Access Where Allegations of Sexual Abuse Are Made: Who Are We Protecting and From What?

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The relationship between the phenomenon of child sexual abuse and the fact-finding processes of the common law has always represented something of a dilemma. On the one hand, there is the immediate need to protect children from the actuality and the risk of such abuse and, on the other, to seek to ensure that the reputations and privileges of parties in custody and access disputes are similarly protected. Like problems may also arise in relation to cases where such matters end in criminal prosecution but it is beyond the scope of this paper to canvas those issues.

A major issue then, is protection, and it follows from this that the law must seek to devise appropriate and effective methods of ensuring that individuals are properly protected. That this is not always done will be readily apparent - instances of dubious standards of proof, clinical misfeasance and bureaucratic ineptitude are so well documented in the case law from various jurisdictions and in the literature as not to need rehashing. Yet the issue of protection recurs on an almost day to day basis and one must scrutinise the methods by which that crisis is sought to be avoided.

In recent Australian law there have been two inter-related matters which have attracted the attention of the Family Court in this regard and which also touch upon wider issues including the applicability of the trial process, the value of interdisciplinary input and the nature of the parent and child relationship itself. These two matters in order are: the applicability of supervised access and the use of psychological or psychiatric examinations.

Writing about supervised access in general, the Australian writer Burrett[1] has pointed out

> Lack of trust, which is common during the early post-separation period, and reluctance to share the children, rather than established deficits on the part of the access parent, are often at the root of

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1 J E Burrett, *Child Access and Modern Family Law: A guide for family law practitioners and counsellors* (Law Book Company, 1988) at p 52.

> demands for access to be supervised. More serious and lasting is when a demand for supervision stems from a lack of commitment to access in any form. The caretaking parent would really prefer there to be none, and may have been advised that they have insufficient grounds to seek a suspension of access.

Burrett does not directly deal with the question of supervised access and child sexual abuse, but it will be apparent immediately that the issues which she raises are especially relevant where allegations of child sexual abuse have been made in connection with custody or access disputes. Inevitably, in recent case law the issue has arisen in more than one Commonwealth jurisdiction.

A primary example is the decision of the Full Court of the Family Court of Australia in *In the Marriage of B*,[2] which raises many of the issues involved in a particularly graphic form. The facts in *B* were that the parties had married in 1980 and had separated seven years later. There were two children of the marriage, a boy (B) aged 6½ at the time of the hearing and a girl (T) aged 5½. The children remained with the wife after separation though the husband exercised regular access, on occasions for extended periods, during 1990.

In April 1990, the children began to exhibit behavioural problems immediately before access visits to the husband. These problems persisted after access and, towards the end of 1990, both children displayed symptoms such as disturbed sleep patterns, nightmares and bedwetting. In particular, the boy became preoccupied with his genitalia and that of male adults with whom he had association. The wife then contacted a child protection unit and investigations were conducted which included interviews with the children, which were usually videotaped. As a result of those interviews, the wife became convinced that both children had been sexually abused by the husband and, in consequence, refused access. The husband instituted proceedings for access in a Magistrates' Court where a compromise was reached, together with an agreement that the children be assessed by a child psychiatrist. The husband thereafter had access to the children, although supervised. However, the wife again became apprehensive regarding the children's behaviour and access was again suspended pending the children being interviewed by a child psychiatrist.

The trial judge gave close consideration as to whether there were explanations for the children's behaviour other than sexual abuse by the husband. In particular, he considered whether the

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2 (1993) FLC 92-357.

children could have been abused by other persons, have fabricated the evidence or whether innocent statements could have been misinterpreted. The Full Court[3] considered[4] that the trial judge had dealt with these matters in a logical and comprehensive manner. He had analysed the nature of the other evidence which suggested that sexual abuse had occurred. He applied the standard of proof which the High Court of Australia had laid down in 1938 in the well known case of *Briginshaw v Briginshaw*.[5] There Dixon J had said that

> reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequence flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

The judge then went on to refer to matters involving 'grave moral delinquency.' It should be said that the *Briginshaw* test has not been without practical difficulties in its implementation[6] but given the very serious nature of the allegations made against the husband, it is suggested that the trial judge was correct in adopting a high standard in the civil standard of proof. Nonetheless, he had admitted the possibility of grave error.[7] Ultimately, he rejected the husband's denials of the abuse and considered the risk of further abuse and concluded that, although supervised access was likely to involve some tensions and demands, there should be fortnightly access provided it was supervised by the wife or a woman friend of the wife. The wife appealed successfully to the Full Court.

Before seeking to analyse the Full Court's decision, it should be said that it is the present writer's view that *B* is quite the most important Australian decision on child sexual abuse since the High Court decisions in *In the Marriage of B*[8] and *In the Marriage of M.*[9]

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3 Fogarty, Baker and Purvis JJ.

4 (1993) FLC 92-357 at 79,772.

5 (1938) 60 CLR 336 at 362. For another recent application see *Taylor v L; Ex parte L* [1988] 1 Qd R 706.

6 See F Bates, '"A Metaphor for a Proof" - Of Evidence in Matrimonial Causes' (1972) 4 *U Tas L Rev* 58.

7 See (1993) FLC 92-357 at 79,773.

8 (1988) FLC 91-978.

9 (1988) FLC 91-979.

Although this commentator is far from happy with the test of 'unacceptable risk' which these cases laid down,[10] there can be no doubting their global importance.

The first issue which the Full Court in *B* addressed was the role of the Family Court when faced by allegations of child sexual abuse and a positive finding of abuse had been made. They first referred[11] to the decision of the Full Court of the Family Court of Australia in *In the Marriage of B*,[12] where it had been said[13] that

> it is not appropriate for Judges of the Family Court to conduct cases in which allegations of child sexual abuse have been made as criminal trials which seek to establish the guilt or innocence of one of the parties in relation to allegations of sexual abuse with the consequential result being that if the allegation be proved, access will be suspended whereas if the allegation be not proved than access will be ordered.

Their Honours continued by saying that the Court 'might'[14] make findings that the allegation of sexual abuse was proved, was not proved or there was insufficient evidence to make any determination, though any such finding would not necessarily be the determinant factor in the ultimate decision. It followed, the Full Court in *B* said,[15] that the issue for the Court was not whether a parent had actually abused the child but, whether in all the circumstances of the case, access should take place. Nonetheless, that did not preclude a positive finding of abuse where that was open on the facts.

On the issue of making a positive finding, the Full Court in *B* referred[16] to the High Court decision in *M*, where it had been said[17] that a court ought not to make a positive finding of child sexual abuse unless it was satisfied according to the standard which had

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10 F Bates, 'Evidence, Child Sexual Abuse and the High Court of Australia' (1990) 39 *ICLQ* 413.

11 (1993) FLC 92-357 at 79,777.

12 (1988) FLC 91-957. For comment, see F Bates, 'Child Sexual Abuse and the Courts: The Message from Custody and Access Cases - An Old Light on a New Problem?' (1988) 6 *U Tas L Rev* 87 at 98 ff.

13 (1988) FLC 91-957 at 76,923 per Baker and Maxwell JJ, Nicholson CJ concurring on that point.

14 Author's italics.

15 (1993) FLC 92-357, at 79,777.

