Bravehearts
Educate Empower Protect Our Kids

Our **Mission** is to prevent child sexual assault in our society.
Our **Vision** is to make Australia the safest place in the world to raise a child.

17/02/17

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To The Honourable Diana Bryant AO
Chief Justice of the Family Court of Australia
GPO BOX 9991
Melbourne VIC 3001

Dear The Hon. Chief Justice Diana Bryant AO,

We write regarding your response to the telling testimonies by victims and whistle-blowers aired on Ch 9's *A Current Affair* program about the failings of the Family Law 'System'.

As you are aware, Bravehearts is calling for the current Royal Commission into Institutional Responses to Child Sexual Abuse to look into this collective of institutions inclusive of not only the Courts but also including police, child protection, experts, lawyers etc. with a view to progressing transparency, accountability and of course, solutions.

It is our view that only a properly constituted Federal Royal Commission is capable of navigating Section 121 of the Family Law Act and the other complex constitutional issues as well as thoroughly investigating the jurisdictional issues between the State and Federal stakeholders, examining the complex legal frameworks, separation of powers issues, and the application of the international conventions.

Only a Royal Commission will help fix the ongoing failures of the current system to adequately protect children in the future. The time is right now, if for no other reason than the economic one, the Royal Commission infrastructure is built and is ready to go; and focus is firmly on child protection rather than parental rights. This inquiry must be inclusive of the Family Court, report writers, children's lawyers, supervisors, experts, together with the state systems of police and child protection.

It is in the public interest that Bravehearts recently collated video testimonies from devastated parents, young people and whistle-blowers, many of whom have risked a great deal to speak out about their experiences in the Family 'Law System'. These harrowing testimonies show children at risk of harm following decisions made within the Family Law System and offer just a glimpse into the systemic failures occurring on a daily basis. This film serves to underpin the urgent need for reform in this system.

We know that in some cases our most vulnerable little Australians are being sent to live with, or spend time with known sex offenders and known abusive parents, leaving the shattered and protective parent asking why?

We cannot continue to tinker at the edges of a broken system. There are far too many poor outcomes due to a combination of failures, which ultimately culminate at the exit door of the family courts.

The fact is that while those in positions of power procrastinate, kids are dying and families are being ripped apart.

Please note that we are not seeking this Royal Commission to focus solely on the 'Courts' rather exposing failings in the 'System', inclusive of the service providers to the Courts plus the State and Territories' Police and Child Protection systems. Collectively the System is broken and is killing and/or traumatising children and their protective family members. This is our concern and we will not stop fighting for the safety of these children regardless of how annoying or inconvenient it may be to anyone, or any process by which this system is governed.

It is with this in mind that we feel it is necessary to respond specifically to some of the comment in your letter to ACA, in an attempt to clarify our position:

The public should understand that when the Family Court deals with cases involving allegations of sexual abuse - which are denied - they are the most contestable cases. ***They are those in which the police have interviewed the children and found no evidence on which to prosecute.***

Police operate on 'beyond reasonable doubt' to prosecute in the criminal court. Police nor DPP have any responsibility or mandate to access matters on the 'balance of probabilities'.

The High Court has made clear that the Family Court however must operate under 'balance of probabilities'

***M v M* (1988) 166 CLR 69**

"20. But it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence."

They are the cases in which the Department of Child Welfare have investigated and found no reason to intervene to protect the children.

The child welfare departments of every State and Territory in Australia are failing. Statutory child protection departments only intervene in those matters where both parents are unwilling or unable to protect the child. Their failure to intervene is, more often than not, in no way connected to the veracity of the complaints against the child. If there is a parent willing to protect then there will be no intervention by Departments of Child Welfare. In fact, case loads are so high right around the country that most matters don't reach the threshold of intervention even where there isn't a parent willing and able. The failure to intervene does not mean that the child is safe.

We understand that many people who have contacted Bravehearts, that state agencies often only carry out cursory investigation if that; because they know that whatever their findings may be, the Family Court can disregard and dismiss them and frequently do.

The Court's task, not an easy one, is to hear and examine the evidence, including that of the parties and to reach a finding or findings about the evidence and whether conduct complained of did or did not occur. ***Whether or not a finding one way or another can be made (the standard being the balance of probabilities) the Court must assess from the evidence whether there is an unacceptable risk to the child or children before making any orders.***

Bravehearts understands that the task for the Court is not an easy one and made more so by the failure of the System to work cohesively. However, too often the system will disregard the fact that

the child may have reported or disclosed abuse to numerous adults including professionals such as doctors, psychologists, teachers, family consultants, experts etc. that would meet the balance of probabilities test but instead are dismissed or disregarded by Family Law System including the courts.

There is no culture of finding or not finding sexual abuse has occurred.

This statement is completely incorrect. As part of our campaign, a former family court barrister and others have given evidence/testimony of how this occurs on a regular basis. Your own statement acknowledges that: "*its (Family Court's) task is to determine whether there is an unacceptable risk of abuse (or other harm) from a particular set of orders being sought.*" These things logically go hand in hand and so too the culture that drives this assessment.

"..so that the public will have all sides of the story and understand how the judge reached the decision complained of."

How can the public get through the iron curtain that is steadfastly wrapped around this Court? The media cannot report about it, children and protective parents are terrified and so too are the lawyers who want to speak out. Family Court judges are reaching decisions too often with insufficient, inaccurate, and unqualified advice. We are not suggesting that this lies solely at the feet of the Court. We know it accumulates there. There is no training required for those people the court assigns to investigate, write reports, provide services etc., the very people who will feed the information to the Court that will ultimately decide the fate of these children and their protective parent. It is unbelievable, in the face of years of controversy and complaint, that there has been no insistence from the Court hierarchy to ensure this training takes place.

