SUBMISSION

To the

SELECT COMMITTEE ON CHILD PROTECTION

HOUSE OF ASSEMBLY, PARLIAMENT OF TASMANIA

By

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1. Introduction

This submission is in four parts:

1. Introduction.
2. Background and qualifications of the author.
3. Evidence tending to show the inadequacy of the current intervention and prevention strategies.
4. Some suggestions as to further and better intervention and prevention strategies.

I regret that pressure of other work has prevented me from delivering this within the timeframe required and that because of lack of time it is not intended to be an exhaustive or thorough analysis of the current system or to address the full range of problems with the current system.

That is the role of the Committee and my endeavour is to assist the Committee by telling the story of some children who were and continue to be let down by the system.

The mother of the children was my client in a legal saga that has stretched over approximately 3 years. I have my client's consent to the disclosure of the facts in this submission, but in the interest of anonymity the names of the parties have been changed.

2. Background and Qualifications of the Author

I am a Barrister and Solicitor of the Supreme of Tasmania, and a practitioner of the High Court of Australia. I received my law degree in 1974, and practiced as an apprentice at law with the limited right of audience until I was admitted to the bar in February 1976. I practiced in Hobart between 1974 and 1976. In 1977 I was a lecturer in law at what is now the University of Western Sydney. From 1978 I have practiced in Launceston in most areas

of the law, being involved on the one hand in social justice issues, and on the other in complex matters of most types, the latter subsidising the former. I also hold a Graduate Diploma in Advanced Family Law from the University of Melbourne.

Between 1981 and 2000 I appeared in many matters involving the welfare of children, both in the Family Law Jurisdiction, and in the Magistrates Court, and in that period was briefed from time to time as Counsel for what was then the Child Protection Assessment Board. I was also appointed from time to time to act as a Child's Advocate (now known as an ICL – Independent Childrens Lawyer).

As a consequence of my experience I became quite familiar with the law and sociology surrounding child abuse.

In 2007, although I had substantially wound down this aspect of my practice I was still reasonably familiar with the practice and principles relating to such matters. In that year I accepted instructions to act for a mother whom I will call Caitlyn Ruddock, whose story is substantially the basis of the submission.

3. Evidence Tending to Show the Inadequacy of the Current Intervention and Prevention Strategies in Place for the Department of Health and Human Services.

3.1 The Ruddock Saga

In early 1999 Caitlyn Ruddock had 2 daughters, Shalin about 5 years old, and Bronwyn about 4 years old. She started living with Sam Robins in early 1999. They both worked for the Department of Health and Human Services as carers.

In November 1999 they had a daughter Amanda, and in March 2001 they had another daughter, Monique.

From the beginning the relationship was abusive. Sam smoked marijuana and when he ran out he suffered withdrawal symptoms and became angry and volatile. He physically abused Shalin and Bronwyn by poking at them, pulling their ears, yelling at them and smacking them. He physically abused Caitlyn and forced her to submit to anal and non-consensual sex.

In or about 2001, Caitlyn became concerned about sexual abuse of the children when she walked into Shalin's bedroom late one night and found Sam squatting at the side of her bed. Her pyjama bottoms were down. He was leaning over and touching her. When she spoke he jumped up and his penis was erect. She tried to leave him at this time but did not know where she could go with 4 children. As a result of the family violence upon her she became passive and submissive and could not pluck up the courage to leave him.

In early 2006 Caitlyn found images on a tape in the family video camera of child pornography. She left Sam that day and reported it to the police. She also reported it to Child and Family Services. Sam was charged on 3 counts; child exploitation, accessing child exploitation material and using a child abuse product.

Child and Family Services had Sam assessed by a psychologist in Hobart. The psychologist did not speak to the children, did not read police interviews, did not speak to Caitlyn, and reported to Child and Family Services that he was not a threat to his children.

During the assessment period Child and Family Services allowed Sam to see the girls under supervision by CFS workers. After the report was received, and before the prosecution had been to the Supreme Court, Child and Family Services advised that they concurred with the psychologist that he was not a sexual threat to his children and ended their intervention.

