COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005

MONDAY, 4 JULY 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 4 July 2005

Members: Mr Slipper *(Chair)*, Mr Murphy *(Deputy Chair)*, Mrs Hull, Mr Kerr, Mr Melham, Ms Panopoulos, Ms Roxon, Mr Secker, Mr Tollner and Mr Turnbull

Members in attendance: Mr Kerr, Mr Melham, Ms Roxon, Mr Slipper and Mr Turnbull

Terms of reference for the inquiry:

To inquire into and report on:

The provisions of the draft Bill.

Specifically, the Committee will consider whether these provisions are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled Every Picture Tells a Story, namely to:

a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate

b) promote the benefit to the child of both parents having a meaningful role in their lives

c) recognise the need to protect children from family violence and abuse, and

d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

The Committee should not reopen discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

WITNESSES

Committee met at 2.22 pm

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

NOAD, Ms Susan, Acting Senior Legal Officer, Attorney-General's Department

PIDGEON, Ms Sue, Assistant Secretary, Family Pathways Branch, Attorney-General's Department

PLAYFORD, Ms Alison, Principal Legal Officer, Family Law Branch, Attorney-General's Department

WARNER, Ms Michele Ann, Senior Legal Officer, Family Pathways Branch, Attorney-General's Department

CHAIRMAN—I declare open this private briefing. Welcome. We would at this stage like you to outline the job we have got, the way you have in the legislation sought to pick up the points accepted by the government following the *Every picture tells a story* inquiry. Then we might ask you a few questions.

Mr Duggan—We have offered to give the secretariat a table which sets out the actual recommendations and where the legislation will pick them up. We should have done that previously and I apologise about that. We will do that the next few days. It is just an easy checklist for you to go through.

CHAIRMAN—To make the job of our secretariat a little easier, could you put in the recommendations of the committee, the recommendations of the committee that were accepted by the government and where in the legislation you have put those recommendations in legislative form.

Mr Duggan—Yes.

Ms ROXON—Obviously there will be a grab bag at the end that do not necessarily come from the committee but are changes.

Mr Duggan—We will highlight in that as well, if you like, where there have been modifications to the recommendation. The government's response to that recommendation might not be exactly the same but it will be a response. We will do that in the next few days.

CHAIRMAN—Just before you do that, the committee is aware that we have a limited reference. We are not going to reopen all of the subject matter of the previous inquiry. We have a very tight time frame to report, 11 August. We are hoping to meet that and I have spoken to the Attorney's office about the possibility that we might need a few extra days but we hope that will not be it is necessary. We understand your department has a high level of commitment now to getting this legislation through the parliament and the committee is keen to assist you in any way that we can.

Mr Duggan—Thank you. I might briefly indicate to the committee that this is part of the government's response to the *Every picture tells the story* report and there are effectively three parts to the government's response to that. The first and in some ways most important was the federal budget announcement on 10 May of the extra $400 million for additional services, particularly family relationships centres, which will be rolled out over the next four years. There will be 65 of those family relationships centres. Additional to that there will be a whole range of additional contact orders programs, the children's contact services, extra dispute resolution services and outreach programs for rural and Indigenous communities, and there will be maintenance of the 30 per cent increase in funding to existing family relationship services. That was the initial government response, if you like.

The second stage was the Child Support Task Force report, which you may well be aware of. I indicate to the committee that some initial modelling done by the Department of Family and Community Services indicates that there are about 40 payers and payees who are not affected by the proposals of the Parkinson report. About 600,000 or 700,000 people are in fact potentially affected by those recommendations, so it is a major change in that regard. That is the second tranche of the government's response to the *Every picture tells a story* report.

The final tranche, if you like, is what we are now dealing with, which is the legislative changes to the Family Law Act. In summary, there are five schedules to the bill. The first schedule is probably the one that deals with most of the recommendations of the committee that need legislative change. That particularly deals with cooperative parenting and encouraging arrangements to be made outside the court process. The emphasis is very much on encouraging parties to resolve disputes outside the court process in line with the government's commitment to massively expand alternative dispute resolution, or what we call family dispute resolution.

Schedule 2 provides some strengthening to the existing parenting order compliance regime in response to concerns that there were more options required by the court for enforcing parenting orders. Schedule 3 contains provisions amending the procedures by which children's matters will be run by the court to encourage a less adversarial approach. To some extent that is the government's response to the suggestion by the committee that there should be a tribunal to deal with these matters. Schedule 4 contains changes to dispute resolution provisions which are currently in the act, in particular terminology related to those and also about the way that people are accredited to do this work. If the committee wants to go to the detail, Ms Pidgeon can deal with that.

Schedule 5 contains consequential changes to terminology away from contact and residence. We have tried 'custody' and 'access', we have tried 'contact' and 'residence' and now we are going to try nothing and see if that does any better. The dilemma is that the terminology did not achieve the change in culture that I think everyone was hoping it would do. Residence was effectively equated with custody, contact with access—those terms which really were, as many of you will know, part of the sort of welfare terminology. It effectively did not change with the change of terminology. In line with the committee's suggestions, we have tried to do away with handles altogether and see how that works.

I might take you through the bill, if that is appropriate. Schedule 1 is probably the one that deals with most of the recommendations of the committee. In particular it deals with the recommendations from the committee that we should very much encourage the concepts of

shared or joint parental responsibility. The concept effectively is that, even if you are not necessarily having major contact with the child, to use the old terms, or have the child living with you, you can still maintain a very significant role in terms of the child's life by having involvement in major long-term decisions which affect the child. So what we have done in item 2 is amend the objects and principles provisions of the act, firstly by adding item 1(c), 'to ensure that children have the benefit of both their parents having a meaningful involvement in their lives'. Equally importantly, in 2(b) there is elevation of the need to protect the child from physical and psychological harm. What we have done as well, in relation to provisions of the legislation which require the court to make a determination about the best interests of the child, is that we have actually reflected the objects changes in that those provisions. One criticism of part 7 of Family Law Act in the past has been that the objects provisions are not of themselves mirrored in the actual detail of what then follows in part 7. In this situation we have picked up those two changes to the objects and principles and added them as the first and primary considerations when the court is considering the best interests of the child. I will come to those changes later.

Ms ROXON—When you do come to those later, could you explain how the hierarchy is going to work in terms of it not been the overall interests of the child but specific interests, that it looks like the intention is to give some more weight than others or something. That obviously relates to this as well.

Mr Duggan—That is true. I think the government's viewpoint would be that it is indeed a hierarchy and they are intended to be given greater weight than the other matters which are set out in section 68F(2). Perhaps I could deal with those when we come to them.

Those objects provisions draw their genesis from recommendation 3 of the report. As I said, we were set this out in a table for you. There are also some amendments which will probably come as something of a surprise to you because they were not actually dealt with by the committee but they flow from a report of the Family Law Council. That deals with the Aboriginal and Torres Strait Islander amendments that are in the legislation and better recognition of the impact on the cultural heritage of Aboriginal and Torres Strait Islander children in particular. Those amendments flow from recommendations of the Family Law Council. The government thought it was appropriate to pick them up in a situation where we are dealing clearly with issues related to the care and welfare of children. That is why they are there although they are not recommendations from the *Every picture tells a story* report.

One of the first issues that will be of interest of people is in item 6. The bill spells out what we mean by join parental responsibility. In particular, where joint parental responsibility exists between parents—

Mr TURNBULL—Is that item 6 or item 5?

Mr Duggan—Item 5 is the component. What I was coming on to is that we actually set out what major long-term issues are. The government was keen to make it clear that someone who does not necessarily have the major care and welfare of a child can still have a very significant impact on the child's long-term development. So what we have done is to spell out in the legislation what we call major long-term issues. Again this follows from a recommendation of the committee. Item 6 sets out what they could be: things like education, religion, health, the

name of the child and significant changes to the child's living arrangements. The expectation is that where those issues are brought up then the parents will discuss them between themselves with a view to reaching agreement. That is probably the first time we have actually tried to put some meat, if you like, on the bones of what parental responsibility actually means when it is joint. Arguably under the current provisions of the act those orders are regularly made now.

In terms of the key issue in keeping matters out of the courts, subdivision E of schedule 1 deals with compulsory attendance at dispute resolution. The government has decided that there will be a hurdle before you can actually get to a court, and that is that you will have undergone or at least attempted family dispute resolution prior to get to a court. It is not dissimilar in some ways to what is required in things like human rights complaints these days, and native title is another one where this sort of thing happens.

Ms ROXON—Industrial relations for a few more weeks!

