



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Family Law Amendment Bill 2004**

THURSDAY, 1 JULY 2004

CANBERRA

BY AUTHORITY OF THE SENATE



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**SENATE****LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Thursday, 1 July 2004**

**Members:** Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

**Participating members:** Senators Abetz, Bartlett, Barnett, Mark Bishop, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Hogg, Humphries, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Robert Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Kirk, Ludwig and Payne

**Terms of reference for the inquiry:**

Family Law Amendment Bill 2004

**Committee met at 12.04 p.m.****FOSTER, Mr Michael, Chairman, Family Law Section, Law Council of Australia**

**CHAIR**—This hearing is in relation to the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Family Law Amendment Bill 2004. The inquiry was referred to the committee by the Senate on 16 June 2004 for report by 30 July 2004. According to the explanatory memorandum, the bill seeks to amend the Family Law Act 1975 to improve the operation and modernise the terminology of the act. It addresses the interaction of bankruptcy law and family law, the enforcement of court orders and frivolous and/or vexatious proceedings. The committee has received eight submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I apologise for the late commencement of the hearing today. The committee was considering another bill in a separate hearing first thing this morning, and that ran slightly over time.

I welcome our first witness, Michael Foster. The Law Council of Australia has lodged a submission with the committee, which we have numbered No. 6. Do you wish to make any amendments or alterations to that submission?

**Mr Foster**—No.

**CHAIR**—I invite you to make an opening statement, at the conclusion of which we will go to questions from members of the committee.

**Mr Foster**—Thank you. The Family Law Section represents Australia's family lawyers and is part of the Law Council of Australia. We do not have any particular major concerns about any aspect of the bill other than items 139 and 140. Both of those seek to expand the rule-making power of the judges of the court, and we are very concerned about that. The President of the Law Council has written to the Attorney-General about his concerns, and I am here to amplify those. Our concerns are that this extension of rule-making power is a back door for the Family Court to bring about some novel and radical changes to substantive law using the rule-making power of the court, which is intended for procedural matters, not for substantive law.

The reason I say that the changes to the law that are sought to be achieved are novel and radical is that they affect two important areas. One is the costs regime. As you are probably aware, in section 117 of the Family Law Act the parliament has set out the way in which costs should be dealt with under the act. The court's proposal, as it has admitted, is to make rules which conflict with those cost proposals by limiting the discretion of judges. We see that as an attempt to override section 117 and we believe that section 117 should never be overridden by the rule-making powers of the judges.

In particular the court has two things in mind, both of which relate to automatic costs consequences. One idea it has is that litigants will be able to put offers and there will be an automatic costs consequence if the offer ultimately is as good as the court's award. The other idea that the court has is that, in relation to procedural breaches, there will be automatic cost consequences, so that if you do not do something such as file a document then there will be an automatic costs penalty. They are major changes.

The other aspect of the changes that the court wishes to achieve are in relation to the introduction of civil penalties, where the court has admitted that it wants to be able to impose penalties as high as \$27,000 for mere noncompliance with procedural matters. Traditionally, procedural matters are dealt with by costs orders.

I say that this is by the back door because these are matters of substantive law and they should be dealt with by parliament; they should not be dealt with under the rule-making power, particularly because judges are not accountable to people, there is no consultative process for the wider community for the changing of rules, and court rules are changed quite frequently. We would say that, if this legislation came to pass, these two items would essentially create some bad law for three important reasons. Firstly, they would allow the Family Court to be even less consistent with other courts in its rules and procedures. These provisions are not sought by other courts and they do not exist for other federal courts. They are in conflict with the civil justice paper that the Attorney General's Department has released—it was released this year by the government—which suggests in recommendation 4: That the courts continue to develop, where appropriate, uniform procedures for those areas of law in which the same jurisdiction can be exercised in more than one court.

This is a move in direct conflict with that policy.

The second reason that it is bad law, as I touched upon a moment ago, is that this gives to the judges the power that the parliament ought to exercise, which relates to fundamental principles in relation to costs, the determination of effectively criminal penalties—\$27,000 has to be regarded as a pretty substantial fine—in relation to procedural matters, and the determination of what procedural matters will fall under those penalties. These penalties would be imposed on both litigants and lawyers as appropriate. We see that the determination of those sorts of penalties ought to be reserved to the parliament.

The third reason that these items in the bill would be bad law is that, if the court were able to do what it wanted to do in relation to civil penalties and automatic costs consequences, it would be bad for certain categories of litigants. To put it really simply, it is good news for the wealthy blokes and it is bad news for timid women. Costs consequences and the prospect of civil penalties do not worry robust litigants. They do not worry people who are inclined to take a punt. They do not worry people who are manipulative or obsessive. They do not worry people who have plenty of resources. But they deeply worry and intimidate people, particularly women, who are reluctant participants in a court process and who are unable to get a reasonable settlement except by coming to the court.

In the English High Court, this process of automatic costs consequences on offers has been likened to spread-betting by one of the judges of the court because a person could pay a lot for good advice, bet on the good advice and sit back and see what the impact is of their offer linked to automatic costs consequences. Someone who is barely managing to get into the court process because of their timidity and lack of resources will be overwhelmed by that. They will have no choice but to take the last settlement that was put by the person who is prepared to back their advice with money.

I hope that that was not too lengthy, but that is, in essence, why we say that there are problems with the legislation. These things look inconsequential—it looks like mere rule-making powers—but they have deep implications in a wide range of areas. If you look at section 123, which is where the rule-making power is found, you will see that there is nothing like this in there. It is all procedural stuff about filing the document and the courts having the right to make rules and procedures. This goes well beyond the rule-making power of the courts.

**CHAIR**—Thank you very much.

**Senator KIRK**—Thank you for your submission. You have just mentioned section 123. I notice that that already provides for the imposing of criminal penalties. But, from what you have said, that provision relates to more substantive matters rather than to procedural breaches. Is that correct?

**Mr Foster**—No. As I understand it, the provision has never been used because there are some difficulties in its interpretation. It is also limited to 50 penalty units for offences against the standard rules of court—I am not sure exactly what a penalty unit is at the moment—and it is for minor penalty consequences. In fact, I do not believe that it has ever been used. The court is keen to considerably expand this aspect of its powers.

**Senator KIRK**—So, from what you are saying, these amendments are seeking to impose really what amount to criminal penalties for these procedural breaches. Is that your argument, even though they are referred to as civil penalties?