Subsequently Sam was convicted of the charges, fined, and put on the Sex Offenders Register for 5 years. Caitlyn was not shown a copy of the letter from the psychologist, and was not asked for her views about it. Sam continued to abuse, harass and belittle Caitlyn, sometimes in front of the children. Eventually in May 2007 Caitlyn obtained a Family Violence Order and refused to allow Sam unsupervised contact with the children.

Sam took an application in the Federal Magistrates Court for contact orders. It was argued for Caitlyn that allowing unsupervised contact subjected the children to an unacceptable risk of sexual abuse. However in view of the conclusion of Child and Family Services that he did not pose an ongoing risk to the 2 children, on an interim basis they were placed with him by the Federal Magistrate for approximately one half of the time and placed with Caitlyn for the other half.

Despite the obstacles to success, Caitlyn appealed to the Full Court of the Family Court against the interim orders for placement of the children.

The obstacles were great because the job of the Full Court is not to review the decision of a Federal Magistrate, but only decide whether his finding of acceptable risk was open on the evidence. The Full Court cannot simply re-exercise the discretion to decide the case. It can only interfere when a Magistrate, properly applying the law, could not come to any other conclusion *apart from* unacceptable risk.

The decision of the Full Court is reported in Austlii as *Ruddock & Robins* [2007] FamCA 1181 (30 August 2007). In the decision, great weight was placed on the decision of Child and Family Services not to intervene any further. At paragraph 30 it was stated:

"the Federal Magistrate however, had expressed the view that he was particularly influenced by the conclusions reached by the State Child Welfare Authorities and by the arrangements that the parties themselves had reached for 9 months immediately prior to the hearing".

At paragraph 30 the judgement continued:

"This is an appeal from a discretionary judgement. There is no doubt that the Federal Magistrate could have reached a conclusion that the children were at an unacceptable risk in the father's care pending further investigation of the matter. But my enquiry in determining whether or not there is an appealable error is not to determine that the Federal Magistrate could have reached that conclusion, but to determine whether he had any option other than to reach that conclusion or that he reached the conclusion that he did through inappropriate procedure or failed to pay attention to the appropriate priniciples..

34. Whilst I am troubled by the conclusion reached by the Federal Magistrate, I can understand the path which he took to reach it and I cannot come to the conclusion that it was not open to him, on the material – namely, after an investigation by the State Authorities of the elements of risk to the children and the conclusion that there was not in their view an unacceptable risk.

35... It does not axiomatically follow that even if he had been interfering with his step-children that he would pose a risk to his own children. It does not axiomatically follow that because he had a predilection towards child pornography that he posed a risk to his own children. Those are matters that were no doubt investigated by the State Authorities who reached the conclusion that the father posed no risk of harm to the children in his care.

36. In the circumstances, as uncomfortable as it may seem, I cannot say that I feel there is an error on behalf of the Federal Magistrate, and accordingly the appeal will be dismissed"

The appeal turned on a fine point of law. A discretionary decision appealed from, to be upset, must have been so wrong that no Judge, properly applying the law, could have possibly come to that conclusion. That was an insurmountable obstacle.

The decision was based almost exclusively on the (wrong) decision by the Department of Child and Family Services.

There was at all times ample literature to suggest that the majority of those who view child pornography also or subsequently engage in child abuse. Common sense suggests it.

The litigation continued in the Family Court, Sam continuing to have contact with the children. An Independent Childrens Lawyer was appointed for the children. However, no doubt influenced by the CFS decision, he advised the Legal Aid Commission of Tasmania that there was no merit in Caitlyn's case, and her case, which had never been funded by Legal Aid continued to remain unfunded. The perpetrator father had always been legally aided, and the children's lawyer was also legally aided, but Caitlyn had to battle on without any assistance except from her lawyers.

