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Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Committee
E: legcon.sen@aph.gov.au

18 August, 2023

Dear Ms Dunstone,

Please find attached in addition to the document outlining transcription changes for me, Ms Charisse Hay and Ms Michelle Bauman, further information on matters raised in discussion with committee members or requested on notice.

Regards

Andi Sebastian
Communication & Policy Coordinator
Council of Single Mothers and their Children

Child's right to be heard

In further response to Senator Scarr's question: *Whether or not it needs to be expressly stated in the legislation that the child has a right to give their perspective, their view, as opposed to it being something which is relevant to consider, by a judge,* we submit the attached letter from Ms Baumann to the Attorney General dated 8 September 2022

Presumption of shared care

Chair: "I have one question, just to make it very clear and put it on the record. We will hear arguments—and they'll probably be made in parliamentary debate—about the removal of the presumption of shared parental responsibility leading to some sort of skewed bias towards mothers, or the dads, and not being in the best interests of the child. Why do you think that presumption is important to improve the wellbeing of the children—the removal?

We reiterate our collective view that it is family violence, that interrupts and indeed, should interrupt any presumption of shared care. As Ms Hay stated in her opening, *Perhaps the question we need to ask is this: if a parent fails to act in the best interests of their child, is it in a child's best interest to be forced to spend time with them?*

Passports

Further to the conversation about passports, and acknowledging the need for safeguards, we add two suggestions.

As Ms Edwards noted: *"I understand that there may need to be some safeguards, but if you're the primary carer and you can demonstrate that you have an airfare out and an airfare back then one signature should suffice."*

Further contemplation of the need for safeguards leads us to suggest that where, for whatever reason, one parent only is approved to sign a child's passport, we recommend this is limited to travel to **Hague convention countries**.

Alternatively, if there is not agreement for any other functional change, perhaps once children are **mature minors** (16), there can be a provision to renew their (interim) passports and the chid can then select one parent to sign and to nominate the purpose of their travel (i.e.- school trip, family holiday with stated family members etc). This would allow them to travel before they reach 18.

Accessing personal counselling records

As promised to Senator Waters, I forward the matter of **CHOAT & GRENDEL *[2018] FamCA 579***

Family Report Writers

Attached are some interim observations from a small study being undertaken by Swinburne University. Included for the Committee's interest.

8th September 2022

The Hon Mark Dreyfus QC, MP
Attorney-General of Australia
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Dear Attorney-General,

Re: National Child Protection Week and the Family Law System

As a woman who has experienced family violence and tried to have the Family Court recognise the impacts of this, the biggest part of my journey relates to the ability to protect my children and give them a sense of safety wherever they are, and agency over their living arrangements which is a key part of their safety.

I read with interest the **11 new Child Safety Standards** which recently came into force in Victoria (where I live) on 1 July 2022. This came as a circular for interest to the organisation I work for. CCYP | The 11 Child Safe Standards

Looking at the provisions - which are now law in my home state, and in the context of the National Child Protection Week, I find it beyond belief that the **Family Court does not comply with these provisions!** By way of example:

> CCYP | Your rights
>
> All children have rights, no matter who you are. This includes the right to be safe and feel safe and to have your say in decisions impacting you. Being safe means you are free from abuse, harassment, discrimination or inappropriate behaviour. Feeling safe means you are comfortable in the places where you spend time and trust the adults around you.
>
> You have a right to:
> - be safe and feel safe wherever you are
> - expect that the adults around you are keeping you safe
> - be given information about how to raise a safety concern
> - be listened to and for action to be taken if you have a safety concern.
>
> Most significantly:
>
> Standard 3: Children and young people are empowered about their rights, participate in decisions affecting them and are taken seriously

I consider the Family Law Courts in breach of the Convention of the Rights of the Child (CROC) and offer these examples from my own experience where the courts:

- booked access visits for my infant when she was still breast-feeding
- ignored the children's wishes to live with their mother, as the children stated these to the family consultant, their teachers etc.
- ignored their fears, and reports of physical and psychological abuse by their father.

