

CITATION: *Jackson v C P W* [2004] NTMC 056

PARTIES: ALEXIS JACKSON (DELEGATE OF THE
MINISTER FOR HEALTH & COMMUNITY
SERVICES)

v

C P W

TITLE OF COURT: Family Matters Court

JURISDICTION: Community Welfare Act

FILE NO(s): 20403839

DELIVERED ON: 12 July 2004

DELIVERED AT: Katherine

HEARING DATE(s): 17 & 18 May 2004

JUDGMENT OF: Mr V M Luppino SM

CATCHWORDS:

Community Welfare Act - Application by Minister for an order that children are in need of care – Application in relation to three children based on alleged sexual abuse of fourth child – Application also based on respondent’s consumption of cannabis – Whether consumption of cannabis can form basis of an in need of care finding.

Evidence -Standard of proof – Whether Briginshaw principle applies.

Community Welfare Act 1983 (NT) ss 4, 35, 39, 40, 42.

Briginshaw v Briginshaw (1938) 60 CLR 336; *Taylor v L; Ex parte L* [1988] 1 Qd R 706; *Northern Territory of Australia v Herbert* [2002] NTSC 4;

REPRESENTATION:

Counsel:

Applicant:	Mr Carter
Respondent:	Ms Holtham
Children	Mr Fay

Solicitors:

Applicant:	Casandra Tys
Respondent:	Sivyer & Associates
Children	KRALAS

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 056
Number of paragraphs:	39

IN THE FAMILY MATTERS COURT
AT KATHERINE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20403839

BETWEEN:

**ALEXIS JACKSON (DELEGATE OF
THE MINISTER FOR HEALTH &
COMMUNITY SERVICES**

Applicant

AND:

C P W

Respondent

REASONS FOR DECISION
(Delivered 12 July 2004)

Mr V M LUPPINO SM:

1. This is an application by Alexis Jackson as Delegate of the Minister for Health & Community Services seeking a declaration pursuant to section 43(4)(a) of the *Community Welfare Act 1983* (“the Act”) that the subject children are “in need of care”. The application also seeks an order that the Minister have sole guardianship of the children pursuant to section 43(5)(d) of the Act. The children the subject of the application are CPM born 21 September 1993, RCM born 16 November 1994 and JRM born 16 December 1995.
2. The mother of the three children is SLM. The father of CPM is MP. The father of the remaining two children is the Respondent. MP and SLM did not take part in the proceedings, the latter indicating an intention to abide

the decision of the Court without further involvement. The Respondent denied the substance of the application and opposed the orders sought.

3. The sections of the Act relevant to the issues in the current proceedings are set out hereunder.

4. Interpretation

- (2) For the purposes of this Act, a child is in need of care, where –
- (a) the parents, guardians or the person having the custody of the child have abandoned him or her and cannot, after reasonable inquiry, be found;
 - (b) the parents, guardians or the person having the custody of the child are or is unwilling or unable to maintain the child;
 - (c) he or she has suffered maltreatment;
 - (d) he or she is not subject to effective control and is engaging in conduct which constitutes a serious danger to his or her health or safety; or
 - (e) being excused from criminal responsibility under section 38 of the Criminal Code he or she has persistently engaged in conduct which is so harmful or potentially harmful to the general welfare of the community measured by commonly accepted community standards as to warrant appropriate action under this Act for the maintenance of those standards.
- (3) For the purposes of this Act, a child shall be taken to have suffered maltreatment where –
- (a) he or she has suffered a physical injury causing temporary or permanent disfigurement or serious pain or has suffered impairment of a bodily function or the normal reserve or flexibility of a bodily function, inflicted or allowed to be inflicted by a parent, guardian or person having the custody of him or her or where there is substantial risk of his suffering such an injury or impairment;

- (b) he or she has suffered serious emotional or intellectual impairment evidenced by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which he or she belongs, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is a substantial risk that such surroundings, deprivation or environment will cause such emotional or intellectual impairment;
- (c) he or she has suffered serious physical impairment evidenced by severe bodily malfunctioning, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is substantial risk that such surroundings, deprivation or environmental will cause such impairment;
- (d) he or she has been sexually abused or exploited, or where there is substantial risk of such abuse of exploitation occurring, and his or her parents, guardians or persons having the custody of him or her are unable or unwilling to protect him or her from such abuse or exploitation; or
- (e) being a female, she –
 - (i) has been subjected, or there is substantial risk that she will be subjected, to female genital mutilation, as defined in section 186A of the Criminal Code; or
 - (ii) has been taken, or there is a substantial risk that she will be taken, from the Territory with the intention of having female genital mutilation performed on her.

