# The Victims of Crime Assistance League Inc NSW

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Submission to the committee's Inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005

Thursday, February 23rd, 2006

Committee Secretary

Please accept this submission on behalf of my organization.

***No fault Divorce***

When the Family Law Act was introduced in 1975, the 'no fault' provisions were meant to dignify divorce – to take the level of proof from the gutter. What it also created was a climate where immorality, violence, drug taking, theft, extortion, financial abuse etc flourished and were essentially ignored in subsequent divorce and property settlements.

If people left unacceptable relationships, they were often then silenced by the 'no fault' rules from being heard, compensated and they were denied a forum in which they were properly able to reflect the value and contractual bases of their failed relationships.

***Are Australia's children REALLY Important?***

In 2006 we continue to generally ignore the high cost and importance of child rearing in this country (and of Australian children living overseas) and that translates into the mess society has become and the constant validation of the abusers in the family by many societal systems, especially our courts.

***Our Organisation***

The Victims of Crime Assistance League Inc NSW (VOCAL Inc NSW) has served people harmed by crime for seventeen years. Any crime, any person, any stage, any process, any court , any systems abuse matter, etc. I suggest our view is a unique one as

few agencies see men, women and children across the crimes, stages and over time as do we. I would also suggest that there are relatively few similar agencies across the nation and what we are seeing, working with and reporting on is real life, real people and now.

VOCAL's focus group is **people** harmed by abuse, threat, crime and consequences.

***Victims Rights – a new idea. Systems fail untrained victims of crime.***

While my clients are predominantly from NSW, I have dealt with many who live outside NSW – in each state and in several other countries. Over these many years, our clients have experienced state Child Protection, Domestic Violence strategies and processes, criminal law of every type – from AVO breaches to murder, and Family Law. The overarching complaint is ***that there is a huge failure of systems to act in concert for the protection of citizens.*** Most clients bemoan the apparent loss of the 'tell the truth' concept of swearing the Oath and the willing ease which with lies and untruths can dominate a case. It seems obvious that some legal personnel have a significant and welcomed (by the courts) opportunity to take any implausible alternative explanation to explain away the reality of people's lives, and the courts run with and reward such displays.

Judges are prone to say, with an air of genuine mystery 'Why would he give such evidence if it were not true?' I'd say two reasons – first, to win, and second because there is no penalty for lying. If I can figure it out, why can't they?

I am also often disgusted, and my clients distressed, at the ignorance and apparent bias often shown by so called 'experts' in cases where Domestic violence and child abuse feature.

My clients are ordinary people caught in a war – the adversarial system. They, through real life experience of crime and systems can distinguish the clear and unsatisfactory difference between policy and practice, rhetoric and rubbish. I speak for them, our members and clients.

***Men's Rights (not people's rights)***

We are concerned at the obvious current political influence and dominance of the men's rights movement – a movement already particularly well placed in political, social and economic circles.

I am very concerned about the undue influence of men's groups and the mischievous manipulation of statistics and reports which aim to generally demonize women who dare leave them, and then have the cheek to deny them ***their*** rights to ***their*** children. I am sure the Committee would have noticed the plethora of glossy television advertising valuing fathers for sons, and it is to be hoped it was also noticed that daughters and mothers were unmentionables.

I think it's called spin, and lobbying.

***Safe fathers NOT restricted with access and shared parenting***

It is a fact that over the time of this organization, there have been very few cases where **safe** fathers have been denied a good relationship with their children in various, negotiated forms. However if that does happen, VOCAL supports the safe father through any process. There are also occasional cases where women sexually/ physically abuse, and/or cannot protect their children from new partners.

We have noticed that where the children are made to live with the abusive parent by court order, the pain of the non-abusive parent and family can be unbearable – basically because we Australians feel betrayed, because we believed, somewhat naively, that a child has the right to live without abuse and that Australian State and Federal Governments have strategies that support that view both here and overseas.

But we have found out, by experience, that we were quite wrong.

***Negotiated parenting***

The vast numbers of people who have been able to negotiate a parenting arrangement after separation testify to the general goodwill of the majority of parents to try to continue to raise their children after separation. The marked focus of current changes however, all too often, will result in increasing the rights of unsafe fathers to dominate their ex partners, and to access their children regardless of safety. It seems the Government is choosing to just ignore the violence, the abuse and all their dreadful consequences, the cost to the individual child, the damaged relationships and families of the future. If you do that, you serve no one.

