*

The Full Court overturned the decision of the trial Judge and held that finding that abuse has occurred can only be reached by strict application of the onus of proof as set out in *Briginshaw v Briginshaw* and that given the gravity of the offence, a finding of this nature can only be justified by evidence satisfying a standard of proof towards the **strictest end of the civil spectrum.** The Court went on to state that the evidence which may be relevant and probative in relation to the question of an unacceptable risk of abuse occurring may or may not be relevant or probative when deciding whether or not a specific instance of abuse has in fact occurred.

However the Full court of the Family Court said recently in *Amador & Amador* in examining one of the grounds of appeal was that the magistrate accepted uncorroborated evidence of domestic violence and sexual assault by the father on the mother. The full court stated:

".... to the extent that it is submitted that the mother's allegations of 'horrific domestic violence' could only be accepted if objectively corroborated, we do not find that any such requirement exists. Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. We have not been referred to any authority in support of such a proposition."

In regard to this variance in the standard of proof in cases of domestic violence and child abuse, Deputy Chief Justice John Faulkes stated in a speech in October 2010 that,

"Allegations of family violence and abuse in the context of family law litigation need to be established in accordance with two seemingly contradictory constructs. The first is that whether or not family violence or abuse has occurred needs to be made out on the civil evidentiary standard ***on the balance of probabilities****,[1] not beyond reasonable doubt. In a judgment I recently gave (Kings & Murray[2]) I identified the difficulty inherent in navigating the evidentiary standard of proof (at paragraphs [8] & [9]):*

Proof on the balance of probabilities involves, among other things, a consideration of what is more likely to have occurred than not. However, it has been well known for some time (and the Evidence Act 1995 (Cth) provides for this[3]) that where what is being sought to be proved is a grave and serious matter, or put in more blunt terms, if what is sought to be proved might be a criminal action, then the Court must apply what has been loosely described in the past as the Briginshaw v Briginshaw[4] standard of proof. In that decision, their Honours (Latham CJ, Rich, Starke, Dixon and McTiernan JJ) considered whether the matter required to be proved (which related to whether adultery on the part of one of the parties had occurred or not) was to be proved on the civil standard of proof or some other standard
.

Chief Justice Faulkes and the Briginshaw findings are therefore suggesting that in cases of child sexual abuse that Judges are setting a *third* standard of proof which is not the generally accepted standards in civil Courts and is a serious departure from a fundamental principle of justice which has been in place for centuries.

This appears to be in conflict with judicial comments in Krach & Krach [2009] FamCA 507 (5 June 2009) i.e.

Standard of proof

" 36. *In assessing the evidence, I apply the balance of probabilities as the standard of proof. The practical application of the balance of probabilities was discussed by Lord Nicholls in Re: H & Ors[17]. Relevantly, His Lordship stated:*

Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise various serious issues, but so do other forms of civil proceedings.

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

37.As was observed by Carmody J in D and D [2005] FamCA 356, the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. [18] The balance of probability standard takes account of the instinctive judicial feeling that even in civil proceedings a court should be surer before finding serious allegations proved than when deciding less serious or trivial matters. There are degrees of probability but, when the law talks about "the balance of probabilities", it envisages a degree of probability to the point that a court can be satisfied that the alleged fact in issue is more likely than not. There has to be something more than mere conjecture or suspicion. A proposition is proved on the balance of probabilities in a circumstantial case when the combined weight or preponderance of the totality of the available evidence favours it as the most likely explanation. The more information consistent with one of a number of competing hypotheses, the more probable that explanation becomes. I agree with those observations.