The book *Broken: Children, Parents and the Family Courts*[1] which I'm in progress of reading, seems to articulate this lack of regard for children and their needs and wishes in the family court - simply, they are not believed or listened to.

I find it incomprehensible that we accept all the evidence that "Children and young people thrive when they grow up safe, connected and supported in their family, community and culture" and nationally state that: "They have the right to grow up in environments that support them according to their needs, now and into the future," and yet we impose court-ordered situations on children and young people that subject them to childhoods of stress, anxiety, pain and fear.

In 2022, when National Child Protection Week is committed to "shining a light on children growing up safe and supported"[2] I implore you to:

- Take steps to ensure that all our legal and care systems are restructured to put the wellbeing, safety, rights and interests of children at their centre.
- Make the ten child safe standards applicable to all aspects of the Family Law System and include them in any future review or reorganisation of the Family Courts.

I would be willing to speak with any committee or your or your staff, to further this end.

Yours faithfully,

Michelle Baumann

Email:

[1] C. Nelson & C, Lumby: *Broken: Children, Parents and the Family Courts* Black Inc. Books 2021
[2] https://www.napcan.org.au/get-involved-2022/ National Child Protection Week 2022

FAMILY COURT OF AUSTRALIA

CHOAT & GRENDEL ***[2018] FamCA 579***

FAMILY LAW – PRACTICE AND PROCEDURE – Subpoenas – Objection to the inspection of material produced under subpoena – Where the mother asserts that certain material in her clinical psychologist records is confidential and attracts public interest immunity – Where the mother's relationship with her psychologist does not attract public interest immunity – Where the mother asserts that certain material in her clinical psychologist's records is not relevant to any issue to be determined in the parenting proceedings – Where that objection is upheld.

Family Law Act 1975 (Cth)
Criminal Procedure Act 1986 (NSW)

Benson & Hughes (1994) FLC 92-483
D v National Society for the Prevention of Cruelty to Children [1978] AC 171
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49
Feinster & Feinster and Anor [2006] FamCA 232
Goldy & Goldy (No. 2) [2011] FamCA 418
Jermyn & Carling (2012) FMCAfam 814
Merrill & Burt [2015] FamCA 159
R v Young [1999] NSWCCA 166
Smith & Duke [2015] FamCA 990
Wenlack & Cimorelli [2013] FamCA 602

APPLICANT:	Mr Choat
RESPONDENT:	Ms Grendel
INDEPENDENT CHILDREN'S LAWYER:	Ms Rutkowska
FILE NUMBER:	SYC 2065 of 2010
DATE DELIVERED:	30 July 2018
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Watts J
HEARING DATE:	5 July 2018

REPRESENTATION

SOLICITOR FOR THE APPLICANT:	Litigant in person
SOLICITOR FOR THE RESPONDENT:	Litigant in person
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Ark Law

ORDERS

(1) The mother be permitted to redact from the notes produced by Ms B:

1.1. The first bullet point of the notes on 18 February 2014, the first and second bullet point of the notes on 25 August 2014 and the 21 October 2014 notes together with additional references at about point 5 of the page of notes on 25 August 2014; the first dot point of the notes on 20 January 2015 and the third dot point on the notes of 4 August 2015;

1.2. The counselling notes dated 6 June 2016, 4 July 2016, 25 August 2016, 29 August 2016 and 4 October 2016 be removed in their entirety and the last bullet point of the notes of 2 August 2016, the first and second bullet points of the notes of 5 September 2016, and third line of the notes of 28 November 2016;

1.3. Any reference in any document that identifies the mother's place of residence or telephone number.

(2) As soon as is practicable:

2.1. The mother attend the Exhibits Section of the Sydney Registry and photocopy those pages which are to contain redactions in accordance with order 1;