***Why protective parents fight for their children where the other party is dangerous.***

It is in these cases that protective parents will fight with whatever resources they can muster. To them, the safety and well-being of their child is their highest calling. The old 'King Solomon Test' is not acceptable here – because to simply let the abusive parent have the child is contra to the birth-bond and obligation to die trying to do the right thing by the child and in the child's best interest.

Really, what's happening in Australian Family Court today is the judges' new-wave King Solomon test says 'cut the child in half' and the non-protective parent jumps with glee because the safe parent cannot disagree.

***Legal Games***

Shamefully, many solicitors are all too ready to encourage such a parent to fight – their financial reward is high indeed – whether the protective parent 'wins' or loses everything the solicitor gets paid – they do not mind a protective parent losing their home to legal fees. This is not the place to detail the appalling legal scandals impacting on people in Family Law matters – enough to say I see it all too often in the cases of good and decent citizens.

***The high cost of naivety***

Few protective parents have any idea what awaits them if they pursue their naïve ideological position of an expectation of society's support for safety – the 'systems', the exorbitant costs; the derision, the punishment, the lack of real concern for them and their children.

These people I call 'protective parents' are the parents at risk – the ones Family Report Writers might call 'obsessive' rather than committed, alienating rather than protective, and the safe parent who tells the truth and is genuinely afraid for their child's wellbeing and safety, is regarded as manipulative, malicious. The child who speaks of violence or abuse 'has been manipulated and taught to lie' by the wicked parent. Such parents are named as difficult because they can't in any conscience let the child be harmed again.

Female protective parents in this position in my practice outweigh male protective parents a hundred fold. I think that probably reflects the way things are in society. In terms of female to male violence in relationships, there are very few men who come to me with broken bones and faces, (but were nevertheless subject to control and manipulation by women) but the stream of seriously damaged women and children never ceases.

It is important to recognize that few services for male victims of crime exist, so in this region, ***my service is a rare and safe one for men***, women and children. Yet it is a fact that few men report being dangerously assaulted and damaged by women with whom they have had relationships.

***The fiction of PAS – parental alienation***

The issue of parental alienation must be addressed. The source of the syndrome was a pro-paedophile doctor in the USA. He decided that there was a syndrome where mothers determinedly set about denigrating and falsely accusing the father of their children for the purpose of winning custody in the Family Court. He felt that ***children who report that their fathers' sexually or otherwise abused them, should be beaten***, and ***mothers who listen to their children should be jailed.*** Essentially he decided that alienating a father was such a crime that the children should go to the father. Abuse allegations should be

ignored. His ideas never achieved academic peer support, and have been roundly rejected by the scientific community – it was contrary to the overwhelming and consistent internationally verifiable research results.

And yet, the truth is that his ideas were taken up by many so called child experts, many of whom make reports for the Family Court of Australia.

**Criticisms of Parental Alienation Syndrome (PAS)**

- *PAS is not in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV[1] (DSM IV) or earlier versions.*
- *Dr Gardner's work has never been published in a peer-reviewed journal and his books are self-published.*
- *Not a single study has confirmed that mental health professionals can reliably diagnose PAS.*
- *The Diagnostic criteria suggested by Dr Gardner are similar to those for his now widely discredited test for fabricating allegations of sexual abuse – the Sex Abuse Legitimacy Scale (SAL).*
- *The fundamental assumption at the heart of PAS - i.e. that children frequently lie about sexual abuse - is contradicted by all the major research in the area[2].*
- *The idea that false allegations of child sexual abuse increase in custodial litigation has been contradicted by research conducted both within Australia and internationally[3].*
- *The PAS theory is blatantly sexist and targeted against mothers.*
- *PAS is not applicable if there has been actual abuse i.e. if the accusations are truthful (which studies suggest they generally are).*
- *Dr Gardner's suggested remedy of placing the child with the alienated parent risks handing an abused child over to an abuser while removing the protection of the other parent.*
- *Several American Courts have rejected PAS as scientifically baseless and disallowed its admission as evidence[4].*

