DOMESTIC VIOLENCE AND CHILD SEXUAL ABUSE

Paper prepared by

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① I thought it appropriate for a speaker such as myself to choose the subject of domestic violence and child abuse in addressing a conference such as this one with its theme, Crime – Preventable or Inevitable. Domestic violence and child abuse in their criminal forms are crimes which if not preventable can I believe be greatly minimised. This will however not be achievable in the context of the criminal or civil law. At best all the criminal law can do is to deter and punish and all that the civil law can do is to endeavour to protect the victims of such crimes after they have been committed or at least threatened. The incidence of such crimes will only be reduced by a total change of community attitudes i.e. by an educational and informative process which should commence in the home and at the earliest stage of a child's education at school. People must be taught that women are not the chattels of men and children are not the chattels of their parents. Although these self evident facts are recognised intellectually at discussions of this nature this is not the perception of vast numbers of the community. In this regard it is only necessary to sit in any criminal or family court to realise that for many people these facts are just not accepted. Until they are accepted and understood we will continue to battle with this problem.

② In an article by Patricia Abrahams, *"Violence Against the Family Court : Its Roots in Domestic Violence"*, AJFL Vol. (1) August 1986, Ms Abrahams cogently argues that the legal status of women over the centuries has contributed to the existence of domestic violence, for example: legal control over married women was exercised effectively by depriving them of any legal identity. *"By marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover she performs everything:"* Sir William Blackstone *"Commentaries on the Laws of England"* Vol. 4, 1783, page 203-204. Further examples are Cloborn's case, (1629) HET 149, where a husband successfully claimed the fact that he gave his wife "a box on the ear, and spat in her face and wheeled her about and called her a damned whore" was reasonable chastisement. In Atwood v Atwood (1718) 24 ER 220, the Court decided that a husband could confine his wife but not imprison her – and over a century later in Re Cochrane (1840) 8 DOWL 630, Coleridge J refused to release a wife who was being forcibly confined but not imprisoned by the husband.

THE HONOURABLE JUSTICE ALASTAIR NICHOLSON was born on the 19th August, 1938. He was educated at Scotch College, Melbourne which he attended from 1946 to 1955. He studied law at Melbourne University and graduated in 1960. He signed the Roll of Counsel of the Victorian Bar in 1963. He practised extensively in all jurisdictions at the Bar including general common law, family law, crime, town planning, local government and administrative law and also appeared as counsel in a number of public inquiries.

He became Queen's Counsel in 1979 and in 1981 he was appointed by the Victorian Government to conduct a public inquiry into the affairs of the Richmond City Council and published an extensive report concerning that inquiry in 1982.

He was a member of the Victorian Bar Council from 1980 to 1982, during which time he acted as Chairman of the Bar's Fees Committee.

He was appointed a Justice of the Supreme Court of Victoria in November, 1982 and at the same time was appointed Deputy Chairman of the Adult Parole Board. He succeeded Sir John Starke as Chairman of that Board upon the latter's retirement in 1985. In February, 1988 he was appointed as Chief Justice of the Family Court of Australia and a Justice of the Federal Court of Australia.

His Honour's other interests include a long association with the RAAF which he joined as a cadet in the Melbourne University Squadron in 1956 graduating in 1959 as a Pilot Officer. He became a member of the Legal Panel of the RAAF Reserve in 1965 and thereafter appeared extensively in RAAF Courts Martial, in Australia, and in Vietnam and Malaysia. He was appointed Deputy Judge-Advocate General of the RAAF in 1982 with the rank of Group Captain and in 1984 was appointed Judge-Advocate General. When that office ceased to exist with the introduction of the Defence Force Discipline Act, His Honour was appointed Judge Marshal of the RAAF with the rank of Air Vice-Marshal. He was awarded the Reserve Forces Decoration in 1985. His Honour was appointed Judge-Advocate General of the Australian Defence Force in 1987.

His Honour and Mrs. Nicholson were for many years members of Kids in Care, a group providing emergency foster care to children and on many occasions they acted as foster parents for such children. Since 1984 he has been the Chairman of the Epistle Centre which is a charitable organisation devoted to the provision of care, accommodation and counselling to ex-prisoners of both sexes.

Justice Nicholson is married with three daughters and his leisure interests include reading, bush walking, jogging, tennis and horse–racing.

We thank him for his thought-provoking paper which it is now our pleasure to publish.

The Matrimonial Clauses Act 1857 UK, enabled both men and women to petition for divorce on the ground of adultery. However males were able to petition for divorce solely on the basis of a wife's adultery, whereas women had to show not merely adultery but cruelty or desertion as well. The required degree of cruelty – danger of life, limb or health or reasonable apprehension of such violence – was laid down in Evans v Evans 161 ER 466.