38. In these reasons, statements of fact constitute findings of fact.

*"In **summary, the law is well settled as to the standard of proof required to make a positive finding of sexual abuse,** and that such a finding should not be made unless a trial judge is satisfied to the highest standard**, on the balance of probabilities abuse has occurred**. We accept, as a matter of practice, a trial judge will almost inevitably be required in a case where sexual abuse allegations are raised to consider whether abuse has been proven on the balance of probabilities as well as considering whether or not an unacceptable risk of abuse exists.*
And
26. While Dixon J's classic discussion in Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 at 361-363 of the operation of the civil standard of proof may appositely express the considerations which s 140(2) of the Evidence Act 1995 (Cth) requires a court to take into account, the correct approach (as recently observed by Branson J (with whom French and Jacobson JJ agreed) in Qantas Airways Ltd v Gama [2008] FCAFC 69; (2008) 247 ALR 273, at para. 139 is that :

. . . references to, for example, "the Briginshaw standard" or "the onerous Briginshaw test" . . . have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s.140 of the Evidence Act provides.

27. Similarly, in Johnson & Page (2007) FLC 93-344, at 81,891, the Full Court of this Court expressly agreed with the "view that reference to the Evidence Act, rather than Briginshaw, is appropriate".

28.Section 140 is as follows :

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

NCCPS Comment: Determinations in the Family Court are regarding the welfare and wellbeing of the child, and is not a trial of the accused parent and must be determined on a Balance of Probabilities as is known and accepted in civil law. If there is a finding that a child has been sexually abused, then it is a matter for the Public Prosecutor to determine whether, or not, such evidence is sufficient to take the matter before a criminal court. This is how such matters are handled in the Children's Courts. This was in our view a seriously flawed judgment as there cannot be an `Extreme End of the Scale" in a balance of probabilities determination. It contradicts the entire principle.

It should not be for a Family Court to change the standard of proof to somewhere in between such standards, in order to give advantage to the accused parent. The Family Court has no responsibility for conducting a criminal trial and in any cases, their findings based on a `Balance of Probabilities' may well not be accepted by a Criminal Court to the standard of proof of `beyond reasonable doubt' required in criminal Courts. The Briginshaw principle is therefore seriously flawed in its application to Family Law cases in seeking to attain a compromise and reconciliation between the separate legal principles used by civil and criminal courts.

With such ambiguities, uncertainties, and contradictions among the judiciary regarding the application of a standard of proof of a `Balance of Probabilities', it is little wonder that such cases have become virtually impossible to prove.

e) FAMILY COURT DETERMINATIONS REGARDING CHILDREN

There have been several cases where residence has been given by Family Courts to fathers with convictions for child sexual abuse. In an Adelaide case in 2010 a father was awaiting sentencing as a child sex offender but was awarded contact with a small child. Another father who had HIV/AIDS and had no experience of child rearing and parenting was awarded shared care of a female child. Some years later she reported that she was being sexually abused by her father but the judge dismissed this claiming she had been "trained by the mother" who she hadn't seen for several months. There was no evidence to support such a contention and finding.

There are also at least two cases where mothers who had been brutally raped by their former partners, have been awarded compensation from the Criminal Injuries Compensation Scheme which assesses cases on a balance of probabilities, yet the respective Family Court Judges refused to accept such evidence, as evidence of intimate partner violence.

A Judge in the Magellan Court is reported as stating to a group of University students that *"mothers' allegations of child abuse are always false".*

NCCPS Comment: When allegations of domestic violence and the inherent abuse of children are made to a Family Court, the Court must be obliged to refer these matters for investigation by the statutory child protection authorities in regard to safeguarding the welfare of the child and to the police to investigate as to whether there is evidential proof sufficient to warrant criminal charges. Court Reporters, Independent Children's Lawyers, and Expert Witnesses are not the appropriate persons to report to the Courts and give opinions on such matters and in most cases are failing in their mandatory duty to report such matters to the statutory authorities.

f) COURT APPOINTED EXPERT WITNESSES

There is very considerable concern that Family Courts are appointing Expert Witnesses, Independent Children's Lawyers [ICLs], and Court Reporters who do not have the necessary expertise to undertake the tasks for which they are being engaged.

There are many Court Reporters who do not appear to have the necessary training and experience in working with children and young people.