**<u>The sexual abuse of children remains a crime in every state in this country.</u>**

[1] The DSM IV (published in 1994) is the accepted international standard for psychiatric disorders.
[2] See supra note 4.
[3] In two Australian studies, the rate of unsubstantiated allegations of sexual abuse, as assessed by state child protection workers, was no higher among couples involved in Family Court disputes than in the general population – Hume, M 'Child Sexual Abuse Allegations and the Family Court' and Brown, T. 'Child Abuse In The Context Of Parental Alienation and Divorce'. A large US study reached the same conclusions – see Macdonald note 4.
[4] See for example *In the Interest of T.M.W*, 553 So.2d 260 (Florida District Court of Appeals)

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Garner committed suicide in a most gruesome manner, a discredited man who made a lot of money out of his anti mother strategies. Yet pro PAS Report Writers still influence Family Court decisions to this day. In fact, just last year I attended a session at the Sydney Registry. The sessions were held because, as clearly stated by Court staff session leaders '***that the Family Court of Australia has realized it was not very good at Domestic Violence'.***

A question was asked of the Senior Mediator of the Court about PAS and its use in cases before the Family Court of Australia. This important man explained that he himself ***had changed his mind now***, and no longer used it but that there were still many Report Writers using PAS and he admitted 'It would take quite a while for that influence to be completely gone!'

Bizarre? But true! I was the one who asked the question.

***Child representatives***

Because of PAS, when Child Representatives pursue a pro-contact agenda, they tend to offer the mother a choice between two options: allow the abuse to continue or lose the children permanently. A woman who cannot agree to the former may well lose her rights to see her children at all! I place most Children's Representatives in the Dodgy Box – it is rare to see and hear one come out in defence of the child's right to be safe.

***Family Violence Orders***

I am really concerned about changes in Division 11 that will make it harder for people escaping violence and children to 'prove' their claims of violence.

It is hard to believe that politicians and legislative writers could be so ignorant of the difficulty of obtaining Final Family Violence Orders under State civil law that they would premise 'believability' about violence on either the criminal system, or the pathetic state processes.

In my view, a decent society would not support violent or sexually abusive people and silence those who object, or by making the tests required to reach a guilty verdict almost unreachable? We ***do*** do that you know, you know! For example in NSW in criminal law, there is a less than 3% success rate in prosecutions of sexual crimes committed against children. That's 3% of cases that ever get to court, not 3% of all cases reported. The failure of the State authorities to charge and successfully prosecute will apparently be seen, under the changes to Family Law, as a plus for abusive fathers using the courts to get to their children for whatever reasons, including bad reasons.

***RE The introduction of a presumption of joint parental responsibility;***

Turning to the amendments to the Family Law Act intention to address the issue of fatherlessness, we talk of the 'right' of the child to know *both* parents, and now the 'benefit' to the child to a meaningful relationship with *both* parents.

***Where is the rider that says 'so long as it is safe for the child'?*** New Zealand has it – why don't we?

There is no 'right' for a child to decide they do not want to know one or both of their parents. It may be impossible for a child to 'have a meaningful relationship' with a violent, drunk, mentally ill, drug addict, criminal, terrorist, abusive or otherwise unsafe parent – to name a few types I would not want to have unsupervised care of my children. What about you?

Yet the way to 'prove' the unsafe nature of such a relationship reverts to the protective person, a person who will be seen to be manipulative and oppositional to the other parent, often in increased danger, no matter what the dangerous parent may have actually done and may be continuing to do. Instead, we are threatening to punish (usually) the woman who can't prove claimed violence.

Proof – that mysterious issue 'evidence' is a topic constantly being reviewed at law. May I point out the obvious? A slap is violence and it may leave a mark of proof, but a loaded gun held in your face, or inside your private part, does not. The slap may well be done

in public, but I'll bet the later is not. Proof. That's not something a victim has any control over, but an accused has plenty!

I absolutely reject any person, organization or body's 'right' to sanction unsafe child placements - and I think you would too – especially if it was your child. However, that's what you (as politicians) are already sanctioning and what is happening in courts every day. You could stop that, but you have to look at what's really happening.

The Federal Judiciary remains apparently blindly confident that the criminal jurisdictions serve us well. For example, Child Sex Assault cases – the hardest types of cases for the child witness, have an atrocious rate of successful prosecutions. Either judges prefer the view that fathers (and some mothers) do not sexually abuse their own, or they still believe that incest reflects 'dysfunctional families' rather than criminal assault, or they just can't see what's wrong with it (eg Man-boy love associations).

