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

WEDNESDAY, 20 JULY 2005

MELBOURNE

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 20 July 2005

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

Members in attendance: Mr Cadman, Mrs Hull, Mr Kerr, Mr Price, Ms Roxon and Mr Slipper

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 re-open 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 9.04 am

BARTFELD, Mr Martin, QC, Immediate Past Chair, Family Law Section, Law Council of Australia

KENNEDY, Mr Ian, AM, Chair, Family Law Section, Law Council of Australia

CHAIRMAN (Mr Slipper)—I declare open this public hearing of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. I welcome everyone here today. The Attorney-General has asked the committee to examine the provisions of the exposure draft to determine if they implement the government's response to the report of the Standing Committee on Family and Community Affairs, *Every picture tells a story.* We are on a fairly short time frame and I thank you all for coming on short notice. The committee has been explicitly directed by the Attorney-General not to re-examine policy issues already canvassed in the previous inquiry and the committee is grateful that witnesses have been able to attend at short notice and make submissions where possible.

I welcome the representatives of the Family Law Section of the Law Council of Australia. I gather we got your submission yesterday afternoon. Even though the committee does not at this stage require you to give evidence under oath, I advise you that the proceedings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee has received the executive summary of your submission, and I think we now have the full submission as well. Both documents have been authorised for publication. Would either or both of you like to make a brief opening statement and then we will turn the white light on and subject you to questions.

Mr Kennedy—Thank you. We are most grateful for the opportunity to appear before you today. This is a very important piece of legislation which affects our profession and also profoundly affects the entire Australian community. The family law section is the largest section of the Law Council of Australia and, as you will be aware, the Law Council is the peak national body for the legal profession, incorporating all of the law societies and bar associations of the states and territories of the Commonwealth. The family law section has over 2,000 individual members, all of whom are practising lawyers, throughout the country. As a profession we have now had over 30 years experience with the Family Law Act—its 30th anniversary of operation is January next year.

The members of our section represent parents and children from the very beginning of the process of separation through to finalisation of their family arrangements. In the course of that journey—and it is a real journey for most people, and for the vast majority of people it is fortunately a journey that does not end up in the legal system or the courts in a contested dispute—there is that relatively small number of families who have difficulty in resolving the issues that arise from the breakdown of the relationship between the parents and the impact that that has on the children. It is that particular group that the legislation itself and no doubt the inquiry itself is focusing on in the proposed amendments.

As you say, it is a little unfortunate that there has been so little time to consider some 316 amendments and 114 pages of draft legislation. We have done the best we can in the time available. We hope we have picked up most of the issues that may be of interest to the committee in the drafting of the legislation. If we can be of continuing assistance—in the past we have worked with the department on technical drafting issues—we are more than happy to continue that process.

The national profession endorses the policy initiatives and intentions underlying the proposals. We are well aware of the terms of reference and in particular the need to ensure that the court process is easier to navigate and less traumatic for parents and their children. Our submission is really focused on that aspect of it and the technical issues underlying it. Our principal concern is to see that the policies underlying the legislation are brought into effect in a way which is workable, effective, intelligible and accessible to the general public; that preserves and protects the welfare of children; that does not inadvertently encourage inappropriate disputation between parents—there are some aspects of the current drafting that has that potential, and I will perhaps talk to you about that; that does not create confusion or undermine existing well established protections; that reduces rather than increases complexity; that, more importantly, works in a way to reduce the costs to parties who are in the unfortunate position of suffering marriage breakdown, which is very economically dislocating for them in any event; and that, above all, creates as much certainty as possible for families confronting the consequences of marriage breakdown.

In our submissions we have followed the five schedules to the bill and have provided detailed comments on those parts of the amendments which we think might be helpful to the committee. We have also added a few general structural comments, which I will talk to you about in a moment, and we have made some 50 recommendations, as to areas of the draft, which might usefully be considered in the committee's deliberations.

Before we go to the detailed schedules it may be helpful if I talk about those two or three general structural things. Over the 30 years since the act was introduced, it has been amended in a significant way, on average, almost every year. As a consequence, part VII on children, the part we are talking about, has become very complex and difficult to navigate, and provisions which should go together are often many pages apart in the legislation itself. For example, parental responsibility and parenting orders are introduced in division 2, but they are not explained or defined until division 5, which is some 22 sections, or 10 pages, later on in the legislation. The criteria for parenting orders, including the paramountcy of the welfare of the children, is found in division 6, but it is not for another 90 sections, or 40 pages, of legislation that we actually get to see the mechanism for considering 'best interests'. The jurisdiction of the court to make orders in relation to children and on who can apply for orders does not present itself until some 90 pages, or 130 sections, into part VII. So there is a structural problem whereby even we as lawyers find it very difficult to negotiate our way around a very complex piece of legislation—and there will be more changes. Our recommendation is that, when this redrafting process is going on, consideration should be given to trying to remove that confusion and to restructuring part VII in a more logical and helpful sequence with the relevant provisions grouped together.

Similarly, in part VII there are some 40 individual sections which contain definitions of one sort or another, a number of which are very major definitions, and that is in addition to the definitions in section 4 at the commencement of the act. Again, we recommend that some

consideration be given to preparing a comprehensive dictionary which would bring all those definitions under the one heading and be easily accessible to people who are trying to use the legislation. So there are a few structural things. As we mentioned in our submissions, there is also the rather narrow definition of 'abuse', which comes under the definition area, and a number of well-established types of abuse of children are not reflected in the current definitions. So again there is a recommendation that consideration be given to broadening and refining that definition. Those are the preliminary matters. We are now in your hands as to how we can best assist the committee.

CHAIRMAN—Mr Bartfeld, do you have any introductory comments?

Mr Bartfeld—No. I will participate in the discussion, if there is to be one, but I have nothing further to add.

CHAIRMAN—I do not know if my colleagues have any questions at this stage. We are very fortunate to have on the committee Mrs Kay Hull, who was chair of the family and community affairs committee, so we do have some continuity—and I think Mr Price and Mr Cadman were also on the committee—although we are not to reopen those issues.

Ms ROXON—I would like to ask a couple of questions. I am working from the executive summary because we did not have the full copy very far in advance of this hearing. I want to ask you about the parenting plans overriding the parenting orders of the court. I have noticed that you say in your submission that you do not have any general objection to that.

Mr Kennedy—No, we do not.

Ms ROXON—You say that you want to make sure that they are in writing and signed and that there is a cooling-off period. Can you explore for us why you would be confident that that is sufficient protection. Obviously, plenty of parties do agree, subsequent to court orders being made, that there are appropriate variations. How is it that you would feel confident that those parenting plans are sufficiently consensual? What sort of status do you believe they should be given? We have had some discussions about concerns. From a practice point of view, you would be able tell us that consent orders are made, varying court orders, all the time. Would you talk us through that and talk about why you are not concerned at all about that.

Mr Kennedy—Yes. I am very happy to do that. In the first place I should say that it is not so much that we are not concerned. We have worked on the basis of the terms of reference in that the underlying policy considerations are to be maintained. So we are looking more at the technical aspects and at how we can provide the best protection. In the 99 per cent of cases where people do make their own arrangements successfully, often in the tidying up process of the marriage orders are made so that everyone knows where they stand with the children. That is by consent, and the vast majority of cases that go to court are dealt with by consent. As you properly observe, as time goes on circumstances change. What was agreed at the time is not necessarily any longer the best arrangement for the children.

I had a perfect example of that just last week. A male client I was acting for was complaining bitterly that his wife was not encouraging the 13-year-old to come and see him or to answer his telephone calls when he rang. We looked into that a bit. You know what 13-year-olds are like:

they are looking for their independence; they have their friendships and their activities. It is not always convenient. Dad had a habit of ringing up in the early evening when the son was in the middle of homework. He would tend to say, 'I can't talk to him now. I've got to get this done.' These were things the father had not thought of. Once we explored that, the scales dropped away and he said, 'I see it is not her fault. I have to readjust my own thinking.' That is an easy adjustment to make for people who are sensible.

The big issue in this area is that core group of people who are finding it difficult to cope with the breakdown of the marriage, the separation and the underlying issues that go with it. I have seen a number of recent instances where women in particular have been really coerced into agreeing to a change to an order in circumstances that are not appropriate. We do not want to discourage parents from being able to vary an order informally but in a way that you can rely on so that someone is not trotting off to the court later on and saying, 'Look, she didn't comply with the order,' even though they had agreed to change it. On the other hand, you do need a degree of protection to deal with those situations of power imbalance and circumstances of that nature.

Another very recent example this week was a mother who was admitted to a psychiatric hospital for a short period of treatment. The father and his brother descended, grabbed hold of the children and took them away. They got her to sign something saying: 'I've got to go into hospital. You can have their custody.' She had no capacity to agree to do that. That is why we are saying that if we are going to have that process it needs to have in-built protections. The current drafting does not require it even to be signed; it just has to be in writing. I suppose that if one person wrote: 'We agree that,' technically that would be sufficient. We would suggest that if we are going to have that process it should be in writing and it should be signed and dated by both parties. Most importantly, there should be a cooling-off period so that if someone in the position of that woman with the psychiatric difficulty needed to get advice, which in that case occurred—the rest of the family said, 'This is not right; let's sort it out,' and we did—that opportunity would present itself.

Ms ROXON—So you are confident that the signing, dating and some built-in cooling-off period would be sufficient protection? I know we are only talking about the core number of cases where relationships are at risk, rather than the much larger number of cases that can come to some consensual arrangement.

Mr Kennedy—No, we are not confident at all. It is a question of what are the best protections. Any provision of that nature should be subject to an overriding discretion in the court which exists anyway. But I think if you read the draft legislation holistically, if the matter is brought back before the court then the court will have regard to the most recent parenting plan but is not bound by it. If there are circumstances surrounding the entry into that parenting plan then the court would have the discretion to vary it. That is what we are trying to avoid as far as possible.

Ms ROXON—Why is that any different to the filing of consent orders—I understand that there is no filing fee now in the Family Court anyway? Why is this actually an easier process than that?

Mr Kennedy—I think it is for most people, particularly given the focus on consensual resolution of problems between parties in public resolution fora that the legislation will set up

and which the overall plan that the government has in mind will establish. With the family relationships centres, if people are able to attend at such a centre and to resolve their problems in a practical and sensible way then all they need to do is sign off on that. The fact that there is an existing order in place should not require them to go back to the court to vary it. Even though there is no fee, there is still a cost factor in that; there is still the issue of having to prepare documentation in detailed form. I suppose, as a legal practitioner, one should be encouraging that, but in fact we do not; we try to get people to resolve their own problems outside the court system.

I think one needs to build in safeguards. There is no perfect solution. We see many cases of power imbalance. Take another example we were dealing with in court yesterday. A mother was permitted to return to Denmark with a child. There was a long history of family abuse in that family. The husband coerced her into signing a piece of paper saying that she wanted the orders revoked and would not go. You cannot have a perfect system to deal with that sort of problem other than the overriding decision-making process of the court if it arises. Of course, in that circumstance, the court dealt with it quickly and sensibly and it was all dealt with. But it did mean going back to court in that case. You do need the fall-back position of the final authority of the court.

CHAIRMAN—Because we have not had the opportunity of digesting the full submission as yet, I do apologise if some of the questions we ask are covered in your full submission. For the record, what elements of the bill do you have the greatest concern about? To what extent do you consider that the bill accurately reflects the government's response to the earlier *Every picture tells a story* inquiry report?

Mr Kennedy—It seems to us that it certainly reflects the policy of the government. That is why we say the profession nationally has no issue in relation to it. We may have disagreed about the policy before it was decided upon and we have had robust debate about that.

CHAIRMAN—We are not here to debate the policy; we are here to debate whether the legislative form of the bill adequately seeks to implement the policy.

Mr Kennedy—It certainly is focused very much on implementing the reforms. We acknowledge that. The only areas where we think we might be able to have some useful input are practical ones as to how that is best done and whether the way it is currently drafted and structured is going to fully achieve those objectives. That is what our submissions have focused on and that is the focus of the 50 or so recommendations that we have made —some are quite minor drafting ones and some are more major.

CHAIRMAN—Basically the criticisms, if you want to use that word, of the bill that you have relate partly to drafting, which of course does not affect the effectiveness of the bill, and also a number of items. Presumably, you have concerns about the extent to which the bill implements all of the government's response to that report. Some of your other objections might well relate to the fact that you do not agree with the government's response to the *Every picture tells a story* report in every respect.

Mr Kennedy—I do not think there is much we disagree with. I think it is more a question of making sure, as I said in the opening statement, that the final product is effective in bringing

about that implementation. There are a number of areas in each of the schedules which we think raise some more major issues and, as I indicated, a number of drafting issues that hopefully the committee can pick up and tidy up.

Mrs HULL—I am working from your small executive summary, but I note that in item 16 you strongly oppose proposed section 70NJ(2A) of the Family Law Act regarding automatic cost sanctions in contravention applications. You have also said that it is highly inappropriate to impose automatic cost sanctions in children's cases, even on a prima facie basis. The court already has sufficient discretion to order costs in appropriate circumstances, as I read from your item 16. How do you then get a deterrent? I have tossed this up and considered this time and time again. As a committee, we considered constant and flagrant breaches of contact orders. If somebody has properly constituted orders from the court, and the resident parent, as it is currently in the system, is not complying with those orders, it is then up to the person who is trying to achieve contact to pay continually. I have said this time and time again—they are applying back to the court to get those orders enforced, the court says to the offender, 'You must do this,' but it does not happen. The offender goes back out and the same thing takes place. We put in place legislation to send an offending person to prison. The court, it has been said to the committee, is very reluctant to do that because it could impact on the child. It may not be in the very best interests of the child for that to take place—and for many other reasons. But you say that the court already has sufficient discretion to order costs in appropriate circumstances. How often would costs be awarded against an habitual offender for not providing contact, and how many times do they have to go to court in order to get costs awarded against them?

Mr Kennedy—That is an excellent point. One of the hats that I wear is that of Vice-President of the International Academy of Matrimonial Lawyers, which is an international body representing about 30 different countries. This issue of compliance is absolutely an international and extremely difficult one. No-one in any part of the world has a solution to it. Lots of people have tried. Some of the American states have been quite innovative. California had a habit, regarding people who did not comply, of seizing their car keys when they came to court. Not having a car in California is a real problem, but that does not necessarily help the kids either if you cannot get them to school or sporting activities. In most case where there has been a flagrant breach, costs will be ordered. However, in many cases the people breaching the orders, and those doing it repeatedly, are people of very limited means. They will often have underlying psychiatric or other health issues, such as alcoholism, drug addiction and all sorts of social and other problems. Also, the mere imposition of a financial penalty on them is impractical for two reasons: they cannot pay it, and if they were to pay it the children would suffer because they would not have those funds available for other purposes.

We are not saying that there should not be costs. We are saying that the court should make costs in all circumstances where that is appropriate—and it already has a general costs power which it uses wherever it can. We are also saying that we need to look at other ways of dealing with it. In the recommendations which you have not yet seen in detail, we talk about things like imposing a bond which is conditional upon compliance with orders in the future. We have previously discussed with your committee things like weekend detention on the weekends when perhaps the other party has the children. But there is that group of people who, whatever you do, are not going to play the game and comply with orders. It really is an intractable problem. We absolutely recognise that. If anyone could invent a solution, it would spread around the international community like wildfire.

Mrs HULL—Because I have not read your recommendations, it is a little bit difficult for me. We did discuss all of the scenarios and we found it to be most difficult to determine how, when and why a judge, or a person responsible for resolving these issues in a court, would ever have the public courage to be able to do something significant about this. I am of the opinion that it only takes one or two judges with some very strong courage to send out a clear signal that children are entitled, all things being equal and positive, to know both their parents. I will be interested to read your recommendations.

Under schedule 5 of the draft bill, there is a removal of references to 'residence' and 'contact'. You indicate that you do not feel that changing the terminology will have any great effect and that it might cause additional unnecessary confusion without commensurate gains. The proposal that we are making at the moment is to try and change the thinking about the way in which separation and partnership breakdown takes place. We need to change the culture and change the thinking. I would suggest—and I would like your comments on this—that it sends a very clear message of just what is meant if 'residence' is replaced by 'lives with'. This tells you exactly what the child is doing, and the child will know exactly what they are doing. Then there is 'contact', which can mean contact across the room, visually, by touch or whatever. 'Contact' is replaced by 'spends time with' and 'communicates with'. That is very clear. Communication can be by telephone, by email or by spending time with children. Don't you think it is important that we try to take away the old-fashioned versions of custody—'I own the children'—and access—'You can have access if there is a reason'—and replace them with something more liveable for children? I am not talking about the parents; I am talking about the children. Do the children know exactly what is meant?

Mr Kennedy—We do not put that extremely strongly other than to make the point that this has been tried in a number of jurisdictions around the world. It is very difficult to overcome the entrenched concept of ownership of children that parents seem to have. Most clients, and most people in the community, still seem to talk in terms of 'custody' and 'access'. I am constantly saying to people: 'Sorry; we don't have those. We took those off the supermarket shelves 10 years ago. We replaced them with these other concepts.' I get the message across eventually but with some difficulty. I do not know if that changes the underlying thinking. I think our message would be: don't expect making those changes to be a panacea, and be aware that the terminology that is used has repercussions in terms of the international recognition of orders made in Australia and for Australia's obligations under international conventions that touch on family law issues.

The 'residence' and 'contact' terminology was not a total disaster in terms of Hague convention matters, for example, in Europe. Because England had already adopted that terminology—we followed it—Europe was familiar with it. We still have enormous problems with getting American courts to understand that 'residence' and 'contact' actually meet the criteria in the various conventions in terms of international child support, child abduction and a whole range of other issues relating to children. We need to be very aware that, if we are going to introduce this sort of terminology, we also need to have some provision in the act that explains to some of the people outside the jurisdiction what it actually encompasses.