Caitlyn continued to advise Child and Family Services ("CFS") that Sam was sleeping in the same bed as the children but it refused to do anything about it. She filed a notice of child abuse but CFS declined to intervene. CFS demanded that she change her surname before they would allow her to work for them as a carer any further. In effect she, notwithstanding being a mother working hard to protect her children, was demonised and lost her employment for doing so. She was banned from visiting friends at a family group home run under the auspices if CFS.

At one point Caitlyn discovered that Sam had breached his Supreme Court order regarding the Sex Offenders Register. He had failed to report for over 2 years about all the little girls who had stayed at his house overnight. He had failed to disclose his convictions to their parents. Caitlyn sought help from Tasmania Police, the girl's school principal, and an affected child's parent. The Police investigated and said that he had not been reporting to the offenders register, but they gave him a verbal warning instead of prosecuting.

At or about this time Caitlyn ascertained from her children that their father had removed the bathroom door and they had to change and bathe with their father watching them.

Caitlyn took steps to try to activate CFS. She asked for a second psychologist's report as the first one was wrong and had left her children and their friends in great danger. The Northern Area Manager refused to intervene asserting dogmatically that paedophiles do not offend on their own children. While there is no universal talisman, this absolute assertion is incorrect. As a result the children continued to be in danger.

Caitlyn's lawyers, my firm, also attempted to have the decision reviewed without success.

As part of the Family Court process a new psychologist (Dr. Seymour) was appointed to do a second assessment. This psychologist actually spoke to the children and it was disclosed to her that Sam played tickle games around

their private parts and their friend's private parts. One of the daughters complained that she had to dress in the wardrobe at her fathers so that he doesn't look at her getting dressed. There was also a disclosure that Sam asked one of his daughters to get into bed with him and he fondled her bottom in a way that made her feel uncomfortable.

While there is much more in the report, and the case, the long and the short of it was that this psychologist came to the conclusion that there was an unacceptable risk to the children in unsupervised contact. Eventually the Family Court accepted this and put in place protective orders.

The shame of it all is that the whole family, and Caitlyn's de facto husband who was also victimised and caught up in these proceedings were put into turmoil for over 3 years because CFS failed to protect these children. Indeed the whole legal system, including the Police, Legal Aid, the psychologist who did the original assessment, the Magistrate who heard the interim case, the appeal court Judge who heard the appeal, and the Independent Childrens Lawyer who represented them let these children down.

4. Suggestions as to Further and Better Intervention and Preventative Strategies.

I respectfully submit that the Ruddock saga indicates that the children concerned were not appropriately protected by Child and Family Services and that the following changes ought to be made to the practices and procedures employed by it.

4.1 The risk of abuse, neglect and family violence ought to be given a higher priority than any other matter, including a higher priority than the benefit to a child of having a meaningful relationship with a parent.

Since the amendments to the Family Law Act in 2006 there seems to have crept in to not only the family law system, but the child protection system a culture of promoting shared parenting over and above child protection. This is exemplified in the Ruddock saga by CFS who maintained supervised contact while the perpetrator was being assessed. Until the assessment is complete, in my respectful submission contact should cease because the risk of damage to the child should override a short term denial of contact.

The 2006 amendments to the Family Law Act have been roundly criticised in *Family Courts Violence Review* by Professor Richard Chisholm, *Evaluation of the 2006 Family Law Reforms* by the Australian Institute of Family Studies, and *Improving Responses to Family Violence in the Family Law System* by the Family Law Council. Those criticisms have been taken to heart by the Commonwealth Government in its recent proposed amendments to the Family Law Act making welfare of children the

primary concern. That Commonwealth change should be reflected in State Legislation.

4.2 Child and Family Services should not form any view without, (subject to age restrictions) ascertaining in an appropriate way the views of the children concerned, as well as the views of the parents.

4.3 CFS should use contracted experts such as psychologists by rotation from a panel of suitable persons, and not repeatedly utilise the same expert.

Repeated use of the same expert can give rise to the danger of the expert moulding his or her views to any views expressed in the brief from CFS. It can also lead to CFS utilising experts with particular predilictions and known views, at least in finally balanced cases.

4.4 Briefs to experts to provide opinions should require that the contracted expert interview both parents and de facto parents and the children who are the subject of the referral.