**Mr Foster**—Yes.

**Senator KIRK**—The intent seems to be to expand the power so that civil penalties can be imposed.

**Mr Foster**—Very substantial penalties, as we said. We are talking about individual litigants and lawyers being punished in the order of \$30,000 merely for noncompliance with procedures. Those sorts of penalties need the attention of parliament.

**Senator KIRK**—So your understanding is that section 123, which does already provide for criminal penalties, is very rarely used?

**Mr Foster**—I am not aware of it having been used at all. I think it may be because of a difficulty in relation to the interpretation of penalty units and whether or not that empowers the court to impose even civil penalties.

**Senator KIRK**—So could the same thing as has been attempted to be achieved in this legislation be achieved simply by relying on the existing provision?

**Mr Foster**—We take the view that using penalty units is just not the way to deal with court procedures. Courts make costs orders all the time in relation to noncompliance with penalties. They can make costs orders against lawyers, and they do in appropriate instances. The system works well. Other federal courts do not seem to see that there is a problem and, frankly, many people do not believe there is a problem in the Family Court of Australia either. But, still, this has been the response of certainly some of the judges of the Family Court.

**Senator KIRK**—Was your section of the Law Council consulted in the process of drafting these amendments?

**Mr Foster**—The court has been saying for a couple of years that it wants to introduce substantial civil penalties, so we have been involved in a process of dialogue with the court about that. For a long time we have said that it is unnecessary and inappropriate. The provision in the bill is really an extension of an initiative by the court.

**Senator KIRK**—You also mention in your submission that there is some ambiguity in section 66X as drafted. You suggest that the section should be redrafted. Could you elaborate for us on where you see the ambiguity in section 66X?

**Mr Foster**—I am sorry that I am not more properly responsive to that question. I think the intention is to simply make sure that the provision works well even if there has been partial compliance with the maintenance order, so that a respondent could not avoid the consequence of the amendment by saying there has been partial compliance.

**Senator KIRK**—Are you suggesting that that could be redrafted to be made clearer?

**Mr Foster**—Yes. It is just a technical aspect to do with tidying up the drafting a little bit to avoid the possibility of people being able to avoid the intent of section 66X.

**Senator KIRK**—In a submission that we have from the National Network of Women's Legal Services, they suggest that amendments to the cost rule should be amended to add a requirement that:

... the Court should also take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation.

What is your response to that? Do you agree with that?

**Mr Foster**—I have not heard of that suggestion. To my knowledge, it has not arisen as a result of this particular bill, so I would be interested to know what the rationale for it is and what they would intend to flow from the observation that someone was represented or was not represented. Obviously, if you are not represented then it is pretty difficult to recover costs, because you have not had any.

**Senator KIRK**—We have them on next. We will ask them further questions in relation to that.

**Mr Foster**—I will certainly be staying to hear what they have to say.

**Senator KIRK**—I was interested in the three points that you gave as to why it is you consider that these amendments are not the way to go. Are there any proposals, as far as you are aware, that these changes be implemented in any of the other federal courts, such as the Federal Court of Australia?

**Mr Foster**—Not that I am aware of, no.

**Senator KIRK**—It seems that the thrust of what you are saying is that this rule-making power in this area should not be given to judges but should be provided for by parliament. Is it your contention then that the amendments that we have before us should be more explicit in what they are providing for legislatively so that it is quite clear what parliament's intention is?

**Mr Foster**—Yes. If the court thinks that section 117 ought to be changed, then it ought to ask that the provisions in section 117 be changed and not for the power to establish cost principles to be delegated to the judges, who are, as I say, not accountable, who do not have any proper consultation processes and who change their mind about their rules very regularly. It is just the wrong arena. For instance, the people who are going to give evidence before you next are very likely to never be heard by the court as it changes its rules from time to time. The legal profession is the only group that is likely to be consulted, although it will not necessarily be taken any notice of. But other groups like women's representative groups and family representative groups or men's representative groups will never, ever be part of any formal or regular consultative process by the judges in their rule making.

**Senator KIRK**—You are probably not the right person to ask about this, but what do you think the rationale for this was? Why is it that the judges have decided that?

**Mr Foster**—It is no secret. There is a section of the Family Court of Australia that believes that there is a culture of noncompliance. That is what they call it—'a culture of noncompliance'. It does not seem to be a difficulty for other federal courts. Even the Federal Magistrates Court in the family law arena does not seem to feel that it is wracked by a culture of noncompliance. Certainly there are many who take the view that there is no culture of noncompliance—that this is a working court which deals with people in difficult

circumstances and that, just as judges do not hand down their reserve decisions necessarily the day after the hearing, so litigants are sometimes a day or two late in filing a document. But it is all of no great consequence—the wheels can continue to turn. But there certainly is a proportion of the Family Court of Australia, which of course now has a new chief justice, who have had the view in the past that there is a thing called a ‘culture of noncompliance’ which has to be addressed through fairly draconian steps. So getting the parliament to delegate to those judges the right to impose substantial financial penalties on lawyers and litigants and to make costs the whip, if you like, to bring about certain results is seen as an appropriate measure.

**Senator KIRK**—Why is it, in your view, that the judges have sought this power for themselves and have not been satisfied for it to be dealt with by legislation?

**Mr Foster**—I think it is to do with what I have said. In an ideal world it is nice to be able to change things as you wish. You do not have to be accountable to anybody. Judges are not elected—they are lifetime or career appointments. It would be something of a luxury for the court to be able to from time to time determine costs principles and override section 117 and to identify certain procedural conduct upon which it wishes to impose these things.

**Senator KIRK**—But in your view this could be achieved just as successfully through just an amendment of section 117?

**Mr Foster**—Absolutely, more responsively. It would mean that there would be more continuity, certainty and public awareness in relation to what costs principles are. It is quite a good idea that costs principles should not be changed too much on a whim. It may well be, using the parliamentary process, that on inquiry there is no justification for changing section 117, or there may be. Either way, it should be for the parliament to look at that and decide.

**CHAIR**—The submission says that in the council’s view:

The Court already has ample means by which it can enforce compliance with procedures.

Could you indicate to us what some of those are? Your observation is countered by the Attorney-General’s observation in the second reading speech where he makes reference to the need to foster a culture of compliance with court orders, but does not really provide us with any information about what the actual problem is per se. I am interested in what you think is already in place to enforce compliance.

**Mr Foster**—I observe that it is interesting that he does not feel that this culture exists in any other federal courts. Even though the policy is to move towards consistency, there is no initiative by the Attorney-General to impose the same provisions in relation to other courts.