CHAIRMAN—Before I ask Mr Cadman to ask questions, you might like to outline why you want an expanded meaning of the term 'abuse'.

Mr Kennedy—Yes. The term is used in I think about five different sections in part VII: in the principles underlying the objects, in attending family dispute resolution before court application, in one of the exceptions to family dispute resolution where child abuse or family violence exists, in the presumption of joint responsibility in making parenting orders and in the menu of factors in section 68F.

Mr CADMAN—Could you refer us to a page?

Mr Kennedy—Sorry, yes. If you have the whole submission, it is in the preliminary comments on page 1 of schedule 1 to our submission. Our concern here was that abuse is a very relevant consideration in any parenting issue, but it is currently defined rather narrowly and does not, for example, encompass the effects on a child of witnessing violence, although there is an enormous amount of research on the impact of that on children where parents or other family members are abused on a regular basis in their presence. It does not include the behaviour of a parent in general in relation to a child. We have not had a chance to think it through in huge detail, but I think what we are suggesting is that some consideration should be given to expanding and tightening up that definition so it does pick up all of the classes of abuse that may be relevant in making decisions about parenting arrangements for children and dealing with those issues about whether or not family dispute resolution should take place because of a background of family violence or abuse.

Mr CADMAN—Many of the changes which are proposed are to be made by a process of regulation rather than by legislation, and in that regard a court order relating to children is quite a different concept to a parenting plan. In one I think there is the prospect of legal advice as a consent arrangement develops.

Mr Kennedy—Yes.

Mr CADMAN—In the other there is no implied legal advice. What is your opinion of that change?

Mr Kennedy—It is interesting, because we have had the parenting plans in the legislation since 1995 and they have proved to be really quite unpopular. It was all a bit too difficult. But bear in mind that a consent order in itself, where people are properly advised, tends to be a parenting plan. It sets out the various things that we are talking about: who the children live with, when they see the other parent and what communication they have with the other parent. It can cover anything, and in some of these international cases and even national cases we have set up web cams so that the other parent, who might be some distance away, and the children can physically see each other and talk every day. It is an artificial distinction, in a way. The only distinction is that one of them is an order of the court and is directly enforceable; the other is the record of an arrangement that parents have made between themselves which in itself is not necessarily enforceable, although it is obviously something that the court would give considerable credit and weight to.

It is a bit hard to know how much that provision will be used, given the experience of what happened with the 1995 amendments—the difference there being, as I recall it, parenting plans had to be registered with the court. But that is not the case as we are now looking at it. The take-up rate, I suspect, may not be as great as anticipated. There is a risk that if people try to put

together arrangements through a family relationship centre—and we do not know what the qualifications of the people who are going to be staffing it will be because that is part of the regulations that we have not seen—that without legal advice people may commit to inappropriate arrangements for children in a parenting plan, which is drawn up on the spot without the chance to think too much about it. That will create unintended consequences and conflict that would not otherwise be there.

Let me give you another, very recent example. There was an application by a senior businesswoman to relocate to London with her children. The couple got together with the counsellor—again, there was a background of family abuse and violence—and after four hours of intensive work they came up with a plan which was totally unworkable and would have been very destructive for the children. So everyone sat down and worked that out, and the court had a look at it and said, 'No, that is not going to work. We will do it a different way.' In the end both people were legally advised so they were able to deal with the issue. But there is that risk of undue influence on someone who is coerced into entering into an unsatisfactory arrangement, which then becomes the nucleus for an ongoing dispute which escalates over time, and an issue that probably should not have been an issue between those parents suddenly becomes one of those intractable problems that Mrs Hull was talking about.

Mr CADMAN—Thank you. You did not comment on regulation versus legislation.

Mr Kennedy—I am sorry. Are you referring to those sections—

Mr CADMAN—Yes, those sections and where the general thrust is regulatory rather than legislative.

Mr Kennedy—It is our view as a profession that courts are very much a last resort for family issues. The law is a very blunt instrument for trying to deal with what are, fundamentally, intensely interpersonal problems. It is only used when we exhaust every other option. This is the case now; there is nothing new about it. I mean the legal profession has, certainly throughout the currency of the Family Law Act, been highly focused on dispute resolution and it is only that 'tip of the iceberg' type of case that gets into the court system. And even then it tends to be resolved rather than litigated.

So our general view is that if we can encourage people to regulate their own affairs and to do it with legal advice, but to resolve them outside the formal legal system, that is a terrific objective to aim for and a great outcome. But you need effective legislation to deal with those issues where people cannot achieve those sorts of outcomes or where the outcomes that they achieve, for one reason or another, break down and you need a determination made.

Mr KERR—I have got two issues that I would like to follow up briefly. One flows from the question that was raised earlier about the removal of terms like 'residence'. You did mention the overseas treaties and conventions that apply, and one of the confidential submissions that we received referred to this. Submission 4 says:

The Convention on the Civil Aspect of Child Abduction has very clear language describing the relative responsibilities of parents. Article 5 of the Convention refers to custody and access …

I do not know whether your submission goes to this issue. Would it not be possible to put in something by way of a dictionary or some other provision that would enable clarity for the purposes of international translation of the language of the act so that we could have in a sense a win-win solution, pertaining to the greatest degree possible of the objectives. I understand your quite correct point that many people still speak of custody and access, even 10 years on, so change is not something that happens instantly. But, assuming we wish to pursue that objective, could we not find some way of clarifying the intent of the words being used such that it would be no problem for the United States or other treaty parties?

Mr Kennedy—Absolutely, and I think that would be a very sensible idea. It picks up two thoughts: (1) our recommendation that there should be a comprehensive dictionary in any event; and (2) the necessity of making it clear how the concepts that Mrs Hull was talking about, and very properly strongly endorses, interrelate with the received legal knowledge of several centuries now.

Mr KERR—Is that in your submission?

Mr Kennedy—No. It was in my supplementary oral comments before.

Mr KERR—It would be of assistance if you could formulate the way forward as you see it in this fairly technical black-letter area of law to make sure that, if we do something on this, we do not have Australians unable to access those remedial international treaties.

Mr Kennedy—We will certainly do that.

Mr KERR—The other much more substantive point that I would like to test with you is your objection to the removal of the requirement of the court to apply the rules of evidence. As a preliminary comment, I have always wondered why we ever applied the rules of evidence at all in the Family Court. I regard it as entirely inappropriate and quite inconsistent with the objectives that are foundational to the informality of the Family Law Act that we ever required the rules of evidence to apply, when in many other more informal processes and tribunals, and even in some judicial forums, they are not required. This seems to be very much the kind of environment where you would expect the court to inform itself subject only to relevance and to the deliberate choice of some exclusionary rules—for example, advice in conferences and the like. I wonder whether that is a bit of a straw man. Lawyers love the rules of evidence. We are highly skilled at applying them and we are familiar with them. They are a bit of a barrier to the self-represented litigant who bumbles along and discovers that half the things they have sought to put before a court get struck out for various reasons. I really do want to test you as to why in any rational universe we would be persisting with the rules of evidence in the family law jurisdiction at all.

Mr Kennedy—I will ask Mr Bartfeld to comment on part of that in a moment, but I would like to take you back to 1976, when the Family Court first started, and in particular to Justice Watson, who was one of the first appointees to the court. His philosophy was precisely that. What happened was that very quickly everything descended into chaos. There were no rules, there was a sense that decisions were being made on a totally arbitrary basis and the High Court took the view that that really was not appropriate. The Family Court over the intervening 30 years has adopted very much a halfway house. If the rules of evidence are flexible, the court has

a power to dispense with them in appropriate circumstances, and particularly in the new Children's Cases program that the Family Court has introduced and which we strongly support. It has the enormous support of the profession nationally. Some of the issues you are raising are in fact dealt with in a very practical way, but there is still a very good rationale for having a core body of evidentiary rules. Perhaps Mr Bartfeld can give you a different perspective on this.

Mr Bartfeld—The rules of evidence are not the sort of problem that they are understood to be in jurisdictions where criminal law applies or where strict proof is required. As Mr Kennedy said, the Children's Cases program, which the section supports and which, on all accounts, looks as though it has been a very successful experiment which it is proposed to roll out nationally, is an example of how the rules of evidence can be dispensed with when necessary in order to achieve the appropriate outcome. But the rules of evidence are not necessarily exclusionary. For example, the Commonwealth Evidence Act permits such simple concepts as the proof of matters in business records to be achieved by simply tendering the business record.

If that provision is taken away, as is contemplated by the draft legislation, the question then is: how are business records going to be proved? Similarly, the rules of evidence permit the limitation of irrelevant and inexpert opinion, for example, not to be tendered. But, if that rule of evidence is not available, a judge will necessarily have to sift through every piece of—if I can use the expression—rubbish that is thrown up to them to see whether it is of marginal assistance to the judge.

The rules of evidence that are being excluded in the proposed draft stem from the implementation of the Children's Cases program on a consensual basis in the Family Court when it was trialled as an attempt to do something without necessarily being able to resort to legislative change. The court resorted to the provisions of section 190 of the Evidence Act to have the people who were accepted into the program, as a condition of acceptance into the program, agreeing, as they can under section 190, to waive the rules of evidence as a sort of overall and preliminary approach to see whether the system could be got going without the necessity for the timelag which legislation necessarily involves.

This legislation picks up those very matters and excludes them in circumstances where the children's cases are before the court. But it does not exclude them in property cases and, in a lot of circumstances, the two run together. I can understand that Mr Kerr would say, 'Why not exclude them all?' There are very real difficulties with that proposition because of the changes that are being made to the act, where, today, not only do husbands and wives come before the Family Court but there are very extensive powers to attach to and affect the rights of third parties. Those extensive powers will come into operation on 17 September, where trustees in bankruptcy, and all the creditors whom they represent, can be involved in and brought into Family Court proceedings. It would be inappropriate, we would suggest, for those sorts of cases to be excluded from the operation of the rules of evidence, particularly where they involve complex commercial issues. The rules in those circumstances are facilitative rather than exclusionary.

So we contend that the draft section 60KI in the legislation sufficiently outlines the powers of judges to give directions and make orders about what evidence can and cannot be given, the length of cross-examination, if indeed there is to be cross-examination. There is a panoply of

powers which we say are totally appropriate and which will facilitate the operation of the Children's Cases program without that wholesale exclusion of the whole of the Evidence Act.

The second proposition I put is that where, for example, hearsay is a problem—and it does not seem to be a big problem in Family Court proceedings, except in certain states of the Commonwealth where these issues seem to be fought fairly hard—the court, under the Evidence Act, has the power to make orders admitting hearsay evidence if the circumstances are justified. Sections 63 and 64 of the Evidence Act give that power to the courts.

The next comment I would make about excluding the Evidence Act is that, if that were done, section 79 of the Judiciary Act is triggered, and the unintended consequence of that would be that the evidence acts of the various states would then apply in those states where the court was sitting. So, for example, the Family Court—or the Federal Magistrates Court, for that matter—sitting in New South Wales, would be subjected to the New South Wales Evidence Act by virtue of the operation of the Judiciary Act, which is identical in form to the Commonwealth Evidence Act. So there would be no difference to any practitioners in New South Wales or any cases in New South Wales.

In Victoria, where the court can be subject to the Victorian Evidence Act, there would, from the point of view of residents' or children's cases, be a disastrous consequence, because the Victorian Evidence Act preserves medical privilege as a basis for excluding evidence, whereas the Commonwealth and the New South Wales acts do not exclude medical privilege and there is no medical privilege available to exclude evidence of doctors, psychologists and psychiatrists—those sorts of practitioners—whose evidence is vital in a lot of children's cases. This is not in our submission because I only thought of it and came upon it when preparing for these hearings, but this is one of the unintended consequences that could flow from this sort of legislation. I am sure that, given more time and more lawyers to sit around and discuss it with, there will be other problems.

Mr KERR—A horrible thought! I can assure you it would not be my intention to have a provision which removes the requirements to comply with the rules of evidence to revive state based evidence regimes, but I do take your point that, where there are counsel on both sides and equality of arms, I see no particular difficulty in complex financial matters. I see no reason why the parties, just out of convenience, could not agree themselves to proceed in that way. But, in those instances where matters evolve from essentially a consensual process that is intended to operate differently, not applying the laws of evidence with respect to these children's matters into settlement of other interrelated matters, it does seem to me to be drawing a long bow to say that the world will fall if we do not apply the rules of evidence. We will need to look at that more carefully.

Mr Kennedy—I think we are all actually on the same page. I think all we are saying is that you need some rules. You cannot have a ruleless environment for natural justice purposes, if nothing else. One of our concerns is that if we follow the course in section 60KG—

Mr KERR—Judges are usually wise enough to sift relevance from irrelevance.

Mr Kennedy—I am coming to that. Our concern is that you start to have the potential to develop a new and unnecessary secondary body of rules in the court. The overwhelming point is

that section 90K(1) of the legislation is a terrific set of rules. We are very happy with all of that. That is all you need. You are complicating it beyond necessity by having section 60KG and throwing out the baby with the bathwater—if you will pardon that expression in a children-related matter—when you have a perfectly good regime that gives the court ultimate flexibility.

Mr KERR—I may well be persuaded once I look more carefully at it. It was just a point I wished to raise.

Mr PRICE—Thank you very much for your submission. Like others, I have not done it justice. I am interested that the Family Law Section has 2,000 members of the Law Council. How many people practise family law? Does the council have any idea of the dollar value of all that activity by those practitioners?

Mr Kennedy—No, we do not. Part of the reason for that is that many people who practise family law are general practitioners. They may or may not be members of the section, depending on their direct interest in the area. A lot of country practitioners have to do a wide variety of things. There is a huge difference nationally and within regions in the availability of those sorts of legal services. We know how many specialist practitioners there are in the country—I cannot quote you the figure off the top of my head—who hold themselves out as being fundamentally committed to family law practice as their specialty area.

CHAIRMAN—Is there special training for that specialist qualification? My understanding is that there is.

Mr Kennedy—Yes, there is. There is now a national program for specialist accreditation which is very arduous and currently has about a 30 per cent pass rate. Many people do it two or three times until they get there. Their drafting skills are tested and there is a mock interview which is videotaped, with an actor playing the client coming in with a set of problems. Their reaction to the client and the problems, their analysis of the issues and the advice given are all analysed to see whether they meet appropriate standards.

CHAIRMAN—But they do not need to pass that course to practise family law.

Mr Kennedy—No, they do not.

CHAIRMAN—They just need to pass it to call themselves a specialist. Presumably, if they are able to call themselves a specialist, they are more likely to attract the better end of the market.

Mr Kennedy—The market is very sophisticated in many ways. People who are not specialists but who are very good at what they do attract as much if not more of the public, because they have that service to offer, than people who hold themselves out as being specialists. I have never been able to work out how that happens. What also tends to happen, for reasons that escape me, is that most people seem to get to the practitioner who meets their needs. If they are focused on resolution, they will find their way to a resolution focused practitioner. If they are not, they may find their way to a practitioner who is less committed to that process.

Mr PRICE—Mr Kennedy, would you be able to provide the committee with the number of specialist family law practitioners?

Mr Kennedy—Yes, I can certainly do that.

Mr PRICE—That would be very helpful. In your own estimate, given that there have been no studies, have the numbers been growing, remained static or are they declining?

Mr Kennedy—We take some pride this. The number of practitioners who are practising in family law has declined and the work has become more and more concentrated in specialist hands. That has been very productive for the public and for the administration of the court. It is always a great relief to receive a communication from someone representing the other party who you know is competent. They may be tough and difficult but at least they know what they are doing and you can sort things out with them.

Mr PRICE—Turning to an area that has already been discussed, contact orders, you would be aware that in the original committee report there was a proposal for a tribunal that would specifically deal with these orders prospectively and ultimately retrospectively. Perhaps the Attorney is too modest to take ownership but he floated a cost of some $600 million for the tribunal. Does the council have a view about trialling the tribunal? Given in Western Australia it still operates under the state constitution where the establishment of tribunals is less onerous than under the Commonwealth, does the council have a view about piloting a tribunal in Western Australia, or would it have a view?

Mr Kennedy—If it had a view—we do not have a formal view—I think we would be strongly opposed to it for a number of reasons, two of which would be most pressing. One would be the cost implications. We have a national family law system at the moment which is vastly underresourced and causing enormous problems for families dealing with relationship breakdown. In most states of the Commonwealth it is not possible to get a final determination of child-related disputes for up to two years. That is just outrageous in our view and the damage done to children in those circumstances is horrendous. We already have the Family Court and the Federal Magistrates Court. Both of them deal with family law issues at various levels. Both of them are underfunded, underresourced and understaffed. Adding a tribunal to that would be fiscal insanity.

CHAIRMAN—Mr Price, that is beyond the terms of reference of the committee.

Mr PRICE—I appreciate that. I am very grateful, though, for Mr Kennedy's response and understanding of the position of the council. The earlier committee—and I hope Mrs Hull and Mr Cadman might back me up—took legal advice as to the nature of contact orders or parenting plans and it was strongly advised, admittedly in camera, that these were of an administrative nature, not judicial. Does the Family Law Section of the Law Council have a view about whether or not parenting plans and contact are essentially administrative matters or judicial matters?

Mr Kennedy—It is probably neither. If one analyses it properly—we obviously have not seen the advice—a parenting plan is clearly an informal arrangement between parents. There is no administrative action associated with that and it does not go before a tribunal. It is not registered

anywhere and no registrar stamps it. It is purely an interpersonal arrangement between two parents.

