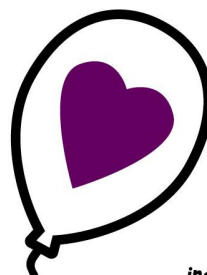




Submission to the
Attorney-General's Department:
Family Law Branch

Family Law Amendment (Family
Violence) Bill 2010 – Exposure Draft



Bravehearts^{inc.}
Educate. Empower. Protect.

11 January 2011

About the Authors

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Hetty Johnston is Founder and Executive Director of Bravehearts Inc., whose purpose is to provide therapy, support and advocacy services to survivors of child sexual assault. Hetty is the author of the national awareness campaign, "White Balloon Day", the "Sexual Assault Disclosure Scheme", the "Ditto's Keep Safe Adventure!" child protection CD-Rom and her autobiography, "In the best interests of the child" (2004). In 2005, Hetty was announced one of 4 Queensland finalists for the 2006 Australian of the Year Awards.

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About Bravehearts Inc.



Founded in 1997 by Hetty Johnston, Bravehearts Inc. has evolved into an organisation whose purpose is to provide therapeutic, support and advocacy services to survivors of child sexual assault. We are also actively involved in education, prevention, early intervention and research programs relating to child sexual assault.

Bravehearts operates at a National level, from our Head Office on the Gold Coast, advocating and lobbying across the country, with a physical presence in three States: Queensland (Gold Coast, Brisbane and Cairns), New South Wales (Sydney and Shoalhaven) and Victoria (Shepparton).

Bravehearts makes a difference in child protection by:

- Assisting children and their non-offending family members to recover from the trauma of child sexual assault through therapy, advocacy and support;
- Raising awareness via initiatives such as the 'White Balloon Campaign' - a public awareness and child protection initiative;
- Protecting survivors and providing them with avenues of redress through projects like the 'Sexual Assault Disclosure Scheme' (SADS) – a means for anonymous yet official disclosure of assault;
- Providing and developing effective education and prevention programs (Ditto's Keep Safe Adventure) to empower children and young people and increase their resiliency to child sexual assault;
- Provision of professional training and workshops; including specialised training for therapists and professional development for organisations that work with, or who's core business involves children;
- Advocating for survivor's rights through participation in legislative review and reform (successful campaigns include: the introduction in Queensland, New South Wales, Western Australia, Victoria and South Australia of Continuing Sentences for dangerous paedophiles; the closure of Queensland's Department of Family Services; the introduction of Section 189, the right for children and their families to speak publicly; the introduction of the Amber Alert system in Australia; the instigation of various formal Inquiries; and successful amendments to legislation);
- Proactive involvement in cyber-safety initiatives, including a presence on the Federal Government's Cyber-Safety Consultative Working Group;
- Raising community awareness through participation in public debate and in the accumulation, production and dissemination of relevant research material; and
- Supporting the work of other agencies (government and non-government) and individuals in their work around child sexual assault.

Background to our Submission



Our work supporting victims of child sexual assault has provided us with a wealth of experience and knowledge around the failures of the past and current family law legislation and procedures in protecting children who have been or who are at unacceptable risk of exposure to child sexual assault by a parent or through an un-protective parent.

While we are aware the issues facing the Family Law Court of Australia, and those addressed in the consultation paper surrounding the [Family Law Court of Australia](#), are far wider than those confined to the focus of Bravehearts, we would stress that the bulk of this submission is never-the-less centred around the issue of child sexual assault.

As discussed on Page 8 of this submission, we have consistently lobbied our position that child sexual assault is a unique crime and as such needs to be considered separately to other issues of abuse, neglect and harm perpetrated on children and young people and this position has now been adopted by COAG and is captured in Outcome Six of 'The National Framework for the Protection of Australia's Children'.