16 Id at 79,777.

17 (1988) FLC 91-979 at 77,080.

been enunciated in *Briginshaw*.[18] The High Court had emphasised that if an allegation had not been made out according to that standard, that conclusion did not determine issues of custody and access. Indeed, the High Court had gone on to say that it was in 'all but the most extraordinary cases, that finding will have a decisive impact on the order to be made respecting custody and access.'[19]

The issue which arose from that dictum was the meaning of the phrase, 'the most extraordinary cases.' In *B*, the Full Court noted that the High Court had not made clear what that phrase meant. It followed that any attempt so to do by the Court in *B* might result in 'the setting down of examples by the Court [which] runs the risk of them becoming iron-clad and exhaustive categories.'[20]

At the same time, the Court did suggest that any list of 'extraordinary cases' might include situations where the parent has abused the children and seeks treatment, there is evidence of that treatment and the children wish to continue to see that parent. Nonetheless, the Court considered, whatever were the limits of the content of this exception, the instant case could not be said to fall within it. As noted earlier, the children had exhibited signs of trauma which the Court said were 'a result of the abuse'. Further, the female child had expressed a wish not to see her father, the father had not sought treatment or counselling and supervision had not appeared to protect the children in the past.

How much further the notion of 'extraordinary cases' is likely to take us is far from clear. On one level, one might hope that, in one sense at least, all cases involving child sexual abuse could be regarded as exceptional. However, that does not appear to be so.[21] In the circumstances of *B*, saying that it did not fall into that category seems fair but, at the same time, it also appears from the way in which the judgment was structured that there will be few cases which ultimately fit into that category. Given the features which the Court articulated, that seems likely, but I am far from sure that 'extraordinary' is an appropriate word to use in the present context. Thus, for instance, the Australian Family Law Council in a recent report[22]has urged that traditional terms such as custody and access

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18 (1938) 60 CLR 336.

19 (1988) FLC 91-979 at 77,081.

20 (1993) FLC 92-357 at 79,778.

21 See, for example, B Campbell, *Unofficial Secrets: Child Sexual Abuse - The Cleveland Case* (Virago Press, 1988).

22 Family Law Council, *Patterns of Parenting After Separation* (1992), at p 29 ff.

be abandoned.[23] The importance of language as indicative of power structures in law is by now well known[24] and the designation of situations which might normally be treated as, all being well, 'ordinary' should not otherwise be designated.

The Court then continued,[25] as given the preceding discussion seemed inevitable, by discussing the situation where there had been a finding of 'unacceptable risk' of child sexual abuse. The ensuing discussion by the Full Court in *B*, it must be said, merely confirms this writer in his earlier expressed view.[26] First, the Full Court noted that the test which had been initiated by the High Court in *M*[27] 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' was authoritative. That test, the High Court had also said, was aimed at achieving a balance between the risk of sexual abuse and the possibility of the child benefiting from parental access. The Full Court in *B* interpreted those comments as meaning that[28]

> where the Court makes a finding of unacceptable risk it is a finding that the risk of harm to the children in having access with a parent outweighs the possible benefits to them from that access.

That appears to be a direct application of the ordinary standard of proof in civil cases, as stated by Eggleston,[29] as 'more probable than not'. This, as will readily be apparent, does not take into account the *Briginshaw* test raised by the Court earlier in their judgment.[30] Whatever problems that test may raise, it is hard not to conclude that a high standard ought to be required in such cases.[31] Likewise, the facts in *B* suggest that any nominate and, perhaps

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23 That has, of course, already been done in the United Kingdom (*Children's Act* 1989 ss 8-11).

24 See, for example, P Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford, 1986), especially at pp 148 ff.

25 (1993) FLC 92-357 at 79,778.

26 See note 10 above.

27 (1988) FLC 91-979 at 77,081.

28 (1993) FLC 92-357 at 79,778.

29 R M Eggleston, *Evidence: Proof and Probability* (2nd ed, Weifenfeld and Nicolson, 1983) at pp 129 ff. See also *TNT Management v Brooks* (1979) 23 ALR 345.

30 *Briginshaw v Briginshaw*(1938) 60 CLR 336.

31 For a general comment, see F Bates, 'Strength or Intensity? - Some Reflections on the Modern Standard of Proof in Civil Cases' (1980) 27 *Chitty's LJ* 335.

intermediate standard - such as 'clear and convincing'[32] - would clearly have been met.

At the same time, the Court in *B* commented[33] that the High Court's conclusion, which they were forced to adopt, might only apply to unsupervised access. Indeed, the High Court had said in *M*[34] that 'in access cases, the magnitude of the risk may be less if the order in contemplation is supervised access.' The Full Court in *B* interpreted that dictum as not meaning that there was no unacceptable risk were supervised access to be ordered. At the same time, as the Court in *B* noted, that unacceptable risk did not exclusively relate to the risk of child sexual abuse occurring. The High Court had said that 'even in such a case there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes has sexually abused her.'[35]

It followed that if supervised access posed an unacceptable risk of whatever kind - physical, emotional or psychological - then supervised access should not be granted. In *M*, the High Court had also said[36] that the test of unacceptable risk was 'subservient and ancillary to the Court's determination of what is in the best interests of the child.'

In that view, the Court was reinforced by an earlier decision in *In the Marriage of Brown and Pedersen*,[37] where a differently constituted Full Court[38] had adopted[39] the statement of Lord Oliver in the House of Lords decision in *Re KD (a Minor) (Ward: Termination*

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32 See for example, *Murrillo v Hernandez* 281 P 2d 786 (1955); *Southwestern Bell Telephone Co v City of San Antonio, Texas* 4 F Supp 570 (1934); *In re Chappell* 33 NE 2d 393 (1941); *Hobart v Hobart Estate Co* 159 P 2d 958 (1945).

33 (1993) FLC 92-357 at 79,778.

34 (1988) FLC 91-979 at 77,081.

35 Ibid.

36 Id at 77,080.

37 (1992) FLC 92-271.

38 Ellis, Nygh and Bell JJ. For comment, see R Chisholm, 'Access: Principles, Presumptions and Practice: A Comment on *Brown and Pedersen*' (1992) 6 *Aust J Fam L* 176.

39 (1992) FLC 92-271 at 79,010.

of Access).[40] There, his Lordship had said that he could not

> conceive of any circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue. Whatever the position of the parent may be as a matter of law - and it matters not whether he or she is described as having a 'right' in law or a 'claim' by the law of nature or as a matter of common sense - it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child. If the child's welfare dictates that there be access, it adds nothing to say that the parent has also a right to have it subject to considerations of the child's welfare. If the child's welfare dictates that there should be no access, then it is equally fruitless to ask whether that is because there is no right to access or because the right is overborne by considerations of the child's welfare.

There are of course, various other dicta from various jurisdictions to the same effect.[41]

However, although the Full Court in *B* did not draw attention to it, Lord Oliver's judgment in *KD* went rather further when he stated that:[42]

> Parenthood, in most civilised societies, is generally conceived of as conferring upon parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities upon whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say, the welfare of the child.

The notion of parenthood as involving privileges and responsibilities, rather than rights (whatever that term might

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40 [1988] AC 806 at 827.

41 In Australia, see *Re A* (1982) FLC 91-284; *In the Marriage of Cotton* (1983) FLC 91-330; *In the Marriage of B[Access]* (1986) FLC 91-758 In England, see *Re E (SA)(A Minor) (Wardship: Court's Duty)* [1984] 1 WLR 150; *In re L (Child in Care; Access)* [1985] FLR 95.

42 [1988] AC 806 at 825.

mean),[43] is relatively new. But it has long appealed to the present writer[44]and has latterly become enshrined in sections 2 and 3 of the United Kingdom *Children Act* 1989.

On a broader basis, note should be made of the *United Nations Convention on the Rights of the Child.* Although that Convention, unlike the *Hague Convention on Civil Aspects of International Child Abduction*[45] has been ratified but not been incorporated into Australian municipal law, it is not without relevance. Thus, in *Murray v Director, Family Services, ACT*[46] Nicholson CJ and Fogarty J stated that:

> in cases where a convention has been ratified by Australia, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation.