CHAIRMAN—You recommend that further consideration be given to the definition of major long-term issues in the Family Law Act—I think it is recommendation 1.9. Section 65DAC provides that in circumstances where there is joint parental responsibility and a decision is required to be made about a major long-term issue in relation to a child there should be a requirement to consult and to make a genuine effort to come to a joint decision on that issue. That section, I am advised, is intended to clarify that parties should litigate only in relation to major issues and to avoid litigation in relation to non-major issues under the current system. My question is: will section 65DAC—and you may have to take this on notice—reduce the litigation on decision making in relation to the child and will defining and listing issues that are considered to be major long-term issues operate so as to reduce litigation? Perversely, it might create an opportunity for more litigation. Do you have a view on that now or would you like to go away and consider it and let us have a response?

Mr Kennedy—We will let you have a more formal response, but our reservation about it is that merely by listing categories the consultation has within it the seed of creating disputation for that core group of families that we are having difficulty dealing with. We saw that in 1995 when the last major rewrite came into effect. We were talking about parenting orders—it was a new concept; it came in then. People were applying for all sorts of things and trying to define in great detail what parenting orders they wanted—who bought the shoes, who decided dietary things and whether there had to be consultation on school camps. Menus were published of possible parenting orders that might be looked at. That has faded and people realised that it was impractical. But that sort of concept does have the potential to create a dispute where there might not otherwise be one. That was our only reservation—we are not necessarily being critical of the categories themselves but we are a little concerned about the mere listing of categories.

Ms ROXON—I have two questions. One goes back to your point about putting in a definition of abuse. Would you like to comment on the earlier committee's recommendations of the use of the term 'abuse or entrenched conflict'. Do you have a view at all about the term 'entrenched conflict', because it seems that it picks up a range of things—not just the witnessing of abuse of other people but a different set of facts that it might be relevant to look at?

The second thing I wanted to ask you about is a more substantial one which takes us into a different area. That area is the hierarchy that the bill introduces for the court assessing what is in the best interests of the child. I notice that you say that you do not support it, but could you go through that in a little bit more detail. It seems to me to be a very fundamental change to the way the court will determine children's matters and it would be useful for the committee if you could take us through your concerns about how that would work and be applied.

Mr Kennedy—If I may, I will take on notice the question about entrenched conflict, but I think it is touched on, in any event, in our comment on abuse in terms of the impact on children of what happens in families and the desirability of perhaps extending the concept to recognise the very things that were referred to in the earlier report. I am just looking for the appropriate section.

Ms ROXON—I think I found it on page 16 of your submission—your item 26.

Mr Kennedy—I am just trying to pick it up in the executive summary, because I think it—

Ms ROXON—Funnily enough, I did not really see much reference to it in the executive summary, but it was something I wanted to ask about and then I found it in your more detailed submission at page 16. This is introducing primary considerations—

Mr Kennedy—And additional considerations.

Ms ROXON—The additional considerations are what the existing considerations are and adding some primary ones.

Mr Kennedy—We now have four concepts that have to be considered when you are dealing with parenting orders. You have the objects of the act and the underlying principles and then you have primary and additional considerations. Our concern is that that leads to confusion and it gives rise to the potential for argument about what weight each of those categories has, whether they are in a cascading descending order and whether the objects govern the principles, govern the primary considerations, govern the additional considerations. Our recommendation was that we should not split into primary and additional considerations; they should all be part of the one set of considerations that the court needs to take into account in determining what is in the best interests of the child. Of course, we have no problem with objects and principles but we think it is unnecessary and undesirable to differentiate between primary and additional considerations in that way. They have the potential to be somewhat contradictory within each other but also to cause confusion for the public in knowing how the court is going to deal with those two tiers of consideration. When you look at them, they all fit together. They are all part of the welfare of the child determination.

Ms ROXON—So if it stayed as it was, presumably you would end up having an argument before a court about how much weight needs to be given to the relative considerations rather than putting an argument to the court about what the overall best interests of the children are, taking account of a number of factors?

Mr Kennedy—I think it is even worse than that. If you look at the actual terminology of section 60F, it is a question of how far those primary considerations—that is, the benefit of the child having a meaningful relationship with both parents and the need to protect the child—override all of the other considerations that become additional considerations. Clearly, the benefit of a meaningful relationship gets a big tick from everyone, and that reflects the objects. The protection of the child is again quite obvious and reflects the underlying principles. But are they to have overriding weight in terms of any of the other considerations or are they—and we have no firm view on it, although our inclination is to try to avoid ambiguity and the potential for dispute—intended to be part of a hierarchy or are they part of an overall, holistic way of assessing what is in the best interests of the children? Depending on the factual matrix, each of those things will be given the appropriate weight in the determination process.

Ms ROXON—I have one remaining question on that same provision. Do you have a view about how those primary considerations would operate if they are in conflict with each other? Presumably there are many cases that your members deal with where the benefit of a meaningful relationship with a child and the protection of a child may in fact conflict with each other. If they

are, with these provisions, required to be the two primary considerations, how would anybody argue that matter or give advice on it?

Mr Kennedy—It is very difficult. Clearly, they will often be in conflict in those high conflict cases. In a sense, in a particular cohort or case, by definition they will be in conflict with each other. But if they are part of the one overall set of factors to be considered, it is less important because you will be able to say, 'In this particular case, the importance of the continuation of the relationship with the other parent is outweighed by the potential damage to the child.' On the other hand, you may have a welfare report that says, 'There is a history of family violence in this family, but this child is very closely bonded to that parent and it would be detrimental to the child to break the relationship.' So the other one would countervail in that particular circumstance. It is ever thus in dealing with contested children matters that you have that menu to look at. You have to weigh up and see, first of all, which factors apply and, secondly, which factors are the most important in the resolution of that particular problem.

Mrs HULL—I would like to ask two questions. Firstly, we have a jurisdictional issue. We had a problem with the committee proceedings in hearing a lot of vexatious AVOs, a lot of vexatious claims, how it was dealt with within a state system and then how that information transferred into the Family Court in a different jurisdiction and how that was dealt with. Have you identified those areas within your submission? We have not had an opportunity to look at it. Have you looked at the issues of false allegations, vexatious claims, the use of AVOs when in fact they have not been proven, they have been thrown out? When you get to the Family Court, you have this list of AVO applications in front of you but you do not have the evidence in front of you about the way in which it was dealt with by, say, the New South Wales police. You are not getting those corresponding reports to enable you to clearly understand whether these are true and genuine concerns of fear of violence or fear of whatever or whether they are simply vexatious and false allegations to get to the base of what a person's objective is.

Mr Kennedy—I suppose the first point is that, as you would know, AVOs are state based determinations. They would not normally be before the Family Court other than in the evidence of a party saying—

Mrs HULL—Exactly.

Mr Kennedy—I am sorry Mr Kerr is not here because this really gets into this whole evidence issue and the importance of rules of evidence. It would be possible for either the person making the allegation or the other party to bring that material into evidence before the Family Court in a proper and appropriate way. If the evidence was that these allegations had been thrown out, you would be fairly foolish to be relying on them. If the allegation had found to be proved and a protection order had been made then that may be something that the court may consider.

False allegations are a very difficult issue. We see a lot of allegations where people have really convinced themselves that it is true. When they are tested it is perhaps not as bad as they thought it was. Apart from the more radical client, we do not see a great number of false allegations in that sense. I know that you as a committee get constant complaints about such things. But, again, it is the tip of the iceberg thing which creates a great focus. But, by and large, one does not see a

great number of those things. We do not see too many vexatious litigants, but when they exist they are extraordinarily difficult to deal with.

One of the really problematic balancing factors is when to exclude a person from access to the court in relation to issues concerning the welfare of their children. There is no easy answer to that. Courts have tended to err on the side of permissiveness because there may be something in the application. If someone is not getting contact with their child, for example, it may be that it is something the court needs to deal with. It may be that they are so difficult and the situation is so extreme that the child wants no contact with them. If you get to a stage where you have maybe had two or three applications, the court may finally say: 'That is enough—no more applications without the leave of the court. Stop harassing your former partner. Stop putting the children in that position.' Again, it is very difficult to legislate for in any meaningful way. But I think now we have some rules for vexatious litigants.

Mr Bartfeld—Yes, there are rules in relation to vexatious litigants. Just yesterday we as a section concluded a submission to the Attorney-General seeking to give the registrars of the Family Court the power to not accept applications which are patently silly or obviously vexatious. If the Attorney accepts that submission it will go forward, the idea being that people should not have to litigate in order to prove that someone is a vexatious litigant when it is well known and there are reported decisions about someone being vexatious. That is a corollary to the point that is being made.

Mrs HULL—I will move on. I will go back to Nicola's question on how a court determines what is in a child's best interests. You went into that in great depth before. But the objective we are trying to achieve here is that the court must take all of these things into consideration. It was raised with us during the committee inquiry that all of these things primarily exist in the court's realm now and can be taken into consideration, particularly since the 1995 Family Pathways reforms.

It was proven that from 1995 onwards there were less shared parenting and these areas taken into consideration than there were previous to the reforms. I am trying to indicate to you that I do not see these areas as being split into two, which creates further litigant opportunities. It is a process that says that the court must take these things into consideration—they must. Not that they will or they should but they must. That process is not happening at the moment. There are varying ways in which judges are dealing with all of these areas. This sounds like industrial relations reform to me. There is a very strong need for a national overarching system.

It appears to me, and I am not being derogatory or disrespectful, that if as law societies and lawyers you are going to offer everybody all of these means, options and opportunities for getting your objectives, there are too many opportunities being offered. Isn't it a fact that parenting orders and all of these issues should be taken into consideration? Surely, if parents sit down and make parenting orders, whether you think they are unreasonable or cannot work, aren't they the basis for what the parents have agreed that they want? We are talking all the time in your text about coercion. It always comes back to that small percentage of people who are coercive impacting on 95 per cent of the people who would really just like to get on with it and be parents—all things being equal—with a set of rules that they know they can follow. My problem is that today I have heard you continually talk about the negatives—my cup is always half empty—never about how it can be of great benefit.

Mr Kennedy—I wonder whether you heard the opening comments or took them in. What we said—and what we stress at all times—was that it is only that tiny minority of families who have the sort of problems that this legal process needs to address. I would be interested in the research on a fall-off of shared parenting after 1995, because our experience is that it is much more common for that to occur now than it was before. You are only talking about the cases that go before the court. We offer people alternative ways of resolving their disputes. We try to encourage them to come to an agreement in relation to their children that is going to be workable for the kids. That is what happens. They do not get into the court system for that reason. The factors set out in the legislation are what need to be considered when you are coming into an agreement or a court is making an order. We have no problems with what is actually there. The only comment we made was about whether it was wise to have them split into two tiers or whether that was going to be confusing and have the potential to create unnecessary argumentation. With respect, I think there is a fundamental flaw in the starting premise of that comment.

Mr PRICE—Earlier you referred to the cost power of the court, and I assume the Magistrates Court as well. Could you tell the committee how often that power is utilised?

Mr Kennedy—There are clearly no statistics as to when cost orders are made—

Mr PRICE—Could you give me—

Mr Kennedy—We can give you an anecdotal, gut feel about it. Where a party has failed to obey a court order or a direction, has misconducted themselves in some way, acted unreasonably or fallen under any of the other heads of section 117 of the Family Law Act, the court will make an order. In some cases it will make a very substantial order. In other cases it will be a more token cost order because of the financial circumstances of the parties.

Mr PRICE—I am not looking for the range of costs but for the frequency with which it is applied.

Mr Kennedy—I will give you a couple of recent examples. We have had one case where someone simply decided they would not turn up for a hearing and everyone else was there, and a cost order was made for $2,000, I think. In other cases it might be a token $200 if a solicitor has had to go up for an hour or so and be there. The court is fairly ready to make orders, in appropriate circumstances, where people have simply not done what they are required to do.

Mr PRICE—I do not want to get into trouble with the chair, but the previous committee was of the view that there needed to be severe sticks, and in particular the power to be able to readily change contact orders. Would you comment about the stick provisions, if you like, in this legislation and to what extent you as a practitioner, or the council as experts, believe this will impact on the parenting orders or parenting plans that will be abided by?

Mr Kennedy—In fact, it is part of our submission that, where an issue comes before the court arising in relation to a contact order—as it is now called—or a parenting plan, the court should have the power to change those arrangements if they are not workable, and to change those arrangements of its own motion. When you get to read the detailed submissions, you will find that that is covered and it is one of the specific recommendations that we do make.

CHAIRMAN—You recommend that further consideration be given to the proposed changes to sections 60B and 68F of the Family Law Act.

Mr Kennedy—That is the objects and principles of the provisions. It was the point we were discussing with Ms Roxon before: we have four tiers of considerations—the objects, the principles and the primary and secondary considerations. The point we were making was the one we have just been debating with Mrs Hull: whether the most desirable way is to split it into two parts or to roll it into one and have one set of criteria. We are not being dogmatic either way; we are simply suggesting something that the committee might usefully consider in its deliberations.

CHAIRMAN—The response to this next question might well be staring me in the face, but it is currently escaping me. You recommend that the definition of 'Aboriginal child' be amended to read: 'Aboriginal child means a child who is a descendant of the indigenous inhabitants of Australia.' Why are you making that recommendation?

Mr Kennedy—Because there are a vast number of people in the Aboriginal community who identify as Aboriginal but are not necessarily falling within the current definition because they are descendants of first or second generation, whereas the current definition seems to limit it to—

CHAIRMAN—First or second generation of what?

Mr Kennedy—Of Aboriginal or Torres Strait Islander people. We are making the point that there is a group of people who would identify as being Aboriginal who may not technically fall within the current definition. We are suggesting that some thought might be given to that definition and whether it needs to be expanded a little.

Ms ROXON—So your proposal is to broaden it.

Mr Kennedy—Just to broaden it a bit, yes, to make sure that we pick up those who identify with their Aboriginality who may not fall under the current definition.

CHAIRMAN—There has been some discussion in Australia over the definition of 'Aboriginality'. Broadly, the definition seems to be someone who is descended from and identifies as being an Aboriginal person and is accepted by the community as such. Your proposed recommendation would simply mean that anyone who is a genetic descendant of an Indigenous person in Australia would be an 'Aboriginal child' under that definition, regardless of whether that person identifies as Aboriginal or whether that person is accepted as being Aboriginal by the Aboriginal community. The person might not even look Aboriginal in any way and might not identify as such. Are you suggesting that that sort of person should be roped in as an Aboriginal child under this act, even though for any other purpose in Australia that person would not be an Aboriginal child?

Mr Kennedy—No, because it has to be read in the context of the act itself and the provisions that require the court to take into account the desirability of a child maintaining its relationship with its Aboriginal or Torres Strait Islander culture. It is in that narrow area. If there is not the connection with the culture, it is not going to be an issue.

Mr CADMAN—I do not know whether you have commented on this in your submission. I am seeking a legal opinion, I guess.

CHAIRMAN—We hope your collective meters are turned off!

Mr CADMAN—I refer you to section 60KI(3). It would seem to me that the provision which allows the Family Court, in the case of Aboriginal or Torres Strait Islander children, to examine the findings of other courts or tribunals or the same court is a very interesting process that could well apply to the broader community. Do you see any restriction to that being applied broadly? What would its impact be if it were to be applied?

Mr Kennedy—I must say that we have not given that specific consideration, but it is an issue that does arise from time to time in Family Court proceedings, particularly in the Torres Strait Islander communities. The former Chief Justice of the Family Court arranged for sittings of the court in those more remote areas and for local elders with knowledge of tribal customs and law to in effect act as assessors to assist the court in working out what was the best arrangement for the children in those circumstances—for example, where children tend to be raised by uncles and aunts rather than the direct parent because of cultural and traditional things.

Mr CADMAN—I am thinking of that sort of situation. But, for instance, in a non-Indigenous community, proof of drug abuse may be easily obtainable but can only be alluded to within the Family Court whereas expert witnesses or court or tribunal proceedings could quickly dispose of a matter such as drug abuse amongst the parents.

Mr Kennedy—If it related to those particular parents then that evidence would clearly be admissible before the Family Court because it goes to the welfare of the children. That would be covered by the general powers of the court to look at all of the issues including the capacity of the parents to act effectively as parents. If they were drug affected or drug abusers, that may have an impact. The court can look at things like whether there are other people who are important in the lives of the children who could offer a better alternative.

Mr CADMAN—Grandparents, for instance?

Mr Kennedy—Yes. Grandparents do in many cases become part of the equation. We see a lot of cases, for example, where drug-addicted young women have children and are incapable of caring for them. The grandparents take on that caring responsibility. In our view, that is something that needs to be supported in the legal system and the community so that those grandparents actually have some status.

Mr CADMAN—Off the top of your head, would that provision—that is, this capacity for the courts to examine the proceedings before the court, another court or a tribunal—be a useful one to include for the broader community?

Mr Bartfeld—I think that already exists.

Mr CADMAN—Why does it not apply to the Indigenous community? Why does it need a special provision?

Mr Bartfeld—Really, I do not know the answer to this, but I think what they may be focusing on and referring to in the draft legislation are the outcomes of such things as hearings of native title tribunals, which gather enormous amounts of evidence of an anthropological nature and reach conclusions about such things. In the legal system that is somewhat unusual and unique to people of Aboriginal origin. The same problem does not seem to exist in terms of anthropological research and the like in proceedings in the broader community which emanate from the criminal courts and other such organisations.

Mrs HULL—Mr Kennedy, on page 11 of your submission you talk about section 61DB—the application of joint parental responsibility after interim parenting orders are made. The proposed amendment is that, if there is an interim parenting order in relation to a child, the court must, in making a final parenting order in relation to the child, disregard the allocation of parental responsibility made in the interim order. You have said that you would like to see that deleted.

Mr Kennedy—Mr Bartfeld and I were having a substantial discussion about it last night. I might ask him to deal with that for you.