Why are paedophiles so protected by legal process and our courts?

On that note, do you politicians know that it is common for judges in criminal child sex assault cases to so strongly instruct a jury as to the 'standard of proof' to say words like 'You can be 99% sure of guilt, but that 1% doubt must lead you to say 'Not guilty'. Yet such a father, 'cleared' of allegations against him by that 1% of doubt in one untrained juror's mind, has had the way paved for him in Family Court should he desire to get access to the child who gave evidence against him, or others.

I have attached at Attachment 1, a copy of a statement about the Family Court's manner of deciding allegations of child sexual abuse and the high standard of proof required. Please read it.

***Parental Responsibility***

On the issue of 'equal shared parental responsibility' much should be made of the term 'responsibility' and heavy weight placed against the parent who harms the child through

neglect, abuse of any kind, be it violence, financial and emotional deprivation, or harm or omission of any kind, including interfering with the rights of the ex partner to live without fear and interference. Things like promoting sibling rivalry, encouraging violence or criminal activity, denigrating the other parent, threatening and silencing the child are all abusive strategies and must be accountable. Courts need to have regard to the overall well-being of the child. Pity the child at school whose parent is violent and abusive and ask why the child is not learning or complying to standards. But do not overlook the almost perfect child, the one too scared to make a mistake, and the one who runs, smiling to sit on the supposedly violent parent's lap.

Children learn very easily to expect punishment for non compliance. That's why they are often seen by psychologists to be pro a supposedly cruel parent, and often naughtier with the protective parent, because they can safely do so. Sadly, too many experts are looking for the wrong signs and miss the obvious signs and symptoms of abuse and *then* denigrate the safe parent's parenting skills because the child behaves 'better' with the other.

***Protection from harm***

The amendments to the Act include the requirement to protect the child from harm, abuse and family violence. My work shows me EVERY DAY that even victims of long-term violence do not even comprehend themselves, that they are involved in this 'thing' so easily trivialized as 'Domestic Violence'. Call it Family Violence as the Family Court has done and it takes on the connotation of conflict, of fighting in the family. ***That is not 'it' at all!*** Domestic Violence it is not an issue of conflict that ends with separation, but a mechanism of control and dominance. The perpetrator will use any strategy, threat, force, plan and opportunity to manipulate, demean and keep control over another. The issue of how children are affected by ongoing conflict, indirect and direct violence is still in the early days of comprehension by practitioners far too often. I can tell you it is very harmful and very costly to this nation.

***State systems support violence and abuse***

As a realist enmeshed in the system from the victim's perspective on a daily basis, I say that State systems support violence – not the victim, no matter what current mythology and the expenditure of vast amounts of public money might imply. It is too hard to prove private violence, police have become slack and disinterested because it's too hard, too dangerous and there is little career reward to them for being good at Domestic Violence in a resource-poor police service. Police tell me that working in Child Protection is soul-destroying because of the resource and evidentiary requirements. Changes in strategies have been largely cosmetic. Trying to get an Apprehended Violence Order is a far cry from the bleatings of 'too easy' by men's groups. It's more like a cattle call where an applicant victim cannot even have the history told – just the last event, which mitigates against justice every time. Breaches of orders are very difficult to prove against any abuser with half a brain who violates in privacy.

The failure to protect women and children is detrimental to Australian. It is a reason why women are choosing to not have children. The summary of findings by Vic Health[1] outline the costs in that state alone. The federal Government acknowledged that Domestic Violence is a major problem in its recent "Violence Against Women, Australia says No" campaign but only told part of the story despite enormous costs to the taxpayer. And how does that help the individual victim asking the courts to keep her and her children safe? It doesn't. Not at all. Especially in the Family Court. You don't have to put up with violence? Yes. Actually you often ***do*** unless you want to expose your children even more to harm

Wake up Senators – we can't have children because it isn't safe, but you can make it safer. Don't debate RU486 until you can guarantee a fair go for children once they are born.

Through all this, there is still little recognition of the intimate connection between domestic violence and child abuse in the Family Court. The relationship between the matters have been repeatedly identified by Australian researchers[2] and an examination of the cases in the Family Court bear out the fact that the Family Court has become an arm

of the child welfare system – doesn't do any better than the state systems, it has no protocols in place to work cooperatively with State services. Thus a protective parent complying with State directions may soon find that compliance becomes an additional and unsupported and critical hurdle for them in Family Court.

