COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

Reference: Child custody inquiry

FRIDAY, 10 OCTOBER 2003

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

Friday, 10 October 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, Ms George, Mrs Hull, Mrs Irwin and Mr Pearce

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 9.05 a.m.

CHISHOLM, Justice Richard, Judge, Family Court of Australia

COOKE, Ms Jennifer Marie, General Manager Client Services, Family Court of Australia

COTTA, Mr James, Principal Mediator, Family Court of Australia

FOSTER, Mr Richard John, Chief Executive Officer, Family Court of Australia

NICHOLSON, Chief Justice Alastair Bothwick, Chief Justice, Family Court of Australia

CHAIR—I declare open the 13th public hearing of the House of Representatives Standing Committee on Family and Community Affairs 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. I welcome representatives of the Family Court of Australia to today's public hearing. We are particularly grateful that both Chief Justice Nicholson and Justice Chisholm have agreed to appear before the committee.

Approximately two hours have been set aside for the public hearing. The evidence 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 contempt of parliament. The Family Court of Australia has made two submissions to the inquiry, copies of which are available from the committee secretariat. Chief Justice Nicholson, I invite you to make a brief opening statement after which I will invite members of the committee to proceed with questions.

Chief Justice Nicholson—Chair, as a matter of form, I would like to indicate the way in which both Justice Chisholm and I are here, and I do so simply for the record. As you know, judges are not normally summoned to parliamentary committees but both Justice Chisholm and I took the view that we wanted to be of assistance to the committee and felt it appropriate that we should attend. The first time I appeared before such a committee, I took advice from the then Chief Justice of the High Court, who was of the view that that was an appropriate course. I mention that simply for the record.

I had given some thought to making an opening statement, but it seemed to me that our submission is pretty full. I am quite happy effectively to go along with answering questions about matters that cause concern. I simply want to stress that the court's broad position, as stated in the submission, is, as is proper, that it will abide by whatever the parliament eventually determines in relation to these issues and it will no doubt do its best to apply the law in that way. Having said that, we obviously have some 25 years experience in dealing with matters of this sort—not me personally; I have only about 15 years experience—and, in those circumstances, I think there are issues we have developed knowledge about and which I am sure could be of assistance to the committee. It is really in that spirit that we attend today.

I was going to ask Justice Chisholm to say a few words, following me, on a particular aspect. Justice Chisholm has a particular interest in the best interests of children and matters associated with that. Like me, he will probably not be affected by the eventual outcome in that he will cease

sitting as a judge of the court at the end of this year and I will cease at the end of March next year. In that sense, we have a fairly objective approach to the matter. But Justice Chisholm has done much work in these areas. He has been a judge of the court for 10 years and I felt that his contribution would be helpful to the committee.

The Chief Executive Officer, Mr Foster, is here to answer any questions relating to matters that go specifically to court administration, in so far as they do. Ms Cooke is the general manager of client services and she originally comes from a counselling mediation background in the court, so she has broad familiarity with all of that. Mr Cotta is the principal mediator—counsellor—of the court and he has long experience in the mediation and conciliation of disputes. Again, those are the areas of expertise should the committee want to ask particular questions of them. I now ask Justice Chisholm to make a few comments.

Justice Chisholm—There are two things that occurred to me to say. One is that I have been wondering over recent weeks whether I should put something on paper for the committee, and frankly I have not been sure what would be useful to the committee, and what would not. The two things that occurred to me that I could possibly do—and I would be happy to do so, if the committee wanted—are to say something about what a presumption might look like (the drafting of it) and something about the sorts of cases that typically come before a court. My thought there was that it might be useful for the committee to confront the particulars of it: if you had a form of a presumption in front of you and some imaginary cases, you could actually think through how it might all work. That was my thought about that technical question, which I would be happy to do if it were thought to be of assistance.

The second thing was a general comment about the way the court works in these cases. Again, I do not know if this is helpful or not. But it would be a mistake to think that the court starts off with some particular view about what should happen and then imposes that view on all the cases that come along. What strikes me is that the decisions flow from the evidence in a number of ways.

One way, of course, is that the court receives a lot of evidence in each case about the particular circumstances of each family. Those circumstances usually include evidence about how the parents have handled the question of children up to date. So we know for a particular family what they have done, what attitudes they have taken to the children, who has looked after the children and there is usually evidence about discussions they had about the values and so on. So we get a lot of context in each particular case.

The second thing that happens in court is that we tend to get exposed to constantly changing views about what is good for children in general. We frequently have evidence from psychologists or child psychiatrists and lawyers and we ourselves keep up with the literature to some extent. Over the 10 years that I have been there I have seen quite a notable change, which is, I think, reflected in some of the things that brought this committee into existence. For example, these days it is common to hear people from the bar table talk about the qualitative difference between a parent who sees the children merely on weekends and takes them for outings and that sort of thing and a parent who has a fuller involvement and has the children overnight—and that is important—is involved with the children at school and maintains a sort of active, responsible parenting role as distinct from just a provider of entertainment. That is now a very familiar idea and it gets mentioned quite a lot—one tends to find it in family reports and

one tends to find barristers saying it. I do not remember people saying that 10 years ago when I started. The point I am trying to make is that it is not as if the court is locked into some particular view which it imposes on all cases; we get exposed to evidence which reflects the research that is going on, current moods, changing practices of people in relation to children and so on. They are the only opening comments that I wanted to make.

CHAIR—Thank you, Justice Chisholm. Before we go to questions, I acknowledge that the Minister for Children and Youth Affairs, the Hon. Larry Anthony, is also here this morning.

Ms GEORGE—Thank you very much for the quality of the submission. It has covered a lot of the main issues that we are grappling with. Unfortunately we have received the statistical data only in the last couple of days so I am not totally on top of that, but there are some interesting issues that have come out of that as well. One of the major issues that we are confronted with is what seems to be a very adversarial system for resolving post separation and contact matters and residency for children matters. Can you envisage any alternative way of proceeding? I ask this because people argue that only five per cent of cases end up going before a judge—I think your data says it is now probably about six per cent—and that those are highly contested cases. At times there is an assumption that if they do not end up before a judge matters have been amicably resolved, and I do not believe that is the case.

Chief Justice Nicholson—I agree entirely.

Ms GEORGE—We do not seem to be able to get any data that can assure us either way, so I would be interested in your comment on that. The submission recognises that the system is highly adversarial. You make comments to that effect and that you are looking at European models. Is there some way that we could structure a system whereby people are actually mandated into some form of compulsory mediation even before they set foot in a more legal, adversarial system? I ask that also because a lot of the people that I represent would argue that justice is denied to them because of the high costs of litigation. I would be interested if you could elaborate on that or if you had any views on those issues that would help us.

Chief Justice Nicholson—I am happy to do that. It might take me a little while as there are a lot of issues raised by that question. First of all, just taking the mediation issue, I think a lot of people do not appreciate the extent to which mediation is offered by the court. In fact, every children's case does involve compulsory mediation after the case starts. We always order mediation. That is done as a matter of course. It has a very high success rate in settling disputes. We used to offer it on a prefiling basis as well, and I really very much regret that we now do that only in remote and regional areas because I think that was a very effective method of winnowing out disputes before the first shot was fired, but budget pressures really got to the point where we could not continue to offer that service and at the same time perform our core function which is as a court.

But that is a very important aspect and I should say though that non-government organisations have, to an extent, stepped into that breech. One of the difficulties has been that lawyers were very used to referring their clients to the Family Court mediation service. They have been much slower about referring the prefiling cases to non-government organisations. I think that is changing. There is another aspect there, of course, that our services are always free in mediation and that non-government organisations are required to charge. There are some lawyers who take

the view that they issue proceedings and then send their people to the free mediation in the court, so there is coverage there. I think mediation is absolutely essential. In fact, rather more important than the six per cent of cases that go to trial, I think the significant statistic is that about 70 per cent of Family Court cases are resolved in the first four months after the proceedings commence. That is not all due to mediation but it is a very significant component of it. Although it is customary to criticise lawyers for promoting litigation, lawyers often play a very significant role in resolving those disputes at that stage. Many family lawyers have a quite significant commitment to mediation and to resolving cases in that way—so that is perhaps the first bit covered.

The second part is that, once you go past that, you then run into quite considerable cost. We have been trying over a number of years to simplify our procedures. We have a complete rewrite of our rules and forms, which we are rolling out in April. It is all aimed at making the process simpler and more understandable. As I see it, you still have the problem in relation to an adversary trial, which we are wedded to in the Australian legal system. I think it is time we re-examined that. One of the problems may be constitutional, because we are talking about exercising the judicial power of the Commonwealth. The High Court in the past has been fairly conservative about innovative approaches that break down the adversary system. There has been some recognition, and we deal with this in our submission, that cases involving children are not strictly adversary cases, because one of the adversaries is not there—that is, the child. So I think there is an avenue there.