The costs consequence is the key thing. If people do not comply, two things happen. One is that a court will allow the proceedings to be heard by default, without the involvement of the other party—that is, they lose the right to be involved in the proceedings. That, of course, is quite appropriate. But if things do not go quite that far then the consequences of noncompliance are dealt with by costs. If that noncompliance can be shown to have been the fault of a legal practitioner, then the court can order that the lawyer pay the costs. That works very successfully. In our view, there is no noncompliance problem that goes beyond the rough and tumble of litigation in any court. Of course, the Family Court has its own particular demands, given that it involves ordinary people at difficult times in their lives.

**Senator LUDWIG**—The issue you have, then, is that you do not think the judges should have the discretion in relation to costs.

**Mr Foster**—No, that is the point, really—that the judges have the discretion in relation to costs and that discretion is guided by section 117. As a matter of practicality, in cases of noncompliance with procedural matters judges would find it very easy to make orders for costs wherever that was appropriate. This is an attempt to take discretion away from judges—

**Senator LUDWIG**—That is the point I am trying to ascertain whether you are getting to. The rules may provide, so who makes the rules?

**Mr Foster**—A majority of judges.

**Senator LUDWIG**—This is the point where you are losing me in the debate. If the majority of judges are making the rules, then the discretion to alter the rules and make necessary rules for the administration of justice still lies with them. I am not sure where the discretion still does not reside with the judges.

**Mr Foster**—The intention of the court is to impose automatic costs consequences—there is no doubt about that; the court has made that quite clear.

**Senator LUDWIG**—Whether they do or not is another matter. I know what the intention might be. I take it we have not seen the rules yet.

**Mr Foster**—Yes, we have seen the rules.

**Senator LUDWIG**—What do they provide for?

**Mr Foster**—Automatic costs consequences. In March the court introduced a complete new set of rules—

**Senator LUDWIG**—That is right, yes—

**Mr Foster**—And there were some things in those rules that they were not able to bring into operation pending this legislation. So we have actually seen the provisions which provide, for example, for automatic costs consequences in relation to offers. So the intention would be that the costs liability would simply fall on a person as a result of an event, judgment or offer—something other than a judge's discretion—and then the person upon whom the automatic costs consequence fell might then be able to make an application to a judge for relief from it. But that brings us back to the timid women and the robust men. Timid and poorly resourced litigants are in no position to fight battles to get rid of automatic costs orders that have been imposed on them. That is the intention behind this, but I do not think that the court recognises that not all litigants are equal—they are not all robust, well resourced and accustomed to backing their judgment.

**Senator LUDWIG**—I would be surprised if they did not think that. They do live in this world.

**Mr Foster**—I will respond, reluctantly. The judges are like all of us, there is a complete variety of views and—

**Senator LUDWIG**—All right. Is this a new provision that is rare or unheard of in the federal legislature? As I understand it from your submission, the provision would mean that if

you do not accept a settlement which might be reasonable—if we could put that caveat on it—then you might bear the costs associated with that. Is that correct?

**Mr Foster**—No, there is already a well-established and highly successful system of offers under the Family Law Act in which offers are filed in every case—certainly in every financial case, I would have thought. In fact, it is obligatory under the new rules. The whole point of the offer system is that, subject to a judge’s discretion, costs may follow the result of the decision as compared with that offer. We all advise our clients that they need to take offers very seriously because they could expect that a judge would most likely exercise their discretion under section 117 to order costs. This is trying to take it another step forward so that the judge does not have to make a decision. The cost consequence is automatic and the fight would be to try and seek relief from it.

**Senator LUDWIG**—I see the point. That is helpful. The other area I was interested in is part 19, which deals with the interaction of the family law and bankruptcy law. As you might be aware, draft legislation in relation to bankruptcy law is currently before, I think, a House of Representatives committee.

**Mr Foster**—I am here next Tuesday for a hearing of that.

**Senator LUDWIG**—Is it Tuesday? I was curious as to which day they were going to deal with it. Thank you. This is part of that process, as I understand it, and that flows from the task force report. I have an open-ended question: if that bankruptcy legislation fails, would this stand in its own right or do both need to be passed to have any reasonable operation in that area to address the mischief?

**Mr Foster**—I think this stands alone. We have no particular difficulties with that. In that exposure draft there are extensive further amendments to the Family Law Act to pick up various issues raised by the exposure draft.

**Senator LUDWIG**—In your view, is that bound up with that other bill to such an extent that they should be cognate and dealt with together or can they be addressed separately?

**Mr Foster**—They can be addressed separately.

**Senator LUDWIG**—That is helpful, thank you.

**CHAIR**—Mr Foster, thank you very much for assisting the committee. Again, I apologise for the delay in commencing.

[12.34 p.m.]

**CARNEY, Ms Catherine, Principal Solicitor, Women's Legal Services New South Wales, representing National Network of Women's Legal Services**

**RATHUS, Ms Zoe Scott, Law Reform Worker, Women's Legal Service, Brisbane, representing National Network of Women's Legal Services**

*Evidence was taken via teleconference—*

**CHAIR**—Welcome. The National Network of Women's Legal Services has lodged a submission with the committee which we have numbered No. 8. Do you need to make any amendments or alterations to that submission?

**Ms Carney**—No.

**CHAIR**—First, can I apologise that the committee is running late. We had another hearing on a different bill first this morning and it went slightly over time. Please accept my apologies. I invite you to make a short opening statement. I am not sure whether one of you or both of you is intending to speak. At the conclusion of that I will go to questions from members of the committee.

**Ms Rathus**—We are very pleased to have the opportunity to provide this evidence to the committee. We have prepared a written submission in relation to this bill and members will notice that it also covered the bill in relation to bankruptcy, which is currently before the House of Representatives committee. The reason that we decided to combine our comments on both bills in one submission was because, from the point of view of our client base and the issues that we were concerned about, both bills cover some similar territory, particularly the relationship between family law proceedings and bankruptcy proceedings. So we did do that and both committees have been provided with a full copy of the submission as written.

In respect of the Family Law Amendment Bill, it covers a number of areas that have been of administrative concern and issues which we had seen amongst our clients relating to matters such as appeals, transfers from local magistrates courts et cetera. In respect of many of those provisions, it appears to us that the machinery issues which have now been dealt with are likely to be advantageous, so we made no particular comment in our written submission. I suppose the main areas that we were concerned about and that we have written about at some length are the provisions relating to the new section 70NEB, which allows the court to vary an original parenting order in situations where either the court has not found a contravention or a reasonable excuse has been proved. We have made submissions in respect of that, and I will come back to the detail of that.