39. Powers of Court at hearing of application

- (1) At the hearing of an application under this Part, the Court may, in addition to any other powers it has -
 - (a) require the person having the custody of the child at the time to account for the cause of an injury which is a ground for the application; and
 - (b) admit as evidence the finding that any other child in the care of the person having the custody of the child in

relation to whom the application is made has suffered maltreatment.

- (2) In hearing an application under this Part the Court is not bound by the rules of evidence but may inform itself on any matters it thinks fit.
- (3) At the hearing of an application under this Part, where the Court is of the opinion that the child the subject of the proceedings needs legal representation and that such representation has not been arranged by or on behalf of the child, it may, by order, make such provision for the legal representation of the child as it thinks fit.

40. Procedure

In proceedings under this Part, the Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted.

42. Proof of need of care

The burden of proving that a child is in need of care in an application under this Part lies on the Minister and the standard of proof is on the balance of probabilities.

4. All evidence in chief was by affidavit with deponents being made available for cross-examination. The affidavit material before the court consists of: -

- 4.1 Affidavit of KM (Respondent's daughter and "complainant") sworn 10 May 2004;
- 4.2 Affidavit of LM (friend of KM) sworn 10 May 2004;
- 4.3 Affidavit of BLS (friend of KM) affirmed 5 May 2004;
- 4.4 Affidavit of Kirsten Camilleri, Counsellor, sworn 10 May 2004;
- 4.5 Affidavits of Respondent sworn 27 February 2004 and 16 May 2004;
- 4.6 Affidavit of SMW (Respondent's brother) sworn 14 May 2004;
- 4.7 Affidavit of PCW (Respondent's mother) sworn 24 March 2004;

4.8 Affidavit of KO (Respondent's business partner sworn 27 February 2004.

5. In addition, the Court was provided with various reports. These comprised two court reports prepared on behalf of the Minister pursuant to the Act, being an initial report dated 27 February 2004 and an addendum report dated 17 May 2004. Two reports of psychologist Louisa McKenna were put in evidence during her testimony. Those two reports were dated 18 March 2004 and 5 May 2004.
6. The application is essentially based on allegations of abuse allegedly committed by the Respondent on his daughter KM, born 4 October 1987. An order is not sought in relation to KM, presumably because of her age and that she does not reside with the Respondent. The application is based on the perceived risk of a repeat of that conduct upon the three children the subject of the application, particularly the child CPM who is not the natural child of the Respondent. The Minister's case opened on this basis. However, during the course of the case evidence emerged of the Respondent's use and sale of cannabis and the knowledge of that by some of the children. During the course of closing submissions Mr Carter, Counsel for the Minister, adopted the allegations of use and sale of cannabis as a further basis in support of the application.
7. Ms Holtham, Counsel for the Respondent, submitted that such conduct could not form the basis of an application under the Act. I should add at this point that although the Respondent admitted occasional use of cannabis and admitted a conviction for possession of a trafficable quantity of cannabis, he denied smoking cannabis in the presence of the children and particularly denied ever being involved in the sale or supply of cannabis.
8. Leaving aside the dispute on the facts regarding this issue for the present, the preliminary issue raised is whether, assuming the conduct occurred as

alleged, it can form the basis of a declaration that the subject children are in need of care within the meaning of that term in the Act.

9. The relevant sections of the Act, namely section 4(2) and 4(3) are set out above. Whether the cannabis allegations can form a basis for the declaration sought by the Minister effectively depends on the meaning of “suffered maltreatment” as set out in section 4(2)(c). None of the other subparagraphs of section 4(2) have application. Of the criteria in section 4(3) which expand on the meaning of “suffered maltreatment”, section 4(3)(a), dealing with physical injury or impairment, cannot apply on the evidence before me. Indeed, other than the disputed allegation of sexual abuse, all of the evidence seems to suggest that the Respondent is a caring and competent father. Although the same cannot be said about the mother SLM as she has repeatedly put her interests and her relationship with MP before the interests of her children, that is not relevant for current purposes.
10. Although arguably section 4(3)(b), which deals with emotional or intellectual impairment could apply, the psychological evidence which has been lead does not support this. The criteria in section 4(3)(c) is of course relevant to the other allegation in this case i.e., the allegation of sexual abuse. It clearly cannot apply in relation to the allegations of cannabis use and sale. Lastly, the criteria in section in 4(3)(e) relates specifically to female genital mutilation and is of no relevance to the current proceedings.
11. Having regard to the foregoing, it is my view that the allegations of use and sale of cannabis cannot found the declaration sought by the Minister, even on the most favourable findings of evidence. In my view, having regard to the objects of the Act, that conclusion logically follows else it is difficult to see where the line is to be drawn. As a general rule, not every child whose parent smokes or sells cannabis is necessarily a child in need of care by that fact alone. Not every child of a person who commits criminal offences will necessarily be a child in need of care by reason of that fact alone. In my