To put our submission in to context, we provide the following facts surrounding child sexual assault:

Prevalence:

- It is estimated that 1 in 4 girls and between 1 in 7 and 1 in 12 boys are victims of sexual abuse. (James, 2000).
- Girls and boys of all ages are sexually abused and victims are sometimes toddlers, young children and even babies. (NSW Child Protection Council, 2000)
- Research shows a staggering 45% of women aged 18-41 were sexually abused as children by family members (30%), friends or family friends (50%) or strangers (14%). 75% of the abuse involved some contact, most of which was shockingly severe. (Watson, B., Griffith University, Herald Sun, 9th October, 2007)
- Based on a review of research conducted on child abuse between 2000 and June 2008, researchers estimate that... between 5 and 10% of girls and up to 5% of boys are exposed to penetrative sexual abuse, and up to three times this number are exposed to any type of sexual abuse. (Gilbert, Spatz-Widom, Browne, Fergusson, Webb & Janson, 2009)

Offenders:

- Most children know the perpetrator with studies estimating between 10-30% of offenders were strangers. (National Child Protection Clearinghouse, 2005)
- Non-biological family members (stepfather or mother's defacto) are disproportionately represented as sex offenders. For example, Russell (1989)

reported that girls living with stepfathers were at a markedly increased risk: 17% had been sexually abused compared with 2.3% of girls living with biological fathers. (National Child Protection Clearinghouse, 2005)

- Women do sexually offend against children. Females do sexually abuse in a small proportion of cases, approximately 5% of female victims and 20% of male victims experience sexual abuse perpetrated by a female (Finkelhor & Russell, 1984). Female sex offenders are responsible for 6% of all reported cases of sexual abuse against children. (ChildWise study, cited in The Australian, 7th March 2006)

Disclosure & Reporting:

- In 98% of all child abuse cases reported to officials, children's statements were found to be true. (NSW Child Protection Council, cited in Dymrna House, 1998)
- About half of the victims of child sexual abuse never report the abuse to another person and many do not disclose until they reach adulthood. (Queensland Crime Commission & Queensland Police Service, 2000)
- One in five parents who were aware that their child had been sexually abused did not report the abuse. (Smallbone & Wortley, 2000)
- One in three people in NSW suspect a child they know has been abused but 43% of those did not report the abuse to authorities. (Department of Community Services, 2006)

Convicting, Treating & Managing Sex Offenders:

- Only about 17% of reported sexual offences result in a conviction, a figure consistent with data from other States and overseas. (Queensland Crime and Misconduct Commission, 2003)
- Less than 2% of cases reported to police, where the offender is a female, result in a jail term, compared with 16.5% of cases involving men. (ChildWise study, cited in The Australian, 7th March 2006)
- 90% of reported sex assaults do not end up in convictions. (Fitzgerald, 2006)
- Only 17% of reported sex assaults end up in court. (Fitzgerald, 2006)

National Framework for Protecting Australia's Children

In addition, we would like to highlight the 'Protecting Children is Everyone's Business: National framework for protecting Australia's children 2009-2020' document endorsed by all members of the Council of Australian Governments on 30th April 2009 (enclosed).

The Framework's relativity to the current submission is clear under Supporting Outcome 1 of the Framework, which specifically states:

"Upholding children's right to participate in decisions that affect them is a key signal of valuing and supporting children. In the context of child welfare, this is particularly relevant in judicial proceedings in care and protection, juvenile justice and family court matters, and in child protection and out-of-home care services."

Prioritising the Safety of Children



Best Interests of the Child

Bravehearts supports the inclusion of Item 13 of the . It is our position that at all times the best interests of the child is paramount, and that this is particularly relevant in decision-making processes regarding the safety and protection of children.

We note that in relation to the current Bill, there are 4 Articles of the 'Convention on the Rights of the Child' which should underscore any Family Court of Australia proceeding where the welfare of a child is considered. These are (our emphases):

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will,
Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis,

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views in accordance with the age and maturity of the child.
2. For this purpose, the , either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 39

States Parties shall take _____ to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Both historically and within the current system, the _____ as promoted through the ‘Convention on the Rights of the Child’ have not been prioritised by the actions of the Family Court of Australia. While the Family Court has previously articulated an emphasis on ensuring the protection of the best interests of children, this has repeatedly not evidenced in the decisions and actions of the Court.

This has been clear in the impact of the shared parenting laws introduced by the Howard Government, where parents have seen that the desire to ensure ‘shared time’ has been given predominant weight in the decisions within the Family Court. While shared parenting was articulated as meaning “shared responsibility” for children, it manifested as “shared time”. While we agree with the intention that children benefit from having both parents in their lives, this does not hold true when one parent is acting abusively or harming a child, or is unable or unwilling to act protectively. Experiences of parents where there are allegations of child sexual assault, child abuse or harm have been that the shared parenting laws serve to override the need to ensure the safety, protection and wellbeing of children.

While we commend the introduction of Item 13, Bravehearts emphasises the need to ensure that, in the practice of decision-making, the rights of children as defined under the Convention are in fact acted upon.