Lawyers are not trained nor experienced in gaining the trust and confidence of children in order to talk openly and honestly with children and are frequently giving opinions to Courts when they have not even spoke with the child or have given only a 15 minute office interview to the child. The ICL then presents their own opinion to the Court on what they consider to be `In the best interests of the child' and which is not founded on research studies of children's developmental needs, their wishes and feelings, and with little regard for the rights of children under International Conventions.

Psychiatrists and psychologists are frequently appointed by Family Courts to give opinions on matters related to domestic violence and child abuse, yet they have neither training nor experience in the investigation of such allegations. In many cases they give opinions which are `outside of their area of expertise' yet Courts are failing to rule such evidence as inadmissible or even challenge the validity or utility of their evidence. It has become a fashionable practice amongst psychiatrists and psychologists to label mothers who make allegations of domestic violence and child abuse as `deluded' or to have `Personality Disorders', because they cannot competently investigate the allegations.

An example of the reasons for concerns regarding expert testimony arises from the case of Re: W and W: (Abuse allegations; Expert evidence] [2001] FamCA 216 (14 March 2001).

In this appeal hearing the Judges said of the evidence of a Dr. W, a Consultant Psychiatrist:-

145. It is important to note some features to Dr W' involvement in the case which we think should have led to his evidence being regarded by his Honour with considerable reservation.

146. Firstly, that Dr W had been brought from New South Wales in order to support [the husband's] case.....

147. Secondly, Dr W did not have the opportunity of having the husband, the wife and the children attend on him. We think that there are grave dangers in reliance upon expert evidence given in such circumstances. When we examined the transcript of his evidence we considered that there was even greater cause for reservation, as hereafter appears.

156. As we have said, Dr W saw neither of the parties and none of the children and yet arrived at damaging conclusions about one of the parties, who happened to be on the opposite side to the party who commissioned him.

157. This brings to mind the statement in Lord Arbinger v Ashton (1873) 17 LR Eq 358 at 374 that:

"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves as witnesses, rather consider themselves as the paid agents of the person who employs them."

161. Freckelton et al's sample of 244 judges amounted to just over half of all those approached and were thought to represent approximately 60% of trial Judges. The results were conveniently summarised in the following way at para 6.95 of the Managing Justice Report:

"Most judges responding to the survey questionnaire had occasionally encountered 'biases on the part of experts. Nearly nine out of ten judges said they had encountered 'partisanship' in expert witnesses, and nearly half considered that such partisanship was a significant problem for the quality of fact-finding in their court" (footnotes omitted).

163. In an article by Sperling J presented at the Supreme Court of New South Wales Annual Conference in 1999 and published as "Expert Evidence: The Problem of Bias and Other Things" (2000) 4 The Judicial Review 429, his Honour observed at 432:

"The actual role of the expert witness, particularly in major litigation, is that the expert is part of the team. He – it usually is a "he" – contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial he is a front line soldier, carrying his side's argument on the technical issues under the fire of cross-examination. Natural selection ensures that expert witnesses will serve the interests of their clients on this way. If the expert measures up he will be kept on and he will be used again by the same client, the same solicitors and others. If he does not measure up, he will be

dropped from the case or never used again by anyone. He then disappears from the forensic scene. An appearance of objectivity is a marketable attribute. Cross-examination or contrary evidence may unmask dissemblance or may not. A judge is ill-equipped to diagnose bias in an expert witness. It is likely, therefore, that the incidence of bias as assessed by surveyed judges in the Freckelton report is an under-estimate."

166. Our examination of the transcript of Dr W' evidence gives us the clear impression that what the trial Judge considered to be objectivity was in fact something else. We have, of course, had the advantage of subsequent argument and time for reflection on that argument that was not available to his Honour.