view, these are not the types of social problems which the Act seeks to address.

12. That therefore leaves only the alleged abuse by the Respondent on KM in issue. On the evidence before me, the case turns on firstly, whether I am satisfied that those allegations or any of them are proved to the requisite standard and secondly, whether it can then be said that the three subject children are at risk. In this regard, during the course of submissions I raised the issue as to whether the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 applies to the current case. The issue is relevant given that serious allegations are made in the present proceedings against the Respondent. *Briginshaw* is authority for the principle that the seriousness of the allegations made and the gravity of the consequences flowing effect the process by which the necessary standard of proof is determined. Dixon J summed this up at pp 362-363 where he said:

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must effect 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. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.”

13. In *Taylor v L; Ex parte L* [1988] 1 Qd R 706 at p 714, Thomas J spoke of the application of the civil standard of proof in a case where it was necessary to consider whether a father had sexually abused his daughter. His Honour said:

“It is impossible to give any precise description of the point of balance required in such proceedings according to the *Briginshaw* scale. It can however be said that such a finding should only be made in reliance on convincing evidence and upon a firm

satisfaction. A finding made on suspicion alone, or on the footing that it would be safer for the child to be taken away from the father in case a suspicion might be true would be quite wrong. We have not yet reached the situation where the traditional preferred role of the parent has been displaced in favour of arrangements made by the State, and a finding that would produce such a result ought not be lightly made”.

14. The relevance of the principle in the current case is obvious. Not only are allegations made that the Respondent committed a crime (sexual assault), the allegations are serious in their own right. Moreover I do not lose sight of the fact that no allegations of abuse are made concerning the three children the subject of the application. The application by the Minister is based upon the truth of the allegations of sexual abuse committed on K M i.e., not one of the children the subject of the application. This application is founded on the apparent risk then translated to the three children the subject of the application. In my view the application of the principle assumes considerable relevance in light of that.
15. Mr Carter submitted that the Briginshaw principle does not apply in this case because the standard of proof is specified in the Act itself (refer section 42 cited above). He submitted that the statement in section 42 that the standard of proof is on the balance of probabilities is clear and unambiguous. He submitted that on the application of the literal rule of statutory interpretation, there is therefore no scope for the application of the Briginshaw principle. Although the High Court appears to have accepted that and has distinguished the application of the principle in that way in cases involving administrative decision making, the cases do not go as far as Mr Carter submitted. It appears clear, at least implicitly, that the rule can apply in the present case notwithstanding the statement in section 42. In *Northern Territory of Australia v Herbert* [2002] NTSC 4, Martin CJ applied the principle in a case where the relevant legislation specified in terms similar to section 42 of the Act that the appropriate standard of proof was on the balance of probabilities. As such, in my view the Briginshaw principle

applies equally in the case of a statutory standard of proof as in the current case as it does at common law. I now consider the evidence in that light.

16. I set out hereunder a chronology of relevant events. This also represents my findings of facts where there was disagreement on the evidence presented.

