



**A submission to the Federal
Attorney-General, the Hon Phillip Ruddock
MP.**

Jonathan Humphrey, November 4, 2005.

1. Introduction

1.1 Focus of Submission

This submission argues that in child custody cases involving allegations of child sexual abuse, the Australian Family Court (“the Court”) is failing in its mandate to act in the best interests of the child. In many cases abused children are legally compelled to continue an unsafe relationship with their abusive parent. In other cases children are actually put at greater risk of abuse by Family Court orders. In few cases are children’s disclosures of sexual abuse given the ‘due weight’ they deserve by the Court.

There are many concerning areas of failure in the Family Court system that have left abused children potentially unprotected from continuing abuse. This submission will narrow its focus to the decision-making models used by judges and other Family Court

workers in cases of alleged sexual abuse. The haphazard concept of unacceptable risk will be examined as well as the Parental Alienation Syndrome paradigm that has permeated the reasoning and decision-making processes of many Family Court judges and lawyers.

1.2 Child Sexual Abuse Allegations in the Family Court

A study published in 1998 by Thea Brown and her colleagues has demonstrated that child abuse cases now comprise the core business of the Family Court. Although child abuse cases represent only a small amount (<5%) of total cases concerning children each year, they do not resolve at comparable rates to other disputes. As a result, child abuse cases represent over 50 per cent of all Family Court proceedings concerning residence and contact orders that reach a pre-hearing stage. Furthermore they are extremely time and resource intensive. The Brown (et al) study asserts "the Family Court has become part of the child-protection system".

A significant number of defended cases concerning children involve allegations of child sexual abuse. A Family Court study conducted in 1990 found that 7 per cent of cases involved allegations of sexual abuse by the child's father and a further 3 per cent concerned allegations of sexual abuse by another parent such as a stepfather, mother or other relative.

Of particular significance is the Family Court's position as protector of 'last resort' for many abused children. Studies have shown that over 85 per cent of child sexual abuse happens in the home. According to the Family Law Council "if one parent is allegedly abusing the child and the parents have separated, it is often left to litigation in the Family Court or Federal Magistrates Service without the State or Territory child protection authority getting much involved. It is seen as a private law matter, and a parent is required to take responsibility for proving the case". It is evident that the Family Court performs an integral role in Australia's child protection framework.

2. The Family Court and the Convention on the Rights of the Child

2.1 Introduction

The United Nation Convention on the Right of the Child (UNCROc) is the international benchmark for children's basic rights. It is submitted that current decision-making frameworks employed by the Family Court violate articles three and twelve of UNCROc.

2.2 The 'Best Interests of the Child'

Article 3 (CroC): *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.*

The Family Law Act (1975) states that in Family Court cases concerning children the best interests of the child are to be the 'paramount consideration'. On its face, this doctrine would indicate that the Family Court is in compliance with Article 3 of UNCROc. There is, however, an appreciable difference between the rhetoric of the Family Court and the underlying principles which are actually apparent in its decision-making in cases of child sexual abuse. The practical outcomes of the Family Court are, in fact, frequently not in the child's best interests.

3. Australian Family Law Culture – Attitudes to Violence, Fathers and Contact

The exploration of judicial decision-making in this submission is best viewed in the light of a family law culture that has changed dramatically since the 1995 Family Law Reform Act (FLRA). The FLRA brought with it significant reform particularly in part 7 of the Family Law Act, which is dedicated to issues concerning children. The amendments broadened the definition of violence, made family violence a compulsory factor which the court must consider when assessing the child's best interests and set out that children must not be exposed to an "unacceptable risk" of family violence. The reforms also established several 'rights' for children. Two of these so-called rights included the 'right' to know and be cared for by both parents and a 'right' of regular contact with both parents. Several commentators including the former Chief Justice of the Family Court Alistair Nicholson have pointed out that these amendments contained potentially conflicting ideological imperatives.

The FLRA reforms giving children the right to contact were modelled on rights afforded to children under the United Kingdom's 1989 Children Act. British researcher Carol Smart points out that the UK legislation heralded a complete paradigm shift and that just two years after the introduction of the Act, cases were being decided completely differently to before. The ideological shift from prioritising child protection to prioritising child contact with parents was never properly examined and was instead considered a sign of 'good sense' amongst the judiciary. According to Smart, speaking out against the 'obvious benefits' of contact became like arguing against virtue itself. A mother seeking to protect her child from violence became "seen as not only hostile but selfish. She is seen to be in possession of an asset (the child), which she should be willing to share with the father. By refusing to do so she is obstructing the new ideal of the post-divorce family"

Multiple Australian studies conducted in the wake of the FLRA have supported the conclusion that the primacy given to the 'right' to contact by the legislation has entirely overwhelmed the provisions relating to family violence. A Griffith University study into the attitudes of Family Court judges, registrars, counsellors, solicitors, legal aid workers and community legal centres supported the above conclusion. The solicitors interviewed by the researchers specifically pointed to an increased perception amongst fathers groups that the legislation entitled them to more contact than previously. Roades, Graycar and Harrison, in a significant exploration of the impact of the FLRA on legal culture, further show that interim orders denying contact have become much more infrequent in the wake of the reforms dropping to under 5 percent of cases.

Recent findings by Kaspiew suggest that in the Family Court, fathers' claims now carry greater legitimacy than mothers' claims at a number of levels. Family violence "must be of an extreme nature and have a very firm evidential basis, before it can be argued to be a

'disqualifying' factor in residence or contact applications". Kaspiew argues:

"The informal presumption of contact in FLA s60B(2)(b), together with the changed bargaining dynamics under the Reform Act 1995, mean that it is tactically dangerous for women to problematise contact except in the most extreme circumstances".