Mr Bartfeld—The point we would make is that we recognise the problem. We recognise the problem of interim proceedings locking in forever, effectively, what happens on the final question. However, this clause would seem to preclude the court, when dealing with the final hearing, from looking at a matter of history. For whatever reason, whether it is by reason of a court order or of an agreement—and most of these cases are by agreement—interim orders are made which provide for the child to live—and the child has lived—in that environment. There is nothing to stop the court from saying, 'Even though that has happened, it is now time to change,' and the court will make that change in an appropriate case. But we should not say you must, as a matter of law, ignore history. As Mr Kennedy said, some cases take two years to get to final trial. If that were to happen, and the court had to disregard two years out of a young child's life it would be—

Mrs HULL—But Mr Bartfeld, isn't that a matter for interpretation? What the clause is clearly trying to deliver is that interim orders are made in a very short time after separation. For all intents and purposes interim orders may be put in place simply because of the circumstances—housing circumstances et cetera—of the perhaps estranged partner or estranged parent. More often than not, during the inquiry we found that interim orders then become permanent orders simply because that is the structure in which the child has been for that long period of time and we really cannot move them out of that structure.

I sat in a courtroom and listened to a judgment on a relocation where a child had been taken to a town and had only been there for five weeks. The applicant was trying to get the children back to a particular place. That child had only been taken away from that place of residence, to another town, for five weeks, and the judge decided that the child was now settled into school in that other town—after five weeks—and so agreed that the child would stay in that town. Of course, the non-resident parent was in another town and so their time with their children was cut extensively.

This is not an attempt to say that you should disregard all of that evidence from the separation; it is an attempt to say that interim orders should not automatically become your permanent orders and that you should, and still could, take into consideration all aspects of where the child

is and what has happened since separation to determine final orders. I get concerned about this determination that you must disregard the two years or so that the child has been under interim orders and only deal from there on. My reading of that is not that at all. It is that you just do not take interim orders as the permanents.

Mr Bartfeld—Mrs Hull, I think we are in heated agreement. The submissions we are making are of a technical nature. We are trying to predict how the court would interpret that section. It is only a simple matter of drafting to achieve the outcome that you suggest, that interim orders should be disregarded but the reality can be looked at. That is a matter of drafting which I am sure the parliamentary draftsmen can achieve.

Mrs HULL—You are opposed to clause 61DB, and recommend that it be deleted. You say it is highly inappropriate for the court to disregard the factual circumstances that may evolve.

Mr Bartfeld—The way it is drafted, it has the effect of saying that the court may not in any way look at what has happened between the interim order and the final order.

Mrs HULL—Here comes my positive question again: could you not indicate in there that there could be a way in which that could be achieved? Could you not recognise the issue of interims becoming permanents? Instead of saying that it should be deleted, maybe you could determine that there could be other ways to achieve this. For example, it could be inclusive of interim orders—that is, interim orders could be taken into consideration but they should certainly not be permanents.

Mr Kennedy—We agree with you. This was the discussion we were having last night when we were going through the submissions. What we said in the submission—and bear in mind that this was all done on the run and we have all had very little time to deal with it—is what we say in relation to that provision as currently drafted. What we were talking about last night was how we could redraft it so that section 61DA and section 61DB could fit together properly and achieve the objective, which we strongly support.

Mrs HULL—Thank you.

CHAIRMAN—I thank our two witnesses for appearing before the committee. Hansard will forward to you a draft of what you have said. Please make any necessary corrections. You have undertaken to give the committee some additional information upon reflection or reconsideration. If you could pass that information on to the committee secretary as soon as possible we would appreciate that, particularly given that the Attorney has asked us to table our report by 11 August. We have a very short time frame, if you could bear that in mind. On behalf of the committee I thank you both for your attendance.

Mr Kennedy—Thank you, Mr Chairman, for the opportunity to be present and to take part.

Proceedings suspended from 10.47 am to 10.59 am

MOLONEY, Professor Lawrence John, Representative, Children in Focus, School of Public Health, La Trobe University

CHAIRMAN—I welcome our next witness. Although the committee does not require you to give evidence under oath, I advise you that the proceedings of the committee are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I invite you make a brief opening statement, and then we will ask questions.

Prof. Moloney—I would like to make a brief opening statement. I am here representing Children in Focus, which was formed a few years ago in conjunction with successfully tendering for a series of projects that were initiated by the Attorney-General's Department. At that time, the Attorney-General's primary question was how to work more effectively with high-conflict couples who were separating and in dispute about their children. My codirector of Children in Focus is Dr Jen McIntosh. Jen is a clinical and developmental psychologist who has pioneered child inclusive mediation practices in Australia. The program is located at La Trobe University here in Melbourne. My credentials are that I am a registered psychologist, with specialties in clinical and counselling psychology. For the first 10 years of the Family Court's existence, I was a Family Court counsellor and director of the court counselling service in Victoria. I have supervised family mediators for more than 15 years and I have published approximately 100 articles, monographs and chapters on family law related matters.

For the past four years, Jen McIntosh and I have been involved in training both lawyers and non-lawyers to work more effectively with separating couples in child-sensitive ways. The core elements of our work have been published in the *Journal of Family Studies*, a peer reviewed journal that I began editing shortly after we began our Children in Focus program. This journal's mission has been to publish practice and research relating to children in transitional situations. I have copies of the journal with me and I would be very grateful if the committee would accept them. I have highlighted quite a few articles that relate to the issues that I know will be exercising this committee over the next little time.

Dr McIntosh and I also gave evidence to the parliamentary inquiry that produced the report *Every picture tells a story*. I just want to say that it is to the credit of the members of that inquiry that at that time they took up our invitation to fly to Melbourne a week or two after our evidence to hear from a group of children who had experienced the separation or divorce of their parents. At that time I sat with those parliamentarians, some of whom are here, behind a one-way screen while Jen worked with the children. I remember that some of parliamentarians were visibly moved by what they saw and it was clear to me from the preface in the report that this experience impacted quite considerably on the committee. In the preface Kay Hull wrote:

> These children .. told us their stories and as a result the real meaning of this inquiry was clearly understood.

Again, it is to the credit of that committee that they were prepared to go beyond a strict interpretation of their brief and arrive at the core of the problem. What is the core of this problem? In my view it is this: in family law we endorsed a so-called no fault divorce system. In

my view there is no going back from that. But at the same time all the surveys demonstrate that we remain very uneasy about no-fault divorce. So a percentage of marriages and de facto marriages break down and decisions have to be made in an atmosphere that does not formally recognise the injustice that may be strongly perceived by one of the parties or perhaps both of them. For the separating family's sake, especially for the sake of the children, decision-making processes need to be transparent but, at the same time, we have to find ways of better recognising the emotional anguish that exists in a percentage of these cases.

In the almost 30 years I have been associated with family law I have witnessed a range of initiatives that have purported to place the needs of children at the centre. Despite the 'best interests of the child' rhetoric, most have had limited success and, I think, limited impact. There are a lot of reasons for this but underlying much of it, as Kay Hull's committee recognised, are the persistently limiting factors associated with adversarial processes. The committee understood that the fact that only five to 10 per cent of cases proceed to a full hearing is not the core issue. The core issue has been the adversarial processes that have underpinned negotiations and that have traditionally begun, for example, from receipt of the solicitor's first letter. To put it somewhat simplistically, there is overwhelming evidence that adversarial processes in family law inflame conflict rather than reduce it.

Why is this important? I think it is especially important because ongoing, unresolved conflict between parents has a very negative impact on children. We know that the children of divorced families are three or four times more likely to suffer mental illness problems, compared with children from non-divorced families. But the principal cause of these problems is not the divorce; it is the ongoing conflict that divorce and divorce resolution processes may generate.

In my view, the draft legislation being considered by the committee represents the best chance yet to assist families to resolve postseparation disputes in ways that are more likely to reduce conflict and therefore impact more positively on children. There are some technical difficulties in the drafting, such as terms like 'advisers'. I think there is also a risk that we might be tempted to employ individuals at family relationship centres who are insufficiently trained to deal with the complexities of some postseparation disputes. But I am aware that there will be other qualified witnesses who will want to speak on these issues, and I assume that these matters can be dealt with if there is goodwill and clarity of vision. I am quite happy to speak of them later if you wish to ask questions about them.

In the article that I mentioned I have recently published in the *Journal of Family Studies*—the article on family relationship centres—I suggest that it is useful to think of separating families in four broad categories. It is useful to think of separating families in this way because each category requires a different form of response. Often one of the problems when we listen to discussions on family law is that we are looking, possibly, for a one-case-fits-all sort of solution. The first category includes cases that involve systemically abusive situations—so violence and child abuse cases would fit into that. I know there are definitional issues around what we mean by that but, as a broad category, that is the first one. The second category takes in cases that involve significant mental health problems. They remain the cinderella area of family law, and that is something that we may come back to. I do not think it is adequately recognised how mental health issues contribute to some of these dispute resolution problems.

The third category includes clients who are overwhelmed. At the time that the separation occurs, it is very difficult for them to hear any message other than messages that might help them feel a little better. The fourth category includes couples who have simply grown apart. They tend to be less problematic in terms of dispute resolution, although they can still have their problems. If it is of interest to the committee, I would be happy to expand on what I think is required for each of these categories and how the proposed family relationship centres might fit into the picture.

On the broader question of family relationship centres, I simply say at this stage that, in my view, the manner of their roll-out, their ease of identification and the publicity they receive are all crucial issues. I am apprehensive at this stage that if family relationship centres are rolled out over too long a period and do not become quickly recognisable by separating families, they may fail to have their intended impact and many families may simply drift back to less helpful processes. Again, I am happy to elaborate on that if the committee wishes.

I do not believe separation should be an excuse for overservicing, whether that overservicing be legal or psychological. In my experience, many separating families need only a bit of a nudge in the right direction, and some are quite capable of keeping their children's interests adequately in view and need virtually no formal intervention at all. But, at the same time, it is clear that we spend a large amount of money on a minority of postseparation disputes, and it is important that we get this process right.

In the paper I mentioned in the *Journal of Family Studies* I spell out how, in my view, family relationship centres and the Family Court or a combined Family Court-Federal Magistrates Court can complement each other. In order to maximise the chances of this happening, the family relationship centres need at this stage to be pulled together by an individual in a senior chief executive officer position who can take senior executive responsibility for family relationship centres. Again, I am happy to expand on that. The family relationship centres are a wonderful idea. I have some concerns about the way they will be rolled out and the length of time it will take, and I strongly urge the committee to think seriously about having a senior chief executive officer who can pull this together in a way that makes sense and that links in, in ways that I am happy to describe later, with the Family Court and the Federal Magistrates Court.

In conclusion, it is extremely gratifying to see that, after almost 30 years, the court has also begun to embrace non-adversarial ways of hearing cases and making decisions. I am now moving away from the family relationship centres to the court, but this is an important issue to flag. I do not underestimate the difficulties that may lie ahead in this enterprise of what is currently called 'children's cases'. Even as a non-lawyer, I am not unmindful of the constitutional and practice issues that confront lawyers and judges, but I have not a shadow of a doubt that for the sake of separating families and the children caught in disputes this is an initiative that is crying out for continued support, continued dialogue between lawyers and social scientists and continued research.

CHAIRMAN—Thank you very much. My understanding is that you are not formally lodging a submission and you are here to give evidence in lieu of that.

Prof. Moloney—That is correct.

CHAIRMAN—I was very interested in what you had to say. With respect to the family relationship centres and the period it is going to take to roll them out, there are logistical problems about finding the right people to look after all these centres from day one, and that is why I think it was to be a progressive thing. However, we will certainly look at and make sure that we ask the department whether it is feasible to accelerate the rolling out of these centres. If we agree that they are a good idea then obviously it would be advantageous to have them out there in the field as quickly as possible.

You mentioned that the bill currently before the committee offers a lot of hope and is a very positive step forward. You also mentioned that there were some drafting problems that you have a concern about. I do not think you elaborated on those. I would appreciate your noting and sending to the committee secretary problems that you see with the bill. It does not necessarily have to be a full submission but, if you see problems with aspects of the bill, given your experience in this field, the committee would appreciate your putting in that amount of time.

Prof. Moloney—I am very happy to do that.

CHAIRMAN—Are there any parts of the bill in particular that you have concerns about?

Prof. Moloney—I think the overall thrust of the bill is absolutely in the right direction. In going down to details, for example, I have some concerns about words like 'advisers'. I would be very happy to take up your offer, note those concerns and send them to the committee.

CHAIRMAN—The committee has been tasked with reviewing the draft legislation to see the extent to which it picks up the government's response to the recommendation of the *Every picture tells a story* report. To what extent do you think, generally speaking, the bill does that? Can you explain where you believe that, in some parts, the legislation might not accurately reflect that response? There were some additions to the legislation by the department, and I am interested in where you see the legislation doing a good job and, more importantly, where you see it could be improved to make a reasonable effort even better?

Prof. Moloney—I do need to say that I have recently come back from overseas. I was asked on Friday if I would appear before the committee. I do not believe I have looked at the legislation in sufficient detail to really answer those questions adequately. My reaction as I read the draft legislation was almost: 'My God, they've got it right. They are actually going in the direction of the report.' It is unlike a lot of situations where I have read family law related legislation here and overseas, when I am often struck by the fact that it almost has a risk management sort of approach. We look at the lowest common denominator and 'What would happen if', and that becomes the baseline. I think this draft legislation begins with the right assumptions. It begins with assumptions about shared parenting. It has adequate cautions around issues of violence and child abuse. I think it possibly does not deal adequately with the mental health issues, but I recognise that they are very difficult.

CHAIRMAN—How should they be dealt with?

Mr PRICE—Can you expand your comments about mental health being the Cinderella in family law? I was very interested in that.

Prof. Moloney—One of the articles in the *Journal of Family Studies* here is a review of the relationship between mental health issues and family law. If you look at intractable cases—or so-called intractable cases—there is a group of cases within that that are fuelled, if you like, by the fact that people have particular mental health problems, especially personality disorders, which somehow particularly fit into an adversarial sort of process in which every issue becomes one that you contest.

I know there are problems around these things, because diagnosis is a very difficult issue, and I know that it is very difficult to assume or take too lightly that a person is suffering from a mental health disorder. But the practical issue there is that over the years we have probably neglected the input of mental health professionals in this work. When I say we have neglected them, it is probably more the case that we have employed them in more adversarial processes where they contribute to an adversarial system of decision making. I think there is another way—that is, with facilitated processes like mediation, it is possible to get assistance from mental health professionals who are actually working with the client but also have a broader view. The broader view relates to how this issue is going to be resolved and especially how it is going to be resolved in the interests of the children.

CHAIRMAN—Before I ask Mrs Hull, who sings your praises from the rooftops, to ask a question, one of the aims of the legislation is to reduce litigation and to encourage people to talk more. To what extent has the bill succeeded in that, or do you see that, on your current reading of the bill, there any provisions which might actually encourage additional litigation rather than discourage it?

Prof. Moloney—I do not think the bill itself, at least on my reading of it, is likely to discourage it.

CHAIRMAN—It is not likely to discourage it?

Prof. Moloney—Let me put it more positively. I think the bill has the capacity to encourage people to talk more and to be less adversarial. The proof of the pudding, of course, will be in the way it is implemented. I was sitting behind Mr Kennedy earlier this morning, and I was interested to hear his analysis of why the 1995 amendments did not work so well. There is a cultural issue, which we are only slowly moving towards, around ideas of shared parenting and around ideas of cooperation in decision making. I guess that is why I am concerned about the way the family relationships centres are going to be implemented. If they are well-publicised, people will know right from the start that, short of violence cases—and there may be one or two other categories—that is where they go.

What we know from research is that the way in which the dispute is framed in the early stages is critical. If it is framed right from the outset as: 'You are now separating. How do you plan to now parent your children?' that is a very different framework to: 'You are now separated. You need to dig in and to present your case with as much vigour as possible and put yourself forward as the preferred custodian.' Those two processes lead to very different outcomes. We need a structure that allows for that first process, which I think the family relationships centres are capable of delivering, and allows that to be seen as the first port of call. To me it is not so much a question of legislation but the implementation.

Mrs HULL—Thank you, Professor Moloney. It is great to see you back again. You heard and saw a lot of the committee evidence when we were doing the inquiry. It was the committee's intention to make the family law courts operate for and on behalf of families rather than to operate for and on behalf of solicitors and lawyers. That is the real intention of the committee: to bring it back to a family process that then relates back to the family relationships centres; they should be in unison. If it cannot be resolved there then all of the same principles and priorities of the family relationships centres—operating on behalf of families and in the best interests of children—should then carry on to a family law court. That was our view; it was our intention to put that together and take it away from the adversarial process. Is that the way you see the family relationships centres and the family law courts should work?

Prof. Moloney—Absolutely. Once again, I will draw your attention to the article I have written on family relationships centres in the most recent edition of the *Journal of Family Studies*. I have tried to set out a process of how the family relationships centres, and also the family relationships service providers—that is another whole area that we need to acknowledge, Relationships Australia and all of the others—link in with the court. This is where the implementation phase is really important. I assume that the Family Court will have made a submission and I hope the committee gets an opportunity to hear from Diane Gibson, who is the principal mediator in the Family Court.

I would strongly urge the committee to take seriously Di's vision of how the Family Court's own services need to change. By that I mean that the mediators and the counsellors that the Family Court have employed over many years need to adopt a different role, and I think Di is absolutely in agreement with this. They need to be there to assist families in which violence and abuse are alleged and also to play a forensic role and to feed into the court processes early in the process in those cases that go to the court. I do not think those cases are suitable cases for family relationships centres, but they need to be dealt with in a holistic way. I think the idea, for example, of confidentiality between those families and what are currently known as court counsellors and mediators is not viable in this situation. They need to be assisted, and if they can get that assistance directly from the court consultants that is fine. I call them 'consultants' rather than 'mediators' or 'counsellors' because that is the word, again, that Diane Gibson is very keen to use. It is clear that decisions will often need to be made with these cases. I think that is where the court needs the support of the really high-quality forensic sort of intervention that these consultants can make. It may be that some of the Family Court counsellors and mediators will need to get additional training to provide that role adequately. It may not happen, of course, overnight.