The Convention, happily, is not silent on the issue of parental responsibility. First, Article 5 specifies that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capabilities of the child,

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43 Indeed, Lord Oliver, [1988] AC 806 at 825, had commented that: 'Such conflict as exists, is, I think, semantic only and lies only in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it. The word "right" is used in a variety of different senses, both popular and jurisprudential. It may be used as importing a positive duty in some other individual for the non-performance of which the law will provide an appropriate remedy, as in the case of a right to the performance of a contract. It may signify merely a privilege conferring no corresponding duty on anyone save that of non-interference, such as the right to walk on the public highway. It may signify no more than the hope of or aspiration to a social order which will permit the exercise of that which is perceived as an essential liberty, such as, for instance, the so-called "right to work" or a "right" of personal privacy.'

44 See F Bates, 'Redefining the Parent/Child Relationship: A Blueprint' (1977) 12 *U West Aust L Rev* 518.

45 See *Family Law Act* 1975 s 111B; *Family Law (Child Abduction) Regulations* 1989.

46 (1993) FLC 92-416 at 80,252.

> appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Second, and rather more emphatically, Article 18.1 requires States Parties to

> use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In Australia, that view has been rehearsed in a recent report of the Family Law Council,[47] which seeks to ensure that both parents are, after separation, involved in their children's development.

As the court properly pointed out,[48] *Brown and Pedersen* authoritatively puts an end to the line of judicial reasoning as represented by Australian cases such as *In the Marriage of Cooper.*[49] Custody and access proceedings, the Court emphasised in *Brown and Pedersen,*[50]were not to be regarded as adversary proceedings in the ordinary sense, but as an investigation of what order would best promote the welfare of the child. The example of *Cooper* is interesting and instructive: first, it was not a decision of the Family Court of Australia, but of the New South Wales Court of Appeal, in a transitional period. Second, inevitably perhaps, considerable reliance was placed on pre-1976 authority.[51] Third, it was specifically repudiated by the High Court of Australia when they rejected leave to appeal from the Full Court's decision in *Brown and Pedersen.*[52] On that occasion, Brennan J had said that, 'If it be the case that *Cooper* and other cases in the Family Court suggest that a non-custodial parent has a presumptive right of access, they are incorrect and cannot be followed.'[53] Finally, in *B* the court stated[54] that, the High

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47 *Patterns of Parenting After Separation* (1992).

48 (1993) FLC 92-357 at 79,779.

49 (1977) FLC 90-234.

50 (1992) FLC 92-271 at 79,011. See also *In The Marriage of M* (1988) FLC 91-979 at 77,080.

51 Including the well-known High Court decision in *Storie v Storie* (1949) 80 CLR 597.

52 Unreported, March 13th, 1992.

53 Though he continued by saying that: 'Equally, it is incorrect presumptively to deny access to a non-custodial parent. There is no presumption either way as a matter of law. The benefit to the child of maintaining a bond with a non-custodial parent is a matter of fact to which weight is given according to the circumstances of the case.'

Court's view notwithstanding, *Cooper* demonstrated the vulnerability of children's welfare to the value system of the decision makers. It may, of course, be that that is inescapable, but that risk surely ought to be especially eschewed in cases involving allegations of child sexual abuse.

In Australia there have been recent attempts to obviate that risk; first, there are the amendments to the *Family Law Act* made in 1991.[55] Inter alia, those amendments include a new s 64(1)(bb)(va) which directs the Court to have regard to, 'the need to protect the child from abuse, ill treatment or exposure or subjection to behaviour which psychologically harms that child.'[56] Further, ss 70BA and 70BB impose a mandatory obligation on the Court to notify a prescribed child welfare authority in cases where a party alleges child abuse or where a member of the Court personnel has reasonable grounds for suspecting that a child has been abused or is at risk of being abused. These additions are undoubtedly desirable but one must not be too sanguine as to their likely efficiency. Hence, as I have earlier pointed out,[57] existing provisions in the Act[58] which bear on the issue have been little used. Similarly, the Australian writer Wade, in discussing domestic violence generally, has suggested[59] that the State statutory provisions may be more readily used. Wade advances four reasons for his view which do not augur well for these amendments: first, he suggests that State police are sometimes rather uncooperative when asked to enforce Federal orders and few Federal police are available. Second, Family Court judges seem less willing to imprison for contempt than magistrates in lower State courts. Third, there are substantial delays in Family Court proceedings. Finally, it seems that proceedings under Federal legislation (ie the *Family Law Act*) do not take precedence over analogous State proceedings.

A further development noted by the court in *B*,[60] is the landmark decision of the High Court of Australia in *Secretary,*

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54 (1993) FLC 92-357 at 79,779.

55 For comment, see F Bates, 'Child Abuse and the Fact-Finding Process: Problems With Recent Commonwealth Decisions' (1992) 41 *ICLQ* 449 at 457 ff.

56 For the definition of 'abuse' see text following note 85 below.

57 See note 55 above, at 459.

58 *Family Law Act* 1975 ss70C and 91B.

59 J H Wade, *Australian De Facto Relationships Law* (CCH Australia Ltd, 1985), para 73-700.

60 (1993) FLC 92-357 at 79,779.

Department of Health and Community Services v JWB and SMB.[61] This is a case of substantial complexity and a detailed discussion of it is beyond the scope of this paper. However, in *Secretary, Department of Health and Community Services*[62] it was stated that the 1983 amendments to the *Family Law Act* 1975 'were intended to, and did, confer jurisdiction on the Family Court similar to the parens patriae jurisdiction ...' This, of course is an extremely wide jurisdiction and that point was particularly strongly made by Latey J in the English case of *Re X (a minor)*[63] where he had said that he could

> find nothing in the authorities ... to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature.

Although *Secretary, Department of Health and Community Services* was not directly in point (it was concerned with the authorisation for sterilisation of a young woman with a mental disability), the fact that a court of such high jurisdiction should have taken that view cannot be without significance. The Full Court in *B* also referred[64] to s 43(c) of the *Family Law Act* 1975 which refers to the need '... to protect the rights of children and to promote their welfare' and also[65] to Article 19.1 of the *United Nations Convention on the Rights of the Child.*

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61 (1992) 106 ALR 385. For comment see P Parkinson, 'Children's Rights and Doctor's Immunities: The Implications of the High Court's Decision in *Re Marion*' (1992) 6 *Aust J Fam L* 101.

62 Id at 409 per Mason CJ, Dawson, Toohey and Gaudron JJ.

63 [1975] 1 All ER 697 at 699.

64 (1993) FLC 92-357 at 79,779. The effect that this provision has had is questionable: see F Bates, 'Principle and the Family Law Act: The Uses and Abuses of Section 43' (1981) 55 *ALJ* 181; H A Finlay and R J Bailey-Harris, *Family Law in Australia* (4th ed, 1989) p 29.

65 (1993) FLC 92-357 at 79,780. This places an obligation on signatories 'to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'

However, the cumulation of these authorities and provisions, the Court said,[66] meant that

> the obligation cast upon the Family Court by statute is not only to promote children's welfare (the content of which varies with changing social values) but also to uphold children's rights (including the fundamental common law right of personal inviolability and the right to protection from physical and mental abuse ...)

It followed in the present context, that given the obligation to protect children from abuse, a court must be careful to ensure that any order for supervised access was not attended by any infringement of the child's right to safety.