167. Our conclusion, however, is that this case is a classic example of the misuse of expert evidence. In light of the matters to which we have just referred, and the case-specific matters which we will next identify, we think that the trial Judge should have harboured significant reservations about the evidence and opinions of Dr W because Dr W was more than prepared to express views favourable to [the husband] and contrary to the position of [the wife] about her suitability as a residential parent without the opportunity to properly assess the issues.

168. On the issue of removing the child from the care of [the wife], his Honour had this to say about the evidence of Dr W (paragraph 284):-

"According to Dr W, if the child [T] still believed that the husband had sexually assaulted her, then, the longer the child received reinforcement for this belief, the longer it would take for the belief to abate. Given the relationship between the wife and the child, there was a serious risk that even contact might be enough to reinforce it

169. In cross-examination Dr W stated that:-

> *"The answer is probably total removal, - - or highly supervised contact, unless you are convinced that the mother isn't going to fill the child's head up with some other idea, or an extension of the one she already has, because this child is very, very vulnerable to that. We know that already."*

170. According to Dr W, the solution of removing the child from the wife was predicated upon the notion that the wife still held her beliefs absolutely and that she was not going to be able to stop herself talking to the child about her beliefs, even if the child resided with the husband.

171. Dr W was also of the view that removing the child [T] from the care of [the wife] was a discrete harm, but allowing the child to grow up believing she had been a victim would also be harmful to her.

172. Dr W also attached considerable significance to the wife's new age beliefs and beliefs in spiritualism as providing an explanation for the child having made false allegations of sexual abuse. This was a view accepted by his Honour and a matter, which considerably influenced his judgment.

173. The extent to which Dr W was prepared to express opinions about people with whom he had never been associated can be measured by the fact that he said "It is clear that [T] was a troubled, very insecure girl from toddlerhood, although of superior intelligence." and

his conclusion that "It is probably that Mrs [W] is a highly susceptible but persuasive person, but [T] is a very insecure girl who is desperate for attention and has felt that way since early childhood."

174. He went further and said:-

> *"The materials which I have seen strongly suggest that once the mother became convinced of her paranormal beliefs and philosophies she inappropriately shared them with her daughter who, being extremely needy of attention, produced for her mother based on suggestive questioning, a range of paranormal experiences which confirmed in the mother's mind that her daughter had special powers."*

175. In cross-examination, Dr W said:-

> *"We're talking about a highly dysfunctional set of fantasies which have - - transported this child off the planet a couple of years ago and -- and at least within the sexual domain, in my view, have transported her off the planet now, and that -- its -- it's part of the same process. I mean what you're trying to do is separate the two where it is absolutely wrong to do that."*

176. We are very troubled about an expert expressing such views about people that he had never dealt with. This is even more marked when it is remembered that Dr W was the only expert to see a link between the wife's spiritual beliefs and [T]'s allegations of sexual abuse.

177. Somewhat startlingly in our view, Dr W did not concede that if [the wife] was able to stop herself from talking to the child about the sexual abuse allegations, there would be no reason that [T] and her sisters should not remain living with [the wife].

178. At AB 1642 there was the following cross-examination of Dr W-:

> *"MS BRADDOCK: I see. Moving on, your postulated, as it were solution of removing [T] from the household in which she lives is, presumably, pre-conditioned on the same conditions existing at the present time? - - - Exactly. It's predicated on the notion that the mother still absolutely believes this, and that the - - and that she's not going to be able to stop herself from talking to [T] about it, even if [T] lives with the father.*

The solution, presumably, would be different if that were not the case? - - - Yes.

I mean, I would have thought that all of things which need - - need to be thrown into the melting pot, in terms of the mother's capacity to - - to parent, her own mental stability, the extent - - the extent to which she can focus on the children's welfare, and put - - put her own welfare - - or - - or subordinate her own welfare to the children's welfare; all of the usual sorts of things that one should - -

"The usual considerations - - ? - - - - -so - - so I mean, I - - I would have - - I would have thought that, even if there's a change of mind, that there is - - there's a basis for - - perhaps a strong basis for believing that the children would still be better placed with the father. I mean, I - - as you say, I haven't seen the parties, so I can't really say. Dr Lord is probably in a better position to answer that hypothetical question, if you like."