Mr Duggan—Indeed. But the intention is that you cannot compulsorily go to dispute resolution without the services being available. So what the government is proposing to do is to phase in the requirement that you go to compulsory dispute resolution prior to lodging with a court. Initially we would simply legislate for requirements that already exist. The Family Court in its Family Law Rules has what they call pre-action procedures, and basically those procedures require parties to have attempted dispute resolution prior to them coming to the court.

Ms ROXON—Chair, do you want us to ask questions along the way for each section?

CHAIRMAN—It probably would be better if the department finished the presentation first.

Mr Duggan—I will probably take a little while but I am happy however you want to do that. The second stage, which commences on 1 July 2007, will require all new applications to the court to have gone through compulsory dispute resolution. By that stage we are hopeful that a fair number of our family relationships centres will be established and there will be services available.

Ms ROXON—And other services.

Mr Duggan—And other services will also be rolled out by that time. The intention is that from 1 July 2008 we are hopeful that all of our family relationship centres will be rolled out, and then it will be compulsory for effectively all applications, including enforcement applications except in certain circumstances which I will come to, to have a certificate from a family dispute resolution practitioner that says you have made an attempt to go along. If your partner does not come, you cannot make them, but at least you have made the attempt to go along.

The other areas where there would be exemptions from having a certificate would be, firstly, where there is consent. If it is a consent order, you simply want an order from a court, there is no need for compulsory dispute resolution. Another exemption is where you are actually responding to an application of another party. There are also ones which relate to things like abuse of a child; family violence; where there is urgency, which is a well-known term in the Family Law Act; and where one party is unable to participate effectively in family dispute resolution for a whole range of reasons, including capacity. There is also a regulation making power by which if

necessary we can specify other circumstances. So effectively after 1 July 2008 any party seeking to have an order from a court will be required to go through compulsory dispute resolution.

Ms ROXON—That is the parenting ones, not the property ones.

Mr Duggan—That is right. It relates to most orders under part 7; it does not deal with property. But, because those procedures apply to property as well as to children's cases, under the Family Law Rules you would still have to go through the compulsory process. That is item 9.

Mr KERR—Why not put it in the act, not the rules? Is it anticipated that you do not require this in the instance of property disputes? It seems very odd to have it statutorily embedded in one instance but not in the other but to require it nonetheless.

Mr Duggan—As you would be aware, arguably there is considerably more option for requiring less adversarial type procedures in relation to children's matters as opposed to property matters. Property matters are much more disputes between parties, less inter partes, if you like, as opposed to children's matters, where the court is deciding—

Mr KERR—I will give you a week's experience in my office—I contest that proposition.

Mr Duggan—Indeed.

Ms Pidgeon—One comment we could make is that the Family Court Rules only apply to the Family Court itself and they deal with the larger and more complex property matters. Those rules do not apply to the Federal Magistrates Court, which would deal with the majority of the straightforward ones. To make it legislation for everywhere we would have to put a lot more services in. That is the main reason.

Mr KERR—I think that helps me and I will shut up because otherwise I will break the rule.

CHAIRMAN—I think we should be flexible. I prefer the questions left until the end but, if there is a question you feel you need to ask, ask it.

Ms ROXON—I thought it might have advantages to do it in sections, but I am happy to wait to the end.

Mr Duggan—There is provision in the legislation that if a party has not attended primary family dispute resolution for whatever reason and the court, for example, makes an interim order then there is an obligation on the court to nonetheless consider sending them back out again to go through such a process before final assessment.

One particular matter to raise with you is proposed section 60J, on page 9—I think you have got the same print we have got. It is headed 'Family dispute resolution not attended because of child abuse or family violence'. That provision effectively requires someone before they go before a court to have sought information in relation to services and alternatives that might be available to them rather than court processes. That is all it is. It is not about attending a dispute resolution process; it is simply informing them that there may be services which can assist them which might be more appropriate than a court. That would simply be a matter for the individual

to take account of. That does not relate to a situation where there would be likely risk. If it is an urgent matter, clearly it is not covered.

Ms ROXON—So it is to inform them about services; it is not to try to find out what issues are contested between the parties.

Mr Duggan—That is right. It is simply to inform them that there are services they may wish to consider before they go to a court.

Ms ROXON—This is one of the things I marked in the explanatory memorandum, on page 4. Where it says that parties must obtain information about the issue or issues in dispute, I did not understand whether what it was saying was that if there is violence or abuse you will use non-face-to-face methods to find out which issues are contested between the parties.

Mr Duggan—Effectively that is right.

Ms ROXON—Or to find out that there are services.

Mr Duggan—No, what you are looking at is to find out if there are services and consider whether in fact a court is the best place for you to be going. That is the issue.

Ms Pidgeon—It needs to be better drafted and we will make sure we do that for the explanatory memorandum. Where it says that parties must obtain more information about the issue or issues in dispute, it was supposed to be referring to the violence or the child abuse, not to try and investigate it but rather that there might be support services or other options available to them.

Ms ROXON—That is not very clear.

Ms Pidgeon—No, it is not, and we need to make sure we clarify that better.

Mr KERR—Does the threshold satisfy you about violence? Is there some test? You cannot just make an assertion of violence, can you?

Mr Duggan—We do not believe that there will be significant attempts at using excuses such as this to not use family relationship centres. The threshold will be relatively low. We do not want counter staff, for example, at Family Court registries having to make decisions about whether someone should or should not get before a court. It will be up to the court to determine later on if someone has deliberately attempted to get around the provisions and make appropriate cost orders and what have you in those circumstances. So we are not asking to have a mini trial on whether in fact there has been violence or risk of violence.

Mr KERR—But there has to be, doesn't there, under subsection 8? It only applies if the court is satisfied that there are reasonable grounds. There has to be a mini trial.

Mr Duggan—That is a matter that the court can determine during the time it is hearing the application. It is not a matter on which the court needs to be satisfied at the time the application

is lodged. The application can still be lodged and the court will determine that as part of what it determines in relation to the matter generally. That is the intention.

Mr KERR—So there will be no test applied by the registrar.

Mr Duggan—The registrar does not receive the application, as you would be aware. The way we would anticipate this would work is that, because of the new less adversarial approach, these matters would get before a judicial officer quite quickly and it would be up to that officer to make a determination as to whether in fact it was a reasonable ground to believe that.

Ms ROXON—On this section I think we will probably need a quite detailed briefing, whether it is today or another time. I also wanted to ask about what Duncan has been asking on some things being an exception and some being rebutted and what that was really going to mean in the way that people had to prove various threshold—

Mr Duggan—In terms of the presumption, you mean?

Ms ROXON—Yes. In this issue, where you have got exceptions that you do not go through this process if there is violence or abuse, Duncan is raising questions about how you have to prove that and get into that exception. I started with the explanatory statement rather than the bill, so I was looking at where it also says that there is the presumption that has to be rebutted on what is in the best interest of the child. So there are all these different thresholds that seem to apply for different things, and I think for the committee's assistance we are going to need a fairly clear breakdown of steps A, B, C, D and E that had to be gone through or hurdles that have to be jumped over before these things apply.

CHAIRMAN—Could you provided to the secretary in writing?

Mr Duggan—Sure.

CHAIRMAN—Are you happy with that?

Ms ROXON—Yes. I think that there are some questions we are going to have to look at fairly closely on those, so it would be helpful.

Mr KERR—It still does strike me under section 8, subject to your explanation, that there is a mini trial that has to occur if such an application is filed because there is a direction that a court must not hear an application unless it is satisfied on these grounds. It can only be satisfied on those grounds if it has objective material in front of it which satisfies it on the balance of probabilities. There must be a threshold case.

Mr Duggan—It would be an early matter to be considered in the hearing but it would be considered at the hearing at the same time as all the other issues are dealt with. That is the intention.

Mr KERR—Presumably it would be contested in most instances.

Mr Duggan—Indeed. It would still be the one hearing. You would not have a series of hearings; it would be within one hearing.

Mr TURNBULL—Picking up what Duncan is saying, if it was not heard as a preliminary point and it was all heard as part of the issues in the hearing, you could have a long hearing dealing with a whole range of other matters and at the end the court concludes that they have got to go back, that they should have gone to the family dispute resolution process first.

Mr Duggan—The court is required to consider that issue as an early matter before it in relation to whether it should be referenced out.

Mr TURNBULL—Does it say that? That is your concern, isn't it, Duncan?

Mr KERR—No, I do not think it is quite a concern, because it says it must not hear an application and then it gives an out under 8. My concern is that you are going to have mini trials. Fathers in particular against whom allegations of violence are made are going to be saying, 'That's not true.' I am just worried that this is going to be another litigious point along the way, spending a lot of time and court resources and also causing emotional anxiety to the parties.

Mr TURNBULL—What is the solution?

Mr KERR—I do not know.

Mr TURNBULL—So you are just producing problems.