In the Ruddock saga the psychologist retained by CFS did not interview Mrs Ruddock, and was not aware of the allegations of prior abuse of the spouse and step-children of the perpetrator. All that was taken into account were the views of the perpetrator. This was necessarily one sided, and a serious breach of ordinary rules of natural justice.

4.5 Both parents should be given a copy of any report by an expert contracted by CFS.

It is a travesty of natural justice to have decisions made by CFS based on a report without a party having a copy of that report in order to draw attention to problems with it. As the Ruddock saga demonstrates, once a decision is made by an expert, it almost always becomes a decision of the Department, and the whole legal system begins to hinge on that decision as others later in time point to it as a reason for non-intervention. It is irrelevant to say that other parties have a chance to argue a case before a Magistrate. By this time positions are entrenched, and damage may already be done to relationships let alone the children.

4.6 Wherever CFS decides not to intervene there should be some independent review of that decision.

Obviously a decision not to intervene exposes a child to alleged risk at the very least. It is anomalous that a decision to actively intervene is to all intents and purposes reviewed by a Magistrate who must be convinced in order to make an order, while a decision not to intervene which may expose children to great risk of harm is not reviewed in any way. There is a complete imbalance in this approach.

4.7 Where CFS proposes to make a decision not to intervene advocacy support should be made available to the party seeking the intervention.

Advocacy support can come from lawyers in private practice, lawyers in community legal centres, advocacy support organisations within the community, or other caring professionals in organisations such as Laurel House or other support networks such as Advocates for Survivors of Child Abuse. The reality is that in very many cases the parent notifying of child abuse is disempowered in a number of ways including being emotionally overwhelmed by an abusive partner.

Of course it will be said that sometimes one parent makes an unfounded claim of child abuse as a way of getting at the other parent or as a tactic, and in my experience that does sometimes happen.

However the welfare of the children should be paramount, and no one contends that cases such as these are easy. The danger is that in applying preconceived ideas and kneejerk reactions the interests of the children are overlooked. So often victims of physical and sexual assault in relationships are worn down to the point where they can hardly carry on, and need support just to maintain a protective position for their children. Even when family violence orders are in place, force is exercised by the perpetrator by subliminal messages and communications, communications through third parties, friends and family and so on.

4.8 Diversity of opinion by workers within CFS should be encouraged and not discouraged or quashed.

I believe that in the Ruddock saga within CFS persons having opinions different to the official decision and who wished to re-examine the matter had pressure applied to them to "let it be". I think that generally this occurs because of overwork and lack of funding leading to an inordinate desire to "close the file" in order to reduce the statistical workload to the detriment of children in need of protection. However in particular in this matter I believe it happened simply to prevent loss of face and "a back down" from the position initially taken.

Workers within CFS should have a right to freely and without fear of retribution express a different view to any other worker including those senior to them. I suggest that discrimination against a worker because of a genuinely held but different professional view ought to be illegal discrimination under the Anti-Discrimination Act. Because the reality and practice is that few people ever make complaints, the right to a different point of view should be enshrined in legislation and in the Policies and Procedures Manual of the CFS.

4.9 CFS should have sufficient funding in order to enable it to employ enough case workers to do an adequate job of protecting children.

Insufficient funding causes hasty, ill considered and sometimes wrong decisions in order to "close the file". That expression is almost a cliché within those working in the Department because of the pressure to take that course. That pressure emanates from having insufficient resources to do the job properly. In my view most of those working within the Department are genuine, feeling, compassionate people who are driven to take decisions they might not otherwise take because of lack of resources or fall into error because of the pressure they are under. It has been alleged to me that:

- Most children do not receive counselling they need even when it is requested many times.

- Many children are returned to homes where the child had previously been victimised, including physical violence and sexual abuse. It has been claimed that one child used to come back for contact visits with his mother with cigarette burns. Although the carer made complaints to CFS, contact was continued and ultimately he was sent back to live with his mother.