The Matrimonial Causes Act (1959-1966) Commonwealth reflected similar social attitudes. Section 28(d) required the violent partner to have been habitually guilty of cruelty to the party petitioning for divorce *"during a period of not less than one year"*. These attitudes linger on.

③ Murder and assault in a domestic situation are for some reason regarded as less serious than elsewhere. Police show a demonstrable reluctance to intervene in *"a domestic"* and the sentences imposed by the courts in such situations reflect the same attitude. A study by Dr Suzanne Hatty, a Senior Research Fellow in social work at the University of NSW, the results of which were published in the Sydney Morning Herald on 5 July 1989 reveals an alarming state of affairs. This study involved a survey of 500 police officers in the Sydney area. Fifty five per cent of the police interviewed did not want to be involved in domestic violence matters, seeing it to be the problem of social workers. Four out of ten saw the wife's behaviour as the most important single contributing factor to the violence. Two thirds of those interviewed saw violence as a normal or typical occurrence in relationships and 22 per cent believed that women stayed in violent relationships because they enjoyed it. The research team accompanied police on 56 calls where domestic violence involving injury had occured. All but one of the injured were women. Police arrested only 20 (36%) of the 55 males involved and also arrested the sole female offender who fatally shot her male partner after having frequently sought police protection from his violence. Of the men that were arrested 1/3 were charged with drunkenness alone and not with any form of assault.

If this represents an accurate summary of Sydney police attitudes it can be seen that the law is failing the victims of domestic violence at the very first level, namely that of police intervention. Further, I see no reason to suppose that the situation is any different in this State or indeed in any other part of Australia. The problem seems to be one of attitude and given this attitude no amount of legislation will improve the situation. This attitude is also reflected in the treatment of domestic murderers. My experience both as a judge and as chairman of the Parole Board in this State was that domestic murderers were inevitably treated more leniently than others even when the murders were multiple and associated with circumstances of extreme violence. Again the attitude seemed to be that this behaviour was excusable simply because it occurred in a domestic setting. The criminal law has an important role to play in deterring domestic violence but I believe that these factors seriously limit that role. It is more than time that police and courts realised that a brutal assault carried out in a domestic situation remains a brutal assault and the perpetrator should be treated just as severely as any other person guilty of a similar crime. Furthermore children are entitled to and must be given the full protection of the law.

All too often one hears accounts of victims being too frightened to press for proceedings to be taken against the perpetrators of acts of domestic violence and child abuse and complaints that courts are indifferent to the urgency of the need to make appropriate protection orders as well as punishing the offenders. There is obviously room for considerable improvement in this area.

The criminal law nevertheless always remains something of a blunt instrument in curtailing domestic violence and child abuse and there remains a significant role to be played by the civil courts, including the Family Court, in addressing the problem. I stress

however that the courts cannot be expected to solve it; that is a problem for the community as a whole.

④ The involvement of the civil courts in this area is a comparatively recent development.

The enactment of the Family Law Act in 1975 and the creation of the Family Court has led to a much greater use of the court's injunction and contempt powers directed at the protection of families. This has not been without its problems. Since the court is a Federal court, State police have demonstrated a reluctance to enforce its orders and Federal Police have very limited staff and capacity to do so. Although the Act provides for the appointment of Marshals to enforce the Court's orders, none have been appointed. Contempt proceedings tend to be protracted and expensive and are often beyond the resources of victims.

⑤ A more recent development has been the enactment of State legislation along the lines of the Crimes (Family Violence) Act 1987 which enables Magistrate's courts to make protection orders in certain circumstances. This step whilst an improvement has also created difficulties.

I propose to discuss some of these difficulties because although as I have said the courts cannot solve these problems it is vital that they are used to the fullest extent to at least protect the victims of these crimes and because of jurisdictional and attitudinal problems this is not always achieved.

⑥ Legislation both under the Family Law Act (1975) and the Crimes (Family Violence) Victoria Act 1987 reveals a tension between two competing principles. The first is the priority given to the preservation of the family which is enshrined in Section 43 of the Family Law Act, namely: *The Court shall have regard to*

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

The second principle is then the physical protection of the members of the family e.g. "the need to be sure that the aggrieved family member is protected from violence" section 5(2) Crimes (Family Violence) Victoria Act 1987. In providing physical protection to the family members the Court must on occasion damage the sanctity of the family by, for example, excluding a family member from the home or preventing contact between family members. There cannot be domestic violence remedies unless in some circumstances the disintegration of the family unit is contemplated.