2.2. The mother is to redact words in accordance with order 1 and replace the relevant pages in the bundle with the redacted copies;

2.3. The original unredacted copies are to be placed in a sealed envelope;

2.4. The mother is to give written notice to the father and the Independent Children's Lawyer as soon as possible that the records with redacted copies are now ready for inspection.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Choat & Grendel* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYC 2065 of 2010

Mr Choat
Applicant

And

Ms Grendel
Respondent

REASONS FOR JUDGMENT

1. On 7 February 2018, I granted leave to the Independent Children's Lawyer to issue a subpoena for the mother's counselling notes. I gave liberty to the mother to inspect the documents and then indicate whether or not she objected to the Independent Children's Lawyer and father seeing the material.

2. The subpoena is sought in the context of final parenting proceedings in respect of a child who is 12 years of age. The mother alleges she herself has been the victim of family violence at the hands of the father including being a victim of his alleged cybercrime in 2011 and 2012.

3. The mother fears the father might use part of her health records to harm her outside this current court case.

4. Both Ms B, the mother's clinical psychologist and the mother object to the Independent Children's Lawyer and the father seeing the mother's counselling records. The mother limited her objection to those parts of the notes which contain details of trauma suffered by members of her family, refer to incidents that occurred when she was in high school and disclose the mother's residential address and telephone number.

5. The mother seeks, in relation to the counselling notes detailing trauma suffered by members of her family, that the first bullet point of 18 February 2014, the first and second bullet point of 25 August 2014 and the 21 October 2014 notes, be either removed or redacted from the subpoenaed material. In addition, there are also references at about point 5 of the page of notes on 25 August 2014; the first dot point of the notes on 20 January 2015 and the third dot point on the notes of 4 August 2015.

6. The mother also seeks to retain confidentiality as to discussions with her counsellor about experiences she had when she was in high school, and

accordingly, the counselling notes dated 6 June 2016, 4 July 2016, 25 August 2016, 29 August 2016 and 4 October 2016 be removed in their entirety and that the last bullet point of 2 August 2016, the first and second bullet points of 5 September 2016, and third line of 28 November 2016 of the notes be redacted.

7. The mother objects on the following grounds:

   7.1. That communications with her psychologist are confidential; and

   7.2. That they can have no relevance to the matters in dispute in these proceedings.

8. The father alleges that the mother has alienated the child from him and argues that this behaviour may emanate from the mother's mental status. He seeks to look at the subpoenaed material to know what has happened to the mother in the past on the basis that events in the mother's past may have contributed to her mental status. The father drew attention to [136] of the family report of Ms C, dated 21 June 2018, which states:

> Many survivors of family violence find that they experience a number of psychological effects, which quite understandably may cause significant challenges for them, and interfere with their parenting and capacity to respond appropriately to their children's needs. It is possible that [the mother's] behaviour has been directly impacted by the abuse she claims has been perpetrated by [the father].

   The father argued this was demonstrative of his point that past experiences may impact upon the mother's parenting capacity.

9. In relation to the first ground, there is no doubt that the communication between the mother and her therapist is confidential.

10. However, in *Feinster & Feinster and Anor* [2006] FamCA 232, I found that the ordinary psychiatric/patient relationship does not attract a public interest immunity. That finding was applied by Aldridge J in *Wenlack & Cimorelli* [2013] FamCA 602.

11. The seminal decision of *R v Young* [1999] NSWCCA 166 considered whether communications between a victim of sexual assault and a therapist could be seen as a new category attracting public interest immunity. Four of the five judges found that it did not. Spigelman CJ said:

> [92] In any event, this is not an appropriate occasion on which to establish this new category of privilege. First, it has not been demonstrated that the privilege propounded has attained the requisite level of community acceptance, as a special case entitling treatment that differs from other confidential relationships. Secondly, the evidentiary material presented to the Court is much too limited to take such a significant step.

