Submission No 60

CHILD PROTECTION AND SOCIAL SERVICES SYSTEM

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LET'S MANAGE CHILD SAFETY BETTTER – CROSS JURIDICTIONAL MISALIGNMENT
SISTERS IN LAW PROJECT

Lets improve safety processes for children in Cross Jurisdictions of Family Court and NSW state Child Protection!

By Jane Matts CEO – Sisters in Law Project

Law student, advocate and transformational change professional

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Executive summary

This submission directly comments on the terms of reference points 1, 2, 3, 4 ,6 ,7 ,8 as it applies to the cross jurisdictional conflict between Federal Family Law and state child protection services. Parents who comply with state child protection and withhold contact with a parent as a result of either informal risk assessments or formal determinations of *Risk of Significant Harm* can be determined as an impediment to a relationship under the *Family Law Act* 1975. It can be seen as psychological abuse to the relationship to withhold contact.[1] Where there have been *Risk Significant of Harm* reports in some instances, the Family Court jurisdiction have ignored them,[2] ICL's have failed to table them in some instances[3], and the Family Court has handed sole parental responsibility to the perpetrators who would not obtain custody under our NSW state law provisions.[4] The Family Court jurisdiction has been known to provide unsupervised parental responsibility to convicted child sex offenders in opposition to what would be good practice in state child protection practice.[5] Failing processes in the Family Court jurisdiction have been identified[6] as unsafe for women and children. The voice of children and their fears can be overlooked and not given due weight. This submission identifies some of the gaps that have been highlighted many times in other inquiries[7] and I encourage the committee to set up a formal review of processes to address jurisdictional conflicts. This submission requests state intervention in Family Court jurisdiction as it relates to parents who have been deemed as a *Risk of Significant Harm* from obtaining custody unsupervised in the Family Court jurisdiction and create a consistent practice of child welfare across the state and federal court systems.

NOTE: It is important to note that the Department of Communities and Justice (DCJ) did not produce important documents relevant to the research of this submission[8] until late January 2021 via Anna

[1] Family Law Act 1975 Part VII, s60CC (2)(b)
[2] *Syms v Syms* [2019] FamCA 724. Two notifications by FaCs stating that the children were at risk of significant harm in the care of the father. The ICL failed to put the evidence before the court. FaCs failed to act when it was brought to their attention.
[3]Ibid; Debbie Morton solicitor https://www.smh.com.au/national/nsw/jack-and-jennifer-edwards-lawyer-misled-family-court-inquest-told-20201112-p56e36.html.
[4] *Children and Young Persons Care and Protection Act* (1998)
[5] *Farnell and Another v Chanbua* [2016] FCWA 17. David Farnell has 2 convictions of child sex assault. It was determined by an expert that the young girl was a low risk of harm in a home with a twice convicted child sex offender and high risk outside that home. David Farnell died July 2020.
[6] Refer to Senate inquiry *A better family law system to support and protect those affected by family violence. Family Law for the Future – An Inquiry into the Family Law System* [sic] with 60 recommendations
[7] *Seen and heard: priority for children in the legal process* (ALRC Report 84)
[8] *Memorandum of Understanding* between the Family Court and NSW state child protection , and the Magellan Manual.

Watsons office, Shell Harbour. These documents were first requested May 25, 2020 in writing, and verbally, directly with the Attorney General of NSW Mr Mark Speakman. The Magellan Manual is still outstanding. It is a process used by Family Court that they will not allow to be scrutinised.

Current interventions are failing children

Numerous inquiries by the legislature have been conducted concerning both State and Federal court systems, without creating measurable change, despite identified flaws.[9] There appears to be good processes for documenting issues in Inquiries, with some delay in creating solutions to those issues. In Family Court/Federal Circuit court cross jurisdictional issues have not adequately managed concerns raised by children in a manner that has weight. Children are not directly represented, where documented claims of child sex abuse, domestic violence and neglect are not having their disclosures of abuse and fears translated into 'child safe' outcomes.

Children can have psychological assistance removed, medical assistance removed, by order, when a qualified medical professional has assessed the need and provided a referral. Under our NSW state child protection systems parents who fail to provide adequate care as directed by a medical professional can have their children removed. There is conflict in the system. It seems unusual that a Family Court/ Federal Circuit Court judge who has no formal medical training to assess psychological/medical need can remove treatment services for children to preserve the status quo. I argue that this is a human rights breach and not in line with UNCROC[10], or good practice and legitimate expectation as State Parties to apply the tenets of the covenant.