The Family Law system is supposed to be to the civil standard of proof 'On the balance of probabilities' and VOCAL would prefer that Governments and the courts, having for the unsupported and essentially unrepresented status of children by having ***both*** err on the side of caution – and not on the side of the parents who choose to be violent. The commonly and repeatedly acknowledged failures of the states Child Protection systems should not translate into a presumption for Father's Rights. The proposed amendments do not address the more dangerous and costly fallout from changes to the Act based in a mindset to address the complex problem of fatherlessness. Children from broken homes suffer. When there was and is violence, the separation often makes them a more direct target. Making them have unwanted contact with an abusive parent creates the trifector of misery. Some will pay for your mistakes in getting this legislation wrong, and I invite you to take personal responsibility each time the ultimate price of unsafe contact orders results in children being murdered by their own parent in the supreme act of Domestic Violence. Domestic Violence is the highest cause of murder of women in Australia.

Even the rather flamboyant and proactive Fathers 4 Justice group from Britain has finally disbanded, saying 'Men are not yet ready for what they think they want' – and that is to be safe, productive parents who put their children first.' That's an important concession worthy of note. Britain has tried similar changes for some time and they have largely failed. I repeat, when parents are safe there is usually little contest about parental roles and relationships.

We implore you to weigh up these changes carefully. In an ideal world children would be raised by two loving parents who even after separating could place the interests of the children above their own. However, the stark reality of life for many thousands of (particularly but not exclusively) women and children is that many, particularly men, first

become violent after commitments like marriage or defacto marriage arrangements, after children are conceived, shortly after birth of a child, and some have children in a sort of 'grow your own' victim and then sexually abuse them. That Australian Governments, the federal courts and state systems and child protection agencies often support the abuser is unacceptable. That's absolutely what these Family Law changes are going to do. AGAIN!

A shred of hope lies in Mr Ruddock's recent recognition that false denials require sanctions. I am unconvinced that anyone legally brainwashed to uphold the rights of an accused over that of his victims really comprehends the enormity of the issue. Nevertheless I believe that you Senators have the opportunity to at least provide balance on this issue. False allegations are found in research to be minimal. I very much doubt false denials are minimal. I recommend that comparable penalties be introduced for false denials as those mooted for false allegations. A better use of perjury might also be a good recommendation.

Please use your power carefully and do not condone the continuing abuse of victims of crime.

Our members are people from all walks of life who want to live, work and raise their children in a country that supports safety. The proposed reforms to the Family Law Act miss the boat alarmingly

Be safe

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(Note Attachment 1 follows)

[1] Victorian Health Promotion Foundation (2004): *The Health Costs of Violence, Measuring the Burden of Disease Caused by Intimate Partner Violence.*

[2] Brown, T(ed), Frederico, M.,Hewitt, L., and Sheehan, R. (1998): *Disputes before the Family Court*, The Family Violence and Family Court Research Program, Monash University Clayton and the Catholic University Canberra; Hume, M. (1997): *Child Sexual Abuse Allegations in Family Court*, Thesis, University of South Australia.

## ATTACHMENT 1

# Adversarial game or access to justice?

Thursday, 29 September, 2005

**Recent complaints about the family law system by two expert witnesses involved in a Queensland case resulted in the court's decision to publish the original reasons for judgment. Donna Cooper* discusses the implications of publication and the questions raised about the adversarial nature of family law.**

### Introduction

Two expert witnesses, paediatrician, Dr David Wood and psychologist, Susan Aydon, who recently gave evidence in a Family Court parenting case on behalf of a mother, where the primary issue was an allegation of sexual abuse against the father, have spoken recently of their disillusionment with the Family Court process. They believed their evidence was ignored by the court and that the adversarial court process failed to accurately ascertain the best interests of the children.

In Tony Koch's article published on 29 August 2005 in *The Australian*, "Family Court 'putting children last"', these experts declared that they would never appear in the Family Court again. One stated, "I know a number of medical experts who have adopted this approach — that they are not prepared to be part of an adversarial game that seeks just to discredit them so the parent with the most aggressive and expensive lawyer wins."