Therefore, Australia's judicial decision-making must necessarily be analysed in light of the pro-contact family law culture that has developed in the last decade. The problems and human rights abuses set out in this submission are influenced by, and derived from, this dominant culture.

4. Parental Alienation Syndrome - Protecting the Best Interests of the Perpetrator.

"Difficulties... arise because the allegations are made in the context of a custody or access dispute. Generally speaking ... the mother who suspects the child is being sexually abused voices her concern and reports the perceived disclosures that have been made to her by the child to the authorities and the Family Court. Her account is at once seen as "allegations" or an "accusation" of sexual abuse and her motives are viewed with suspicion. It is suspected that she is seeking to discredit the father and so advance her claim to custody or to restrict the father's access. Her credibility is put squarely in issue. Although the mother may do no more than report the unusual behaviour she has witnessed in her child and the perceived disclosures which the child made to her, the somewhat dated aphorism that such allegations are easily made and difficult to refute may still prevail"

- (Thomas, J in S v S)

4.1 Introduction

The Australian Family Court frequently uses the 'Parental Alienation Syndrome' ("PAS") paradigm as a foundation for decision-making in cases where child sexual abuse is alleged against a parent. It is submitted that PAS and PAS-related paradigms and myths have permeated the Court's decision-making at all levels in child abuse cases. The lack of psychological knowledge and understanding amongst the judiciary and court workers creates the perfect environment in the Australian Family Court system for a de facto operating presumption of 'Parental Alienation Syndrome' to exist and thrive. The use of PAS in this manner violates children's rights under UNCROc.

4.2 Parental Alienation Syndrome

Parental Alienation Syndrome is the brainchild of Dr Richard Gardner and remains a theory, rather than a scientifically accepted syndrome as its name suggests. The theory asserts that children are frequently 'brainwashed' or 'programmed' by their mothers into making false allegations of abuse for the purpose of gaining an advantage in custody litigation. According to Dr Gardner the only remedy for PAS is to put the child with the alleged abuser and to severely curtail or totally prohibit the child's contact with the 'alienating' parent'.

A distinction should be drawn between the PAS paradigm and the general concept of alienating behaviour by a parent. General alienating behaviour includes such things as denigrating the other parent in front of the child, expressing anger if the child speaks positively about the other parent or preventing the child's communication with the other

parent. This behaviour has obvious negative affects on the child and prevents them from fully enjoying a relationship with the other parent. General alienating behaviour towards the other parent invariably occurs in many marital breakdowns. It is not however a 'gendered' behaviour and is committed by both mothers and fathers alike. The PAS paradigm differs by suggesting that children are frequently deliberately 'coached' by the alienating parent (invariably the mother) into making malicious accusations of child abuse against another parent.

PAS has become the weapon of choice for fathers' rights groups in Australia and amongst Family Court lawyers in cases where child abuse is alleged. The PAS paradigm endorses the idea that children cannot properly articulate their experiences of abuse and are prone to coaching, manipulation and lying. The paradigm privileges the accused parent's right to enforce a relationship with the child. McInnes argues: "PAS is a winner with violent parents because (a) it enables the abuser to occupy the role of the victim and (b) assists and legitimizes their continuing access for abuse". A further incentive in arguing PAS for an abusive parent is that the Court's focus is diverted from the alleged abuse to the character and personality of the mother. In the light of an accusation of PAS, the mother's mental health can be examined and attacked and her attempt to protect the child can be framed as prima facie evidence of her alienation against the father.

The PAS theory is a hydra, which has appeared in family law circles under the guise of several other alleged syndromes. These include "Malicious-Moms Syndrome", "Maternal-Alienation Syndrome" or "Parental Alienation". Often PAS reasoning is simply utilised under the umbrella of "alienation".

4.3 Criticisms of Parental Alienation Syndrome

PAS is a theory whose widespread use and admission in international family law courts has never been matched by widespread acceptance within the international scientific community. The theory has been criticised in publications that are too numerous to mention. Below are some of the most frequent criticisms of the theory.

- *PAS is not in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV (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.*

- *The idea that false allegations of child sexual abuse increase in custodial litigation has been contradicted by research conducted both within Australia and internationally.*
- *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.*
- *Dr Gardner has made several comments in his books which are sympathetic and supportive of paedophiles.*

4.4 Evidence of PAS in the Australian Family Court

"My grandson's abuse has been going on for 2 years now and all we've managed to do is have over night access stopped. To us that was a blessing, because he would scream hysterically at hand over time. His access is 9-5 twice a week now, still pretty traumatic at hand over because he's coming up to four and he holds my face and pleads "please don't let daddy take me".

(Grandmother of a child abuse victim)

Family Court judges, lawyers and other workers frequently use PAS or PAS-related paradigms as a foundation for decision-making in cases of alleged sexual abuse. This has led to the establishment of a climate within the Australian Family Court System of unjustifiable suspicion and mistrust against parents seeking to protect their children from sexual abuse at the hands of another parent or family member. The ultimate consequence of this approach is that children are left unprotected from further abuse.

1 Case Study 1 (E v R, 2001)

- Facts

Sarah (mother) and Terry (father) were married for twelve months. In this period a child Joe was conceived. Sarah stated that she left the relationship because of Terry's violence toward her. Sarah and Terry negotiated an informal custody agreement whereby Sarah was to have primary residence of Joe and Terry was to

have regular contact. Beginning in 1997, Sarah began to notice that Joe was being returned from his father with regular bruising. One day in 1997, the child was returned after a two-hour contact with a very sore, inflamed and weeping penis head. The father offered no explanation. In 1998, Joe began to frequently complain of having a sore bottom after visitation with his father. In 2000, the child told his mother that his father “had been naughty” and had pinched his penis and “it hurt”. Police decided that due to the child’s young age they would not charge Terry with ‘indecent dealing with a child’. Sarah sought a Family Court order limiting Terry to supervised contact with Joe.