With the other cases—the mental health cases and then the other two categories: the one I termed 'overwhelmed' and the fourth category of 'just grown apart'—I think family relationships centres have the potential to play a highly significant role, but I think they also need to link in with the family relationship service providers, like Relationships Australia, the Family Mediation Centre, Unifam and so on. The family relationships centres cannot do this work on their own. The work that I think the family relationships centres ought to be focusing on is that initial, if you like, framing of the problem. The problem is that the couple are separating and they need to be given an opportunity to get enough space to think about their children. The child focused and child-inclusive practices that we have worked on with lawyers and others over the past four or five years would seem to me to be the focus of their work.

It is clear that some of these cases will not be able to be resolved within the three hours that has been suggested. There needs to be some kind of clear overlap between the family relationships centres and the family relationship service providers. My own view is that the family relationship service providers are already doing about 80 per cent of the sort of work that the family relationships centres would be doing. My view is that it would make a lot of sense to badge—though I do not particularly like that word, but it is the best word I can come up with—all of those family relationship service providers as family relationships centres.

I think there is a marketing issue here. I think people are often very confused when they separate. They are confused for a whole range of understandable reasons. But that core issue of 'Where do I go now that I am separating and I am in dispute' needs a very simple message in response: 'You go to a family relationships centre.' That is where you go unless, as I said, there is violence. If that is the message, then those centres have to be clearly visible. Whether they are called Relationships Australia or something else to me is secondary. People should not really be concerned about that. They just go through a door that says 'family relationships centre'. Once that process begins, then I think you are in there with a real chance to prevent these disputes becoming entrenched.

Mrs HULL—You are very focused on the family relationships centres, and I am really pleased that you are, because there is a definite need to understand the operational aspects and the modelling that takes place with those centres. It is my personal thought that a model should be developed and that that model should have enough flexibility in it to deal with individual cases. But the models across Australia should basically be the same. They should have the same objectives and the same outcomes, with some flexibility in them rather than having a Relationships Australia way of doing things, a mission way of doing things and somebody else's way of doing things. Would it be to our advantage to look at establishing the best practice model we see available at the moment in order to implement it into our relationships centres? Then, of course, it could be working. Rather than having different applications and different models all over the place, should family relationships centres have an underlying objectives and outcomes model?

Prof. Moloney—I think they should, and I think it is achievable. There is enormous goodwill amongst the family relationship service providers to move in that direction. It would be a pity if family relationships centres were somehow seen as separate from those providers. I think those two things need to be knitted together. We have learnt a lot over the past few years about best practice. With most of the mediators in family law that are operating in Australia at the moment, we have moved from a kind of old-fashioned notion of mediation as simply a neutral exercise to which the couple come, to much more child-focused work. That is not easy work. There is a delicate balance between allowing a family to find its own best solution but at the same time keeping children up front and centre. But you are absolutely right: there does need to be a best practice model that is agreed upon, where people can enter these family relationships centres and pretty much expect that this is what they will get.

Mr PRICE—Pardon my ignorance, Professor, but isn't it possible, under the government's model, that there will be different providers running different centres, so that one group might win a tender for 10 and another group might win a tender for five et cetera? You will have different service advisers winning tenders—am I mistaken in that?

Prof. Moloney—No, I understand that that is probably the way it will go.

Mr PRICE—Within the model that the government has embarked on, you made the heavy emphasis, which I accept, that you needed a very strong CEO. But it goes without saying that you cannot have a strong CEO, because you are having the Commonwealth have contract administrators rather than someone who has line responsibility for the operations of these centres. How do you resolve that conflict?

Prof. Moloney—I am not sure. Perhaps CEO is the wrong model.

Mr PRICE—I understand what you are getting at in using that descriptor, but it seems to me that the Commonwealth is limiting its ability to be able to do that.

Prof. Moloney—Yes, I think that is true. Whilst I think that we do need to look at a best practice model, clearly there are local contingencies—local cultural issues and so on—that only the organisations on the ground in those places best understand. But somehow I think that considerable thought needs to be given to some sort of overarching accountability around best practice.

Ms ROXON—I have two questions. One of them I think you have partially covered in dealing with the family relationships centres. My concern is that 65 centres are not going to achieve the objective that you were referring to of everybody being able to walk into the one place. I think—correct me if I am wrong—you have answered that by saying you want to tie in with the existing family relationship services to have a much larger number. Would you express the view that the legislation that we are reviewing now puts in place a compulsory mechanism to be involved in mediation and dispute resolution which is contingent on the roll-out of these services and on people being able to get them? Would you agree that the legislation itself will just tick over as time goes on, and this will become compulsory irrespective of what happens with the funding and the roll-out of services? Would you express a view on whether you think it is appropriate to put that in the legislation now? Would it be wiser to implement just the first phase and to make amendments to the law later, following the introduction and proper implementation of the centres? That is the first question.

Prof. Moloney—I do not know what the answer to that is. I raised that issue in the article that I have just drawn attention to. It does seem inappropriate to make something compulsory if that something does not exist or does not exist in sufficient numbers for people to access. On the other hand, I am concerned that the momentum might be lost. My pragmatic response to this is to look seriously at, as I said, badging FRSPs as family relationships centres. I have been supervising mediators in several FRSPs in Melbourne for 15 years and I have watched the quality of those mediators grow and go from strength to strength. They are perfectly capable of running these sorts of programs and running them very well. There may be some issues of retraining, but I do not think they would be major ones.

Ms ROXON—Secondly, because in your submission you are so focused on the importance of children and how to make sure that these processes are more child focused, you are probably aware that one of the changes in the bill sets out a new definition of how the court should assess what is in the best interests of the child. It gives primary consideration to two factors: a meaningful relationship with both parents and violence. Then there are the other factors. Would

you express a view on whether you think it is appropriate to have primary and additional factors. With your experience and the complexity you referred to of making sure families' and children's interests are all taken account of, is there a better way of doing that than what is currently in the bill? Do you think it poses any risks? Is it an advantage?

Prof. Moloney—This is the old chestnut: at what point does violence become something that you have to take so seriously that you simply cannot envisage the child continuing in a relationship?

Ms ROXON—To assist your thoughts a little, I particularly thought that one of the things you might be interested in is that the children's views are in the additional considerations, not in the primary considerations. That would seem to turn on its head some of the comments that you made about counsellors changing their focus to bring on board views that might be expressed by children.

Prof. Moloney—The term 'children's views' is a little problematic, even though I am fully supportive of engaging children in these processes where it is appropriate. It seems to me that the way in which children are brought into these decision making processes needs to be thought through very carefully. I am not really sure how this fits into legislation. I do not want to put myself up as an expert on the drafting of legislation. I am concerned, though, about the way in which children are brought into these processes and whether or not that becomes traumatic for children. I think there are ways in which they can be brought in. Certainly in the child-inclusive practice work that Jen McIntosh and I have been involved in we have models for that.

It is a question of children's views, but it is a larger issue than that; it is a question of how this child sees his or her life right now. The narrower question: do I want to spend a weekend with dad? is often missing the point. I know that, in the end, decisions often need to be made, either by the couple themselves or by an external decision maker, but I would like to somehow see the context of the child's world broadened as well as processes that enable that to happen. Child-inclusive practices within mediation, which we have been promoting for some time and which we are continuing to research, are certainly one way forward. Where a child's views need to be put to a decision making body, I think, again, we have to pay greater attention to how that child is brought into the process. We must consider what the experience for this child is and listen not just to his or her views but to his or her sense of family. It is a broader set of issues. I am sorry, that is being a bit vague.

Ms ROXON—That is okay. Thanks.

Mr PRICE—You emphasised links between the Family Court and the family relationships centres. Do you think that there needs to be a legislative link? If not, how does the parliament achieve it?

Prof. Moloney—Can you be a little more specific? Achieve what?

Mr PRICE—The links that you were talking about between the Family Court and the relationship centres.

Prof. Moloney—Is the question: is it still open for people to use either service at their discretion? Is that the core of the question?

Mr PRICE—No. To what extent does the linkage need to be reflected in legislation? That is what I am trying to ask.

Prof. Moloney—As a legal layperson, it seems to me a good idea that it is reflected in the legislation. I guess I am being a little cautious, because I do not know what the traps in that might be but, from a commonsense point of view, I would say yes.

Mr PRICE—Again, my question may reflect my ignorance. This legislation is dealing with people who have a relationship that has broken down. The parties are establishing parenting plans and dealing with the entrails of their relationships and family responsibilities. To what extent are those who have already been through that process and are dissatisfied actually benefited by this new legislation or the establishment of the relationship centres? I am getting a bit long-winded here. How do the new arrangements benefit those thousands of people who are currently dissatisfied with their contact orders, who do not have the money to take it to the Family Court and who do not have the will, if you like, to be self-represented in the Family Court? How does this legislation and the newly established family relationships centres deal with this massive problem that we have?

Prof. Moloney—I am assuming that those family relationships centres would in some way be accessible to these people as well if they wish to use them. If they do wish to use them, I guess there are issues of whether this is still going to be a free service for these people or only for people who have separated after a particular date.

Mr PRICE—You yourself said that, in solving these matters, how the problems are framed early is significant to its outcome. These people are hardened practitioners. They and their families, or one party's family, have usually been denuded of thousands upon thousands of dollars but they still have orders that are not being enforced.

Prof. Moloney—You are right. I think the way in which the problem is framed and the way it then develops make it increasingly difficult as time goes on to turn it around. I am not sure, to be honest, no matter how good the legislation was—if it began tomorrow—how many of those older, entrenched cases it would be capable of picking up. I only know as a practitioner that, the longer these things have gone on, the harder it is to turn them around. As a dispute resolution practitioner, the only tool that you may have at your disposal with a case that has gone on and on is to, in a sense, put to both parties: 'How long do you want this to go on? How long do you want to feel like this?'—and appeal to some sense that there might be a better life after this. That works with a percentage of people, but some people are so entrenched.

Mr PRICE—In terms of the cultural issues that you raised, one of the beliefs that have been well-embedded or practised for a long time is not to link child support and contact. It appears that that is starting to change. Do you have a view about that? Does it help in terms of compliance regimes if there are linkages?

Prof. Moloney—I think it probably does. I understand the thinking behind the purist view that of course one has a responsibility to a child, whether or not you have any ongoing relationship

with that child. The reality in my experience for most parents—certainly for most, and I guess in the majority of cases it is men—is that these things are in some way linked. I have seen the whole gamut from men who have been heroic, in my view, in their willingness to continue paying—with, in one sense, no reward to themselves at all—right through to the other extreme, which is men who just make the link: 'I will pay if I see.' The first position is heroic and in many ways commendable, but I do not think the other extreme position can be endorsed. I think the reality is, if you think of the child as a whole and you are thinking of your relationship and your contributions, both personal and financial, those two things are inevitably linked in the minds of most parents.

Mr CADMAN—In the time that you have had to look at the proposals, do you think there is adequate emphasis given to the participation of both parties—and maybe a wider group of grandparents or whoever—in settling the matter before it comes to court? Is there sufficient emphasis in the legislation to ensure that process occurs?

Prof. Moloney—As I said, from my reading of the legislation when I got back from overseas, it seemed to me to be heading in the right direction—in fact, very much in the right direction. Whether or not it can be strengthened in certain areas to emphasise that this is what you do, I do not know. There is an expectation that, if you separate, you are responsible for the ongoing parenting of your children. You need to make strenuous efforts to resolve that and, if you need assistance to resolve that with what I would call facilitative processes, that is where you go. Again, I do not want to get too detailed in relation to whether the legislation sufficiently emphasises that, but I think that is the aim, and if it is not sufficiently emphasised in the legislation then it ought to be. As I am speaking, I feel the need, in relation to questions like that, to go back and do a much more fine-grain reading of the legislation.

Mr CADMAN—When you do so, I wonder if you would look at whether there should be greater emphasis on equal participation in decision making by both partners. That is an area where there seems, to me anyway, to be a slightly softer approach than the one envisaged by our committee.

Prof. Moloney—I am happy to look at the wording of that. The exact wording of it escapes me, so it is hard for me to comment on that.

Mr PRICE—I would like to return to the point we were making about the linkage between contact and child support. Regrettably, the government has embarked on a fairly lengthy consultation process over the Patrick Parkinson task force recommendations on child support. In a sense, we have got a one-shot look at this but we are not sure where all that is going. In terms of non-compliance with parenting orders or a parenting plan, do you see some value in there being a legislative provision for the magistrates court to look at a reduction or a variation in terms of child support because of a failure to adhere to contact orders?

Prof. Moloney—It seems to me a last-ditch stand—

Mr PRICE—Yes—

Prof. Moloney—if you have got to that point. I guess I am reluctant to say yes, but I can see that in certain circumstances that may be all you have got left in your arsenal, so to speak.

Mr PRICE—In terms of this legislation, it not only has to suit newly broken down relationships; it also has to suit existing relationships. Notwithstanding a great generosity of sprit, it would be hard to believe that the family relationships centres are going to have a 100 per cent success rate.

Prof. Moloney—Of course they are not.

Mr PRICE—So we do need to learn from experience rather than resile in international best practice of non-performance.

Prof. Moloney—It is always a case of the stick and the carrot.

Mr PRICE—I do not disagree. If I may say so, I think the committee was very much of the view of making sure that there were plenty of carrots but felt there needed to be a balanced approach, therefore including a stick, to some of the problems as well.

Prof. Moloney—Again, I suppose it is an issue of what is in the legislation and how it is put into practice. There probably does need to be something in the legislation that allows for that sort of provision. One would just hope that it is not put into practice too easily.

Mrs HULL—You were in the audience before when the previous witnesses were putting forward their points of view. I am wondering what your thoughts are on parenting plans and the emphasis on them. It seems to me that the process of going to a family relationships centre is established in legislation, the Family Law Act, saying, 'You must go through this process prior to proceeding down this pathway.' So the preparation, understanding and discussion of parenting plans would be a major part of the family relationships centres. It would be about trying to get people to a level plateau—not a level playing field but a level plateau—in emotions in terms of developing a parenting plan. My thought is that what happened there would then go forward into a family law scenario where it would be considered—and should, in my view—as an optimum document and starting point because obviously it would be the document which people would have spent most time discussing.

When I heard the previous evidence, it seemed to me that the Law Society believes a parenting plan is just a plan and that where it is not practical or possible it should be dispensed with. That confused me because I would have thought that that was up to the parents to decide during the determination and preparation of that parenting plan. Hopefully, it was signed off on and agreed to and there was no coercion. Hopefully, the parents would have looked at all of the difficulties. It should be the parents who determine whether or not the parenting plan is reasonable and able to be delivered, not lawyers and judges.

Prof. Moloney—I agree with that. With respect, there is a presumption sometimes among lawyers that the parenting plan is what the parents aspire to and that the lawyers should get down to tin tacks and reduce it to reality. That is an unfortunate approach. It is the parents who are in charge of the children. Whatever aspirations they want to build into that parenting plan—so long as they are not against the interests of the children—ought to be preserved.

Earlier I listened to the response from Mr Kennedy on the difference between the parenting plan and other ways of approaching things. I think it is unfortunate. The notion of a parenting

plan is to put the child in the total context. That is what I was trying to get at when I answered the other question so badly. It is the contextual issues that are important. People need to ask: what do these parents want for those children and for themselves as parents? There are an almost infinite number of issues that can be raised and discussed and agreed upon. When you put the question in that way, somehow it is incumbent on whoever needs to reduce that to some sort of writing to ensure that that spirit is preserved.

Mrs HULL—I understand you have not read the reforms—you have not been here to read the reforms—but do you think it follows that we should be looking at a new culture, one in which the family law court is available for families and delivers family aspirations?

Prof. Moloney—The starting point for me has to be that people are in charge of their families. Parents, even if they are separated, are in charge until and unless it is demonstrated that they are not capable of being so. The court has always had the problem of setting up laws and expectations around the way parenting ought to be. We can go back to the initial difficulties around the 'every second weekend' notion. Where did that come from? It emerged from a whole range of practical considerations and so on. But at the end of the day it is about individual parents and what they can manage and what they want and how that fits with their own children's interests. The way you put it is quite refreshing.

Mr KERR—This is probably a wee bit of a side wind to our discussion, but when we talk about cultural approaches to these problem-resolving areas, one of the difficulties that always strikes me is the training of legal practitioners. I mean no ill towards my profession, because I have enormous regard for those who work in family law, but it seems to me that those who practice in family law, either because of the experience of clients who wish to pursue adversarial solutions or because of their own training, intuitively start with an adversarial frame of mind. They see it as a conflict of interest to see themselves as owing anything to the other party.

By way of a side comment, my own experience of this, like that of so many parliamentarians, is that, sadly, my marriage broke up. We did try to resolve matters between ourselves amicably. We approached a family law practitioner with a view that we would give joint instructions, in the sense that we would try to avoid fighting by saying, 'You tell us, if we had the biggest row in the world, roughly where would this come out, so that we can then try to apply some intelligence to this and make a decision?' We had an enormous degree of difficulty in persuading that practitioner to accept it on that basis, and we both had to give written undertakings that we understood the limits on conflicts of interests and all those sorts of things. Without any inference that legal practitioners are a problem, it does seem to me that if all these systems are set up to produce non-adversarial solutions and to facilitate positive outcomes yet people are approaching solicitors at an early point and, in a sense, commencing to conceptualise themselves in an adversarial way, then, no matter how good this process is that we put people through, they are going to be doing it against a backdrop where they are thinking in these conflict related terms. Have you got any thoughts about training approaches or whether there should be subsets of legal practitioners who are identified as persons who will approach things somewhat differently and in a different environment, perhaps having to pass it on to more adversarial ones at a later stage?

