COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

Reference: Child custody inquiry

MONDAY, 15 SEPTEMBER 2003

CANBERRA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

Monday, 15 September 2003

Members: Mrs Hull *(Chair)*, Mrs Irwin *(Deputy Chair)*, Mr Cadman, Mrs Draper, Mr Dutton, Ms George, Mr Pearce, Mr Price, Mr Quick and Mr Cameron Thompson.

Members in attendance: Mr Cadman, Mr Dutton, Ms George, Mrs Hull, Mrs Irwin, Mr Pearce, Mr Price, Mr Quick and Mr Cameron Thompson

Terms of reference for the inquiry:

To inquire into and report on:

(a) given that the best interests of the child are the paramount consideration:

  (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and

  (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

(b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

(c) with the committee to **report to the Parliament by 31 December 2003**.

WITNESSES

Committee met at 8.34 a.m.

CHAIR—Thank you for attending this ninth public hearing of the House of Representatives Family and Community Affairs Committee inquiry into child custody arrangements in the event of family separation. This inquiry addresses a very important issue which touches the lives of all Australians. To date the committee has received over 1,500 submissions—a record for an inquiry by this committee and amongst the highest ever for a House of Representatives committee. We are grateful for the community's response and this is one important way in which the community can express its views. From the outset of this inquiry we want to stress that the committee does not have any preconceived views on the result of the inquiry. Accordingly, throughout the inquiry we will be seeking to hear a wide range of views on the terms of reference. While at any one public hearing we may hear more from one set of views than another set—for example, more from men than from women—by the end of this inquiry we will have heard from a diverse group and will have thus received a balance over the range of views.

The public hearings that the committee are undertaking are focused on regional locations rather than just capital cities. This is the first public hearing with the larger organisations and these hearings will be held in Canberra or via video conference. Today we will hear from the Attorney-General's Department and the Department of Family and Community Services. The committee appreciates that the policy work on the Child Support Agency is undertaken by the Department of Family and Community Services; however, given the terms of reference for the inquiry, we will of course have a further hearing with representatives of the CSA to deal with additional operational matters associated with that agency. About four hours have been set aside for the public hearing with two hours for each of our witnesses.

[8.36 a.m.]

DUGGAN, Mr Kym Francis, Assistant Secretary, Family Law Branch, Family Law and Legal Assistance Division, Attorney-General's Department

LYNCH, Ms Philippa Anne, First Assistant Secretary, Family Law Branch, Family Law and Legal Assistance Division, Attorney-General's Department

PIDGEON, Ms Sue, Assistant Secretary, Family Pathways Branch, Family Law and Legal Assistance Division, Attorney-General's Department

CHAIR—I welcome representatives from the Attorney-General's Department to today's public hearing. I advise you that the evidence that you give at this public hearing is considered to be part of the proceedings of parliament. I, therefore, remind you that any attempt to mislead the committee is a very serious matter and could amount to a contempt of the parliament. The Attorney-General's Department has made a submission to the inquiry and copies are available from the committee secretariat. I invite you to make a short opening statement before I invite members to proceed with their questions.

Ms Lynch—We have not prepared an opening statement. The committee has a copy of the department's submission and we have nothing further to add to that, but would be happy to answer questions.

CHAIR—We can go directly to questions. Mr Quick, would you like to start the questions?

Mr QUICK—On page 18 of your submission you state:

It is the Department's view that the introduction of a rebuttable presumption would lead to a further increase in litigation because of the need to rebut the presumption in many cases.

Can you explain what you mean by 'a further increase in litigation'? Can you quantify that?

Mr Duggan—That was a reference to the changes that were made to the act in 1996, which brought in the concept of parental responsibility, which led to a significant increase in contact enforcement applications. I need to emphasise that that has been a worldwide trend, that there have been significant increases in contact enforcement applications globally in the last five or six years, perhaps even longer.

Mr QUICK—What do you mean by a 'significant increase'—60 per cent, 80 per cent or 120 per cent?

Mr Duggan—I do not have the figures in front of me but it is probably in the order of the figures you are talking about over that period—about 60 to 80 per cent. We could provide those figures to the committee; we would be very happy to do that. It has been a graph that has been going up steadily overall. In our view, the nature of the presumption would require that it be rebutted in a significant number of cases, which would be likely to lead to an increase in

litigation. No, we cannot quantify that because it is an unknown quantity, but that would be our view, based on that experience.

Mr QUICK—So, if there is going to be a further increase in litigation if we have a rebuttable presumption introduced, and legal aid is involved, is there any idea from the department—perhaps in estimates for the next budget—that there needs to be an increase of X millions of dollars?

Ms Lynch—I do not have any figures or estimates for the possible impact on legal aid—was that what you were inquiring about? Sorry, I did not catch what you said in that question.

Mr QUICK—It is interesting that on page 4 of the South Australian government's submission to this inquiry it says the inquiry should also consider the likely impact that any amendment entrenching a rebuttable presumption of shared custody will have on the level of litigation, and that any increase in litigation which is not matched by an increase in legal aid funding will lead to more parties being unrepresented.

Ms Lynch—I do not have any figures or estimates on what the impact on legal aid is likely to be. I have the current figures for the number of applications for legal aid received each year and the number granted. I do not have an estimate for you if we extrapolated the possible number of cases if a presumption were introduced. But any increase in litigation would be likely to flow on to an increase in requests for legal aid.

Mr Duggan—I am reminded, Mr Quick, that our submission indicates that in 1994-95 there were 10,000 applications with respect to what was then custody and access. In 1996-97 there were 30,000 such applications. So just in those few years there was a very significant increase in the number of applications dealt with by the court.

Mr PRICE—I guess we have had some difficulty with the concept. Does the department see this rebuttable presumption of joint residency as the outcome of, or the starting point for, negotiations? In other words, if two parents start off on the basis of fifty-fifty but—taking into account their circumstances and the best interests of the children—it ends up being sixty-forty, do you still see that as fitting in that model?

Mr Duggan—If I understand the question, you are suggesting that, effectively, the equal rebuttable presumption would be a starting point—

Mr PRICE—Yes.

Mr Duggan—and it could be rebutted by evidence as to the best interests of the child in any particular case.

Mr PRICE—I am actually referring to a bit earlier. I am asking whether, in all separations, in terms of the terms of reference the starting point should be fifty-fifty; then parents can look at what is in the best interests of the children and themselves, and there may be quite a number of different outcomes other than fifty-fifty. Alternatively, is the presumption so rigid that if the fifty-fifty is not agreed the case goes to court, and people rebut and vary it that way?

Mr Duggan—Our understanding of the presumption is that, as you indicated previously, parties would be able to make whatever arrangements they chose in the shadow—if that is the right word—of the fifty-fifty presumption. That is pretty much as they do now, where there is, as you know, a starting point that responsibility is equal and then parents have a whole range of arrangements resulting from that. We would expect the same situation in relation to the presumption.

Mr PRICE—Given that 96 per cent of cases are sole residency arrangements—and, admittedly, that is only looking at the child support cases—what needs to be done to enable parents to migrate to looking at this joint arrangement, and negotiating? What do we have to do to migrate so many cases so that they are looking at that and working on that presumption?

Mr Duggan—It would be difficult to answer that question in just a sentence or two, I suspect, because I think quite a multifaceted response would be necessary. To achieve that result it would not be enough simply to change the law.

Mr PRICE—Quite; that is what I am trying to suggest.

Mr Duggan—Obviously, we could change the law tomorrow. With respect, I do not think that that would achieve the result that those who put forward the presumption are seeking. I think that there would be a significant need for additional alternative dispute resolution mechanisms—counselling, mediation and those sorts of things—to be put in place to allow parents to consider this whole new starting point, if you like. I would have thought that there would need to be very significant input of resources to allow that change from what is, as you say, a very significant proportion the other way at the moment.

Mr PRICE—Does your submission address those additional resources?

Mr Duggan—You may have noted that, as an alternative, the department has put forward what we call an early intervention type proposal which will assist parties to better manage contact and residence arrangements, in our view, without the need for litigation. I would have thought it would be possible conceptually for something of that sort to be combined with a change to the legislation if that is what is in mind.

Mr PRICE—How much are we spending on the Family Court and the Family Court of Western Australia per annum?

Ms Lynch—I think we would have to take that on notice because we do not have those figures.

Mr PRICE—What about the legal aid that predominantly goes to family law matters?

Ms Lynch—I have some figures for legal aid which are for the number of applicants.

Mr PRICE—I need a dollar figure, if you could take that on notice.

Ms Lynch—There are some difficulties there because not all legal aid commissions can cost their in-house services. I am happy to give you whatever we can.

Mr PRICE—Yes, your best estimate would be good. For some time people have been asking, given that the Attorney-General has so many advisory bodies, how much is being spent with the legal profession on family law matters?

Mr Duggan—Do you mean how much the legal aid commissions refer out?

Mr PRICE—No. How much are parents paying on solicitors, lawyers and barristers on family law matters?

Mr Duggan—We would need to take that on notice as well.

Mr PRICE—Okay. In regard to Mr Andrews's committee 'to have and to hold', I noticed that the department—not your department—estimates that it is costing the Commonwealth $3 billion a year in terms of family break-up. I think that committee, if my memory serves me correctly, said that it was costing in the order of $6 billion a year to the economy. Is that correct?

Mr Duggan—I do not have those figures in front of me. We can certainly provide that to you.

Mr PRICE—I was wondering if you would be kind enough to look at those figures and perhaps you might like to update them for 2003 because it has been a while since that committee looked at them. Do you have any better figures on what it is costing?

Mr Duggan—Not that I am aware of. We could certainly discuss this with the Department of Family and Community Services, which may have some updated figures. We will certainly do that and come back to you.

Mrs IRWIN—In the legal proceedings, what steps have to be taken to rebut a presumption? What do you consider are the likely circumstances in which a presumption of equal time should be rebutted?

Mr Duggan—First of all, it depends of course on how the presumption was drafted, particularly how the presumption interacts with the principle of the best interests of the child. If we take it in the general sense, if parties cannot resolve their differences and both parties seek to, if you like, enforce the presumption in the legislation, then the party who seeks to overturn the presumption would need to take action in the court. It depends on how the presumption is worded. The reason I keep coming back to that is that there are grades of presumption, if you like, in terms of what you would need to overcome the presumption. On the one hand, it would be possible to have a bare presumption whereby simply evidence to the contrary could be led. It would not necessarily have to be very strong, the presumption is then overturned and the court then considers what is in the best interests of the child for that particular case.

On the other hand, it would be possible to have a very strong presumption where you would need 'strong and compelling evidence'—usually the words that are used in legislation—to overcome the presumption. I hope I am getting across the fact that greater evidence or substantive evidence would be required there to overcome the presumption. If we went for the latter presumption, it would be a significant onus on the parties seeking to overturn a presumption to bring evidence before the court to overturn the presumption. The court would then get into the question of what is in the best interests of the child.

Ms Lynch—I suppose the question too is if the presumption is that joint residency is in the best interests of the child. The evidence that you would need to bring to overcome that would be to show it was not in the best interests of the child. There are various ways you could frame the presumption if you wanted to put one in both as to what the presumed fact was going to be and what it took to overcome that presumption.

Mrs IRWIN—Following on from that, when would equal time be contrary to the best interests of the child?

Mr Duggan—It would be in a range of circumstances, I would have thought. It would depend on a particular case, but a situation where there has been domestic violence would be a classic situation of that. There may be lesser circumstances—for example, where one parent travels extensively and is just not physically able to do the task.

Ms Lynch—Age.

Mr Duggan—Possibly the age of the child as well. There is a whole range of factors that might be relevant in that regard.

Mrs IRWIN—I have one more question and then the other committee members might want to have a go. Regarding the enforcement of court orders and with respect to the parenting compliance regime, your submission has indicated that appropriate post-separation parenting programs have not been available. What can be done to address this, and why haven't they been available?

Mr Duggan—I think our submission is suggesting that the three-stage parenting compliance regime has not been a particular success for a range of reasons. One has been availability, and that is mainly because we were not certain about how extensively the programs would need to be made available. That is something we will need to address with government.

Mrs IRWIN—How would the department like to see this addressed? Have you got any ideas?

Mr Duggan—Certainly the agencies providing services have suggested to us that more resources will be necessary. Particularly, these agencies are finding they are now getting more and more couples in high-conflict situations, and many of these agencies have not had experience with such couples in the past. Perhaps of greater concern is the fact that very few are actually being referred to these programs. There have been very few orders by the court to refer parties to these programs.

What we are trying to suggest in our submission is that perhaps one of the main reasons for that is that, the first time that the matter comes before the court, it is often a case that the original order made by the court—usually by consent—proves to be inappropriate. What parties tend to do when they are in conflict is to agree to things which in the end will not actually work for them. The first time they try to make it work they realise that the circumstances just do not fit. They are still in conflict so they have then got to go to the court. What the court is effectively doing is varying or making the order more appropriate to their circumstances. What the government did in terms of the three-stage parenting compliance regime was to build it on the enforcement of the original order. What appears to be emerging is that the original order is often

flawed. I make no criticism of the court in this case, because in most cases these are consent orders.

It seems to us clear that there needs to be more support for couples before they make these orders so that they are not rushing into things which prove to be inappropriate once they actually start to make them work. That is why we have come up with the suggestion in our paper of this early intervention service which can give couples that support and give them an opportunity to think about the impact of these orders, which of course are intended to operate long term. The difference with a contact residence order as opposed to most orders is that they operate for a long, long time whereas most court orders are designed to settle a dispute today and then you move on.

Mr CADMAN—Can I ask a question about interim arrangements? To follow on that train of thought, because I think you have raised a very important point, some of the evidence that we are getting—from the males, I have to confess—seems to indicate that they will readily agree to an interim arrangement because they think it is temporary. But they come to court and find that a period of time has transpired and that in fact influences the outcome of the court case. Have you got any statistics or information about the variation of interim orders and the numbers that are varied as well as some more detailed information about that process?

Mr Duggan—We can certainly provide you with more details of the number of interim applications that are made and then the number of final orders that are made. I am not entirely certain that would give you the information that you are seeking.

Mr CADMAN—The number of variations, for instance.

Mr Duggan—We could certainly seek some of that information from the court. It would be dependent on what statistics the courts keep. Certainly, the evidence we have gained from talking to judicial officers supports the proposition I have given to you. We are hoping to get some statistics from the court about what the courts do in that first instance. I will be talking to the court a little later on today about where they are up to regarding that. I imagine that you will be having a public hearing with the court as well, so you may well want to ask them that question. But, certainly, we could provide you with that information. The difficulty with protracted proceedings is that, if they take 18 months to two years to resolve, and certain procedures, as you say, have been put in place, there may be very young children involved—that is the bulk of their lives—and that may well influence the final order. I think this is probably true.

Mrs IRWIN—A lot of individuals and organisations that have come to the hearings so far have suggested we look at compulsory mediation. We know that we have mediation in place, but a lot of them are saying that they feel if compulsory mediation were in place and funding were given to a particular group to do that, they would not have any problems with the Family Court—they would not even have to go that far.

Mr Duggan—This is clearly a matter for government to consider, but there are a couple of things we would say to that. Generally, alternative dispute resolution literature suggests that compulsory primary dispute resolution, in the family law context, works best where parties agree to attend. By making it compulsory, it does not have the same outcomes. Having said that, you

might be interested in some proposals that the Family Court—and, no doubt, the court will tell you more about this—has drafted. The court is proposing in its new rules—I hasten to add, they are not new rules, they are draft proposed rules—to introduce what are called pre-action procedures. The court may have already told you something about this. It would require—or may require, depending on how the orders finally come out and if they actually take place—the sorts of possibilities you are talking about: parties would have to go through certain steps before they litigate. That would almost certainly include counselling or mediation prior to filing in the court. It is not an unheard of suggestion but it would clearly be a matter for government. We point to the fact that the court is thinking along similar lines in that respect.

Mrs IRWIN—Has the department any statistics on families who have reached arrangements in other ways and have not gone through the court system?

Ms Lynch—There is probably a range of things. There would be the statistics of the number of cases filed in the family court and the number that actually proceed to hearings.

Mr Duggan—We could also tell from the divorce statistics, which indicate there are children involved—that is, if we are talking about parties who are actually divorced. The difficulty is we would have very little information on parties who separate but do not divorce unless they are in the child support system. Some of those statistics could be cobbled together—I think it would be possible. We would be happy to take that on notice.

Mrs IRWIN—Thank you very much.

Mr DUTTON—Could we just go back to the issue you were talking about before that involves the adversarial process. We have taken some evidence from people who have suggested to us that it has cost them up to $100,000 to become involved in the court process, as trials and hearings drag out for two years without, as you say, in many cases—in some of their opinions—a satisfactory outcome. Is there a case to be mounted for, or would the department support a look at, taking this particular section of law out of the Family Court and out of an adversarial process?

Mr Duggan—This is clearly a matter for government. We touched on this issue when we appeared before the committee previously. When the government set up the Child Support Agency it saw fit to remove child maintenance matters from the court and put that to an administrative body—the Child Support Agency. The other major area of controversy in terms of the enforcement of court orders remains those in relation to contact in residence. There is an argument—philosophically, at least—for public law intervention in that regard as well. I make no comment on whether that means setting up something similar to the Child Support Agency, but I understand the thrust of those concerns. On the one hand, where there was a significant cost to revenue, the government set up the Child Support Agency. It has not done something similar in relation to contact. This is a personal opinion, but there are questions about the nature of contact orders and whether the ongoing evolution of the relationship is an appropriate one for the court to be adjudicating. I think that is a fairly significant point.

