From: [redacted]
Sent: Thursday, 4 August 2005 12:36 PM
To: Horne, Nicholas (REPS)
Cc: [redacted]
Subject: further comments on Exposure draft bill Family Law Act

Dear Dr. Horne,

I note from the Transcript of the public hearings that reference was made to provisions of the State child protection legislation concerning rules of evidence.

The wording proposed in section 60KG differs from the State child protection provisions.

Some of these are:

South Australian Consolidated Acts

CHILDREN'S PROTECTION ACT 1993 - SECT 45 (see similar section 17 of Children's Protection and Young Offenders Act the previous legislation)

45. (1) In any proceedings under this Act--

(a) the Court is not bound by the rules of evidence but may inform itself as it thinks fit; and

New South Wales Consolidated Acts

CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 - SECT 93 General nature of proceedings 93 General nature of proceedings

(3) The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children 's Court, are to apply to those proceedings or parts.

Queensland Consolidated Acts

CHILD PROTECTION ACT 1999 - SECT 105

105 Evidence

(1) In a proceeding, the Childrens Court is not bound by the rules of evidence, but may inform itself in any way it thinks appropriate.

Victorian Consolidated Legislation

CHILDREN AND YOUNG PERSONS ACT 1989 - SECT 82

Conduct of proceedings in Family Division

82. Conduct of proceedings in Family Division

(1) The Family Division-

(d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.

One of the decisions of an appellate court dealing with the consequences of this type of legislation is from the Supreme Court of South Australia.

The proposed amendments to the Family Law Act will make it difficult to avoid the dangers referred to in this case.

DAVID B AND DIANNE B v THE MINISTER FOR FAMILY and COMMUNITY SERVICES No. SCGRG 1126 of 1992 Judgment No. 3575 Number of pages - 23 Infants and children -

children in care of state [1992] SASC 3575 (21 August 1992) IN THE SUPREME COURT OF SOUTH AUSTRALIA OLSSON J Selected quotes: "48. I again pause at this point. I am constrained to express considerable concern at the admission of or reliance upon any material of this nature. Most of it was, of course, the rankest of hearsay of a highly prejudicial nature. It was quite irrelevant to the issues directly falling for decision in this matter, because it focused on fundamentally different periods of time and related both to M rather than the children and also an opinion expressed by her, on no identified basis of evidence. It was of no logical, probative value in relation to the primary issues in this case. 49. It was, to say the least, equivocal and extremely tenuous in its nature - even as to what may in fact have transpired in relation to M - and it had a very profound tendency to distract attention from what were the true issues to be determined. Its acceptance was of highly dubious validity, even as to any finding of fact on the topic of sexual abuse of M by David B. It certainly worked very unfairly against the appellants. M herself denied on oath the occurrence of any sexual abuse towards her. Having regard to her longstanding animosity towards David B that denial was of considerable significance, as was her offhand remark "He probably does"."

"54. I have now twice expressed some criticism of the nature of the evidence permitted to be led before the learned Judge. In making those criticisms I do not, of course, overlook the provision of section 17 of the Act, which stipulates that the court below is not bound by the rules of evidence, but may inform itself upon any matter relating to the proceedings in such manner as the Court thinks fit. 55. The learned Judge made reference to this in the course of his reasons when he made the points:-

> "In considering the evidence as it bears on the sexual interference with T by David B, I am to weigh the facts not as in a criminal case, on the standard of proof beyond reasonable doubt, but rather on the balance of probabilities (Section 17,
> (Embedded image moved to file: pic28145.gif)<<Children's Protection and Young Offenders Act(Embedded image moved to file: pic23281.gif)>>). The enquiry or
> hearing is one which allows of hearsay evidence and the allegations from T are given as they could be for one so young by an intermediary, in this case Mrs Rooney. There was much other hearsay evidence presented by Departmental officers and other witnesses.
> I bear in mind the legal principles to be applied in being satisfied on the balance of probabilities where such serious allegations are made, as laid down by the High Court in Briginshaw v Briginshaw (1938) 60 CLR 336."

56. Whilst I entirely agree with him as to the onus of proof and the necessity, in a case such as this, of adopting the approach adverted to by the High Court in Briginshaw v Briginshaw, there are other aspects which, on the material before me, demand comment. 57. There can be no doubt that it is open to a Court, in proceedings pursuant to section 12, to admit and act upon hearsay and other informal evidence. But that is not to say that evidence is at large and that no constraints exist. The fundamental concepts of relevance and probative weight still remain applicable. 58. In departing from an adherence to strict rules of evidence it is incumbent upon the Court to tread warily, particularly in cases of this type, in which grave issues, which have the potential to affect both the welfare of the children in question and also the character of other persons in a most serious manner, fall to be determined. 59. Even given what fell from Lord Devlin in Official Solicitor to the Supreme Court v K and Anor (1965) AC 201 at 242-3, the discretion vested in the Court, manifestly, must be exercised in a judicial manner; and one which pays due regard to the basic principles of natural justice. Where material proposed to be placed before the Court is of doubtful relevance to the issues to be determined and/or of little (if any) logical, probative value and has a potential to be highly prejudicial to a party, it is simply not a proper exercise of discretion to admit it - the more so where it is not only rank first (or even second) hand hearsay, but is also evidence which, by its very nature, may be well nigh impossible to refute; and, at best, in part, consists of little more than innuendo. 60. How, for example, rank hearsay allegations of possible earlier abuse of M (allegations which were never directly relevant to the issues in this case and were never

made good) could possibly be of any weight or even be relevant to the issues in this case is difficult, if not impossible, to see. Their prejudicial effect was very considerable, based as it was on what is, logically, a patently invalid basis of propensity reasoning. They were, in reality, no more than a character smearing exercise which diverted attention from the real issues to be addressed."

"78. It must be conceded that the learned Judge approached his task with the precepts discussed in Briginshaw and M v M well in view. But one of the great disadvantages which he had was the existence in his mind of a great deal of hearsay or other material of very dubious and prejudicial quality. There was, for example, not a scintilla of acceptable, hard evidence of any specific untoward behaviour by David B towards M."

"125. But, as was pointed out by O'Loughlin J in that case and as I have earlier sought to demonstrate, the wide potential ambit of section 17 of the Act carries with it a concomitant need for extreme caution as to both the ambit of evidence to be allowed in, and the manner in which it is to be assessed as to relevance and weight. There are serious dangers that a party accused of misconduct may well find himself faced with a trial within a trial as to extraneous or tangential evidentiary features; and be considerably embarrassed by having to embark upon an endeavour to conduct what is essentially a defence to collateral assertions. In this connection O'Loughlin J underscored what fell from Lord Devlin in Official Solicitor to the Supreme Court v K and Anor (supra). 126. My concern in the instant case is that, as I have earlier indicated, not only did the learned judge allow in a wealth of material which was both highly prejudicial and also ephemeral as to its relevance and probative weight, but he also accorded it considerable significance in his final processes of analysis and reasoning." (my underlining)

This case highlights the dangers of abandoning the rules of evidence in matters involving strong emotions and the lives of children.

Yours sincerely,

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