Prioritising Safety

We note that under the Family Violence Bill, the two primary considerations for determining the best interests for children are retained:

- a) the benefit to the child of having a meaningful relationship with both parents
- b) the need to protect the child from physical or psychological harm and/or from exposure or subjection to abuse, neglect or family violence,

but where there is a conflict between the two, the need to protect the child (b) is given primacy in the decision-making process (Item 17).

While we commend this amendment, Bravehearts advocates that while there are many factors that need to be considered, there should only be one primary consideration, being:

“The need to protect the child from physical or psychological harm and/or from exposure or subjection to: sexual assault, exploitation or harm; physical, psychological or emotional abuse; neglect; or family violence”.

In addition to this, the legislation should include a list of factors that should also be considered and that courts should give relevant regard to these - dependent on individual matters. This list should include the benefit to the child of having a meaningful relationship with both parents (as well as their extended family).

Allegations of Harm and Prioritising Safety

Bravehearts believes that under the prioritising of the safety of children, consideration should be given to legislating that where there are allegations of child sexual assault, child abuse or neglect, that supervised contact with the subject parent be mandatorily awarded and precedence be given to referring the allegations to the authorities (inclusive of an order for counselling for all parties) for immediate investigation.

The awarding of supervised contact, until such time that the allegations have been investigated, allows for the safety and protection of the child to be foremost, while allowing for a continued relationship with the subject parent.

We further submit that too often, the Court is refusing to accept, disregarding, 'demonising', or ignoring testimony provided to it by external parties and/or failing to give appropriate weight to the testimony of those professional persons. We submit that the testimony of such persons should be sought out and given weight (on the balance of probabilities) to help in the assessment of any potential risk to a child. In particular we refer to police and child protection workers but we believe there is valid argument to cast the net more widely.

As such we ask you to consider the introduction of what we call 'Community Assessment Reports'. Opinions (based on observations, assessments, investigations and other intelligence) of professionals such as counsellors, social workers, teachers, medical practitioners, police and child protection workers who have knowledge of the child and the family's background or current situation should be sought and due weight given to them by the Court.

There should be a valid reason for a court to disregard advice provided to it by qualified persons (such as conflicting professional opinion) rather than mere judicial discretion. We have too many instances where judges actually slander child protection workers or therapists simply because they simply do not accept their testimony or assessment. This could be ameliorated by the use of a Community Assessment Report to be compiled by the Child Representative and provided to the Court.

We would also like to take this opportunity to raise the practice of Courts prohibiting parents/carers from seeking medical advice and attention, and/or therapeutic help for the child and doing so without the professional assessment to support such decision and in fact, in the face of conflicting professional opinion. We submit that only in a very small number of cases would a judgement of this nature be in the best interests of the child.

Redefining 'Family Violence'



Impacts of Family Violence on the Child

Bravehearts supports the broadening of the definition of family violence to better identify the various behaviours and acts that constitute family violence.

We note consideration given in the Consultation Paper to understanding the impact of family violence on children and young people. We would further state that the impact of family violence on children is not prescribed; the complexity of the impacts of any form of harm on children is compounded when perpetrated by a parent.

Commonly, we hear of matters where doubt on the presence of harm is expressed by the Court because the child has articulated their love and desire to see the subject parent. The complexity of the relationship between an abusive parent and their child often means that the child is torn between their love for their parent and the physical or emotional hurt that the parent perpetrates. So, while a child may express a desire to be with a parent, consideration needs to be given to factors of safety and protection from harm as contact (particularly unsupervised) may not ultimately be in the child's best interest.

Identifying ‘Abuse’ of a Child



Recognising the different forms of Child Harm.

Bravehearts supports the broadening of the definitions of ‘child abuse’ under the legislation to cover the wide range of harms that may be experienced by a child. We particularly commend the separation of child sexual assault from other forms of child abuse, harm and neglect.

In working with the Federal Governments Working Party in the development of The National Framework for the Protection of Australia’s Children, Bravehearts successfully lobbied to have child sexual assault recognised as distinct from child abuse and neglect and requiring of a distinct response and specific resourcing.

Traditionally, child sexual assault has been ‘lumped in the same pot’ as child abuse and neglect. However, while all forms of child harm are damaging to children it is important to take child sexual assault ‘out of the ‘pot’ as the dynamics are fundamentally different. Recognising these differences is necessary to effectively address, respond to and prevent child sexual assault.