CHRONOLOGY

4/10/1987	KM is born
July 1988	The Respondent and SLM commenced cohabitation
June 1990	The Respondent and SLM separate for the first time
July 1991	The Respondent and SLM reconcile and resume cohabitation
February 1992	The Respondent and SLM again separate
February 1992	SLM and MP commences cohabitation and KM resides with them
March 1993	SLM and MP separate
July 1993	The Respondent and SLM again reconcile and again commence cohabitation
21/09/1993	CPM is born
16/11/1994	RCM is born
16/12/1995	JRM is born
September 1998	The Respondent and SLM again separate
September 1998	S L M reconciles with M P and they leave Katherine leaving the four children with the Respondent
July 1999	SLM and MP return to live in Katherine
21/01/1999	Consent orders made in the Family Court giving

	custody of the four children to the Respondent
February 1999	The Respondent buys a house in Donegan Crescent, Katherine and he and the four children commence living there
06/09/1999	SLM applies for custody of the four children in the Family Court
March 2000	The Respondent and four children move in with the Respondent's mother at her home at Shadforth Road, Katherine
December 2000	The Respondent and the four children travel to Queensland for a holiday
13/02/2001	Final orders are made in the Family Court by consent giving custody of the four children to the Respondent
March – May 2001	The Respondent moves into a caravan situated on his mother's property
May 2001	The Respondent moves into accommodation at the premises of his auto wrecking business
July 2001	After renovations to the accommodation at the Respondent's wrecking business premises, the four children move into the accommodation at the wrecking business premises with the Respondent
July 2001	The Respondent's brother SPW and SPW's partner also move into the accommodation at the wrecking business premises
November 2001 – October 2003	KM lives away from the Respondent's residence and the two only have sporadic contact
02/11/2003	KM leaves SLM's home and moves in to live with her friend LM
22/11/2003	SLM assaults KM. The Respondent becomes involved and assists KM by taking her to the police to make a statement, waiting while that occurs and driving her back to her home at the

	conclusion
December 2003 – January 2004	KM visits the Respondent at his seafood shop on a number of occasions
Christmas Day 2003	KM visits the Respondent and her sisters and spends Christmas day with them

17. The following subsidiary chronology sets out details of the residents at the Donegan Crescent, Katherine home during the period that the Respondent and the four children resided there.

February 1999	The Respondent girlfriend, Julianna Garrard, and her two children also move in
August 1999	Carrie Penley, a live in nanny, moves in
December 1999	Carrie Penley leaves
February 2000	Julianna Garrard and her children leave

18. KM is currently sixteen years of age. She described four distinct occasions of sexual abuse committed by the Respondent on her. She said that the first occurred while the family was travelling back from Queensland to Katherine after Christmas 2000. She said that after spending Christmas with family in Brisbane, she and her sisters and the Respondent travelled back to Katherine by road. She said that for a time they travelled with two of her father's friends. She said that the group stopped at various places along the way staying mostly at motels. She said that the group first went to Noosa and then onto Rockhampton. It was at Rockhampton that she alleges the Respondent first touched her. She said they were staying in a cabin. The

cabin she described had bunk beds and a separate bedroom containing a double bed. She said that the three girls slept on the bunk beds and that she slept in the double bed with the Respondent. She said she described how she had fallen asleep on the double bed. She said that her father had been outside on the veranda until then. She says that she was awoken because she could feel her father kissing her cheek. She claims that he then pulled her towards him and kissed her on the lips. She claimed that he had his mouth open and was trying to use his tongue. She said that she pulled away and got out of bed. She then said that she slept with the girls.

19. There was contradictory evidence from the Respondent to the effect that the group did not stay overnight in Rockhampton. The Respondent said the group only stayed in a cabin in Longreach. The layout of the cabin as he described it did not coincide with KM's version. It would seem that if any abuse occurred during that trip, then it occurred in Longreach and not Rockhampton. The discrepancy between the Respondent's evidence and that of KM is not material in my view. Although I prefer the Respondent's evidence on this point, nothing turns on that finding. Where the abuse occurred and the precise layout of the cabin is not material except as to credit. Moreover, I do not believe that the discrepancy in KM's version is in any way indicative of unreliability of KM's evidence regarding the abuse on that account alone.
20. Although KM described four discrete occasions, she said that over the next six to eight months occasionally the respondent would stroke her arm or touch her arm and shoulder in a way which made her feel uncomfortable. She said that sometimes he would brush past and touch her breasts but she couldn't say whether it was accidental or not and therefore she did not worry about it. Her evidence indicates to me that the contact was unlikely to have been anything but accidental and I so find.