- The Court Outcome

The Court-appointed child representative described the mother in her report to the Court as “honest” and her accusations of sexual abuse as “honestly documented”. The report further noted that at contact handover time with his father, Joe was “crying hysterically and wetting himself” and that the representative had never encountered such an extreme reaction from a child in such circumstances. The children’s representative further noted that Joe had mentioned that he was afraid of his dad because “he hurts me”. At the hearing the child’s disclosures of abuse went unchallenged. The children’s representative however made reference in a report to perceived “alienation” and the mother’s inability to contain her “emotional reactions” when discussing her alleged abuse of her child. Counsel for the father argued PAS. In his Reasons for Judgment, the Judge stated “it may well be that the concept of Parental Alienation Syndrome is the subject of ongoing debate between psychologists...whether or not there is or is not a syndrome described as PAS is not the critical issue. The critical issue is whether the wife, consciously or unconsciously has alienated the child from the husband”. After ignoring the child’s wish to live with his mother and to have limited contact with his father, the Judge ordered that the child’s primary residency be reversed and that the child should reside with the father. Joe’s further contact with his mother was to be limited to supervised contact.

- Criticism of The Family Court’s Response

The child was disclosing and alleging sexual abuse and this was not disputed. What the child wanted was considered inconsequential. The mother’s attempts at protecting her child from being sexually abused (e.g. alleging abuse, seeking to reduce the father’s contact, carefully documenting the child’s complaints, going to the police etc) were viewed by the court and court workers as prima facie evidence of alienation by the mother against the father. The father’s counsel endorsed this view, as did the children’s representative. Using this “evidence” the judge decided to reverse custody. The court claimed not to be applying PAS but from its comments it is clear that it did. The mother’s attempt at utilizing the Family Court to protect her child from sexual abuse proved not just futile, but absolutely disastrous, with primary residency being reversed. She went from primary caregiver to being allowed only supervised contact. The child, thanks to the Family Court order, is now at permanent risk of being sexually abused. Jenkins states “it remains

difficult to accept the rationale that the best interests of the child can be met through a willingness to sacrifice the child's relationship with his/her primary caregiver, given what is known about the importance of the relationship, in order to facilitate a relationship with a secondary carer".

Parents seeking to utilize the Family Court to protect their children from sexual abuse are frequently confronted by a pro-contact family law culture where child-safety is a low priority. The system they face is skeptical of their claims, dismissive of their basic capabilities, suspicious of their motives and willing to use PAS or PAS-related thinking to punish them for alleging abuse.

2 Case study 2 (Unreported Decision of the Family Court of Western Australia)

- Facts

The mother in this case sought to protect her daughter from sexual abuse at the hands of her husband. From an age of 6 months, the child began to experience sore and inflamed vaginal and anal openings. No doctors could provide an explanation, but it was concluded that it was not nappy rash. One paediatrician, suspecting sexual abuse, made a mandatory notification to the State Department for Family and Children's Services of suspected abuse. The statutory child protection agency did not investigate. The father was frequently domestically violent with the mother and the children and there were several complaints to the police that were documented. The police later accommodated the mother and the children in a hotel before they left for a women's refuge. The girl disclosed to the mother that her father played "tickling games" and had "put his willy in here and there" pointing to her mouth and vagina. The child drew sexually explicit pictures of the abuse, which were held by an expert to typify drawings of an abused child. The police determined that in their opinion, sexual abuse had occurred, but due to the child's age – three and a half, the Department of Public Prosecution declined to prosecute. The father applied to the Family Court for access to the children.

- The Court Outcome

On the third day of the Family Court hearing, the children's representative held a meeting with the mother and offered her two alternatives: either she take the children back to the country town where they had lived and agree to the children having unsupervised access with the father (including sleeping over at his house) or the children's representative would advocate the removal of the children from the mother. During the hearing an expert witness who had never met the children testified about PAS and concluded that in his opinion the girl was most probably lying about the abuse. The Judge ultimately reversed custody. The Judge said in her Reasons for Judgment that the girl's account of performing fellatio on her father in the shower could be that she was kneeling on the floor and water dripped of the father's penis into her mouth. The vaginal infection was dismissed by the Court as

nappy rash and the internal damage as self-inflicted. The mother later fled with the children to Switzerland and sought the protection of the Swiss legal system. Legal-Aid later spent over \$1 million in pursuing the father's claim through the Swiss Courts.

- Criticism of the Family Court's Response

In this case the entire family law system, through their belief in PAS, was predisposed to be against a parent attempting to protect her children from abuse. The children's representative, instead of advocating for the wishes of the child, which were to have no contact with her father, dismissed the child's views as the product of "brainwashing" and alienation by the mother. The child's disclosures of abuse were similarly discounted. The representative, believing in the universal benefits of contact for children, decided that contact with the father was in the child's best interests and offered the mother a choice between two options: allow the abuse to continue or lose the children permanently. When the mother rejected an option that would not have protected her child from ongoing contact with the perpetrator, the representative recommended a change of primary residency. The Judge allowed expert evidence on PAS and then, in conjunction with the children's representative, made a diagnosis of PAS. This allowed the child's disclosures of abuse to be dismissed by the Court and for primary residency to be reversed.

The organization Advocates for Survivors of Child Abuse (ASCA) in a 2001 submission to the Family Law Council, stated that in their opinion non-offending parents are regularly losing custody to the offending parents in Family Court disputes. ASCA claims in the submission to have seven statements from parents who have lost primary residency of their children to the alleged abuser. In each case there was corroborating evidence (including medical evidence) that the child was being abused. In each case the child stated that they were being abused and clearly identified the perpetrator.