⑦ There is often a need for urgent remedies in cases of domestic violence which may take the forms of ex parte orders and injunctions restraining the offender from molesting his victims and restraining him from continuing to occupy the matrimonial home.

⑧ Under the Family Law Act the granting of an ex parte injunction is a matter of discretion for the Court and is *"not to be exercised lightly"* (Sieling v Sieling (1979) 4 Fam LR 713). The onus is always on the applicant to justify both the creation of the ex parte order and its continuation at any later hearing. The Court must primarily determine whether there is an imminent risk of harm to the applicant and the damage that may result to the respondent if the ex parte order is made without the respondent being given an opportunity of being heard. Ex parte orders in the Family Court can be made as a matter of urgency and can be listed before a Judge immediately after the issue of an application. The problem is that all too often such applications are accompanied by material which tells only one side of the story and experience over the years has suggested that it is preferable to have both parties before the court before making use and occupation or non molestation orders.

⑨ Expedited hearings can be given to applications where it is intended to give prior notice to the respondent and such applications can be made returnable the day or several days after issue, provided there is some urgency revealed in the supporting documentation sworn on oath by the applicant. The applicant in fact has the right in issuing an ex parte application to insist that the matter be listed before the Court that day. In this way the court can make orders which provide real protection for victims of violence. Failure to comply with such orders enables the court's contempt powers to be resorted to where necessary. Judges of the court are available on a 24 hour basis to hear applications of this sort in all States. Surprisingly however this service is rarely availed of.

⑩ Under the Crimes (Family Violence) Act 1987 (Victoria) Section 8 provides that interim intervention orders can be made in the absence of the defendant if the Court is satisfied that it is necessary to ensure the safety of the aggrieved family member. Further Section 9 provides that where a complaint has been made for an intervention order:

(a) The Clerk may issue a summons; or

(b) if : (1) the complaint alleges that the aggrieved family member has been assaulted or threatened with assault; and

(ii) the Clerk is satisfied that the personal safety of the aggrieved family member would be seriously threatened unless the defendant was apprehended and brought into custody –

the **Clerk** may issue a warrant for the apprehension of the defendant.

⑪ The matter can proceed by way of **summons** or **warrant** and considerable discretion is left with the Clerk of the Court. There are some dangers however:

The basis upon which the Court can make an order is that it needs to be satisfied that:

(a) An assault having occurred, and the likelihood of an assault occurring in the future;

(b) A threatened assault and likelihood of assault in the future;

(c) The person has harassed or molested a family member or has behaved **in an offensive manner** towards a family member, and is likely to do so again.

⑫ The procedure laid down in the Crimes (Family Violence) Victoria Act 1987 enables ex parte orders to be obtained and for the order to remain in force for up to twelve months. It enables a warrant of apprehension to be attached to the order and provides that any appeal from the order is to be dealt with by the County Court of Victoria.

⑬ Pausing for a moment, whilst there is a need for a responsive protective mechanism, there is an obvious danger in provisions of this sort. If there is one thing that experience in the Family Court has taught, it is that ex parte orders are fraught with danger and tend to produce feelings of great injustice on the part of persons against whom such orders are directed. Such persons have not been heard and often have a perfectly reasonable explanation for the allegations which are made against them. Most of the Family Court's problem people have been the recipients of such orders. Further, provisions such as this pay no regard to the value of counselling interventions and behaviour in *"an offensive manner"* has such broad connotations that almost any hostile behaviour comes within its ambit.

⑭ There is also the problem of a clash of jurisdictions. At the time the Crimes (Family Violence) Victoria Act 1987 was passed, the Family Law Act was amended in an attempt to avoid this problem – s114AB. Unfortunately it has made the situation worse.

⑮ As has already happened, the following scenario can readily develop.

A husband and wife have a disputed access fight before the Family Court. The wife alleges that the husband is an unsuitable person to be brought into contact with the child and makes many complaints that can be properly classified as harassment, molestation or behaviour in an offensive manner. A Judge of the Family Court nevertheless orders access upon the basis that it is in the child's best interests for such access to take place. The wife, by reason of her dissatisfaction with the order of the Court, or as a result of some perceived behaviour on the first access period, or subsequent access period, lays a complaint in the Magistrates Court under the State legislation and the Magistrate makes an intervention

order prohibiting the husband from contacting the child, or entering upon any premises where the child may be from time to time. The Magistrate attaches a warrant of arrest to the order.

A Superior Court of Record has made an order that the husband have access. A Court of Summary Jurisdiction makes an order ex parte that if the husband attempts to have the access, he is to be arrested. If the husband is aggrieved with the Magistrate Court's order, his appeal lies to the Country Court, another inferior court.