21. KM says that she was making entries in her diary and recorded some of these events. She clearly referred to multiple events. That diary however was not produced because some time afterwards, and being concerned that her grandmother would find it, she and her friend BLS burnt the diary near the dam on her grandmother's property. BLS confirmed the burning of the diary but she had no independent knowledge of its contents. During cross examination, a discrepancy developed regarding the destruction of her diary. KM confirmed that she moved in with her paternal grandmother in March of 2001. In her affidavit she had said that it was not long after moving in there that she destroyed her diary. By that time the only occasion of abuse that had occurred was during the Queensland trip in January of that year. Oddly she said that at the time she moved in with her paternal grandmother, there was nothing in the diary about the Respondent's actions. That cannot be correct given the rest of her evidence. This questions the reliability of her evidence to some extent. Ignoring that for the present, I find it hard to reconcile this with her destruction of the diary for the reason she gave and apparently not long after the occurrence of the first episode. When pressed in cross-examination she was not certain as to when it was that it had been burnt. She thought it was after her first interview with Louisa McKenna which occurred in January of 2001. I have some concerns about these inconsistencies concerning events which I think are comparatively significant in terms of the issues in this case.

22. The next discrete occasion which KM described was in 2001 during the dry season and shortly before the children moved to the accommodation at the premises of the wrecking business. She said that the family was still living at her grandmother's place and that her father was staying in the caravan on that property. According to my findings of fact in the chronology above, the Respondent used the caravan as his accommodation during the period from March to May 2001. He moved to the accommodation at the wreckers in May 2001 to prepare it for the rest of the family to move there. That move

occurred in July 2001. Again KM's timing seems out and there is a discrepancy with the timing according to the Respondent's evidence.

However again, and despite me preferring the Respondent's evidence on the timing and sequence of events, I do not consider that anything turns on this as I do not consider this discrepancy to be indicative of unreliability of KM's evidence on that account alone.

23. On the occasion under discussion KM said that she had been asked by her grandmother to give her father a message and went to his caravan for that purpose. She said that he was lying down on the bed at the time and that he asked her for a hug. She did so and then sat down on the end of his bed. She said that her father then put his hand on her leg and was rubbing her thigh on the inside and top of her thigh near her vagina. She said she felt uncomfortable and therefore got up walked out and went back to the house and went to bed.
24. The next occasion she describes was one when the family was living at the wreckers. The children lived at the wreckers from July 2001. Although the three other children remained there beyond September 2001, at about that time KM left and began to live with her mother. This event therefore must have occurred within that two month period between July and September 2001. She said that she and her sister CPM fell asleep while listening to music on their father's bed. She says that she then woke up and found her father in bed with her. She says that her father reached over and touched her thigh and pulled her up against him. She says that she was wearing boxers and that her father put his hand in the boxers and was rubbing her vagina. Although she said that she protested, she said that her father attempted to assure her and to convince her to come back to bed. However, she said that she then went into the lounge room and slept on the couch.
25. According to KM's evidence the last incident occurred about one month later. Clearly it was while she was still living at the wreckers. She said that

her father's brother (SPW) and SPW's partner were living with them. According to the Respondent, his brother and partner moved into the wreckers at about the same time as the four children. SPW largely agreed. KM said she was asleep and woke to find her father in bed with her. She said that he pulled her over and was holding his hand and then he put her hand on to his erect penis. She says that she got up and went into the girls' room. She was very specific about this which is relevant as her account to Louisa McKenna differed markedly.

26. KM described only ever discussing these events with her friend BLS. She said this occurred sometime in 2001. She claims that she didn't tell her exactly what happened but in any event she prohibited BLS from telling anyone else. It would appear that this occurred before September 2001, which was the time when KM began living with her mother as KM said that following that she did not live with or stay with her father again.
27. KM confirmed that she went and saw her father in January 2004 to discuss leaving school with him. She confirmed that he was at the wreckers at that time. She said that she entered her father's room and sat down on the end of his bed. She said that he sat down next to her and put his arm around her and started to kiss her on her shoulder apparently inappropriately in her view as he kissed her many times and she said that she felt uncomfortable. She said that the Respondent then drove her back to her work place and that she hasn't spoken to him since. Other credible evidence in the case, which evidence I prefer to KM's, is to the effect that events did not quite occur in this way. KM seemed to have played this event down quite significantly. Her evidence gave the impression that she was distant to the Respondent at that time. Credible evidence to the contrary was given to me by the Respondent and confirmed by other persons. It is of concern that KM appeared to deliberately play this down. It is also of concern as regards KM's credibility that the psychologist, Louisa McKenna, was surprised that KM would enter the Respondent's room in light of her claimed history of