The other thing that has happened is the considerable reduction in legal aid entitlement, which has meant that a lot of our litigants come to court without legal assistance for some or all of the proceedings. I think the court unanimously would recognise that that is an unsatisfactory situation in an adversary system, because you have a system where one side is, in effect, significantly handicapped. I will give an example from an actual case, because that sometimes helps to make it clear. We heard an appeal in Queensland last week. It was a case that involved allegations of child sexual abuse against the father. The mother was unrepresented at the trial, the father was represented by counsel and there was counsel for the child representative. The mother was cross-examined for 2½ days by counsel for the father and counsel for the child representative without any advice herself. She was expected to cross-examine the husband herself without any assistance. You have only to state those facts to feel some concern about those outcomes. Many of our judges have been very unhappy about the way things have gone.

We started off with a self-represented litigants project, which was chaired by Justice Faulks in Canberra. He has done a lot of work on putting together aids for litigants. I will not go through all of those—we have referred to that in the submission. That may get you up to the trial, but it does not help you much during the trial. The trial is a very expensive exercise if you are going to be represented—there is no doubt about that. If you are talking about 2½ days of cross-examination, as I just did, counsel and solicitors are being paid for that time.

Our submission deals with this, but I think it is a very important aspect. Rising out of the growing realisation of these difficulties, we have started to look at European countries where a less adversarial system operates and where the judges have a much greater control of the proceedings. I would hope that within the next few months we will commence a pilot in Sydney and Parramatta which will involve that sort of approach. But it has some difficulties. The principal difficulty is the legal difficulty. The way we are going to do it is to invite parties to

consent to the matter being dealt with in a judge-controlled manner, where the judge will decide which witnesses are called and how the evidence will be given—in other words, by affidavit or orally. The idea is to eliminate a whole lot of irrelevant material that we get forced on us under the present system and then, hopefully, arrive at a decision much more quickly.

I do not believe, though, that we can do that under the existing legislation without the consent of the parties. So, in effect, we are going to offer this service to the parties. I have I think about six judges who are extremely keen to try it, because they have the same concerns that I have expressed. If the parties consent—and we hope that a sufficient number will—we are going to run a pilot of that system. The attraction, hopefully, to the parties will be that it will be quicker and cheaper and will still produce a just result. That is a long answer, I am sorry, but there were a number of issues there.

Mrs IRWIN—Thank you very much for your submission—it was excellent. Following on from the comments that you were just making, the committee has heard complaints, particularly from men's' groups, about perjury in family law proceedings and that the courts do nothing about that. This is most often raised in the discussion of false allegations of violence or child abuse, as you would be aware. Given that perjury is a criminal offence that requires police action and a decision to prosecute, what can the Family Court do to address this problem?

Chief Justice Nicholson—I will answer that in two ways. First of all, the allegations of perjury are thrown around very freely in family law matters, and understandably because two people often have two very different views about sets of facts. Undoubtedly, there are some people who do tell lies in court—there always have been. The court is not an investigative agency. If a judge feels that there are particular concerns about the evidence of a witness all they can do is refer that matter to the Attorney-General's Department. They cannot really refer it to the DPP. My experience of having done that is that nothing happens.

Mrs IRWIN—Nothing happens once it is referred to the Attorney-General's Department?

Chief Justice Nicholson—No. Very rarely someone might refer it to the Australian Federal Police and they go round and make some investigations, but that is quite uncommon.

Mrs IRWIN—We have had a large number of complaints from men's groups that men have been charged with sexual abuse and have not been able to see their child or children for nine or 10 months or even longer and the child has gone through counselling and in some cases even medical examination and when the case went to court, the case was completely thrown out. They feel that some action should be taken where people make these allegations. What changes would you like to see? You have also stated that you have referred some cases to the Attorney-General's Department and nothing has happened.

Chief Justice Nicholson—I would like to see some more action taken when there is a reference from the court because the judge will not make a reference unless it is a pretty obvious case of perjury, for the reasons I have given. Just to take a sexual abuse case, it does not necessarily involve a false allegation; it may involve a false interpretation of what happened. That not uncommonly does occur. We said something in the submission about shades of grey rather than black and white.

Mrs IRWIN—You did.

Chief Justice Nicholson—That is one that is almost a classic example of it. The person who is the victim of the allegation of abuse says it is perjury, whereas the judge who heard it would probably say that it was a misunderstanding or a heightened apprehension. But of course if the judge does say it is deliberately made up, something should be done about it. I agree. Do you want to add to that, Richard?

Justice Chisholm—I would like to emphasise the point that you just made. In practice, sexual abuse allegations are quite common and they are very distressing and difficult to deal with. In my experience, it is almost always the case that there is some independent or objective evidence of one kind or another. It is common, for example, that the child might have said something about what daddy did with his wee-wee or something like that. There is no need to go into graphic details. But you often get statements, especially made by young children, that are worrying. And you sometimes get behaviour by children, like aggressive sexual play with other children or wanting to physically interfere in a sexual way with adults whenever they get the chance. There are sometimes other signs of children being disturbed.

Sometimes there is evidence of an equivocal kind. For example, when a father is in a bath with a young child or involved in some activities which are normally necessary and appropriate to do with toileting and cleaning, sometimes one parent sees something that they think is a bit suspicious. For example, in a case I had last week the wife said that she saw that the father while in the bath with a young child had an erection. The father's evidence was that that was true and he was embarrassed about it. That is perhaps a good example of something which could just happen that could well be innocent. This child was quite disturbed, and nobody really knows why. The father denies all abuse and is very upset about these accusations having been made. The mother's position is that she cannot think of any other explanation for the child's genuinely disturbed behaviour—the child is receiving therapy—and she says that she has seen things which have led her to the idea of sexual abuse and that she has spoken to people who have said he must have abused the child.

Having heard the case, I do not know whether he did or he did not. The mother does not know; the child does not know. There is evidence about the child's state of mind, and the child has since been told by the mother that the father had abused him. So this little boy thinks that his father has abused him, but he does not have a memory of those early events.

That is just a particular case, but it is an example of how, looking at that case, I might conclude that the child probably has not been abused, for example, or there is not much risk. It would be very hard for me to say that anybody is telling lies in that case.

Mrs IRWIN—To come to that decision, what counselling would that child have been given? Was it counselling that was directed by the court? There are a lot of women, and some men who even have their children, who cannot afford the counselling.

Justice Chisholm—What happened with this child was that the court had ordered, at an earlier stage, that there should be some supervised contact and also some therapeutic intervention involving the child and the father, with a child psychiatrist. That happened on two occasions. I heard the case last year and then adjourned it, and then it came back to me with the

new evidence. For about two years, the mother had arranged for the child to be counselled by a counsellor. There were some questions about whether that person was the most suitable. The mother did not have much money for anybody else, and the counsellor's qualifications were reasonably limited but he had been counselling the child and the mother seemed to think that the child was improving a bit, and he thought the child was improving a bit. So that was counselling arranged by a parent. No-one objected to that counselling. I did not have to rule on whether that counselling was a good thing or a bad thing; it was happening, and nobody asked for it to stop. The psychiatric intervention happened and then there was a report produced by the psychiatrist about the interactions between the child and the father in the psychiatrist's room, and that evidence came before me in the later hearing.

Chief Justice Nicholson—The issue of cost is a problem, and it does depend, to an extent, on where you live, unfortunately.

Mrs IRWIN—That is correct. In the electorate that I represent, there is no way that they could afford it.

Chief Justice Nicholson—Yes. I heard a case in Brisbane where the recommendation was that the child should be counselled by a child psychiatrist in Brisbane. The mother lived on the Sunshine Coast, and she said, 'There is no way I could afford to even get in there regularly, let alone pay for a psychiatrist to do it.' But we were able to get some lesser arrangement locally. It is a problem.

Mrs IRWIN—Do you see a presumption of 50-50 leading to an increased number of custody matters coming before the Family Court?

Chief Justice Nicholson—Yes, I do. That is not simply a guess. I think that the evidence of the Family Law Act 1995 does provide a pretty good example of that. If you look at page 27 of our submission, you will see that there were 11,430 custody guardianship applications and 12,464 access applications—as they were then called—filed in 1995-96. That is before that act came into force. Then if you look at 1996-97, you have 16,000, so there is an increase of about 5,000 residences distinct from custody guardianship, and you have an increase in contact of something like 8,000 applications. The percentage is very high indeed. If you go down the page, you can see that that trend continued to 2000. It is levelling back a bit at the moment but not back to where it was before. I think it is reasonable, because the 1996 legislation, and particularly some of the publicity surrounding it, produced expectations of a 50-50 arrangement—which the legislation did not set out to do, but I think many people interpreted it that way.

At the same time, I think it is obvious that there was considerable resistance to the 50-50 prospect by other people; in other words, say, your litigation rate went up. I think that that is going to happen. I do not know whether James Cotta would like to say something about it, but we are already finding, even as a result of this committee and the publicity surrounding it, that there is an expectation developing.

Mrs IRWIN—We have already heard that in some of the evidence we have taken. I would like to hear from Mr Cotta.

Mr Cotta—In many of our registries where we offer voluntary appointments—and, indeed, even in general mediation appointments—the session commences with one parent saying, 'I'd like to start with the week-about arrangement, please,' and from that point the session is stymied in terms of each parent being totally polarised in their stance. That does not really lead to, I am told, any type of settlement because of the position being taken or pushed from that initial starting point.