In that view, they were reinforced by the opinion which had been expressed by the Report of the Australian Family Law Council, *Access - Some Options for Reform*,[67] where it was written that 'Orders for supervision of access should never be made in circumstances where it is regarded as being necessary for the protection of the child.' In *B*, the Court was unwilling to elevate that recommendation to the status of a legal principle. The reason they took that view was because, in some circumstances, supervision might be necessary for a short period of time - such as where a parent was inexperienced or the child was very young. The Report to which the Court referred in *B* had set out a list of appropriate circumstances where supervised access was appropriate,[68] but for the instant purpose the criterion applicable was where supervised access was intended to assist in re-establishing a relationship between the access parent and the child.

The Court then went on to express the opinion that a trial judge who has made a finding that an unacceptable risk of child sexual abuse exists, or that child sexual abuse has occurred, should 'look to the level of trauma, in the widest sense, that has been occasioned to the child or children or may be occasioned in the future, to determine whether supervised access is appropriate.'

If an unacceptable risk exists, by reason of children being exposed to physical, emotional or psychological harm, then an order for supervised access would not be appropriate as the Court is

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66 See note 64 above.

67 (1987) at p 24.

68 These were as follows (*Access - Some Options for Reform* at p 24): first, where it is intended to assist the access person to establish or re-establish a relationship with the child; second, where assistance is needed because the child is of tender years; or, third, where the disability of the child or the access person makes assistance desirable.

obliged to protect children from such harm. In these cases, they continued, access should be suspended until such time as the access parent is able to show that there is no longer an unacceptable risk of access re-commencing. The Court noted that, in some cases, that might well involve an acknowledgment by the access parent that abuse had indeed occurred, together with evidence of appropriate treatment.

Their Honours then suggested[69] that other family members ought to have the opportunity to resolve the effects of the trauma to the children and that the children have the opportunity to recover from the effects of any abuse. With respect to the Court in *B*, that might be a somewhat optimistic line of thought given, for instance, the rather extraordinary Canadian case of *Plesh v Plesh*.[70]

That case involved a five day contested hearing as to whether the father's access should be supervised or not. The facts as found were that the wife, apparently out of spite and desire for revenge caused by her husband's advances to other women, alleged that he had sexually abused the six-year-old male child of the marriage. It seemed from the judgment[71] that the basis for the allegation, which was found ultimately to be groundless, was a chance remark made by the child to his mother. There was ultimately an order made for increasing unsupervised access, though the judge specifically stated[72] that the father was presently, and had always been, absolutely fit to have unsupervised access to his son. Unsupervised access was to be gradually increased partly on the recommendations of a psychologist consulted by the husband but more particularly because of the attitude of the wife and her mother. The judge agreed with the psychologist that:

> access will not work out until such time as the mother wants it to. She and her mother will have the ability to ensure that his case never ends, and I will be pleasantly surprised if access goes well. As [the psychologist] stated, all problems of the child henceforward will be blamed on the father. From the observed sneers and glances

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69 (1993) FLC 92-357 at 79,780.

70 (1992) 41 RFL (3d) 102. This case was described by the trial judge (Carr J of the Manitoba Court of Queens Bench - Family Division) at 102 as: 'a classic example of a family law case gone amok. It is the sort of case that gives family law a bad name. It is the sort of case that from time to time has prompted our appellate court and our Chief Justice to comment with amazement at how a seemingly simple matter snowballs and only stops when the financial resources of the parties (and often their parents) are depleted.'

71 Note 70 above, at 103.

72 Note 70 above, at 104.

> of the mother, I worry that she has not yet 'finished' with the father. I hope that I am wrong.

Although *Plesh* is probably an exceptional case, it is as well to bear it in mind when considering the general issue of child sexual abuse allegations.

At the same time, the Court in *B*[73] did state that without any such contemplative period and counselling and/or treatment

> the children's feelings of distress and fear may well be restimulated by contact with the access parent, despite the alleged assurance of safety provided by a supervisor. Supervised access may not be capable of being ordered for the time-limited purpose of re-establishing a relationship between the access parent and the children. Supervised access is not appropriate as a long term measure.

Furthermore, the Court considered that suspension of access for a period of time might be important for the custodial parent as well as for the children. It was not unreasonable for the Court to take into account, in assessing whether an unacceptable risk exists, the need of a custodial parent to be assured of the children's protection. The Court's view was that, 'As primary caregiver, anxiety about the children's exposure to potential harm is likely to impact adversely on that parent's ability to care for the children.'

The next issue which the Court discussed in *B* was, if supervised access were to be ordered, who should, or should not, supervise the access. The immediate point made by the Court on that question was that both experience and social science literature[74] agreed that it was generally inappropriate to have friends or relatives of the access parent supervise the access where any risk of harm to the children exists. The reasons why the Court took that view was, first, that family and friends were not neutral, but would usually, as was the situation in the present case, have an opinion about whether any harm had occurred or whether any risk exists. Hence, they may believe that monitoring the children is unnecessary. Second, the Court took the view that in

> a practical sense they cannot always be present and may fail to respond protectively to complaints of abuse or distress by the children. Supervisors must be available to the children for safety and support and be prepared to intervene on the children's behalf if an issue of protection arises during the visit. It is, in our opinion,

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73 (1993) FLC 92-357 at 79,780.

74 See, for example, B James and C Gibson, 'Supervising Visits Between Parent and Child' (1991) 29 *Family and Conciliation Court Review* 73.

> unrealistic to expect a supervisor to undertake those responsibilities on a regular weekly or fortnightly basis for an indefinite period.[75]

If this remark is taken literally, it could spell the end of supervised access in child sexual abuse cases totally. It may be possible to envisage a situation where access could be supervised by a professional - though the same problems could well arise then - but the Court did not refer to that possibility, merely emphatically finding that family or friends of the access parent were 'in most cases' unsuitable to supervise access. One might argue that family and friends of the custodial parent could be more appropriate, but other considerations, such as personal antipathy towards the access parent, might very well arise, which would also make the access less valuable to the child than it otherwise might be.

In *B*, the Court concluded that, on the facts of the case, the order for supervised access did not protect the rights of the children, did not promote their welfare and failed to provide adequate protection from further harm. An all-purpose condemnation indeed! The reason for this view was that, in the Court's opinion, neither supervisor believed that the husband had abused the children and the wife was justifiably distressed at the prospect of access in these circumstances. The issue was further complicated by the fact that M (the husband's mother) was clearly antipathetical to the wife and the other supervisor was only available on a temporary basis. Taking all of these factors into account, the Court considered that the trial judge had failed to consider four matters: First, the attitude of the children to access; Second, the trauma to the children demonstrated by their behavioural problems following periods of access to their father, some of which had been supervised; Third, the wife's belief that the children had, in fact, been sexually abused by the father and the effect of that on the wife as primary caregiver of the children. Finally, there was an unacceptable risk to the welfare of the children if access were to occur, even if supervised.

In *B*, it is clear that it is the Court which supervises supervised access, in the sense of deciding whether the supervision is adequate or appropriate. At the same time, the processes whereby the ultimate conclusion was reached are not without interest. It would have been simple enough to have looked at the relative situations of the two proposed supervisors and to have found them to be inappropriate. The discussion of fundamental issues could, of course, well have resulted from the Full Court's initial finding[76] that the trial judge had dealt with the evidence in a logical and

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75 (1993) FLC 92-357 at 79,781.

76 See text at note 4 above.

comprehensive manner. The reliance on basically important cases such as *Briginshaw, KD, Brown and Pedersen* and *Secretary, Department of Health and Community Services,* suggests that the Court in *B* were seeking to place the application of the 'unacceptable risk' test, as enunciated in *M,* on a more solid foundation than the High Court had, to this writer's mind, originally.