⑯ In my view this is an intolerable situation, which makes a mockery of the status of the Family Court. Whilst fully appreciating the need for a swift and inexpensive remedy in cases of genuine violence, it seems that in all matters relating to husbands, wives and their children, or ex-nuptial children which can properly be said to be within the purview of the Family Court, it must retain a supervisory role and be the ultimate determinant court in respect of these matters.

⑰ These are other examples of potential difficulty. It is not hard to imagine a clash between a Court of Summary Jurisdiction making an order for the wife to have sole use and occupation of the property and the Family Court in the exercise of its powers, ordering that that property become the sole property of the husband and that he be entitled to the use thereof.

⑱ A further absurd scenario of the wife going to the Magistrate's Court seeking sole use and occupation under the State law, whilst the husband goes to the Family Court seeking sole use and occupation under Federal law, could well arise with each Court able to make conflicting orders and no order having any apparent superiority over the other.

⑲ It may be arguable that the superiority of Commonwealth law would prevail, but it would place policemen and other welfare professionals in great difficulty as they can hardly be expected to be familiar with the vagaries of the Australian Constitution.

⑳ Decisions taken in the early stages of a dispute may have serious implications later on. A party may wish to proceed in the Magistrate's Court for a number of reasons. Geographical proximity, familiarity, and costs are practical facts which might make the Magistrate's Court a more attractive option than the Family Court. There are clearly problems in reconciling the need for protection to be readily available with the need for a uniform family law jurisdiction.

㉑ I accordingly regard it as vital that the problems to which I have adverted be addressed at a joint State and Federal level as a matter of urgency. It is simply not good enough for issues of such importance as the need to protect victims of violence becoming bogged down in the jurisdictional morass of a federal system. I shall deal subsequently with the way in which these problems should be addressed.

㉒ I turn now to the problems of child abuse and in particular, because it has come to occupy so much of the court's time, to the problem of child sexual abuse. Increased community awareness of the extent of child sexual abuse and child abuse generally and more sophisticated techniques for its detection, have inevitably led to complexities in finding appropriate legal and evidentiary solutions when such allegations are made.

㉓ Again this is an area where the criminal law has an extremely limited role to play. In the absence of a confession it is extraordinarily difficult to obtain convictions for these offences. The child may be too young to be capable of giving evidence and if old enough, a prosecution necessitates the child being subject to an appearance in the witness box to give evidence against perhaps a father or mother, with all of the difficulties that such an experience entails.

㉔ The very seriousness of the allegations and the potentially devastating effect of such behaviour on children, have produced an ambivalence in both the community and legal reaction to the problem.

㉕ On the one hand, there is the very natural concern that innocent persons should not be branded as abusers with the severe consequences that follow in terms of their relationship with their children. It was this concern that led to the setting up of the Cleveland Inquiry in the UK which demonstrated that in at least some of the cases considered such a concern was more than justified. A similar case in Australia was that of *Minister for Community Welfare v BY & LF* where the trial judge awarded costs against the Minister for Community Welfare in South Australia whose Department had been largely responsible for the making of an entirely groundless allegation against an access parent. The Minister sought to challenge the decision of the trial judge as to costs in the Full Court but failed. See 1988 FLC 91-973.

㉖ On the other hand, there is the principle of the paramountcy of the child's welfare and the very real concern that young children are likely to be endangered if an overly strict approach is taken to the question of the proof of child abuse. This has led to proposals such as that made by the Family Law Council for a suspension of access for a limited period in all cases where such an allegation is made. I regard that particular recommendation as an over reaction but depending upon the nature and seriousness of the allegations made, a Court obviously must give serious consideration to the suspension of access in such cases.

㉗ These ambivalent concerns surfaced in a very real sense in the cases of **B & B** (1988) FLC 957 and **M & M** (1988) FLC 958 and 979. **M & M** is perhaps the best example, because apart from the allegation of child sexual abuse, there was no other factor which would have justified a refusal of access, whereas in **B & B** some other factors were present which might have justified such a refusal. In both cases, the trial judges were not satisfied on the ordinary civil standard of proof, that child abuse had occurred, but were not able to discount the possibility that it had occurred and both expressed themselves in terms of having *"lingering doubts"* which led to them refusing access. All members of the Full Court were of the view, which the High Court confirmed, that the trial judges were correct in finding that the principle of the paramountcy of the child's welfare meant that it was not necessary to make a positive finding of sexual abuse in order to justify a refusal of access.