Mrs IRWIN—Would you agree with the Chief Justice when he states that since this inquiry has started he has noticed an increase in cases?

Chief Justice Nicholson—I am sorry, that is a misunderstanding. I did not intend to imply that. I do not know whether there has been an increase or not; we do not have figures for that. What I was saying is that we have an increase in the sort of reaction that Mr Cotta was referring to.

Ms GEORGE—On that point of expectations being raised, when you look at some of the changes that came in last time around, one of the concerns I have is about what we say in the principles under section 60B—specifically that children have the right to know and be cared for by both their parents regardless of whether their parents are married, separated or have never married. When you look at the outcomes—and I think your data confirms this—what we seem to get is almost a one-size-fits-all solution where the majority of contact, whether it is as a result of an order or by consent, seems to fall within that 51 to 108 days. So the contact is every second weekend and half the school holidays. It is almost like that is the mindset. Obviously when children are young—and you made this differentiation in your own submission—you can understand the primary care giver, predominantly mothers, having more of the contact hours. But society is changing and I wonder whether the law and the outcomes are not reflecting the changes that are occurring out there—where we have a substantial increase in the number of two-parent families at work. Yet we seem to have a system, and even the child support formula is like this, where you have to meet a certain threshold in terms of the application of the formula and—surprise, surprise!—the 51 to 108 days is kind of that cut-off point. Would you like to comment on that?

Chief Justice Nicholson—I appreciate that there is a lot of evidence of both parents working, but I think the degree of societal change is perhaps not as great as we sometimes think. For example, I think there is plenty of evidence that women in the home—even if they are working—still take on the bulk of the child care and homemaker roles, as well as their work. That is one of the factors, I think, that is sometimes forgotten. The fact is that women are, for example, more likely to be in part-time work than men. We only look at couples as they come before us. From my point of view as a judge—and, I am sure, for all my colleagues—the most horrible decision we ever have to take is to say that someone should have no contact with a child. That is something that is extraordinary stressful and very difficult to have to do—and it is very rarely done. We try and produce the best contact arrangements that we can. It is not question of just simply applying a formula.

You can quite often, for example, make some arrangement in the off week or something like that. It depends so much on the people, what their availability is and the children's needs in respect of their own activities outside the house. Certainly my experience is that we do our best in court when we have to deal with it to try and find a result that helps the children to maintain

as good a relationship with the parents as they can. Again, I would ask James Cotta to comment. One of the difficulties that counsellors and mediators find is quite often persuading the father to undertake that role. It is not so much a question of the father insisting on it, but often as a result of the break-up they perhaps are reluctant to play a more active role.

Mr Cotta—The starting point is looking at the needs of the child and, for most parents, trying to put in place suitable living arrangements. They ultimately come back to a formula type arrangement purely because of their own work arrangements, the children's needs and the geographic location of their accommodation. So there is a whole matrix of factors impinging on living arrangements and the arrangements that best suit their children's needs at that time.

Ms GEORGE—So is it just coincidental that, in the statistics that you give us, contact agreed to in consent applications is 40-odd per cent in that 51 to 108 days, contact agreed to in settled applicants as high as 50 per cent and in judicially determined matters around the 70 per cent mark? Is there a mind-set that the system has perpetuated that we need to understand or try and break?

Justice Nicholson—I do not believe so, but Justice Chisholm would like to comment on that.

Justice Chisholm—Essentially, I do not think there is. I think that that is the result of the sorts of factors that the Chief Justice and Mr Cotta have spoken about. I suppose there is always a temptation to find a convenient solution and assume that that solution fits the seventh case you have got coming up that day and so on. There may be something to be said for the proposition that the legal profession had got into—I do not know about the counsellors, but a pattern where they would advise clients that the ordinary expectation might be that you would get alternate weekends and half school holidays. It might have happened in the course of clients being advised and perhaps talking with their neighbours who might have got divorced five or 10 years ago. So I would not rule out the possibility that that may well be the sort of mind-set that is operating in the world of family law.

I do not want to sound defensive but it is not the case that I—or, I think, any of my colleagues—start off a case thinking that that is the right outcome, and you have to drag me kicking and screaming to any other solution. It may be that some people perceive that after talking to their lawyers who may not be up to date or something. I generally do not think that is the case. There is constant education going on among everybody. The judges have seminars and we have presentations from people who are doing research and so on. The lawyers have it too. In recent times I have seen a couple of articles in legal journals drawing attention to recent research which indicates that overnight contact for little children is not as risky as people once thought it was. So there might be some mind-sets around in the way that I have indicated.

Mr PEARCE—Thank you for taking the time to come along today. I have a series of questions about your submission and then I would like to go a bit broader. On page 58 in the conclusion of your submission you say:

> The Courts suggest that the Committee may well find that the solution to such problems as currently exist in the family law area is not a legislative one.

Are you saying in that statement that in your view there is no need to change any legislation?

Chief Justice Nicholson—No. I am not opposed to the concept of changing legislation, and there may well be suitable changes. Indeed, the history of the Family Law Act has been one of constant change. But that statement is really directed at the particular term of reference before this committee. I think it has been somewhat slanted. I do not mean the committee is slanted but, by concentrating on that particular issue of changing the law, I do not know that it is going to achieve what everyone would hope it would achieve. That is really what I am saying. I think there are ways, such as the non-adversarial emphasis that I was talking about, in which we could improve the way we do things which would achieve more. That is really what is intended by that statement.

Mr PEARCE—I also note that you say on page 11:

A well planned family law system does not exist in this country and has never done so.

Why hasn't it ever existed? What has the Family Court of Australia tried to do to establish a family system that does work?

Chief Justice Nicholson—The Family Court has always had to operate within the limitations of its own charter. I am speaking generally about a family law system. If you look at the United States, for example, you see that there is a unified family court movement there. They are talking about setting up family courts that deal with, firstly, child protection issues; secondly, juvenile crime; and, thirdly, family disputes, which we are talking about—even dealing with offenders against children in that context. The whole idea is that it is a unified system—and it has professionals working with it—that enables the court to deal with family problems in a holistic way. We have a constitutional difficulty in this country. If you recall, the Constitution itself only talks about marriage and divorce. There was the reference of powers in relation to ex-nuptial children in all the states except Western Australia. We cannot deal with child protection issues in the Family Court, yet we are often faced with very serious issues of sexual abuse and matters of that sort.

Until we address those sorts of problems, we will never get a completely satisfactory family law system. Having said that, I think that, insofar as the Family Court is concerned, if you compare, for example, this court with the facilities offered by similar courts in other countries, you find that the big difference is its emphasis on conciliation and mediation and having its own staff who are able to do that, which you just do not see in anything like the same proportion in the US, the UK or even New Zealand—and New Zealand is closer to our system.

Mr PEARCE—Having said that, what do you believe could be done or should be done to bring about a better system? It seems to me that a lot of the issues that we are talking about in this inquiry and a lot of the evidence that we have been presented with largely stem from some structural type issues. It is one thing to look at the various points of reference but, in doing that, we do need to understand the system and how it could be improved. What recommendations or suggestions do you have to put in place a system?

Chief Justice Nicholson—One is always accused of it being pie in the sky when one talks about constitutional change, because it seems to never happen. There have been cooperative efforts between the states and Commonwealth, as I mentioned, in relation to the reference of powers over ex-nuptial children. I think there is still a significant amount of work that could and

should be done to try to have the two systems operating more as a unitary system than we have at the moment.

So far as the Family Court is concerned, if I were asked about our difficulties, I would say that our primary difficulty is the ability to provide swift and reasonably inexpensive justice to people. I think that is one of the areas that we still need to work on. We are working on it, as I have indicated, but there are problems. You have to have the resources to do that—and resources have been and remain a problem. I suppose that applies to any institution but, nevertheless, it is a significant problem. There are areas of Australia, for example, that I do not believe we can service as well as I would like to service them or as well as they should be serviced.

Mr PEARCE—Moving onto the issue about the rebuttable presumption of joint residency, or whatever term you might choose to call it, your submission clearly is erring on the side of being very cautious about any legislative change. I am interested in your comments, and also Justice Chisholm's, from a practical point of view. Essentially, joint residency exists today. As a justice, you have the discretion to actually do that today. You say in your submission that any introduction of such a rebuttable presumption would put the onus on the various parties to come to the court and present evidence as to why that should not happen. That also exists today in your determinations. People come along and they put forward evidence by way of affidavit about why they think they should have the children and the other person should not have them at all et cetera. In a practical sense, what would actually change in how a hearing would proceed if there was a rebuttable presumption of joint residency? People have to present their view and their evidence now and justices have the ability to take that evidence on board on a case-by-case basis, including domestic violence and child sex abuse and any other factors that are relevant. What would change?