Prof. Moloney—I gather we are short of time. I could speak on this issue for the next hour. It is a systemic problem. I think lawyers are trained to work in a particular way and they are really being invited to do something very different. I should also say that, even as a nonlawyer, when a

person approaches me as a psychologist and tells me his story of separation, there is a sort of systemic pressure to move into an advocacy position for that particular individual. So I think it is systemic issue. I think that is why the mediation process is both so important but so difficult to sustain. We need to continually reinforce that in the culture. I interpret your more specific question to be about how to deal with the lawyers—

Mr KERR—Yes, but I really am very conscious that it is such an easy thing to do to attack the legal profession.

Prof. Moloney—Of course. I have always made a distinction between what I regard as the systemic problem and the individual problem. It is like the 'Some of my best friends are lawyers' argument. In the majority of cases, where it gets resolved well is in the individual relationships between the non-legal practitioners and the lawyers. I could cite many, many examples from the work I do as a supervisor where cases hinge in the end on not just the skill of the mediator but the willingness of the lawyer to see that this is actually a good way to go and the willingness of the lawyer to define his or her role more particularly, to occasionally back off a little bit on the issue of ego and just be an important but not the most important part of the whole process. I think that can only happen through constant work between the two professions. I do not think there is any other way other than to almost do a complete reversal of legal training in family law. I am assuming that that is not going to happen.

Mr PRICE—The Commonwealth's approach to mental health is, in men's health, to have 25 projects, of which only one is to be re-funded. All the money is to be devoted once again to demonstration projects. Given that we know that suicide is a big issue in family law, what is the efficacy of this approach? Are you aware of Commonwealth projects that also look at women's health—because presumably women also suffer, although perhaps they do not suicide at the same rate as men—and whether or not we need some ongoing commitment post separation, post parenting plans, post the whole process, to look at ongoing mental health wellbeing?

Prof. Moloney—I am assuming this also relates to state and Commonwealth responsibilities and who, in a sense, picks up the tab.

Mr PRICE—Actually the Commonwealth has funded these projects out of its own money, but it seems to me to be a concern that there is no ongoing funding. Of the 25 projects which will not be re-funded, surely some have demonstrated success. Again, there will be a round of funding of what will effectively be just demonstration projects that will go nowhere in terms of ongoing funding or tackling of this very important and underdone area of family law.

Prof. Moloney—I am aware, for example, that Mensline has been highly successful, that it has been re-funded and that the funding has been increased. I saw some figures recently that indicate—I cannot quite remember the exact figures—that the re-funding and the increased funding allows them to move from being able to take something like 25 per cent of the calls they receive to something like 50 per cent or 60 per cent. They are still a long way short of what they believe the need is. That service has certainly been highly successful. One of the things that I think is underrecognised in the mediation services as they exist—in the FRSPs, and I imagine with the family relationship centres it would be the same—is the amount of outward referral. These mediators have become increasingly skilled at understanding what other issues are there for the individuals that come their away. They often work very hard to link them in with the

appropriate mental health services and so on. On your point about the number of services that are being tried out and their funding running out, I am just not aware of the details of that, but I take your point. Surely, if there are 25 projects and only one has got up for increased or ongoing funding, something is not working.

Mrs HULL—Surely the inclusiveness of mental health into the family relationships centres mediation area would start to address those issues of mental health. When you have to go through this process, you are going to start to understand that there are mental health issues and then that there would be an inclusiveness opportunity of mental health options there.

Prof. Moloney—I think it would. I think that goes back to the one of the points I made in my opening statement. I do not think the FRCs can afford to have people who are not well qualified.

Mrs HULL—That is right.

Prof. Moloney—To put that positively: they need to be well qualified and able to at least recognise the core elements of major mental health problems.

Mr CADMAN—Are there enough male counsellors or parent-child specialists?

Prof. Moloney—This is an industry where there is a predominance of female workers. I would say that there are never enough male workers in this area. It is just not a sufficiently enticing area, I imagine, for a lot of men to get into. Having said that, there are some excellent men in the field. If this really does get up and become the norm for family law interventions, hopefully it will attract more men.

CHAIRMAN—It is a bit like school teaching—primary school teaching in particular.

Mr PRICE—You did not answer the question about women's health. We are recognising that men suicide as a result of family law issues or that that is a predominant factor often in suicide. Is there much work being done on the impact on women in relation to family law? What is happening in terms of their mental health? Is this an underdone area?

Prof. Moloney—I think it is an area that has possibly faded a little. I suppose it is difficult to keep all of the balls in the air at once. If you go back 15 years or so, you find there was a lot of emphasis on the impact on women. I think men have quite rightly in a sense put their hands up and have been noticed a little more. Maybe one of the costs of that is that some of the women's issues have faded a little.

CHAIRMAN—Thank you for appearing before the committee. A *Hansard* draft of your evidence will be provided to you for checking. If you could get that back, that would be appreciated. I think also you said that you were going to let the committee have some additional information. If you could do that as expeditiously as possible, that would be appreciated. Given the tight reporting time frame that the Attorney has imposed on the committee—that is, 11 August; I think the government is pretty keen to get this legislation into parliament—if you could come back to us as soon as possible, that would be appreciated. Thank you.

Prof. Moloney—I am not sure what the formal process is here, but I would like to pass on to the committee copies of the *Journal of Family Studies*.

CHAIRMAN—We will accept those as exhibits. Thank you.

[12.12 pm]

HUDSON, Ms Eva, Outreach Worker, Elizabeth Hoffman House Aboriginal Women's Services Inc.

SOLOMON, Ms Rose, Chief Executive Officer, Elizabeth Hoffman House Aboriginal Women's Services Inc.

INGLIS, Mr Robin, Research Officer, Victorian Aboriginal Legal Service Cooperative

JUBB, Ms Greta, Research Officer, Victorian Aboriginal Legal Service Cooperative

CHAIRMAN—Thank you for appearing before the committee today. I welcome representatives from the Victorian Aboriginal Legal Service Cooperative to give evidence. Elizabeth Hoffman House Aboriginal Women's Services is a different organisation from the Victorian Aboriginal Legal Service Cooperative, so we have two organisations appearing. We were not expecting that, but I am sure that will not be a problem. Although the committee does not require you to give evidence on oath, I need to draw to your attention that these are legal proceedings of the parliament and it is important to treat these proceedings with the same respect as proceedings of the House of Representatives itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament, with consequential penalties. I would ask each of our two organisations to make a brief opening statement. Maybe the Victorian Aboriginal Legal Service Cooperative can give theirs first.

Mr Inglis—I would just like to say that we invited Elizabeth Hoffman House Aboriginal Women's Services to assist us in making our presentation because of their expertise in the area and because we have worked with them collaboratively in doing things like responding to the family violence pilot projects and organising forums about family violence.

We welcome the opportunity to comment on the draft bill. As you are aware, the time lines are very brief and we have not had as much time as we would have liked to look at it but these are our initial comments. Just a couple of words of introduction about our service. We are a state-wide service providing representation, advice education, policy and law reform to people across the state. The service was established in 1972. It is governed by a board of Indigenous directors. The service has 10 Indigenous client service officers who provide information and assistance to clients and help bridge the gap between the legal culture and institutions and the community.

CHAIRMAN—You only give advice to Indigenous clients?

Mr Inglis—Usually. There are occasions where there may be a partner involved or there may be a case for doing that, but in 99.9 per cent of cases that is the practice and the policy. Six of the client service officers are based in regional Victoria. Slightly more than 50 per cent of the Indigenous population live outside metropolitan Melbourne. The city based client service officers also provide an after hours phone service which provides a response to notifications from police when Indigenous people are in custody. The service has 12 lawyers, four of whom do civil and family law. Our civil and family lawyers see approximately equal percentages of

males and females. We provide the majority of legal aid services in the criminal law area to Indigenous people and over 60 per cent of civil and family law services. We support mainstream services becoming more culturally aware and accessible to Indigenous people and we have many cooperative arrangements to support this. However, we do not believe that this needs to be, or should be, at the expense of funding and supporting a strong and high quality range of Indigenous services. There needs to be Indigenous and non-Indigenous services to cater for conflicts of interest and to ensure people have a viable choice. My colleague Greta Jubb will talk briefly about these matters and also raise the issue of whether people are going to be able to access legal advice prior to being compelled to engage in counselling.

Ms Solomon—Thank you for listening to me today. I welcome the opportunity to contribute to this process. I think it is a really good opportunity, not only for our organisation to understand the legislation a little better, but also to provide this committee with some information about the Indigenous family violence in Victoria and the impact that it has on families. Indigenous family violence is an issue of serious concern to all Aboriginal people and communities across Victoria. The most recent statistics indicate that Aboriginal women are 45 times more likely to experience family violence than their non-Aboriginal sisters. Some of the statistics that we have recently dragged out are quite concerning. Two of them stand out for me. There have been more deaths of Aboriginal women over the last 20 years than there have been Aboriginal deaths in custody. Most of these women have died as a result of serious assaults. The other interesting statistic is that Victoria has the highest number of Aboriginal children coming to the attention of child protection due to family violence and the highest number across Australia. This is incredibly concerning, given that Victoria has one of the lowest Indigenous populations—

CHAIRMAN—Why do you have that level?

Ms Solomon—I believe that part of the problem has been an escalation in family violence, and child protection having to intervene in those families. One of the things that I think has contributed to the escalation in that statistic is that child protection is not managing family violence cases well. Therefore, families are continuing to be renotified on. Hence that has created the increase. Sixty-five per cent of the Aboriginal population in Victoria is under 35 years of age.

Given our role in the community, we have dealings with the Family Court, the Magistrates Court and the Children's Court. In relation to family violence I would ask: where is the interface between these three jurisdictions around establishing the best interests of the child? In our experience we have gone to different courts with different types of conditions and so forth but the Family Court process in particular is very difficult for our people. The Family Court, to my knowledge, does not have any Indigenous specific programs that can educate people about the process. Aboriginal people are frightened of courts in general because of the historical stuff. However, when they come to the Family Court it is very confusing. They do not understand the legislation and often we have one parent dropping off and not following through.

When I talk about the interface of family violence I am focusing on the best interests of the child, because the impact on our children is presenting itself in the statistics in relation to child protection. I would like to see some interface across those three courts to determine what the best interests of the child may be. I say that because, firstly, I heard the previous witness talk about suicide. We have a very high youth suicide rate in our community. A report done by the

Victorian Aboriginal Health Service indicated that a majority of the youths who had committed suicide were survivors of sexual assault and family violence. It is very important to look at the impact of family violence at a very young age so that children do not grow up, as they have in our community, believing violence is quite normal. We refer to it as 'transgenerational violence': where there have been generations of families for whom that is the only way that they have survived. I am really quite committed to this area because I think that we do not look at integration and how it could work better.

I would like to also bring to the attention of the committee the fact that handovers can be really problematic in the cases where there is family violence, for various reasons. We are a state-wide service and lack of transport is one. The costs related to contact sometimes are not taken into consideration. And, in the cases of family violence, often families are requested to designate a person to supervise the access. In our community that is often a family member, which can compromise families at times. There are no workers in the field that can assist in this area. In our organisation we have several sites and we have a 24-hour service. When it is appropriate we can send a worker to supervise the handover. But we find that the handover process is more the time when violence is perpetuated and children are often compromised. I wonder whether some consideration could be given to Indigenous specific handover centres or child contact centres or a similar service of that nature.

I would also like to bring to your attention the role of grandparents in our community. Many of our women, partners and so forth who are involved in the cycle of violence are in no position to care for their children; hence grandparents, aunts, cousins and uncles play a huge role in caring for these children. Sometimes that can be quite problematic as well. Often our clients present with multiple needs—it could be family violence, drug and alcohol abuse or a range of issues—and grandparents are left to bring these children up but also to deal with the issues that emerge out of that. I would like to see the role of grandparents looked at more thoroughly, and consideration given to what supports could be put in place for them. Often they are diffusing violent situations and they are caught in the middle.

CHAIRMAN—The important role of grandparents is not restricted to the Indigenous community. I get lots of representations from grandparents.

Mr PRICE—No, Ms Solomon is talking about raising the children, which is a separate issue.

CHAIRMAN—A lot of grandparents raise children even in the general community.

Mr PRICE—Yes, I do not disagree.

Ms Solomon—Yes. I am saying that—

Mrs HULL—You are talking about them in an Indigenous cultural way—they are the extended family.

Ms Solomon—That is right.

Mrs HULL—You do not generally just have a mother and father; you have an extended family relationship in the way you culturally raise your children.

Ms Solomon—Yes.

Mr PRICE—I am a bit lost. I thought you were making the point that in the culture and because of circumstances there were a lot more grandparents actually physically raising the children than in the wider community.

Ms Solomon—Yes. I know that in our community many grandparents play that role, more so than in the wider community.

CHAIRMAN—Is that because the circumstances of the children and the parents necessitate that, as they do in the general community where grandparents just step in and effectively become replacement parents, or does this occur because of the Indigenous culture and the extended family? I suppose your answer could be that it is a bit of both.

Ms Solomon—That is right; it is a bit of both. Basically, this type of arrangement has been in place for a long time. We are finding that it is occurring more so now. For example, where there are child protection issues and they are investigating a case where there is a likelihood that children may be removed because of family violence, the extended family members are stepping in more because they do not want the children to go through that system again. They want to prevent that system from entering that family. So we are finding it is a bit of both. There are cases where children have been removed and extended family members have been approached to care for the children rather than them being placed in foster care with people they do not know. Certainly there has been an increase in the number of grandparents who are now caring for grandchildren because of the levels of family violence and the impact that that has on our community.

CHAIRMAN—Thank you for those opening statements from both organisations. The aim of the legislation is to encourage parents to reach parenting agreements and to have an ongoing interest in the upbringing of their children. You would have seen the terms of reference. One of those terms of reference hits right on the subject you have concentrated on and that is the need to protect children from family violence and abuse. To what extent do you believe that the bill, and I suspect you have had a chance to look at it although it is a huge document, actually implements what the government is seeking to do as far as ongoing parental responsibility, particularly given what you told us before about how the bill affects the areas of family violence and abuse?

Ms Solomon—I am concerned that the term 'shared responsibility' changing to 'joint responsibility' may be misleading. In my experience—and I have been in this field for over 20 years—often when there are family violence issues people clutch at straws, and this pertains to both parents. The word 'joint' could be misconstrued, and I am concerned about that. It could be used in a manner that will be derogatory in the long term for the child. Our experience is that family violence in separation is a time of escalation when there is lots of anger towards each other. We find that children are often caught in that process. The change in the wording in the legislation from 'shared' to 'joint' concerns me because of the reasons I have stated.

CHAIRMAN—In your opinion, will the proposed amendments ensure the safety of children and people living with domestic violence? If so, how? If not, why not?

Ms Solomon—I do not believe it will. There needs to be more dialogue between the different court jurisdictions. We have the Children's Court that gets involved in family violence issues. We now have the Family Violence Court and we have the family law court. If we are talking about the best interests of the child—forget the parents; I should not say that—I think more effort should be made to look at the interface of those three jurisdictions in determining the best interests of the child.

Mr PRICE—I am not from Victoria. Could you explain the Family Violence Court? I am not familiar with it.

Ms Solomon—Victoria has recently launched two pilot Family Violence Courts—one at Heidelberg and one at Ballarat. They specifically deal with family violence issues. I am not yet clear about the legalities for making orders over other jurisdictions—for example, the Children's Court or the Family Court. They have a program whereby perpetrators of violence are referred to mandatory counselling. They also have an applicant and a defendant worker so that, on application to the court for an order such as an intervention order or stalking order, each party is educated about the process and what is going to happen. Also, there are some built-in supports to do some follow-up once the order is made by the court.

Mrs HULL—During the previous inquiry, with its report *Every picture tells a story*, we were in Cairns. There was an excellent presentation on a program that was being funded by the Family Court of Australia. That program was available in North Queensland and the Northern Territory. It was having enormous success in delivering generic mediation training programs to Indigenous communities. I think it is called the peacemaker course. It was enabling outreach areas to enhance their skills in dealing with family problems in traditional Indigenous cultures. It was not available to the urban people, which was a shame; it was available to outreach tribal areas. Are you aware of such programs taking place?

Ms Solomon—Yes. I met the Indigenous Family Court worker at a conference in Queensland.

Mrs HULL—She is very good.

Ms Solomon—She is very good. The question is: why haven't we got one here in Victoria?

Mrs HULL—That is why I am raising this issue—maybe this committee should be looking at that. The Family Court of Australia funded it for about $588,000. In the pathways report they suggested that this funding should continue and they should expand it. To date, that has not happened. It may be that you need to recognise that there is a process that deals specifically with Indigenous issues associated with family relationship breakdown, it has had some significant success and you need to be working on establishing available programs and training options for mediation in urban communities as well, which would fit within your program. I would like to raise with you that we as a committee should take that on board and additionally recommend that within family law.

ACTING CHAIR (Mr Cadman)—I am sure that will be noted.

Mrs HULL—You should also pursue that if you make any response to this committee.

Ms Jubb—As a representative of the Victorian Aboriginal Legal Service Cooperative, I will say that we would agree with that too. In terms of a mediator, there are no Koori people who are trained to deal with family disputes in Victoria. We would argue that more funding is needed for Koori mediators to help in this context.

Mr KERR—I will draw on that point. I am sure that you are aware that one of the proposals is that there will be an initial rollout of some centres—I think in the end it will be 65 of these family relationship centres. I am not sure whether in the development of this idea there was any focus on the participation of Indigenous Australians and, indeed, whether you want to make a case that there should be or that there is something specific about the way in which mediation and the resolution of potential conflict would be distinctly different or need to be addressed in a manner that is not the same. All I am doing is opening that up. It may be that the answer is: no, these mechanisms will work equally effectively across the board, but I thought I would at least test that proposition.