The National Council of Single Mothers and their Children (NCSMC) reported in a submission to the Family Law Council of being regularly contacted by distressed mothers attempting to deal with the trauma of a court not believing their child's allegations of sexual abuse and being legally forced to hand their children over for weekends of "sex" and "sex games" with their fathers. One mother reported that her six-year-old son had attempted to suffocate himself in a plastic bag after a weekend where the child had been burnt with cigarettes and anally raped. The mother knew that the Family Court wouldn't believe any more of her claims of abuse and feared losing residency completely if she further complained. In another case a young child's statement that if his dad got custody of him he would "run on to the road and let a car squash me" was dismissed with the comment that children of that age "have no concept of death".

The Family Court's failure to protect children from violence and sexual abuse has resulted in an increasing number of mothers electing to flee with their children. The Family Court has in turn used this in several cases to justify reversing custody. In these cases, the child

is always the one punished.

3 Case Study 3 (Unreported Decision of the Family Court of South Australia)

- Facts

A woman had a 6-month relationship with a man in which time a child was conceived. The woman stated that she left the relationship because of domestic violence. The mother had successfully raised two children from a previous relationship. The father later applied for joint-custody. The father had 26 criminal convictions, two for sexual assault. It was later revealed that he had HIV/Aids and had a life expectancy of 7 years. The mother, after being told by Legal Aid that joint-custody was the inevitable outcome even if she contested the application, fled with the child. Federal police later tracked her down and the child was put into foster care. The child was later collected and taken home by the father. The father then successfully obtained Legal Aid which automatically denied further Legal Aid to the mother.

- The Court Outcome

The Family Court referred to the father's criminal record (including sex offences) as "trivial" and "irrelevant" and awarded custody to the father. The mother was restricted to three 6-hour contact sessions a month or a total of 9 days a year with the child. Because the mother removed the child she is considered a dangerous parent and therefore this contact is supervised. The child is reported to be experiencing severe behavioral problems at school and there have been numerous reports of physical abuse, sexual abuse and child neglect by the father and sexual abuse by the half-brother. Some of these reports have been made to authorities by the child's school and by kids' help-line. The state child protection agency (FAYS) has refused to investigate because the case is still before the Family Court. The child (aged 7) recently held her mother and the supervisor at bay with a knife and begged her mother to kill her rather than to send her back to her father. The judge later told the mother that she needed professional therapy to help deal with her "inability to accept that the Family Court is fulfilling its duty to act in the child's best interests".

- Criticism of the Family Court's Response

In this case the Court punished the mother for removing the child. In doing so the Court also punished the child. The child who is now residing with her father is clearly at an unacceptable risk of abuse. The Court however mistakenly sees the mother as the dangerous parent and, using PAS-related thinking, refuses to accept her or the child's accusations of abuse.

4.5 How PAS breaches UNCROc Art 3 – The Best Interests of the Child.

The use of PAS by the Family Court to dismiss children's disclosures of abuse increases the risk that the child will be exposed to continuing abuse. This is clearly not in the child's best interests. As the case of E v R (case study 1) demonstrates, Family Court judges have used PAS as a justification for taking children away from their primary caregiver and for handing them over to the alleged abuser. A child's best interests are never served by a willingness to sacrifice the child's relationship with his or her primary caregiver to facilitate a relationship with a secondary caregiver. This is a core principle of developmental psychology. A young child's relationship with their primary caregiver is absolutely fundamental to their best interests and should never be jeopardized or put at risk as it was in this case. For abused children this principle is even more pertinent. If they disclose abuse to a protective parent, they will rely on that parent to protect them from the perpetrator. An abused child will fear future contact and anger from the other parent and will come to identify almost totally with their protective parent. PAS encourages the Courts to view this natural reaction of an abused child as prima facie evidence of "alienation". The PAS theory is very dangerous because by its very logic, PAS does not acknowledge cases in which abuse has actually occurred, instead portraying the normal reactions of an abused child towards their protective parent as pathological. The adoption of the PAS paradigm as a basis for decision-making by the Family Court therefore carries with it enormous risks that children's actual disclosures of abuse will be dismissed as 'coaching' and will not be believed. The use of the theory by the Family Court is absolutely contrary to the best interests of abused children.

Parents who try to protect their abused children from abuse in the Family Court are punished by a system that is suspicious of their motives and is doubtful of their accusations. This is not a system that operates in the best interests of abused children.

Several of Australia's foremost experts in child abuse now counsel parents not to raise accusations of sexual abuse in Family Court litigation. According to these experts the alleging parent will most likely be "discredited" and will face an increased risk of losing primary residency of the abused child. A system where parents cannot protect their own children from abuse for fear of losing them is not a system prioritising the best interests of the child.

5. Giving Children's views the 'due weight' they deserve

5.1 A further breach of CroC

Art 12 (CroC): State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

PAS enables the voice, wishes and disclosures of the abused child to be discounted, ignored and silenced. The Family Court, through its frequent use of the PAS paradigm as a framework for decision-making in abuse cases, is therefore silencing the allegations and views of abused children. This is contrary to Article 12 of CroC. Under Article 12, the Family Court is required to give the child's views "due weight" in accordance with their age and maturity. The Family Court, through its use of the PAS ideology, frequently views young children's disclosures of abuse as nothing more than coaching by an alienating and vindictive parent. Parents who can't make their young children eat breakfast in the morning without making a mess are credited with the ability to make the children repeatedly allege sexual abuse.

According to paediatric research, children can from a surprisingly young age articulate their own individual opinions. Wallerstein and Tanke state: "children at a very young age have powerful feelings that do not necessarily reflect the feelings of the adults in their lives... the courts and the legal profession have been overly committed to an implicit perspective of children as passive vessels of parental attitude and interest".