The final order was that all access be suspended until such time as the husband could show that there was no longer an unacceptable risk in his having access to the children and was able to provide the Court with suitable material to that effect.[77] The children must also have been given the opportunity to come to terms with their experience and could feel safe in their father's company. Again, it is hard not to be troubled by the notion of 'suitable material'; 'suitable' has many of the same connotations as 'unacceptable' - although, since the Court took the view that supervised access might, at that time, be appropriate to enable the relationship between father and children to be re-established, 'suitable to the Court' seems to be the likely meaning of the phrase. At the same time, no indications of the criteria for suitability were specified.

On the question of supervision for supervisors, the Full Court did refer to the fact that the initial orders sought to limit the risk of further harm by providing for psychiatric assessment following the first period of supervised access, though it was unclear as to what was to happen thereafter. The matter of psychiatric examination in such cases is not without its own problems and, indeed, one particular problem had been flagged as early as 1976 by Street CJ of the New South Wales Supreme Court in *Epperson v Dampney.*[78] The problem relates to the subjection of the child to multiple psychiatric or psychological examinations. In the Chief Justice's own words

> Whatever may be the degree of scientific value of the conclusions able to be reached in these five consultations, one cannot but be concerned that a child, old enough to understand what was going on, was thus made available by his custodian for the time being ... to these experiences in professional consulting rooms.[79]

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77 (1993) FLC 91-357 at 79,781.

78 (1976) 10 ALR 227. For comment on the immediate implications of this case, see F Bates, 'New Trends and Expert Evidence in Child Custody Cases: Some New Developments and Further Thoughts from Australia' (1979) 12 *Comparative and Int'l LJ of Southern Africa* 65.

79 (1976) 10 ALR 227 at 231. It should be noted that there was a strong dissenting judgment by Hutley JA, at 232 ff.

Epperson v Dampney was not decided under the *Family Law Act* (indeed, it was decided only just after that Act came into force) but under State legislation[80] and before the phenomenon of child sexual abuse had attracted public attention. Recently, however, the issue has been raised in an acute form and one which calls attention to the issue of scrutiny of the fact finding process. In 1991, the *Family Law Act* 1975 was substantially amended to take account of child abuse with a new division 12A inserted in the Act[81] as well as, more importantly, a new s 102A which deals with the restrictions on the examination of children. By 'examination' is meant, first, 'subjected to a medical procedure'[82] or second, 'examined or assessed by a psychiatrist or psychologist (other than by a court counsellor or welfare officer).'

The first major provision, contained in s 102A(1), is that, subject to the remainder of the section

> where a child is examined without the leave of the court, the evidence resulting from the examination which related to the abuse of, or the risk of abuse of the child is not admissible in proceedings under this Act.

Section 102A (2) then goes on to provide that where a person causes a child to be examined for the purpose of deciding, first, to bring proceedings under the Act involving an allegation that the child has been abused or is at risk of being abused[83] or second, for the purpose of deciding whether to bring an allegation, in proceedings under the Act, that the child has been abused, or is at risk of so being,[84] then the prior subsection will not apply to the evidence resulting from the *first*[85] examination which the person caused the child to undergo. In s 60, 'abuse' is defined as

> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person

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80 *Infants' Custody and Settlement Act* 1899 (NSW) s 5

81 See text at note 55 above.

82 *Family Law Act* 1975 s 102A (5)(a).

83 *Family Law Act* 1975 s 102A (2)(a).

84 *Family Law Act* 1975 s 102A (2)(b).

85 Author's italics.

It may be that this definition is one directly applicable to Part VII of the Act which deals specifically with children, but it is suggested that a wide definition of 'abuse' in relation to s 102A is desirable and s 60 is a useful starting point.

Section 102A (3) continues by setting out the matters to which the Court must have regard in considering whether the child should be examined and there are four of these. The first is whether any proposed examination is likely to provide relevant information that it is unlikely to be obtained elsewhere.[86] Second, the court must consider the qualifications of the person who proposes to conduct the examination to conduct the examination.[87] Third, 'whether any distress likely to be caused to the child by the examination will be outweighed by the value of the information that might be obtained from the examination.'[88] Fourth, the Court must have regard to any distress already caused to the child by any previous examination associated with the proceedings or related proceedings.[89] Lastly, any other matter which the Court thinks is relevant.[90]

From the organisation of ss 102A(2) and 102A(3), it might immediately be apparent that the aim of that part of the legislation is to restrict the use (or abuse) of medical (in the broad sense) examinations in child abuse cases. Section 102A(4), though, goes on rather to loosen the chains by specifying instances where the Court may admit evidence which would otherwise be inadmissible. There are three connected situations; first, where the evidence related to relevant matters on which the evidence already before the court is inadequate;[91] and second, where the Court will not be able to determine the proceedings properly unless the evidence is admitted;[92] and third, where the welfare of the child would be served by the admission of the evidence.[93]

The scope of this provision was considered by the Full Court of the Family Court of Australia in the recent case of *In the Matter of P (a child); Separate Representative (Appellant).*[94] This case concerned the

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86 *Family Law Act* 1975 s 102A (3)(a).

87 *Family Law Act* 1975 s 102A (3)(b).

88 *Family Law Act* 1975 s 102A (3)(c).

89 *Family Law Act* 1975 s 102A (3)(d).

90 *Family Law Act* 1975 s 102A (3)(e).

91 *Family Law Act* 1975 s 102A (4)(a).

92 *Family Law Act* 1975 s 102A (4)(b).

93 *Family Law Act* 1975 s 102A (4)(c).

94 (1993) FLC 92-376.

five-year-old daughter of the parties who had separated in 1989. Since then, P, the child, had been the subject of protracted custody and access proceedings. At the time of the hearing, the wife had custody and the husband supervised access. A central issue was allegations of sexual abuse of P by the husband, which had first been made in early 1991. Since that time, P had been interviewed on about twenty occasions by a number of different people and, in addition, there had been two family reports prepared by Family Court counsellors.[95]

The outstanding claims, at the time of the hearing, were an application by the husband for custody or unsupervised access and contrary claims by the wife that access be terminated or, alternatively, that the supervision arrangements be altered. In August 1992, the Court made an order that P be separately represented[96] and, in October of that year, the husband applied for orders under s 102A of the *Family Law Act* that he be granted leave to have P interviewed by two experts nominated by him. In December 1992, the Family Court granted those orders and the Court-appointed separate representative appealed.

The arguments raised on behalf of the father and the separate representative were predictable: the father claimed that proceedings in the Family Court of Australia were adversarial and

> fundamental to that proposition is the right of each of the parties to best prepare their case because it is accepted that justice is done when the presiding Judge is presented by each of the parties with all of the evidence that each of the parties wish to put before the Court.[97]

The husband, though, did admit that that claim was subject to ss 43(c) and 64(1) of the *Family Law Act*, which emphasised the welfare of the child as being the paramount consideration, and also the provisions in s 102A of the Act.

The husband's submission was important, Nicholson CJ and Fogarty J noted,[98] because the trial judge had regarded the case as a contest between denying the husband natural justice and subjecting the children to further investigations which had already been carried out by an 'inordinate' number of people. In the event, he had decided in favour of the former on the broad basis of the notion that

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95 See *Family Law Rules* 1984 O 25 at 5.

96 *Family Law Act* 1975 s 65.

97 Quoted in the joint judgment of Nicholson CJ and Fogarty J, (1993) FLC 92-376 at 79,895.

98 Ibid.

justice must not only be done but must be seen to be done. As Nicholson CJ and Fogarty J said:

> Approached in that way it raises fundamental issues as to the nature of the jurisdiction of this Court in relation to children, the still emerging recognition of the rights of children and the overall issue of the welfare of the child in the context of that concept.