Mr DUTTON—I think it is a very valid point and I think you touched on it before, when you talked about the failure of many of these interim orders and the fact that, as children get older and people's circumstances and family situations change, they obviously desire different things out of the residence orders from when they were first granted. Are there any constitutional

impediments or legal impediments otherwise that would prevent a tribunal type body or a CSA type body being set up to deal with these matters?

Mr Duggan—I would have thought you would almost certainly need, as an end point, an ability to attend a court for a final order.

Mr DUTTON—You would have to have some sort of judicial review—

Mr Duggan—That is right.

Mr DUTTON—but, in my view, you would need to put some sort of significant impediment there to prevent people from trying to run the other party broke or drag out the process—almost a leave to appeal situation. That could be one such—

Mr Duggan—Indeed. As I have indicated, the court considers these pre-action procedures that it is considering to be constitutionally valid. They would be a series of things, if you like, that you would go through before you actually got to the lodging of the litigation. A similar procedure could be adopted in relation to contact orders and, indeed, it would be possible to constitutionally have the involvement of an administrative body, providing that at the end there was the ability to go to a court for a final order. If the government were to go down this line—

Mr PRICE—Let me say that I am very supportive of Mr Dutton's advocacy of tribunals, but I thought there was a problem in Brandy in relation to the compulsion of having chapter 3 judges head a tribunal of the Commonwealth but—

Mr Duggan—We would not be suggesting that the tribunals would be headed by a judge and we are not necessarily—

Mr PRICE—I just want to understand the argument, so I apologise. You are saying that, in terms of a tribunal facilitating parents in relation to a separation, these are administrative matters and they can be set up in a tribunal.

Mr Duggan—There would be a requirement for there to be a review by a court at some stage, much the same as there is in a final situation in relation to the Child Support Agency.

Mr PRICE—Are you saying this would be de novo or would the tribunal be able to ensure that matters that are settled are not reopened in a court?

Mr Duggan—You are getting to the stage of significant legal advice in relation to constitutional issues, but it seems to us that there would be significant scope for some administrative involvement in attempting to resolve these matters in a non-adversarial sense.

Mr PRICE—Could I just indicate that, like Mr Dutton, I am keenly interested in this, and anything that the department may be able to take on notice and come back to us with would be most welcome.

Mr Duggan—Absolutely.

Mr DUTTON—The next point that I want to raise is about enforcement, and you discussed that in brief before. One of the concerns I have is that obviously there is a lack of enforcement under this system, and you have outlined in your submission the reasons why. If we went to a non-adversarial system or made any changes, I suppose, to try and improve the situation, enforcement would still be the problem. If people with malicious intent in mind want to deviate from what we have in place, I suppose at the end of the day there needs to be some sort of enforcement to bring those people to bear. How could that work? What sort of enforcement measures could we consider?

Mr Duggan—Again, those are very much matters for government. I think the way that the court is moving in many of these matters is perhaps an indication of where we might consider it in this regard. The court is considering the option of moving towards a much more inquisitorial role, in much the same way, perhaps, that judges operate in the continental system. This may indicate a model where the judge takes a much more active role in the management of the proceedings generally. What often happens in proceedings now is that the courts spend half or more of their time dealing with material that is not relevant, because each party simply wants to have an opportunity to put that material before somebody to consider.

In terms of the constitutional issues that Mr Price was raising previously, I think there are clearly difficulties in our courts going too far in the inquisitorial model, but certainly a much more hands-on role from the judicial officers concerned is a likely outcome of the way that the courts are attempting to deal with these matters now. Certainly the Family Court, as I understand it—and Virginia could probably tell you a bit more about this—is considering those sorts of options. There are constitutional limits obviously on how far you can go, but certainly the concepts of case management and what have you suggest that there are options within the current system. It would be possible constitutionally to introduce some measure of those changes to the legislation if you wanted to go to a different system, but even within the current system there are probably some options for greater judicial involvement in the management of these cases, and that is certainly something that both the Family Court and the Federal Magistrates Service have very much in mind.

Mr DUTTON—On a separate issue, one of the main concerns that I am sure we all share is that, while we want to act in the best interests of the child, we do not want to put children into a domestic violence scenario. I am sure that everybody has got that at heart and obviously, if it were to come in, as a rebuttable presumption it would certainly be the starting point. One of the problems that we have heard about is the conflict between the state and the federal jurisdictions so far as any investigations might be concerned with DOCS, Family and Community Services or a similar body, and either the two courts are not talking or the time lines are out of sync. Do you think there is an argument to bring in or allow federal courts or the Family Court to have some sort of control in those situations so that in a disputed matter it could take those considerations could on board? Again, are there constitutional restrictions on doing that, to passing the file as such over to the Family Court to be considered in the whole process of those orders?

Mr Duggan—There may be some constitutional issues to be considered in such a matter. You are probably aware of the Family Law Council's report on just those issues: the interaction between the child protection jurisdiction of the states and the Family Court. The Attorney sought the assistance of his colleagues at the Standing Committee of Attorneys-General and the Community Services Ministers Advisory Council to look at the possibility of what the Family

Law Council has termed the 'one court approach', and that is that these matters would be dealt with by either a state or a federal court, depending on where they start.

One of the big difficulties from a state court point of view is that at least in some states, where they are making orders in relation to children those orders have only a very short duration—up to 12 months, for example—whereas a Family Court can make permanent orders. On occasion the child will be in litigation in both the state and the federal schemes, and sometimes in neither, and that is a difficulty as well.

Certainly one issue of concern in the Family Law Council's report was the level of investigations of allegations of child abuse that go to state bodies from the family law jurisdiction. For a whole range of reasons, not many of those are picked up. There are significant issues for government in that. The Attorney certainly has considerable concerns in that regard, which he has raised with his colleagues. Hopefully, there will be a report to SCAG about those issues in the not too distant future and the possibility of introducing a one court principle, which would allow these matters to be dealt with either by the Family Court or by the state court if it were appropriate.

Mrs IRWIN—By 'not too distant future', do you mean that the tabling of this report will occur before the end of this year?

Mr Duggan—I suspect that that would probably be a little ambitious. The child protection systems of the states and the family law system are quite different in their concepts; they are quite different in the way they take evidence. There are a whole range of issues about the bringing together of those two systems. It is also an area where the Commonwealth has only fairly recently been involved in terms of having a leadership role. There are issues to be resolved in that regard, so I think the end of the year would probably be a little ambitious.

Mrs IRWIN—A bit like it would be for this inquiry!

Mr CAMERON THOMPSON—You have to advise on these issues all the time. In relation to the presumption of shared residence, your submission shows reasons for and against. Is there a view in the department?

Ms Lynch—At the end of the day it is really a matter for government. If you are asking what our policy advice might be, it will of course also involve the consideration of whatever this committee recommends.

Mr CAMERON THOMPSON—I know that, but you are able to express very eloquently all the ins and outs of the whole thing. Do you see any part of this being, for example, a show stopper? Do you see any of the things opposing the idea of the presumption of shared residency as absolutely bringing it to a grinding halt?

Ms Lynch—Again, I think that is really a matter for government. As we have said, if the committee went down the path of presumptions or starting points, there are a number of ways that they might be framed. It is difficult because at this stage we are talking about hypotheticals that we cannot really comment on. At the end of the day those are possibly issues that relate to

policy which we would advise the government on but which I do not think we are in a position to talk to the committee about.

Mr CAMERON THOMPSON—For example, in your submission you talk about the impact on court services, and yet opposing that there is the comment:

> The degree of communication and contact is, however, much greater if children spend equal time with each parent because the parents need to convey information about the children and make arrangements for the children to a much greater degree than if one parent has contact only.

That seems to be saying that that will assist with communication between the parents, but you are also saying there is going to be an impact on court services. Are you saying there will be a dollar cost, that there is going to be much greater litigation? What is the point you are making?

Mr Duggan—In terms of the latter point, which is a point we discussed a little earlier, if a strong presumption is introduced into the legislation and both parties are unable to reach an agreement, it will require the party that opposed the presumption to take action in court to overcome the presumption. The experience from the changes that occurred in 1996 suggests that, where a starting point is introduced—the 1996 changes were not presumptions; they were just a starting point—which changes the status quo, more parties are likely to insist upon what they see as their right. If the government were moved to introduce a presumption of this sort into the legislation, in our view it would be likely that more parties would insist upon that right rather than approach it in terms of what is in the best interests of the child. In our view, that would then require more applications to the court to overturn that presumption.

Mr CAMERON THOMPSON—Isn't there now a presumption that stability, which is generally interpreted as the child staying with the primary caregiver, is in the best interests of the child? Isn't that an existing presumption that seems to be made by the court system?

Mr Duggan—No, not in our view. The court looks at each circumstance on its merits and makes a decision on a case by case basis. The courts go out of their way, it seems to me, to maintain contact between the parties. They are obliged to do this because of the objects of part VII of the act, which indicate that children should have contact with both parents. It is certainly not our view that there is, if you like, a de facto presumption operating in the court.

Mr CAMERON THOMPSON—What does only 19.6 per cent of fathers having residency mean? What is in the act that delivers that result? There must be some presumption that gives you a result where 19.6 per cent of fathers get residency and the rest do not.

Mr Duggan—That figure comes about as a result of the consideration of each individual case and the recognition that, in most circumstances, in intact couples the mother will be the primary caregiver. That is simply the reality.

Mr CAMERON THOMPSON—Isn't that what you just said did not exist? There seems to be a presumption that, because there is a primary caregiver and stability is important, the children should be with the primary caregiver. Isn't that what were just arguing?

Mr Duggan—You indicated that that was a presumption. I am indicating that it is clearly a factor that the court takes into account and gives certain weight to in particular circumstances. Clearly, the younger the child, the more likely it is that the court is going to give greater weight to stability. The older the child, the more able the child is to cope with varying arrangements.

Mr CAMERON THOMPSON—A proportion of the 80.4 per cent of fathers who miss out on residency, whether or not they are chasing it, are likely to be upset with that kind of ruling and want to challenge it. Isn't that just as likely to promote court action as a presumption of shared care?

Mr Duggan—In terms of what we put in our submission, we were crystal ball gazing. We cannot definitively say that this will occur. We are extrapolating from the changes that occurred in 1996, indicating what happened then and suggesting to you that in our view, because of the need to overcome the presumption—and the likelihood is that more people will insist upon it—there will be greater litigation. That is simply our view. You might take the view that the obverse will occur, but our view would be that because, for a start, the presumption will have to be overcome, in many cases there will be more litigation.

Mr CAMERON THOMPSON—Isn't there a statement in your submission that the degree of communication is going to be greater? Doesn't that mean that they are more likely to talk amongst themselves?

Ms Lynch—Our submission was aimed at giving particular aspects that arise on both sides. It is a balancing issue for the committee of where you might come down. There were pros and there were some arguments that we thought might mitigate against a joint presumption, but we were not trying to come to a particular conclusion. We were trying to list them to assist the committee. The reference to the increasing litigation is an extrapolation from the experience the last time the legislation was significantly changed, but I do not see them as necessarily being inconsistent. We saw them as factors that the committee might want to consider.

Mr CAMERON THOMPSON—I am just pushing it to see if somewhere in the bowels of the department there is a view; that is all.

Mr Duggan—The position, from our point of view, is that the government policy in this area is not clear. That is why you are having the inquiry.

CHAIR—That is why we are having the inquiry. You are right.

Mr CADMAN—I would like to put it to you that the presumption that is now in place is that it is an 80-20 shared process and the mother is the prime carer—that custody is 80-20: every second weekend and half the holidays.

Mr Duggan—I think we would take the view that that is not a presumption.

Mr CADMAN—I am afraid that is the public perception.

Mr Duggan—As you are probably aware, that figure of 20 per cent has been increasing steadily—slowly but steadily. As fathers, in particular, are making different life choices for

themselves and making themselves more available to be a primary caregiver, those figures are steadily increasing. I do not have the figures in front of me, but certainly since 1996 there has been a steady increase in the number of fathers who are awarded primary residence. We see no reason why that will not continue to increase, albeit at a steady rate.

Ms Lynch—There is no existing presumption in the legislation other than the ones we have referred to about children's best interests and children having rights to continue—

Mr CADMAN—I am sorry; I cannot hear you.

Ms Lynch—There is no presumption in the act at present about the 80-20. There are the objectives in the act about children maintaining relationships with both parents et cetera. Practical outcomes of custody or contact and access cases at present might be the 80-20 you are referring to, but there is no actual presumption in place that that is the way it will come out. I acknowledge the practical experience is that that is the outcome, but there is no such presumption in the act.

Mr CADMAN—In practice, though, I think that what the community perceives is that they have to argue in court to vary that presumption—the mother as primary carer and 80-20 shared time—rather than there being any other concept in place.

Mr Duggan—All we can say to that is that the court is obliged, under the legislation, to look at each case upon its merits and make a decision on those merits about the best interests of the child. That is what the legislation requires.

Mr CADMAN—That is going back to the mechanism. It seems that the presumption process is the thing that has to be argued in a very strict, legal way. Whether it is 80-20 or whether it is equal, it has to be argued in a very legal, nitpicking manner, whereas the court may be better charged with assessing whether any agreement entered into separately, perhaps, is a reasonable one. You say that the presumption will be challenged in the majority of cases. Yes, it probably will be, as couples try to settle on what the best arrangement is. I can imagine mums and dads wanting to vary the 50-50 arrangement. But is the court the right place to be doing any of this?

Mr Duggan—We have had some of this discussion previously, Mr Cadman. Only six per cent of matters that go before the court eventually get a final order.

Mr CADMAN—But if there is a presumption, as I say—

Ms GEORGE—What about the other 94 per cent?

Mr Duggan—Most of those matters are resolved amicably between the parties.

Ms GEORGE—Do you have evidence of that?

Mr Duggan—Certainly the statistics the court has indicated to us suggest that most of those matters are resolved through PDR. We can provide some of those statistics to the inquiry.

Mr CADMAN—To come to the enforcement issue, which I think is related, that is very hard. Aren't we really seeking—and perhaps it would be a better way of looking at it—somebody to arbitrate about who is playing games, who is keeping kids away and who is breaching, but not in terms that would warrant somebody going back to court, which is complex, expensive, limited in its focus and, as you point out, limited to common law?

Mr Duggan—Arbitration is available under the legislation at the moment in relation to property matters. It would be constitutionally possible to extend that to children's matters. There would be a whole range of policy issues to be considered in that regard. Clearly, property matters lend themselves more readily to an arbitrated type outcome. However, it would be possible, from a constitutional point of view, to extend that, and certainly groups like the Family Law Section of the Law Council have made representations to government in that regard.

Mr CADMAN—I am almost tempted to say that some of the statements of Family Court judges lead me to believe that they can nearly do anything.

CHAIR—That is a statement!

Ms GEORGE—I just want to pursue a little bit further the idea of an alternate mediation or arbitral stream. You said earlier in answer to a question that mediation would work where couples were in a reasonably non-antagonistic situation. Would it be in breach of any constitutional provision, in the event that mediation did not work, for an arbiter to impose a decision subject to judicial review if either party chose to take the matter further?

Mr Duggan—The act used to contain a provision for compulsory arbitration in property matters. It no longer does so. There were significant constitutional concerns about that provision. Now the arbitration provisions operate such that if you request the matter go to arbitration then the court makes the order. I am not a constitutional expert. All I would say to you is that if we were going to have compulsory arbitration of these matters then, along the Brandy line that Mr Price was talking about earlier, there would be some serious constitutional issues to consider. I am not saying that they would necessarily be a bar to such an operation. Certainly it could be offered on a consensual basis. Then parties would have that option. What is often the advantage of an arbitrated outcome is that it can be done much more quickly. There are, however, significant issues. In terms of arbitration for property matters, you are generally dealing with, if you will excuse the expression, the top end of town, where both parties have significant assets and significant resources available to them for advice and what have you. In parenting order matters, obviously there are often very different clientele involved. There would be significant issues in relation to power imbalances and what have you.

Ms GEORGE—But what we are finding now is that the system is skewed against those who do not have the means to pursue what they believe is their natural right of justice. Ninety-four per cent of cases do not come before a judge. We have heard people in evidence say that because they have not appeared before a judge their matters have been amicably resolved. That is why I asked whether we have evidence. Has there been any study done as to that 94 per cent and what their reasons were for non-pursuit? Was it primarily money or did they come to an agreed settlement? A lot of speculation exists in this area but I have not read any evidence. If you have any, I would be pleased to get it.

Just as a matter of principle, in a country like ours we should not be denying anybody the opportunity to pursue what they believe is their case on the grounds of money alone. I have been very alarmed at the high cost of litigation in the family law system, which I think is a reason why many do not pursue legal action. In one of our documents, we have been advised that the mediators who currently practise under the Family Law Act are required to advise clients to seek legal advice in the course of mediation. Is that a statement of fact?

CHAIR—It says that currently mediators who practise under the Family Law Act are required to advise those clients. That was one of my major issues, because it seems to me that it encourages an adversarial process.

Mr Duggan—I apologise. We need to take that on notice. We will certainly get back to you.

CHAIR—Thank you.

Ms GEORGE—In your background document, you give some information about the systems operating in different states in the United States, where joint custody can mean different things depending on what legislature you are in. Can you provide the committee with some background information on the situation in the Scandinavian countries—in particular, in Denmark and Sweden? Can you also tell us what is happening in Canada? I believe there was a similar argument in Canada, but I am told that they in the end rejected the notion of rebuttable presumption. I would like to know the grounds on which they did that. I would also like to know what is happening in New Zealand and the UK so that we have a sense of what happens beyond the United States.