It is clear that the Family Court is not giving children's disclosures of abuse, nor their desires to be protected from the perpetrator due weight in accordance with Article 12.

6. The Concept and the Application of “Unacceptable Risk” and the Civil Standard of Proof

6.1 The Civil Standard of Proof

The Family Court operates on a civil standard of proof. In *Briginshaw v Briginshaw* the High Court stated that the civil standard of proof was dependant upon such factors as “the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding”. Dixon, J in *Briginshaw* further stated that the evidence needed to satisfy the Court that the civil standard of proof had been met in a matter concerning a serious allegation should not be “inexact”, “indefinite” or “indirect”. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* the High Court stated “the evidence necessary to establish a fact or facts on the balance of probabilities may vary”.

The consequence of the above decisions for private litigants in the Family Court is that a positive finding of child sexual abuse will only be justified by evidence that is strong enough to satisfy a standard of proof towards the strictest end of the civil spectrum. Child sex abuse is one of the most difficult offences to prove due to the young-age of the victim. In practice this factor when combined with the rigorous evidentiary requirements needed to satisfy the Court on the balance of probabilities that sexual abuse has occurred, has led to few positive determinations of child sex abuse by the Family Court. Most allegations of child sexual abuse ultimately fall within what Cooke, P described in *M v. Y* as the "gray area in which a confident conclusion cannot be reached either way".

6.2 The Unacceptable Risk Test

In *M v M* the High Court laid down the concept of “unacceptable risk” – an attempt by the bench to forge a compromise between the strict evidentiary requirements needed to allow a positive finding of child sex abuse and the ‘best interests of the child’ principle. According to the High Court, the Court should deny or restrict contact to a parent or family member if there is an “unacceptable risk” to the child if contact were to continue. The High Court reiterated the point that in cases where child sexual abuse is alleged, the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the determination as to what is in the best interests of the child.

A fundamental defect of the “unacceptable risk” test is that the Court is forced to work from suspicions and not determinations of fact. As Parkinson argues “Findings of fact are binary in nature. An event occurred or it did not... the father or step-father either molested the child or he did not... findings of fact, expressed in this stark binary way, are a necessary basis from which legal conclusions about future risk need to be drawn”.

While the “unacceptable risk” test sounds logical and appealing, its practical application by the Family Court has proved highly problematic. Parkinson further notes “the question becomes how to base an assessment of unacceptable risk on findings of fact when the

central 'fact' is in dispute and cannot be proven to the requisite degree of proof"

The concept of "unacceptable risk" has transformed Family Court Judges into 'risk-assessors' who attempt to guess about the future safety of children based upon their suspicions and doubts. The consequent discretion and responsibility granted to judges who have no particular expertise in the area of child sexual abuse is enormous. The lack of knowledge combined with the wide discretion means that judges continue to get it wrong and abused children are left unprotected.

6.3 The Variables behind the Unacceptable Risk Test.

Family Court judges in cases of alleged child sexual abuse must evaluate the risk of future abuse occurring and then decide if that hypothetical risk is acceptable or unacceptable when viewed in overall terms of what is in the child's best interests.

The following model crudely replicates this decision-making:

If	$A \times D > (1 - A) \times B$	- then there is an unacceptable risk
If	$A \times D < (1 - A) \times B$	- then there is not an unacceptable risk
Where:		
A = Estimated probability that Abuse will occur by the accused parent; D = Estimated Damage to the child if the abuse occurs; B = Estimated Benefits to the child of contact with the accused parent.		

6.4 Problems with the Unacceptable Risk Test

If judges could always tell on which side of "acceptable" or "unacceptable" the risk to the child of further contact with the alleged perpetrator lay, then this decision-making model would operate to protect the best interests of abused children. The reality, however, is that untrained judges cannot and do not always make the right decisions. There is evidence to suggest that the Family Court's pro-contact culture is encouraging judges to systematically prioritise contact over child-safety. A system that truly operated in the child's best interests would be extremely careful and circumspect in allowing contact in cases where children or other family members were alleging sexual abuse. Too often children are made to bear the apparently acceptable risk of contact with an abusive parent.

The following are some key defects in the judicial application of the test for "unacceptable risk".

6.4.1 Judges lack any expertise in predicting the probability of future sexual abuse occurring (Variable A)

Family Court judges have no formal education or training about the sexual abuse of children. They lack any specialized or advanced ability to recognize or detect the symptoms of sexual abuse amongst children and psychopathology amongst offenders.

The estimated probability of future abuse occurring (A) is the most important variable in the decision-making model as it influences both the assessment of risks and the assessment of benefits to the child. It is also the most difficult variable to estimate. If an estimation of A is wrong, for example too low, then the actual risk to the child of contact will be understated by a factor of D times the error and the benefits will be overstated by a factor of B times the error.

Without a developed understanding of child sexual abuse and child psychology, judges frequently have serious trouble interpreting the meaning or significance of the evidence put before them. This severely undermines their ability to make informed assessments concerning the likelihood of future abuse occurring. Often they must decide between competing expert evidence.