The other areas we have made some brief comment around include recovery of child maintenance and frivolous and vexatious proceedings. We have particular concerns in relation to rules as to costs. We are very concerned about the new regime in respect of the family law rules, which is quite prescriptive and has many punitive provisions, in that the more one encourages the court to make cost orders, the concern for us is the number of women that the women's legal services are now assisting around Australia who are representing themselves in the Family Court. We have chosen to use the expression 'unrepresented' generally in the

submission rather than 'self-represented' because we actually think that many of our clients do not actually have the capacity to self-represent. Basically, when they do not have a lawyer, they are unrepresented people. It is extremely difficult.

Many of these people who end up unrepresented are women for whom being organised around paperwork and around the complexity of legal proceedings is extremely difficult. These are women who generally live with violence, who live with significant poverty, for whom access to the Internet, to fax machines, travelling into court to file documents, to photocopiers—all these practical things, apart from actually creating documents and understanding the rules that they are being subjected to in respect of proceedings—is very difficult. There are literally thousands of women self-representing or being unrepresented in Family Court proceedings now and we are concerned that neither the rules nor the proposed sections specifically invite a court to look at whether or not someone is represented as the circumstances of lack of representation if that is the case. So we consider that to be a very important point.

The balance of our submission in respect of the actual Family Law Amendment Bill relates to the interaction between family law and bankruptcy. I suppose on that point and on the proposed section 70NEB there is rather more to say, and I do not know whether you want me to go through in more detail what we have put in the written submission or whether the committee wanted to ask particular questions around those based on what we have said.

**CHAIR**—I think we will go to questions if we can, Ms Rathus, because we have your written submission here—unless Ms Carney wishes to add anything.

**Ms Carney**—I do not wish to add anything.

**Senator KIRK**—Thank you very much for your submission. I want to go to the question of the parenting compliance regime and the provisions in section 70NEB. I wonder whether you could elaborate a little further for us in relation to the additional relevant factors that you say the court should be able to take into account when deciding whether to vary the parenting order.

**Ms Rathus**—It is interesting because, when one of the other family law amendment bills was before parliament a few years ago, we looked very carefully at that matter, and we have referred to that in our submission. At that time the parliament was looking at the capacity to amend an original parenting order in circumstances where the opposite had occurred—where the court had found a contravention. From our clients' point of view, what happens in practice is that the most common circumstance is that parenting orders are made which provide the mother with residence and the father with some sort of contact. As that order ends up being implemented, the mother becomes more and more concerned about whether or not the children are safe when they are with the contact father.

As we have mentioned in our submission, the ways in which that original order gets made are many and various. A fairly early agreement may be reached at some kind of mediated arrangement—perhaps at a legal aid commission or perhaps through another agency—and a consent order being filed. Consent may be reached at any time along the way through legal proceedings which are going to extend for a longer period of time, or an order may be made as a result of a judicial decision. It is our experience that many of our clients, no matter what

way the order is made, have a great deal of difficulty ensuring that the violence that they have lived with with that partner is properly taken into account in formulating that order. In fact, one of the concerns of our network is the frequency with which women enter into consent arrangements when they are quite concerned about the violence, and where they have not really been able to have that violence taken into account in terms of the wording of the consent order—so the order looks like an order where there is no violence in the background for those parties.

The mother may continue to get ‘feedback’ in different ways from the children that the contact is not safe—and that may come from the children directly saying things to her, it may be from them saying things to other people who report back to the mother, it may be that contact exchanges are places of the violence and extremely unhappy circumstances or it may be that the kids continue to return from contact in very distressed, unsettled states where the mother becomes very concerned about what is really happening. The mother, in the end, will start to be someone who does not fully comply with the order. She may stop contact altogether or she may try to create some situation where contact does not occur overnight. In various ways she will end up in contravention. That is often what sparks these contravention applications, which have become so common in the Family Court nowadays. Our concern is that often the problem in those arrangements is the original court order—whether it was an appropriate order.

It was with all those things in mind that we wrote the very lengthy submission on that original family law amendment bill, which started to talk about the courts having the power to look back at the original order when there was a contravention—rather than simply making a finding as to whether or not there had been a contravention, perhaps trying to look at what the source of the problem was. In particular, we wanted to ensure that where there had been a contravention and the court was going to look at the original order, the attention of the court would particularly be drawn to examining whether this was a case in which there were allegations of family violence or child abuse—because if that is what lies behind a case, the court needs to ensure that proper information regarding these things is put before the court; otherwise, the findings on the contravention will simply leave the parties trying to continue a life with an unworkable order in place.

**Senator KIRK**—So your suggestion is that the factors that you have listed in recommendation 1 be taken into account when the order is originally made. Is that correct?

**Ms Rathus**—No, if I have understood the suggestions in this bill correctly, it goes like this: when the earlier amendments were brought in with the earlier family law amendment bill, that bill covered the situation where the court found that there had been a contravention or where reasonable excuse had not been proved. In other words, it was a situation where, from our client’s point of view, she had contravened and there was no getting around what had objectively happened. What we were wanting the court to do was to still scrutinise the order. The court might say: ‘You have contravened the order, you haven’t been sending the children and you should have been, but we are going to look at the reasons why. We are going to see whether there is a real problem with this order here which means that we need to look at it again.’

We had suggested that, where the court was in that situation, it would actually adjourn the proceedings and the things that it would take into account in making the decision as to whether or not to adjourn was that list of factors which we had put in there. What ended up happening is that some of our suggestions got taken up. In fact the wording of section 70NG(1) now is something along the lines of what the network recommended at the time, but all the things that we said were never quite taken up.

The section that I am looking at is section 70NG(1A) in the current act. That does list the factors that a court has to take into account when considering whether or not to adjourn the matter. In fact, it does not make specific reference to family violence and child abuse, which we suggested it should. It also suggests that the court should look at whether the primary order was made by consent, but, in the section, it does not in any way explain why that should be important. My memory of the explanatory notes that went with that amendment bill also did not explain our concern, which was that a lot of consent orders, rather than actually being an indication of genuine agreement, are actually an indication that people end up consenting to things because they do not have the power to take the matter to court. They do not have the financial resources and legal representation to litigate and so a consent order is not necessarily something that was really agreed to.