The first major point to be made is the nature of proceedings in the Family Court of Australia. In *In re Watson; Ex parte Armstrong,*[99] the majority of the High Court of Australia had emphasised that proceedings in the Court were adversarial, rather than inquisitorial but, at the same time, their comments seemed to have been confined to matters involving maintenance and property. In *P*, Nicholson CJ and Fogarty J discussed the matter further, stating that proceedings in relation to the welfare of the children were not strictly adversarial, having regard to the Court's obligation to treat the welfare of children as the paramount consideration.[100] They were reinforced in this view by considerable authority, some, indeed, pre-dating the *Family Law Act*. In 1973 Mason J, as he then was, in the High Court of Australia, said in *Reynolds v Reynolds*[101]

> This provision makes it clear that the nature of the Court's jurisdiction in custody is very different from ordinary inter partes litigation, and that all the rules applicable to that class of litigation are not appropriate to custody proceedings

This view was taken up in *M*[102] where the High Court stated that 'proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression.'

On the issue of natural justice, there was authority for the view that the doctrine of natural justice was susceptible of modification. Thus, speaking of the wardship jurisdiction in

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99 (1976) FLC 90-059 at 75,269.

100 (1993) FLC 92-376 at 79,896.

101 (1973) 1 ALR 318 at 328. The provision to which Mason J referred was s 85(1) of the *Matrimonial Causes Act* 1959.

102 (1988) FLC 91-979 at 77,080. See also *In the Marriage of Harris* (1977) FLC 90-276 at 76,478 per Fogarty J; *Reynolds v Kilpatrick* (1993) FLC 92-351 at 79,703 per Finn J.

England, Lord Evershed had said:[103]

> the jurisdiction is not only ancient but it is surely also very special, and being very special the extent and application of the rules of natural justice must be applied and qualified accordingly. The judge must in exercising this jurisdiction act judicially; but the means whereby he [or she] reaches his [or her] conclusion must not be more important than the end.

A similar view had been taken by Brennan J in the High Court of Australia in *J v Lieschke*[104] (though it should be said that it was held, in that case, that parents in dispute with local authorities regarding neglected children were, on the basis of the principles of natural justice, entitled to be heard):

> If an unqualified application of the principles of natural justice would frustrate the purpose for which the jurisdiction is conferred, the application of those principles would have to be qualified ... In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child.

It followed that the rights of litigants to natural justice were qualified insofar as 'those rights encroach on or are in conflict with' the provisions of the *Family Law Act* which specified that the welfare of the child was the paramount consideration.[105]

At the same time, as their Honours pointed out,[106] the instant proceedings only related indirectly to custody proceedings: that is, the orders which had been made at first instance were for the purposes of presenting evidence *relevant*[107] to custody proceedings. At the same time, the case also fell within the jurisdiction of the Family Court as had been recognised by the High Court in *Secretary,*

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103 In *Re K (Infants)* [1965] AC 201 at 219. Lord Evershed likewise approved a statement by the trial judge that, having regard to the paramountcy principle, '... the procedure and rules of evidence should serve and certainly not thwart that purpose.'

104 (1986) 162 CLR 447 at 457. See generally, on an unrelated issue, *Kioa v West* (1985) 159 CLR 550.

105 Nicholson CJ and Fogarty J also, (1993) FLC 92-376 at 79,896, said that the Family Court did not have an obligation to determine the truth, or otherwise, of allegations of abuse of the child nor to determine the guilt or innocence of the parent who is alleged to have perpetrated the abuse. See also *In the Marriage of M* (1988) FLC 91-979 at 77,080. See text at note 12 above.

106 (1993) FLC 92-376 at 79,897.

107 Nicholson CJ and Fogarty J's italics.

Department of Health and Community Services[108] and s 43(c) of the *Family Law Act*.[109]

Turning to the specific issue of examinations of children and the provisions of s 102A, Nicholson CJ and Fogarty J commented generally that:

> The evidence of experts is frequently of great importance in decisions made by this Court in child-related matters. That is because those decisions usually involve a sensitive analysis of the relationships, personalities, wishes and family dynamics of the persons involved in the exercise of the wide discretion which the Court has within rather generally stated legal principles. Where allegations of abuse are involved the input of the experts can be of especial importance, involving professional skills including the interviewing of the child and the assessment of the statements and actions of the child.

Yet their Honours raised again the matter, which had initially been raised by Street CJ in *Epperson v Dampney*,[110] regarding the harm possible to children in being subjected to multiple interviews. Chief Justice Nicholson and Fogarty J, *Epperson v Dampney* notwithstanding, produced considerable evidence from social science literature to support their general view.

Without attempting to rehearse all of the points which the judges took into proper account, especial attention should be paid to the views of Brown[111] (the Principal Director of Court Counselling in the Family Court of Australia) on family reports.[112] Brown was of the opinion that:[113]

> Apart from being resource-intensive the preparation of a Family Report is often an unwelcome event and is sometimes a traumatic experience for those involved in spite of the care taken by Court Counsellors to assist people through this difficult process.

On the question of multiple assessments, Brown[114] queries whether pursuing the evidence to support or refute an allegation is in the best interests of the child. She has well articulated the

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108 See text at note 61 above.

109 See text at note 64 above.

110 See text at note 78 above.

111 C Brown, 'Children - Heard But Not Seen Family Reports' *Conference Handbook: Fifth National Family Law Conference* (1992) at p 251.

112 See note 95 above.

113 See note 111 above, at 251.

114 Ibid at 270.

fundamental problem which the Family Court of Australia (or any other Court) faces when she states that

> The Court has been criticised for not stopping access in all cases where an allegation of child abuse has been made. On the other hand it has also been criticised for giving weight to false allegations. The predicament is that evidence is rarely unequivocal yet paradoxically where prolonged investigations occur they do not allow the healing process to begin.[115]

That, of itself, given Brown's experience, ought to be sufficient reason to avoid multiple assessments as these do seem to serve to obfuscate, rather than illuminate, the reality of any situation.

Further, Nicholson CJ and Fogarty J also suggested that repeated questioning might cause the child to relive the abuse and, thus, magnify the harm caused to the child by any abuse which had previously been caused.[116] The judges then went on to say that the multiple assessments could themselves constitute an abuse of children in other ways. First, they argue that children who are moved from assessment to assessment may:

> feel that the adults believe they are lying and their sense of trust in adults may be undermined by being forced to divulge sensitive material to a procession of strangers ... It is often the number of different interviewers rather than the interviews per se which exacerbates the distress.

Prolonged investigations, they further considered,[117] also involved an invasion of the child's right to privacy and the delay caused by ordering further assessments may make it difficult for the child to resume normal pursuits and interests.[118] In addition to the points raised by Nicholson CJ and Fogarty J, Jones and McGraw have argued[119] that children who have been subjected to multiple

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115 To that end, she quotes A Banning, 'Children As Witnesses in the Family Court' in J Vernon (ed), *Children as Witnesses* (Leo Cussen Institute, 1988) p 199 at 203, that: 'Children require therapy and support rather than investigation. In time, they may experience anger (which is often outside their awareness), but it should be their own anger and at their own pace.'

116 (1993) FLC 92-376 at 79,897.

117 See also J Myers, 'How To Get The Child's Side of the Story' [1991] *Family Advocate* 36.

118 See J Cashmore and K Bussey, 'Disclosure of Child Sexual Abuse: Issues from a Child Oriented Perspective' (1987) 22 *Aust J Social Issues* 13.