Mr KERR—I think at least requiring it to be sworn.

Ms ROXON—We are in family law, you know.

Mr KERR—I think at least requiring a sworn affidavit and saying that is sufficient. Actually having a trial which is to be adjudicated at a threshold stage where the court has to adjudicate that somebody has been guilty of violence—I am sure if you have had that finding made against you you are not going to think that the court is going to treat the rest of your case in the same sort of dispassionate way as they would if it had not had to make that finding.

Ms ROXON—In a situation like that, a sworn affidavit or something would really be sufficient if you are simply trying to say, 'I need this to go before the court.'

Mr KERR—That is all I am saying.

Ms ROXON—You do not want to necessarily give it any weight anyway. I think there are a whole lot of parts of the bill where the risk of being more litigious is a serious question that we have to deal with.

Mr Duggan—The intention is as I have explained it to you. Another thing which the court is at pains to attempt to avoid is a plethora of affidavit type material early on in proceedings. What that tends to do is polarise the positions of parties.

Mr KERR—That is what worries me about this. Actually requiring the court before it hears a matter to make that positive finding that there has been abuse of a child or all those sorts of things seems to me to be very highly problematic in the sense that, first, the person making that case will have to produce affidavit material and the person resisting it will be saying, 'I'm a reasonable person and I don't want this finding made against me that will colour the way in which my character will be seen through the rest of these proceedings.' If I were the subject of one of these things, I would be wanting to make certain that no such finding was made.

Mr Duggan—That is a matter, as I have indicated to you, that will be dealt with at the trial of the matter. It would not be a separate trial.

Mr KERR—You cannot start the trial.

Mr Duggan—That would be the first matter that is dealt with at the trial.

Mr KERR—But it is not.

Mr Duggan—Yes, it can be, and that is the thing that the court hears initially; that issue about whether there is violence or not will be a thing the court deals with initially. That is the intention, that if there are allegations of violence in relation to a matter they should be dealt with quickly and should be dealt with as a matter of urgency and a matter of early consideration of these matters.

Mr KERR—And you are going to have judicial finding that one party on the balance of probabilities has established reasonable grounds that there has been violence or abuse towards the child et cetera. Doesn't that colour the whole way—

Ms ROXON—But, Duncan, the purpose is trying to say that when there are such allegations, even prior to them being proved you should not be forced to try to mediate outside the court because you are not going to be able to. It is only to provide an exemption—

Mr KERR—I agree, and that is why I think having such a test is unnecessary. All you need to have is an allegation and maybe some process of treating as a contempt a person who swears a false affidavit. One of the problems in this jurisdiction is that people lie their heads off all the time with no consequences.

Mr TURNBULL—Unlike in other jurisdictions!

Ms ROXON—It is not only the people making the allegations who lie.

Mr TURNBULL—Let me get this straight. The concern we have got here is that, let us say as a caricature of the situation, a mother seeks to have a custody order and her ability to get a quick custody order is held up because of subdivision E and she has got to go to the dispute resolution. She does not want to do that. Duncan's concern is that she then, whether the facts are there or not, swears an affidavit saying that her husband has abused the child or threatened or been violent or whatever. Then the court has to determine that in a mini trial. Surely once the custody order was made, even on the view, perhaps mistaken, perhaps maliciously mistaken, on the part of the wife, once the child is in the custody of the mother, there surely should be no reason why

the parties cannot go back to a dispute resolution, cannot be sent back to endeavour to resolve their dispute. The only reason for this subsection 8(b) is because of the concern for the child.

Mr KERR—It can be the mum too. The mum might have been assaulted.

Mr TURNBULL—Okay. But even there it would have to be a very extreme case where there would be a concern that you would be assaulted in a family dispute centre.

Mr Duggan—Subsection (9) of that provision—

Ms ROXON—I think that is what is at issue. I know everyone is trying to understand what the provisions say, but I am concerned that we are falling into a lot of the stereotypes that are in this area. I do not think a false allegation being made is the most common problem we are dealing with. The main problem we are dealing with is that the government has made a decision that there should be compulsory conciliation before a hearing and this is an exception to when it should be compulsory. Surely we should be arguing over what sort of threshold has to be passed to get into that exception, not who makes false allegations or who does not or how commonly that happens. We should go through whether this is too rigorous a test or not. But let us not reinstigate a lot of the biases that there are about these proceedings. I am trying not to have my biases here too.

Mr TURNBULL—I am not trying to reinstate any biases either.

Ms ROXON—This comes about not because people make false allegations; it comes about because it is a change if the government wants conciliation to be compulsory. This is only talking about why you should not be forced to sit in a room with someone who has been violent to you or to your children or something. Is that right?

Mr Duggan—That is right.

Ms ROXON—We still do not answer your question about whether it makes it another threshold.

Mr KERR—I prefer to take the risk. What I am saying is that I do not want to have this litigated in that way. I accept that people should not be forced to go through mediation where these matters are raised. I am simply saying that I think this actually creates a circumstance where the myth that there are all these false allegations has led to in a sense a judicial trial before these proceedings can happen. There are likely to be false denials as much as false allegations. Given that, it seems to me to be a very unpromising way to start out a process that in the end is supposed to end up with agreements in the best interests of the children in terms of the joint management of their care. To start out having a row about whether you hit me or abused the child as a starting point does not seem to be very smart.

Mr Duggan—The dilemma is that there has to be an exemption in relation to violence and child abuse.

Mr KERR—Why not just allow the woman to make that assertion on a sworn affidavit and that is the end of it—full stop. It is made, it is asserted, it is accepted without belief, or something of that kind.

Mr Duggan—It is the government's view that there ought to be a higher threshold. You are quite right. That is a matter upon which there is disagreement at this stage.

CHAIRMAN—That is a matter we could tease out.

Ms ROXON—That is a matter that we need to vet.

CHAIRMAN—If you could let us have that paper, that would be very useful.

Mr Duggan—Subsection (9) of that provision—

Mr MELHAM—But it is not a heavy test that says the court is satisfied there are reasonable grounds. I do not have a problem with that test, to be perfectly honest with you, rather than accepting it when someone asserts it.

Mr Duggan—That is the nub of the issue. You have identified exactly the issues we have grappled with, and this is where we came out.

Ms ROXON—It is about how you make a test serious enough but not have to be proved.

Mr Duggan—That is a significant issue. That is absolutely right, with respect.

Ms Pidgeon—There are quite diverse views.

Mr MELHAM—Which is why I accept the test you are proposing over Duncan's because I think that is where the abuse could occur.

Mr Duggan—As I say, there was much debate within government about that. Subsection (9), which is on page 8, is the provision which requires a court to consider sending people out again when they have not gone through this process. So for the person who applies for the order and has not gone through family dispute resolution, the court is obliged to think about sending them out again.

I will move on to item 11, which raises some of the issues Ms Roxon raised in relation to presumption. Presumption reflects in part recommendations 1 and 2 of the committee's report. What it does not do is allow for negative presumption, as recommended by the committee. We have had a large number of drafts of this provision. Presumptions are complex beasts and they are difficult to interpret, if I may say so. Having a negative presumption proved extremely complex, particularly for the courts. We have obviously not consulted the public generally on this matter, but we have consulted with the three courts—the Family Court, the Federal Magistrates Court and the Family Court of Western Australia. Certainly, the courts were concerned about the complexity of having a presumption and a negative presumption.

Mr MELHAM—So your submission to us will outline why you went this way.

Mr Duggan—We can do that. In fact, what we have done is simply had one presumption which is rebuttable.

CHAIRMAN—Were the courts unanimous in their view on this?

Mr Duggan—Certainly, their concern was complexity—absolutely. The courts are of course concerned about the very significant number of self-represented litigants who appear under the family law legislation generally, as you would be aware. The concern was that a provision of the sort we had originally drafted would have been extremely difficult for a self-represented litigant to understand. It was not entirely clear what a negative presumption was doing anyway. So, in the end, the government has agreed to have the positive presumption which is rebuttable. That is where we come out.

Ms ROXON—Presumably, this note and the things you have had to put in there are because, with all of the redrafting, people still are not confident that it is not going to be misunderstood.

Mr Duggan—That is right. It is a complex provision but, as I say, it responds directly to a major recommendation—in terms of legislation, arguably the major recommendation that the committee made. There were recommendations made in other areas which are equally major but, in terms of the legislation, this is probably the biggest change.

Ms ROXON—It looks like asking questions at the end has been thrown out the window, so I will ask one more thing: is parental responsibility defined somewhere else?

Ms Playford—Yes, in item 23. It is in 65DAC.

Ms ROXON—On what page?

Mr Duggan—On page 17. Functionally, if you like, that sets out what has to happen in relation to an order where there is joint parental responsibility. That is the issue I raised previously about consulting on major long-term issues. That is effectively what it means.