This particular amendment and the difference between it and the earlier amendment is that there is now a suggestion that a court should also be able to look at that original order when it has actually found that there was not a contravention or that there was a reasonable excuse. In other words, this is the situation where the person trying to make the contravention application has actually lost but the court still wants to look back at that original order and see whether there is a problem with it. Our concern is that we see our clients all the time in a situation where they do not have an opportunity to put before the court what their real concerns are. The court does not turn its mind to whether the real issues that lie behind this story are family violence and child abuse. For example, if one of our clients had proved reasonable excuse, it is likely to be that she was concerned about the safety of the children. So if the court does find in her favour they should then say, 'Okay, you were able to prove reasonable excuse and, therefore, that is a defence to the contravention, but we want to look back at that parenting order and work out whether it is correct or not.'

What we are saying is that the court should not just rush into that there and then; they should adjourn the proceedings and indicate that the reason they are adjourning the proceedings is to allow the parties to come back and present information appropriately. In doing that, the court should have regard to whether or not there is a history of family violence or child abuse in this case. If so, the other part of what we suggested here is that the court should then make appropriate directions as to the kind of material which could and should be filed before the court reconsiders what that original order should be.

We have suggested that this wording should also be included in the existing section 70NG, because it has never been put in there properly. Only part of what we have suggested has been picked up. I know it is a complex and longwinded explanation, but it is actually quite a complex, technical thing and it took me a long time to understand what the proposed difference was between the new section 70NEB and the old section 70NG. Then I realised that one is where the contravener has won and the other one is where the contravener has lost.

**Senator KIRK**—Thank you, Ms Carney. We will take those matters on board. We now have your lengthy explanation as well as your written submission.

**Ms Rathus**—I have to say that that was Ms Rathus and not Ms Carney, just for the record. Catherine may not wish to ever have a reputation of being so longwinded.

**CHAIR**—You will have to be very brief, Ms Rathus, because we are very much short of time.

**Ms Carney**—You would all be very aware of the enormous push towards mediation. A lot of these consent orders are coming out where violence has not been taken into account.

**Senator KIRK**—You say on page 5 of your submission that the changes to the cost rules that are proposed by part 16 ‘could be a double edged sword for our clients’. I wonder if you could elaborate on what you mean by this double-edged sword.

**Ms Rathus**—On the one hand, the more power the court has to be a bit punitive about people complying with the rules can be an advantage to our clients because a lot of their ex-partners use the legal system itself as a tool of harassment. They intentionally obstruct litigation, extend the length of time and push matters on. One of the things we have written about before is the cap—generally up to \$10,000—on how much legal aid funding someone gets. If the ex-partners continue the legal proceedings and bring lots of procedural steps or take other actions like that, by the time the actual trial happens the women have often run out of legal aid.

Men actually use litigation as a tool of violence against our clients. To allow the court to step in and actually be more punitive or stricter on compliance with the rules can therefore be an advantage to our clients. We have found that the courts have tended to be fairly generous in respect of those matters. The difficulty is, though, that, because so many of our clients are self-representing, the complexities for them to comply with the rules are also very intense. They may not be trying to do these things intentionally or intentionally extending proceedings or breaking the procedural rules which have been made, but they simply may not have the capacity to understand them and the financial and intellectual capacity—or English-speaking capacity or whatever—to follow through. So we have suggested that, when the court is looking at whether or not someone has been complying with the rules, they should look at whether or not that person has legal representation and, if they do not, whether that is a matter of that person’s choice or whether it has come about because of their circumstances.

**Senator KIRK**—So you are saying that whether or not a person is represented is something that should be taken into account in the determination as to whether or not costs should be awarded and that that should be made explicit?

**Ms Carney**—Yes.

**Ms Rathus**—That is right.

**Senator KIRK**—Finally, you say that you support the amendments that relate to frivolous or vexatious proceedings. Could you elaborate on why it is you are in support of those provisions?

**Ms Rathus**—For the same reason stated previously: men really do use family law proceedings to continue a pattern of violence and abuse against some of our clients. One of

the particular provisions of it that was pleasing to us was that we noted that the Family Court could now look at proceedings taken in other jurisdictions. Many of our clients are also harassed, fairly obviously, in domestic violence jurisdictions. We have had a number of clients here, though, who have also been harassed through civil courts over debt matters and other such things. If there is any issue that the men find that they might be able to litigate over, they start legal proceedings somewhere, which just takes time, emotional energy, money et cetera and makes it harder and harder for the woman to actually focus on being a mother and to focus on the family law proceedings, which are probably the ones that really most concern her. The more he can divert her resources, emotional, psychological and financial, he will. So we were very pleased to see that those other matters could be taken into account, and we support that.

**Senator LUDWIG**—In relation to those amendments that go to the bankruptcy legislation under part 19, do they stand alone, in your view, or should they be dealt with cognately with the Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill?

**Ms Rathus**—We are quite concerned about the ideas which have been suggested under the Bankruptcy Legislation Amendment Bill. Many of those suggestions do not necessarily have anything to do with whether parties are together or separated but are actually intended to attack certain kinds of arrangements for people in intact marriages. We have a general concern about that. For many of our clients it would just never be relevant because our clients are not of a wealthy base. But we are very concerned that, in the current state of the way that bill has been proposed, it may catch a whole lot of people who are not particularly wealthy. We have a real concern about the bringing together of philosophies in family law which are actually aimed at protecting dependent spouses and children and utilising them in a bankruptcy scenario where what you are talking about is trying to protect innocent creditors, so to speak. We think that these have not yet been well enough followed through and we find that very concerning.

What becomes difficult is to reimagine some changes to the Family Law Act only that were not considered to be connected to this bigger scheme. We certainly oppose the bigger scheme suggested in the bankruptcy legislation altogether, whether it would be an intact marriage or whether it is linking the bankruptcy proceedings and family law proceedings. If the only thing that was then being talked about was, for example, the new suggested section 79 subsection (10), which is about clarifying the right of a creditor to join in proceedings, I do not think that enough consideration has yet been given to how the rights of that person would be prioritised or taken into account together with the section 75(2) factors of future needs of the dependent spouse and children. I think there has been far too much commercial thought around all of this and that is where the philosophy and approach have come to, and usual family law principles have somehow got lost and buried. If one were going to try and go ahead simply with some of the amendments in relation to family law and giving creditors a right, for example, to intervene, then we would need to rethink that and look at that as a stand-alone and be very clear as to where those creditors' rights would rank in comparison with the need to ensure wherever possible a reasonable ongoing quality of life for a dependent spouse and children after a marriage has broken down. I hope that answers your question.

**Senator LUDWIG**—Thank you.

**CHAIR**—Thank you very much. I think that covers most of the issues the committee wanted to raise with the National Network of Women’s Legal Services. Thank you very much for your comprehensive submission and your comprehensive answers. Thank you for assisting the committee.

[12.59 p.m.]