179. It is clear from this passage that Dr W was prepared to go well beyond the position of an expert commenting on facts that were common ground or the opinion of other experts and was stepping into the ring himself. Perhaps the realisation came at a late stage in the above passage when he made a partial retreat from his position.

180. We believe that a careful reading of Dr W evidence reveals him to have been extremely partisan to the point where we find it difficult to accept his professional objectivity. We refer to the following examples:

a) We find his comparison of [T] to the victims of professional brainwashing to be farfetched in the extreme (AB 1624-5);

b) The significance that he sought to attach to [the wife's] attendance at a course on sexuality and use of an artefact to relieve menstrual tension decision bordered in our opinion upon the ludicrous as having any bearing upon whether [the wife's] encouraged the child to make allegations of sexual abuse (AB 1661-15);

c) His refusal to accept that [the husband's] behaviour could have affected [T]'s behaviour was in our view partisan (AB 1616-18). When it was put to him that [the husband's] behaviour in getting into bed with the child may have caused her some concerns, he attempted to equate that with an insecure child attempting to get into bed with a parent (AB 1617). This was a most inappropriate analogy and suggests the reaction of a witness who is attempting to act as an advocate for a cause.

d) He stated that he had only once previously recommended the removal of a child in a case such as this and that was in relation to an allegation of a satanic conspiracy. Again, his attempt to equate this case to that one was drawing a long bow indeed. (AB 1622-3);

e) His attempt to justify [the husband's] alleged justification for touching [T]'s breast as "she's my daughter". (AB 1626) Again this passage of evidence smacks strongly of the evidence of a partisan witness.

f) His speculation as to [the wife's] behaviour prior to 28 October and the effect of the Relationship Australia interviews was again very troublesome,(AB 1642).

He said :- "She got father to go off to Relationships Australia and-----and between she and the Relationships Australia person, managed to talk him into--into trying to enrol himself into a sexual offenders programme or something like that".

We find this to have been an extraordinary assertion, particularly in view of the fact that Dr W had already conceded that he did not know what had occurred at that interview (see AB 648). The counsellor from Relationships Australia was not called and could not have been called and we have great difficulty in attaching credibility to an expert witness who would make such a statement in these circumstances.

g) His dismissal of the validity of a police interview that he had not previously seen suggests that he was determined to maintain [the husband's] position at any price. (AB 1639);

h) His reference in a pejorative sense to [the wife's] psychiatric treatment as a possible basis of removal of the children is curious in the context of a witness who had no direct knowledge of her condition. (AB 1642). In our view this was an irresponsible and partisan statement

from a witness who had never had, nor sought, the opportunity to assess [the wife].

i) His refusal to accept that even if [the wife] had genuinely changed her mind about the allegations the children could or should remain with her.

181. Although his Honour expressed a note of caution, it is clear that he accepted the evidence of Dr W almost in toto and that this underpinned the orders that he in fact made.

183. This connection was critical to his Honour's finding that the allegations of child abuse against the husband was at least in part due to the wife's spiritual beliefs.

184. It is apparent from the above discussion that we also regard the second argument in relation to Dr W has been made out.

SUMMARY AND CONCLUSIONS

185. In this case [the wife] was the primary carer of all three children. Findings were made that:

- *[the wife] was genuinely concerned about the welfare of the children.*
- *the two older children wish to live with [the wife].*
- *[the wife] was able to adequately provide for the physical and educational needs of all children.*
- *[the wife] had a warm and close relationship with all children.*
- *it was agreed that the three children should not be separated.*

186. However, an order was made that all three children reside with [the husband] because of:

- *a finding in relation to [the wife's] ability to provide for the emotional needs of the eldest child.*
- *a finding that there was a very real danger that the children and in particular the eldest child would suffer psychological harm if they resided with [the wife].*

187. These findings in turn depended upon the findings in relation to [the wife's] attitude to the acceptance or otherwise of the validity of the findings that no sexual abuse occurred and the evidence of Dr W.