Processes applied in Family Law are failing to protect children in line with the state

Processes in the Family Court jurisdiction have been identified[11] as failing to protect women and children[12]. Rosie Batty in 2015 stated;

> *"There needs to be a total overhaul of the Family Law Courts – by recognizing that children who are coming from a history of FV are in danger and that FV needs to be acknowledged as extremely serious. Parents should not have entitlement to access to children where there is proven and thoroughly investigated FV and monitoring. There needs to be heightened transparency of FL courts – women can't speak about situations that they are in, media cannot investigate or report and the whole process costs families thousands of dollars. The safety of children is still not the highest priority and deciding factor which is totally unacceptable."*[13]

[9] Ibid, ALRC 2019, *Seen and Heard* Report 1997- priority for children in the legal process ALRC report 84, Royal Commission into Institutionalised Child Sex Abuse, NSW Inquiry into Child Protection 2016. Royal Commission into Family Violence Vic.
[10] United Nations Covenant on the Rights of the Child ratified by Australia 17 December 1990.
[11] Refer to Senate inquiry *A better family law system to support and protect those affected by family violence.* ALRC report - *Family Law for the Future – An Inquiry into the Family Law System* with 60 recommendations
[12] Rosie Batty - *Senate Inquiry into Domestic Violence in Australia* 2015. Submission number 145
[13] ibid

State child protection defer to the Family Law jurisdiction where the processes for determining risk are limited in the federal jurisdiction. The State has more power to conduct a full investigation of children's issues in a family. I encourage the committee to set up an urgent process to better manage the welfare of children in the Family Court jurisdiction. I am observing male perpetartors obtaining custody in opposition to what I believe is a safe practice. As Professor Richard Chisholm stated in 2009, there is a propensity by perpetrators to make false denials as seen in this next example.[14]

> *The father denies the violence and abuse except to a very limited extent. In submissions his Counsel conceded that some of the father's denials could not stand scrutiny. When faced with overwhelming evidence the father minimises his culpability and/or blames others or events.* [15]

Jess Hill describes in *See What You Made Me Do* how a Recovery Order by Family Court led to a psychological breakdown of a child as the court failed to recognise physical abuse by the father. In Chapter 5, she explains how 'Carly' a 15 year old girl ran away from her abusive father. He successfully filed a Recovery Order in Family Court, removing Carly from her maternal god father, where none of her issues about her father were investigated or tested in court. The police arrived at her home with a paddy wagon prepared to physically man handle her and bring her back to her father. In this instance she had a mental breakdown and was hospitalised for 18 days. Her father with sole parental responsibility would not let her stay with relatives and she went to a live in a refuge where there was no schooling or mental health intervention despite child protection eventually intervening in the matter. Despite having an assessment she was at *Risk of Significant Harm* in the fathers care by child protection she was still ordered to go back to her father by the Family Court in further orders after the breakdown. She refused to do so. Carly is with her mother, who was demonised by the court. The issues of family violence were minimised even though there was a finding of fact that family violence had occurred. I have reports that Carly is now at studying Law University despite not finishing Yr 9.

The problems with Magellan in Family Court

The Family Court Magellan program was developed to deal with Family Court cases involving serious allegations of physical and child sex abuse and links in with state child protection. As these cases involve the most vulnerable children, the Family Court implemented this fast-track program in all of its registries that include state child protection. The program has not been recently reviewed but a 2007 report identified some procedural flaws.

The report[16] regarding the efficacy of the Magellan process that focuses on evaluating the risk of child sex abuse a judge is quoted as stating,

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[14] ALRC *Family Court Violence Review* 2009 (number 114) p 47
[15] Ibid p113
[16] Report by Darryl J Higgins - *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan case-management model. 2007*

> *"I have a sense that in the overwhelming majority of cases, abuse is not confirmed. And probably in not many cases is there found to be an unacceptable risk. I don't have the stats, so it's probably silly of me to quote stats, but I'm talking of probably upwards of 70 or 80% where the relationship with the father is restored. Which in itself is a worry if that is true."*

It appears that there are decisions being made in the Family Court that does not align with good safe practices and management of child welfare issues. Nor is there evidence that safe child processes as directed by the Royal Commission into Institutionalised Child Sex Abuse are being applied.

Problems: Memorandum of Understanding between Family Court/ Federal Circuit Court,

Magellan Manual and failure to apply good practice!