Some of the important differences include:

- Acts of **child abuse and neglect** are generally unplanned, re-active and are generally aligned with socio-economic and/or family dysfunction issues and are comparatively predominant in areas of social disadvantage.
Sexual assaults against children are almost always pre-meditated, involving predatory acts of grooming, manipulation, self gratification and exploitation, and occur widely across the various socio-economic areas.
- **Child abuse and neglect** more commonly involve the infliction of pain, violence and aggressive force.
Child sexual assault more commonly involves manipulation, intimidation and sexual contact.
- **Child abuse and neglect** are nearly always perpetrated by a parent or primary caregiver (in an estimated 90% of cases), including a significant proportion of females.
Child sexual assault is generally perpetrated by a male (in excess of 90% of cases) and more likely to be perpetrated by someone known to the child or their family (research varies but commonly finds between 85% and 95% of the time). Of those offenders known to the child most commonly the offender is not living with the child (approx 70%).
- **Child abuse and neglect** offences are almost always intra-familial.
Child sex assault offences are commonly extra-familial as well as intra-familial.

Refining the Definition of Child Sexual Assault

Bravehearts is concerned that the definition of child sexual assault included in the Bill is not inclusive of common forms of this harm. The definitions under Item 1 state:

abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child; or
- (b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.

Bravehearts is pleased to see that the definition of child sexual assault includes acts where the child has been “used, directly or indirectly”, however we believe that the definition under Item 1 does not recognise behaviours where a child is deliberately exposed to sexual images, acts or behaviours, where the child is not “used, directly or indirectly”.

Bravehearts recognises that behaviours constituting child sexual assault may include those where sexual gratification by the aggressor or the sexual objectification of a child may not be the focus. For example, children and young people may be the victim of sexual assault when deliberately exposed to sexual images, acts and behaviours or where the other person is not protecting the child or young person from exposure to sexual images, acts and behaviours.

The impact of such exposure can be as traumatic and there is most definitely evidence of long term impacts on children’s future sexual or adult relationships, as well as their ability as adults to recognise harmful behaviours and protect their children from harm.

We would also recommend that consideration be given to the inclusion of provision in the definition for when a parent is unwilling or unable to act protectively. Just as ‘serious neglect’ is a form of abuse, so too should the ‘unwillingness or inability to protect a child from sexual assault or harm’ (for example, a parent who continues to allow their children contact with a partner who is a convicted sexual offender). Additionally, we submit, in light of the COAG agreed terminology within the National Framework for the Protection of Australia’s Children, the change of terminology of ‘Notice of Child Abuse or Family Violence’ to ‘Notice of Child **Harm** or Family Violence’.



Obligations Relating to the Best Interest of the Child

As outlined in the Consultation Paper, Advisers, such as legal practitioners, family counsellors, family dispute practitioners, family consultants and child representatives, play a crucial role in the family law system, particularly where there are concerns, allegations, or substantiated child sexual assault.

In principle Bravehearts supports Items 22-24 however, as outlined above under 'Prioritising Safety' (see Page 5) we would advocate that the primary consideration under the listed obligations (Sect 60D) be:

“The need to protect the child from physical or psychological harm and/or from exposure or subjection to: sexual assault, exploitation or harm; physical, psychological or emotional abuse; neglect; or family violence”

and that the remaining considerations be considered secondary to prioritising the child's safety and protection.

Training and Education on Child Sexual Assault

Bravehearts believes that there is a pressing need to ensure that professionals working within or supporting the family law system undergo extensive training and education around the dynamics and realities of child sexual assault. Within this we would include, judicial officers, legal practitioners, family counsellors, family dispute practitioners, family consultants and child representatives.

The dynamics of child sexual assault, in particular the grooming process, the indicators, the impact on the child and the nature of the secrecy and silence that surrounds this type of offending, are unique. When there is a lack of an understanding of the realities of child sexual assault, victims of this crime and parents seeking to protect their children will continue to be let down by the Family Court of Australia.

Bravehearts already provides education workshops to professionals who work with children and young people to assist in the protection of children in their care, and we believe it is absolutely imperative that similar, comprehensive training be undertaken by those working or supporting the family law system.

Bringing Evidence of Violence and Abuse to Court



Disclosure

We commend the inclusion of Item 29.