Shortly after this article was published, the father made an application to the Family Court seeking leave to publish the original reasons for judgment or any portion of the reasons in any newspaper, periodical, radio broadcast or television program. This application was successful and Byrant CJ ordered that in the course of publication, all of the experts be named, however, that the names of the parties, children and other lay witnesses be omitted.

Generally Family Court proceedings are not laid open to such media scrutiny. When cases are published or reported it is a requirement that the names of all participants, including expert witnesses, are kept anonymous, and that identifying details, such as the parties' occupations, are omitted, primarily to protect the identities and privacy of the children who are the subject of the proceedings. In fact, s 121 of the *Family Law Act 1975* (Cth) sets out that it is an offence to identify any party, witness or anyone associated with a party to Family Court

proceedings, except in certain limited and exceptional circumstances, where court permission has been obtained. So what led a Family Court case about parenting issues to become such a high profile media case, are the concerns of these experts justified and what was the reasoning behind Chief Justice Bryant's decision to permit the proceedings to be aired in the media with the expert witnesses identified?

### The parenting case

The initial case, *SS and AH* [2005] FamCA 481 (10 June 2005), concerned appropriate parenting orders for the two children of a seven-year marriage, a boy aged 11 at the time of the hearing, referred to as "J" and a girl aged 7, referred to as "K". The mother was seeking orders that the children reside with her and that the father have reduced supervised contact to protect the child K, due to the allegations of sexual abuse. The father sought that the children reside with him as he argued this was the only way in which he would be able to maintain a viable relationship with them.

At separation, both children had resided with their mother and were having regular contact with their father. However, the mother became concerned that the contact arrangements were placing undue stress upon the children and were connected to the problems that her son was experiencing at school. She commenced to seek out experts to assist with counselling and the resolution of these difficulties. These concerns escalated when the mother became concerned that her daughter had been sexually abused by the father. In the course of seeking treatment, the mother and children attended upon several experts including Dr Wood and Susan Aydon.

Although there was evidence that both parents had denigrated the other in the presence of the children, Buckley J concluded that the father's denigration of the mother was not ongoing, however, that the mother had conceded she had constantly exposed the children to her negative attitude towards their father and to her own anxieties surrounding contact arrangements.

Buckley J ultimately decided to change residence from the mother to the father, accepting the father's contention that the children would be prevented from having a meaningful relationship with him if they remained living with their mother. In the course of his judgment, Buckley J stated that the child K had not made any genuine disclosures of sexual abuse and that the allegations of abuse had not been proved. His Honour was of the view that the mother's actions in subjecting the children to the treatment of several professionals, including Dr Wood and Susan Aydon, in her quest to find professional support for her desire to reduce contact, was evidence of emotional abuse and demonstrated her inability to adequately meet the emotional needs of the children.

### The evidence of the experts in question

A social worker had initially referred both children to paediatrician, Dr Wood in April 2002. In turn, Dr Wood had referred the children to psychologist Susan Aydon, in May of that same year. Both Dr Wood and Susan Aydon had given evidence in support of the mother's

allegations that the father had sexually abused K. Buckley J rejected this evidence on the basis that neither expert had received a direct disclosure of sexual abuse from K, both had relied purely on a case history that reflected only the mother's version of events, neither made any independent investigations into the abuse allegations and both experts were unaware of the children's continual exposure to the mother's negative attitudes to their father and anxieties surrounding contact.

The trial judge's rejection of the evidence of these two experts was primarily based on the observations of the Full Court of the Family Court in *Re W (Sex Abuse: Standard of Proof)* (2004) FLC 93-192. In that case the court warned of the grave dangers of relying on expert evidence as to whether sexual abuse has occurred, where the expert had not interviewed both parties and observed both parties with the children. In the present case, neither Dr Wood nor Susan Aydon had met with the father nor observed him in the presence of the children. For this reason Buckley J was of the view that their evidence could be accorded very little weight.

### Father's application for publication order

As outlined above, the father subsequently made an application for publication of the judgment of Buckley J pursuant to s 121 of the *Family Law Act 1975* (Cth). This application was heard by Bryant CJ on 2 September 2005.

The Chief Justice followed the case of *F and R (No 2)* (1992) FLC 92-314 where Fogarty J set out that the court had to examine two criteria, firstly the best interests of the children and secondly whether the matter involved raised an issue of public interest. Fogarty J had pointed out that "…the welfare of the child may not be the absolute determinant of the matter, it is, nevertheless, a most critical circumstance." The Chief Justice also referred to, *Re Lowe, Herald and Weekly Times Ltd* (1995) FLC 92-592 where Nicholson CJ had said, "There is a recognized right of freedom of public discussion of matters of legitimate public concern."