119 DPH Jones and JM McGraw, 'Reliable and Fictitious Accounts of Sexual Abuse to Children' (1987) 2 *J of Interpersonal Violence* 27 at 40.

interviews may begin to recount their experience with muted emotions over successive interviews. This is important as, as I have sought to demonstrate elsewhere[120] particularly in relation to the English case of *C v C (Child Abuse: Evidence)*,[121] clinical procedures must be carefully scrutinised, not merely by medical and other practitioners, but by the courts. Admittedly, the facts in *C* were somewhat exceptional, involving, as they did, no record of the interview being kept, a psychiatrist's notes being lost and a videotape having been (accidentally?) erased. They stand as a documented warning to lawyers and others. On the specific issue of multiple interviews, Spencer and Flin,[122] in their compendious study of children's evidence, comment that repeated interviewing is not only

> stressful but jeopardises the quality of the child's evidence by increasing the risk of leading questions and confusing the child. There is also a risk that this will diminish the child's motivation and cooperation. By the time the child reaches the courtroom she may be reluctant to repeat her evidence yet again, and in addition, over-rehearsed evidence may diminish the child's credibility in the eyes of the court.

In *P*, Nicholson CJ and Fogarty J noted the appellant's argument that the child's long-term welfare would best be served by the resolution of the allegations of abuse.[123] Their Honours countered that argument by saying that:

> the experience of this Court in cases like this is that evidence as to that is frequently equivocal and additional psychological or psychiatric evaluation of the child may provide little in the way of new insights, particularly when competent evaluations already exist.

Ultimately, they were of the view that, whilst natural justice required that parents be given every reasonable opportunity to present their case, it would not justify an unlimited right to do so at the expense of the interests of the children. In most cases, they said, provided that the initial interview was conducted in a competent manner, its conclusions could be challenged by other expert evidence without further interviews with the child. They analysed a variety of

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120 See note 12 above, at 93 ff.

121 [1987] 1 FLR 331.

122 JR Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (Blackstone Press, 1990) p 289.

123 (1993) FLC 92-376 at 79,898.

Rules,[124] Practice Directions[125] and other documents[126] which sought to restrict multiple assessments and which had led up to s 102A of the *Family Law Act*. As regards that section, which they considered, as 'not being without difficulty',[127] Nicholson CJ and Fogarty J did emphatically state that the provision did not prohibit repeated examinations of children; it merely rendered evidence resulting from such examinations inadmissible without the leave of the Court.[128] At the same time, as has already been noted, that provision is subject to s 102A(3) which allows the Court to admit otherwise inadmissible evidence. Nicholson CJ and Fogarty J, perhaps most importantly, suggested that further legislative attention should be given to the provision as a whole and, particularly, prohibiting examinations without the leave of the Court. In that context, the description of Spencer and Flin[129] of the so-called 'Bexley Project' is worthy of recitation. They state that any

> harm to the child apart, repeated interviewing tends to undermine the quality of any evidence the child eventually gives in court - partly because the child's memory tends to get corrupted by false details which each questioner accidentally implants in the child's mind, and partly because endless repetition kills all spontaneity so the child's courtroom evidence sounds unconvincing and rehearsed. In an attempt to solve this problem, in 1985 the Metropolitan Police and the social services department of the London Borough of Bexley set up a pilot project under which the children who were allegedly the victims of sexual abuse were interviewed once by a joint team acting on behalf of both agencies, and the interview was videotaped for anyone else who needed to hear the child's account of what had taken place.

The general feeling was that the project had been a considerable success and was adopted in other areas in England.[130]

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124 *Family Law Rules* 1984 O 30A rr 2, 8 in Australia; *Family Proceedings Courts (Childrens Act 1989)* 1991 in the United Kingdom: [1985] 1 All ER 832.

125 In England, *Practice Direction (Minor: Psychiatric Report)* (1985); *Practice Direction (Minor: Psychiatric Report)(No 2)* (1985). Followed in Australia by the Family Court *Practice Direction* 1986/1.

126 In England, Home Office, *Memorandum of Good Practice* (1992); In Australia, Family Law Council, *Child Sexual Abuse* (1988) at pp 67 ff.

127 (1993) FLC 92-376 at 79, 902.

128 For comment on the provision itself, see note 66 above.

129 See note 122 above, at p 146.

130 In West Yorkshire, see K Lawrence 'Let the Child Be Heard' [1988] *Police Review* 1074.

The point made by these judges in *P* is well taken as regards s 102A: it is clearly, in s 102A(2)[131] tied to the questionable[132] criterion of 'risk'. In addition, as their Honours also noted, both s 102A itself and the relevant rule[133] were directed primarily towards the admissibility of the results of the examinations rather than to the regulation of the examinations themselves.

In the event, Nicholson CJ and Fogarty J concluded that the trial judge had been in error in failing to take proper account of the trauma which had been caused to the child already in consequence of the multiple examinations or of the likelihood of further damage were they to be reviewed.[134] Similarly, the trial judge had not taken into account evidence that the child's recollection of the events and subsequent examinations was beginning to fade and he had not evaluated the likelihood of that process being jeopardised by further investigations. These, of course, are matters to which specific reference is made in s102A(3).[135] Chief Justice Nicholson and Fogarty J also disagreed with the trial judge's finding that the husband would have been denied natural justice particularly as the evidence had showed that, for two years of the present litigation, the father had taken no steps to obtain any examinations. It also appeared the husband considered certain of the earlier findings adverse to him and, if they had not been so, he would not have been seeking the present orders.

Most important, though, Nicholson CJ and Fogarty J were of the opinion that, even if those factors had not been present, the decisive consideration was the welfare of the child. They stated that,

> In our view it could not possibly be said that further examinations are in her interests or welfare. They will force the child to again go over painful experiences and recollections with little prospect of the litigation or the child's welfare being advanced. The child is entitled to look to this Court to protect her from abuse by litigation.

The earlier orders were discharged accordingly.

Justice Strauss agreed with the other judges, though he adopted a very much more purposive approach in relation to the legislation. He, like his colleagues, regarded the trial judge as having erred in regarding the doctrine of natural justice as having

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131 See text at note 82 above.

132 See note 10 above.

133 See note 124 above.

134 (1993) FLC 92-376 at 79,904.

135 See text at note 85 above.

overriding significance.[136] First of all, Strauss J commented that the object of s 102A had been spelt out in the statutory heading, 'Restrictions on Examination of Children.' Justice Strauss then referred to cl 17 of an Explanatory Memorandum which had been attached to the amendments represented by s 102A to the Act. In that Memorandum, as Strauss J appropriately notes, 'abuse' had been defined in s 60 of the Act. This expression and opinion seems to differ from the view which had been expressedby Nicholson CJ and Fogarty J to the effect that the definition in s 60 did not necessarily apply to s 102A.[137] Justice Strauss was at pains to point out that the term 'abuse' ought, in relation to a child, to have the same meaning throughout the Act.[138] It is hard to disagree with Strauss J as, first, there is no intrinsic evidence to suggest that any other definition was indicated in s 102A. Further, the Commonwealth *Acts Interpretation Act* 1984 introduced a new s 15AB into the original legislation[139] which permits, inter alia, extrinsic material to be taken into account in interpreting a statutory provision if that provision is ambiguous or obscure[140] or

> the ordinary meaning conveyed in the text of the provision taking into account its context in the Act and the purpose of an object underlying the Act leads to a result that is manifestly absurd or is unreasonable.[141]

So the view which had been expressed in the Explanatory Memorandum, to which the judge referred should prevail.[142]

Justice Strauss then continued by stating that:[143]

> No doubt the reason underlying the introduction of s 102A was the concern felt that repeated medical and psychiatric examinations of children, who were allegedly the subject of sexual physical abuse, be kept within such limits as would least cause damage to the child.

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136 (1993) FLC 92-376 at 79,904.

137 See text at note 85 above.

138 (1993) FLC 92-376 at 79,904.

139 *Acts Interpretation Act* 1901 (Cth).