- Financial support for foster carers is insufficient. As a result there are few, or few suitable, foster parents. I have been told of a case in which a foster parent in 2006 was paid $75.00 per child to cover Christmas. That person had 13 children in her care and spent approximately $200.00 on each of them, a total of $2,600.00. I am told there is insufficient funding for decent clothing for children who are in foster care.

- Workers do not visit children under protection sufficiently. While much is hidden on a visit, much can also be gained.

- In one case a 10 year old boy who had spent time in care through two lots of 8 week care and protection orders was returned back to his family but the younger sister was not as she was considered to be at risk. It is inconsistent and discriminatory for male children to be exposed to risk and not female children.

- A 10 year old boy was put in care and was not assessed for several months, despite being classified as having high needs (prescribed 6 dexamphetamines per day).

- A 14 year old girl in care was quite open with CFS workers that she performed sexual acts for small amounts of cash. She regularly boasted about giving blowjobs for $10.00 to taxi drivers. Nothing was done. Approximately 2 years later a carer was charged with

having sex with her and taxi drivers were charged with having sexual contact with her. The stable door was closed after the horse had bolted.

- It was reported to the Department regularly that a 15 year old girl in care was regularly visiting a man at Hadspen who was approximately 50 years old and was staying overnight with him. This man had been flagged by the Department as being a risk to young girls. The Department did nothing. It was reported to the Department on two occasions that the 15 year old girl took a 12 year old girl to this mans place and stayed overnight. The Department did nothing.

- A male family group home carer had a highly sexualised 14 year old girl placed in his care. He asked that she be removed as he had concerns it was an inappropriate placement for the girl and felt that he was at risk of false allegations. He was assured by the Department that measures were in place to protect him and further training would be provided to deal with her. No further training was ever provided by the Department. Subsequently the carer was subjected to false allegations and after long and stressful investigations the allegations were found to be unfounded.

The Select Committee may hear of other questionable decisions. The root cause of these must be either incompetence or overwork. My own view is that it is the latter. Whichever, the fact is the system is having some difficulty coping.

4.10 Whenever carers become aware of illegal sexual activity and substance abuse, it should be mandatory that they refer the matter to police.

There should be no reluctance to do this based on excessive or inappropriate response by the court system. The court system deals appropriately with offences by children and young persons and in a caring and rehabilitive manner. Even if carers are overworked they should be able to find the time to do this. As with compulsory notification of abuse, so there should be compulsory notification of illegality.

4.11 When CFS are aware of a child engaging in illegal sexual activity, they should be able to obtain a type of restraint order against the other party without findings, based on the "unacceptable risk" *Briginshaw* civil standard of proof and not the criminal standard.

4.12 When CFS is aware of a child attending overnight at a place or with a person that is inappropriate, it should be possible to obtain a type of restraint order forbidding the occupier or that person from allowing the

child to stay overnight, without findings, based on the "unacceptable risk" *Briginshaw* civil standard of proof and not the criminal standard.

While it may not be possible to prove beyond reasonable doubt that sexual intercourse or other inappropriate sexual activity is taking place, often times common sense suggests, on the balance of probabilities, that such is the case.

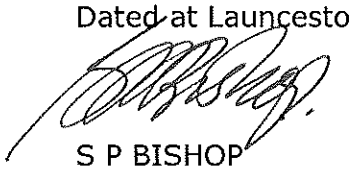
Alternatively the doctrine of unacceptable risk as authorised by the High Court in *M v M* should be a sufficient basis for a protective order without the necessity for findings at all. When inclination and opportunity coincide it is too often the case that child are exploited. In the real word it is hard for perpetrators and children alike to resist.

Sometimes the making of such an order would in my view just tip the balance sufficiently against such exploitation taking place by adding the risk of prosecution. It is certainly not impinging on the rights of the other party to make an order forbidding exploitation or sexual contact without any adverse finding.

5. Conclusion

This submission is circumscribed by the necessity to prepare it in haste. I would be happy to elaborate on anything at a later time either in writing or orally.

Dated at Launceston this 22nd day of November 2010.



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