Lastly, if we are talking about what is in the best interests of the child, what we seem to have in the Family Law Act are principles, some of which appear to me to be given more weight than others in the outcomes. Mr Cadman touched on that. The principles state specifically that children have the right to know and be cared for by both their parents, yet in terms of residency outcomes that principle seems at times not to be given the weight it should by law. Do you have any comment on how one might toughen up the existing principles that underpin that section of the act? If we were not to go down the route of joint rebuttable custody presumption but to argue that the family law already provides for that notion but it may not have been implemented to the extent that one would want, how could we give greater enforcement to the existing act and its principles?

Mr Duggan—A possible way of considering that—and I must emphasise that this is purely a personal view again—would be to put something in the factors in section 68F of the act. Section 68F(2) sets out the factors that a court must take into account when determining what is in the best interests of the child. It would perhaps be possible to put into subsection (2) a consideration along the lines that a court must consider whether a joint arrangement would be in the best interests of the child and to make that a specific factor—

Mr CADMAN—That would—

Mr Duggan—Indeed, but the concern, as I understand it, in this case was that the court might not be giving sufficient weight to these joint arrangements. This is a way of responding to that. It is simply a suggestion. Others may have a view that that would not work, but it is a possibility if

you put that into section 68F(2) as a factor to be considered when you are making such a determination.

Ms GEORGE—Finally, has there been any argument in legal circles that the outcomes may reflect a time when women were at home as the primary caregiver and that the law has not kept pace with changes in society? We see this in other parts of law. Has there been anything written on this by any of the reform commissions? Maybe we just carry in our head a very stereotyped view of couples and separation that was predicated on the caregiver at home and the man in the work force.

Mr Duggan—I am not aware of any of the law reform commissions making such a suggestion. There is, of course, significant literature from parties advocating change to the system which suggest that point of view. Certainly the Australian Law Reform Commission has considered the family law system on a number of occasions. We could check to see whether they have made such a suggestion. We will do that and get back to the committee.

Ms GEORGE—Thank you.

Mr PEARCE—I would like to ask a couple of questions about how the department relates to and interfaces with the Family Court. You made a comment a short time ago that the court is obliged to look at each case on its merits. Have you any idea whether or not they do? If you do, how do you know that?

Mr Duggan—Effectively it is what is required by the legislation.

Mr PEARCE—I understand that, but do they actually do that? Is there any accountability process that the department undertakes to ensure that happens?

Mr Duggan—As you would be aware, because of the separation of powers under our Constitution, there is a limited ability of a department, as there should be, to seek accountability in that regard. The court, of course, reports generally and regularly to the Attorney-General on outcomes of matters. With individual cases, the way that our system operates is that, if there is a concern about that individual decision, the appeal process takes place. Certainly there are regular appeals in these matters to the full court of the Family Court and then from that court to the High Court.

Mr PEARCE—So there is no process in place that ensures that the Family Court is ensuring that each case it looks at is based on its merits? There is no formal process?

Mr Duggan—There is no constitutional process available for us to do that.

Mr PEARCE—I am particularly interested in the area of the accountability of our Family Court and particularly the judges. We talk about the best interests of the child and what have you. Do you have any comments to make? How would judges know?

Mr Duggan—Our courts operate—and must operate—on the basis of the evidence that is presented to them. This is the standard of evidence required for the Family Court. The Family Court is what lawyers call a court of record. It has fairly high standards in relation to the

evidence that it is able to consider, and that is one of the areas of difference between the Family Court and children's courts in the states and territories, which do not have the same problem about separation of powers. They are much more likely to take hearsay, even anecdotal evidence in particular cases. The Family Court simply is unable to consider that or at least give any weight to it.

Mr PEARCE—Do you have a view on that? Do you think that there should be some change where the Family Court is able to take a wider range of evidence than it currently does?

Mr Duggan—The court takes a wide range of evidence from experts. Generally there will be things like family reports. No doubt you have heard of these things before. The court is regularly informed in its decision making by experts who have direct contact with the children, the family, its interaction and that sort of thing. That is the way that the court tends to inform itself objectively. Certainly it also takes into account and gives appropriate weight to the evidence from the parties themselves, but generally speaking in high conflict cases the court will have evidence before it from experts who will have considered the particular circumstances of the families concerned. It weighs all that evidence together in making its decision.

Mr PEARCE—But my question was whether you think there is room for the court to take a wider range of evidence. We have heard some evidence—and each of us in our respective constituency roles would have heard from members of the community who have been concerned about this—that certain facts are not taken into account. My question is: do you think there is an opportunity to broaden the spectrum of admissible evidence in the Family Court? Do you think it is appropriate?

Mr Duggan—Earlier we spoke about the Australian Law Reform Commission considering the family law system. They have made some suggestions in this regard and in the past there has been some consideration by government of allowing the court to take greater cognisance of published research material, for example. There are some difficulties in that regard, but we could provide you with some of the literature which indicates that there have been these considerations in the past. I am not sure that that is getting to the point that you are making, but certainly in the past there have been these considerations of allowing the court to take a wider range of information into account.

Mr PEARCE—Just getting back to the point I raised about accountability of the judges, I believe that there is a fair bit of concern in the community—and I share most of it—that most of the judges that sit in the Family Court are out of touch and have no real idea about how the families suffer going through this whole process. Does the department have any view on how the judges are trained, developed and kept up to date with certain dynamics? We were talking earlier about the concept that maybe the court is lagging behind some of the trends in our society and in our families. Is there any process there that the department works on? I understand very much the separation of powers under our Constitution, but the fact of the matter is that judges do not live in isolation and they need to take into account trends and dynamics in the community. I am concerned that they do not.

Mr Duggan—There are a couple of answers to that, I think. Firstly, the court—and this question would be better addressed to the court—has a regular and ongoing program to educate its judges about a range of these matters. The judges meet regularly in the chief justice's

consultative committee. Many of these issues are considered there. Then there is the judicial conference, the judges conference, once a year, as I understand it. Certainly the court has a very active and ongoing program to deal with these sorts of issues. Secondly, I might point out that the Commonwealth took a leading role in the development of the Australian Judicial College, which is taking a national perspective on, for want of a better word, the training of judges and is developing best practice in that regard. There are a couple of aspects to that. Whether that would satisfy the people you are concerned with, I do not know, but certainly there are a number of facets to this and we would be happy to provide you with this information about the Judicial College.

Mr PEARCE—I would like that, please. Are you aware of any process or any occurrence where a judge has looked back on a determination and reviewed it? When you say that they go through a series of training workshops, are you aware of any Family Court judges talking to anybody that has been impacted by any of their judgments and hearing whether their judgment was a good judgment or a bad judgment?

Mr Duggan—Certainly the court has regular contact with a whole range of its stakeholders and regularly hears the concerns that some of those put forward about individual decisions. Under our system, once a decision is made, unless there is a technical difficulty with that decision—for example, it was just invalid—effectively the judge is what we call functus officio. The judge has made their ruling. The way to challenge that is by appeal. Judges do not go back and say, 'Perhaps I made a bad decision in that case.' I have no doubt that every judge who sits occasionally thinks that, but that is not the way the system works. The way it operates is that you then go on appeal if there is a need to overturn that decision. Often these cases are quite marginal and it is a question of how the witnesses present and what have you. Generally the court will be presented with two very conflicting sets of evidence and must make an assessment between them.

Mr PEARCE—Do you think that, perhaps 10 years later, it would be a good idea for judges to have the opportunity to review the outcome of one of their determinations to see whether it was a good determination? The point I am getting at is that I am not sure that there are many other professions in Australia which have no accountability, as in the family law court. Judges can make a determination, and you are right that, unless there is an appeal, that is the end of it as far as they are concerned. Members of parliament are accountable every three years and people who have other jobs are accountable for the workmanship that they carry out in those jobs. If the mechanic does not fix the car he does not keep his job. Do you think there is an opportunity for Family Court judges to be more accountable for their determinations?

Mr Duggan—With respect, I think that the Family Court judges are as accountable for their judgments as are any other judges in the federal system or the state system, with the possible exception of an issue I am sure Mr Price is about to raise concerning the publication of judgments of the court. I am happy to discuss that but it is a separate issue. In terms of the formal process of review and accountability, the Family Court judges are subject to the same processes as all other judges in this country. If we were to attempt to interpose some other form of accountability, it would have significant implications for the separation of powers, the doctrine under the Constitution. You will, of course, have been aware of the ongoing debate about whether there should be judicial commissions and that sort of thing where judges are subject to significant misconduct, but they are generally limited to situations where there has

been serious and grave misconduct of judges, not about whether someone has a different view about a judgment they may or may not have made. Going down that road, particularly under the Commonwealth Constitution, brings you up against this issue of the separation of powers.

Mr PEARCE—Finally—

CHAIR—Not finally; you can come back. I want to ask something similar. In 1996 changes were made to the Family Law Act, particularly relating to the use of the concepts of custody and access. As a result, according to your submission:

> In particular, instead of using the concepts of 'custody' and 'access', which foster a notion of property or ownership in children by parents, the Family Law Act now refers to the broader concept of 'parental responsibility' and provides for the court to make 'parenting orders'.

I ask for your opinion as to whether or not this has been successful in real terms in shifting the mind-set away from ownership and property. In 1994-95 you had 77.8 per cent of residence orders in favour of the mum, and in 2000-01 you had 74.6 per cent, so there has been almost a three per cent drop. But do you think that the mind-set has changed? It is a change of words but is it a change of mind-set?

Mr Duggan—I think it is a very interesting debate that we are now having, given that this committee is basically looking at issues of child custody. I think that is an indication—and I mean no disrespect to the committee at all or to its terms of reference—of perhaps the fact that the terms 'residence' and 'contact' have not permeated into the community as perhaps government would have liked. It is an indication also, if I might be so bold, that while the government of the day promoted a very active education campaign about the changes and spent significant amounts of money on it—and I would be happy to provide you with the details of that; I do not have them in front of me—it was a one-off campaign. One thing about the people engaging in the family law field—as opposed to the lawyers, the judges and the bureaucrats like me—is that they change. If you have a commercial core, you have business and what have you, which is constantly in there. But in the family law system the clientele of the court changes all the time. It is never the same people. So whilst you may have educated certain people about the way that the changes operated, that was a one-off campaign.

Certainly the Pathways report suggested that there needs to be an ongoing campaign to assist people in this regard, and maybe it even needs to be targeted very early in schools. That is of course a matter for government to consider, not us. But it is an interesting point that you make. Even a recently retired High Court judge said that she—that perhaps gives her away—could not get used to the new terminology. Perhaps I might interpose there that the Family Law Council has been further considering these issues in light of the inquiry. One issue that is being considered is whether in fact we should have a residence/contact type or a custody/access type at all and whether we should talk about something like 'parenting time' or have one word which applies to both parties, as opposed to 'residence' and 'contact', which still suggest a win-lose situation. Perhaps we might go to a term which is neutral so you would talk about 'parenting time' or 'caring time' or something of that nature. That might be something that the committee might want to consider, because arguably 'residence' and 'contact' have been equated with custody and access.

CHAIR—Thank you. As you are working on the quality framework for mediation services, would you give us an update as to what you have come up with to date? If in fact the committee went down the path of having more of a mediation type of process, you would need to have a quality framework and expertise in that area. Where are you up to with this framework? How do you think the community at large is positioned in respect of the number of mediators that might be available? When will we see enough competent mediators out in the populace in order for people to be able to get access?

Ms Pidgeon—The quality framework project is still in its fairly early days. There is a team based at La Trobe University which is undertaking a lot of work for us on it. They will be going to public consultations early next year. They are developing issues for discussion at the moment—with input, obviously, from the department and other stakeholders—but it will be early next year that there will be a public consultation, with a report by the middle of next year. There are already quality provisions in the contracts with the community organisations that are funded by the government, by the Attorney-General's Department and by the Department of Family and Community Services. Those contracts do have quality provisions, so any funded organisation already is subject to quality standards. The quality framework we are looking at is broader than that. The idea is that it will enable private practitioners in mediation counselling, if they meet the quality framework, to then be badged as being people who can undertake that mediation under the Family Law Act. But that will be a voluntary thing. Those people—the private practitioners—are already out there, it is just that we do not have a way of judging their quality. Once we have got the quality framework in the place, they can then opt in; they can then decide whether they want to apply to be—

CHAIR—Is that like an accreditation?

Ms Pidgeon—Yes, very much; I am trying to avoid the word 'accreditation' because it may not be in that formal way. It may be done slightly differently from accreditation, but certainly the idea is that they can opt in, pass the standards under the quality framework and then be able to badge themselves as being under the Family Law Act.

CHAIR—So you are not only particularly looking at a national system of accreditation?

Ms Pidgeon—It will be a national system. All I am saying is that there are already standards in place for the funded organisations under the Family Relationships Services Program. This will incorporate them, but it will go out more broadly to the private practitioners. Without that project being finished, we have already got standards for the funded organisations.

CHAIR—Basically, what I am after is: would you need and should you need to undertake training and formal accreditation or some process before you start to offer these services? It seems to me to be a responsible thing to do.

Ms Pidgeon—Under the quality of framework, that will be the case. There will be minimum training standards although they have not been settled yet. Part of this whole consultation process will be settling what they should be. At the moment, the funded organisations do have standards in terms of training and qualifications.

CHAIR—Are you suggesting in that framework that, if you do not meet the standards and if you have not undertaken that training, you would not practise in this area?

Ms Pidgeon—You would not be practising under the auspices of the Family Law Act. Unfortunately, with mediation, people can just put out a sign at the moment saying they are a mediator. That is why we need this new approach that will give some confidence about which ones are qualified and which ones are not. If you are not funded by the government to do it, then at the moment there is no set standard for training or whatever. There are over 100 organisations funded by the government for counselling and mediation of various sorts, and they do have to have the training and the qualifications.

CHAIR—If you were looking at a mediation process—say, a mandatory mediation process—prior to going into any adversarial process, would it be preferable and within your power to ensure that anybody who offers this under that process, needs to be accredited to go through and ensure that they are actually able to carry out the process?

Ms Pidgeon—I do not think there will be any problem with that. If we changed the legislation to have compulsory mediation then at the same time the legislation could specify that they have to meet the standards under the quality framework before they could be a practitioner in that area.

Mr QUICK—Can I go back to the issue of equal time presumption. On page 20 of your submission you state:

> ... in the case of equal time parenting after separation, it would appear from the lack of frequency with which this arrangement is currently either chosen by separating parents or ordered by the court, that the presumption will be challenged in the majority of cases because it is not the norm that couples would choose for themselves.

Can you elaborate on the department's view that 'it is not the norm couples will choose for themselves'?

Mr Duggan—We have provided you with information, based particularly on the Child Support Agency figures, which indicate that where couples are effectively choosing arrangements for themselves—they are the couples that never see the courts in the vast majority of cases—then there is a residence parent. It is not equal time in those cases in those figures that are, I think, in our submission.

Mr QUICK—You then go on to state:

> Should an equal time presumption be introduced, a decision will need to be made about the strength of the presumption.

Am I right in suggesting that might be a test case in the court? You refer to Briginshaw v. Briginshaw in 1938 and Dillon v. The Crown in 1982. Will we need to have a test case about the strength of the presumption?

Mr Duggan—There will almost certainly be a test case. But before that time government would have to consider, in terms of a legislative change that would be required, what its intention was in relation to the strength of the presumption. As I indicated to you previously, it

would be possible to say that the presumption is only able to be rebutted with strong and compelling evidence—that is a very strong presumption. Otherwise you could simply say that there is a presumption and leave it to the individual case to overcome that simply by evidence that would be tendered in the courts. So there are ways of making a presumption legally stronger, and that would be a matter for government to consider if it went down that track.

Ms Lynch—There are examples in the Evidence Act, for example, where there are presumptions and then the Evidence Act talks about the standard of evidence that would need to be brought to rebut the presumption. If you were to have a legislative presumption, you could include in the legislation the standard of evidence required to rebut the presumption.

Mr QUICK—You then go on to say, on page 20:

Establishing a negative proposition … may, more often than currently, involve the parent challenging the presumption by bringing evidence of the shortcomings of the other party before the court. This is likely to increase the acrimony of proceedings.

Then you go on:

The difficulty of proving a negative proposition has been commented on judicially. In this case, the court noted the heavy onus on those having to show a negative proposition.

I then go back to your statement, where you say:

It is the Department's view that the introduction of a rebuttable presumption would lead to a further increase in litigation because of the need to rebut the presumption in many cases.

So we are going to have the courts even more clogged up if you have to establish this negative proposition.

Mr Duggan—In our view, that is a factor that the committee should consider, yes.

Mr QUICK—For my final question we go back to page 19, where it says that one possible outcome of this equal time presumption introduced into the Family Court could be that it 'would effectively replace the principle that the best interests of the child are the paramount consideration'. Is that a real concern for the department?

Mr Duggan—It would depend on how the presumption interacted with the principle. If, effectively, you were to say that the court will assume that a 50-50 presumption is in the best interests of the child, then that is a legislative indication to court and you would have to consider how you would balance that to be in the best interests of the child in a particular case.

Mrs IRWIN—What provisions does the Family Law Act currently make for children to be separately represented in family law proceedings?

Mr Duggan—Section 68L, I think it is, of the act allows the court to make orders in relation to children being represented by a child representative. We have some statistics in relation to how often that is done. I think there were 3½ thousand orders, or about that number, last year. In

those cases the court orders and the procedure is, effectively, that the legal aid commissions in the various states fund a representative to act on behalf of the child or children in those cases.

Mrs IRWIN—If we could get those stats that would be good. At what stage of the proceedings do child representatives generally appear? I am talking here about mediation or contested hearings.

Mr Duggan—We could probably provide you with statistics in that regard, but the court endeavours to get orders made as soon in the proceedings as possible. We could probably provide you with information—although you could get some of these from the court—in relation to an innovative program that the court is rolling out nationally at the moment called Magellan, which involves some of the sorts of considerations and where there is an appointment of a child representative quite early in the process, and they are integral to the resolution of what are high-conflict matters.