Chief Justice Nicholson—I would like to answer that in two ways. If you are talking about actual hearings before judges, the effect would be much less than would be the situation prior to that time because, as you correctly say, the issues would all be before the judge and it is subject to a best interest test anyway. The judge would, I expect, proceed to examine the evidence and probably come to a decision in much the same way as they now do. But there is some evidence—in fact, there is an article by an American judge in the American *Family Law Quarterly* that I have left with the committee—that judges sometimes get a bit lazy in relation to a presumption like that and tend to find it easier to apply it than to not apply it. I would hope that would not happen here, but I think the effect would be less there.

The real effect comes at the earlier stage because we know it is an expensive business to go to court, we know how difficult it is to go to court without representation and we have got a situation where the legislature is saying there is a presumption of fifty-fifty. Parents may be more inclined to simply give in on that without regard to the fact that it might have a detrimental effect on their children. There is plenty of evidence already, with the legal aid difficulties, of people not being prepared to pursue litigation simply because they cannot. I am not prepared, as a matter of principle, to say that in general it is better to have an equal sharing of time of children between parents; I think each family has to be looked at in its context. I do not think that you should start with that sort of a point. It is fair enough to say that it is very important, as the Family Law Act does now, that the child has a right to know and have contact with both parents. That is very important. No-one is going to argue that that is not so. No-one is going to argue that if the parents can work out a shared parenting arrangement of a sensible nature between them it is not

a good thing. Of course it is. In fact, probably about half of parents never come near the Family Court. We do not know what arrangements they make in relation to their children, but presumably they do so in a responsible way and work it out the best way they can.

I get concerned when we start to say that, for people who are in conflict, there is a presumption that they ought to share their children equally. To give an example, we had a case before us in Queensland last week—another appeal—where the parties had been separated since about 2000 and the case was heard this year. They had very violent conflicts between them, which led to the separation, but they had agreed upon an equal sharing of the children. By the time they got to court, the only thing they agreed on—they did not agree on anything else—was that the equal sharing was not working because of the effects on the children. They did not say so, but I think it probably came from the very high level of conflict between them and certainly the psychological evidence was to that effect. Of course, each was saying that they should have the bulk of the time with the children, but they were agreed on the difficulties of that arrangement. I just have great concerns about it.

I have great concerns when I look at the differing ages of children and their development, too. One thing might be good for a three-year-old. In fact, a shared parenting arrangement when children are pre school and both parents live somewhere handy is probably the easiest arrangement to make. It is the most likely to succeed. But even then conflict does not help. If you have a fight every time there is a handover it is very difficult. The handover centres provide some relief from that. But then when they get to school there are problems—if the parents live too far apart—of their attending different schools. I have heard of cases where two perfectly decent parents, even living in the same town, felt that their child was being significantly unsettled by being swapped from one house to the other as regularly as was occurring.

Those are my concerns about it. It is a sort of one-size-fits-all suggestion that does not take into account the effects on individual children. I am concerned that it will be forced on people. Also, I am concerned about aspects of violence in relation to it. When there has been, for example, a history of violence in the family I am concerned that a controlling type person may well say, 'I want my half share,' and the other party may well not be able to withstand that.

Mr PEARCE—But wouldn't that be one of the rebuttable—

Chief Justice Nicholson—Only if you go to court—that is the problem. This court has always tried to get to a situation where we assist people to resolve disputes without going to court. The problem is not so much when you go to court; you can deal with it at that level.

Mr PEARCE—Just to pick up on your point about one size fits all, the reality is that—and I am sure you have heard this before today—in my experience of being a member of parliament representing people in my constituency and certainly being a member of this committee and hearing a lot of evidence and reading a lot of submissions, a large majority of the Australian public think that the Family Court does have a one-size-fits-all approach today. It is one that already exists. There are solicitors who tell clients today, 'If you want to go to court, we need to make sure that we get a day when we will have judge X, Y or Z because he or she will go this way and this judge will go this way. So what we need to do is manage it so we make sure that we lob on the day and we get the right judge.' We have something like seven or eight out of every

10 determinations going to the mother of the family. We have this issue where status quo is often used as a strong argument in determinations.

We have this issue about the primary carer. I have been in Canberra all week. My wife has been the primary carer of my son this week. There have been a lot of submissions that indicate that couples have reached an agreement about what the working relationship will be only for one of them to find that when the marriage breaks down it is used against them. Those are the issues that we as representatives have. Each and every day we are confronted with the concept from constituents and other people that the Family Court of Australia already has a one-size-fits-all approach. Do you have any comment to make on that?

Chief Justice Nicholson—I reject the concept of a one-size-fits-all approach because we just do not have that sort of approach. The statistical material is a bit misleading in that sense. It is almost impossible, when you are looking at people who resolve disputes between themselves as distinct from the way the court resolves them, to work out why they did it. They do it for all sorts of reasons. I do not think you can look at a seven out of 10 situation and say, 'That means that the court is favouring the mother or the father.' The cases that get to the court—the cases that require actual judicial determination—are very difficult cases indeed, normally. I have never started a case saying, 'The mother should win,' or, 'The father should win.' I always examine the various factors that are there. Often you change your mind during the course of a case. You often agonise about it afterwards. You do not start with that sort of approach. That misunderstands the judicial approach.

Judges are not there to impose policies. They are there to hear the evidence and determine cases on the evidence. So far as picking your judge is concerned, that is as old as the law, if I may say so. As a young barrister, I was very careful to try and select the judge that I thought would suit my client's case best, and that was not only in family law but in criminal law or any law. You do think you can pick a judge who might give your case a better go than another one. I do not know that there is much we can do about that. That is part of the way the system operates.

When people talk about bias and the court, it is very easy to use some statistics to say that. I am not saying that to be critical of your question. It is very difficult and, indeed, I am not aware of anyone who has produced any evidence that the actual judgments are indicative of some particular bias or otherwise. It is very rare that this happens, but I can recall one case coming to the full court some years ago where the trial judge had made a decision in favour of the mother using a rather old-fashioned approach that the father should be at work instead of staying at home looking after the child. The full court was very clear in saying that that was unacceptable, that was not the way the court operated, it was quite an improper assumption to assume that he had to go to work and that if he was caring for the child then that was a very significant factor that should have been taken into account in his favour, and the full court ordered a new trial. There was a very strong message sent in that case, and the only other case I can remember involving that sort of issue that has come before me was again an appeal where I actually dissented in favour of the father on the basis that I felt the trial judge had been unduly favourable to the mother's case. It is a very hard accusation to counter, but when you look at the way the court actually conducts its operations and you look at the actual decisions there is no evidence of it.

Mr PEARCE—Talking about decisions, your court and the judges in your court are making life-altering decisions every day and impacting on families and all the rest of it. I am particularly interested in what process of review and accountability exists within the court system on judges and their determinations. By that I mean is there any system within your court system where, after making a determination, a judge is required to go back over it after a period of time and review that decision? Is there any process that exists where a judge is required to check that certain factors have been taken into account as a minimum before a determination is made? Do judges spend any time talking with parties to proceedings several years afterwards to try and learn from their experiences? Do judges go back over their cases or does the court enable any process where, 10 or five years later, judges can hear from the parties that were involved in the proceedings and actually find out whether they did in fact make a good determination or whether they actually ruined the family for the rest of those people's lives? Is there any process that exists within the court system where a judge can learn from their determinations in order to try and make better determinations in the future?

Chief Justice Nicholson—That covers a wide range of issues and goes really to the issue of judicial education. Perhaps I should answer it in this way. In my view, the process of judicial education in this country has not been adequate over the years. There have been changes in the sense that the Australian Judicial College was set up for the first time last year and it is engaged in judicial education approaches. My own court has a regular judicial education program, which we introduced several years ago on the basis that one-third of the court will spend a week attending a seminar dealing with all the various issues that come before the judges. I think that has been very successful. That is attended usually by child psychiatrists and experts of various sorts. We look at cultural issues.

Mr PEARCE—Do you ever hear from any of the people that were involved in cases?

Chief Justice Nicholson—I am coming to that. I am just trying to answer the first part of the question first. I think that is a very important aspect and is something that I have been very much behind and I am pursuing. So far as hearing from the people is concerned, that is a very difficult issue to undertake. About three or four years ago, we did some sampling in which we asked people who had been involved in the court for their views. We found it helpful. I attended one of the sessions—it was not a seminar—and people were invited to express their views about how they were treated. It is a process that we are continuing with. We have plans to do it again next year. It is quite useful. It is difficult to get down to the detail of examining a particular judge's decision, but doing that you get an idea of how people felt about how they were treated in the court system.

As to getting a hold of individuals, though, many people would regard being surveyed as an interference with their privacy. But, again, in our self-represented litigants project, we invited some self-represented litigants to attend a weekend seminar because we wanted to get their experiences. That seminar was conducted by the Hon. Fred Chaney on our behalf. We had a mixture of New Zealand judges and Australian judges from other courts. So the answer is, yes, we are doing it, I think we could do more, and there are some difficulties about it.

Justice Chisholm—It is a subject that I am particularly interested in. I was an academic before I was appointed—and, who knows, I might be an academic after I finish. It would be wonderful, frankly, to be able to have access to information about the consequences of our

decisions. It might be painful in some cases to look at them, but as an educational thing I could imagine it would be very good.