188. As to the first matter, a finding was made that [the wife] was genuinely concerned about the welfare of the children and further, a finding was made that [the wife] had not acted maliciously. Therefore to support the findings about the mother's ability and danger to the children it was necessary to link [the wife's] attitude to the husband with her New Age beliefs and it was only Dr W who did this.

189. The injustice to [the wife] is compounded by the failure to consider the possibility of counselling in the context of the children residing with [the wife]. It was ordered only in the context of the effect on the children of a change in residence.

*190. As to the evidence of Dr W, we are of the opinion that **Dr W demonstrated bias and thus little, if any weight, should have been attached to his opinion. In our view, he stepped out of the role of an expert witness and assumed the role of advocate.***

191. It follows in our view that the trial Judge's decision must be set aside.

192. We are of the opinion that the case highlights the need for reform in the area of expert evidence. In this regard, we note that the previously cited article by Sperling J offers a number of recommendations which we see as applicable to the family law jurisdiction, such as:

- *Promulgating a code of conduct for expert witnesses;*
- *Consideration of amending statutes to make breach of a duty of objectivity professional misconduct;*
- *Greater use of the power to refer out technical issues for determination by an expert referee; and*
- *Amendments to the Rules of Court in respect of matters such as an express power to limit expert evidence to that of a single expert selected by the parties or the Court in appropriate cases.*

193. We think that there is considerable merit in these proposals. We note that some have been adopted by changes to the Rules of the Supreme Court of New South Wales (see Bill Madden "Changes to the role of the expert witness" (2000) 38 (5) Law Society Journal 50) and that the last one is also favoured by the Family Court of Australia's Future Directions Committee Report which was published in July 2000 (see http://www.familycourt.gov.au/court/html/future_summary.html).

There are a small number of other psychiatrists who are similarly, predictably, and repeatedly making reports to Family Courts which summarily dismiss any allegations of domestic violence and child abuse, accuse mothers of `coaching' the child, and label the mother as `deluded' or to have a non-specific `Personality Disorder'. Recent statistics show that one-third of mothers appearing in the Family Courts have been so labelled as `mentally ill'.
For many years some psychiatrists in Australian Family Courts labelled mothers as having Parental Alienation Syndrome [PAS] an American psychiatric label, which has subsequently been discredited for having no basis of scientifically conducted research and the creator, Richard Gardner was subsequently found to have sympathies with paedophiles. There has been no subsequent review of those cases where children have been placed in the care of their alleged abusers.
Many mothers do suffer severe Complex Post-Traumatic Stress Disorder where they have been subjected to many years of violent abuse and are consequently mentally and physically exhausted and in consequence are unable to competently instruct legal counsel or represent themselves competently to the Family Court. We know of no case in which a psychiatrist has recognised such a condition in mothers and perhaps indicates a serious lack of knowledge of the effects of domestic violence by the psychiatric and legal professions.

g) REPRESENTATION OF CHILDREN'S VIEWS TO FAMILY COURTS

In Kingley & Arndale (No. 2) [2010] FamCA 968 (8 October 2010) it is stated:

27.The first is Harris & Harris (1977) FLC 90-276 at 76,476 in which Fogarty J remarked that the role of an independent children's lawyer has unusual features, which he identified as including that an independent children's lawyer does not necessarily advance what his or her "client" wants but what is in the best interests of that "client" (being a child) and to that extent exercises an independent judgment "quite out of character with the position ordinarily occupied by an advocate".

NCCPS Comment – If an Independent Children's Lawyer is not required to represent the child or young person's wishes and feelings to the Court, this effectively means that the child's views on decisions being taken regarding the child's future care are not represented, which is in clear breach of the U.N. Convention on the Rights of the Child.

h) ARE FAMILY COURTS FITTED AND APPROPRIATE TO THE TASK?