140 *Acts Interpretation Act* 1901 (Cth) s 15AB(1)(b)(i).

141 *Acts Interpretation Act* 1901 s 15AB(1)(b)(ii). For an instance of the broad provision's application, see *Re Shingles and Director General of Social Security* (1984) ASSC 92-006. For comment, see F Bates, 'Benefits for Handicapped Children in Australian Social Security Law: A Disaster in Statutory Interpretation and Reform' (1990) 11 *Statute L R* 108.

142 (1993) FLC 92-376 at 79,904.

143 Id at 79,905.

> It was felt that multiple examinations of children who had been or are alleged to have been the victims of sexual abuse were damaging to their well being.

This view, he considered, was reinforced by the structure of s 102A(4)[144] where the requirements were, unlike the preceding subsection, conjunctive and the evidence might only be admitted if the Court is satisfied that all three policy matters had been made out. In s 102A(3)(e), Strauss J noted, it was provided that the Court, in deciding whether to give leave for the child to be examined, must have regard to 'any other matters the court thinks is relevant'. Justice Strauss queried whether there was a possibility that that provision might include a general consideration of notions as to what constitutes a 'fair hearing.' In the end, he, correctly in this writer's opinion, rejected that argument and took the view that the phrase referred to matters which are 'relevant in particular circumstances and on the facts of the particular case.' Although the judge did not specifically make the point, once more he is reinforced by the earlier part of the section which, for instance, deals with distress caused to the child by examinations.[145]

After having said that it was the duty of the Court to act judicially, Strauss J then, applying the statements of Mason J in the High Court of Australia's decision in *Kioa v West*[146] and the Full Court of the Federal Court in *Roderick v OTC*,[147] emphasised[148] that what a fair procedure would be must depend upon the nature of the inquiry, the rules under which the tribunal acts and *the subject matter which is being dealt with.*[149] That last is of obvious importance, given the earlier discussion[150] concerning the basic relationship of parent and child as presently recognised by the common law. In that context, Strauss J doubted that discussion of whether the welfare of the child overrode notions of natural justice was appropriate at all. That view was, of course, in clear contradistinction to the opinion which had been expressed by Nicholson CJ and Fogarty J.[151] The approach adopted by Strauss J has much to commend it, in the sense that the broad position as the other judges seemed to describe it has yet properly to be refined. In England, the position represented by

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144 See text at note 91 above.

145 *Family Law Act* 1975 s 102A(3)(c),(d).

146 (1985) 159 CLR 550 at 584.

147 (1993) 111 ALR 355 at 363.

148 (1993) FLC 92-376 at 79,906.

149 Author's italics.

150 See text at notes 62 and 108 above.

151 See text at note 127 above, ff.

the majority of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[152] has undergone some modification in the light of cases such as *Re R*[153] and *Re W.*[154] Justice Strauss's view, in the end, was that the principles of natural justice - or, more appositely, the requirement that there be a fair trial - did not 'authorise the infliction of physical or psychological damage to a child or any other person.'

The major error made by the trial judge, Strauss J thought,[155] was that it was not open to him to weigh considerations of fairness or natural justice against the specific matters set out in s 102A. Whilst it is correct to say, Strauss J stated, that parties should be accorded a fair trial,

> ... such a trial must be within the parameters set by the Act. Section 102A evinces an intention to exclude multiple medical and like examinations of children in child abuse cases. The person who mistakes the allegation may call evidence of the first examination. Evidence of subsequent examinations is restricted in the manner already referred to in section 102A(2). The purpose of the legislation is to reduce examinations to a minimum.

Once a judge has decided to grant or not grant leave under the provisions of s 102A, then any trial which follows will be a fair trial. Put another way, as Lord Shaw said in *Local Government Board v Arlidge*[156] in a different context: 'If a statute prescribes the means it must employ them.'

These cases are of considerable and global importance: in both Australian cases it would have been easy for the courts to have dealt with the issue on much more particular basis. In *B*, as has already been pointed out,[157] the case could have been decided simply on the basis of the suitability of the supervisors. The Court did not do so. *P* could, similarly, have been decided on the immediate application of *Epperson v Dampney.*[158] Once again, they did not do so. Indeed, the very reliance on case law concerned with the tripartite

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152 [1986] AC 112. For comment, see J M Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxf J Legal Stud* 161.

153 [1991] 4 All ER 177. For comment, see G Douglas, 'The Retreat from *Gillick*' (1992) 55 *MLR* 569.

154 [1992] 3 WLR 758. For comment, see J Bridgeman, 'Old Enough to Know Best?' (1993) 13 *Legal Studies* 69.

155 (1993) FLC 92-376 at 79,907.

156 [1915] AC 120 at 138.

157 See text at note 75 above.

158 See text at note 78 above.

relationship between the State, especially as represented by the courts, parent and child suggests that the Court, in both cases recognised that importance.

Both cases also emphasise the extraordinarily broad supervisory jurisdiction in child law matters which is now possessed by the Family Court of Australia and it is one which they are now prepared to utilise fully. This, in this writer's view, is wholly to be endorsed: as we now know more of the realities of family life (rather than idealised perceptions) and those realities, inevitably, involve issues such as child sexual abuse, so that the courts and legislators must respond to them. Put another way, if, the words of s 43(b) of the Australian *Family Law Act* 1975(Cth) - that 'the family [is] the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children' - are to be taken even remotely seriously, then that must be the case.

The direction has also been pointed by the *United Nations Convention on the Rights of the Child* which, in Article 19.1, is concerned that States Parties should

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the case of parent(s), legal guardian(s) or any other person who has the care of the child

Yet, at the same time, Article 19.2 takes up many of the points made in this paper when it emphasises that such protective measures should

> as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have care of the child, as well as for other forms of prevention and for identification, reporting referral investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement

The manner of expression of this Article suggests that the entire situation of families and groups involved must be given proper cognisance.

On a specific level, as regards the methods of protecting children, *B* and *P* tell us that the Australian Courts will involve themselves in such particular issues as the nature and quality of supervision of access when it is argued as being appropriate and the details of proposed psychological and psychiatric evidence relating to children. In addition, they will not merely do that, but will seek to contextualise those instant issues having regard to the broader

questions of the role of the Courts and the policies which ought to be adopted.

As regards the role of the Courts and the very nature of the trial process itself, *P* is most instructive in that it does seem to have gone some way down the track of eschewing formal legalism as it affects the conduct of trials, at least insofar as the welfare of the child is concerned. Again one's immediate reaction is that that is as it ought to be. However, it is not altogether untempting to think that the father in that case might just have been disadvantaged by the ultimate adjudication; though pragmatically, Strauss J might well have been correct when he had said that the instant damage to the child as a consequence of the repeated examinations was of more importance than any general theoretical consideration.[159] But, at the same time, these broader issues must be addressed by Australian law and, indeed, by most common law jurisdictions. On the question of any disadvantage having been done to the father in *P*, one should not be too eager to ignore the factual situation that was found to exist in *Plesh*.[160]

In the end, that is what this discussion has really been about - traditionally, members of the caring professions (psychologists, social workers, court counsellors and others) would be likely to say that the protection of the child is the sole consideration. However, *P* tells us that it is not merely protection from the actually or potentially abusing parent that may be needed, but protection from the caring professions, and their activities, themselves. Lawyers, fearful perhaps of cases such as *Plesh* could well be cautious of any apparent abandonment of traditional standards of proof and of procedure. In *B* and *P*, the Full Court of the Family Court of Australia has heartily espoused the cause of children, albeit in relation to specifics, though one can only speculate as to what would happen were a *Gillick* situation to happen in Australia.

159 See text at note 151 above.

160 See text at note 70 above, ff.