Mr PEARCE—I agree.

Justice Chisholm—There is the question of the privacy of the litigants and so on, as the Chief Justice has raised. We would have to look at that. One could imagine a research exercise in which people were asked when their cases came on whether they would consent to some kind of review five years down the track. If they say yes—and they would have to say yes again at the time—one could imagine a research exercise conducted over a period of time which might solve that problem.

It would be hard, however, to draw any clear inferences from the result. Suppose you make a decision in a difficult children's case and the result turns out to be a disaster—the child is very unhappy or there are various other sorts of disasters. I am sure you have heard lots about them. It does not follow from that that, had you decided the other way, everyone would have been happy.

Mr PEARCE—Of course.

Justice Chisholm—Similarly, that is so in cases where everyone is happy. For example, in many relocation cases where somebody wants to go to another country or to another state or something like that—they are some of the difficult cases that we face—the children have a good relationship with both parents and it may be that the kids are going to be all right whichever way it goes. I am with you in looking at the consequences—I would be very interested in that—but one would then have to think quite carefully about what inferences to draw from what you found.

I am not aware of other courts—this sounds defensive, and I do not mean it to be—engaging in that kind of exercise. It may happen. I do not know of criminal courts, for example, conducting research into the extent to which the people they gave sentences to were more or less likely to commit crimes on that basis and did that turn out to be true or not.

Mr PEARCE—That might be the case, but right now we are talking about your court.

Justice Chisholm—Indeed, but it could be a fruitful line of research.

Chief Justice Nicholson—I should have perhaps added that people tend to think about the Family Court's judicial performance; they tend to forget counselling and other areas. We have on a number of occasions surveyed customers, clients—whatever you care to call them—in relation to how the conciliation-mediation system worked for them and how things went. That again is useful information, and it is the sort of thing we do.

Mr PEARCE—There has been a lot of evidence about the child's best interests and making sure that any changes are clearly focused on that. I think all the committee members would agree with that. But there has been quite a bit of evidence about the children not having a voice in the proceedings. It is an area that I am particularly interested in and something that I feel does need some reconsideration. I would be interested in any comments that you have about that. For example, there has been some evidence presented to the committee, both public and in camera,

which suggests to us that all the parties have a view on everything and they are all listened to except for the children, and the children sometimes do have a particular position and a particular view that they want to put across, but they are not permitted to do that. What is your view?

Chief Justice Nicholson—I think there is some force in that criticism. I do not want to bore you with the legislative history of that, except to say that there was very little guidance given in the original Family Law Act about what a child representative should do, and there is still no guidance in the Family Law Act about what a child representative should do. I recently issued a practice direction which sets out detailed guidelines as to what such a person should do, and the full court some years ago issued a set of tests as to the circumstances in which a child representative should be appointed. That is just background to what I am saying.

The way the court has traditionally obtained the views of the children has been through one of its reporting mediator counsellors. It may be someone working within our court or it might be someone we engage from outside who has got experience in that area. They do have the task of finding out what the children say. It is not always as simple as asking, 'Who do you want to live with?' Some children find that question very intrusive. It does need a fair bit of expertise to deal with it. I think that there are circumstances where other methods can be used. Traditionally the judge has always been able to see the children, but the judge has not been able to use the evidence of what is said in the case, which is a bit difficult. Judges rarely do. Without digressing too far, I have had two experiences which were quite interesting. In one case I saw the children, who told me not to worry about things because they would fix things up, whatever order the court made. That was heartening, actually.

Mr PEARCE—It was probably good advice.

Chief Justice Nicholson—It was. They were older children, and the case should not have been going on anyway. In another case, which was a relocation case, the children had told the counsellor that they wanted to go to the United States; but when they saw me two of them said they didn't. So there are significant problems. I do not pretend to know the answer. I do not like the idea of putting children in witness boxes in courts. I think there is a better way to seek their views, but I think perhaps the best solution lies in better representation of them. In fairness to the various legal aid commissions, they have done a lot of work on training child representatives in presenting children's cases further. Perhaps I should ask Richard to comment on that.

Justice Chisholm—I agree with that—and not just because you are the Chief Justice. There has been a lot of writing on the subject recently. I wrote an article a couple of years ago, and I would be happy to supply a copy to the committee, if you would like it.

CHAIR—Thank you.

Justice Chisholm—Sometimes one needs to do things in different ways. I had a case a few years ago in which the father had killed the mother by stabbing her—in the presence of the children, on one view of the facts. The children were aged 10 and nine or something like that. The father was convicted, and when the father was in prison he issued threats against the family and also threatened to kill the children, I believe. It was a high publicity case. The father was released from prison and applied for contact with the children. He was unrepresented in the proceedings. The children were living with relatives on the deceased mother's side, and that

family was under the witness protection program, so there was a high security issue. There was a family report about the children's wishes.

When I got to the court, the child representative informed me that the children wanted to talk to the judge. Had they talked to me, I would have felt that, in procedural fairness, I would somehow or other have had to tell the parties what the children had said. Since the father may then have wanted to cross-examine the children, I could see dangers in that route. What eventually happened in that case was that I discussed the problem with everybody and we worked out an arrangement, which in fact everyone agreed with, which was that the older one of the children, the child who wanted to talk to the judge, would be interviewed by a counsellor. He was interviewed by a counsellor in the precincts of the court, and a videotape was made of that. The counsellor asked him a series of questions which had been settled in advance by me in consultation with the people in the court. Then the video was shown in open court. The father agreed in advance with that way of doing it.

It seemed to me that was a nice way of handling that particular case. The child knew what was happening. The child knew that a videotape was going to be played to the judge so that the judge would hear what he said, and yet he was not exposed to cross-examination by his father. I managed to persuade everyone in the court to agree with that so that there could not be an appeal against it.

As Chief Justice Nicholson says, it is a very important issue. A lot of people, including me, are very interested in it. Getting the right method of having the child's voice heard is often a difficult matter.

Chief Justice Nicholson—Ms Cooke would like to make a comment about that.

Ms Cooke—It is certainly one of the areas we are actively looking at in relation to mediation as well—that is, how to involve the children while the parents are actually mediating on their dispute. This is before they get to a judge. One of the issues that counsellors continually come up against is that, if they see the children, they have to be satisfied that the parents are able to hear what the children want to say, given that the children are then going back to live and have a relationship with both parents. The parents may be in such a level of conflict that they are not capable of hearing that the child does actually have a preference, and the child may then feel that a parent is going to be alienated from them or angry with them, such that their relationship will be in jeopardy. It is quite a complex issue to make that assessment, because you could actually be putting a child at some risk or you could be putting the ongoing relationship of the child with a parent at risk. Often children will express their concerns about their ongoing relationship in expressing a particular view they have.

We have looked in the past at running group programs, with a number of parents in a group who see the children as a group. Information from the children is presented back to the parents in a group way, so it is safer for the children. These are very powerful interventions, where the children talk about what it feels like to be split, to be in a situation where their alliances and allegiances are compromised. They sometimes use videos or paintings to present their views. It is a very important issue, and we are actively looking at better ways to involve children, but we have to take those other issues into account at the same time.

Mrs IRWIN—Following on from the questions asked by Mr Pearce and your answers, I refer to page 45 of your submission, where you write under the heading 'Children's Voices in Australian Family Law'. This inquiry is mainly for the purpose of the best interest of the child. You have stated in the submission:

The Family Law Act provides that children whose parents are litigating may be separately represented by a lawyer appointed for that purpose.

Chief Justice—or someone else may be able to answer this—how many children, to your knowledge, have come before you who have been represented separately?

Chief Justice Nicholson—I cannot answer off the cuff, but the orders are made very freely. In fact, there was a debate some years ago when legal aid restrictions were put in place where commissions were refusing to make legal aid available to child representatives. That has now been largely cured. My present belief is that, where we recommend a child representative, it is almost automatic that the legal aid commissions will fund the child representative, so that has improved. We can give the committee the figures; I just do not happen to have them here.

Mrs IRWIN—It would be good if you could take that on notice.

Chief Justice Nicholson—Certainly.

Mrs IRWIN—This will be my final question—

CHAIR—Is it on the same issue?

Mrs IRWIN—It is on the same issue. I was concerned about a comment you have made on page 45:

... what a child may *want* is not necessarily what is most appropriate for the promotion of his or her best interests.

Before the inquiry, we had a delightful young lady—and I think she was about 18 or 19 years of age—who told us that, at the age of eight, she virtually told the court that she wanted to be with her father. The court decided that, no, she had to be with her mother. She stayed with her mum for an amount of time and was most upset. She left home by train, found a police station and said that she wanted to go home to her dad. She just felt—and this is what she said to us—that the court did not listen to her. She thought that, at the age of eight, she was old enough and mature enough to make up her own mind. You say:

... what a child may *want* is not necessarily what is most appropriate for the promotion of his or her best interests.

What would be not appropriate and not in the best interests of a child who says they want to go with their mum or dad?