Ms Jubb—In relation to that, I think the answer is to structure the tendering process in a certain way that opens up the possibility of Indigenous organisations making a bid. There is funding out there, and at least some of that funding should go to Indigenous community organisations. We do not want the tendering process to exclude Indigenous organisations from competing. The capacity of Indigenous organisations to go through a tender process is a little bit difficult because of a lack of expertise, if it is competing against a mainstream organisation that has been through multiple tendering processes. We are arguing, as a maximum result, that the committee should at the first opportunity to raise whether the structure and content of the tendering process for these services should maximise the capacity of Indigenous organisations to participate in this process. We recognise that there is a need for Indigenous organisations to participate in it and that Indigenous people need a choice between service providers.

If a mainstream service provider was to tender, we would argue that the requirements for the request for tender should be that at the very least they can prove a working relationship with an Indigenous organisation or put together a package that ensures that Indigenous people are employed or that non-Indigenous people who are employed receive cultural awareness training. Unfortunately, it is sometimes our experience that, when the last two things I mentioned are included in the request for tender, as an Indigenous organisation we do not see the results. That is why we consider those things necessary at the very least. In our eyes the best outcome would be to encourage Indigenous organisations to compete in this tender process effectively.

Mr KERR—I would ask you to take one step further, because most of your response was in relation to procedural matters—will you allow Indigenous organisations to tender. Of course, the answer is, yes, they will be allowed to tender. But then you identified some threshold difficulties in terms of putting that tender in a form that is equal to or better than that being submitted by organisations of a greater scale and with a different kind of expertise in putting these kinds of submissions together. I was really asking a more threshold question which goes to that cultural sensitivity issue: are there some things that should be built into the availability of these services as part of the planning process overall?

Mr Inglis—It is a really critical issue. What tends to happen, as Greta was saying, is that cultural sensitivity gets tacked on to a tender proposal. We say that there has to be some thought given to how you structure the tender proposal so that two things happen: your mainstream

services genuinely do something to improve their cultural sensitivity and the organisations that already exist, that have an interest and are stakeholders, have the capacity to talk together and put in some sort of proposal or contribute in some way. This is simply because with something like mediation there is already a state government funded dispute settlement service that targets Indigenous people. They developed a slightly different training process to make it more culturally appropriate. We initiated contact with the Commonwealth government to talk about getting funding for mediation training in Victoria, but we have suggested that it needs to involve the stakeholder Aboriginal organisations to make sure it is optimally culturally accessible and fits with the realities of where the people and the services are.

I agree with your point that there are different issues. We are only partially aware of the extent of those issues, because we are only partially down the path of trying to work out these things. If the tender is structured so that only big organisations get a foot in the door and they have to think about how to include all the other parts to it as well, I think it will take much longer and you will deprive organisations that are already up and running and trying to do things. I might add that we did some research recently where we surveyed all the mainstream organisations to find out if any of the big players that provide family counselling or mediation have any Indigenous specific policy or any Indigenous mediators. As Greta said, there are not any and none of the organisations had any particular Koori-friendly policy. So there is a long way to go. We see it not as an 'either/or' but as a 'both/and' process that has to be entered into.

Ms Solomon—Also, in relation to identifying some of those needs, one of things that we need in the Family Court is some type of liaison officer similar to that person in Cairns. I went to an Indigenous conference at that time, and nobody at that conference knew that that position existed. It was just wonderful to hear her presentation and what she was doing in her community around educating people about the Family Court process and encouraging them to use it in a more friendly way.

CHAIRMAN—How was that funded?

Mrs HULL—Through the Family Court.

CHAIRMAN—We have the Family Court appearing before the committee next week in Canberra. I think that is a question we should put to the Family Court.

Ms Solomon—Yes.

CHAIRMAN—And we will do that.

Ms Solomon—Thank you very much.

Mrs HULL—I want to ask a question on the parenting plan process. We are moving ahead with the roll-out of 65 relationship centres. You have made the point clear that there may not be enough expertise available out there to cover all of the Indigenous issues and requirements. Regarding those relationship centres, would you have a comment on what could be included within the guidelines for the performance or the establishment of the relationship centres that would assist specific Indigenous communities to come to parenting plan agreements? That might be the utilisation of an extended group of people to come in and discuss a parenting plan, as

might happen in your general traditional community values. Would you have thoughts as to the roll-out of relationship centres and how Indigenous issues could and should be addressed until such time as you have the numbers on the ground, so to speak, to be able to deal specifically with Indigenous breakdown right across Australia?

Ms Solomon—That is a big question.

Mrs HULL—You do not have to answer it now. I would be quite happy to take that on notice if you would like to offer some suggestions to the committee on structure, guidelines and process in family relationship centres.

CHAIRMAN—If you could put pen to paper and forward that to the committee, the secretary would appreciate that very much.

Ms Solomon—That would be great, because I think that there are a few things that should be considered. I would be delighted to put something on paper and get it to the committee.

Mrs HULL—That would be good.

Ms Jubb—In relation to the centres—and this would probably apply to and be just as beneficial for Indigenous and non-Indigenous Australians—as a legal service, we are concerned that people who are directed or redirected from the court to the centres have access to legal advice. We consider legal advice a fundamental human right. If a person comes from a disadvantaged background, if a person is not aware of their rights or if one person is, there is a potential for the stronger party to take advantage of that during the mediation process. We are aware that there may be a need for a registrar at the court to inform a person, before directing them to a centre, that legal advice is an option and where to seek it. We would argue that that might result in a better outcome with a parenting plan, because there is no chance of it being unworkable or unfair.

Mrs HULL—But isn't that the process of mediation? The intent of the whole process here is to prevent more litigation rather than to create more litigation, to stop adversarial issues and hopefully resolve them in a mediation process with a skilled mediator rather than to involve people in legal issues. Hopefully a mediator would be skilled enough to give people a level playing field, basically. That would be the intention, I would imagine, of the legislation.

Ms Jubb—We are as aware as anyone of the downside of the adversarial system and the way that lawyers are seen in that context, especially in the context of family law. I suppose in making that suggestion we were trying to put a safeguard in and argue that, although there are downsides to the adversarial system, if it goes too much the other way there can be a downside to mediation, especially when you have power play between two Indigenous people or between a non-Indigenous person and an Indigenous person.

Mr CADMAN—People cannot go into this dispute-settling process under these proposals if there is a history of violence. So the presumption of joint parental responsibility is an effort to get a fine balance between protection from domestic violence and child abuse and getting a settlement. Have you had a chance to consider whether the legislation achieves that objective? Maybe a legal comment would be handy here, and then a practical one.

Mr Inglis—I will try to be both legal and practical. We have talked to lawyers about this, both in the service and outside the service, and the concern we have is that adding the word 'joint' to responsibility and shared responsibility and emphasising shared responsibility in real terms in a court setting is not going to significantly change the way a court will decide, because the act is already talking about shared responsibility.

Mr CADMAN—They have not done it up until now.

Mr Inglis—I cannot comment on the extent to which that has happened. All I can say is that when the proposal was put up initially about joint residence, it was starting from an assumption that was the least likely outcome in any of the family court possibilities. Now that the term joint parental responsibility is being used, my point is that in 61DA it is talking about presumption of joint parental responsibility in making parenting orders and then there is a whole paragraph in the small print which explains that it does not mean equal time and it does not necessarily mean substantive time. The fact that this legislation has changed in this way and then there is a note to try and clarify it underneath highlights the potential for misunderstanding.

We encourage people to use counselling more; your proposal is to compel people. What we have been saying in relation to an Indigenous context—and possibly non-Indigenous—is that people have not had access to counsellors effectively. There has not been a history of Indigenous people using counselling. There have not been any Koori or Indigenous mediators. There have been isolated examples of innovative projects, but there has not been an across the board attempt to educate people about the merits of negotiating and doing that sort of thing. To compel people to do something which is quite clearly, if you are well informed about the matter, going to be in your child's interest—we would suggest looking at encouraging and educating people before you compel them. It seems to us, in a lot of cases, people have not started off on a level playing field and they have not started off with a clear understanding of what can and cannot be achieved. Whilst we would applaud the attempt to get more services to people and to recommend that people use a non-adversarial approach, it is a question of how you go about trying to get there.

Mr CADMAN—As part of this proposed change, there is an educational package that is going to go out. What we need to do is to make sure that Indigenous communities are involved in that process. That is the signal you are giving us today.

Ms Solomon—Yes.

CHAIRMAN—There was one suggestion made by the Family Law Section of the Law Council of Australia in relation to the definition of 'Aboriginal child'. I have not got the exact wording in front of me, but I think it was something along the lines of 'an Aboriginal child should be defined as a descendant of Indigenous people of Australia' whereas on page 147, section 60D describes an Aboriginal child as 'a child of the Aboriginal race of Australia'. I do not know whether you have any views on either of those alternatives. You might like to take that on notice.

Ms Solomon—Yes. I am a non-Aboriginal person with an Aboriginal husband and Aboriginal children. I guess each area would have their own views about that, but I would more likely agree with the descendant of an Aboriginal person rather than the child of an Aboriginal person.

CHAIRMAN—This reference to 'a child of the Aboriginal race of Australia' seems unusual.

Ms Solomon—It is very unusual. I have never heard it before. 'A descendant of an Aboriginal person' would be more acceptable.

CHAIRMAN—I think it said 'Indigenous.' Regrettably, a lot of trees have died in the course of this inquiry. We are drowning in a sea of paper!

Mr PRICE—While you are looking for that reference, I would like to get back to the issue of grandparents raising the children. Under the new arrangements, it is likely that the parents have bypassed a family relationship centre for that outcome to be placed in law. In the situation where grandparents do have the responsibility for their grandchildren or a grandchild, do you think they should be required to submit a parenting plan?

Ms Solomon—That is an unusual question.

Mr PRICE—It actually applies to the non-Indigenous community as well as the Indigenous community.

Ms Solomon—It is a difficult question. To be honest, I have not given it much thought. My immediate thoughts are that I think it would assist, because often if there is conflict in a family the grandparents are in a terrible situation. I think a parenting plan would enable the grandparents to participate in articulating the type of care and maybe the boundaries in terms of their children as well.

Ms Hudson—At the moment we have a lot of grandparents out there that are dealing with young people because of chroming and going through the child protection court and all that. There is no support whatsoever for them in dealing with teenagers, even though they have reared their kids. Grandparents have a big responsibility all over again, rearing a second lot of families. I disagree with parenting for grandparents.

Mr PRICE—About the need to have a parenting plan?

Ms Hudson—It depends on the circumstances, too, and whether there are alcohol, drug or mental health issues.

Mr PRICE—They usually have responsibility for their children in extreme circumstances.

Ms Solomon—Yes.

CHAIRMAN—To clarify those two definitions, the proposed act states in section 60D says an Aboriginal child means 'a child of the Aboriginal race of Australia'. The family law section of the law council is suggesting that the definition of 'Aboriginal child' be amended to read that 'Aboriginal child' means 'a child who is a descendant of the Indigenous inhabitants of Australia.' We will query the department next week on why they have chosen their definition—there must be some reason for it. Could you reflect on which you think is the better description? I imagine that there are some children who might be technically descended from Indigenous people but

who have become entirely assimilated and who do not identify. I imagine they might come within one definition but not the other.

Ms Solomon—I do not know. That might also have something to do with that fact that for example, in Victoria, we have no full-blooded Aboriginal people alive. It is a question about whether you are fully Aboriginal. Basically, living in the Aboriginal community, I can categorically tell you that I come from an Italian background, my husband is Aboriginal, and my children identify themselves as Aboriginal. It is something that we talk to our children about as they are growing up, notwithstanding that some of my children can also speak Italian and their cultural language as well. We are not denying them of that; we are making sure that they understand that and can feel confident in identifying themselves as Aboriginal people. I think that has something to do with the proposal of the dying out of the Aboriginal race.

Mr CADMAN—Evidence that we took in the previous inquiry that led to these changes was that blood parents are the least likely to assault or damage their own children and that it is others that are more likely to cause that problem. Is that your experience?

Ms Solomon—In our experience, it is not so much about damage caused by assaults on children; it is more about the impact of them witnessing violence over a long period of time. A good example of that is that we have seen a change in some of the children who come to our refuge when they are two and three years old and are very angry and aggressive. The language that comes out of their mouths, which they have obviously heard over a long period of time, is absolutely shocking. We have seen the change and the impact that it has on young children. That does not necessarily happen in an environment where there is a blood mother and father. It can happen where there is a blood mother and father but can also happen in other relationships as well. I think that the potential for children to get hurt increases when the partner is not their father but, certainly, the impact of children witnessing violence over a long period of time can be just as damaging.

Mr CADMAN—That is a great answer. Thank you.

Mr Inglis—I will briefly say something about family violence notification. The bill is saying that, before you can be excused from the compulsory counselling, you are going to have to go to a family relationship centre and get a piece of paper there that says that, yes, there is a family violence problem. Can I suggest that that is not as flexible as you might be able to arrange? Somebody may well have had an existing relationship with, say, the refuge. There may be a range of other people who can provide evidence or corroborate the fact that there is a problem. I recognise that, in some cases, the veracity of that may subsequently be questioned, but it seems to me that if you are interested in trying to make it easy for people to defend themselves then at least initially it should be possible for people not to go to counselling providing some sort of evidence that there is family violence. If that is contested by the other side then there may have to be some revisiting of it. We recommend that it be more flexible—at least in the first instance—for people to be able to do that, get their advice about what their options are and then look at the counselling situation.

CHAIRMAN—Thank you very much for appearing before the committee. If you have any additional information, please let us have it as soon as possible, given the reporting date that we have of 11 August.

Proceedings suspended from 1.04 pm to 2.00 pm

McINNES, Dr Elspeth, Convenor, National Council of Single Mothers and their Children

HUME, Ms Marie Cecilia, Representative, National Abuse Free Contact Campaign

CHAIRMAN—I would like to take this opportunity to welcome our witnesses. We do not require you to take an oath but I do have to draw to your attention that the principles of parliamentary privilege exist as far as this committee is concerned, and also it is important to appreciate these proceedings are proceedings of the parliament itself and if you fail to tell the truth then there could be some dire consequences, not that I am suggesting that there is a problem here. Dr McInnes—it is a largely irrelevant question—but are you a medical practitioner?

Dr McInnes—I am a sociologist.

CHAIRMAN—Are you a real doctor as opposed to a courtesy doctor?

Dr McInnes—I am a PhD.

CHAIRMAN—That is what I mean. The witnesses now have the opportunity to make an opening statement of about 10 minutes duration, and then members of the committee will be invited to ask questions. Doctor, would you like to kick off?

Dr McInnes—Okay. We both put in separate submissions; I will speak to mine briefly. The National Council of Single Mothers and their Children has one main concern, which is to ensure that the safety of people who are involved in separation is preserved: both adults and children.

CHAIRMAN—That is one of the aims of the bill.

Dr McInnes—Yes, but whether the bill will actually achieve that outcome is, in our view, severely compromised; we have grave concerns about its capacity.

CHAIRMAN—We are very interested to hear your view on it and that is why we are having these hearings.

Dr McInnes—Yes. The second point that I would seek to put the argument for is that domestic violence against any member of the child's family needs to be understood as an abuse of the child. That is, domestic violence and child abuse are not separate phenomena. Where a person has a child and they are being assaulted by somebody in the family then that is also abuse of the child. The third point that I want to make is that the government has before it—from its own statutory advisory body on family law, the Family Law Council—two documents which raise and point out that people involved in separation are being killed and injured and harmed in the current system. That is, the current family law system is failing to protect their life and their wellbeing, and it has recommended action to the government to address that. Finally, another document which has recently been produced is the evaluation of contact services and their functions entitled *Children's contact services: expectation and experience.* This also highlights the current situation of injury and harm to both adults and children attending those centres.

To return to the first point: the family law system as it stands is failing in serious ways to protect the lives and wellbeing of individuals. The bill seems to address this only by stating a principle of safety; there is no recommendation to actually increase the safety of individuals. In fact, many of the provisions in the bill will function to reduce access to safety by people at risk of harm. And, of course, there is the absence of any positive action to secure increased safety in the family law system. This bill seems to presume that, simply by referring a matter to a court, there will be an outcome of increased safety for individuals, when the government has before it current documents showing that this is not the case. I will stop there and hand over to my colleague Marie Hume.

Ms Hume—I too would like to focus on violence and abuse issues. I highlight to the committee that the Family Law Pathways Advisory Group found that 60 per cent of matters before the Family Court contained allegations of child abuse and domestic violence. So we are not talking about a small figure: a significant percentage of people who are using the court system have concerns about violence and abuse.

CHAIRMAN—Some of those claims would be spurious, wouldn't they?

Ms Hume—The research we have on false allegations shows quite clearly that they are very rare. There seems to be a myth that women and children make up allegations in order to gain an advantage in court, but the research shows quite clearly that such allegations are rare and that there is no advantage in raising these allegations in court because contact often happens anyway, regardless of these allegations.

CHAIRMAN—It would be good if you could let us have that research.

Ms Hume—The research is in my submission. The Family Court is the only court of law in which a victim of abuse is required to prove their own case. Often, there is no access to legal representation. They have to collect evidence and present a legal case to the court without legal representation. There are consequences for them, which put them and the children at risk, in raising those allegations in court. There is the question of how their partner is going to respond and, under the proposed bill, there are also consequences for them in not being able to prove the allegations and therefore being seen as uncooperative. In her attempt to protect herself and her children, the woman is going to be seen as vindictive and uncooperative, and may lose her children in the process.