sexual abuse. I think it very unlikely that events would have occurred had there been such a history of abuse. It is unlikely that KM would have even visited the Respondent even for the reason of discussing leaving school. This could easily have occurred by telephone if that was necessary. It is odd that she chose to actually attend to discuss the matter with the Respondent, in relation to whom she claimed numerous ongoing instances of inappropriate contact with her rather than discuss the matter with her mother when her mother had by comparison physically assaulted her and on one occasion. Comparatively, if both allegations were true, then I would expect that she would have preferred to have discussions with her mother. It is interesting to note that LM said that she advised KM to discuss leaving school with one of her parents and she was only able to convince KM to speak to her father. She said that KM refused to speak to her mother about it. The objective difficulty with this evidence is obvious. None of this was explained satisfactorily. As far as I am concerned there is no satisfactory explanation as to why she would even contemplate approaching her father, let alone enter his bedroom, if the abuse as claimed had occurred. This impression was reinforced by the evidence of Louisa McKenna which is discussed below.

28. KM's affidavit also omitted other contact that she had with the Respondent during this period, conduct which I am satisfied occurred based on evidence I heard. That contact demonstrated instances where KM showed no apparent reluctance or discomfort to be with her father. The apparently deliberate omission of these instances also put a certain colour on her evidence and I consider that and the manner in which she played down the episode referred to in the preceding paragraph to detrimentally affect the reliability of her evidence.
29. Despite the description in her affidavit of the events surrounding the occasion in January 2004 when she visited her father to discuss leaving school, in cross-examination she confirmed firstly that she had telephoned

the Respondent the night before, secondly, that she had rung the Respondent when she arrived there to find that he had left for work and, thirdly, that he came back to see her. She confirmed that she was upset and that it was that which prompted him to give her a hug although she maintained that he kissed her on the shoulder. She confirmed that the discussion regarding her leaving school was in the Respondent's bedroom and she also agreed that at her request, the Respondent took her to Red Rooster on route to taking her to her work. Again I consider this sort of interaction to be indicative of a largely normal relationship and therefore inconsistent with her allegations of sexual assault. It was with interest that I noted subsequently that the psychologist Louisa McKenna also was troubled by this and other instances of behaviour apparently inconsistent with the allegations KM made.

30. KM also conceded in cross examination that she told Louisa McKenna that she wanted to live with her father because she was scared of MP and felt safer with her father. She says that she is now no longer afraid of MP although there was no explanation given for this change in circumstance. She agreed that she told Ms McKenna that she did not report the abuse out of fear that she would be separated from her sisters. That she voluntarily separated herself from her sisters in any event for no apparent or significant reason within a short time of that is again another apparently irreconcilable inconsistency. She had also claimed that in 2001 she did not want her sisters to be in the custody of their mother because she was afraid of MP.
31. Apart from the obvious inconsistencies and difficulties reconciling her evidence, KM's presentation in Court was what I expected in all the circumstances. She seemed nervous and withdrawn, but that is a normal and anticipated presentation in the circumstances. She did not show any apparent outwards signs of animosity towards her father and she was very matter of fact and unemotive when giving evidence in relation to what would be expected to be very traumatic events. She clearly however is a very troubled young person.

32. I had concerns about the reliability of her evidence based on the apparent inconsistencies in her evidence and difficulties I had in reconciling important aspects of her evidence. The evidence of Louisa McKenna was very relevant in this regard. In the course of her evidence her reports prepared for these proceedings specifically of 18 March 2004 and 5 May 2004 were proved. She had also interviewed KM in January 2001 for the purposes of a report for Family Court proceedings. In summary form the pertinent aspects of those reports were:-

1. On 6 March 2004, KM was apparently emotional when discussing her mother, but was very matter of fact when discussing incidents of alleged abuse perpetrated on her by her father.
2. Ms McKenna's general impression of KM was that "she is a troubled young lady who has significant emotional difficulties, poor self esteem and who is feeling isolated from her family".
3. Ms McKenna reported that KM was concerned about the violence that MP was perpetrating on her mother.
4. At the interview in January 2001, an interview conducted shortly after the alleged first episode of abuse, although KM was quite outspoken about concerns about family issues including a willingness to disclose details of her father's usage of cannabis, she made no allegations about sexual assault. Ms McKenna said that she would have expected that KM would then have disclosed it. However, Ms McKenna also observed that KM had a strong bond with her father, there was nothing to suggest that the relationship between KM and her father was in any way inappropriate or that she felt uncomfortable in her father's presence. In cross-examination Ms McKenna confirmed that this was of significant concern to her from the point of view of the veracity of KM's allegations.