Mrs IRWIN—Who generally pays the cost of the child representative? Is it legal aid?

Mr Duggan—At the moment, the child representative is funded by legal aid. Occasionally the child representative will have a costs order in favour of them made by the court. But, initially at least, all of the costs of child representatives, as far as we understand it, are borne by the Legal Aid Commission. It would not be impossible for the two parents to independently fund the child representative, but I am not aware of that actually ever occurring.

Mrs IRWIN—Do you have any percentages for cases where parents might be paying the costs?

Ms Lynch—I do have the figures for 2001-02. It looks like legal aid commissions received approximately 3,500 applications for funding separate representatives and approximately 3,500 were approved. The figures do not entirely correlate because some would have been approved the year after the application was put in.

Mrs IRWIN—Following on from that, are there proposals to make parents pay for the cost of a child representative in a higher proportion of cases?

Mr Duggan—You would probably be aware that the Family Law Amendment Bill 2003, which is before the Senate for its consideration, has proposals in relation to the strengthening of provisions in section 117, which is the cost order provision of the act, in that regard. The Senate Legal and Constitutional Legislation Committee has made certain recommendations in relation to that provision, and the government is currently considering its position in relation to those recommendations.

Mrs IRWIN—To make parents pay for the costs.

Mr Duggan—That is right.

Mr PRICE—I want to follow up the chair's question on parenting plans. They do not seem to have made a big impact.

Mr Duggan—No.

Mr PRICE—The Attorney-General commissioned a review of section 121. Where is that up to? Your submission is replete with people who do not understand some of the changes—which is a fair point; there is a need to inform more people—but isn't one of the principal ways of informing people to allow them to see what is happening before a court?

Mr Duggan—You would be referring to the McCall report, I presume?

Mr PRICE—Yes.

Mr Duggan—Some minor changes are being made to section 121 by the Family Law Amendment Bill 2003. However, they do not go to the issues that you have your main concern with. The government had been considering amendments in relation to section 121 for the Family Law Amendment Bill 2000. Those amendments have not proceeded. I am not aware that the government is currently considering major changes to section 121.

Mr PRICE—Would you consider that the rights of children, which are supposed to be paramount, would be protected if section 121 were changed such that parties could apply for suppression orders or a judge, of his own motion, could initiate suppression orders? Is that not a more appropriate way for courts to operate in 2003, compared to the star chamber model of the United Kingdom?

Mr Duggan—I really cannot offer an opinion on that.

Mr PRICE—Okay. Child support and family law deal with people as snapshots. In other words, we have not considered effectively that people are repartnering. You do not provide any figures to show where a non-resident parent has repartnered. Surely, 96 per cent of child support cases involve sole parent custody. If there is an accelerated rate of repartnering and serial relationships, isn't the basis being laid for the possibility of greater share or joint custody? Admittedly it would be a blended family, but there could be two parents in that new household. Can you give us some figures?

Mr Duggan—Figures in relation to what? Do you mean situations where residence orders are made in favour of a party who has repartnered?

Mr PRICE—We talk about what is decided on separation, but things move on and people repartner, so what is the rate of repartnering? In that rate of repartnering, aren't there grounds to review an original decision because there is presumably perhaps a greater capacity to fully exercise full parental care that may not have been available in the beginning? If you want to take it on notice I am quite relaxed about that.

Mr Duggan—In relation to the rate of repartnering, we will obviously have to take that on notice. We will endeavour to get you some figures in that regard. In terms of whether that should impact on a variation to the original order, clearly a residence contact order is always able to be varied if the circumstances so warrant—

Mr PRICE—And they have got the money.

Mr Duggan—Many litigants in the Family Court are unrepresented and choose to be so.

CHAIR—It is 61 per cent or something like that, isn't it?

Mr PRICE—I understand that, but I guess that is the frustration in those figures. I do not know that you are going to have time on the public record to walk us through that six per cent figure that the Family Court uses. I would like the statistics and I would also like the view of the department, if it is appropriate, as to whether that has an impact.

I turn to the matter of the Child Support Agency. The Attorney-General has had very strong views about the appropriateness of administrative review and wanted to in fact reform it so that departments like Centrelink have an external body to review those cases—they have an internal review option after the original decision and full proper external review. Can you advise me whether or not the department accepts what I consider to be the internal review process of the Child Support Agency? It does not fit any other model of departmental review. Why shouldn't there be a proper external review other than in the Family Court of the Child Support Agency decisions?

Mr Duggan—Matters relating to the Child Support Agency, as we have indicated in our submission, are more properly the province of that department.

Mr PRICE—Sorry, child support is part of the terms of reference. I am not trying to pick a fight, but you are the experts within the government in terms of administrative review—more so than the agency.

Mr Duggan—I recognise the point that you make, but our view is expressed in the submission that these are matters more properly for the Department of Family and Community Services and its minister, Minister Anthony, to comment upon.

Mr PRICE—Do you see an anomaly in the fact that if we are dealing with one parent on child support there is no external review, but if we are dealing with the same parent or the other spouse and they are dealing with Centrelink there is external review? How is that appropriate, consistent or just? With no disrespect, you are saying that the first law officer of the land and his department do not have a view about these things.

Mr Duggan—We are quite happy to refer this matter to the Attorney-General as to whether he would wish to make a formal response to the committee, which we will do.

CHAIR—Thank you, Mr Duggan.

Mr CAMERON THOMPSON—I asked you earlier about the issue of presumption. I thank you for page 5 of your submission where you talk about the best interest of the child, because you put nine points there. I am trying to determine how this huge imbalance comes in the relationship of the people who are getting residence, and I look at the nine points. You have summarised nine points as to the grounds on which you could decide the best interests of the child. If we take out point 7 and point 9, which are both about violence and psychological harm, and talk about people who are not engaged in those sorts of things, we are left with seven points.

I put to you that, of those, four are pretty heavily charged against a breadwinner. Those four points are:

- the likely effect on the child of any changes in the child's circumstances
- the practical difficulty and financial costs of a child having contact with a parent—

that sounds like it is the Treasurer speaking in terms of protecting the amounts of money that have to be contributed into those things—

- each parent's capacity to care for the child—

and—

- the attitude of the parents towards their child and their parenting responsibilities ...

In that case, every time the breadwinner goes off to work it is a black mark against their name. In determining what is in the interests of the child, the sorts of questions I would be asking include: does the child enjoy the parent's company? Does the child miss the parent when they are away? Does the child confide in the parent? Does the child have shared interests with the parent? Does the child learn from the parent? Why are those sorts of things not in there? Why are we talking about things that, if you ask me, seem more concerned with the financial ramifications? How is that of itself of benefit to a child?

Mr Duggan—There are a couple of things we would say in relation to that. The first two of those factors are clearly concerned with, firstly, the child's wishes and, secondly, the nature of the relationship.

Mr CAMERON THOMPSON—I forgot to finish listing those factors. I left out Nos 1, 2 and 6. No. 6 relates to 'the child's maturity, sex and cultural background'. If you were a man I suppose you could argue that there is one that might help you: if the child is a boy that might be relevant. But 'any wishes expressed by the child'—that could be any wishes; it could be entirely random. 'The nature of the child's relationship with both parents'—the sorts of questions that I had could be discussed within that one, I know. Obviously, if you are a breadwinner the immediate point is raised: 'You are never there.' I am putting to you that these questions are very loaded. Maybe we could just look at an overhaul of this as a way of trying to rectify the imbalance.

Mr Duggan—As I indicated to you previously, there has been some discussion about that in terms of the considerations the Family Law Council was having. Our view, as we have indicated to you, is that they allow the court to take into account all factors concerning the best interests of the child. The issues that you have raised will often be raised in the court in terms of expert evidence as presented in the family report and what-have-you. However, it would be possible, obviously, to reform section 68F(2) if the committee were so moved. A possibility would be to introduce into that provision a factor that requires the court to consider the benefits of equal time parenting.

Mr CAMERON THOMPSON—Have there ever been any changes in this list of what is in the best interests of the child?

Ms GEORGE—Society is moving more quickly, I think, than the Attorney-General's Department. I did not mean that personally!

Mr Duggan—I am happy to provide you with the history of it. This provision is, obviously, different from the one that was there in 1975. Obviously, the best interests of the child have been a foundation principle of the act since 1975, but there have been certain changes during the period, and I will provide you with information about those if you like.

Mr CAMERON THOMPSON—You said that you have summarised there. Are they hard and fast as to what are the best interests—

Mr Duggan—The nine factors we have mentioned are summaries of what is in subsection 68F(2) of the act. That is where they come from.

Ms Lynch—Of course—

Ms GEORGE—Could I just make the point that there was no personal intent in what I said a moment ago, as the witnesses would know. But it does get back to my earlier point, and that is the mind-set about the dichotomy between the primary childcare giver, who is at home, and the breadwinner out in the workplace. Family formation today is very different even from what it was in 1975.

CHAIR—Ms Lynch, would you like to make a response to some evidence discussed earlier?

Ms Lynch—I just wanted to clarify something in relation to section 68F. The list that is in our submission is not an exhaustive list, and the provision expressly provides that the court can take into account any other relevant considerations. So the list in there is not an exhaustive list of what the court considers: there is a provision under which the court can take any other fact or circumstance it thinks is relevant into account in looking at those issues.

Mr PEARCE—I have two quick questions. Firstly, it is my sense that when you consider all of the stakeholders involved in this matter—children, parents, other carers, grandparents, lawyers, counsellors, the bureaucracy and the court system—there are actually only a couple of stakeholders that want change. I get a very strong sense that a lot of the stakeholders think that it is fine and that there really is no need for reform. I am interested to know if you have a comment on that, if that is your sense.

Mr Duggan—The provisions in relation to part 7 are certainly being regularly updated by government. Throughout his time, the Attorney-General has regularly made changes to those provisions. That is the only comment I am able to make.

Mr PEARCE—What about the court? Do you have any comments about the court wanting change?

Mr Duggan—The court is always bound by the legislation that it has to work within. I would put to you that the Family Court is regarded as having world best practice in many areas of its operations. That is certainly how it is regarded in many countries in the world. For example, the fact that the court continues to have a very active counselling and mediation service within itself is a very unique and unusual thing for a court. That impacts on the way that the court approaches its work.

Mr PEARCE—My final question is this: given the importance and significance of this issue to people as individuals, and within our terms of reference, what would be the most significant piece of advice that you would give the committee in its contemplations?

Mr Duggan—I will wait for Ms Lynch to interrupt me perhaps but I think that these are extremely complex matters. One piece of advice that we would give is that these matters will not be resolved by changes to the law alone. That is probably the advice that we would present to the committee. Whatever changes you make, a change to law will not resolve this thing. We could change the law tomorrow but I think that would not bring about the outcome that you would desire.

CHAIR—With respect to Mr Pearce's question, we seem to have a defensiveness about the Australian Family Court system and how it is acknowledged as one of the best, and we probably do not dispute that. What we suggest is that there are a lot of people prior to that who may not be being picked up or who may be being assumed and presumed to be very happy with what they have arrived at simply because of a whole number of factors. I guess under any conditions there would be some room to move to make any system better, even though that system may be considered to be one of the best. We are not disputing that at all, but we are trying to come to terms with whether or not there are improvements that could be made for the small percentage that you deal with. Certainly, there are obviously improvements that could be made for the 95 percent who do not come to your attention at this point in time.

Mr CADMAN—In regard to children who are fostered, what role does the Family Court have in the placement of children or the decision that children should not be with either parent. How does that work with state departments? I know that you do have a say in some processes. I do not quite understand how you do it.

Mr Duggan—Predominantly, these matters will be dealt with by state courts and fostering is usually of children who have been removed from the care of their parents on a state court order. It will be almost entirely as a matter for state law that these matters are dealt with. The Family Court is rarely involved in such matters.

Mr CADMAN—Can a state government bring a proposal that neither parent should have custody?

Mr Duggan—In some state jurisdictions, the Children's Court certainly has the ability to make long-term residence orders, which effectively mean that a child will stay with one parent rather than the other.

Mr CADMAN—I am not clear. You are saying that a state government can make the decision that it would be in the best interests of a child that long-term residency be with somebody who is perhaps not a parent?

Mr Duggan—As I understand it, that is right.

Mr CADMAN—And they would then ask the court to endorse that process—is that correct?

Mr Duggan—It would be done under state jurisdiction and in the state court. It would be very rare—I will not say it is impossible, because I have not investigated the point—for such matters to be dealt with by the Family Court. These matters are usually dealt with by the Children's Court—or whatever it is called in various states and territories.

Mr CADMAN—But it is impinging upon family law and the relationship within families—is that right?

Mr Duggan—Certainly, it does do that. We have discussed this issue before about the interaction between the child protection system and the family law system and the fact that on occasions it is not an entirely happy interaction. The Attorney is certainly aware of that and is seeking to work with his colleagues on the possible streamlining of those arrangements. Of course, the Family Law Act also allows for orders to be awarded in favour of non-parents, and the act specifically talks about grandparents in that regard.

Mr DUTTON—Taking up where the chair left off before, I want to ask you—and perhaps you could take this on notice—to try and come back to us with some more conclusive figures so that we can understand the enormity of this problem. I know that you have touched on this before. A lot of the stats that you have provided to us are obviously out of matters which are concluded in the Family Court. You may have to do this in conjunction with the CSA or Centrelink or whatever, but I really want to get an understanding of the number of parents—either married, in a de facto relationship, in a casual relationship or any other description of relationship that children are born from—that separate each year? I would like to know how many children are involved in that process and how many then go on to the courts? We know that, of those that initiate proceedings, five per cent go through to the other end, but what number of people get to a hearing and resolve the matter on the day or wind it back before then—if those people do not need to engage the court process at all? Could you break it down by each stage please. We need to be as definitive as we can, because at the moment I do not think we are getting a true picture. If it is possible from there, particularly regarding those specific issues orders that are made by consent, what sort of access arrangements would be arrived at there?

Mr Duggan—In relation to the last question, each order obviously would be very different—

Mr DUTTON—Yes.

Mr Duggan—We may be able to give you the number that are made by consent.

Mr DUTTON—I want to know, for argument's sake—going back to the eighty-twenty, fifty-fifty argument that you were putting before—whether you can categorise the specific issues orders that are made by consent, saying that non-custodial parents fall into a particular category with the amount of access that is granted.

Mr Duggan—I do not know.

Mr CADMAN—Are you only looking for a pattern?

Mr DUTTON—Yes.

Mr Duggan—We will simply have to take up that matter with the court. I can give no guarantee, but we will certainly do that.

CHAIR—That is fine.

Mr PRICE—You could probably take these questions on notice. How many family law practitioners are there? Your submission does not comment on the effectiveness of the parenting order compliance program. Your early intervention suggestions, I thought, were very interesting, but there is not a lot of detail there. Is it possible to flesh that out for us?

Ms Pidgeon—That proposal is still under development and consideration.

Mr PRICE—I appreciate that, but I think it is very interesting. Please flesh it out a bit more for us. How many contact centres currently operate?

Ms Pidgeon—There are 35 around the country funded by the Commonwealth.

Mr PRICE—Could you give us a list of them and where they are?

Ms Pidgeon—Yes.

Mr PRICE—I suppose I could look under the portfolio budget statement, but could you give us an idea of what the Men and Families Relationship Program delivers and how much money is being spent under it?

Ms Pidgeon—The Men and Families Relationship Program is a Family and Community Services program.

Mr PRICE—All right. How many mediators are operating who have not undertaken any mediation courses?

Ms Pidgeon—We do not have any data on the private practitioners, and we would not have any data without going back to all of the 100 or so organisations. In the funded organisations I would not expect there to be any.

Mr PRICE—Do you have a ballpark figure?

Ms Pidgeon—There is no peak body or central organisation that would keep any records about individual mediators, so there is no possibility of finding that sort of data.

Mr Duggan—I will just clarify one of those questions. The first question, Mr Price, was about the number of family law practitioners.

Mr PRICE—Remember that earlier I asked you how much money was being spent. I thought an additional figure that might be interesting would be—

Mr Duggan—Almost all practitioners will at some stage undertake family law. Are you talking about accredited family law specialists?

Mr PRICE—I see what you mean. I would be grateful for whatever detail you can give me.

Mr Duggan—We can certainly give you the figure for accredited family law specialists.

CHAIR—Accredited ones would probably do.

Mrs IRWIN—I will put one question on notice. Mr Duggan, you answered a question I asked about the proposal to make parents pay for the cost of child representatives in a higher proportion of cases. I think you mentioned the Family Law Amendment Bill 2003 that is before the Senate at the moment. All I want to know is what the impact will be of making parents pay more for child representatives and whether they will be more likely to oppose or be hostile towards such appointments if they have to pay.

CHAIR—If you need clarification of that, I am sure that Ms Irwin can give you the document that she is quoting from to show you the way in which you need to respond. I thank you very much. We would like to invite you to come back to meet with us again. There are several issues that we feel that we would like to canvass further with you. We thank you for your attendance this morning; it has been of great benefit to the committee. Thank you very much. We certainly do appreciate your coming in this morning. I look forward to having you back again.

Resolved (on motion by **Mr Quick**):

That submission No. 1257 be accepted as evidence and be authorised for publication as part of the inquiry.

[10.35 a.m.]