㉘ The difference which emerged in the Full Court, however, related to the question of whether some attempt should be made to qualify or grade the possibility of child abuse having occurred.

㉙ The majority (Baker & Maxwell JJ) said at 76 935: *"We are of the view, as a matter of general principle, that in assessing*

whether or not there is a risk to a child if access were to occur, or risk that the welfare of a child could be endangered in the event of access, the ordinary civil standard of proof must be applied. If a trial judge considers upon the balance of probabilities, that the welfare of a child may be endangered or there is a risk that a child may be physically, sexually or emotionally harmed, if access were to occur, then a trial judge may, in our view, suspend access."

In my dissent, I said that I thought that this expressed the test too broadly and I said at 76 927:

"Similarly, in my view, the mere possibility that the granting of an access order will expose a child to sexual abuse, is not sufficient to warrant the discharge of an access order and must be qualified. There must be a real or substantial risk of such abuse occurring as a matter of practical reality. In the present case, it is clear that the learned judge did not apply this test."

(30) The High Court did not accept this formulation and criticised efforts to define with greater precision the magnitude of the risk which would justify a parent denying access to a child. However, and with respect to their Honours, they, having said this, proceeded to do just what they had criticised by expressing the test as being that a court will not grant custody or access to a parent if that custody or access would expose the child to an **unacceptable** (my underlining) risk, of child abuse.

"Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree or risk has been described as a *"risk of serious harm"* (**A v A** (1976) VR 298 at 300); *"an element of risk"* or *"an appreciable risk"* (**M & M** (1987) FLC 91-830 at pages 76, 240-242); *"a real possibility"* (**B & B** (1986) FLC 91-758 at 75,545); *"a real risk"* (Leveque v Leveque (1983) 54 BCLR 164 at 167); and *"an unacceptable risk"* **Minor** 1987 1 WLR 1461 at 1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured in their efforts to protect the child's paramount interest, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse." **M & M** 1988 FLC 91-979 at page 77,081.

(31) The question now arises as to what follows from the High Court decision. In my view, the following propositions emerge.

(a) It is no longer necessary to make a positive finding of child abuse and the court should avoid doing so except in the most obvious cases.
(b) If such a finding is made, the standard of proof to be applied is that provided in **Briginshaw v Briginshaw** (1938) 60 CLR 336.
(c) In resolving the issue as to what form of order is in the best interests of the child, the court must determine whether on the evidence there is a risk of abuse occurring if custody or access be granted and assessing the magnitude of the risk.
(d) If the risk is assessed to be unacceptable, then custody or access should not be granted.

(32) As Professor Richard Chisholm says in his article *"Child Sexual Abuse : The High Court Rules on Onus of Proof"* (1989) 3 AJFL:

"On this matter we now have a formula: the court will not grant custody or access if to do so would expose the child to *"an unacceptable risk of sexual abuse"*. This is one of those formulas that the late Julius Stone might have called a *"category of illusory reference"* since arguably it breaks down into the following tautology: The court should not order custody or access where the risk of abuse is such that the court should not order custody or access. It is possible, however, that the High Court's choice of the word *'unacceptable'* in preference to words expressing degrees of probability, indicates that the court should have regard not only to the **likelihood** of further abuse but also to its **seriousness.**"

(33) The formulation however has left unanswered, as indeed the High Court left unanswered, the question of what is an unacceptable risk. It may be argued that if a Judge has lingering doubts about whether abuse had occurred in the past, then this does constitute an unacceptable risk. On the other hand, as I pointed out in the Full Court, there will be few cases indeed where a judge does not have lingering doubts when such an allegation has been made. Such an approach to the question would, in my opinion, have a devastating effect upon many possibly innocent parents and would not, I believe, be generally in the best interests of the child affected.

(34) I think the better approach and one which is in accordance with the High Court's decision, is to take the words *"unacceptable risk"* at face value rather than endeavouring to relate them either to the facts of **M & M** or the trial judge's reasoning in that case. If this

is done, the test to be applied by the court, where allegations of child abuse are made, is simply whether on the evidence there is an unacceptable risk that abuse will occur if a particular access or custody order is made. It is then up to the discretion of the trial judge to determine what he or she regards as an unacceptable risk. In doing so, I believe the judges should be mindful of the dire consequences involved in permanently depriving a parent of contact with a child from the child's point of view, whilst at the same time, balancing the devastating effect upon the child of sexual abuse or other forms of abuse occurring. I do not think, however, that the High Court's decision means that a finding that there is a mere possibility of child abuse, is sufficient of itself to constitute such an unacceptable risk.