It appears from evidence that state child protection practices are not harmonised with the Family Court jurisdiction. The power of Welfare is a residual power and has not been referred to the Federal jurisdiction. In 3.2 of the Memorandum of Understanding between the Family Court, (only received 3 weeks ago for evaluation for this submission) and NSW State child protection confirms this and it limited by s 69ZK of the *Family Law Act* 1975.

Yet I have observed cases where children identified at *Risk of Significant Harm* prior to commencement of proceedings/during proceedings who have been ordered to live with identified[17] perpetrators, with sole parental responsibility. I can provide proof of this to the committee upon request.[18] The parent in these instances believed the children, had extensive evidence satisfied to the balance of probability, Followed state guidelines to be protective, had professional evidence and were penalised for doing what was required by the state. The children are removed from the primary attachment to re attach with assessed abusers without informed formal considerations regarding trauma. I also see in my support of protective parents that FaCs change their position of support regarding safety and step back in matters which confound supporting parents.

The Royal College of Australian and New Zealand Psychiatrists (RCANZP) do not recommend removal from primary attachment in the family law proceedings, yet it happens routinely in the Family Law setting, to promote a relationship under the s 60CC provisions of the Family Law Act 1975. The College states;

> *The welfare of the child is generally best served when provision is made for consistent care by an adult or adults with whom the child has a safe and secure attachment.*[19]

[17] In NSW I have cases where FaCs has made assessments of Risk of Significant Harm and they have not been considered by the court.
[18] See *Syms v Syms* [2019] FamCA 724.
[19] RCANZP - Professional Practice Guideline 3 Australian Family Court proceedings 2019.

A new process being applied called the *Blended Sequential Intervention Model.*[20] This model appears legally focused father than psychologically smart. Domestic violence and trauma appear not to be addressed in an adequate fashion. This model recommends the switching of custody if parental alienation is determined (rebranded in this paper as *Severe Parent Child Rejection*). I suggest that such a process could breach the mandate under our Constitution s51 xxii and s51 xxii for issues under a *marital cause*. It is with concern that children who experience violence could be determined to be 'alienated' rather than traumatised by abuse. As such, plans for removal from the attached parent *is not* in the child's best interests. It is undisputed that the exercise of the *Family Law Act* 1975 has in the past failed to recognise family violence adequately and such processes fail to protect the wellbeing of children. The death of the Edwards children and the failure of Debbie Morton as Independent Children's Lawyer should be remembered as a red flag, that current practices are flawed.

I note there is a clash of ideas in the published literature between what the Family Court judges, (and the training body *Association of Family Court Conciliators* (AFCC)) and professional peak bodies such as RCANZP.[21] It appears that this too needs further scrutiny and I suggest the judges are focused on co-parenting without a safety lens properly applied and without reference to the importance of the primary attachment. I ask the committee to fully consider the impact of the practice and change this mandate.

While this paper is late, I encourage the committee to fully investigate these issues.
Removing children from protective parents is an injustice, and I recommend an urgent review and consider the recommendations listed below.

Recommendations:

1. Where there is a *Risk of Significant Harm Report* Family Law proceedings should not commence and or should cease until it is deemed safe to do so, as assessed/investigated by Family and Community Services NSW or any other state child protection service;
2. Child protection should not defer to the Family Court decisions making when issues of safety to children are identified. This should be formalised;
3. A full review of the Magellan process to ensure formal sign off from child protection prior to orders;
4. A full review of the Memorandum of Understanding between FaCs and the Family Court to ensure child safe practices are applied;
5. A full review of the Magellan processes including the Magellan Manual, by independent heath professionals and ensure public scrutiny is applied to the process;
6. Place child protection authorities in the Family Court to review all Notices of Risk;
7. That the Family Court adopt a safety agenda that aligns with state child protection rather than a co-parenting one aligning with our Constitution.

[20]Ibid https://www.researchgate.net/publication/340974819_Responding_to_Severe_Parent-Child_Rejection_Cases_Without_a_Parentectomy_A_Blended_Sequential_Intervention_Model_and_the_Role_of_the_Courts
[21] https://www.ranzcp.org/files/resources/college_statements/practice_guidelines/ppg3-family-court-proceedings.aspx

8. The role of the Independent Children’s Lawyer be reviewed so that they exercise their role that ensures child safety.
9. A judge should not have the power to cease the recommendations of a treating Doctor unless it can be established that harm would occur, to a Briginshaw standard.