**BENJAMIN, Mr Robert James Charles, Immediate Past President, Law Society of New South Wales**

**CHAIR**—Welcome. Do you have any comments to make on the capacity in which you appear?

**Mr Benjamin**—I am the immediate past president of the Law Society of New South Wales. I am also chair of their family law committee. I have been chair of that committee for some time. It is in the capacity as chair of that committee that I appear today.

**CHAIR**—The Law Society of New South Wales has lodged a submission with the committee, which we have numbered No. 1. Do you need to make any amendments or alterations to that submission?

**Mr Benjamin**—No, I do not.

**CHAIR**—I apologise for the delay in welcoming you to the table this afternoon. I invite you to make a short opening statement. At the conclusion of that, we will go to questions from committee members.

**Mr Benjamin**—Thank you. I will try to keep it as brief as I can. Firstly, there is a change that we welcome and that we believe is a well thought out change—that is, the ability to transfer from state summary courts to the Federal Magistrate’s Court. That will save considerable cost and time for parties who need to get to that court, so that is a very good reform.

The two other issues I am going to talk about are the rules as to costs, and the civil penalties. In terms of the rules as to costs, I heard what Mr Michael Foster had to say and Senator Ludwig’s comments. The effect of this change is that it will provide the court with some sort of institutional costs order, which will be a default order. If I or my client does not file his or her affidavits by a particular day, a default will occur and they will have to pay costs arising out of the breach of the rules. If that arises as a consequence of a normal thing—for example, someone is sick or misses a taxi, or a document is lost—the party that has not complied with that institutional rule then has another dispute on their hands. They have got a costs order against them. They then have to file a Form 2, with a supporting affidavit, turn up at the court with or without legal representation and wait in a queue until they get heard on that particular day before that particular registrar. Hopefully the registrar will deal with the matter and the other side will not oppose it, or they may then get referred to a judge. So if you have these institutional type automatic rules they in fact create their own disputes. Judges have the power to make costs orders against parties and practitioners. We think it is better to be left on the individual case rather than this institutional type approach. I will not go on at length, because I think Mr Foster has dealt with the other matters. I am happy to answer any questions on them.

We have real concerns about the civil penalties. Most people going to the Family Court are going there for the one and only time in their lives. When civil penalties are imposed upon people for breaches of extraordinarily complex rules, which change over and over again, it is

not going to bring about a solution to their problems. It is not going to bring about a reduction in the intensity of the dispute between them. It is going to do quite the opposite. So we think having civil penalties between parties serves no purpose other than to create animosity and pain, which may continue into the future.

The other, underlying reason, of course, is this assertion of a culture of noncompliance. It is interesting that that is only observable or raised in the Family Court context. It is certainly not raised in the Federal Court, as far as I am aware. It is certainly not raised in the Federal Magistrate's Court. Wearing my hat as President of the Law Society last year, I dealt with all the courts—the Local Court, District Court and Supreme Court. That issue was never raised by the heads of those jurisdictions.

We think that part of the problem is simply the complexity of the rules of the Family Court—which are somewhat at odds with section 97(3) of the act, which says that they should not be complex anyway—as well as the constant changes. We have a profession in New South Wales with some 18,000 or 19,000 practising solicitors, which is a huge number. They have to try to deal with changes to the rules of all the courts. They have to deal with the Local Court, state courts, the Federal Court and the various tribunals. When change comes about, it sometimes takes a while for them to get on top of those changes. That may be part of it. We do not think the solution is a good solution.

We have worries about the civil penalties, particularly on the profession. For instance, if my client does not file his or her affidavit at a particular time, I end up on a defaulter's list before a judge at the Family Court who says to me, 'Mr Benjamin, the documents haven't been filed. You were required to file them on that day. Why haven't you filed them? What is the reason?' The reason may well be that I have a client who has all sorts of health or emotional problems and just cannot get around to dealing with it. I do not particularly, at that stage, want to disclose that confidence of my client if my client says that I cannot disclose that confidence. I would say to the court that my client was unable to achieve that deadline. The court then says, 'Why shouldn't I impose a civil penalty on you or a civil penalty on your client for this?' I am immediately in conflict with my client. My view is that I have to immediately say, 'I'm in conflict with my client, your Honour. Would you grant me leave to cease representing that party?' I then have to go to my client and ask for permission to release the client's legal privilege—it is not mine; it is my client's—so that I can deal with a fairly significant matter which would affect me both in a pecuniary way and in a reputation way. I do not want a fine. Suddenly we have a new conflict.

If I have behaved badly, it is not a matter for the Family Court to impose its own regulatory regime. I have that in terms of the Law Society and I have that in terms of the Legal Services Commissioner—and they are robust in the way that they will treat me, let me tell you. It is not the place to fight that. It is not the place to add another level of regulation to the profession.

This is interesting because one of the problems we have is when we talk to the judges about how we deal with a client who just cannot face doing an affidavit. We talk to people whose marriages have broken up, they are having arguments over their children, they are having arguments over properties and they are really struggling to deal with it. They cannot get a solution. They have gone through mediation perhaps and negotiation. You say, 'Look, we have to sit down and spend half a day or a day to do an affidavit. We have to get all the history

of what has happened over the period of your relationship.’ They just do not get around to it. I say to the judge, ‘What do we do? How do we deal with that?’ The judge says, ‘If they’re not going to comply, you simply file a notice of ceasing to act and you walk away from it.’ That may be an appropriate solution for a judge who is trying to deal with matters. In dealing with our clients, we form quite a bond—we try and work together to solve their problems. Saying to them, ‘I’m sorry; you can’t get around to doing your affidavit and, for my own self-defence, I’m going to dump you,’ is not in my view a solution. I am sorry, I have spoken too long. I wanted to explain how it really affected us.

**CHAIR**—I appreciate the explanation, Mr Benjamin. Thank you very much.

**Senator KIRK**—Thank you very much for your submission and for giving us a real world view as to how these things work in practice. I asked Mr Foster about the use of section 123, which appears to allow for the imposing of criminal penalties. In your experience, is that section used much?

**Mr Benjamin**—I have never seen it used. When you asked that question, I rushed to borrow from the Attorney-General’s office their Family Law Act to have a good look at it, because it had not crossed my mind. I suspect the reason is that it is a criminal sanction, not a civil sanction. I suspect the Family Court—this is what I have been thinking through since you asked the question—does not want to impose a criminal penalty upon parties or members of the legal profession for failing to file an affidavit on time. I suspect that is the nature of it. The creation of this new civil penalty is seen as having a whip but a whip that is not going to impact on your reputation. In New South Wales it will impact on your reputation because a conviction like that we are bound to disclose to the Law Society or the Bar Association, and they are bound to investigate it and determine whether you still should have a right to practise or how you practise.