(35) The delicate balance that must be struck by the courts between the deprivation of custody/access (from the viewpoint of the child and the parent) and the risk of sexual abuse continuing leads to the situation where the court in evaluating the risk must have the best evidence available before it.

(36) In the Family Court and in courts having child welfare jurisdiction it is rare for children to be called as witnesses and the court would normally not permit it. There is a distinction however, between the two jurisdictions in that in the Family Court the ordinary rules of evidence apply whereas in child welfare proceedings, they usually do not. Problems have been alleviated to some extent by the relaxation of the rule against hearsay in the case of young children. See Re K (Infants) 1985 AC 201.

(37) The court's real difficulties arise when the court regards the evidence as evenly balanced or worse, when it is not satisfied that the allegation has been made out on a civil standard of proof, but is nevertheless left with the doubt as to whether or not the allegation is correct. The court cannot say that because an allegation of abuse is not established it must be assumed to be false with the consequence that the alleged abuser obtains an order for custody (see **E v E** (1979) FLC 90-645). The High Court has now made it clear that the court should not necessarily make a finding where the evidence does not enable it to do so. As the High Court said in **M v M:** *"In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof with due regard to the factors mentioned in* **Briginshaw v Briginshaw"**

(38) Thus in the majority of cases of sexual abuse the court must have the best evidence available to enable it to properly assess the risks to the child. That is, to determine whether or not there is an unacceptable risk.

(39) It is my opinion that statements made by children about abuse are admissible in Family Court proceedings for the reasons already stated, and indeed, such evidence is normally admitted. I would think it desirable for there to be an amendment of the relevant legislation to make this absolutely clear. It is obvious that without the admission of such evidence, and in the absence of direct evidence from the child, the court would never be properly informed as to abuse of children, and particularly very young children.

(40) There is also in my view, a case to be made to the admissibility of such evidence in criminal proceedings. In its absence there will be many occasions where an offender will go free. The criminal law thus does not serve its purpose of deterring and hopefully seeking to prevent this sort of crime.

(41) The fact that such evidence is, and should be admissible, carries with it certain dangers however. Apart from direct statements to persons such as teachers or parents, such evidence is often obtained from health professionals, many of whom use the methods pioneered by the Child Sexual Abuse Clinic at the Great Ormond Street Hospital for Sick Children in London. This has led to difficulties, particularly if the professionals see their role as largely therapeutic and not investigative, but then later rely on observations made during therapeutic sessions which proceed upon the basis that the child has in fact been abused. This approach has been the subject of criticism by the courts both in Australia and the United Kingdom. In the Cleveland Inquiry in 1987 Lord Justice Butler-Sloss raised the problem of the confusion that existed as to whether some interviews were being conducted to ascertain the facts or were for therapeutic purposes or a mixture of both. She raised the necessity for a distinction between treatment and investigation and reported at page 208:

"It was apparent that various feelings came together at the time of interviewing some at least of these children – anxiety, the need for a solution, beliefs about *"denial"* and the therapeutic benefits for children of talking about abuse, the perceived need to believe the child and some learnt information about techniques of interviewing. These included matching the pressure on the child not to tell with pressure by the interviewer on the child at the interview. There was in many instances a presumption that abuse had occurred and the child was either not disclosing or denying that abuse. There was insufficient expertise, over-enthusiasm, and those conducting the interviews seemed unaware of the extent of pressure, even coercion, in their approach. There were dangers, which became apparent in some cases, of misinterpretation of the content of the interview.

Some interviews we saw would not be likely to be acceptable in any court as evidence of child abuse. The Official Solicitor refers to an aspect of this – the dangers with such interviews of costly and protracted litigation."

(42) Evidence may depend upon leading questions and conduct which on some views, might amount to harassment of the child in order to extract allegations of abuse. Sometimes the professional is rightly accused of selective editing of the child's responses, informing the Court only of those statements or actions of the child which reach the conclusion that abuse has occurred. In my view many of these problems could be overcome by professionals becoming better trained in the requirements of the Court as to evidence and by the videotaping of such interviews with the child. It is worthwhile to again refer to the Cleveland report. Lord Justice Butler-Sloss quoted Mr Justice Latey referring to cases falling into the category:

"Where there is nothing more than a combination (constellation it is called) *of alerting symptoms"* which are the ones likely to come to Court for decision: *"There should always be a video recording. The reason is that: Where there is a dispute whether there has or has not been abuse the Court is anxious whether it should accept the ipse dixit of the interviewer or interviewers, however skilled and experienced. This is because cases have shown that the precise questions, the oral answers* (if there are any), *the gestures and body movements, the vocal inflection and intonation, may all play an important part in interpretation. Where there is a dispute, there should be an opportunity for another expert in the field to form a view. Often, no doubt, he would reach the same interpretation and conclusion. In other cases he might not and in the interests not only of justice between the parties, but at doing its best to arrive at*

the truth of the matter in the interests of the child, the Court should have the benefit of such evidence, so informed" Page 209, paragraph 12.46.