Ms ROXON—The only reason I ask is that it does not seem to be a very strong legislative tool to have the note be the thing that deals with the most contentious part of the changes.

Mr Duggan—As I say, it effectively does. In relation to a situation where there is joint parental responsibility you need to consult over major long-term issues with a view to reaching agreement. At the moment there is already under section 61C of the legislation arguably a starting point of joint parental responsibility, depending on your point of view. There is no meat to that at all. This legislation attempts, where there is joint parental responsibility, to not try to legislatively define the extent of that, because what that parental responsibility might be changes a lot; it evolves as—

Ms ROXON—I agree with this, but my point is that it does not include any assumption about the amount of time people spend. Am I right that that is mentioned only in the note and not somewhere else in these various levels of reform?

Ms Playford—Yes. There is no specific provision saying that the court does not apply presumption in relation to time. Instead there is provision 65DAA, page 6, which specifies what the court has to do in relation to time—the court has to consider the child spending substantial time with each parent in certain circumstances. Having that provision is, I guess, instead of having a presumption in relation to time, and that is consistent with the committee's recommendations.

Mr Duggan—The committee, as you know, rejected the concept of 50-50 sharing.

Ms ROXON—I am not arguing for it. I am wondering in terms of implementing all this whether or not it is a very strong way to do it. I just wanted to check whether time was a factor anywhere else.

Mr Duggan—No. Joint parental responsibility does not relate to the time a child spends with a parent.

Ms ROXON—I understand that, but is there nothing in the legislation other than this note that makes that clear?

Mr Duggan—We might answer that on notice and try to draw out where we say it is clear what 'joint parent responsibility' means and what it does not mean. We are happy to do that. The one issue that you might want to be aware of in terms of major long-term issues that were causing concern for players we have consulted with is in relation to significant changes to the child's living arrangements. You may well get some submissions in relation to that. On page 5 we define the major long-term issues in item 6.

Concerning the last one—(e) significant changes to the child's living arrangements—there was a lot of debate about the best way of describing, if you like, that provision, because originally it was drafted to deal just with where the child was usually to live. The dilemma and concern was that there may well be a lot of litigation again about the fact that a parent had moved just across the street. So we are looking at significant changes. It is a very difficult concept because on the one hand from the nonresident parent's point of view, to use current terminology, where a child is living is clearly a key issue. On the other hand, we do not want a resident parent, again using current terminology, when they have moved just down the street to have to litigate or hope they can reach agreement with the other parent. It is a very difficult concept to try to find a balance in relation to.

Ms Playford—And that is a change. The committee had it as the 'usual place of residence'.

Mr MELHAM—I take it your submission to the committee will highlight that and the basis upon which the government has moved away from it. It seems to me that it is important that in your submission you lay the foundation as to why you went a particular way as against another, from a transparency point of view.

Mr Duggan—Indeed. Item 14 on page 12 deals with the obligation of advisers—people who are advising parties that have suffered separation. That provision substantially implements points 1 and 3 of recommendation 5 of the report, and starts to implement recommendation 24 in relation to giving importance to the role of grandparents. It is designed to ensure the sorts of

things that parties, when they are being advised by a family dispute resolution practitioner and others, have to be advised about, amongst other things which the parenting adviser might well discuss with them. That is what that is designed to do.

Mr KERR—The note at the bottom of 16DA is different from the text of 16DA(2). The note says that the adviser is required to inform people that they 'should' consider the option of a child spending substantial time with each of them; the text actually says 'could' consider. So the note and the text do not fit. What was intended?

Mr Duggan—That should be consistent. 'Could' is the intention.

Mr KERR—We might as well scrap that para.

Mr Duggan—Indeed.

Mr TURNBULL—Are you suggesting that 1A should delete 'could' and insert 'should'?

Mr KERR—I do not know; I am just asking.

Mr TURNBULL—I think it should be 'should'.

Mr KERR—I think it should be too. If it is saying anything, it should say 'should'; otherwise, delete the paragraph. It is something like 68 words that an overly long act could do without.

Ms Pidgeon—The only problem with 'should' is that if a mediator, for example, is trying to be very neutral and then starts using words like 'should'—'You should do this' or 'You should do that'—then one party might well see the mediator as siding with the other party. If mediators use much more neutral language like 'could consider', that will help their ability to be neutral.

Mr KERR—But if an adviser is satisfied that the child spending substantial time would be both practicable and in the interests of the child, then to say that they 'could' mention that does not seem to me to really be the sort of thing you put in legislation.

Ms ROXON—It does not matter if they 'should' or 'could' consider something. The 'should' is not something more onerous than considering it.

Mr KERR—That is right. 'Should consider' seems to be perfectly fine.

Ms Pidgeon—It is because here we are talking about neutral mediators, and words can make a difference to how they are perceived.

Mr KERR—I will come back to that.

Mr Duggan—In relation to that provision, we have also made slight changes to the recommendation by the committee, and that is that the adviser advises about spending 'substantial' time with each of the parties rather than 'equal' time. The reason we did that is that the difficulty with the suggestion that they spend equal time is that it is a very specific situation where in fact equal time will be appropriate to each of the parties. To have 60-40 might be

absolutely appropriate in a particular circumstance, and why should that not be an obligation on the adviser to at least advise on? It is also similar to the obligation on the court, which we drew your attention to earlier, where the court has to consider substantial sharing of time, not equal time. So we brought that into line in the two provisions, but it is a change from the committee's recommendation.

On page 13, at item F, we start dealing with the issue about giving some teeth to the use of parenting plans and the intention by the committee that there should be much greater use of parenting plans. The court just informs the parties that, where there is a parenting plan, the court will be obliged to consider it.

Ms ROXON—This is not the place to discuss the effect that a later parenting plan can have on a court order, but I will want to go through that in some detail later on. I know this is just simply to inform them, so this is not the place to do it.

Mr Duggan—Item 16 is where we begin the process of having no terminology in relation to names of orders. We talk about the fact that an order may deal with the time a child is to spend with another person or a parent, the person or persons with whom the child is to live and the allocation of parental responsibility. It is an attempt to do away with any sort of name of an order—with the possible exception of maintenance, which is retained.

Ms ROXON—Is that why item 18 says that an order is made in your favour if—

Mr Duggan—Yes.

Ms ROXON—So, essentially, all parties can have an order made in their favour, even though some may have more favour than others?

Mr Duggan—That is right.

Ms ROXON—Does that have an effect on the later issue of costs?

Mr Duggan—Yes.

Ms ROXON—Because that is being introduced as a new idea—

Mr Duggan—In relation to issues about enforcement costs predominantly, this legislation does not undermine the basic provisions in section 117 which effectively mean that both parties bear their own costs. It is only in very specific circumstances, which we will come to, where the court is obliged—

Ms ROXON—Does what now constitutes a decision in your favour have any flow-on effect to that change, in relation to costs? Would you be able to take that on notice?

Mr Duggan—Okay.

Ms ROXON—I understand the PR behind why you have an order made in your favour. That is very sensible, but I am concerned about the consequences further down the track for these other matters.

Mr Duggan—In section 64D, item 19 on page 16 commences the issue that you have just raised about parenting orders that are subject to later parenting plans. This provision is effectively designed to automatically include in an order—unless the court determines otherwise—that a later parenting plan can in fact supersede a court order.

Ms ROXON—Could you talk the committee through that? I understand the logic of providing flexibility where parties who have agreed to changes do not have to go back to court to vary the order—that is a sensible reduction in the court time that people have. But if somebody is then hauled before the court because of a breach of a parenting order and the party who is accused of breaching it says, 'No, that is consistent with a later plan that we have agreed to', does the later parenting plan then have the status of what would have been a court order?

Mr Duggan—No. The court must take it into account before it makes an order enforcing the original parenting order. It must consider it. It does not have the weight of a court order.

Mr KERR—But it does.

Ms Pidgeon—In terms of being found in breach of the original order—

Mr KERR—It does, doesn't it? 64D makes it—

Ms Pidgeon—If the parenting plan overtook an order that came in after this came into effect, then it is not a breach.

Mr KERR—It supplants it.

Ms ROXON—I am concerned about how, with a greatly contested matter in court, you ensure that a parenting plan that is agreed to is an accurate reflection of what the parties will—

Mr Duggan—The amount of evidence in each individual case. You may be aware that the provisions in the legislation allowing for the registration of parenting plans were removed in 2003 because they were never used and they made parenting plans far too inflexible. It is not the intention that they would be reintroduced. It would be a matter of the evidence in each individual occasion.

Ms ROXON—But it is giving them a lot of weight.

Ms Playford—The parenting plans have to be in writing.