6.4.1.1 Case Study 4 (N and S and the Separate Representative)

- Facts

A child T was born in January 1991. The husband and wife separated in 1992. The child from a very young age made numerous disclosures of abuse. When the child was two and a half years old she told her mother "daddy hurt my bottom". Later that year the child told the mother "daddy hit me here" and pointed to her vagina. A month later the child told the mother "daddy bit my bottom". There was observable bruising on the child's buttocks for which the husband confirmed responsibility but claimed that it was the result of 'play'. When the child was three she was observed attempting to insert a dummy into her vagina. On or about 8 October 1994 the child said to the mother's boyfriend (Mr F) "do you have a penis? All men have a penis don't they? My Daddy has been doing naughty things to me". Later the same month the child allegedly touched (Mr F.) in the groin area and said "is that your penis". In November the child commented to the mother "Daddy has a penis. It is big and red. He makes me touch it." Two days later the child allegedly stated "Daddy wants me to touch his penis. I rub cream on him". The mother sought a Family Court order that the child had been sexually abused and asked the court to deny contact to the father.
- Court Outcome

The father alleged PAS. This was not accepted by the court. Despite the court's refusal to give weight to PAS, it nevertheless judged that the risk to the child

remained acceptable. The judge Coleman, J was offered a choice of expert evidence. A psychologist Ms Grundy, appointed by the Department for Community Services, who in the words of the judge had “seen (T) on more occasions and in a more therapeutic capacity than Dr Fairley” testified that in her opinion child sexual abuse by the husband had occurred. Dr Fairley a psychiatrist testified that it was “most unlikely” that the child had been sexually abused and put the hyper sexualized behavior down to “attention-seeking behavior towards the mother” and the fact that T was an “unusual child”. Coleman, J preferred Dr Fairley’s evidence and stated: “there may be cases, which, though not involving a positive finding of sexual abuse do involve a finding of unacceptable risk but this is not such a case”. One of the Court orders was that the child should continue counseling for a period with Ms Grundy. Ms Grundy wrote a letter to the Court terminating the counseling. In her letter she said that to continue to see the child “would not be therapeutically appropriate, as she is to have unsafe contact with her father”. She continued “the basis of counselling for children is that they have been very courageous to tell about the abuse and that now they have disclosed, people who care about them will keep them safe from any ongoing events with that particular perpetrator. Obviously my credibility to (T.) about keeping her safe and therefore any ongoing work with this child has been rendered impotent due to the court ruling”. The Full Court later dismissed the mother’s appeal with Fogarty, J dissenting.

- Criticism of the Family Courts Response
The disclosures of the child, coupled with the sexualized behavior and the supporting evidence of a psychologist who had worked extensively with the child should have raised very serious concerns for the child’s safety in the judge’s mind. Indeed, if the facts of this case are not sufficient to found a finding of unacceptable risk then it is difficult to contemplate facts that would.

6.4.2 Judges may tend to underestimate the potential damage to the child if future sexual abuse occurs (Variable D)

It is difficult for a person who has not been subjected to the horror of sexual abuse to properly appreciate the long-term damage that such abuse can cause. The child will be forced to visit the perpetrator or live with the perpetrator and may suffer repeated rapes or sexual assaults over many years. The damage caused by any abuse will continue to affect the victims for the rest of their lives.

6.4.3 Judges systematically overestimate the potential benefits to the child of future contact with the alleged perpetrator (Variable B)

Australia’s pro-contact legal culture (see Section 3) encourages judges to systematically over-estimate the benefits to the child from having contact with the alleged abuser. If a

young child discloses abuse, expresses fear of a parent and states their wish not to have contact, then it stands to reason that there is little benefit to the child from continuing contact. Many judges such as Coleman, J have taken a contrary opinion.

6.4.4 The discretion given to an untrained judge in determining whether an unacceptable risk exists is enormous.

The case of N and S and the Separate Representative is illustrative of the enormous discretion that judges have in determining whether an unacceptable risk exists. Justice Fogarty - a respected and senior judge stated in his dissenting Full Court Appeal judgment that there were very clear signs of risk to T that were not properly considered by Coleman, J. The majority of the Full Court however found that it was a legitimate exercise of judicial discretion by the trial judge. This clearly shows the risks inherent with the current level of allowable judicial discretion.

6.4.5 Children bear all the risk in a determination of “acceptable risk”

The unacceptable risk test implies that there is an “acceptable risk” of child abuse that a Court is willing to take with the child’s safety. This “acceptable risk” must be borne by the child, in private and behind closed doors. If the paramount consideration is the best interests of the child, then the Court should be very careful and circumspect in deciding that there is an “acceptable risk” to the child. This is not always the case.

6.5 How the application of “unacceptable risk” may breach UNCROc – Article 3.

The use of the nebulous and discretionary concept of ‘unacceptable risk’ as a basis for decision-making in Family Court cases of alleged sexual abuse is producing outcomes where children are left unprotected by the Family Court. This is contrary to the child’s best interests. The notion that untrained Family Court judges can make complex risk assessments and ultimately decide on which side of “acceptable” or “unacceptable” the balance of risk lies for the child is unrealistic. In Case Studies one, two, three and four, the court ignored cogent evidence of abuse including the opinions of medical professionals in deciding that the risk was “acceptable” to the child.

Australia’s pro-contact family law culture is further encouraging judges to focus strongly on the universally perceived benefits to children from contact with both parents. The pro-contact culture that permeates the Family Court has proven disastrous for victims of child sexual abuse. It has distorted the Court’s ability to objectively act in an abused child’s true best interest. The most fundamental requirement for an abused child is safety. Children who disclose that they have been abused and express a desire to have no contact with the offending parent often get over-ruled by a Court that is zealous in its belief in the universal benefits of contact.

7. Current Reform Proposals

7.1 A glimpse into a 'bleak' future for abused children in the Australian Family Court

"The main provision within the bill that makes any reference to safety is a statement of principle... if that is that is the solution, given that the court system is manifestly failing to protect people's lives and wellbeing at the moment, both adults and children, it is only a perpetuation of the current problem"

The Federal Government's proposed Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill encompasses an agenda for reform in the same spirit as the 1995 changes. The proposed amendment will in all likelihood further intensify the current tension that exists between the competing goals of child-safety and the child's right to contact with a parent. The Bill will introduce a rebuttable presumption of shared parenting and will make the benefits to the child of having a meaningful relationship with both parents a primary consideration in the Court's determination of the child's best interests. The reforms will further increase the penalties imposed on parents who fail to comply with contact orders. These reforms reflect the demands of fathers' groups for equal access and rights to their children and are a result of the recommendations put forward in the federal Inquiry *Every Picture*.