(43) Complaint that video-taping is too expensive is not in my view justified when compared with the expense involved in long and protracted examination and cross-examination of expert witnesses. For example in the Adelaide Registry of the Family Court during the last twelve months at least three cases involving allegations of sexual abuse have each occupied 20 sitting days of the court's time and one case took in excess of 30 days. The cost to the community of these cases is enormous.

(44) A further major advantage of video recording is the reduction in the number of necessary interviews with the child. However, there are some disadvantages, the unavailability of reliable high quality equipment with reproductable sound: the possible interference with the relationship with the child or even the reduction of spontaneity of accounts. However as Lord Justice Butler-Sloss reported the presence of video recordings was very helpful as it exposed the interview to critical evaluation by others.

(45) Video taping of interviews with children is now common in the United States. In fact as at August 1987, 19 States had enacted legislation providing that video taped interviews with children be admitted in evidence in criminal matters.

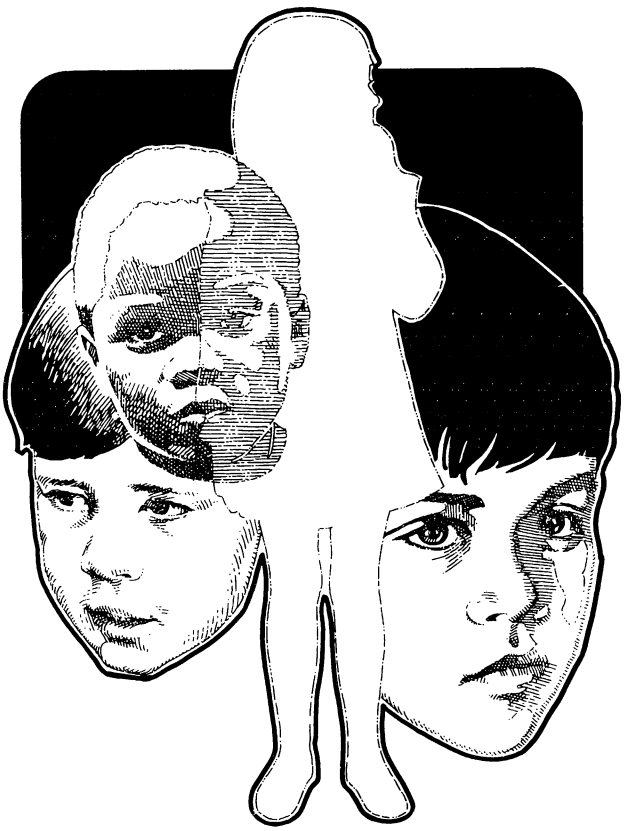
(46) In England at present the government has elected not to proceed with the admissibility of pre-recorded video tapes of children's evidence in criminal matters but rather has proceeded with a provision to allow child witnesses to give live evidence by means of a *"live link"* alias close-circuit television. (This decision has been criticised – see John Spencer – *"How Not to Reform the Law"* New Law Journal Vol. 138 No. 6365.) However, it is generally accepted that the hearsay rule would not prevent the use of video taped interviews in civil proceedings and the use of video taped evidence is becoming commonplace. Whilst a Judge may not accept the evidence of the interview and consider a particular example as unconvincing, videos of interviews with young children are being admitted as evidence, see Re E (a Minor) *"The Times"*, July 16th 1986.

(47) In this regard I was surprised and somewhat disappointed to note that the Family Law Council in its discussion paper did not support the video taping of such interviews. In my opinion they represent the best evidence of what has occurred and enable other professionals to express opinions on the issues involved without the necessity of subjecting the child to further interviews and investigations which can in themselves amount to abuse of the child.

(48) **Problems of Jurisdiction**

The question of which court is appropriate to determine allegations of child abuse is one which must be addressed.