Ms ROXON—They have to be in writing, but they do not have to be created with any external advice. That is fine in all the cases where people are happily agreeing, but presumably the contested ones are not those situations.

Mr Duggan—As you described it, the situation in the legislation is that there is no particular form other than in writing for a parenting plan. The government wished to give as much flexibility as possible to parties in that regard.

Ms ROXON—I just cannot get my head around this—maybe some of the other committee members can. If something is sufficiently contested that it has gone all the way through this cumbersome process and there is a court order, the parties can then agree without anybody knowing how that agreement is suddenly amicable enough to agree on something that is—

Ms Pidgeon—It may be with the help of a family relationship centre, for example. One of the problems, if you do not have a provision like this, is that once people have a court order they never get out of the loop. Every time they want to change it because of changed circumstances—their child is older and they are in different circumstances—

Ms ROXON—I understand that. It is the same issue as how you protect at the other end. It is a sensible measure for that part, but I do not see how easily it is going to work.

Ms Pidgeon—I think the essential point is that they can enter into a parenting plan knowing that, if it changes something that was in a court order, they will not be found to be in breach of that court order. That is the essential part.

Mr KERR—Can I raise some issues here, because it does strike me as problematic. For example, where there was a court order and a subsequent parenting plan is agreed, and then there is some issue of enforcement involving, say, the Australian Federal Police for breach of the parenting plan—not the order now, because under section 64 it is subject to the parenting plan—what happens? How do you prove the parenting plan? Production of a court order is usually verified by the stamp of the court.

Mr Duggan—If you want the order enforced, it is still a matter of going back—if you want the original order enforced. As you know, that is probably one of the biggest complaints we had in relation to this particular—

Mr KERR—No, the parenting plan—

Ms Pidgeon—This is where the parenting plan has overtaken the order, because you would not be enforcing—

Mr KERR—I am interested in how you deal practically—

Ms Pidgeon—Are you asking, 'How would you then prove what the parenting plan is'?

Mr KERR—with a piece of paper that is written on the back of a school exercise book—from when mum and dad got drunk one night, got happy and agreed everything. They have five lines, 'This is our new parenting plan,' and now mum wants to enforce it. Dad has taken the kids for a time beyond the period agreed on that happy evening. How do you persuade authorities that that is now the document upon which you are relying?

Mr Duggan—To enforce that parenting plan you would have to go back to the court to seek an order of the court enforcing the plan.

Ms Pidgeon—The plan itself is not enforceable. You would have to go back to the court and get a new order to the same effect as the plan. The court would have to take that plan into account, under a number of provisions—

Mr KERR—It does not take it into account. The order is subject to a parenting plan.

Ms Pidgeon—Yes. You cannot enforce the original order because you have had the parenting plan in the meantime, and that has made the original order null by superseding it. But it does not have the status of the order in the sense of enforcing the plan as if it were an order; it does not say that. Most people will now—

Mr KERR—So you lose your capacity to enforce—

Mr Duggan—The original order.

Mr KERR—Anything.

Ms Pidgeon—You cannot enforce the court order or the parenting plan.

Mr KERR—You cannot enforce the court order or the parenting plan? Now you have moved into unenforceable zones.

Ms Pidgeon—Which is what the majority of people have now, because the majority of people do not go to court or get orders. What you are saying is that, if you have moved on from that order, you should not have to keep going back to court every time; you should be treated like other people.

Mr MELHAM—If you want to enforce it, you have to revisit the court, but you would not get—

Ms Pidgeon—If you expect to be able to enforce it then you need to keep going back and getting orders.

Mr KERR—But most people would not think that they had voided their capacity for enforcement by agreeing on even a minor area of change.

Ms Pidgeon—It only makes it unenforceable to the extent that it has been updated.

Mr KERR—That is not true. You could not enforce the original order because it has now been modified, so you have nothing to enforce.

Mr TURNBULL—Duncan, your concern is that you have got an order that is clear, a new agreement is entered into and the new agreement in effect makes the arrangements under the previous order unenforceable, and you would say in toto—

Mr KERR—Well, I do not know; I was asking—

Ms Pidgeon—They are not intended to be in toto.

Mr TURNBULL—But that is not clear. I think Duncan might have a point there. I do not think that is entirely clear, because it says 'subject to'. That would suggest that it is only subject to the parenting plan insofar as it is inconsistent with the original order.

Ms Pidgeon—Yes.

Mr TURNBULL—If that is the intention, maybe you should put that language in.

Mr Duggan—That is the intention.

Ms ROXON—Could you also, whether now or later, explain how that is going to work in practice? Duncan used the example of a matter that the Federal Police might be involved in, but you could equally have the Child Support Agency relying on the parenting order, which showed how much time was to be spent with different parents and affects the amount of money that people pay. If a later parenting plan varies that, what becomes the basis upon which other agencies can—

Ms Pidgeon—The Child Support Agency are already talking about using the parenting plan if it is later than an order, so it will be consistent.

Ms ROXON—They are already talking about it or they are already doing it?

Ms Pidgeon—That is something that we have been discussing with them.

Ms ROXON—If we are going to put it into legislation before that, if we have made a decision about how they are going to be able to collect money then it seems that we might be doing it a bit prematurely. It would be helpful if you give us your thoughts on which other agencies or bodies might be affected by it.

CHAIRMAN—That is a pretty fair point. Can you come back to us on that?

Mr KERR—The other point—taking Malcolm's point a little further—is that, assuming it was not the intention that the order be rendered ineffectual by a variation to a component and unenforceable, why should the variation to the component be unenforceable? If the agreement is still intended broadly to be enforceable, the parents have not chosen to go back to the free and easy route that they were subject to like the rest of the folk who agreed to everything. The fact that I have agreed a variation in an otherwise enforceable regime means that I am a good person and I have worked out something consensually with the other partner that I could not work out previously by agreement. But then, if they defy the law and my agreement, why can't I enforce it? It seems to me that the argument that you take yourself out of the enforceability regime falls down.

Ms Pidgeon—I think it was a constitutional issue, wasn't it, Alison?

Ms Playford—I think it was a general kind of concern as to how people get out of the loop of going back through a court process to change their order if, several years on, their circumstances change. People come to agreements and then they might renege on it and seek to enforce in a contravention application their original order, and the person says, 'I was relying on the fact that we had reached this later agreement.' That is difficult.

Mr MELHAM—It can be framed in a plain English way, that any variation on the early order is unenforceable unless it is confirmed by a court. That is what I understand the intention is.

CHAIRMAN—Couldn't that provide a disincentive for people to enter into parenting orders? You might well have an enforceable order and then if you want to vary it, to try it out, for instance, you might want to enter into some sort of spirit of reconciliation with your ex-partner. If the effect of that is to deny you the court order which is really what you ultimately wanted, why on earth would you sign a parenting agreement?

Ms Pidgeon—You would not be doing it if the order was still okay. You would only do something like this if you thought the order no longer worked in that family.

CHAIRMAN—Sometimes a lot of people go to a court and spend a lot of money to get an order. They might have got one which was called a custody order, and that is exactly what they want, but they can see that it is in the child's interests to be a little more flexible. But if the price of that flexibility is the loss of the secure protection the party previously had, wouldn't that make people disinclined to enter into parenting orders?

Ms Pidgeon—It may, but the alternative is to say that they do not have any way of changing without going back to court.

Ms ROXON—Because the registration of parenting plans has been removed, is any consideration being given to having some registration process if you are varying an existing order? Duncan's point that, if you have always been in agreement, the parenting plan is a different situation from one where you have had to go to a court process.

Mr Duggan—The concept here is effectively about giving people an option to vary an order without necessarily going back to court. Once you start introducing provisions like registration and what have you, that is exactly what you are talking about, because you would register with the court.

Ms Playford—You may get consent orders.

Mr Duggan—Yes, you can certainly go back and get consent orders if you want to, but the idea is that you are able to resolve these matters without reference to the court at all. It is a bit like a binding financial agreement in relation to those matters.

CHAIRMAN—Obviously this is a matter we are going to have to look at quite seriously in our inquiry. We want to take whatever time we need to deal with this properly, so I do not want to cut off any debate. However, we do have a wish to finish at four o'clock. How much longer is your presentation?

Ms ROXON—Because I am in the awkward position of having two hats—one as a committee member and one as shadow minister—I had hoped that this briefing would be sufficient. If it is not, I might have to put you on notice, Mr Duggan, that we might do what we normally do, which is to seek a briefing from the Attorney's office. No doubt, you will all then have to turn up to do that. I am happy if that means we ask the questions, but it will not really resolve the problem of needing to go through these things anyway.