Chief Justice Nicholson—What we are really saying is that it should not be decisive, and neither does the Family Law Act. There are circumstances where some children are heavily manipulated by the parent. It may be that they are in effect bribed to say they want to go with a particular parent, or it may be that they are scared into saying they want to go with a particular

parent. We have to be careful about that. It is a somewhat difficult process, because the expression of the wish of the child is filtered through the views of the counsellor. So, if the child expresses a wish and, for example, the counsellor takes the view that the child is doing so under pressure or that there is some aspect of the child's maturity in relation to the issue which means that that wish should be discounted to some extent, the counsellor will say so. The court still looks at that wish.

Taking that a little further, I think in the past there has been perhaps too little weight given to the wishes expressed by young children when they are clearly expressed and when those factors are not there. In fact, in a paper given by a New Zealand judge to one of our conferences, she pointed out that children as young as five are in certain circumstances capable of expressing clear wishes that ought to be taken into account. We have said that in the full court, we have endorsed that view in our appellate decisions, that it is very important that that should be done.

Mr CADMAN—We have received a lot of evidence that the court's formula is an 80-20 rule, with every second weekend and half of school holidays for men. The proposition is that many cases do not go to court because that is the perception. Do you see any difference between that perception and a 50-50 rule?

Chief Justice Nicholson—Yes, I do, because I think it gets back to what society expects. I think that what is happening here when you talk about 80-20 is that the court is being 'blamed' in effect for what is a societal expectation in relation to young children. The court does not have any 80-20 rule, for the reasons I have been explaining. It deals with matters on the face of them as they happen. I do not sit there, count it up and say, 'Who's this way and who's that way?' You have got to realise that quite often there is no issue when we are talking 80-20. There are a lot of cases where there is absolutely no issue—that is, the father does not want the children on terms other than those being discussed. As I said, there are occasions when our counsellors have to actively persuade the father that they ought to see the children. There are many cases where the father does not turn up when such an arrangement is made.

So it is not a presumption. If you have a proper case on residence to place before the court, there is absolutely no presumption against you at all and you are dealt with in the same way as any other litigant: you have either got a case or you have not. The interests of the children are what we are concerned about, not the interest of the person. It seems to me that the presumption has this problem: you are saying that there is a legislative expectation that the children will be shared equally, and that just is not the reality of Australian homes. That just is not the reality of life at the moment; you just do not have people who can comply with that sort of a presumption. I think it will cause a lot of difficulty.

Mr CADMAN—Does the court give equal weight to the legal and physical relationship of the parents with the children following a break-up? It appears to us that there is more emphasis placed on the physical relationship than on the legal relationship.

Chief Justice Nicholson—I am not sure I understand that question. When you say the 'legal relationship', what do you mean?

CHAIR—Are you talking about guardianship?

Mr CADMAN—I am using terms that you have used—I am talking about guardianship versus residency.

Chief Justice Nicholson—I think the court would rarely—and I will use 'guardianship' as a shorthand for it—want a situation where only one parent was the guardian. We would normally want both parents involved in the long-term decision making for the children. Unless the level of conflict between the parents was such that you could not expect them to—

Mr CADMAN—Are orders always made in regard to that situation?

Chief Justice Nicholson—No, you do not have to make an order in relation to the long term. If you make no order, the long-term care remains with both parents. It is only when you make an order that the sole responsibility for the long-term decision making lie with one parent that that happens, and you only do that in very much a high conflict situation.

Mr CADMAN—Do you think there is confusion between the physical and the legal process?

Chief Justice Nicholson—I think there probably is. I think it was simpler under the old act where you had joint guardianship, which meant one thing, and you had custody, which meant another. I think people understood that difference rather more clearly. A lot of the American material that you have been referred to talks about joint custody, and they are talking about that in the legal sense usually rather than equal sharing. In practice, it only occasionally arises as a legal issue. The real issue before the court is with whom should the children live in some cases—often that is not an issue. What often is in issue is how long that degree of contact should take place.

Mr CADMAN—The evidence we are getting seems to relate to the payment of support, the results of that and its linkage with guardianship. If I have a financial responsibility, I should also have a legal responsibility—that seems to be a matter of confusion and concern.

Chief Justice Nicholson—Certainly a view that a lot of parents have is that if I am paying support then I should be able to see the child more often. That is understandable.

Mr CADMAN—But also have a say in what occurs in that child's life.

Chief Justice Nicholson—Yes. But under most arrangements the two issues are not tied. They would still have a say in what occurs in the child's life whether they are paying child support or not. I am troubled about confusing the issue of child support with determinations about residence and the like. Although I can understand people's feelings about it, if you are looking at the best interests of the children then it should not have much to do with who is paying what in terms of money.

Mr CADMAN—Perhaps if there was a greater clarity of guardianship then that other factor might be removed.

Chief Justice Nicholson—It might; yes, I agree.

Justice Chisholm—It is very easy to get tangled up with the language in these matters, with words like 'guardianship', 'custody', 'joint' et cetera.

I think it is helpful to think of two separate matters: one is about decision making and the other is about spending time with. Whatever the language used, the issues that arise seem to me to fall into those two packages of who gets to make decisions about the child's life and who the child spends time with, whether you call that residence or contact.

In terms of the first—that is, decision-making power—we already almost have joint decision making in the Family Law Act. The act says that each parent has parental responsibilities. Perhaps you can call that guardianship. As the Chief Justice says, the court ordinarily does not change long-term responsibility. That is the ordinary position.

In practice, if the child is living with one parent most of the time, as a practical matter it might be difficult for the other parent to exercise decisions about things like haircuts, tattoos, diet, religion and so on. But that arises from the practicalities and the facts, not because the other parent has been excluded as a matter of law from having those decision-making powers.

In relation to time, it is probably useful to collapse the terms of 'residence' and 'contact' and to just think of the second issue as being about how much time the children are to spend with each parent.

Mr CADMAN—Thank you.

Chief Justice Nicholson—The terminology does cause confusion.

Mr CADMAN—It does.

Chief Justice Nicholson—It is said, for example, that the court rarely makes shared parenting orders. The shared parenting order tends to be defined as a residence-residence order, yet it does not mean very much. You can make a residence-residence order that is exactly the same as a residence-contact order in terms of the time that the children spend. I wanted to make that point because it is worth remembering that.

Mr CADMAN—That is helpful. Thank you. To what extent do you believe that, say, interim orders or directional hearings result in the establishment of the permanent relationship? It seems that you set in train a process and in 12 or 18 months the case is heard by the court. By then, the practice is established and is taken as the way in which things are meant to continue.

Chief Justice Nicholson—It is a very difficult issue. It depends very much on the speed with which the court can offer a final hearing, and that varies in different parts of Australia. We can offer, for example, relatively speedy hearings of these matters in Sydney and Parramatta and to a lesser extent in Melbourne. We cannot offer that in Adelaide or Brisbane. The longer the period that expires, the more likely the status quo argument is to arise. I do not know what the answer to that is, other than speedier hearings—and that really gets back to the discussion I started off with. I was talking about a less adversarial system and about perhaps trying to get down to the real issues more quickly than we do at the moment.

Mr CADMAN—There is perhaps a lack of understanding amongst contestants, who believe that the directional hearing or the interim orders are only temporary and that they are discounted when the final hearing comes, whereas in fact they are taken into account considerably.

Chief Justice Nicholson—Yes, I think that is right. Do you agree?

Justice Chisholm—Yes. It is a problem because, given the problems of just getting through the list, we have to deal with those interim matters on the papers, as you have probably heard. We do not have a lot of oral evidence—there is usually none—so we have to do the best we can. Whatever flows from that does represent a kind of status quo or a settled way of doing things. As a practical matter, any change from that involves unknown territory. Unfortunately, that does have a certain significance in the final hearing. That is not because the judge necessarily wants to keep it but because we know about how that works. If it is working well for the child then one tends to think: 'Well, if we make this big change now, we don't know what will happen. We know the child has been doing all right for the last 12 months.' It does have that practicality, and I do not think there is any way out of that.

Mr CADMAN—I have one final question with regard to policing of decisions. It seems to me that people fight about trivial things or they let serious things bank up and there is a huge explosion which creates a lot of problems. The most often expressed idea that I hear is that it is so expensive to go back to the court to get an enforcement process which then again may be ignored.

Chief Justice Nicholson—I agree.

Mr CADMAN—Do you have any thoughts on that area? It is extremely complex.

Chief Justice Nicholson—It is a very complex area. As you know, we—and the parliament, for that matter—have been struggling with it. There was legislation introduced in 2000 which was aimed at trying to overcome the problem, and I would have to say that it did not. We set that out clearly in our submissions. The problem is the consequence. The consequences of a disobedience of an order can be very severe, so the proof of that has to be traditionally a high standard of proof. It is very difficult for a person who is not legally qualified to understand, let along present, that evidence in a reasonable form.

Over the years we have tried to work out ways of overcoming it, but we have had great difficulty. Increasingly, we are finding that people are bringing applications without representation because that does not cost very much—but, if they are unsuccessful, it may cost them a lot because they may have to pay the costs of the other side. We also find that the people making those applications often muck them up—they do not put the material together properly. The court helps them as much as it can but the judge cannot lean over and get on one side in relation to these sorts of issues.