Some of the comments given above have raised very serious questions as to whether the Family Courts are appropriate and competent to the task which they are required to perform. Former Chief Justice Alistair Nicholson has stated that Family Courts were not created to determine child abuse cases, and that there are now eight different Australian courts dealing

with children's issues, not one of which is required to engage professional advisers with expertise in child welfare and development and in child protection.

Former Chief Justice Nicholson recommended that there should be a single court dealing with children's issues.

NCCPS Comment - We would go further and suggest that the adversarial nature of Family Courts are not conducive to determining the most appropriate manner in which the future care and welfare of children should be decided. The adversarial contest and conflict between lawyers creates a high conflict atmosphere which encourages and often incites parents to be derogatory and antipathetic towards each other. If the proposed amendments in the Bill are to be effective, then the system by which such changes are implemented and administered must be changed.

NCCPS CONCLUSIONS AND RECOMMENDATIONS

It is our view that the current Family Law is seriously flawed and defective in its emphasis on parental rights, to the almost total exclusion of the Needs, Wishes, and Rights of Children and Young People and that the Family Courts are grossly dysfunctional in the administration of the Family Laws. This view is supported and confirmed by a great deal of the evidence which was submitted in the several reviews ordered by the government into the Family Law and its administration and as we have illustrated above.

This situation has led to many hundreds of Australian children suffering serious impediments to their growth and development and attainment of their full potential, and in many cases to their physical, sexual and emotional abuse, neglect, and sadly in some cases to their deaths.

It is our view that the Family Law should be CHILD-CENTRED and must place a primary focus on, and give paramountcy to the NEEDS, WISHES, AND RIGHTS of children and young people. Decisions regarding children and young people must be DEMONSTRABLY and MEASURABLY to the benefit of the child or young person and not merely a vague notion of what is in the 'Best interests of the Child'.

It is our views that legal matters regarding children and young people should be heard by a TRIBUNAL OF INQUIRY MODEL, whereby a Panel comprised of a Judicial Head aided and assisted by two experts in child development, domestic violence, and child protection would be far more appropriate. Such a Tribunal to be assisted by a leading legal counsel acting for the Tribunal in the questioning of witnesses and the examination of their testimony. No other legal representatives to be permitted and only professional witnesses to matters of fact to be allowed, and not of opinion. Not only would this more appropriately ensure that the Needs and Wishes of children are given paramountcy and primacy in judicial determinations, but that there would be a very considerable financial saving in the A$6 billion dollar spending of the Family Courts.

If this legislation is brought into force, then there will be many hundreds of cases which have been before the Family Courts in recent years for judicial determinations but such determinations will now no longer be valid in consideration of:

a) The judicial determination regarding the relocation of children in Ryan and Ryan regarding the `reasonable practicability' of such arrangements;

b) The Family Law (Amendment) Act 2010 which was passed in response to the High Court's decision in *MRR v GR* [2010] HCA 4. This decision casts doubt on the validity of certain parenting orders made or purportedly made on or after 1 July 2006 when shared parenting reforms were introduced. Orders that may be affected are those where the parents have equal shared parental responsibility and the court has not considered certain criteria relating to equal time or, if the case requires, substantial and significant time in accordance with section 65DAA of the *Family Law Act 1975*.

c) The proposed amendments in this legislation.

The matters reported above and on which there is widespread public concern regarding the health, welfare, and protection of children, have now reached such proportions throughout Australia, that we respectfully suggest and recommend that a <u>FULL SENATE INQUIRY</u> be ordered into these matters and that Family Law cases affected by the changes (a), (b), and (c) above are considered by a specially convened Tribunal of Inquiry, as such cases would require many years of re-consideration when brought back before Family Courts and subsequent appeal hearings.

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This Submission has been prepared on behalf of the National Council for Children Post Separation by:

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