Mr Duggan—I will try and go a bit more quickly. The key ones are on page 17. Schedule 1 is probably the crucial schedule in terms of the key changes. On page 17 we have got the effect of a parenting order. This is the issue we talked about before about the need to consult and try and reach agreement in relation to major long-term issues.

Ms ROXON—Does that mean, in relation to the other issues that we briefly went through that were the major long-term ones, that there is the potential for litigation over those?

Mr Duggan—Of course. That is why we are particularly concerned to make sure that the family dispute resolution services are available as soon as possible so that they will be able to give support to people in those circumstances. The dilemma is that you give no meat to the idea of what joint parental responsibility means. As you know, there was a very strong push for the idea of 50-50 sharing. The committee rejected that but said that the legislation needs to give some real teeth to the concept of joint parental responsibility. This is the government's attempt at doing that so that it does mean something. Even if you do not have regular contact with a child, it does not mean that you should not have a say in these long-term issues which affect the child's long-term development, such as their name and religion and major issues relating to health. That is the concept.

Ms ROXON—That is the concept, and will that create a new area that is contestable in the courts, or really is that already contestable in the courts?

Mr Duggan—It is an area that is contestable now, because already, if you look at 61C of the legislation, parties have joint parental responsibility. It has never been a matter upon which there has been a lot of litigation up to now but the dilemma is that there is very significant group of stakeholders who say they are excluded from the lives of their children and the government is trying to reflect the views of those people by saying, 'You may not necessarily have the child living with you for any major amount of time but that does not mean that there is not something of value you can add.' Yes, there is the potential there for there to be litigation. That is why we are hopeful that when these provisions came into force there will be already significantly more family dispute resolution services that will be able to assist people with these decisions.

Ms ROXON—When you say you are hopeful that there will be, the provisions of this bill change the hierarchy of those deadlines whether or not the government rolls out its family relationship centres in those times.

Ms Pidgeon—They will come into effect before there will be the full number of services, that is true.

Ms ROXON—This bill does not just deal with stage 1 and say, 'While we've got no centres, this is what is required, and when we've got X number—

Mr Duggan—It does in terms of compulsory dispute resolution prior to going to a court, as we have explained.

Ms ROXON—It has a hierarchy for the dates but it does not have any connection with whether or not the centres actually do get rolled out within that time.

Ms Pidgeon—It is our job to make sure that that matches up. That is in relation to compulsory dispute resolution. These other provisions will come in earlier.

Mr Duggan—That is true. I might just point out 65DAC subsection 4 and that that provision is designed so that organisations like schools, hospitals and what have you do not need both parents' consent on every issue. They can take the fact that one parent has consented as being enough.

Mr TURNBULL—Where is that?

Mr Duggan—That is that the top of page 18. There was a concern that by going this road we are requiring hospitals and schools to have both parties' consent. Item 26 concerns the issue we discussed before with Ms Roxon about primary considerations and another considerations. This is a major change to section 68F, which is the provision under which a court determines the best interests of the child. The government has decided that there should be two major considerations in that regard, and they are as set out in item 26. The remainder of the provisions in section 68F subsection 2 will be additional considerations. The primary considerations will be those two I have indicated and the other considerations will have lesser weight.

Ms ROXON—Since you are going to be writing a briefing to us on a whole lot of things, I noticed in the explanatory statement that in a couple of areas there is a comment that this is consistent with the Convention for the Protection of the Rights of the Child and that there are others where it is surprisingly silent on it. Given that this does introduce a hierarchy, can you give us a rundown of how you think that changes any of our obligations or anything under that treaty?

Mr Duggan—I think they were the major issues that I wanted to raise with you in relation to schedule 1, unless there is anything else in that schedule that you want to discuss. I am just noting the time.

Ms ROXON—The provision in relation to relatives does not essentially change what the court can do; it just spells out that all of those people are relatives. The courts can already make those orders, can't they?

Mr Duggan—That is right. There is an argument about that. I will move on to schedule 2. The first change of significance is in item 2 of that schedule, which deals with the standard of proof. Effectively what we are making clear is that, where the court is considering only civil sanctions in relation to a matter, it will adopt a bare civil standard of proof. Where it is considering criminal sanctions, it effectively uses the criminal standard. There is arguably significant frustration exhibited by a number of parties seeking to enforce orders when in fact they cannot overcome what is commonly called the Briginshaw test. We can explain that in our submission. But, effectively, it is that, where a court is giving consideration to criminal penalties, it tends to

enforce a higher standard of proof, which many parties seeking to enforce simply do not fulfil, and that has led to significant frustration. On the other hand, there is an argument that a court that inflicts criminal sanctions on someone ought to be doing that in exactly the same standard that applies in a criminal court. This is just simply making it clear that that is the intention.

We have given a number of other options for the court to consider in relation to where there has been a contravention of an order, even in the situation, for example, on page 24, section 70NEAB. We are getting to a lot of NEABs and such things, unfortunately, in this legislation; it is sometimes quite difficult to follow. Section 70NEAB basically gives the court a power to make an order to compensate a parent for time lost, even when someone had a reasonable excuse for contravening the order. So, notwithstanding the fact that there was a reasonable excuse, the court thinks it is appropriate to say, 'Okay, it was a reasonable excuse, but in these circumstances we will still award make-up contact.' The court can do that. It was not clear before.

Ms ROXON—Where does that come from? That was not something that the committee recommended.

Mr Duggan—No, indeed not. The government is still concerned about giving the court the greatest armoury, if you like, in relation to enforcement of contact orders—based on one argument, it is the reason we are here even today—because of the perceived dissatisfaction by a very significant group of stakeholders about the lack of enforceability or enforcement of orders from the court.

Ms Pidgeon—This was referred to in the report. It also came up in the consultations that we had late last year on the proposed changes, that compensating—

Ms ROXON—By whom?

Ms Pidgeon—It was brought up by a number of people. There were some concerns about a different provision, which we did not end up putting in, which was that, if there were breaches of orders, the court must consider giving residence to the other party. That was considered to be of great concern where there might be violence or abuse. A worried parent does not hand over their child for contact, because they are genuinely worried about abuse; but then they are more worried about the residence being changed to the other parent and therefore do not withhold contact. So there are a lot of arguments around that. One of the suggestions was that a lesser problem would be make-up contact. That was popular with the men's groups we talked to because many men are not in a position necessarily to have their child living with them all the time but are missing out on contact, and make-up contact was more immediately an effective order than the possibility of a change in the residence arrangements.

Ms ROXON—So the only compensation that is envisaged is making up time?

Ms Pidgeon—No, that is the only one that is envisaged in this particular provision.

Ms ROXON—It is not compensation for someone who says, 'I didn't get my contact for the weekend so you should pay me $100 or whatever'?

Ms Pidgeon—This is time. There is also another provision—

Mr Duggan—Yes, that provision does exist. It is item 6 on page 26.

Ms Pidgeon—But that is for the compensating for wasted tickets.

Mr Duggan—That is right. That is the provision that relates to where effectively you have had costs thrown away. You have had expenses, and that is the provision that gives the court the power to consider those. It is not obligatory. It is purely discretionary. That provision is designed to allow a court to order compensation in circumstances where there has been a pecuniary loss by a party who, say, has flown from Brisbane to Sydney for contact and it has not been achieved.

Ms ROXON—I think we might get stuck on that one for too long if I go into that in any more detail.

CHAIRMAN—It is an issue for consideration.

Mr Duggan—Items 5 to 8 effectively give the court a greater armoury of powers. They allow for an awarding of costs against the party who has contravened. They allow for an order to make up contact time. There is the concept of a civil bond.

Ms ROXON—Is that new?

Mr Duggan—That is new—section 70NGA.

Ms ROXON—Whom does the money go to when you pay a bond—the court?

Mr Duggan—It would go into consolidated revenue. It would be paid to the court.

Ms Pidgeon—The bond is repaid if it is not breached.

Mr Duggan—Of course the bond may not be with any surety at all. It is simply that you still may suffer a penalty if you breach the bond. It is a matter for the discretion of the court. We also have in these provisions the effect of the parenting plan. That is given in both stage 2 and stage 3 of the order. That is set out in sections 70NEC and 70NGB.

Ms ROXON—You can take it that we have got the same concerns about how that proposal operates.

Mr Duggan—That is why I did not go into those provisions. I presumed you had those issues. Those are the main changes in relation to the enforcement provisions of the legislation. Unless you have any questions on schedule 2, I will go to schedule 3.