(49) In some States, as hitherto has been the case in Victoria, the Community Services Department has regarded allegations of sexual abuse by an access parent as a matter to be determined in the Family Court and not a matter which the Department need investigate. In States, such as South Australia on the other hand, the Department has taken such allegations to the Children's Court in its



welfare jurisdiction. As the law stands at present, once a care and protection order is made by a Children's Court, Family Court jurisdiction is ousted. However, until such an order is made, parallel proceedings may exist in both courts concerning the same subject matter. This means that there is a very real danger of the same issue being litigated in two courts with the very real possibility that a different result may be arrived at. In **Minister for Community Welfare v BY & LF,** which was a South Australian case, there were simultaneous proceedings in the Family Court and the Children's Court relating to the allegation of sexual abuse. The Minister intervened in the Family Court proceedings and agreed to an adjournment of the Children's Court proceedings to enable the Family Court to determine the matter, but did not regard himself as bound by its decision on the question of child abuse. In fact, the Minister did eventually accept the decision, save for the costs order made against him, but if he had not done so, the whole matter would have been re-litigated in the Children's Court.

(50) Whilst at first sight, the Victorian position may be thought to be preferable, it is also unsatisfactory because no proper investigation is undertaken by the Department in such circumstances. By default the investigatory role has been undertaken by the Court Counselling Service, which is a questionable role for the Counselling Service and is, in any event, often undertaken at too late a stage.

(51) In New South Wales, as I understand it, there is considerable administrative co-operation between the court and the child welfare authorities. However, I note that the New South Wales Child Protection Council has recommended the staying of Family Court proceedings in relation to a child until the outcome of any proceedings instituted in the Children's Court has been determined. This is not satisfactory, in my view, because if, for example, the Children's Court does not find that abuse has occurred, there is

nothing to prevent the whole issue being re-litigated in the Family Court. On the other hand, if it does determine that abuse has occurred, and makes orders as to the disposition of the child and access, or lack of it, this means that the jurisdiction of a Commonwealth Superior Court to determine such matters has been ousted by, in most cases, the decision of a Magistrate's Court.

(52) The Family Law Council has recommended that both the Family Court and Children's Courts should be able to exercise the jurisdiction of each other pursuant to appropriate cross-vesting provisions, or alternatively, has recommended that the State courts should be able to exercise Family Court jurisdiction. It has also recommended, as has the recent report **"Protective Services for Children in Victoria"** that appeals from child welfare courts should lie to a single judge of the Family Court, rather than to a County or District Court as is the case in most States.

(53) So far as cross-vesting is concerned, there are, I think, problems about conferring the jurisdiction of a Commonwealth Superior Court upon State Magistrates, although these would be much alleviated if appeals were to lie to single judges of the Family Court. On the other hand, there may be much to be said in favour of State child welfare jurisdiction being conferred upon the Family Court under appropriate cross-vesting legislation. The States, with the exception of Queensland and Western Australia, have already conferred custodial jurisdiction in relation to all children on the Family Court and the court can already exercise the jurisdiction of State Supreme Courts under cross-vesting legislation. Having regard to its role and expertise in family matters, it would obviously be equipped to exercise child welfare jurisdiction. This would have the added benefit that the court would have jurisdiction to protect a child in circumstances where either out of fear or complicity, the child's caregiver, who is not the alleged abuser, is unwilling to proceed with such allegations.

(54) There is also much to be said in favour of appeals lying to the Family Court from child welfare courts. This would do much to create a coherent Australian family jurisdiction and could be readily achieved by the conferring of State commissions upon Family Court Judges. There is an existing precedent for the taking of such a step in Western Australia where the judges of the Family Court in Western Australia were given dual Federal Commissions.

(55) It is not possible in the context of a paper such as this to do other than touch upon problems associated with the investigation of child abuse allegations. Again the picture throughout the States is confused and unsatisfactory. It is only necessary to read the judgments in cases such as **B&B, M&M** and **Minister for Community Welfare v BY & LF** to realise not only the ineptitude with which many such investigations are conducted, but also how stressful they are for the child concerned. It is essential that the number of interviews with the child and their length should be minimised. It is equally essential that the nature of such interviews should be subject to examination and scrutiny. At the very least, all such interviews should be tape-recorded and preferably videotaped. Similarly, where devices such as anatomically correct dolls are employed, it is much more satisfactory for the court entrusted with the determination of the issues to be able to see the child on video-tape handling the dolls, rather than relying upon some *"expert"* interpretation of what the child was doing.

(56) The problems associated with child abuse are difficult and complex ones and much work still needs to be done to solve them. There needs, I believe, to be a much greater degree of Commonwealth and State co-operation than has occurred to date. The law itself must be further clarified and the legislative structure improved. Investigative processes need to be streamlined and those conducting investigations must become more aware of the evidentiary requirements of the courts. The problem of dealing with the evidence of children must be further addressed. There are hopeful signs in a number of these areas, but it is the role of the lawyer in this context to ensure that any proposals for change are in fact improvements and do not create more problems than they solve.