ARGALL, Ms Catherine Ann, General Manager, Child Support Agency, Department of Family and Community Services

BIRD, Ms Sheila Margaret, Assistant General Manager, Child Support Agency, Department of Family and Community Services

CARMICHAEL, Mr Tony, Assistant Secretary, Family and Children's Services, Department of Family and Community Services

CURRAN, Ms Patricia Lynne, Assistant Secretary, Family Payments and Child Support Policy Branch, Department of Family and Community Services

KALISCH, Mr David Wayne, Executive Director, Family and Children, Department of Family and Community Services

JACKSON, Mr Wayne Smithers Brooks, Deputy Secretary, Department of Family and Community Services

SULLIVAN, Mr Mark, Secretary, Department of Family and Community Services

CHAIR—I welcome witnesses from the Department of Family and Community Services to today's public hearing. The evidence that you give at this public hearing is considered to be part of the proceedings of parliament. I therefore remind you that any attempt to mislead the committee is a very serious matter and could amount to a contempt of the parliament. Family and Community Services has made a submission to the inquiry and copies are available from the committee secretariat. Mr Sullivan, could you to proceed with your opening statement before I invite members to proceed with questions.

Mr Sullivan—Thank you for this opportunity. We will juggle people around microphones as they need to speak. I think it is a signal of how important we regard your deliberations that we have people here from the core policy areas of FaCS—represented by me; Wayne Jackson, the Deputy Secretary; and David Kalisch, the Executive Director—and Lynne Curran and Tony Carmichael, who run significant branches which have an impact in this area, as well as people from another part of the family and community services department, the Child Support Agency. Catherine Argall is the General Manager and Registrar of the Child Support Agency and Sheila Bird is the Assistant General Manager. We think that with that group of people we should be able to handle, on this first occasion, anything that comes up today.

CHAIR—You would expect that you might.

Mr Sullivan—We will try. We will just juggle people so that we assist Hansard as much as we can in getting people in front of microphones. FaCS's key policy and service delivery responsibility is to support and strengthen families, including programs to ameliorate the worst effects of family breakdown. The range of FaCS's programs and policy interventions include

policies relating to early childhood and child care, policies relating to economic and social participation, programs such as family tax benefit, child care benefit and parenting payments, child support policy, family relationship services and the Child Support Agency. Our focus is on helping children to get the best start in life, especially through supportive and nurturing families and communities.

Our aspiration is to seek to encourage both parents to be fully involved in and contribute to their children's lives. This aspiration applies equally to intact and separated families, except in those extreme circumstances where it is not in the interests of the child. We need to recognise that, even in intact families, caring responsibilities are not always or often shared equally. 'Shared care' is the language used to describe the situation after separation when parents care for their children. However, it means different things to people and of course needs to best meet the needs and wants of children, not just the needs of parents. FaCS supports notions of greater levels of shared care. However, there is no simple formula that will deliver this goal. That there are legitimate concerns by both parents about children's access to their parents is not in doubt. A sea change in behaviour and attitudes in parents and those who support them, even in intact families, is necessary. It will not be easy to realise and is going to take a concerted effort by all players, particularly parents themselves.

Family breakdown costs the Australian community, through government outlays, at least $3.6 billion annually. The full costs, including impacts on the emotional wellbeing of children and their parents and grandparents, are likely to be several factors greater. Child support has been a major plank and a major success story in delivering support for children, particularly those of separated families. Today, some 23 per cent—more than one million—of all children between birth and 18 are beneficiaries of the child support scheme. In intact and separated families, both parents are expected to contribute to the costs of bringing up a child. This has direct financial costs as well as non-financial aspects. The government also contributes with financial assistance in the form of family assistance payments and funded services. If the balance in the relative financial contribution from each parent shifts, or the total quantum of that contribution changes, the government would have to pick up the tab, assuming that the overall level of financial assistance to the child is to remain broadly unchanged.

Prior to the introduction of the child support scheme, parents were required to use the court system to set the amount of child support payable and also to enforce it if the payment was not being made. It is estimated that less than 30 per cent of parents who had a court order actually received their child support. Many parents did not access the court system. Entitlements were low and largely determined to ensure maximum government support through family payments and income support. The community, rather than the parents, largely met the costs of children after separation. Children generally did not continue to share their parents' wealth. Further, children of sole parent households were the most disadvantaged in the community.

The objectives underpinning the child support scheme were to rebalance private verses public responsibility for children, based on parents' capacity. This reflected a community expectation that, post separation, parents continue to have responsibility for their children according to their means. The child support scheme has been very successful in delivering on this objective. Nearly $2 billion was transferred between parents for their children last year. More than 50 per cent of the 1.3 million parents registered with the Child Support Agency transfer their child support privately, and 70 per cent of newly separated parents now opt for private collect arrangements

when appropriately advised of their choices. The government outlays are reduced by at least half a billion dollars each year in net terms. And children are at least $1.5 billion better off than if they relied solely on government payments. Another way of putting this would be that, in the absence of the child support scheme, government outlays would need to increase by around $1.7 billion if children were to be no worse off.

Since its implementation, the child support scheme has been reviewed on a number of occasions—as some of you know—and, as a consequence, has been finetuned to keep pace with changes in community needs and aspirations. It should continue to adapt to changing needs. This inquiry provides the opportunity to consider whether further refinement is necessary. Regardless of what further changes are considered desirable, the nature of the child support scheme, together with some level of underlying conflict between some parents, means that it will not be possible to please everyone. Our collective aim should be to seek the best possible outcome for children, based on the best available evidence.

Without parental conflict, we would not need this inquiry. Conflict gets in the way of parents' capacity to cooperate and share in parental responsibilities after separation. Conflict pre and post separation, as distinct from separation per se, has the greatest impact on children's development and, hence, future capacities as individuals and the next generation of families. The department considers the best outcomes for children will be achieved where cooperation between parents can be encouraged. The government has been very clear about the need for a shift away from adversarial behaviour and the need to keep families out of court system.

In an attempt to meet this goal, the government has doubled its funding on family relationship services over the period 1995-96 to 2001-02. These services aim to encourage parents to negotiate their own arrangements and minimise conflict. FaCS considers that the best outcomes will be achieved for families where cooperation can be encouraged rather than enforced. Where parents work together, with the appropriate assistance when necessary, to agree on an outcome they will be more committed to making things work than if something is forced upon them. Nevertheless, sharing parental responsibilities must be a clear community objective to improve outcomes for children. Fortunately, most parents do work this out cooperatively, taking into account their different needs and circumstances. Thank you.

CHAIR—Thank you, Mr Sullivan. We will proceed to questions.

Ms GEORGE—In relation to the submission from the department, we had the opportunity of an earlier meeting with the Child Support Agency. There was some analysis of the operations of the Child Support Agency done by a group in my electorate, Fairness in Child Support, who argued that the current system is leading to a very high drop-out of low-income men from the work force into unemployment. Their contention was that the rates of unemployment among payers in the system is much higher than the national average. They did some modelling which, on the surface of it, seemed to suggest that the actual amount that is coming in in child support through the agency is not more than would have been the case pre the agency's existence if you took the average level of child support through court orders and applied an indexation factor. Have you had a chance to have a look at that submission? Would it be possible to have a more detailed analysis of it? I think they have gone to some lengths in its preparation, but I and the committee do not have the expertise to analyse it.

Mr Kalisch—Certainly we have had a look at some aspects relating to work incentives for payers. The evidence is quite complex. I would certainly welcome having a look at their submission in detail if you could provide that to us. There are a number of things that are certainly quite clear from the evidence about child support payers. There is a much lower average income level of payers than you see in the general community, which at the outset does concern us as you would expect it to be closer to the average of the community. The other dimension that we are also aware of is that separation from a job can also contribute to financial pressures and tensions within a family and can sometimes be a cause of separation itself. So some of the evidence that we are also alert to is that on entry to child support there is a much higher level of unemployment and low income than you would expect when you look at some of the information across the broader community. At this stage I am not sure that there is too much more than we can say. We are looking at this issue in greater detail with the Child Support Agency; we are looking at some of the information that they have. One of the things that we would really like to use to get a more definitive answer to this is some longitudinal data. That is something that we as an organisation are collecting now in terms of household dynamics and looking at how people's income status can change with their household status. The HILDA longitudinal data set will be able to provide us with a more complete picture of this for some families.

Ms GEORGE—Let us look at the future. In evidence we have heard the typical complaints that any of us get from our constituents about the application of formulae, and you would be aware of those. One of the submissions that we received has not had much evidence taken on it, and I was a bit disappointed that your paper did not pick up on it. If we were to move to the fifty-fifty shared parenting model, as the Illawarra Legal Centre submission points out, it will have widespread ramifications for the rest of the social welfare system. Have you been doing any modelling on what impacts that might have across a range of payments at different levels of contact and residency? If not, that would be very useful, because at the end of the day we are not going to be robbing Peter to pay Paul and I imagine there would be profound implications for the system. I would be interested in your comment as to whether any work has been done.

Mr Kalisch—Probably the first comment that we would make is that to move into a fifty-fifty presumption in shared care does not mean that child support becomes irrelevant. The way that the formula would operate would mean that you would still take into account the relative incomes of the different partners. In all instances a child support transaction would still take place, but it would be quite different from what happens now.

Ms GEORGE—But the impact on family allowances and parenting payments and Newstart—

Mr Kalisch—Certainly, if it were to lead to a lower transfer of child support, then there would be an implication for government in terms of higher costs.

Ms GEORGE—Are you doing any modelling in those areas to look at the impact?

Mr Kalisch—I am not aware that we have done any but we certainly could do some hypothetical modelling with a couple of scenarios. The difficulty with this area is that there are just so many different circumstances for different individuals and families within child support.

Ms GEORGE—You are saying that one of the benefits of the introduction of the Child Support Agency is the fact that we can lift many children out of poverty, and everybody agrees with that aspiration. In any changes we make we want to ensure—as a bottom line, I would think—that no-one is going to be worse off than they are currently.

Mr Kalisch—It is very hard in social policy to have the case where you have no-one being a loser.

Ms GEORGE—That is why I would be interested before we make our final recommendations to have a look at some of these potential impacts that might flow through the system.

Mr QUICK—Especially where in your submission you give us countless examples of Fred and Jane and the children of a certain age and income and all that sort of stuff. I find it hard to believe that you have not done some modelling with changes to the child support, family tax benefit and family payment.

Mr Sullivan—We are quite happy to model and provide a resource to you. We are not doing your inquiry; you are doing the inquiry. We are a very valuable asset for you and, if you would like to set out for us the sorts of modelling that we could possibly do for you, we would be happy to do it. But we are not writing submissions and one of the things that you will not find in this is that we are trying to prescribe what we think your answer should be. You are doing that, and we will help.

CHAIR—Thank you, Mr Sullivan.

Mr PEARCE—I am very interested in the compliance area of child support. In my couple of years as an MP I have had several cases presented to me where both men and women are not fulfilling their obligations in child support. What advice or what view or what sorts of things do you think need to be done to improve on compliance in the collection area in particular? One of the classics we have had quite a considerable amount of evidence about over the last month or so revolves around the area of how people set themselves up behind companies et cetera, thereby avoiding their obligations. Do you have any policy advice? What can be done, in your view, in this area to improve the compliance and the collection and to avoid the escalating debt that is building up?

Mr Sullivan—Before Catherine and Sheila talk about this, in my view obviously in the design of the child support arrangements they work best where we can use the taxation system to enforce compliance where there is not voluntary compliance. That covers a lot of people. It tends to, if you like, set out where the basic compliance issues are. They might be where the taxation system is not capable of enforcing compliance either through people who do not lodge tax returns or people who do not correctly state their income to the tax office. As part of last year's budget the government introduced a measure to resource the Child Support Agency to particularly chase those non-payers. I guess we will describe them as being people who set out to deliberately avoid their obligations under the child support law. That is in its early phase of implementation. I am sure that Catherine and Sheila will be able to give you a more detailed answer.

Ms Argall—Thank you. I think we need to look at this in relative terms. The Australian child support scheme is the most successful collection agency in the world. To put that into perspective, after our informal briefing we provided the committee with some additional information—I am not sure whether you have had a chance to look at it—which details the level of outstanding child support debt. I will summarise some of that information. More than 80 per cent of all parents currently have either no child support debt or a debt of under $1,000. In the big league category, about three per cent of payers owe $10,000 or more. If you put that into numbers, it is nearly 20,000 payers. That is the level of debtor that you would be most concerned about. I am not saying that other levels of debt are not important. We are putting a huge amount of effort into our collection strategies and are increasingly improving on the successful collection rate of some 94 per cent of all liabilities raised since the scheme's inception. Compare that with some of the overseas jurisdictions. They are talking about collection rates of the order of 50 and 60 per cent, to give you a bit of a flavour.

I think there are two issues here. One is enforcing a debt which is actually on the books. Some of those large debts are of real concern to us. The other area that is of concern is where there might be a child support liability which does not reflect the capacity of the parent to pay child support. That could be both parents—payers and payees. I will talk about that group for a minute. A legislative change was introduced in the 1999 reforms to introduce a process where the registrar could initiate a change of assessment where, after investigation, we believed that the capacity of the parents was not reflective of the earning potential of either parent. That is very intensive work, as is detailed debt collection work, but in the years since we introduced it that work has produced some significant increases in child support liabilities. Last year, for example, $1.2 million was added to the annual liabilities as a result of that process being introduced. There were 138 cases that were heard through the change of assessment process in that area.

In the area of enforcement of some of the large debt, yes, some parents are exceptionally clever at manipulating their asset and income streams so that it is very difficult to find an asset or income stream that can be garnished either through our administrative procedures or through a court ordered process. However, we are currently testing a group of cases in the courts to see whether, based on evidence of lifestyle and apparent capacity, the courts will actually pursue those cases through an enforcement through the courts. We are looking at every possible avenue to increase our effectiveness in collecting child support debt by whatever vehicle possible. I am not sure that additional administrative powers will deliver that. There could well be some that would.

Mr PEARCE—I understand and appreciate very much that one of the complexities of this issue is that it seems that no two cases are the same. They are all unique. Within that context, I want to get your view on any potential changes to the formula. I have had representations from a number of constituents, particularly through this committee process, who have made the point to me that, in determining the child support payment, the formula is not flexible enough to consider some of the costs incurred.

Let's take Mary Lou and Jimmy Brown. There has been some sort of settlement and Jimmy Brown is paying child support, but Mary Lou is not happy with the situation in regard to a few things and keeps on taking legal action, taking Jimmy Brown back to court all the time. These court costs build up, but essentially the child support formula does not account for any forced or incurred costs. A lot of people in my constituency that have been to see me are left with massive

debts as a result of the legal action that they have either taken themselves or have involuntarily almost been forced into funding through the other party. So they find themselves in a situation where they have a $30,000 or $40,000 debt incurred through the proceedings. Essentially, the child support formula does not take that into account at all. Do you have any comment about that?

Ms Argall—I will give a brief answer and then hand over to Sheila Bird, who may want to add some comments. Under the change of assessment procedures, parents may wish to apply, under the grounds around necessary expenses, to seek a variation to a formula approach.

Mr PRICE—Are legal costs taken into account in the review process?

Ms Bird—It would depend on the individual circumstances. As you would appreciate, property settlement and care arrangements are separate from child support. But, if, for example, a parent incurred legal fees to enable them to have contact with their children, that could be taken into account in the change of assessment process.

Mr PRICE—That could be or would be?

Ms Argall—Could be.

Ms Bird—The person could make an application. The special circumstances of the case would have to be considered. The overall costs of enabling contact with the child would have to be five per cent or more of the income that their child support is calculated on. Yes, that would be looked at; it can be a ground to depart from the formula assessment.

Mr PEARCE—So it is essentially at the discretion of the Child Support Agency officer, is it?

Ms Bird—The change of assessment process involves both parents. The information that one parent provides is given to the other parent and their response is handed over as well. A senior case officer then makes the decision. They are usually qualified family lawyers that the Child Support Agency contracts to make these sorts of decisions. They would make the decision and in making the decision they would take into account family law precedent—that is, decisions that courts have made—and the guidelines that govern those decisions.

Mr PEARCE—Regarding that particular scenario that you outlined where legal costs had been incurred through the avoidance of contact—somebody has incurred those through trying to pursue their rightful contact—have you got any figures as to how many change of assessment applications from people pursuing a change on those grounds have been successful?

Ms Bird—Not specifically those grounds. The way that we record that information does not separate out any reason that a parent has incurred additional cost for having contact with their children. The category would include those where there were legal fees, but I could not specifically give you those where there were legal fees.

Mr CADMAN—Going back to the costs of raising children and the replacement of the formula with a 'what is the cost of raising a child concept', have you done any work to establish whether or not there is a varying proportion of disposable income allocated to the raising of

children depending on the level of income? Notionally, I would feel that the higher the income, the smaller the proportion that would go to the maintenance of children within a family. By the way, this is not an argument for change, but it would seem that the higher the income the smaller the proportion of it that would go to maintaining children in a normal family.

Ms Curran—We have not done any research specifically on this, Mr Cadman, but there has been work done on this in the past by NATSEM and the Social Policy Research Centre—on the hypothesis that you are putting that, as income increases, parents tend to spend more on their children, but the total amount of that as a proportion of their income may not also increase, in fact it is probably lower.

Mrs IRWIN—Following on from Mr Cadman's maintenance income test question, has the department explored changes to the maintenance income test as a means of equalising incomes of resident and non-resident parents?

Ms Curran—I am sorry, Mrs Irwin, is that in relation to FTB?

Mrs IRWIN—No, to the maintenance income test—you were referring to maintenance income tests, weren't you, Mr Cadman?

Mr CADMAN—No, I was looking at the formula, actually, and what proportion of income is allocated to maintenance.

Mrs IRWIN—Sorry, I thought you were referring to the maintenance income test.

Mr CADMAN—We have taken evidence from a number of people who have spent an extraordinary amount of money on their court case but are currently unemployed. It seems that there is a proportion of people—of males, anyway—for whom the process either has such a damaging psychological impact or takes so much of their time from work that they eventually finish up as unemployed. Do you have any statistics on the ones who start the process employed but finish unemployed?