Schedule 3 sets out the government's proposed provisions in relation to making proceedings in the Family Court and other courts that have jurisdiction under this act less adversarial in relation to children's matters. Many of you may have heard of the children's cases program in the Family Court. To some extent the genesis of these provisions is drawn from that project, but they are designed to be more general provisions and to pick up many of the ways of proceeding that, for example, the Federal Magistrates Court operates under now. The intention is that there would be a much more court managed or judicial officer involved process. The judicial officer is obliged

to do a range of things. Subdivision C sets out what the issues are. You will see, for example, that there is deciding which of the issues require full investigation and hearing. There is also deciding the order in which the issues are to be decided. There is giving directions or making orders about the timing of steps to be taken. There is making appropriate use of technology. There is a whole range of things that the court must initially do. There is a provision that allows the court to make determinations and findings and orders at any stage of proceedings—section 60KF. In subdivision D there are provisions which make it clear which rules of evidence are not to apply in relation to matters under part 7 unless the court otherwise determines.

Ms ROXON—I wish to ask a question as to the whole schedule. I understood that when the children's cases pilot started in the Family Court in Sydney there was a time frame for a report on it. I know we are still not at the end of the pilot time or report-back time. I know that everyone has agreed that there has to be legislative change if we want to implement it more broadly, but is this assuming that the pilot's early signs are good and everyone is going to go this way? I am not asking you to make a political comment. I am just trying to understand the timing.

Mr Duggan—I think the government is convinced that a more judge managed and less adversarial process is an appropriate way to go. What it is attempting to do with these provisions is give the court a general parameter, a general framework, within which to work.

In our view, these provisions will not require, for example, the Federal Magistrates Court to adopt the children's cases process in that court. They will require them to adopt a less adversarial approach—in many cases, exactly what they are doing now. But the view of the government is that there does need to be a less adversarial approach to judicial determinations in the family law jurisdiction generally, and this is the government's attempt to give effect to that. As the explanatory statement indicates, much of this had its genesis in initiatives in the UK and so it is not unproven: these provisions are operating regularly now in other jurisdictions.

Ms ROXON—The explanatory statement also refers to the pilot that is going on. What is the time frame for reporting back on the pilot? You have consulted the courts on this anyway.

Mr Duggan—That is right. The court has been very heavily involved in the determination of these provisions and is currently evaluating the 100 cases in both registries. It is about to roll out the process in Melbourne. The initial findings that we are aware of are very promising in relation to the children's cases program and approaches of that sort, and the government thought it was appropriate, particularly in the light of the very strong recommendations from your committee about there needing to be a different process for dealing with these things—the committee recommended a tribunal.

Ms ROXON—So these provisions are partly from the early signs from the pilot, partly from what happens in other jurisdictions and partly from your consultations and other things with the court?

Mr Duggan—That is right.

Ms ROXON—So as a committee we could expect to get a fair number of submissions on this area, because it would not have been seen by them or by other participants.

Mr Duggan—I think the detail might have been seen. I think people are aware and the government, in all of its material up to now, has been indicating that it would go this way, so some of the—

Ms ROXON—But our job is to deal with the actual provisions.

Mr Duggan—Absolutely. You are quite right. None of these provisions, in this sort of detail, have been exposed to anyone except for the stakeholders I mentioned, which effectively are the courts.

Ms ROXON—Okay.

Mr Duggan—I think one issue that the committee may wish to consider is whether the balance between the general duties under section 60KE, which are what a court has to do, and its powers under section 60KI, which are things that the court may do, in fact creates the appropriate balance. Some of that was quite difficult in terms of its genesis and so there are issues as to whether that balance is the correct one.

You will not be surprised to hear that we have received significant constitutional advice on the issue of less adversarial proceedings. That advice suggests that for parenting orders in particular there is a significant basis for a less adversarial approach in relation to those provisions. It is less clear in relation to property matters. But, certainly, in relation to children's matters where it is not a contest between the parties but a determination by the court as to the best interests of the child, the High Court's view is that there is a much greater range of options available in relation to a less adversarial approach than there might well be in relation to property proceedings. None of these models have gone with these provisions in relation to property proceedings. You can consent to them, as you can now, under section 190 of the Evidence Act, but these provisions would apply primarily to litigation under part 7 of the Federal Magistrates Act.

Mr TURNBULL—What is the nub of the constitutional point?

Mr Duggan—The argument is that this less adversarial or arguably more inquisitorial approach to decision making is not an exercise of judicial power under the Constitution. The advice that we have is that, because what the court is actually doing is making a decision as to the best interests of the third party—that is, the child—rather than making a determination between the two warring litigants, if that is the right word, it is performing a different function than it would be if it was making a determination as to property settlement.

Mr TURNBULL—There is a traditional protective jurisdiction in the Supreme Court, in the common-law courts.

Mr Duggan—It might well apply to that court as well. The High Court is not—

Mr TURNBULL—What I am saying is that there is a long tradition of protective jurisdiction in the courts, because we have such a court system.

Mr Duggan—It is the parens patriae jurisdiction.

Mr TURNBULL—Yes. So why is this different to that?

Mr Duggan—I am not suggesting that it is different.

Mr TURNBULL—If it is not different, then in the parens patriae jurisdiction there is clearly a judicial function being exercised; therefore, this must be a judicial function.

Mr Duggan—This is an issue about, firstly, how much of the parens patriae jurisdiction the Family Court does have. There are issues about that in the High Court decision in, for example, B and P, the children in detention case. But there is concern in relation to the Commonwealth, which does not traditionally have a parens patriae jurisdiction. The Supreme Court has it as part of its residual jurisdiction, if you like. So we simply want to make certain about that.

Mr TURNBULL—What about the section 51 marriage power, the marriage and matrimonial causes: why is that limited by a judicial function?

Ms Pidgeon—It is the style of the proceeding that changes it. The marriage power gives the power to have proceedings, but the style of the proceedings is the problem in whether it is an exercise of judicial power under the Constitution.

Ms ROXON—It is a case of what you can let the court do and what some other body might be able to do, presumably. The Commonwealth could have power. It does not mean that it has to be given to a court.

Mr Duggan—I do not know whether you have seen one of these in operation, but the judge operates extremely differently from the way a judge would normally do in a superior court of record. The judge very much determines the way the proceedings will run, what evidence will be presented, how that evidence will be presented and when it will be presented.

Mr TURNBULL—Picking up what Nicola said, can a judicial officer exercise what are arguably non-judicial functions?

Mr Duggan—A different judicial function, depending on your point of view.

Mr TURNBULL—Yes, the proposition being that it is a non-judicial function.

Mr Duggan—Yes, that is right. Our advice is that they can in these circumstances.

Ms ROXON—I am not sure whether the committee needs this, but I think it would be useful because, presumably, one thing the government would not want is the legislation to be able to be knocked over by any issue like this being contested.

Mr KERR—We cannot stop those.

CHAIRMAN—The government would like to.

Ms ROXON—I am not sure whether there is any benefit to the committee having access to that advice.

Mr Duggan—That is a matter we can raise with the Attorney-General, and I am happy to do that.

Mr TURNBULL—Even if you cannot provide us with the advice, it would be good to get a brief on that. I would have thought a judicial function is what a judge does.

Ms ROXON—Not according to the High Court.

Mr TURNBULL—Nicola, if you think about the procedures that are used in the Supreme Court for commercial lists and so forth—

Mr KERR—They vary enormously.

Ms ROXON—The Supreme Court is not bound by this.

Mr TURNBULL—I appreciate that, but they are unquestionably judges doing judicial work.

Mr KERR—I cannot believe that you would be precluded from having a less adversarial form of proceedings. It is the judicial function that you cannot intrude into.

Mr TURNBULL—As long as the two-counsel rule is observed; that would be important.

Ms ROXON—Let us get to the nub of the real issue!

Mr TURNBULL—That is right.

Mr KERR—At the end of the day, what determines whether a matter is judicial is whether the court makes binding determinations of legal rights. In this instance, plainly it is making binding determinations of legal rights.

Mr Duggan—That is true. But there is also the issue of how you get to that determination and whether the operations of the judge along the way are also—traditionally a judge would have acted almost as an observer, watching the proceedings unfold and allowing the parties to present their cases and let the adversarial approach—

Mr KERR—But there is nothing in High Court jurisprudence that says the mode of trial must be adversarial.

Mr Duggan—I am not arguing that this is.

Mr KERR—There is no constitutional doctrine at all to that effect.

Ms ROXON—Anyway, we would like the advice if it is available. If it is not, we will have to rely on the government having made sure the legislation is constitutionally valid, as we do the rest of the time. But it would be interesting to see it.

CHAIRMAN—Malcolm has said that if we unable to get the advice perhaps we can get a resume of it.

Ms ROXON—Yes.

Mr KERR—We have this all the time, Mr Chairman. It really does help, even if there are doubts. I think the government takes a view that if any caution is expressed in advice that it receives it is best not to publish it because it suggests that the advice is in some way capable of being used by those who would suggest that there are doubts. It is often the case that you cannot be absolutely certain about what the High Court would finally conclude in relation to a matter. I think it is realistic. It helps this parliament if we are open and transparent about these matters, and obviously it is up to us to act a bit responsibly in respect of those sorts of considerations.

