Can We Accept the Acceptable?
Evidence and procedure in child sexual abuse cases in recent Australian law

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In an earlier article (Bates, 1990), it was suggested that the test enunciated by the High Court of Australia in *In the Marriage of M* (1988) F.L.C. 91-979 for denying custody or access in cases where there had been allegations of child sexual abuse was inappropriate. In that case, it will be remembered, the High Court stated (at 77,081) that:

> To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

As pointed out in that article,

> ...the notion of unacceptable risk is unlikely to commend itself to interested parties and pressure groups as it is so clearly a subjective test. Thus, it might be that any risk of child sexual abuse occurring or recurring could legitimately be described as unacceptable, given the high level of community abhorrence. On the other hand, it could well be argued that there might be some generally acceptable level of risk, a view which would be unlikely to find favour with other groups.

To put the matter another way, to whom is the risk to be unacceptable? As will be seen from later in this article, the very subject of child sexual abuse has, probably inevitably, spawned entrenched and intractable points of view which, in turn, tend to obfuscate the realities of the situation.

The purpose of this article is to examine particular developments in Australian law concerning child sexual abuse and to seek to relate them to that initial test. At the outset, it should be said that the overall picture which is presented by these developments is, in this writer's view, far from happy or indeed, satisfactory. Further, in such a controversial area, it is all but impossible to dissociate substance from form, especially in respect to the procedures which have been utilised in connection with the ascertainment of child sexual abuse. Although such appalling instances as represented by the comments of Hollis J. in the English case of *C v C (Child Abuse: Evidence)* [1987] 1 F.L.R. 331 (Bates, 1988), have not as yet occurred, Australia is not without its own controversial and illustrative factual situations.

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...the very subject of child sexual abuse has, probably inevitably, spawned entrenched and intractable points of view which, in turn, tend to obfuscate the realities of the situation.

The first decision to which attention should be drawn is that of the Full Court of the Family Court of Australia in *Minister of Community Welfare v B.Y. and L.F.* (1988) F.L.C. 91-973. There, the parties' marriage had been dissolved in 1985, the wife being granted sole custody and guardianship of the two children of the marriage, the husband being granted access. Six months later, following problems with access, the wife applied for suspension of the husband's access or variation so that there was no contact between the parties at the time of handover of the children. In attempting to solve these problems, the wife had consulted a variety of individuals and organisations and one particular individual had become concerned that the daughter had been sexually abused by her father. That person contacted the South Australian Department of Community Welfare. This was treated by the department as a complaint that the husband had actually sexually abused the daughter even though the wife had made no such allegation.

In November 1985, a departmental officer told the wife that an allegation had been made by an unnamed informant that there had been inappropriate sexual behaviour between the husband and daughter. At that point, the wife instructed her solicitors that she would no longer grant the husband access. In consequence, the husband brought proceedings claiming a contempt of court. These proceedings were heard in March 1986 and the husband was granted supervised access. In April 1986, however, the South Australian Children's Court made an order placing the two children under the protection of the Minister, following an allegation by the department that the husband had sexually abused the daughter. In May 1986, the husband applied to the Family Court for the discharge of the custody order in favour of the wife. By this time, the Minister had intervened and ultimately appealed to the Full Court of the Family Court against various orders made at first instance. The Full Court consisting of Nicholson C.J., Baker and Maxwell JJ. dismissed the appeal.

In reaching that ultimate adjudication, the Full Court were particularly critical of a claim of privilege made by the Minister. On that issue, the Court commented that:

> ...for the Minister to endeavour to rely on doctrines of privilege in this case, was to do nothing more than seek to avoid the consequences of the disclosure of departmental incompetence with which the complaint had been handed. The Minister must accept responsibility for this departmental incompetence.

Although the substantive issue in *B.Y. and L.F.* was that of costs, the Court

did make a general comment on the total circumstances of the case; in their Honours' own words (at 77,045):

> ...there are aspects of this case which give rise to considerable disquiet. The method of investigation of the allegations was unsatisfactory and incompetent and led to a substantial injustice being done to the husband and wife and to the children themselves.

There can be no doubt but that these remarks are wholly justifiable. *B.Y. and L.F.* involved anonymous informants, actions being taken without any genuine evidence (the doctrine of constructive complaint has not yet been formally recognised by the law) and administrative ineptitude - all of which, if one version is to be believed (Bell, 1988) characterised the notorious Cleveland affair. The mother's action in finally refusing access to the husband after the Departmental officers' intervention was wholly predictable: it would indeed be a capable and percipient woman who could, under such circumstances, provide effective resistance to a Departmental initiative of the kind to be found in this most unhappy case.