I do not know the answer to it. Going back to 1992, the court put a suggestion to the joint select committee that looked at it then that at least for serial breaches there might be examined some financial support to a DPP or some government body to bring, in effect, a prosecution in relation to the breach and relieve the person of it. That did not find favour, and I can understand

why—it has its difficulties. The problem is that, under our law, these are civil cases and the issue of enforcement is left in the hands of the litigants.

From the court's point of view, it is extremely difficult. There may be a perfectly legitimate claim of a breach, and there are other people who will bring a whole lot of technical claims of breaches as a means of pressuring the other side in relation to the litigation generally. Some will just do it as part of the war between the parties. Then you have the fairly unpalatable solution of sending someone to jail. If, for example, they are the parent who has responsibility for the children, it does not endear the children and you have the situation of the children being told, 'You've got to go because dad had mum put in jail.' That does not help the relationship between the children and the father. It is an extraordinarily complex area, and I do not pretend to have answers to it. I think we just have to keep trying.

Mr PEARCE—Is there anywhere we should be looking for possible solutions?

Chief Justice Nicholson—I have not seen it work anywhere else, either. I have had discussions in New Zealand, Canada and the US. Sometimes the US has gone in for much more draconian type solutions, but that does not seem to have solved the problem.

Mr PEARCE—But there is also the issue of accessing the courts and being able to afford to do it. We have had lots of evidence that people can afford to go to court and they go to court and the court does not do anything. Time and time again, serial offenders who can afford to go to court—they get legal aid or one way or the other they get to the damn court—go to court and the court does not do anything. We have heard time and time again that it is just a toothless tiger, particularly in relation to contact. That is the classic, I would think; dad has shown up to pick up the children on Friday afternoon and mum has done every single thing possible to stop the contact—for example, she has gone away for the weekend. It happens time and time again and the court does nothing in relation to enforcement.

Chief Justice Nicholson—I do not agree that the court does nothing—but it is not as simple as that. I had one of those cases before me recently. I said to the father, 'You've proved all these breaches and I gave her the complete dressing down; what do you want me to do? Do you want her to go to jail? I'm prepared to send her to jail if you want me to.' That was a bad one. He said no. So what is the next step? It is not as simple as saying the court should get tough. Quite often the parents do not want that sort of result either.

CHAIR—Thank you. I have a couple of questions. We seem to have only talked about the really strong cases of conflict—those really difficult cases in your court. But we are talking about the issue of rebuttable joint residence for everybody; not just for the small amount of very difficult cases that reach the Family Court. If you were listening to this hearing today, you would think that all cases need to be dealt with in this way. We seem to be inflicting the principles of family law across the whole population. If you take into consideration the amount of divorces—I think it is about 34 per cent—and that is without including those family relationships not of marriage, they are just in a partnership and had children, this is an enormous portion of the Australian community. Only a minority of people get into the family law court. We are trying to come up with a system of principle for everybody, not just for those people who end up in the family law court. Could I have your views and thoughts on a principle of 50-50 rebuttable joint residency or custody for the majority rather than the minority?

Chief Justice Nicholson—Although we have got down to some of the more detailed and difficult cases, I thought I had tried to deal with that as an issue. I do not think it is a workable proposition in the Australian community. I do not think that is going to fit very many families. We are dealing not just with middle class families who are involved in a split; we have serial families. There might be three children of three different fathers in one family—there are constellations in those families. To start imposing this kind of concept of equal sharing is so inappropriate to most Australian families that it is just not going to work. I think it is so inappropriate to most Australian children to say, 'There is a presumption that you have to spend equal time with your father and mother.' You are not talking about quality time, you are talking about equal time. It seems to me that quality is the important thing about the relationship between parents and children, not the measure of time. Try to tell a 14-year-old that they have to go to dad's next week because that is the rule. That kid is going to say, 'I have this on and that on and I have to see my friends.' It just does not seem to me to be a realistic concept.

CHAIR—With respect, you may have been dealing with the very difficult people and cannot understand how reasonable people might work it out.

Chief Justice Nicholson—I do not think that is right.

CHAIR—As I said, with no disrespect, it is simply a position we would like to investigate as a starting point that can be negotiated. The issue may be the way the term of reference is worded in that it presumes that, if it were adopted, you must have a 50-50 rebuttable joint residency. We are talking about a position of commencement: a starting point which the rest of the world and the people going through this issue might start from rather than a perception. It is a strong perception—the issue that Mr Cadman and perhaps everyone has raised around the table—that mostly it is 80-20 in favour of the mother. Do you think it is a position that could be operable as a starting point for not just family law court cases but those outside of it?

Chief Justice Nicholson—I still think you have to look at it in two ways. Firstly, the 50 per cent who do not come near the Family Court will do what they like anyway, whatever the law says. They are going to sort things out in the way that suits them. In a sense, whatever the legislature says, those people do not want to go to court; they make their own arrangements and that is it. So we are dealing with the people who come to the court when we impose such a presumption, and it is important to remember that.

It may be that today we have been talking about the ones who come to the court with contested issues, but when you have got people coming to court with an expectation that they are going to get equal time with the children my concern is that you are just going to increase the litigious aspects involved in family law litigation and you are not going to provide a solution that is going to be compatible for the children. There are various claims made about the American experience. I am not going to refer to it in detail, but I have left with the committee an interesting and thoughtful account by a family law judge in Nevada who has been faced with dealing with this particular problem and the difficulties that are associated with it. I commend it to the committee; I think it probably picks up that point very well. It might be useful to ask Mr Cotta to speak, because he does speak to a lot of the people who do not go into the courts on this issue.

Mr Cotta—I would have thought one of the focal points at separation is the continued relationship of both parents with their children as a given. In that proportion of parents who are able to work through their emotions and institute decisions in their children's best interests, varied living arrangements occur. In my experience of having actually worked with parents who are cooperative and in a position to do that there is no 80-20 principle; it could be any type of workable arrangement that fits in with their lives and the needs of their children. In my dealings with parents trying to make decisions about school-age children, children are very clear about wanting to be in one place and wanting to have one abode as their focal point.

I guess the other part of my interest in this is that the role of parents should continue—that underlying principle is something that needs to be the focus at separation. Otherwise, you get into adults' needs versus children's needs, and it would seem to me that having this broad brush starting point takes the focus away from the children's needs and places it squarely in the adult domain. As their honours have been speaking about, those cases that do come into the court would have that as their starting point, and the conflict would be really exacerbated with that as a platform.

Justice Chisholm—It seems to me that your question has drawn attention to the vast majority of cases that do not come before the court and what the effect of such a presumption would be on them. If I may say so, that is a tremendously important question, and we should not get preoccupied with the difficult cases at the pointy end of our jurisdiction.

It occurs to me that it might be useful to ask what it is that such a presumption might seek to achieve. Perhaps there are two answers: one is that you might want it to actually change the outcomes of decided cases in some way, and perhaps we have been talking about that. The other sort of thing you might want a presumption to do is educate people or change attitudes amongst the population of parents. If one were trying to do the second, there might be things that you could put in the legislation other than a presumption that children should spend equal time with each parent that might be helpful. You might put in something about the value of parents, or the importance of parents remaining involved after families break up, or something like that.

If one were engaged in an education exercise or in an encouraging of attitude sort of exercise, I have some caution about whether it would be useful to frame that in terms of equal time. It seems a fairly crude idea compared to the idea of the continuing importance of parents or the idea that is emerging from a lot of the recent research that parents should be involved in a parenting way and not just as entertainers on weekends. That is a nice idea and I can see—depending on how one formulated it—that there may be some value in that, either as an education campaign or in legislation or in some other form.

My suggestion to the committee is to try and pin down precisely what one might expect to achieve. Do we want to affect the outcomes in decided cases or do we want to influence the community? If it is a matter of influence on the community, is what you want to say, 'Children should spend equal time with parents,' or is it something else?

CHAIR—Influence on the community would be what we would be looking at. We would want to, if possible, prevent any of them from coming in the first place to that situation. You consider the opposite will happen and that will create more of them. I think it will mean that fewer cases go through the Family Court system, simply because we will have put in an

intervention pathway—or allowed for that to take place—rather than having the perception of a stipulated pathway through the process.

A question was raised in Perth last week—or whenever we were there—by the Women's Legal Service with respect to biological parents. They started talking about laws in different states in regard to same sex parents and same sex couples and biological rights regarding children. What role do you give to a biological parent in the event of separation? Obviously you must have dealt with this. There have for a long time now been IVF programs and other things—such as adoption, even. What role would you give regarding the rights of biological parents? This came out of left field and I was a bit concerned about this.

Chief Justice Nicholson—I have to say that one has come out of left field to me, too. The law as it is expressed at the moment does not give any particular preference to biological parents, although some of the sections of the Family Law Act might be interpreted as doing so. It is easy to think of different scenarios. For example, if you had an IVF situation and the child was brought up in one family for five or six years and suddenly someone turned up and said, 'I want contact,' my understanding is the law would say, 'You can't have it.'