**Senator KIRK**—So it is still very serious for both concerned?

**Mr Benjamin**—It is still very serious. To be honest, the Family Court is our workplace. I do not want to be prosecuted for the inability of clients to do things or simply for a mistake I have made when I have overlooked something. I am happy to wear the costs if I make a mistake and there is a costs consequence to my client or the other side. Okay, I will wear that; that is part of the hurly-burly of being in practice. But I do not want to have a conviction of any description for that.

**Senator LUDWIG**—I have asked this question, and perhaps you have already been put on notice by that. Should the provision part 19, Interaction of family law and bankruptcy, at section 79 have been dealt with, in your view, as a separate bill or should it have been made cognate with the bankruptcy legislation, which is now being reviewed by the House of Representatives committee? What concerns me is that they seem to be two ends of the same stick. Can they stand alone in your view?

**Mr Benjamin**—They can stand alone easily. Under the present law, if the court know they are going to make an order which could impact upon a creditor, we are obliged to let the creditor know anyway.

**Senator LUDWIG**—So it already happens.

**Mr Benjamin**—It already happens. All this is doing is putting in place a practical solution to something which we have been dealing with in any event. It adds to the existing law. It does not tie in necessarily with the bankruptcy provisions adversely in any way.

**Senator LUDWIG**—It did not seem to have flowed out of the joint task force report. It seemed to have been a separate issue that was considered. The bankruptcy legislation, which will impact upon the family law, comes out of that report and that is contained within the other bill.

**Mr Benjamin**—The Family Court for years, if they see a creditor is going to be in trouble as a consequence of an order—say my wife is trying to transfer all the assets from me to her and all the debt is in my name—have invariably required the parties to serve the creditor or to let the creditor know to give them the opportunity to appear, and they do from time to time appear. This just gives them the status to do that. It may assist it in that, but it has its stand-alone provision.

**Senator LUDWIG**—That is very helpful. Thank you.

**CHAIR**—Mr Benjamin, I want to follow up the other issue that is raised in the Law Society's submission, which is the definitions in part 7. You suggest that the Law Society has some concerns about the use of the word 'and' instead of 'includes' at section 106B(5)(a) and (b). The Law Society suggests that the word 'includes' would be more appropriate there.

**Mr Benjamin**—I am not sure. I have seen it used inappropriately in the family law regulations overseas maintenance type of things, and it struck me that it was wrong there. I raise that not because I am an expert in the construction of legislation but simply to suggest we go back to the draftsmen and ask, 'Is it an appropriate use?' If the draftsmen, who are far more skilled in that area than I am, say it is appropriate then fine. If there is a mistake, it could be dealt with now. It was raised simply to put people on notice rather than to pretend I am a construction lawyer or a lawyer otherwise knowledgeable in those areas.

**CHAIR**—That is helpful to the committee. We can follow that up with the department. Thank you very much for that. As there are no further questions I thank you, Mr Benjamin, for your submission, which does clarify well the views of the society on those two points, and for your oral evidence.

**Mr Benjamin**—Thank you.

[1.13 p.m.]

**MEIBUSCH, Mr Peter, Acting Assistant Secretary, Family Law Branch, Family Law and Legal Assistance Division**

**SELWOOD, Ms Jane, Acting Principal Legal Officer, Family Law Branch, Family Law and Legal Assistance Division**

**CHAIR**—Welcome. I note that the Attorney-General's Department has not made a submission, but I do invite you, Mr Meibusch, to make a short opening statement. At the conclusion of that, we will go to questions.

**Mr Meibusch**—We do not want to make any statement beyond indicating that there are three government amendments to the bill that have been notified on the parliamentary web site. The first two of the three amendments propose amendments to the appeal provisions in part 8 of schedule 1 of the bill. They will retain the capacity for judges of the Family Court to make rules enabling applications for leave to appeal to be dealt with without an oral hearing. The third government amendment, notice of which has been given on the parliamentary web site, is relevant to some of the matters that have passed before the committee this morning. It will limit the proposed judge's rule-making power to provide for civil penalties for failure to comply with rules of the court to 50 penalty units. That equates to approximately \$5,500, not the \$27,000 mentioned earlier in the morning. I will pass over to Jane Selwood to see whether she wants to make any opening remarks, but we are quite happy to take questions on any aspect of the bill.

**Ms Selwood**—I have no further comment.

**CHAIR**—When you say these amendments appear on the parliamentary web site, where do you mean?

**Mr Meibusch**—They are on the web site through [aph.gov.au](http://aph.gov.au), listed under the legislation relating to the Family Law Amendment Bill 2004. The bill is there and, of course, the explanatory memorandum and the second reading speeches.

**CHAIR**—On the Attorney-General's Department web site?

**Ms Selwood**—No, on the Parliament House web site.

**CHAIR**—On the bills list?

**Ms Selwood**—Yes.

**CHAIR**—When were those amendments put up?

**Ms Selwood**—I am not sure of the date they were put up.

**CHAIR**—I think it would be appropriate to note for the record that it would have been helpful to the committee to have been advised of that by the Attorney-General's Department. In turn, we would have been in a position to advise witnesses. You may or may not be aware, but certainly the department in general is aware, that the committee is currently entertaining four if not five legislative inquiries across a range of issues, two of which have held hearings today. Although I would like to think that I and other members of the committee were more

than capable of inspecting the appropriate web sites on a daily basis to make sure new amendments had not been loaded, that is in fact not the case and it would have been helpful for the committee to have been advised.

**Senator KIRK**—We heard this morning from a number of witnesses, in particular those from the Law Council of Australia and the Law Society of New South Wales, who are strongly opposed to the amendments in part 16, relating to rules as to cost. In the absence of a written submission from the Attorney-General's Department, we would appreciate hearing from you why it is that these amendments are seen to be necessary.

**Mr Meibusch**—The amendments have been included as a result of a request from the Family Court to support provisions in the context of their rules of court that commenced in March this year. The provisions of those rules do not include any automatic cost consequences, as the Law Society of New South Wales and the family law section representatives mentioned. The court has advised the department that the request should be viewed in light of the conclusion drawn by the Australian Law Reform Commission in its *Managing justice* report that there is a culture of noncompliance in the Family Court. The Law Reform Commission's recommendation in that report was that the court and its committees should identify clearly the various causes, circumstances, processes and registries in which there is significant noncompliance and should distinguish between inadvertent and deliberate noncompliance and the range of solutions and responses that might be required. I refer there to recommendation 110 of the Australian Law Reform Commission report *Managing justice* in 2000. The department's view is that the provision is necessary because of that culture of noncompliance within the court.