The activities of the South Australian Department of Community Services were also considered by the Family Court of Australia in *In the Marriage of Y and F* (1990) F.L.C. 92-141. There, the parties had married in 1970 and separated in 1984. There were two children of the marriage, one born in 1982 and the other in 1984, who were in the custody of the wife in consequence of sole custody orders made in 1985. In April 1986, the children were placed under the protection of the South Australian Minister of Community Welfare after allegations of sexual abuse of the daughter by the husband were made. In 1987, when the allegations were found to be groundless, the husband was granted access to both children. The husband then sought sole custody of both children, and to that end, sought by way of subpoena, disclosure by the Department of Community Welfare of documents concerning the medical examination and social assessment of both children which had apparently been carried out by the Department after he had been granted access. The Department objected to the production of the documents on the basis of s.246 of the South Australian *Community Welfare Act* 1972. Burton J. upheld the Department's claim.

The first point to be made was that, as he himself pointed out (at 77,973), Burton J. had been the judge in the proceedings where the allegations made against the husband had been found to be groundless. In those proceedings, as he likewise pointed out, he had been critical of the methods of the Department of Community Welfare and of some medical practitioners who had examined the children. The first issue which arose was the fact that the section on which the Department relied was contained in State legislation, whilst Burton J. was exercising federal jurisdiction. This matter was overcome by reason of s. 79 of the Commonwealth *Judiciary Act* 1903 which provides that:

> The laws of each State, including the laws relating to the procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.

His Honour took the view that the relevant statutory provision, the *Community Welfare Act* 1972 s. 246, was concerned with a State law relating to evidence and was, hence binding on the court in the instant case.

The relevant provision stated that no officer of the Department of Community Welfare,

> ...or other person holding any office or position under this Act, shall, in any proceedings before a court, be compelled to give evidence, or produce any document relating to any matter in connection with which any officer of the Department or other person has in the course of his duties given advice to, or been consulted by, any person, except - (a) where the evidence or document relates specifically to the payment or non-payment of maintenance or financial assistance; or (b) where the evidence relates to, or the document constitutes, correspondence between an officer of the Department and a party to the proceedings who is not represented by an officer of the Department.

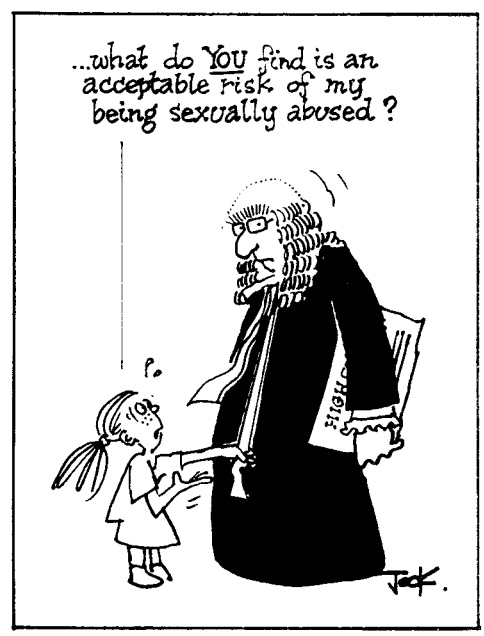
Burton J. took the view, as was clearly spelt out in the legislation, that the relevant officers were protected by the Act. He was also of the opinion that:

> ...any document created by an officer of the Department as a result of such discussions must of necessity be a document made in the course of his duties and must either relate indirectly or directly to advice given by the officer or to a consultation by the wife.

Further, the documents did not constitute "correspondence" within the meaning of s.246 (b) of the *Community Welfare Act*. On the general issue, Burton J. stated that:

> The officers of this government department are provided statutory immunity which as counsel for the Crown put to me at the commencement of his submissions is an enactment of the public policy considerations which Parliament considers necessary to maintain confidentiality between the Department for Community Welfare and those people which the department refers to as its clients. The section is there to promote candour and to encourage people to inform the Department of concerns without the fear of retribution.

Accordingly, the subpoena was struck out.



One cannot but have bivalent views about this case and the legislation which gave rise to it. Burton J. may be correct about the aims of the legislation, but there can be equally no doubt that the enactment may serve to obfuscate crucial inquiry into serious matters. The policy behind it should be questioned at a fundamental level. *B.Y. and L.F.* and *Y and F* do

not show the administration of child welfare in one Australian State in an especially good light.

Burton J. was, once again, the judge in the still recent case of *In the Marriage of D and B* (1991) F.L.C. 92-226, which concerns the role of psychiatrists in cases involving allegations of child sexual abuse. In *D and B*, the husband had applied for access to the two female children of the marriage. The wife had been granted interim custody of the children and the husband had weekend access by agreement. Early in 1988 - the parties had separated in 1987 - the wife formed the opinion that the elder daughter might have been sexually abused by the father. Supervised access then took place for some months until the condition regarding supervision was removed.