Mr Duggan—It is certainly a matter we will raise with the Attorney. That is all I wanted to say relation to schedule 3.

Ms Pidgeon—I do not think we need to spend much time on schedule 4, thank goodness. It takes up a fair bit of paper, but it is essentially housekeeping. I will say in a few words what housekeeping it is intended to achieve, and then, if you have any questions, that will be fine. This is the part where we used to talk about primary dispute resolution. We have moved away from that language because it was a bit confusing and people did not really know what it meant. We are now going to talk about family dispute resolution. The provisions in the act that talked about counselling, mediation and arbitration had been a bit confusing. Everything had been called primary dispute resolution, without necessarily making it clear what it meant at any particular time. So we have tidied up the language by talking about family dispute resolution and family counselling and making a distinction between those two different processes. Obviously dispute resolution is intended to try and resolve issues in a dispute either partially or fully. Counselling is more about dealing with the relationship issues or personal issues involved in a family breakdown.

Ms ROXON—Where does mediation fit in those?

Ms Pidgeon—Mediation is dispute resolution. Mediation will not be referred to anymore—we talk about dispute resolution. Arbitration has not changed. It has been tidied up a little bit, but we have not changed any provisions in relation to it. The main reason for these changes, apart from tidying up, is that we needed to be quite clear what we were talking about when we talked about compulsory dispute resolution. We wanted to make sure that, when people were required to attend a process, the process was intended to try and resolve the dispute, not just as personal counselling. That is one reason that we decided we needed to be much clearer in the language.

Secondly, we wanted to make it clearer what happens inside the court and outside the court. Based in the court there has been what the court used to call counselling and in more recent years has been calling mediation, which is intended to try and resolve disputes after a matter has been filed. We expect, with this new requirement for people to attempt to resolve disputes before they go to court, that the cases of those who attempt to do that will be different types of cases once they get to court. They will be the harder cases, where they either have not been able to resolve things outside in community-based services or the cases involve violence, abuse or other reasons that they may not have had to go to community-based services. In recognition of that

and the fact that the court wants to change to some extent its processes to reflect the new family law system, there will be a lot more dispute resolution outside before you get to court. The changes are to help make a better distinction between what happens in the court and what happens outside. But essentially that is to support the compulsory dispute resolution provisions.

Ms ROXON—Could you explain how subdivision B 10E, on page 48, about the changing of the process for the approval of family counselling organisations, works? It seems to me that that will have quite a significant practical impact on who the service providers are or might be in the future.

Ms Pidgeon—This reflects the current practice. This was a tidying-up provision more than anything, because in practice, family counselling organisations and family dispute resolution organisations that have been approved have been those that are funded under the Australian government's Family Relationship Services Program. That is the way it has been in practice. The law basically said that we could approve everyone, but under the program we have quality standards and we know the quality of the organisations. Therefore, it was important to make it clearer that the approval process relates to funded organisations. It is really a clarification of the practical reality.

Ms ROXON—Isn't it a bit chicken and egg? You say that organisations can do it if they are funded and that is the way we get quality control rather than saying that the organisations that meet this quality control standard are the ones that can be funded.

Ms Pidgeon—In fact that is done through the process for selecting. You do not have to be approved to get selected to be funded. You become approved once you are funded.

Ms ROXON—I understand that, but I do not see then how this gives any quality assurance control. All it says is that it depends on who the government decides to give the money to.

Ms Pidgeon—What we call the tender process, which is the selection process, includes quality standards. However, before we get too worried about that, in the future we are proposing to move to accreditation standards anyway. Instead of approving the organisation, we want to move to accrediting the actual practitioners. That will be across funded and unfunded organisations, so private practitioners—

Ms ROXON—Then this will be obsolete before it is even in.

Ms Pidgeon—No. This will be in effect for a period of time. It will take us at least a couple of years to get the accreditation process established.

Ms ROXON—I know people are catching planes, so can I ask that we get a bit more information about how this compares to the existing process and how it relates to the quality control. It seems that our interests should be ensuring the quality control, not ensuring who gets the funding. That is a separate decision for government. The legislation, though, should either be dealing with quality control or not and not really with the funding side of it. It seems to me to be a bit mixed.

Ms Pidgeon—The funding was already in there. We will just be providing more clarity. There were already provisions about funding and approval. We were making it clearer what the relationship between them is. We are very happy to provide that further information—and on what we hope.

CHAIRMAN—Where we finished the presentation, I was going to invite any member who had questions and has not had the opportunity of putting them to submit them to Joanne. She will pass them on to Kym for a response. I think that this is a very important area and I am sorry that we do not have quite enough time. But I do think that anyone who has questions should have them answered. So, Nicola do you want to think of a list of questions?

Ms ROXON—Without wanting to put too much pressure on the department, does that mean we will get the answers to those questions before we have the other public hearings? It seems to me that we would want to.

CHAIRMAN—I would hope so.

Mr Duggan—We will undertake to get them as soon as humanly possible. We certainly would expect to have them this week, depending on the question, of course.

Mr MELHAM—What is the time frame for the department's submission? When do you think we will have that?

Mr Duggan—We might seek some guidance from the committee. I anticipate that we will probably answer specific questions first and then give our submission, if that is agreeable to the committee.

Ms ROXON—I think it is important to get it in enough time before the other public hearings so that we have been able to read it and to discuss it amongst ourselves, if we need to.

CHAIRMAN—That is a fair comment. I also think that Kym should have the opportunity to answer the questions, as he suggested.

Mr Duggan—Schedule 5 is effectively the range of provisions which needed to be amended in a whole series of legislation to reflect the removal of the words 'residence' and 'contact'. 'Residence' is now effectively replaced with an order 'with whom a child will live'. 'Contact' is replaced with the term 'spends time with'. The intention is for entirely neutral terms. The other thing I did not mention in terms of the government's response to the *Every picture tells a story* report is the education campaign, which has at least got funding for two years, to attempt to explain to people the reasons behind the changes that are proposed and, in particular, to emphasise the benefits of joint parental responsibility and that sort of involvement in the child's life. That will roll out probably—

Ms Pidgeon—When the changes are going through.

Mr Duggan—Yes. It will probably be sometime next year. That is really our presentation, Mr Chairman.

CHAIRMAN—Thank you. I have a few questions here which I will pass over to you. In particular, I am interested in what criticisms of the draft you are anticipating. I think the Shared Parenting Council has already criticised the bill. I am interested in your comments as to what they are saying in their media releases, which I suspect you already have. I will pass those over. I invite other members to give Joanne questions as soon as possible, because the sooner we get the questions in the sooner we get the responses. Could you let us have those responses as quickly as possible and then your submission as early as you can. Then we can take it from there. Are there any further questions?

Mr KERR—I have a question that is a wee bit off where the focus has been. It is about the arbitration provisions and picks up on what I think you have explained as a tidying up exercise. Those provisions gives the court the power to order matters to go to arbitration. I also notice that arbitrators need to be privately remunerated by the parties.

Ms Pidgeon—That is not a change; that is all in the current act.

Mr KERR—So what are the changes in this?

Ms Pidgeon—Things were scattered around that whole part of the act. Michelle can talk about the arbitration.

Ms Warner—We did not make any substantive changes to the arbitration provisions. It is just that we have reordered the whole act and taken out parts 2 and 3.

Mr KERR—Now it is quite visible. What are the circumstances in which a court would order unwilling participants to go to—

Ms Warner—They cannot order them if they are unwilling.

Mr KERR—They can.

Ms Warner—They can only order them with the consent of both parties.

Mr Duggan—We removed that provision. You are quite right: there was originally a power for the court to do that. That provision no longer exists, on the basis that we had advice that there were issues in relation to its constitutionality.

Mr KERR—That is what I was worried about. I am misreading it, then. You are telling me that is gone now.

Mr Duggan—Yes, indeed. We were not changing that with these changes at all. You have to consent to be sent to arbitration.

Mr KERR—Can you clarify that, because on my reading it stood out as though you didn't. I am quite happy to be corrected.

Ms ROXON—This is why I think the table that you are going to give us will be more helpful if it does not just relate to how this matches up with the committee's recommendations from the

previous report but actually tells us which things have simply been moved, which ones are tidying-up exercises for something else and which ones change the existing provisions. Even a mark-up copy of the bill is not going to show us that as clearly.

CHAIRMAN—Thank you all very much for coming along and for being on the spot. If you could get back to us on our questions and your submission, that would be great.

Committee adjourned at 4.02 pm