**Senator KIRK**—Has this culture of noncompliance been identified by the judges of the court? Has anything been put into writing and provided to the Attorney-General's Department in relation to this?

**Mr Meibusch**—A submission by the Family Court's compliance committee went into the *Managing justice* report, and it is footnoted there. We have a document from the Family Court that indicates that that submission was put in.

**Senator KIRK**—So why it was it decided that the amendments would be drafted in the way they have been, namely to delegate to the court the power to make these rules in relation to the costs? Why was the decision not made to spell that out more clearly in a legislative form in section 117?

**Mr Meibusch**—To do so in the form that that may be made in rules of the Family Court would be an exercise of some precision. Jane, would you like to comment on that?

**Ms Selwood**—In relation to the provision in part 17 of the bill, as mentioned earlier today there is provision in paragraph 123(1)(u) to allow for family law rules to provide for criminal penalties for breach of the rules of the court. The other point I would note is that the rules of the court are subject to parliamentary scrutiny because they are subject to disallowance.

**Senator KIRK**—That still does not really answer the question of why it was determined that in the first instance the court should have this delegated power to make the rules and then to leave it subject to parliamentary disallowance. Why was it not decided to contain it within legislation? We have had submissions that you would have heard this morning that it is more

appropriate for this type of matter to be dealt with by legislation rather than by giving the power to the courts.

**Mr Meibusch**—There is a recognition that the Family Court is in a special position in relation to its rules on the costs of proceedings. It is not the same rule that applies to other proceedings in other courts. For instance, in the Federal Court the power to make costs is within the discretion of the court. Under section 43(2) of the Federal Court of Australia Act, the Federal Court itself has discretion to make an award for costs. We have a situation in the Family Law Act where there are specific provisions in relation to the principles which guide the court in making cost orders. There is an initial position that both parties bear their own costs.

One consideration is that the particular circumstances that may be identified by the rules are going to relate to procedural matters before the court. If there is the desire to use the costs power to secure compliance with procedural mechanisms within the court, then the fairly general guiding rule in section 117 of the act is not one that is going to be particularly useful to ensure compliance with particular procedural processes within the court. The Family Court was proposing to deal with that issue by rules of court and sought to have a limit to the act that would support that, leaving the decision with the court as to the circumstances in which those consequences would apply, bearing in mind that the rules that they might make would be disallowable in parliament and that there would be parliamentary scrutiny at that level, as opposed to having the detail of the circumstances spelt out in the terms of section 117.

**Senator KIRK**—So, if this legislation comes into effect, it is accurate to say, is it not, that there will be a lack of consistency between courts, between the federal courts, in particular—the Federal Court of Australia and the Family Court—in relation to costs? Is that not contrary to the civil justice report that the Attorney-General's Department has recently released?

**Mr Meibusch**—The department's position on that is that the recommendation in the 'Federal civil justice strategy paper' on this point is that the courts should continue to develop, where appropriate, uniform procedures for those areas of law in which the same jurisdiction could be exercised in more than one court. It will result in a different set of cost consequences between the Family Court and the Federal Magistrates Service if the Federal Magistrates Service does not pick up any rules that might be made by the Family Court on it. The department's position is that, where appropriate, part of that recommendation leaves it open to each court to develop alternative procedures which it considers appropriate to its own circumstances. In this regard, the Family Court considers it appropriate to facilitate changes to its rules in this area relating to cost in order to address a culture of noncompliance before the court.

**Senator KIRK**—Is this an attempt to shift work from the Family Court to the Federal Magistrates Service? There could well be a consequence of this. Has that been considered?

**Mr Meibusch**—I would have to take that on notice.

**Senator KIRK**—So there has not been any request from the Federal Magistrates Service to make changes to their legislation that would permit them to make these similar sorts of cost orders?

**Mr Meibusch**—No.

**Senator KIRK**—Is there any precedent, model or example of where this has occurred? I guess I am thinking: where did you get the idea from and how do we know how it is going to work in practice?

**Mr Meibusch**—There is no other precedent within an Australian court. I understand that there has been some examination and experience of the operation of rules in some other overseas jurisdictions that have been acquired within the Family Court. I do not believe that it is widespread. Mr Michael Foster, the Chairman of the Family Law Section of the Law Council of Australia, mentioned it is an option that is available in the United Kingdom.

**Senator KIRK**—You might have heard earlier the National Network of Women's Legal Service suggesting that there be amendments to the costs rules so that there is a requirement that the court take into account whether a party is unrepresented and, if so, the circumstances giving rise to that. I wonder whether or not the department have given any consideration to that matter.

**Mr Meibusch**—We have not as yet. It was included in a submission that was made available to us for this hearing. We will be considering that view that has been put to the department.

**Senator KIRK**—On the question of civil penalties, Ms Selwood mentioned that section 123 currently provides for the making of criminal penalties in some circumstances but we have heard from the Law Council of Australia and the Law Society of New South Wales that their understanding is that power is rarely exercised. I wonder if the department has any information on that that could clarify the situation for us.

**Mr Meibusch**—The department also understands that it has rarely, if ever, been used. One reason for that would be that the Family Court is not a criminal court and any offence proceeding would be taken in some other court and prosecuted by a prosecution agency. Certainly the provisions of the family law rules, including these offence provisions, have been there for some time, and we in the department have not become aware of any approach to the department to have proceedings commenced in relation to those offences.

**Senator KIRK**—Is it the underuse of this section which has prompted the move towards the civil penalties that we see in this legislation?

**Mr Meibusch**—One factor would be the procedural difficulty in following through on that particular sanction, as opposed to a sanction that would be one that could be imposed by the court in proceedings before it. The issue then would be taking proceedings in relation to the recovery of that penalty. I would venture, if I could put myself into the shoes of the decision makers within the court on this, that it would be easier to get to the first step, to impose the penalty, than it would be if you were taking an offence proceeding in another court.

**CHAIR**—Mr Meibusch, the committee has a couple of other questions which we may put on notice for the department. Some of those may come in light of the amendments of which we were unaware and others on other matters from submissions that have been made to the committee. We would be grateful if you would receive those and assist us with responses. As there are no further questions, I would like to thank Mr Meibusch and Ms Selwood and all of the other witnesses who have given evidence to the committee today.

**Committee adjourned at 1.34 p.m.**