CHAIR—The reason I ask you is the submission clearly indicated that this presumption would create an unearthly problem for same sex couples. One parent may have been inseminated by a friend and that would leave another parent totally out of the situation; similar with IVF. It seemed like it was not considered. If we had this presumption then these people would be pushed out of their children's lives when they had been in their children's lives from the beginning. It seemed like this issue was raised purely because of the fact that if we proceeded with this process then there would have been all of these things come into the equation. I wondered whether it comes into the equation now.

Chief Justice Nicholson—You would find that you would need to look at the definition of 'parent' if you were going to introduce this presumption. You could get over it by defining 'parent' but it is quite difficult. Just to give you an example of the IVF parent situation, there was one case in our court where a gay couple had had insemination by a father. It was an artificial arrangement. He later sought contact. The court made orders for contact in that case but it did so not because he was a biological parent but because he had developed a relationship with the child during the interim period and then the mother had cut it off. The answer is that the biological parent is not in any advantageous position under the law at present. Would you agree with that, Richard?

Justice Chisholm—Yes. I add that one would have to look carefully at the application of the presumption. Quite apart from the exotic territory of artificially assisted conception of many and varied kinds, at the moment the law states that each biological parent has parental responsibilities, unless the court makes an order changing it, and each biological parent is liable for child support under the child support regime. That means, among other things, that if a woman gives birth to a child as a result of a one night stand, or even a rape, the biological father is a parent under our law, so one might hesitate to presume that it is a good idea that the child would have fifty-fifty time with that biological parent. If, for example, the mother had married somebody else, or had a relationship with somebody else, one would have to be careful about the application of the presumption to varying fact circumstances, even apart from artificially assisted birth.

CHAIR—A question has been raised with us over the period of hearings about the possibility of juries in family law court cases. It has been brought to the committee's attention. Do you have a comment on that scenario? Should you require a jury, as you do in other criminal justice matters? In other matters you have a jury, whereas in family law you do not have a jury.

Chief Justice Nicholson—I would have to describe it as an appalling suggestion. Juries have gradually been abandoned in civil law in Australia anyway, and this is part of civil and not criminal law. There are only two places in the world I know of that would have juries in family law matters, and they are Texas and Georgia. The stories that I have heard of cases conducted in those jurisdictions are horrific because the cases are conducted on quite irrelevant issues about sexual mores and all sorts of matters that would normally now not form part of family law proceedings. It would be a step—almost a leap—back in time. In fact, not even back in time because in English law, from which our law derives, a jury has never been involved in family law proceedings of any sort.

Justice Chisholm—Can I add a brief comment on that? Where you do have juries, if you are thinking of criminal cases, they have quite a limited function. They determine innocence or guilt but they normally do not deal with sentences. They are not used very much in civil cases in these times, but sometimes in civil cases they might determine whether somebody has been defamed and perhaps the amount of compensation. But Family Court cases do not normally have such simple answers; it is usually a series of propositions about parental responsibility, contact, residence—apart from property—and other sorts of matters. Usually one has a fairly finely tailored set of orders dealing with various things: education, parental responsibility, names sometimes, how much time the children should spend with a parent, arrangements for contact. I just cannot imagine a jury making decisions of that complex type, quite apart from what the chief justice said. It is a funny analogy, it seems to me.

CHAIR—It has been raised with us. Out of the cases that come before the court that are unrepresented—and you will probably not be able to answer this; if you want to take it on notice that is fine—what percentage of the outcomes favour those who are unrepresented?

Chief Justice Nicholson—I could not answer that without some further examination.

CHAIR—Can you see whether that information can be given to us?

Chief Justice Nicholson—Yes, certainly.

CHAIR—It seems that there are good family law practitioners, obviously, who try to resolve an issue on behalf of the people that they represent. But the access to family law practitioners, particularly for country people, is very limited. There has been an indication to us—and we have seen—that a higher proportion of people are representing themselves in order that they can harass and interrogate the partner on the stand, thereby being intimidating to that person. But then there is the other side of it: if I look through my local *Yellow Pages* for a family law practitioner, out of all the solicitors there is a minute amount of family law practitioners. So it may be that there is not easy access available to a family law practitioner without travelling to a major centre or a major city. You are thereby at the mercy of whoever is available and whoever might be able to offer the cheapest service. Could we get some feedback from you as to the outcomes that favour those who are unrepresented and the percentages of that happening?

Mr Foster—We have actually been asked that question in another place. We have been researching that, because our outcomes are not linked to success factors—and what is a 'success factor'? Quite frankly, I think we would have great difficulty in answering that question with any degree of integrity. We might have to do some reviews of files. If that was necessary, we would certainly do that, but our systems are not structured in a way that would easily allow us to answer such a question.

CHAIR—What about a person, say, who was in the position of seeking to get a greater percentage of contact time with their children and represented themselves; they had X percentage of time and then represented themselves in order to get a greater percentage of time with their children?

Mr Foster—We will do the best we can. I understand that this sort of information would be helpful if it was available to you.

Chief Justice Nicholson—The difficulty is that the outcomes may not give you very much information. I agree: we will do the best we can. When a judge is dealing with an unrepresented party, although that party is at a forensic disadvantage, the judge still has the task of doing the best that he or she can in relation to the result. The thing that worries me more about unrepresented parties is that sometimes matters are not brought out that could have been brought out, or that they are not in a position to attack propositions that have been put by the other side. Nevertheless, unrepresented parties do have a reasonable success rate on that sort of issue. If I were hearing an issue about how much time a parent should have—unless there were factors of sexual abuse or matters of that sort—I would think I could decide that whether they were represented in a reasonable way or not. So the result may be not very different. Would you agree with that?

Justice Chisholm—Yes; I would. The prospect of producing statistics on that strikes me as being difficult—frankly, I cannot see how it could be done.

If I think of cases that I have had, it is often the case that an unrepresented litigant may not have formulated the order that he or she seeks very clearly. It might change during the trial. It is not uncommon for an unrepresented litigant to seek residence, but then at the time of the trial it turns out that what they really want is something less than residence—for instance, a larger amount of contact—and it may turn out by the end of the case that the mother wants the father to have this amount of contact and the father wants this larger amount. My order might be in between the two. How would you count that in terms of a win or a loss for that litigant? Frankly, I cannot imagine—even if Richard Foster did a lot of work on the files—how any statistical response would actually provide the committee, or anybody, with real assistance. Anecdotal stuff is probably better. I have had lots of cases of the kind that I described where the result is in between what each party wants. I had a case where there were five children, and the father was unrepresented. Both parties wanted residence regarding all five. The result was that the father ended up with residence of three and the mother with two. I do not know how that would be shown in Richard Foster's statistics.

Ms GEORGE—You have argued your case against going down the route of legislated mandatory joint custody—whatever joint custody means. I think there is a definitional problem and I accept some of that caution, obviously. But I have a worry that I am not clear about by

what means you might suggest an improvement in the current law, which would give greater effect to the principles of 60B. I think that power comes with the resident parent, so you have the other parent describing themselves as the weekend or half-holiday parent, which I believe is contrary to the kind of principles that underpin the law. Could you take on notice and come back with some suggestions about the definitional issue, because a lot of the people I represent are in a panicked state thinking that we are going to impose a situation that they believe is not workable or in the best interests of the child. I was speaking to a very distressed mother and I said, 'Joint custody can mean different things,' and I think we have that problem. I would like some wording about the separation of the legal joint custody from that and what amendments we might contemplate to give effect to the principle such that residency does not determine power and control over the child, which I think is one of the failings of the current system.

Chief Justice Nicholson—We would be happy to do that.

Ms GEORGE—And parenting plans with the added view about some form of mandated parenting plan before we get into litigation.

Chief Justice Nicholson—We will certainly give you some responses on that. There are some difficulties. We have tried quite hard with parenting plans without a lot of success in trying to promote them but anyway that is something that—

Ms GEORGE—Whether they could be mandated.

Chief Justice Nicholson—Yes, that may be worth considering.

Justice Chisholm—On that subject, I was on the Family Law Council until about a year and a half ago, and they produced a document about parenting plans. I might try and dig that up. It is a useful discussion.

CHAIR—That would be very helpful. I thank the witnesses who have appeared before the committee today at the public hearing. I thank you, Chief Justice, and Justice Chisholm for coming along, as well as everybody else who has been prepared to come along this morning. The questions that you have been able to assist us with this morning have been by no means exhaustive of the questions that we have to ask, but we have limited time. So if there were questions that we wanted to raise with you, particularly on the perjury issue et cetera, we would appreciate it if we could forward those to you through Mr Foster and we might be able to get some response. This might not be the ultimate end of our relationship with you. If it seems as though committee members were not interested enough to stay, that is not the case. Some of them have a very busy schedule We certainly thank you for your time and particularly for coming all the way here.

Resolved (on motion by **Ms George**):

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.

Chief Justice Nicholson—If there is anything further, we would be happy to reappear if necessary on any issues, but we will certainly answer questions.

Committee adjourned at 11.08 a.m.