5. Ms McKenna noted also that whereas in January 2001 KM had made positive comments regarding her father's cooking ability and provision of food, there was a marked change in her response to the same line of questioning in March 2004.
6. Noting that KM had not reported the allegations of abuse to anyone, Ms McKenna found it difficult to comprehend why KM would not tell her mother about this, particularly if she had such serious concerns about the welfare of her siblings as she claimed. In Ms McKenna's experience a person who has fears that siblings may become victims of abuse are more likely to report such abuse as a protective measure.
7. When KM was further interviewed on 16 April 2004, specifically to seek clarification of her inconsistent answers, KM became angry and unco-operative.
8. KM's explanation for not revealing details of the abuse during the interview in January 2001 was a claimed fear that that would result in her mother being granted custody of her and her sisters and the consequent fear in relation to possible violence by MP, her mother's partner towards her and her sisters.
9. Ms McKenna found it difficult to reconcile why KM continued her practice of sleeping in her father's room after alleged incidents of abuse. Ms McKenna's experience is that children who have experienced abuse in a certain location at the home usually avoid that and tend to become hyper vigilant to avoid that. In cross-examination she said that it could also cause anxiety.

10. KM became angry when told by Ms McKenna that her siblings said that they did not feel uncomfortable in their father's presence or in his home.

11. In cross-examination, Ms McKenna confirmed that KM had not mentioned to her the claim KM had made that her father took her hand and put her hand on to his erect penis. Ms McKenna was very concerned about the variance in the allegation as she said KM was very clear in the details of that allegation during her interview.

33. The serious concerns that I had regarding the reliability of KM's evidence were certainly reinforced by the evidence of Louisa McKenna. Ms McKenna was quite surprised that there was no mention of the first episode of the abuse when she interviewed KM in January 2001. This was because it was so proximate. It was also in the context of KM speaking freely about all family issues and even regarding her father's cannabis usage. On the contrary she detected a close bond between KM and her father, KM actually said that she felt safe with her father and wanted to continue to live with him. According to the affidavit of the Respondent, KM had separate representation for the purposes of the Family Court proceedings, she therefore had additional opportunity to disclose the claimed abuse. This only serves to highlight the significance of her failure to mention that first episode to anyone at any time around that incident.
34. The hyper vigilance which Louisa McKenna expected as well as the possibility of an anxiety situation developing was also inconsistent with the evidence, which I accept, which shows that KM freely and regularly approached her father, including in his bedroom. The last contact that she had with him on the occasion that she spoke with him regarding leaving school, is also inconsistent with this.

35. Ordinarily, given KM's age and the nature of the allegations that she made, I would not readily treat her failure to report the instances of abuse as being indicative of unreliability on her part. That may well be a normal reaction for someone similarly circumstanced. However the situation here goes beyond that. Not only did she have repeated and formal opportunities to do so (eg, the interview with Louisa McKenna, instructions to her own lawyer), she gave the entirely contrary impression. Moreover there are a number of other irreconcilable discrepancies in her evidence which seriously impair its reliability.
36. I do not put much weight on the views of Kirsten Camilleri. Her evidence was that from the few counselling sessions that she has had with KM she considers that her presentation is consistent with someone who has been the victim of sexual abuse. Ms Camilleri's qualifications and experience are limited. In those circumstances the opinion she has formed from her observations do not change my views regarding the reliability of KM's evidence.
37. The net result is that the evidence of KM is not sufficiently cogent or convincing. Although a suspicion is raised the evidence is not sufficient to satisfy the burden of proof to warrant the order that the Minister seeks.
38. The burden of proof is of course on the Minister and my rejection of the evidence lead by the Minister ends the matter. However I should add that I thought the evidence of the Respondent was credible and reliable. His answers were largely spontaneous and he presented well and was not shaken in cross-examination. Although there were some minor issues with his evidence I found nothing in these issues which changes my view of the evidence over all. The issues I refer to are his lack of spontaneity and indeed his minor evasiveness when fielding questions in relation to his cannabis use and convictions, matters not relevant to the central issue in any event. Overall I found his evidence quite acceptable.

39. For the foregoing reasons the application by the Minister is dismissed. I will hear the parties as to any ancillary orders.

Dated this 12th day of July 2004.

V M LUPPINO
STIPENDIARY MAGISTRATE