Mr Kalisch—I think this relates to the question that Ms George asked earlier. We do not have any direct information on that. We have certainly heard some anecdotes around those scenarios, but the evidence that we have been able to gather to date does not suggest that that is a big issue in terms of numerical evidence.

Mr CADMAN—It may also be a revenge tactic.

Mr Kalisch—There are certainly two ways of looking at it, potentially: people who are scarred by the experience or people seeking to minimise their income in that way.

Ms GEORGE—But you have the raw data.

Mr Kalisch—The raw data that we have does not suggest that there is a major problem. We are further investigating that data as well.

Mr CADMAN—But don't the statistics show that there is an increasing number of unemployed people responsible for the payment of family maintenance?

Mr Kalisch—Yes, but as I mentioned earlier, Mr Cadman, the evidence that we have been able to collect suggests that a large number of people are actually unemployed at the time that they first register with the Child Support Agency rather than subsequent to that registration. We are trying to see here what the difference over time is, and that evidence is not very clear. We are trying to get more of a handle on it.

Mr CADMAN—This is pretty important, because you could say that marriage or family break-up is linked to unemployment, or the other way around.

Ms Curran—Mr Cadman, if you look at page 12 of our submission, it gives a distribution of how much parents pay. Essentially, more than 50 per cent of payers pay less than $40 a week in child support, and that figure might include the child support liability for more than one child. So the vast majority of parents pay less than $40 a week in child support liability, and only 22 per cent pay $100 or more.

Mr QUICK—So, of the $800 million that is still owing to the Child Support Agency, does that come from the top 21 per cent or the bottom 95 per cent?

Ms Argall—It would be across the range. I do not have the figures, but I can provide you with the level of debt by income range.

Mr QUICK—I would be interested in that.

Ms Argall—We did not provide you with that; we provided it by region and size of debt.

Mr PEARCE—Do you mean income as per their tax return, whatever that may be—whatever their assessed income is, not necessarily their income range?

Ms Argall—That is right, their taxable income. That is a relevant point when we are considering this issue, and Ms Curran just made reference to that. But of the almost 40 per cent of parents who are paying a minimum child support assessment, 15 per cent of them are in receipt of Newstart allowance. The balance are either in receipt of another form of benefit or—and this is approximately 12 per cent—have a taxable income that produces a minimum child support assessment.

Mr CADMAN—On page 7 you refer to a number of services, including counselling, mediation and reconciliation. Is arbitration offered by the department? Or do you regard that as family law? Could I have a view on that?

Mr Kalisch—Most of the services that we offer are really facilitative services for people to try and resolve conflict or get a better understanding of their circumstance. We do not necessarily arbitrate a position; we try and help them come to a better understanding and resolve their differences.

Mr Carmichael—Mediate would be a term that we would want to use rather than arbitrate. It is voluntary access to a service that might facilitate a mediated outcome.

Mr Sullivan—At one level, the formula is an arbitration. That is the difference. You need to apply to vary it, and that is a decision taken by a senior person. If you do not like that, you need to apply to the Family Court jurisdiction to do something. At one level, of course, the whole formula around child support is an arbitration.

Mr CADMAN—I think that is right. I think that is a good description—

Ms GEORGE—I do not accept that at all.

Mr CADMAN—because it takes so long to change it that a person involved in it thinks, 'You have made that decision; I have to put up with it now until I can prove otherwise,' and that may be a very tenuous process. It may be described as conciliation but the impact on the people involved can be quite traumatic.

Mr DUTTON—There are obviously two sides to the debate about child support. We hear on a regular basis from parents on both sides. I will put to you one scenario that is commonly put to me by some of my constituents, and that is the situation of a custodial parent where the non-custodial parent is self-employed. We took some evidence from a lady whose ex-spouse owned a restaurant. He declared, obviously, a very small amount of income but was living a substantial lifestyle. In the spirit of trying to find a way around some of these anomalies, is there an argument, if a person is employed in a particular industry or in a particular occupation category, that there can be some sort of assumed income in those sorts of scenarios? Is that a dangerous way to go?

Ms Argall—I mentioned previously the registrar initiated change of assessment process that was introduced in 1999. At any time either parent can apply for a change of assessment if they believe that the income earning capacity of the other parent is not reflected in the formula. The registrar initiated change of assessment process, in terms of profiling the client base for appropriate cases to examine as to whether they lend themselves to that process, does actually involve having a look at industry types and groups as part of the profiling. It is not the only profiling that we do, but that is one of the mechanisms that we would look at to decide whether a particular set of circumstances warranted review.

Mr DUTTON—This lady's demonstration was but one example of the fact that it is a very difficult and arduous process to try and get through. In practice, is it working?

Ms Argall—I mentioned that the number of cases we are taking through is quite small, but they are reasonably successful in terms of the change to the child support liability on an annual basis. In all years since we introduced the new measure, it has produced increases in child support liabilities in excess of $1 million. So it has been relatively successful, but it is highly resource intensive and does take time to produce.

Mr Sullivan—The best answer for us is, clearly, if the tax office can get accurate taxable income in assessments, as it is about lodging of tax returns. Often the examples we cite in the child support area are exactly the same ones cited in general loss of tax revenue examples. They

involve people who operate in a cash society. They have the capacity to earn income and then not declare it. I think our view would be that a cross-government approach to income is far better than setting up a set of officials within another agency and giving them some additional powers to determine what your income is. We think the current capacity is there. It is used by some. It is intensive. But we have problems where it is alleged that people are underdeclaring their income, and we would like to see that tested. We certainly have cases where we do not know what the taxable income is because people do not lodge tax returns. We see that as a priority, that we have to chase the lodgement of tax returns where an interest such as child support is important.

Mr DUTTON—Could I then put to you some of the concerns that we have heard both in our constituencies and as part of evidence we have taken in these hearings. They are in relation to the application of the formula and the prescriptive nature of it, as you have outlined before. Middle-income earners, in particular, have come to see me to say that they are concerned about earning overtime or going on to higher income. They are concerned that the percentage does not reflect the costs of raising the child. Many of these people say to me that they do not have an issue with providing for their children; that that is fine. But they object to paying an amount that they see as being over and above what is being expended on the child—an amount that then becomes de facto former spouse maintenance. That is where a lot of the angst comes in for the people that I have spoken to. Could you comment on that?

Ms Argall—I will comment on the overtime and second job issue. That was one of the issues that were raised in a recent inquiry into child support, and changes were made to the formula to allow second jobs and overtime. Where it could be demonstrated that second jobs and overtime were undertaken for the benefit of the second family, they were considered legitimate grounds for changing the child support assessment. So there have been some reforms to the application of the formula.

Ms GEORGE—It is still very hard to get through that.

Ms Argall—The issues there are around whether the overtime or second job was part of the pre-separation arrangements that supported the family. So the test is whether the second job or overtime has been undertaken post separation.

CHAIR—Doesn't the other partner look at all of their ex-partner's income and the whole assessment, so that the ex-partner basically has no privacy after separation?

Ms Argall—That is part of the change of assessment process, which affords both parents natural justice in reviewing applications the other parent has made. So, yes, it mirror-images a court process in relation to that process. In relation to the second jobs and family, the success rate in change of assessment applications is 50 per cent.

CHAIR—Say a female has the residency and is getting child support. If she wants to vary an assessment, does the other partner have the opportunity to see her total cost of living and all of her personal details? Would it be the same way when the male decides that he wants to vary the assessment? I have in mind new partners. So, for the partner who has the child support currently being directed to her, her new partner's earnings, income, lifestyle et cetera have to be taken into consideration—all of that has to be put on the table. So if the female wishes to vary the assessment, her ex-partner can see what her new relationship brings in in its entirety, including

the new partner's allowance or income. On the other hand, if the male wants to vary his assessment, all of his new partner's income comes into consideration as well, so it is equal.

Ms Bird—You need to look at the fundamental nature of the process of applying for a change of assessment. Either the parent is applying to have the child support assessment increased or the parent is applying to have it decreased. The parent who is making the application has to provide sufficient information to make their case. If a parent is applying to reduce their child support because, for example, they have a legal duty to maintain another person, they need to provide sufficient information to show that they need to support that other person. In making that case they would need to advise whether that person has any, for example, income of their own, because if they do have income of their own then that needs to be taken into account in determining whether this person has to legally support them. So the parent provides sufficient information to make their case. Whatever information the parent provides, both in the application form and in any documents that accompany the application form, is always provided to the other parent and their response is also provided. But it depends on the information that the parent believes they need to provide to make their case.

Mr Kalisch—Just in terms of the broader dimensions, child support works on the premise that people on higher incomes generally spend more on their children. In that sense, secondary income and overtime is going to be part of that calculation in generating a higher income, so it still works on that premise. Certainly the cost of children research demonstrates that people on higher incomes—whether that is generated from one job or two jobs, two jobs plus overtime or one job plus overtime—are going to have that higher income to spend on children. So there is that aspect.

Mr DUTTON—How do we know it is being spent on the child?

Mr Kalisch—What we know is broadly from the NATSEM research.

Mr DUTTON—No, how do we know at the moment that it is being spent on the child? We are acting in the best interests of the child. How do we know that money is being spent on the child?

Mr Kalisch—In the same way that we have a general presumption that family payments are being spent on the child. We have some presumptions.

Mr DUTTON—We presume, do we?

Mr Kalisch—We also have, as I mentioned, the cost of children research that talks about the amount of income that families generally spend on children at different income levels, and we can compare that to child support.

Mr DUTTON—It is a big presumption, isn't it? For argument's sake, we took some evidence from a gentleman on the Gold Coast who is a relatively high income earner, from my recollection, who happily paid money each month and never missed a payment, on his evidence. His daughter came down from Cairns, as I recall, in a pair of tattered shoes that he presented to us at the inquiry. They were shoes with the soles worn out. He claimed that happened on a regular basis because his former partner knew that, if the child turned up in such a condition, he

would do the right thing and buy a new set of clothes, a new pair of shoes or whatever the case may be. His gripe was that he was paying this extra money because he was a high-income earner and he wanted to care for his child, but in addition to that he was having to supplement that payment each month by providing for these basic necessities, which you would have assumed would have been paid for by the payee on receipt of the payer's money.

Mr Sullivan—We do not police whether child support payments are spent on children. To police it, if you want to give us that costing exercise, would be a major undertaking. What we have said is that we have research which indicates that the level of child support generated by the formula relates well to the cost of raising a child. The possible exceptions are for very high-income earners, where the result of the formula may in fact exceed the costs of raising a child.

Mr DUTTON—Mr Sullivan, do we admit that there is some problem in that area?

Mr Sullivan—Certainly, the NATSEM research indicates that, yes, at very high income levels the formula would generate a level of contribution beyond the cost of raising a child. There was a move in 2001 to change the formula at the top end, which was defeated. So the government at that time did recognise that there could be an issue at the top end of the formula. Clearly there is no policing of whether child support payments are actually used on a child, just as there is no policing of family tax benefits or other family payments in this regard, or even of whether a family income is used to support a child in an intact family.

Mr PEARCE—Would the change of assessment program provide that high-income earner with the opportunity to say, 'I'm earning $1 million a year. The formula, therefore, means I'm overpaying the average, so make a change of assessment'?

Ms Bird—There is a cap on the amount of income that is taken into account in determining child support. That is set at the moment at just under $120,000.

Mr DUTTON—Could I follow on from there, regarding the reason that I make those statements. Mr Price raised a very good point with our previous group of witnesses. His point was that when the family law court takes into consideration access and residence matters—and I hope that I am quoting him correctly here—there is a mindset almost of a generation ago. In many circumstances of separation today, both the mothers and fathers are involved actively in the care of the children. In many of those circumstances, both of those separated partners go on to new relationships, which, I would suggest, would not necessarily have been the case to the same proportion in years gone by. What I am saying is: is there a case when we review this situation—which I believe is fundamentally flawed—to take into consideration those future family circumstances, not just in relation to the access and residence capacity of one parent or the other but also in relation to the financial capacity and therefore the resulting child support payments that would be made between either party, particularly if there is a higher level of care that is incurred in that process?

Mr Kalisch—Certainly, we would like to see more engagement of separated parents in the care of and contact with their children. I think that is one of the overriding premises that we would like to support. The concern we have is that there is still a large number of parents who do not have any contact. The latest evidence still suggests a very disturbing level of non-contact of separated parents with their children. That is one premise. The other thing that I was going to

refer you to is that in some of the attachments in the back of our submission, we provided you with some scenarios around how the formula currently works now for families where there is a second, subsequent family. Certainly, the indications from those scenarios are that government provides a heck of a lot more in those scenarios to support those second families. The first families are generally not disadvantaged by that, nor are they necessarily advantaged one way or the other. The system works quite neutrally.

Mr DUTTON—I have not seen your latest examples in this. Certainly, from my recollection of the initial information that was provided at the first briefing by the CSA, many of those scenarios do not take into consideration the full or total family income in a second family situation, do they? In the cases that I recall, you relied only upon the income of the person from the first relationship, assuming that they were then a single parent afterwards?

Mr Kalisch—There were a number of scenarios, but I think you are probably right in that we did not build in any presumptions about the income of the second partner.

Mr DUTTON—My concern is that there is a mindset within the bureaucracy that many of these people separate—both men and women; it is not one argument or the other—then go and hibernate somehow and live by themselves forevermore. However, most of the people who come to see us are concerned because they have children from a second marriage. All the examples, and a lot of information that we have, do not take any of that into consideration. In my view, that is part of the problem that we are facing with the Family Court as well. There is an assumption that people are not able to care for their children or are incapable or need to go off and do a course, when, pre-separation, it was okay for them to be fully involved. The same argument extends to grandparents. I have a grave concern that that is a real issue that permeates right through.

Mr Kalisch—I would like to raise one issue that has come up in some work that we have been doing around the government's early childhood agenda. Increasingly, parents are saying to us in that consultation phase that they want to be more involved with their children. So I think that there is a presumption that even in intact families parents are seeking some assistance in caring for their children.

Mrs IRWIN—Have you conducted research and consulted on that matter?

Mr Kalisch—On early childhood?

Mrs IRWIN—Yes.

Mr Kalisch—We have on that matter. We have done some focus groups with parents.

Mrs IRWIN—Have you looked at the effects of family law and child support?

Mr Kalisch—No, not so much that aspect, but we have looked at it from the dimension of parents caring for young children in both intact and separated families. We have looked at what they would like to see government or the community providing—what sort of support they would like to have in the community to carry on with that parenting role.

CHAIR—Ms Curran, would you like to follow up on Mr Dutton's question?

Ms Curran—Mr Dutton, I do not know whether you saw attachment E of our submission, which showed the calculations for a situation where a payer had re-partnered and had another dependent. They were at a lower level of income than the case that you are talking about. The more general issue is that the child support assessment is against the payer's income, and you are raising the instance where the payer re-partners.

Mr DUTTON—Or the payee.

Ms Curran—One of the fundamental principles of the child support scheme is that it is the biological parents, the natural parents, who are responsible for the ongoing care and upbringing of that child.

Ms GEORGE—So why does the cost vary from family one to family two?

CHAIR—Yes.

Mr PRICE—Except if you go through a variation of assessment.

Ms GEORGE—Why does the cost of the child vary?

Ms Curran—I do not think it does.

Ms GEORGE—It does.

Ms Argall—That is another principle which is based on the income capacity of the parents. Costs do vary—and we were talking about this recently—in relation to the capacity of the parents.

CHAIR—I will move on to Mr Price, but we could come back to that question on second families and what you are left with in the second family, as opposed to what you have in your original formula.

Mr PRICE—I want to follow up a couple of issues that were raised earlier. Mr Pearce raised the variation of assessment and your review processes. Surely in like circumstances we must be able to anticipate a like outcome? The response to the question: 'Are those legal costs taken into account?' is exceedingly unsatisfactory. Surely the answer is yes or no?

Ms Argall—We provide our senior case officers with detailed guidelines that they follow in relation to each of the grounds for a change of assessment. However, the process itself must determine whether it is fair to both parents and the children and is just, equitable and otherwise proper. The nature of the process itself was introduced in 1992 reforms to provide an alternative to a court process.

Mr PRICE—Yes, and it was an improvement. I think we need to further improve it. But do the guidelines mention in any way the legal costs of either party?

Ms Bird—Yes, they do. The guidance around this particular reason for a change of assessment uses legal costs to enable contact with your children as a specific example in the material that is available. It is also in the material on our web site, which is available to the general public.

Mr PRICE—Okay. Can you take on notice how many variations of assessment have included legal costs? Mr Dutton referred to the matter of exploiting the area of taxable income; isn't one of the fundamental problems of the scheme at the moment the fact that taxation does not care in what year it takes taxation? In other words, it is quite happy to allow a whole variety of deductions, knowing that down the track company tax—or, if it is a partnership tax—will be paid. Whereas the objective of the child support scheme of course is that whatever the capacity of parents to pay the amount should be paid in that year rather than parents being able to manipulate, quite legally under the tax system, their income and assets.

Ms Bird—There are a number of adjustments that are made to a parent's taxable income before the formula is actually applied. For example, if the parent has a foreign income—

Mr PRICE—I am talking about self-employed people and people working in partnerships.

Ms Argall—I think the vehicles that I described earlier are currently the only vehicles available to us in relation to that.

Mr PRICE—I think it would be only fair to say that the committee would be interested in any views that the department or the agency had in terms of strengthening the current legislation to ensure that a person involved in a partnership, a trust or self-employment is caught in the scheme too rather than just salary and wage earners. You gave a lot of examples. If we have a family and someone was made a widow and they have one child, the next one has two and the next one has three, they are entitled to the family tax benefit and the parenting payment. How much in those three cases is that? What proportion does the department provide by way of support for one, two or three children?

CHAIR—You can take that on notice if you do not have that.