The allegations remain for the Family Court to consider and its task is to determine whether there is an unacceptable risk of abuse (or other harm) from a particular set of orders being sought.

The Family Court lacks the expertise and/or expert information to do this. Nobody is listening to the children. In order that the Family Court exercise its duty of care in determining whether there is an unacceptable risk of abuse (or other harm) the Court is relying on Court selected and appointed 'expert' opinion. One of these experts', report writer Chris Rikard-Bell has publicly conceded to not being an 'expert' in child sexual assault, yet our current understanding is that the Court continues to seek and accept his 'expertise' despite alarm being expressed by the child protection community. In so doing, the Court continues to put children at unacceptable risk of abuse (or other harm), not protect them from it.

Rikard-Bell, recently told the ABC he believed about 90 per cent of sexual assault allegations made during highly conflicted Family Court proceedings were 'false' despite research to the contrary. The claim has alarmed experts in childhood behaviours everywhere and those who work in the family law system, especially because Rikard-Bell says he has written up to 2,000 medico-legal reports.

- http://www.abc.net.au/radionational/programs/backgroundbriefing/in-the-childs-best-interests-v2/6533660
- http://www.theaustralian.com.au/national-affairs/the-family-courts-dilemma-in-cases-of-child-sexual-abuse/news-story/5bfb5689fb918f05005e56747b21f5b2

Most of these cases are handled in the Magellan List. This means that they will be dealt with more expeditiously than other cases and will have an Independent Children's Lawyer (ICL) appointed as a matter of course and the ICL 's costs of representation will not be capped by Legal Aid commissions.

Many ICL's are in fact, too often failing these children. Bravehearts has collated evidence indicating that generally ICL's are not trained in child sexual assault and in many cases do not even meet with, or speak to the child before making recommendations to the Court. These children need an advocate, not a lawyer.

The law is relied upon almost exclusively by the hierarchy to produce the solutions, but with 'proof' being so evasive, and children being so vulnerable, the real answers are equally to be found in social responses.

Unfortunately for reasons I do not understand, Bravehearts have consistently refused to identify the complainants (despite being assured of anonymity) so the Court is in a position where it cannot respond to individual assertions. I have no doubt the public in general would wish to be able to understand both sides of what is being asserted and to be able to read the judgment and decide for themselves whether there is any reason to be concerned about the manner in which the Court deals with these cases. That judgment cannot be made where the complaints are made under the cloak of secrecy and the Court is denied the opportunity to respond to the complaints.

The protective parent/s are punished by the Court if they complain or demand justice. Inviting them to out themselves will only result in further punishment to them and their children – and the Court knows this is true. Even the lawyers routinely advise their clients not to raise matters of allegations of child sexual assault. They know too by experience, that parents who do are punished, their mental health questioned, their children removed. Are we to understand that the Chief Justice is unaware or disbelieving of this?

Section 121 has gagged and bound the very people who have approached Bravehearts in fear for the safety of their children. The cloak of secrecy you hold up as belonging to us actually belongs to you – every thread of it. These traumatised people are terrified of the Court and the Iron Curtain surrounding it – the one that hurts them, disbelieves them, which promises justice and delivers devastation. They don't trust you and for good reason. They will only trust a Royal Commission and it is only a Royal Commission that can transparently and independently make judgements around the veracity of complaints.

Since becoming Chief Justice in 2004 I have ensured that all judgments are published (with appropriate protection of identity) so that the public can see how the judges decide the cases before them. Connecting the cases complained of with the published judgments is part of that transparency.

Contrary to this statement, the truth is that not all judgments are published with many people suggesting those that are, are cherry-picked. Many are `sealed' and held in Court Registries and are not open for public scrutiny.

The family courts own website states that 'most' or 'virtually all' judgements are published, this is very different to "ALL".

*Quote from family court Australia website, "It commits the resources required to ensure that **most** final judgments delivered are anonymised and published consistently with section 121 of the Family Law Act 1975 (Cth). **Beginning in 2007 virtually all judgments**, after anonymisation, are published in full text on the Australasian Legal Information Institute (AustLII) website".*

Hence I reject any assertion that the Court has any culture of inappropriately failing to find sexual abuse allegations proven, and remind readers what I have already said: that the cases that come for hearing in the Family Court are the most contestable. It is inevitable that some will be proven and some will not.

Matters before the Family do not need to be 'proven'. This is not a Criminal Court, there must only be concern around an unacceptable risk to the child on the balance of probabilities. We know that sexual crimes against children are almost impossible to 'prove' to the test required by the criminal courts. The Family Courts however, must act in the best interests of the child, heavily weighted toward the voice of the child, they must abide by the UNCROC and listen to these children and to those professionals who work with them as well as information extracted from the past behaviours of parents, to properly assess the potential risks to the child based on the balance of probabilities. It is critical that the system is capable and willing to listen skilfully and professionally to the audible and behavioural voice of the child.

The research is clear, most children do not disclose sexual harm or abuse during childhood, especially if the perpetrator is a parent or family member. If they do disclose we should listen and take this seriously. Children who are not believed and/or supported when they disclose suffer greater trauma throughout their lives as a direct result. Our systems for protecting children need to understand that it is imperative that when a child does disclose the system and those working in it need to respond accordingly.

Currently children are disclosing, often to professionals such as teachers, doctors and therapists who report these disclosures and evidence, but their disclosures are not being taken seriously by the Family Court System.

Chief Justice, our motivation is not to attack any individual or institution but rather to advocate for and protect children. We believe there is no other way to finally expose the dangerous practices and systemic dysfunctions other than with the powers of a Royal Commission.

We will not give up until the children of Australia get the Royal Commission and the reform their human rights demand.

Kind Regards,

Hetty Johnston AM
Founder and Executive Chair