In March 1989, J, the younger daughter refused to go on access. In May of that year, the wife took J to a doctor who raised the question of whether or not there could have been any chance of sexual abuse or interference. Regular access continued until October but the children, J especially, appeared to be upset. The wife again took J to the doctor, but she refused to be examined. The wife remained convinced that the husband had abused J and informed the husband that the children would no longer be able to visit him. In August 1990, the children's separate representative made an appointment for the whole family to be seen by a psychiatrist. The children, at the husband's request, had been previously seen by another psychiatrist. The second psychiatrist was to investigate the possibility of sexual abuse and whether access should resume. The psychiatrist formed the opinion that there had been some measure of sexual impropriety between the father and J.

...The importance of this statement is that it reflects the legal, rather than diagnostic, fact finding process.

In granting the application, Burton J. considered (at 78,561) that the instant case was one where he could properly comment in general terms on the value of psychiatrists making an assessment of whether or not sexual abuse had occurred. The judge noted that properly conducted interviews by psychiatrists and other professionals were undoubtedly helpful in assisting the court in reaching its ultimate conclusion. He continued by saying that:

> What must be borne in mind, however, is that such a person is frequently not in a position to test the credibility of statements made to him by a parent or statements which he reads in a report or affidavit. The weight to be attached to those statements, reports or affidavits can only be decided after the maker of the statements has had his or her evidence tested in cross-examination. For a psychiatrist to rely upon such statements as a ground for forming an opinion renders the psychiatrist's opinion on the likelihood or otherwise of sexual abuse having occurred to be of little value.

The importance of this statement is that it reflects the legal, rather than diagnostic, fact finding process. In Australia, this is a discrepancy which has been noted by the late Sir Richard Eggleston (1983) in particular. It also emphasises the importance which common law, even in the family law area, attaches to traditional legal safeguards involving such matters as the attribution of weight to particular items of evidence (Bates, 1987). In turn, that view takes us to the nature of the tribunal which is required to adjudicate on these matters. At an early stage in the operation of the *Family Law Act*, the High Court of Australia, in *R to Watson; Ex parte Armstrong* (1976) 136 C.L.R. 248, had disposed of any suggestion that the Family Court's establishment had obviated the advisory system. Barwick C.J. and Gibbs, Stephen and Mason JJ. commented (at 257) that Watson, J's intervention in the proceedings at first instance:

> ...[did] not lend support to a charge of bias, but the active intervention of the learned judge at this interlocutory stage was consistent with his remark that the proceedings were not adversary proceedings but were in the nature of an inquisition followed by an arbitration. It is impossible to allow that observation to pass uncorrected. It indicated a basic misconception as in the position of the Court... These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.

The remarks made by Burton J. in *D and B* confirm that view of the nature of the Family Court of Australia.

Burton J. continued (at 78,561) by saying that the role of the psychiatrist is to draw from a child by proper questioning material which is relevant to whether or not sexual abuse has occurred.

> The role of the psychiatrist is not to attach weight to untested material which he has read or which is put to him by other people. It is the role of the court to make a finding based upon the whole of the evidence after it has been tested.

The judge went on to suggest that when a solicitor sends a family to a psychiatrist, the solicitor should impress upon the psychiatrist the nature of his true role.

> He is not being invited to try the case. He is being invited to use his professional training to provide material which can be of assistance to the court in making a final decision. If that includes an opinion by the psychiatrist based upon the material adduced from the child, then such an opinion may not be tainted by having been affected by reliance upon other untested material and could have appropriate weight attached to it. Opinion based upon a psychiatrist's evaluation of untested statements and reports merely prolongs a trial and does not assist the court.

On the one hand, one does not want unsupported allegations of child sexual abuse to carry unwarranted effect, but, on the other, one does not want offenders free to continue their malpractices.

In the event, Burton J. did not accept the evidence of the second psychiatrist that some sexual impropriety between the husband and J. was likely to have occurred. Accordingly, he was not satisfied on the balance of probabilities that the husband had sexually abused J. or that, on the available evidence, there was a risk of sexual abuse occurring if access were to be resumed. The judge was not satisfied that it was in the children's best interests to terminate permanently

their relationship with their father. He took the view that the parties and the children should receive further counselling but, specifically, did not consider any of the professional witnesses who had appeared in the case suitable to give such counselling. The reason for that approach was that they had given evidence for one side or the other in an extremely fiercely contested case.

As was suggested at the beginning of the article, the state of affairs disclosed by these cases is far from happy. Legislation and traditional legal principle seems to have been used to obfuscate, rather than enhance, the fact finding process. It is clear to this writer that much more needs to be done if the challenges presented by child sexual abuse for the legal system are to be met in Australia. On the one hand, one does not want unsupported allegations of child sexual abuse to carry unwarranted effect, but, on the other, one does not want offenders free to continue their malpractices. Although striking such a balance is difficult, it must be struck if children are to be protected and unwarranted allegations avoided.♦

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