Chief Justice Byrant concluded that publication of the judgment was justified as it was both in the best interests of the children in question and involved an issue of public interest. The Chief Justice was concerned that members of the public who had read the article in *The Australian* could have the perception that the order of Buckley J placed the child K into the care of a parent who had sexually abused her. It was not in the child's best interests that the public hold that perception and could also impact detrimentally on the public's confidence in the Family Court. Her Honour was therefore of the view that it was appropriate that the public have the opportunity to read the full details of the judgment in which it had been concluded that the mother's allegations of sexual abuse had no substance.

The Chief Justice said, "Public confidence in the Family Court, as in all courts, is vital in our society. In my view the publication of the judgment in this case is necessary to enable a proper understanding of the expert evidence that was given in the case, the reasons for judgment, how the trial judge dealt with the evidence and ultimately arrived at the view that it was in the best interests of these children to live with their father."

Examining the decision critically, it certainly allows the public greater access to the original judgment, with the experts named, so that a better understanding of the Judge's reasons and assessment of the expert evidence can be attained. A full reading of the judgment discloses the detailed reasons that Buckley J has offered in support of his decision, based on the principles enunciated in the *Family Law Act 1975* (Cth) which ensure that the best interests of the children are paramount. Of some concern, however, is that such an order for publication may expose the children to further media coverage. For example, the order could potentially result in this case being discussed in a media forum more accessible to the children in question and to their peers, such as on television. A further article reporting on the case was subsequently published in *The Courier Mail* on 9 September 2005.

## Conclusion

Clearly the original Family Court hearing was an adversarial process and the parties were required to put forward evidence in support of their respective cases. This requires the filing of affidavits and the calling of evidence from several witnesses, some of them experts. The Family Court has recently reformed its rules in relation to expert evidence, particularly to provide for both parties to agree on the appointment of a single objective expert to give evidence to the court. However, pursuant to 15.41 of the *Family Court Rules 2004* (Cth), parties are permitted to adduce evidence from experts who have been providing treatment to a party or child to inform the court of the treatment carried out and to provide the results of investigations and observations. In this case it was then the role of the judge to decide what weight to accord such expert evidence in coming to a decision that would promote the best interests of the children.

In applying the case of *Re W (Sex Abuse: Standard of Proof)* Buckley J accorded the evidence of the two experts in question little weight, due to fact that they had not had any involvement with the father in the proceedings. In the course of the judge carrying out his role in the adversarial process, the credit of these expert witnesses was questioned and their evidence criticised. For people unaccustomed to court processes, this could certainly be a confusing outcome. Medical professionals who have been treating only one party and the children could perhaps not be expected to be objective and impartial as in their professional role they have been acting on their patients' instructions and in their best interests.

To lawyers appearing in court regularly the way in which the adversarial system operates is an accepted part of their profession. Witnesses who give evidence, both lay and expert, can be subjected to what some may view as robust, and in some cases, aggressive cross-examination. The Chief Justice stated at page 4 of her judgment that the trial judge's 'rejection of the evidence had more to do with the rejection of the mother's evidence and its underpinning of the expert's views, than the expertise of the expert witnesses themselves'. However, it is clear when reading the article in *The Australian*, that the fact that the court has totally rejected their assessment of the patients, was perceived by these experts as a rejection of their expertise. It flows from this that the outcome of the case may potentially be damaging to their professional reputations.

It appears that one of the implications of this case — the media coverage surrounding it and the order for publication — is that it may potentially lead to fewer experts being prepared to take on patients who are embroiled or may potentially become involved in family law litigation or potential litigation. It also may mean that potential expert witnesses will be more reluctant to appear in court. For lawyers preparing such cases, the value of calling expert witnesses who have only been involved with only one party must be questioned. Perhaps this case also highlights the role of the lawyer as gatekeeper to the family law system with an obligation to explain to expert witnesses the court process and the way in which expert evidence may be regarded. However, a potential benefit of the case is that professionals dealing with sexual abuse allegations may become more aware of the value of obtaining a wider picture of such serious allegations, which have the potential to impact on a child's relationship with both parents.

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