It is our position that any family law practitioner made aware of allegations of child sexual assault, child abuse or family violence, should be mandatorily required to report concerns to the Family Law Court and encourage the person raising the allegations to complete a Notice of Child Abuse or Family Violence.

As noted earlier, we would also recommend, in light of the COAG agreed terminology within the ‘National Framework for the Protection of Australia’s Children’, the change of terminology to ‘Notice of Child **Harm** or Family Violence’.

Bravehearts has heard many stories where parents concerned about child sexual assault, child abuse or family violence have been actively discouraged from submitting a Notice of Child Abuse or Family Violence by legal representatives.

Clients have told Bravehearts that they have been advised against submitting the form by their legal representatives for a variety of reasons; including that that they are unable to submit unless there are supporting child protection authority records. In addition, some clients have been discouraged through legal advice as they have been told that submitting the Notice of Child Abuse or Family Violence without documented proof or substantiated harm will go against the parent as they will be seen to be an ‘unfriendly parent’.

It is essential that this perception be challenged and that parents feel supported in their disclosure of concerns (see next Section: “Removing Disincentives to Disclosing Violence”).

Involvement of Child Protection Authorities

Bravehearts supports Item 21, imposing an obligation for disclosure if the child is, or at some time has been, the subject of a notification or investigation by a State or Territory child protection authority or if the child is or has been the subject of a child protection care order.

We would go further and impose equal obligations on police and the child’s health care professionals.

Removing Disincentives to Disclosing Violence



Barriers to Disclosing Child Sexual Assault

Systems, such as the Family Court of Australia, which have a child protection role, must encourage and support the notification of concerns. The Court needs to understand and recognise that child sexual assault is a complex crime and as such, a child's reluctance to speak out or the absence of substantiation does not mean that the offence did not occur.

Unfortunately with the issue of child sexual assault, harm to children is often shrouded in silence and secrecy. There are many barriers to children disclosing harm and these are compounded when the offender is a primary caregiver.

Offenders usually put a great deal of effort into ensuring that a child remains silent. Apart from promises, threats and bribes, offenders also take advantage of the child's powerlessness by presenting a distorted or false view of what is happening. Some of the ways offenders 'trick' children into secrecy include convincing the child that:

- They are somehow responsible.
- Others will blame them.
- They will be punished.
- They will be to blame if the offender goes to jail.
- They will be to blame if the family breaks up.
- They will be to blame if others in the family are upset.
- They are bad in some way and this is why the assault happened in the first place.
- They will not be 'special' anymore.
- No one would believe them if they told.

Following on from this, some of the reasons children don't tell are:

- They often feel it is their fault because they let it happen.
- They feel guilty about their body's natural reaction to sexual activity (even though this is beyond their control).
- They feel disclosure may cause family problems or breakdowns.
- The offender may be someone the child/young person heavily relies on.
- They fear they will be blamed, punished or not believed.
- They fear they will be separated from their homes and their families if they speak out.
- They fear disclosure will cause harm to someone or something they love and care for, such as family members or pets.

In addition, even when a disclosure has been made, there are considerable difficulties for authorities in substantiating harm.

Unfriendly Parent Characterisation

The 'friendly parent' principle evident within the Family Law Act is extremely problematic. As noted above, it has, in practice, resulted in many protective parents being discouraged from disclosing concerns about child sexual assault, child abuse and/or family violence to the Court.

The removal of paragraph 60CC(3)(c) and subsections 60CC(4) and (4A) are supported by Bravehearts.

Cost Orders

Bravehearts supports Item 37 and the removal of the mandatory cost order provision. As noted in the consultation paper, Section 117 is sufficient to respond to any false allegations or false denials of harm.

Courts Enquiry About Child Sexual Assault, Child Abuse and Family Violence

Bravehearts wholly supports Item 32 requiring Courts dealing with parenting orders to enquire about past child sexual assault, child abuse or family violence and the potential future risks.

Immunity from Costs Orders for State and Territory Welfare Authorities



Encouraging Collaboration

Bravehearts supports Item 36 amending Section 117 to provide State, Territory and Commonwealth child welfare authorities and officers with immunity against costs.

Bravehearts would advocate for a stronger stance that provides that child welfare authorities are unable to refuse a request to intervene, through a mandatory order. We believe that such a provision will ultimately be in the best interests of the child in ensuring that those who are in a position to investigate and support a child are engaged in that responsibility.

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