> [93] The recognition of a new category of privilege requires the formulation of public policy by the courts, within the confines of the proper role of the courts. It is only appropriate for the courts to recognise a category of public policy which is capable of precise statement, and which reflects so widely held an opinion, that the Court's reasoning can be described in terms of 'recognition' rather than 'creation'.
>
> ….
>
> [114] Affidavits in support of claims of public interest immunity have often been criticised for their amorphous quality. General conclusory assertions are not acceptable. (See eg Sankey v Whitlam supra at 96 per Mason J).
>
> [115] Before a new public policy is to be recognised, the supporting material would need to be of a qualitatively different order to that presented in the case. At the least, the Court would expect a systematic review of expert literature on the significance of confidentiality in the counselling relationship. The Court would also expect a review of an expert body of opinion establishing why sexual counselling services ought to be treated differently from other counselling services. In the seminal case before the United States Supreme Court, both the American Psychiatric Association and the American Psychological Association set out relevant studies in their amici curiae briefs filed with the Court. (See Jaffee v Redmond at 345 fn 9).
>
> [116] The Court would need to be satisfied that the material presented to the Court represented the full range of expert opinion on the relevant matters and that, where there were divergences in that expert opinion, the differences had been properly tested. The Court would also need to be satisfied that the materials before the Court covered the full range of relevant matters, and was not confined to the narrow specialisations immediately relevant, in order to overcome the possibility of special pleading that sometimes arises from a mixture of self-interest and obliviousness to considerations external to the specific field of expertise.

12. The common law governs pre-trial procedures unless statute intervenes (see *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [18]-[28]). In New South Wales that part of the decision in *R v Young* to which I have referred has been reversed in criminal proceedings for a sexual assault offence in respect of counselling communication relating to the alleged victim by what is now s 298(1) of the *Criminal Procedure Act 1986* (NSW). The current proceedings are conducted under Commonwealth legislation on the civil standard. There is no comparable statutory provision that applies to pre-trial procedure in respect to confidential communications.

13. In *Benson & Hughes* (1994) FLC 92-483, Chisholm J noted that since the House of Lords' decision in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, the common law recognised that the confidentiality of information disclosing the identity of a person who reported suspected child abuse to a child protection organisation attracted public interest immunity.

14. Another example of where a public interest immunity has been extended by analogy was *Goldy & Goldy (No. 2)* [2011] FamCA 418 where Dawe J held that "the Kids Helpline" attracted public interest immunity because it was an organisation which relied upon its confidentiality for its very existence.

15. More recently, some judges have suggested that in parenting cases a therapeutic counselling relationship might attract public interest immunity if the release of notes might victimise a parent or affect their parenting capacity. Berman J in *Smith & Duke* [2015] FamCA 990 at [49] seemingly quotes Judge Harman in *Jermyn & Carling* (2012) FMCAfam 814 with approval. The mother in this case relies on statements made by Cronin J in *Merrill & Burt* [2015] FamCA 159. At [38] His Honour quotes what Spigelman CJ said in *R v Young* at [93] (set out above) and then Cronin J goes on to say:

> The general public interest in confidence in therapeutic relationships may not be a recognised category, but the specific interest in protecting the best interests of children – in this case, by maintaining the confidence of a therapeutic relationship which improves the mother's ability to parent the children – may be a category capable of 'recognition'.[1]

16. Cronin J concludes at [39]:

> ….The Act (**a reference to the Family Law Act)** consistently places the child or children's best interests at the forefront of any decision regarding parenting such that the courts may well have recognised, to echo Spigelman J's [sic] words (**a reference to [93] in *R v Young***), the reconciliation of these two principles through which a confidential therapeutic relationship may be protected. There is no evidence here that these children are at risk such that their best interests would be served by breaking the confidentiality of the therapeutic relationship

17. I prefer the view expressed by Spigelman CJ in *R v Young* as to the manner in which new categories of public immunity interest may be recognised and accordingly, with respect, I am reticent to adopt the new category suggested by Cronin J, absent proper evidentiary material and demonstration of a level of community acceptance of this new category of public interest immunity.