Mr PRICE—Clearly, the department has a view in terms of these parents, in that it is trying to support those particular widows and provide a reasonable standard of living for the children—not necessarily luxurious, but reasonable. At what point in that NATSEM study is the crossover in terms of child support payments where you are overpaying it? At what level of income by the paying parent is that?

Mr Kalisch—You are probably presuming a level of sophistication of research that is not necessarily there. The research is indicative and it is broadly provided. The other problem that we have got—and it relates very much to the NATSEM research—is that they have updated it for three income levels only. We know that they have a low-income level, a medium-income level and a high-income level that they use as—

Mr PRICE—We know that at that high-income level it is 140 per cent of the so-called cost of the child.

Mr Kalisch—There is a suggestion there.

Mr PRICE—But aren't those studies that look at the ABS household income stats looking at what is being spent on children as opposed to what children cost? Isn't there a difference in that?

Mr Kalisch—There are different ways of dealing with that. I suppose in terms of costs there are certainly different ways in which you can approach it. The household income survey approach that you talked about with NATSEM was largely looking at differences in what families were spending. At one level you could make the interpretation that that is a cost of children, that that difference does reflect the cost of children across some of those different income levels and across different families. At the other end of the argument you could also interpret it to be suggesting that there is some discretion in some of those expenditures. Certainly, at higher income levels, we would suggest that some of that spending becomes more discretionary. Nonetheless, if you go back to the principles of child support that children share in the means of their parents and their parents' capacity to pay then you really are getting to the point where some of that discretion is quite relevant.

Mr PRICE—I am constantly reminded that things have changed and so I am battling to keep up with the changes. You were giving examples of shared residency, but what seems to have dropped out of any example is where there is sole custody and that parent is earning, say, $40,000 a year. Isn't the exempt amount much higher than the disregarded or exempt income shown in your examples? Why have you not shown us an example of that?

Ms Curran—Are you looking at attachment E of our submission, Mr Price?

Mr PRICE—It is either that or the Joan and Bill examples.

Mrs IRWIN—The child support scenarios?

Mr PRICE—Is there a sole residency example there where the exempt amount is taken into account?

Ms Curran—Table 1 shows a single income earner with a taxable income of $25,000 and one child aged five to 12. It shows the impact pre and post separation.

Mr Kalisch—We have something further on in attachment E that talks about scenarios which look at different levels of care. One of the examples we use is where there is sole care and the carer parent is earning $40,000 a year. So that is exactly your example. That is on pages 39, 40 and 41 onwards.

Mr PRICE—Is that called disregarded income?

Ms Curran—Yes.

Mr PRICE—So what you call exempt income is the same for both parents when it is shared residency; is that right?

Ms Bird—That is correct. When they share the care between 40 and 60 per cent the exempt income for both parents is identical.

Mr PRICE—I accept what you are saying—that you should have the same exempt amount—but why do we say then that it should go to exempt and disregarded for sole residency?

Mr Kalisch—The presumption that is made in the formula is that, where one parent largely has care of the child, they are incurring much greater costs and sharing a much greater proportion of their base income with that child than in the case of shared care. With shared care we do go to the same amount but, where there is quite a disparity in the care proportions, that is not appropriate. One parent is incurring much greater costs that the other, given the nature of that care.

Ms GEORGE—It is direct and indirect.

Mr PRICE—Are you comfortable with the disregarded income still having the original factor set by the original committee to allow for appeals to the Family Court for variation of child support?

Mr Kalisch—We have not really seen any need to pursue any change in that.

Mr PRICE—That is a very good answer!

Ms Bird—The parents' disregarded income was changed from 1 July 1999. It used to be an amount that was equal to the average weekly earnings of all full-time employees. From 1 July 1999 it was reduced to be the average weekly earnings of all employees. If we took the previous one—

Mr PRICE—Is it the cap that I am thinking of?

Ms Bird—The cap is the same as it was originally.

Mr PRICE—The cap is 2½, isn't it? My apologies. The cap then contains the element that allows for appeals to the Family Court when it was originally determined.

Ms Bird—There is no direct appeal to the Family Court about the use of any of the specific measures in the child support formula.

Mr PRICE—When it was developed by the child support committee, that is what they ended up with: 2.5—

Ms Bird—Yes, that's right.

Mr PRICE—for the family law appeal. Getting back to repartnering, Mr Sullivan, you were very kind to indicate that you would assist the committee. There are a number of us who are very concerned about the financial impact when the paying parent repartners, particularly when they have a child of that new relationship. I am not sure, if that was the committee's wish, which way we should go—whether that is increasing the exempt amount for that particular family—

Ms Curran—It does.

Mr PRICE—I know it does already, but if we were to lift it further what would be the graduations and what would be the cost or impact of that?

Ms Curran—Mr Price, I am not sure if you have seen the example on page 34 in table 1, which is for a single income earner. If you look at the table, it has pre and post separation and what happens when the payer repartners and has one relevant dependant. It has the amount of child support that would be payable and the total household income.

CHAIR—I think he understands that.

Mr PRICE—Yes, but I am saying, notwithstanding that, there is a lot of feedback that that new family is suffering financially. There are, just going back to what Mr Dutton was saying, a number of cases where, in terms of income available in families, that child has less financial support than the original biological child of the first union.

CHAIR—What he is saying—and it is not hard to see what he is talking about—is the difference between the raising of the exempt income. It is a very minor amount if you compare the amount the children of the first union get with the amount for the child of the second relationship. It certainly does not equate—you have put it up, but it does not equate—with providing and leaving that person with the same amount to raise child number one from relationship number one as to child number two from relationship number two. It is very simple.

Mr Sullivan—The income level suggested in that table is very close. What that says—

Ms GEORGE—That is $25,000 though.

Mr Sullivan—No, that intact family had a total household income of $28,727. The payer, with a new partner and one relevant dependant, assuming nothing in terms of the new partner, has an income of $28,330. So the income available to care for that child after taking care of your child support obligations has gone down by about $380 a year.

Ms Curran—Tables 2 and 3 show that—

Mr Sullivan—But if you look at where it is coming from, it is coming basically from government assistance to families.

Mr PRICE—Pardon me for saying it, but what is your point?

Mr Sullivan—I thought, Chair, that you made a point that people were saying that there was not the available income to take care of a child of a new relationship as there was to take care of the child of the first relationship.

CHAIR—But it has been picked up by the government.

Mr Sullivan—I thought the point you made was not who was paying it, the point was made that, no, this person does not have the same resource to be able to take care of the new child. Now, the resource is provided.

Mr DUTTON—The point that I was trying to make before was that you do not take into consideration any income from the new spouse of the second relationship. That is why I am saying that these tables that we have got, in my view, are flawed. The FTB part A and part B are based on family income. They are not based on separated income—the single income of partner B of the first relationship, who then has children of a second relationship. You are not taking any second income out of that relationship into account, which would—

Mr Sullivan—That would only improve the income of the second relationship. If you get into family income—

Mr DUTTON—No, but it certainly affects the figures of part A and part B.

Mr Kalisch—But the way that the income test would operate is that the family would always be better off if they had more income because of the income test.

Mr Sullivan—You never get worse than this situation.

Mr Kalisch—If they had more income in, say, the second family, we would reduce FTB, but the family income would be higher.

Mr DUTTON—That is a very good point. The point that I was trying to make before was that in that circumstance we are taking into consideration the spouse of the payer in the second relationship and looking at their total situation particularly in regard to children of the second relationship. But how are taking into consideration whether the payee re-partners?

Mr Kalisch—If the payee re-partners then their FTB would also be taken into account.

Mr DUTTON—But their child support is not changed, is it?

Mr Kalisch—No. And this is where there is complexity in that child support is based on the income of the biological parents while the family tax benefit is based on the income of the family unit.

Mr DUTTON—Nobody in evidence that we have received is suggesting that the biological parent payer or payee should abrogate their responsibilities in regard to child support. Of one relationship there are born two, if I can explain it that way. We are looking at them differently in the way in which we are assessing. Where partner 1 of relationship 1 is now partner 2 of relationship 2—I am trying to simplify it, which is very difficult—we are not comparing apples with apples in the two situations, particularly for middle- to high-income earners, because the payer is paying a level above what would be regarded as the cost of living of the biological child. Everybody agrees to pay that amount. Where the excess is paid, the argument is that in those circumstances the new partner of the former relationship should be taken into account. I have gone about explaining that in a very difficult way, but where you are talking about four

different people and three different children it is very difficult. I do not think we are grasping that particular problem. Perhaps it needs to be explained better.

CHAIR—Maybe you could take it on notice, if you would like to respond to Mr Dutton. I still have Mr Quick and Ms Irwin left to ask some questions, remembering that the Child Support Agency will be coming before the committee in its own right as well. At the current time we have FACS.

Mr Sullivan—I think we have an understanding and we will try and do something, of course. How far you spin this through—because often if it is a blended family you may then spin into three—is an issue. You can spin into as many families as you like. The premise of the Child Support Act is that it is at a different level.

Mr DUTTON—The question is really one of whether there is an obligation for new partners coming into the respective relationships to have some sort of financial responsibility for a child—

Mr Sullivan—Is that what you are thinking—

Mr DUTTON—whether or not that child is their biological child.

Mr PEARCE—That is one way to look at it. The other way is mere equity.

Ms GEORGE—That is the argument you get—that we are discriminating against the children, not necessarily the fathers.

Mr PEARCE—It is an equity argument.

Mr PRICE—The other case that I think Mr Dutton was referring to was where there is a re-partnering and the disposable income in the new relationship is exceptionally high.

Mr Sullivan—And should that excuse the first payer or not? That is what you are saying.

Mr PRICE—And should the child support be used as support—

Mr Sullivan—Should they be excused because the ex-partner has married into—

CHAIR—Should it be recognised?

Mr DUTTON—Should it be taken into account, not as an excuse for dropping from $200 a month, for argument's sake, to zero—

Mr Sullivan—But that is the reverse of the argument. It is to relieve the biological parent. Because a person is partnered with a woman or a man, you would then attempt to impose an obligation on that new partner for the child. That is what you are talking about: whether we impose an obligation on a new parent with respect to the child.

Mr DUTTON—My argument comes back to the percentage, particularly for middle- to high-income earners. If we established that the cost to raise a three-year-old child was $500 dollar a month, for argument's sake, and the middle- to high-income earner—the payer—is paying $1000 a month, should that amount be restricted to the cost of raising that child, and the lifestyle and anything in excess of that is then the responsibility of the step-parent and the custodial parent—the payee? The difficulty for me is that in the new relationship of the payer, you are happy in some circumstances to take into consideration the supplemented income of the spouse of the new relationship when you are assessing child support for a child who is not the biological child of that new partner.

Mr Sullivan—But as Ms Bird explained, we take into account the income of the new partner in the payer's relationship where the payer is claiming that the costs engaged in their new family are so high they cannot afford the child support. The only time we ask what that partner earns and take account of it is when the claim is made. You cannot assess that claim without saying, 'What is the income of this person? What are the circumstances, please?' If that person has nothing, you have a prima facie case. If that person has independent means, it is very difficult. It is a question only when someone claims, 'I cannot afford this level of payment because I have new obligations.' Then we look at the whole thing.

Mr DUTTON—In those circumstances why doesn't the income of the introduced partner of the payee come into consideration?

CHAIR—That is a question I came back to—right from the beginning.

Mr DUTTON—That is question we have been asked, so I would love to have an answer.

Mr Sullivan—If we go back to the point of the biological parent's responsibility, we have a payer who has a responsibility. They are paying child support under a formula to the other biological parent—the payee. They repartner; their obligation does not change. If they seek to change it on the basis that 'this new family I have constituted has a drain on my resources such that I cannot afford my child support' we ask to understand whether or not it is a drain. It is about balancing that. That is where we get involved in the third party's affairs. Other than that, we do not get involved in the third party's affairs—other than biological parents.

CHAIR—With respect to what Mr Dutton is trying to say, it is quite clear that you are saying, 'Okay, if you want to reduce your child support, you have to clearly outline what a drain this new family is on you, and that is why you cannot meet your child support payments as high as they are.' Then it goes over to the ex-partner for them to agree to, or for them to have a look through, to respond to and—

Mr Sullivan—To make their point.

CHAIR—to make their point. But at the same time, you are not taking into consideration that their circumstances may be significantly enhanced with regard to their living style and living capacity with a new partner. That is not taken into consideration. I know that that new person is not the biological parent of the child. However, the issue is that if you are going to reduce it on one end, the partner on this end has to be able to respond to the concerns without having to identify that their circumstances are such that they have the capacity to accept that reduction

which would take into consideration the new partner's income as well. So it is only a matter of asking the question: why would you not look at both sets of income when doing a change of assessment for a reduction or an increase? If you could come back to us with an answer to that it would be really helpful.

Mr Sullivan—I think you are introducing a concept that you will impose an obligation on a new partner for non-biological children. That is what the suggestion proposes.

Mr PEARCE—It used to happen in the old days, didn't it?

CHAIR—I need to move on, because Mr Quick needs an opportunity.

Mr QUICK—I have three questions: on pages 38 and 39, you have four scenarios—Mary, Bob, Jack and Jill. I want to introduce another scenario: in a case where care is fifty-fifty and Mary and Bob are unemployed, who can claim parenting payment single and who gets Newstart?

Mr Kalisch—That was something we did touch on in our submission. I will refer you to the page.

Mr QUICK—Can you tell me in simple layman's terms?

Mr Kalisch—In simple layman's terms, parenting payment is generally only available to one of those parents, rather than both of them.

Mr QUICK—Is it up to them or the department to decide?

Mr Kalisch—They can come to some accommodation, and it would be helpful if they did, but there are other factors—

Mr QUICK—Doesn't Newstart provide you with greater financial incentives to re-enter the work force compared to parenting payment single?

Mr Kalisch—Parenting payment single is a more generous payment than Newstart allowance, and Newstart allowance also has some participation requirements. There are certainly advantages of one partner getting parenting payment in terms of some of the financial incentives as well.

Mr QUICK—We have all these scenarios and I am introducing another one. In the event of fifty-fifty being introduced—the parents are both unemployed and they have fifty-fifty care of Jack and Jill—are we going to get a stream of letters from Centrelink saying, 'You have an option,' and then are we going to have review officers looking into this because Mary gets hers before Bob does? Is there a simple solution?

Mr Kalisch—No.

Mr Sullivan—There is no simple solution to that. It is a valid issue to raise. In a very technical way, at the moment the first in would get parenting payment.

Mr QUICK—The first in?

Mr Sullivan—And if one parent was being paid parenting payment, the other parent would be precluded from it.

Mr QUICK—You mentioned providing us with some information. Could you provide the committee with estimates of the likely financial impact by transfer type of child support, family tax benefit and parenting payments, given a range of scenarios in the event we introduce fifty-fifty, of the take-up of, say, 10 per cent, 20 per cent and 30 per cent? Finally, with regard to a constituent who is owed $40,000 through the CSA over a long period of time and who has been made an offer of $25,000 to settle and all bets are off, can you explain to me and my constituent what impact that will have on the parenting payments and the family tax benefit for that sole mother at the moment who has two children?

Ms Curran—In respect of family tax benefit, if there is an arrears payment it depends on the method by which her FTB entitlement is calculated. If it is an entitlement method or a disbursement method—they are the only two forms by which maintenance income is assessed—and if she had an arrears payment of $25,000, it would have a significant impact on her income estimate for the year for FTB purposes.

Mr QUICK—There would be an overpayment and she would have to pay?

Mr Sullivan—It would depend on whether she is on entitlement or disbursement. If she is on entitlement, she would probably get a top-up; if there is a settlement, which is less than the entitlement—

Mr QUICK—But is there any encouragement for her to say, 'This money has been owed over a period of 10 years. My children have been suffering because of the lack of interest of the non-custodial parent. God knows when the CSA are going to pay it. Here's an offer, but would someone please tell me whether it is to my and my children's advantage to take a lump sum? Or am I going to be belted around the head and get numerous letters from Centrelink saying, "Hello, you've guesstimated your income," and suddenly there's this windfall?'

Mr Sullivan—We will provide you with an answer depending on how they receive it, what impact it would have and what the impact of that large lump sum would be on various incomes.

Mr QUICK—Thank you very much.

Mr Kalisch—The broad principle still remains—that is, if she receives a large lump sum, even after we make some allowance for FTB, she will get to keep at least half of that.

Mr QUICK—Even though that is money that, if in the scheme of things her non-custodial partner had been paying on a regular basis, her income—

Mr Kalisch—If it is a smaller amount, there is some issue around how the maintenance income test operates.

Mr Sullivan—If there has been a problem in recovering for a long time, it is probably going to be on a family tax payment and other payments, based on actual receipts. So, over that time frame, a considerable amount of money has been paid based on the fact that they have been in receipt of no child support payments. In terms of a lump sum payment then being made, clearly its impact is against both the fact that it has been owing for a long time and that there has been a considerable amount of government assistance based on the fact that it has not been paid. We can give you those details.

Mr QUICK—In the event of compensation, you get sickness benefits. There is an understanding that you get half and the other half is divided by average weekly earnings and that is the amount of time before you can actually access benefits. Is it the same formula? I would be interested in that.

CHAIR—That is assuming that they knew that they had to apply to Centrelink in order to tell them that they were not receiving that child support.

Mr Sullivan—They know because, to receive family tax benefit, they need to have commenced maintenance action. I do not think that is as distant as the question suggested. Once they have commenced maintenance action they shall be reminded about what the outcome of that maintenance action is. If they move to an entitlement base and they then do not receive money, they quickly move to a disbursement base, because it is in fact how they survive. If you are not receiving your child support, you need to receive your maximum payment of parenting payment plus FTB. So I do not think there is much chance of a circumstance where someone failing to know what they need to tell Centrelink in respect of their maintenance occurs, because it is circumstance driven.