In contrast to the proposed changes relating to equal parenting rights, the augmentations of provisions relating to children's safety are largely symbolic. The Federal Inquiry's critical recommendations as to how children should be given greater protection from abuse and family violence have not been adopted. The Inquiry's suggestion that the Family Court system be altered to allow greater scope for investigation of claims of abuse has been ignored. Furthermore the suggested presumption *against* parenting in cases of family violence has not been followed.

As a result of the proposed reforms, there is a distinct possibility that the current pro-contact family law culture, lopsided as it is, will only worsen further. If this does occur, there will be significant adverse long-term consequences for child protection at all levels in the Family Court structure. The presumption of equal access and equal parenting will only make it harder for parents to utilise the Family Court system to protect their children from sexual abuse.

Dr Michael Flood, a researcher on fatherhood issues at La Trobe University has publicly commented that the achievements of fathers' rights groups, as manifested in the current proposed legislation, will put children at increased risk of violence.

"Both government policy and many fathers' rights groups are guided by two mistaken assumptions – that all children see contact with both parents as in their best interest in

every case, and that a violent father is better than no father at all... the government has bought the lie perpetrated by fathers' rights groups that women routinely make false allegations of domestic violence or child abuse when the evidence shows only a tiny proportion of allegations are unsubstantiated"

It is clear that the proposed Family Law Act Amendment will not rectify the human rights abuses of abused children identified in this submission and will, in all likelihood, only exacerbate the extent to which the Family Court is in violation of CRoC.

8. Recommendations

8.1 Adopting the Family Law Council's blueprint for reform

It is submitted that the Family Law Council's 17 recommendations made in its 2002 Final Report 'Family Law and Child Protection' should be adopted. These are a comprehensive set of reforms which would go a long way towards redressing the current failure of the Family Court to protect child victims of abuse.

For ease of reference these are set out below.

Recommendation 1

The Federal Government should establish a Child Protection Service.

Recommendation 2

The Child Protection Service should be a national service.

Recommendation 3

The objectives of the Child Protection Service should be:

- 1. To investigate child protection concerns and provide information arising from such investigation to courts exercising jurisdiction under the Family Law Act.*
- 2. To ensure, in the course of its work, that children and families are not subjected to unnecessary investigation, assessment or stress.*
- 3. To avoid unnecessary duplication of resources and effort in the investigation and determination of matters involving both family law and child welfare law issues.*
- 4. To promote the development of a co-operative approach between State and Federal agencies in responding to concerns about child abuse and neglect.*

Recommendation 4

The Child Protection Service should be an independent service staffed by people with a background in child protection and social welfare and should embrace a multi-disciplinary approach.

Recommendation 5

The Child Protection Service should be comprised of a mix of core permanent staff and draw on a mix of contract, fee for service and part-time staff to service rural, regional and remote areas, the needs of indigenous communities and other cultural groups.

Recommendation 6

The Child Protection Service should be co-located with appropriate matched services to maximise its effectiveness.

Recommendation 7

The establishment of a Child Protection Service should be accompanied by the development of Protocols for co-operation between it and State or Territory child protection authorities.

Recommendation 8

The establishment of a Child Protection Service should be accompanied by consequential modification to the mandatory notification system pursuant to s.67Z and s.67ZA of the Family Law Act, providing for the mandatory notification of specified child abuse concerns to State and Territory child protection authorities.

Recommendation 9

Section 67ZA of the Family Law Act should be amended to provide that the courts exercising jurisdiction under the Family Law Act can share such information as is reasonably necessary with child protection authorities and the CPS whenever abuse issues arise in proceedings, and ensuring that there is no need for notification to a child protection authority as a precondition for such information sharing.

Recommendation 10

The Family Law Act should be amended to allow Children's and Youth Courts to make consent orders regarding residence and contact in certain circumstances.

Recommendation 11

Section 69ZK should be amended to make clear beyond doubt that residence and contact orders made pursuant to child welfare legislation as an outcome of proceedings brought by a child protection authority for the protection of a child are not inconsistent with the Family Law Act 1975.

Recommendation 12

States and Territories should be encouraged to amend their laws to make it possible for Children's and Youth Courts to make orders concerning residence and contact as an outcome of child protection proceedings brought by the child protection authority.

Recommendation 13

In child protection matters, duplication of effort between state and federal systems should be avoided, and a decision should be taken as early as possible whether a matter should proceed under the Family Law Act or under child welfare law with the consequence that there should be only one court dealing with the matter. This is to be known as the 'One Court principle'.

Recommendation 14

The Council of Community Services Ministers and Standing Committee of Attorneys-General should jointly appoint a Committee consisting of representatives of the

child protection authorities in States and Territories, Children’s and Youth Courts, the Family Court of Australia, the Family Court of Western Australia, the Federal Magistrates Service and the CPS. The Committee shall:

- a) promote cooperation in ensuring the effectiveness of the One Court principle;*
- b) endeavour to agree on the circumstances when the child protection authority should take responsibility for presenting the child protection concerns either under child welfare legislation or by becoming a party to family law proceedings and when it is appropriate for the matter to be left to others, such as the parents, to resolve in private proceedings under the Family Law Act;*
- c) review the operation of the various Protocols between the Family Court and State and Territory child protection departments with a view to promoting as much consistency as is possible given the variations in state legislation and circumstances;*
- d) encourage a high-level of commitment to the Protocols and their incorporation in all relevant agencies;*
- e) explore all the practical issues of improving information sharing, examining how to better coordinate elements of the system, and further refining the role of the CPS;*
- f) keep under review and progressively enhance the various Protocols and promote ongoing collaboration between the child protection authorities in the States and Territories and the Courts exercising jurisdiction under the Family Law Act.*

Recommendation 15

Children’s and Youth courts should be encouraged to collaboratively develop and implement a short form of reporting of their decisions.