18. Consequently I overrule the first objection to the release of the records of the mother's communications with her psychologist which is based upon the grounds that those records are confidential.

19. The mother is, however, successful on her second ground.

20. After inspecting the subpoenaed material, I find that the counselling notes relating to the mother's family members and to incidents during the mother's high school years, are not relevant to any issue to be determined during the final

[1] Whilst the published decision seems to attribute these words to Spigelman CJ in *R v Young*, that is an obvious formatting error.

parenting hearing. Accordingly, I uphold the mother's objections to disclosing those parts of the subpoenaed counselling notes.

21. Given the mother's allegations, it is also appropriate to allow the mother to redact any reference to her address and telephone number.

22. In those circumstances, I grant her liberty to redact and remove the aforementioned material. I shall make orders accordingly.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Watts delivered on 30 July 2018

Associate:

Date: 30.7.2018

Family Report Assessments in Children's Custody Disputes in the Family Court: Experiences of Female Victim-Survivors of Family Violence

The interim observations below have been made available to Council of Single Mothers and their Children by the lead researcher for the purpose of discussion and tabling at the Public Hearing 11 August 2023.

This research is being conducted by **Maria Coelho**, a current Master of Psychology (Clinical Psychology) student at Swinburne University and is being supervised by **Dr Sharon Grant,** (PhD, UoM; BBehSc(Hons), La Trobe), Senior Lecturer, Department of Psychological Sciences, Swinburne University.

Background:

- The impetus for this research project originated from the researcher's work as a family violence specialist counsellor, hearing about women's experiences with the family report assessment process in the Family Court.
- The aim of the project is to investigate the experiences of women who are *victim-survivors of family violence* in relation to family report assessments for custody disputes in the Family Court.
- This is a qualitative study; to date six women have been individually interviewed. The plan is to interview approximately eight women. To be eligible to participate, women must have finalised their child custody dispute in the Family Court.
- Interviews are of one hour duration. Analyses of completed interviews are currently underway. The project should be completed by the end of 2023.

The research questions are:

1. Do women report variation in the methods, processes and events used by family report assessors?
2. Do women perceive that their concerns for their children's safety are considered in the family report?
3. Do women feel understood by family report writers? Do they feel empowered or disempowered by the process?
4. How would women like their family violence experiences to be considered in the assessment process?
5. How would they like abusive relationships to be considered when making recommendations for custody orders?

Observations and themes already identified include:

- The methodology utilised by assessors varies considerably in each assessment. For example, some women have more than one family report assessment during the Family Court process, and there are some instances where children are not interviewed or there is no observation of parent-child interactions. In addition, the assessors' qualifications and work expertise were also varied.

- All women said that they did not feel their family violence was considered at any point in the assessment. Evidence presented in court (such as child protection reports, children's psychologist reports, police reports, intervention order documents) is shared with family report assessors, but not considered/mentioned in family reports.

- The family report assessment is experienced as a continuation of the abuse women suffered during their relationship. Some women felt threatened and manipulated (controlled) by assessors e.g., language used by some assessors is not trauma-informed and was considered offensive by the women. Women described a very hostile environment that did not feel neutral or safe. Some mentioned not being heard and feeling judged by the assessor. They described the assessment as traumatic for their children; and some are still managing the psychological effects of the process on their children.

- Some family reports present information that is inconsistent with what was discussed during interviews. One report even contained incorrect information about the family. However, even when there is a mistake in the report, women felt there was nothing they could do, which is disempowering for women and their children.

- Women's recommendations for change concerns accountability of the assessors e.g., getting a second assessment done sometime after the recommended arrangements are implemented to assess how children are managing; and having more than one assessor present, or a transcript of interviews with assessors, that can be used to demonstrate any inconsistencies, or use of threats and manipulation during interviews.

It is anticipated that this research will be concluded and publicly available by the end of 2023.