Mrs IRWIN—I would like to go back to a presumption of fifty-fifty. Your submission notes the negative effect that conflict between parents has on children's development. Wouldn't a presumption of fifty-fifty lead to an increase in conflict?

Mr Sullivan—It may.

Mrs IRWIN—That is all: it may?

Mr Sullivan—It is not something that you can answer yes or no to. As we said, we certainly have a principle that says the more shared care between parents the better, with the interests of the child paramount in mind. I know, from looking at your deliberations so far, that you have many groups going before you with opposing views. Some argue whether there is a research base or an evidence base for fifty-fifty. In our submission we refer you to family law's Pathways discussion and we refer you to actual statistics on people who pursue shared care—how often it turns up as fifty-fifty. There are not a lot, but we are careful to avoid saying that that proves the point, because it is hard to prove the point for a lot of this. It is very difficult to answer the question as you put it.

Mrs IRWIN—I want to go back to a question that I asked quite some time ago with regard to the maintenance income test. Has the department explored changes to the maintenance income test as a means of equalising incomes of resident and non-resident parents?

Ms Curran—Do you mean the maintenance action test for FTB?

Mrs IRWIN—The maintenance income test, yes.

Ms Curran—For FTB purposes?

Mrs IRWIN—Yes.

Ms Curran—I am sorry; could you repeat the question?

Mrs IRWIN—I just wanted to know if you have explored changes to that? Do you want to answer it, Mr Kalisch?

CHAIR—Would you like it explained further?

Mr Kalisch—One aspect that Ms Curran raised with me refers to one of the questions that Mr Dutton asked earlier. With maintenance income and family tax benefit, we do take account of child support that is paid in reducing the family income for assessed—

Mrs IRWIN—Isn't it the rate of withdrawal of the allowance—the taper? Is that much higher? It is 50 per cent, isn't it, and not 30 when you get child support?

Mr Kalisch—This is in terms of family tax benefit. I was referring to a case where a person is paying child support. The child support that they pay is deducted from their income in assessing family tax benefit for that second family. That is one aspect that you need to be aware of. That was one change that was made to the maintenance income test a few years ago.

Mrs IRWIN—So it remains at 50 per cent; is that correct?

Mr Kalisch—There is a free area of around $1,100 for a single person; those in a couple who are each receiving maintenance get two free areas. Beyond that it is 50 per cent withdrawal.

Ms GEORGE—Isn't that treatment different to other income for the purposes of the family allowance payments?

Mr Kalisch—Yes, it is not included in the standard income test.

Ms GEORGE—That is right.

Mrs IRWIN—Are they saying that should be 30 per cent?

Ms GEORGE—Should that not be equalised so that the same threshold and taper applies to maintenance support as to other forms of income?

Mr Kalisch—If it were absorbed into the ordinary income test for family tax benefit then you would have no separate free area. So from the first dollar of child support that you pay, you would have that taken into account in the family tax benefit. What this separate income test does

is provide most people with a fairly substantial free area, given that the levels of child support paid are relatively low. For most people there is not much deduction in their family tax benefit paid.

Mr DUTTON—Julia, I do not understand your question.

Mrs IRWIN—It was to do with the maintenance income test.

Ms Curran—I think there are two issues: one is from the perspective of the payee and one is from the perspective of the payer.

Mrs IRWIN—Correct.

Ms Curran—If we are looking at it from the payer perspective, if they have a new family any child support income they pay to their ex-partner—to the first family—is deducted from the calculation of family income in determining their entitlement to FTB.

Mrs IRWIN—I needed this for clarification.

Ms Curran—Let us say that this family has a total income of $50,000 and the child support liability to the first family, for the sake of the argument, is $5,000. That is taken from the calculation of their family income and their entitlement to FTB is worked out on the basis of that $45,000, just to keep it simple. In respect of payees, as Mr Kalisch said, for every dollar of maintenance income that they receive above that level of basically $1,100, their FTB entitlement is reduced by 50c.

Ms GEORGE—Is that rate of reduction higher for other forms of income that she might receive?

Ms Curran—It is. It is this interaction between the relative contributions that parents and government pay towards the support of a child. The maintenance income test can never reduce the amount of FTB payable below the base rate. So no matter how much maintenance income the payee might receive, they will always receive base rate of FTB A. If they are a sole parent, they will also receive the full amount of FTB B.

Mrs IRWIN—Has the department conducted any research into where separated families are living? The reason I ask this is that a number of constituents that I have seen who have problems with child support who are living in the outer suburbs are saying that the payer is living in the city areas. Have you done any research on this?

Mr Sullivan—We will look at it. I know we have some research into where sole parents live, as a group, and sole parent populations certainly are strong in outer suburbs and in regional Australia. I do not know if we have done any research into the geographic location of payers and payees under the child support—

Mrs IRWIN—It would be interesting to find out.

Mr Sullivan—We will look at it.

Mrs IRWIN—Could you also supply the committee with a breakdown by electorate of payers and payees in the child support scheme?

Mr Sullivan—By electorate?

Mrs IRWIN—Yes, by electorate. That would give us an idea as well of the various—

Mr Sullivan—We will have a look at whether we can do it by electorate.

Ms Argall—We have done it; we have not done it across the board. I will have a look at it.

Ms GEORGE—I put a question on notice to the minister and got my response for the electorate Throsby, so I presume you could do it for all electorates.

Ms Argall—Yes, we have done it on a number of occasions. It does take a bit of effort.

Mrs IRWIN—It would be great to get that information.

Ms Argall—For all electorates?

Mrs IRWIN—Yes.

Ms Argall—I will let you know how long it will take.

CHAIR—Do you want that information for all electorates across Australia?

Mrs IRWIN—Yes, for all electorates right across Australia; it would be interesting to see the results.

Ms Bird—That is the number of payers and number of payees?

CHAIR—Did you have a particular reason or purpose for that request?

Mrs IRWIN—It would give you an indication if they were in rural areas or if they are in Western Sydney or if they are in the city. I think I have got a right to that information.

Mr CADMAN—You may have, but what does it show? It does not show you which couples are related.

Mrs IRWIN—It will just give me an insight, Mr Cadman. I feel that, as a committee member, I have a right to ask that question of the department.

Mr CADMAN—You might have a right, but I think that is irrelevant.

CHAIR—Would you like to ask a further question?

Mrs IRWIN—No thank you.

CHAIR—My question has an emphasis on partners who are working. Say I have a shared parenting arrangement and it is currently recognised with child support payments et cetera. I think I have talked about this before. There is an emphasis on the male ensuring that that male works whilst he has the shared parenting—say, 50 per cent, or so many nights with his child—but there is not the same emphasis on ensuring that the female works. Could you comment on why there is a difference there? Say there is a shared parenting arrangement, with the dad or the mum having the child or children for 130 nights and the other partner having them for the remaining nights. Do you take into consideration that each partner needs to have as much emphasis on ensuring that they work in the time that their children are with the other partner?

Ms Bird—If you are talking in terms of the child support assessment and the change of assessment process, if care is shared and either parent applied for a change of assessment they would be treated equally in terms of their work.

CHAIR—I am not looking at change of assessment. Say there is a shared care arrangement and one partner works and one partner does not work—they stay at home. For the purposes of the child, if they had a stay-at-home parent—mum or dad—prior to separation, that person is entitled to stay at home. This is more a FACS question. However, for the purposes of when the other partner has the children for the other percentage of shared care of time, that other partner is normally the breadwinning partner or the partner that goes out to work; he or she must go out to work, depending on who has got the children. The reason why we are saying 'he' and 'she here is that we do not want to appear to be gender biased; we do not want to be looking at just the female or just the male in this situation. Take it in the context of ensuring that the committee is not appearing to be gender biased. If one partner has access or has residence of a child and then she, for example, does not work—because that is what the child was used to prior to separation when they were an intact family—the breadwinner, out earning bread, then gets a 50 per cent share for their time. They have to continue working. The child goes into child care whilst they are at work, and that is okay because it is not assumed, for the same purposes, that that child needs a stay-at-home parent while they are in the 50 per cent shared care of the other parent that is the breadwinner. Can you explain to me why that is the case?

Mr Jackson—I think the issue particularly turns on eligibility for parenting payment single, which does not have activity requirements in the main, except those newly introduced this month for the first time that require those with a youngest child of 13 to 16 to undertake up to six hours of activity in any week on average and for those with primary school aged children to attend an annual interview. This was something to which the Australian's Working Together package made a change to reflect some of the changed assumptions that you were suggesting there.

The issues underlying that, though, are obviously about the provisions of the income support system reflecting long-held community values. The current consultation process that the government has just concluded on introducing a single working age payment raises issues about the differences concerning the payments of somebody who might have 30 per cent shared care on Newstart with the activity test arrangements there—these are very different to the rates and activity test arrangements and requirements for somebody on parenting payment single—and asks questions about community views about bringing some of those things closer together. The government will be considering the feedback and then where it wants to take some of those issues. Our submission certainly identified these issues as ones that can benefit from some further examination.

CHAIR—In addition, we are looking at the possibility of shared parenting. Shared parenting, if it were to be put in place—and we do not know that it will be—would obviously reduce a partner's income from child support. Do you think that the fact of having your income reduced would have an impact? Do you think those people would not like to see shared parenting because it would impact on—it would reduce—what they would receive from child support payments and therefore reduce their income and their lifestyle?

Mr Sullivan—You are getting into—

CHAIR—The reason I ask that is you note in your submission that contact with both parents is generally a good thing for children. What I am saying is that many submissions received by the committee suggest that resident parents currently resist efforts of non-resident parents to share parenting because this would have the effect of reducing the resident parent's child support. What I am asking is this: do you think the design of the child support scheme creates a disincentive for shared parenting in that they would be looking at a reduced income? If so, how would we look to remove that?

Mrs IRWIN—That sounds like a personal opinion really, not one from the department.

CHAIR—I am sorry, Mrs Irwin, but—

Mr Sullivan—No, we are quite happy—

CHAIR—there is an issue covered in the submission.

Mr Sullivan—It gets to the heart of the issue, and I think it is covered in the submission.

CHAIR—Exactly.

Mr Sullivan—We say that at the heart of this is conflict. Where that conflict is around money, and sometimes it can be, or where that conflict is around a deeply held view that the other partner having access of that level is not right for whatever reason that they have, it is very hard to dig into. The child support formula is about providing a level of resource to take care of a child, so in a technical way if you move from a parent having sole care of a child to a parent having a half-share of a child, the formula change should only reflect the fact that you now have less expenditure, although there are some who argue that equal time share probably increases the total cost of taking care of a child anyway. Could we say that a loss of resource is at the heart of resistance to more shared care? I think it could be a factor, but I think there are a lot of other factors. If it were only about money, they would have probably stayed together; they did not have to pay then.

Mr Kalisch—I wish to go back to a point that Mr Dutton made about the dynamic nature of some of these families. One of the aspects that you would also want to make some presumption about or have an investigation into is this: if there were more shared care then presumably the former primary resident parent would have more opportunity to go into the work force and generate more income, so there are some dynamics here—

Mr PEARCE—They might not wish to do that.

Mrs IRWIN—Then again, some could have been out of the work force for 10 or 15 years raising children and they need retraining.

CHAIR—Can I just move on, because I would like a question as well. Can I go back to child support. Some parents have, say, 108 nights and they are still paying the other parent whilst they have the child. So we start to talk about some of the inequities, as people who come before us see things. They say: 'We might have them for 109 nights'—or 108 nights; it is always below that cut-off point—'and we take care of them. We are paying for them to come and visit us and stay in another town, but we are still paying the parent whilst they are not having the child for those nights.' That was one of the anomalies raised—well, it is not an anomaly; it is a fact. They feel it is a little bit harsh in that, as they say, 'I have the children, and even if I have the children over and above my correct time'—which happens in a lot of cases—'I am still paying for somebody else to have the children.' Could I have a comment on that?

Ms Argall—With some of the supplementary information we provided you after an earlier discussion—

CHAIR—Yes, we have got that.

Ms Argall—That supplementary information was around what costs of children research had been considered in the original formula. Included in that information which discusses how the formula was original assessed, the architects of the formula did actually consider access costs incurred by non-resident parents as part of their deliberations in coming up with the original formula percentages.

CHAIR—That is exactly what it says, but we are talking about fairness and equity here and I am starting to get concerned about the fairness and equity.

Mr Sullivan—Whenever you have a formula, when you get to the cusps of where things change, that is where you always get into fairness and equity issues. How you design formulas which do not have cusps is a very, very difficult thing to do. We are starting to talk here of the not many who are at that cusp. Most of these people do not have—

Ms GEORGE—Can I just follow-up what the chair said. I am finding it very difficult because I cannot objectively quantify the basis on which the parameters of the formula were set. It is a bit like drawing the poverty line: everyone will have a view. But there must be countries where a system operates that is based on some attempt to quantify the cost for one, two or three children. What we have is a capacity-to-pay formula that actually does not make clear the direct and indirect costs of raising a child, and I think a lot of the problems stem from that. You say in your submission that there was a lack of Australian data to base it on, that they drew on American data and that since then NATSEM and Peter Saunders have done some work. Can we just have a table, say, of what countries are operating a system and what the cost of raising one, two or three children is in the UK system or the Canadian system?

Mr Sullivan—We can research that, but we have got to remember that the child support formula in Australia is around a proposition that the means of the biological parents should be distributed to support a child.

Ms GEORGE—It is not based on the cost of raising a child?

Mr Sullivan—No, it is a sharing of means.

Ms GEORGE—Maybe that is where we want to head—that is, what is the cost of raising a child?

Mr Sullivan—It is on the sharing of means. Some research was done in parallel and certainly subsequently which attempts to show how this sharing of means fits with the cost of a child. Clearly, in terms of sharing of means, the government has to look at its obligations in respect of support for a child where that sharing of means is inadequate. No-one suggests you can support a child on the $5 a week of child support which is paid, by any category, by the highest number. So it is about distributions of means, and largely we talk about that distribution of means as not being sufficient to support a child.

We then get into the argument, at the highest end of this spectrum, which is about a minority. We have some research suggesting that the child support formula determines outcomes there which would seem to exceed the cost of a child. There has been some proper discussion, and the government itself attempted to amend that so as to reduce that. But it is probably only in a small portion here where we are getting into some balancing between whether or not the child support outcome is exactly the equivalent of the cost of the child. In the great majority of cases, it is about sharing means and it does not equate—does not go near—the cost of raising that child. The government then provides.

CHAIR—Basically, we are establishing a formula of child support and we are assuming that each parent is set up—with a house, car, microwave, fridge, everything that they require. One parent, if that person has got residency of the child, is generally in the marital home or the apartment home or whatever.

Mr Sullivan—Not necessarily.

CHAIR—Mr Sullivan, with respect, what is coming before us is what people are considering, and this is what we are dealing with. We are dealing with the questions from people coming before us indicating that they have not had the opportunity to set themselves up correctly in order to offer a quality of life for the child when they are having their visitation or their access or their contact with their children. Because they have left the home and everything intact, they then have to reset themselves up, so they are generally paying another mortgage or for another car or another fridge. That is the issue that is being brought before us. If you have an answer that says to me that this is definitely not the case, that when considering the child support formula that is taken into consideration and they are given an appropriate mechanism and an appropriate amount of leniency to set themselves up—and I suggest that you are going to say, 'It is in the exempt income'—then I would like to hear how it is being derived.

Mr Sullivan—I was not going to challenge you on that. I was challenging you on the presumption that the resident parent is set up themselves. We do not have an overrepresentation of home owners among sole parents. We pay significant amounts of rent assistance to assist supporting parents who were the resident generally in the home. Separation causes and imposes great costs on both parties. It is part of the cost of separation. All I wanted to challenge was the

suggestion that all these costs of separation are absorbed by the payer. They are a significant cost burden on both sides. But it is not right to suggest that a typical separated individual—generally the woman, the resident—has a house and all of the things that go with a house provided for after separation, because they do not.

CHAIR—I am saying that the people coming before us are suggesting this. This is what we are trying to get to the bottom of. In the case where it might be the scenario that a person is left in a substantial marital home with a substantial amount of amenities et cetera, is there any consideration taken of those circumstances?

Mr Sullivan—We will provide some supplementary material. But, of course, property is subject to a different settlement arrangement, and property which is the set-up, if you like, is determined in that settlement arrangement. With regard to the cost of a parent re-establishing themselves, we will get back to you on where, if anywhere, it is taken into account.

Mr PRICE—There has been a phenomenal increase in private collections—that is, where parents have made arrangements about the payment of money. Why has there not been a corresponding migration of people from sole residency into one of the three shared arrangement categories that you list? And if they can agree about payment of the money, isn't there some prospect that we have got to get something right to get that migration happening?

Ms Argall—I think it is fair to say that those parents who have private collect arrangements generally have more cooperative arrangements certainly in relation to their child support, but that would also be indicative of the relationship between the parents and the contact between the parents and the children. It is marginally greater in relation to the private collect. In relation to the CSA collect it is two per cent and in relation to private collect it is 6.1 per cent. I think you would have to ask the parents themselves why they do not have higher levels of—

Mr PRICE—But there has been this growing trend of cooperation.

Ms Argall—There is a growing trend that we have actively worked with parents to achieve.

Mr PRICE—But we have sole custody stuck on 96 per cent.

Ms Argall—That is right, and why is that so?

CHAIR—I thank the representatives of the Department of Family and Community Services for appearing at today's public hearing. We appreciated your attendance.

Resolved (on motion by **Mr Price**):

That submission No. 1251 be accepted as evidence and authorised for publication as part of the inquiry.

Resolved (on motion by **Mr Pearce**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.36 p.m.