Recommendation 16

Section 19N(3) should be amended along the following lines:

“Subsection (2) does not apply to:

- (a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or*
 - (b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse*
- unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.”*

Recommendation 17

Sections 62F(8) and 70NI of the Family Law Act should be amended along the following lines so as not to apply to:

- “(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or*
 - (b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse*
- unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.”*

9. Bibliography

Australian Family Law Council's (2002) Report 'Family Law and Child Protection'

Australian Law Reform Commission (1997): 'Seen and heard: priority for children in the legal process' Report of the National Inquiry into Children and the Legal System.

Brown, T.(ed) Federico,M, Hewitt,L, and Sheehan, R. (1998) Violence in Families. The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia

Brown, T. 'Child Abuse In The Context Of Parental Alienation and Divorce: New Reality and a New Intervention Model' (2000)

Brown, T. 'Separated fathers and unmarried fathers and the courts: Fathers and child abuse allegations in the context of Parental Alienation and Divorce' (2003) Family Court Review 41 Fam. Ct. Rev. 367

Brown, T. 'Celebrating the 25th Anniversary of the Family Court of Australia: Magellan's Discoveries: An Evaluation of a Program for Managing Family Court Parenting Disputes Involving Child Abuse Allegations' (2002) Family Court Review.

Dewar,J, & Parker,S, (1999) 'Parenting, planning and partnership: A study of the impact of the Family Law Reform Act 1995, Family Law Research Unit Paper No. 3, Griffith University

Dickey, A. 'Family Law – Fourth Edition' (2002) Lawbook Company. Sydney, Australia.

Drews, M, Halprin, P. 'Determining the effective representation of a child in our legal system: Do current standards accomplish the goal?' 2002, Family Court Review.

Ellington, P. 'Too close to home: the hidden horror of child sex abuse' The Sunday Age, 24/10/04.

Files, A. 'Upsetting the Standard: Allegations of Child Abuse and the Family Court' (2001) Flinders Journal of Law Reform.

Horin, A. 'Fathers' wins may hurt children at risk' Sydney Morning Herald 17/09/05.

Horin, A. 'New legislation could downgrade child's input' Sydney Morning Herald (Weekend Edition) 8-9 Oct, 2005.

Hume, M 'Child Sexual Abuse Allegations and the Family Court' (1997) Masters Thesis, South Australia.

Hume, M. 'The Relationship between child sexual abuse, domestic violence and separating families' Paper delivered to the Australian Institute of Criminology. May 2003.

Jenkins, S. 'Are Children protected in the Family Court? A perspective from Western Australia' ANZJFT Vol 23 No 3 (2002)

Jonston, J, Kelly, J. 'Rejoinder to Gardner's "Comments on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome' (2004) Family Law Review

Kaspiew,R. (2005) 'Violence in contested children's cases: An empirical exploration' 19 Australian Journal of Family Law

Keough, W. 'The separate representation of children in Australian family Law – effective practice or mere rhetoric?' (2002) Canadian Journal of Family Law.

McInnes, E, 'Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law' Paper delivered to the Australian Institute of Criminology Conference (2000).

McDonald, M. 'The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases' (1998) American Judges Association Court Review.

Media Release from the Advocates for the Survivors of Sexual Abuse 'Problem with Family Courts' www.asca.org.au

Munro, I. 'Court regrets a sad and traumatic case' The Age. 21/09/2005.

National Council of Single Mothers and Their Children (NCSMC) Submission to Family Law Council 2001

Nicholson, A (1999) ' Court Management of Cases Involving Child Abuse Allegations' Paper presented by the Chief Justice of the Family Court to the 7th Australasian Conference on Child Abuse and Neglect

Nicholson, A. 'Children and young people – the law and human rights' in May 2002 to the Law Society of the ACT.

Nicholson, A. 'Children and children's rights in the context of Family Law' Paper presented by the Chief Justice of the Family Court in June 2003 to the Law Asia Conference Brisbane.

Overington, C. 'Access granted to violent dads' The Australian, Sept 12, 2005.

'Parental Alienation Syndrome: A Guide for Pro Se Litigants' (anonymous author)
www.jfcadvocacy.org/programs/HOU_400991_13.DOC (November 2005)

Parkinson, P. 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse'
(1999) *Melbourne University Law Review* Vol 23.

Pelly, M. 'Court's concern for the future of family law' Sydney Morning Herald (Weekend Edition) 8-9 Oct, 2005.

Penfold, S. 'Questionable beliefs about child sexual abuse allegations during custody disputes' (1997) *Canadian Journal of Family Law*. 14 Can. J. Fam. L. 11

Rendell, K, Rathus, Z, and Lynch, A. 'An Unacceptable Risk – A report on child contact arrangements where there is violence in the family' (2002) *Women's Legal Services Inc*

Roades, H, Graycar, R, and Harrison, M. (1999) The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?
University of Sydney

Turkat, I. 'Parental Alienation Syndrome; A Review of Critical Issues' (2002) *Journal of the American Academy of Matrimonial Lawyers*.

Williams, J. 'Special Issue: Alienated Children in Divorce: Should Judges Close the Gate on PAS and PA?' *USA Family Court Review*. 39 *Fam. Ct. Rev*, 267

Williams, D. 'Giving Fathers A Fairer Go' Time, March 2005.

Wood, C. 'The Parental Alienation Syndrome: A Dangerous Aura of Reliability' (1994) *Loyola of Los Angeles Law Review*'.