We recommend that the family law system needs to become more inquisitorial. The Family Court ought to have an arm that is able to investigate these allegations properly. Research shows that in 40 to 50 per cent of cases these allegations are not investigated by any agency at all. So it is really just the word of the mother and the child saying, 'This is what is happening in our home,' without being able to substantiate that through any proper investigation. This is what Elspeth was talking about in relation to the recommendations of the Family Law Council and others that there should be some kind of national investigative unit attached to the court so that it can get that information and investigate it for itself.

CHAIRMAN—That is not the way courts in this country have traditionally operated, is it?

Ms Hume—But you have a public system whereby you have the police or child protection agencies actually investigating situations and taking those cases to court. What you have here is individuals having to present that case to court—you do not have access to a public prosecution system. It would be my argument that the current changes are going to actually increase barriers to safety for women and children, particularly the concept of the friendly parent, whereby if a person does raise concerns and wants to restrict contact in some way because of their concerns about their own safety or their children's safety they will then be perceived as being uncooperative and suffer penalties as a result. In fact, what will happen is that it is more likely that the child is going to have even more contact or end up residing with an abusive parent. Currently there is no screening or risk assessment system built into that, so we have no way of assessing the risks to children in relation to the law. I am quite happy to finish there and move to questions.

CHAIRMAN—Thank you very much for those initial presentations. You do not see the bill as advancing the cause at all?

Ms Hume—I think there are significant barriers within the bill that make it worse for women and children who are escaping violence and abuse.

CHAIRMAN—Clearly your view is that the proposed amendments do not do anything to enhance the safety of abused people or their children?

Dr McInnes—The main provision within the bill that makes any reference to safety is a statement of principle and a process that they should be referred to the court system. If that is the solution, given that the court system is manifestly failing to protect people's lives and wellbeing at the moment, both adults and children, it is only a perpetuation of the current problem. Secondly, within the way that the principles are laid out, the notion of safety appears to be subordinate to the notion of continuing meaningful contact with both parents.

The research concerning the impact on children of exposure to traumatising violence shows that there are short-, medium- and long-term consequences which may lead to lifelong disabilities for the child. I think the evidence of those outcomes can be seen amongst survivors of systems like institutionalised outcomes for children who have been in care and have been abused repeatedly in care. There are similar links between outcomes for children who have been abused within families but also within institutional processes. So the research is there that says that we are setting children up for long-term harm if we do not protect them. Yet in this bill there are only penalties for people raising violence. It seems that there is an expectation that they have to do additional work to prove that there is a problem of violence when the research shows that over and over again domestic violence is likely to be underreported, denied, minimised and trivialised by the victims themselves as well as the perpetrators.

So to say that they are made up to gain advantage is simply a repeated statement of a popular myth. There is no safety, even when you table that violence is an issue. This story that women make this stuff up is so strong that you are repeating that back to us. It seems to be a pervasive element of this bill to believe that people routinely make it up. I would suggest that there is no research or evidence to support that. There are a lot of statements by angry alleged perpetrators, which is entirely consistent with wanting to deny and reject their behaviour and not take

responsibility for it. But there is no research which actually supports the view that women make this up. I would challenge you to table it before presenting us with that perspective.

CHAIRMAN—As a lawyer and a member of parliament, I get a lot of complaints from many people who seem to be suggesting that children are often used as a weapon in custody cases. One of the easiest ways to deny a father access is to claim domestic violence. I am not being judgmental in the sense that I do not know whether or not those allegations are correct. All I know is that a lot of people are telling this to me and I listen to them, as indeed I listen to the evidence given before the committee. The aim of the bill is to encourage parenting plans and shared parenting, and also to prevent violence—we are seeking a balance. I presume you are not opposed to the principle of shared parenting or the principle of parenting plans?

Ms Hume—When you look at the changes to the Family Law Act in 1995, both the right to contact principle and concerns about domestic violence were put into that act. Research has shown that in fact the right to contact principle took precedence over children's safety. Our concern is that this is happening this time around as well. One of the first things in the bill is the right to contact or right to have a relationship. The second thing is the right to safety, but we are saying that the right to safety ought to be the first priority. The bill needs to have a detailed analysis of how that is going to be done. How are we going to protect children from ongoing abuse, violence and separation?

CHAIRMAN—If I said to you, 'You are the parliamentary draftsman and we are going to hand this bill back to you to redraw the bill and meet the concerns that you are expressing,' what principal changes would you make—I am not asking you to give me the technical sections—to have the bill conform to what the government is seeking to achieve in its response to the *Every picture tells a story* report, while remaining consistent with another aim of the bill, which is to protect family members and children from abuse and violence? In other words, where do you think the bill is wrong?

Ms Hume—I think the bill is wrong in the friendly-parent provision, which will systematically obstruct people from declaring issues of violence. I think the bill is wrong in subordinating safety to meaningful contact. I think safety should be the first issue.

CHAIRMAN—Does it do that?

Ms Hume—No, it does not.

CHAIRMAN—Obviously the Attorney-General's Department would take the view that it does not subordinate safety to contact.

Ms Hume—There is nowhere in the bill that outlines how that is going to happen. How do we ensure safety for children?

Dr McInnes—And adults.

Mrs HULL—I disagree with your assertions. There has to be a first and a second word and it is a chicken and an egg situation if you decide that what should have happened is that domestic violence and safety and abuse should have been put forward in the first place and then the rights

of a child to have a meaningful relationship with each parent. That is basically what you are saying—that domestic violence and abuse should have been the first cab off the rank, ensuring children's safety and partners' safety against domestic violence and abuse, and then secondly the establishment of or the recognition that a child is entitled to the love and companionship of both parents, all things being equal. Is that what you are saying?

Dr McInnes—That is one of the things.

Mrs HULL—In essence, I do not think it waters down the bill at all. I think there has been a very strong emphasis on the protection that was debated here this morning, because it has been put in two sections in the bill. The primary consideration in the legislation should be the violence and abuse issue and then other considerations should be all of these others things.

It was widely debated here this morning that perhaps it should be all things rather than singling out safety first and foremost. That is what we currently have in the drafting in front of us. I do not believe for a second that the safety issue is being compromised or being treated as secondary and that abuse has not been taken into consideration. I believe that, right through the process, abuse or any potential for violence and abuse against a child or a person was a major issue for us. How would you propose to establish something that is protective? You say that the Family Court now does not protect people and you assert it is causing death.

Dr McInnes—I can name some dead people if it would help.

Mrs HULL—No. What options would you suggest to rectify what you see as the major problem? The last committee recommended a tribunal with an investigative arm made up of, and not duplicating, the state services—DOCS and others—to investigate allegations of abuse. What do you think needs to be changed in order to provide the protection?

Ms Hume—One of the things you could look at is the New Zealand Guardianship Act, which puts the safety of children as the paramount issue. They are very clear about that in that act. That came about as a result of children being killed by the ex-partner. That is one of the things you could look at. I am also glad that you raised the issue about the recommendation of the committee in relation to the tribunal and the investigative arm of the tribunal. I am wondering whether the parliament could look at that. Whilst I recognise the tribunal system is not going to occur, could the parliament look at that investigative arm? I am surprised that that recommendation got lost somewhere and is not in this present bill.

Mrs HULL—It is not a tribunal; it was associated with a tribunal. Are you saying that the Family Court could possibly have an investigative arm?

Ms Hume—Yes.

Mrs HULL—What do you think needs to be put in place to stop these deaths and to offer the protection that you require?

Ms Hume—Women need to be given the option of raising their concerns about violence and abuse without the possibility of negative consequences as a result, without that being looked upon with suspicion. They are concerned that in reality they may lose their children as a result of

this because they are not able to adequately prove that abuse has occurred. Reasonable grounds for abuse I think is the term used in the legislation. If a woman is being discouraged from actually raising this issue, then we have serious concerns about the safety of children. I think that is what the bill does. It puts further barriers to stop women being able to raise this. If they are not seen as being that friendly parent, because they want to restrict contact with an abusive parent, then there are negative consequences as a result of the bill that will happen to women. Already we know that women are being advised by their lawyers not to raise issues of violence and abuse because it will look detrimental to them and to their case in the Family Court. We are saying that this bill further increases that risk.

Ms ROXON—I have a question that follows on in regard to the hierarchy. Some of the witnesses this morning looked at the new definition of what the court must consider to be in the best interests of the child. You raise this issue in recommendation 21 and obviously the new drafting says two things should be primary considerations: meaningful relationship with parents and the safety and violence issues and then all the other issues. The discussion from this morning that I think Kay was trying to flag is: should all the interests just be a list so that the court is given complete discretion to consider any of them, including the children's views and other things? There was a discussion about whether the meaningful relationship and safety might conflict with each other and there was a discussion about whether you should have primary and additional or not. I want to be 100 per cent clear on what you are proposing. Do you think that safety should be primary and all the rest should be secondary or do you think it should go back to the current status, which is all of them grouped in together?

Dr McInnes—We believe that safety should be primary. After all, you have to be alive in order to have any kind of relationship with anybody. You have to be safe. Just to back up, the friendly-parent provision raises the stakes in declaring that violence is an issue. There is the notion that there has to be more than simply a statutory declaration or an affidavit to make out reasonable grounds. There is no clarity offered about what reasonable grounds might be and whether there is an increased onus on somebody. We already know that the existence of an AVO is not regarded as relevant to establishing violence. That is already being disregarded by the court and we now have a further hurdle of reasonable grounds—and we have a context where it is common for women who are victims of violence to not have legal representation and to be trying to argue their case in court physically next to their perpetrator. It is very difficult to be legally successful when you are arguing against your own perpetrator and having to make out additional grounds—beyond evidence from the police, beyond evidence from the state courts. So raising the stakes there means that you seem to be increasing the threshold, based on this notion that women claim violence in order to get advantage, which you have again repeated—and I acknowledge that you say that people tell you this.

What the research into Family Court cases shows—and I am talking about the assessment by Rhoades, Harrison and Graycar of the operation of the Family Law Reform Act—is that the number of interim no contact orders crashed to under 5 per cent and at the final orders stage it went back up to 20 per cent. So when there was a proper consideration of all the facts before a court in a trial situation the number of no contact orders was increased again. But this is against a background of those children having continuing exposure in the interim period to ongoing violence and, as I say, we have deaths and injuries arising. The current situation is bad and there is nothing in this bill that actually makes it better. In fact, there are increased penalties proposed

for contravention of orders, with no apparent regard for continuing to protect the right of the parent to act to protect their child.

As an example in our submission I used a case—that is, if a person presented drunk to pick up their child in a car and the mother let the child go into the car with the drunk and the drunk crashed and the child died, the mother could be held to be criminally negligent. If she looks at the drunken parent and says, 'No, I won't,' she is liable for a contravention order and she is liable for a regime which can result in jail and she has no capacity to independently prove that his alcohol level was dangerous. So there is no room presented in this legislation, as far as we can see, that says that you have the right to withhold contact on reasonable grounds of belief that there might be a risk to the child, pending an investigation of that, which we have under the current legislation. So there is another protection that is apparently being removed by this proposed legislation. Increasing penalties for claiming violence, increasing mechanisms to change contact if you claim violence, increasing the barriers to claim violence, requiring people to go through an extra stage if they want to have access to the law and having nothing that protects them, puts safety first or requires that they have access to a lawyer—those are our concerns about safety and this bill.

Mrs HULL—What area of the Family Law Act gives you the ability to be able to withhold that access if there is a reasonable sense of danger with the children?

Dr McInnes—I have not got that section in front of me, but it is there.

Mrs HULL—But you are saying that we are removing it?

Dr McInnes—On what you are presenting here, there is nothing in the legislation that I could see which protects the right of a parent to withhold contact—

Mrs HULL—But we would have to be removing it from the existing act. Could I ask you to take that on notice. Could you provide us with the section of the act that enables you to withhold contact on reasonable grounds so that we can determine whether or not that is being removed?

Dr McInnes—Certainly. I am saying it is simply not in this legislation and it is unclear how that would interact with the contravention proceedings that are proposed here. You propose in this bill that there will be additional penalties imposed on people who do not comply with orders.

Mrs HULL—It will mean putting new areas into the act. It might mean taking out some areas, but it might mean keeping all the other areas in the act as well.

Dr McInnes—That does need to be clarified.

Mrs HULL—Yes, that is what I need clarification of, so if you can let me know about that we can undertake to determine that.

CHAIRMAN—While nobody would want a drunk driver to be conveying a child away in his or her car, if the provision that you wanted was inserted into the act what could be done to prevent it being used in a spurious way? Custody of children issues, as you know, are very

emotive and people will often reach out for any weapon at their disposal. To claim that someone was drunk would be seen by some, even if the person was not drunk, as a convenient vehicle for denying access. It is a difficult area and I am interested to know how you would strike a balance between giving a person the right to deny access when the other party having access might not be safe for the child and the fact that, by doing that, you could be giving a recalcitrant party the opportunity essentially to deny access to someone who was not drunk and ought not to be denied access.

Ms Hume—We believe that the next step once a contravention has occurred should always be 'let's investigate why that contravention has occurred' and that is when we are talking about doing a proper investigation of it. That is why we are saying that if there are concerns about a child's safety that is when it should go to some kind of investigative unit who can explore the realities of what has occurred and be able to inform the court about the realities of that.

Dr McInnes—Further to that, I would take issue with the framing context that you put of people vindictively denying access. The research into contact contravention proceedings in the courts shows that the most common reasons underpinning contravention proceedings are domestic violence or abuse concerns and changing circumstances in people's lives which make the orders no longer practicable in terms of their implementation. There is not any evidence, beyond the statements by the usual people who say these things, that women vindictively deny access. That is a very common story. However, it is not backed up anywhere in research statements. It is not in the research. What we see when we look at contravention proceedings are concerns as to safety and changes in lifestyle.

The other point I would make in answer to your question is this: if that contact does not take place on that day at that weekend, what would normally happen would be that an opportunity would be provided for catch-up contact when the person was available, not affected by alcohol and able to take that contact safely. That would be a normal flow-on from that. However—and here is another caveat—if the person was an alcoholic, for example, and had a continuing problem, when would that be likely to occur? This is where we go into issues such as a proper investigation. In terms of that event, another way is that a person who believed that their state might be wrongly construed in some way could take a witness with them who was able to attest to their state and who was able to provide another witness account of what transpired between the parties. So it is not impossible that a person could (a) catch up that time with their child in an appropriate manner when they were available for it or (b) take a witness to protect themselves, if they expected that somebody would lie about the way in which the events had in fact transpired.

CHAIRMAN—I do not know whether there is evidence which would give some indication that people do use spurious reasons to deny access, but we do have other witnesses appearing and I will actually put that to those other witnesses, because I think this is a very relevant question. You tell me there is no evidence, and you may well be right, but it would be interesting to see what these other witnesses say, and of course the committee will have to take into account what everyone says and try to come to some sort of recommendation.

Ms Hume—But there is also the body of research around the issue of false allegations of domestic violence and child abuse. There is quite a body of research around that. We have both referenced that in our submissions. It quite clearly shows that it is a rare occurrence. That is research, not anecdotal evidence.

Mr CADMAN—You make a couple of useful comments here that I would like to tease out with you. In recommendation 16 you talk about the New Zealand provision for the court to determine as quickly as practicable whether or not the allegations of violence are proven. Also, under recommendation 3, you mention police records, reports and prosecutions pertaining to violent conduct of a party and any mandated child protection notifications. One of the problems we had in trying to develop this thought of yours was that we have the Commonwealth-state barrier. It is very difficult for a Commonwealth court to get down into the state records. In one part of the proposed changes for Indigenous people only—and I wonder whether it might suit your purposes if it applied more generally—it says:

In child-related proceedings ... the court may, for the purposes of section 61F:

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

To my mind, in getting to the bottom of the problem, this is a better way than we do it now. You seem to be saying the same thing. Does that approach, which is in here for the Indigenous community only, sound like a reasonable one?

Dr McInnes—It certainly would also be helpful to many single mothers, many of whom are unrepresented. You say that the Commonwealth has difficulty in getting access to records of state courts, but that problem is certainly compounded for someone without legal status, knowledge, funds or legal representation.

Mr CADMAN—It is harder than it is for the Federal Court—yes, that is true.

Dr McInnes—So that provision would certainly be more helpful in making the history of what has happened to this person available. However, it is not sufficient in and of itself, necessarily, in that there will not always be court proceedings. There will not always be AVOs. It might be the fact that violence has occurred and there are no positive records of that. It is just simply occurring.

Mr CADMAN—But it would be a step forward?

Dr McInnes—Yes, in my view.

Mr CADMAN—You seem to say that any records pertaining to a child of a party should be brought forward. That would include reports, allegations and complaints to the police. All of

those sorts of things would in fact be able to brought into the Federal Court, whereas there is limited capacity to do that now.

Dr McInnes—Yes, that would be useful. The Family Law Council's recommendation with respect to child protection was to set up an investigative arm. That was also echoed in the parliamentary inquiry. One of its roles would be to assemble that evidence and to be able to assess and look at it to see what happens.

Mr CADMAN—The legislation that is proposed does not go in that direction, but the recommendation of the committee—

Dr McInnes—We would see that as helpful.

Mr CADMAN—was that there would be an investigative arm that could go and get this information.

Dr McInnes—As Marie has already said, the current status of complaints made in the court is that they get referred to the state departments, which put them through the same tier assessment process as any other referral. Quite often, there is actually no active investigation of that referral at all, in which case it is named unsubstantiated and interpreted in the legal arena as a false allegation. So the perception that there are false allegations is continually reinscribed.

Mr CADMAN—'Let us try to deal with facts' is what you are saying, and I agree with that. I think that would be an improvement on what we have now. I like those words for the Indigenous communities, but I do not know if there is a barrier. Maybe what I am saying is that the Commonwealth has a particular responsibility after that constitutional change for Indigenous people. I do not know whether we can extend that capacity in the way it is proposed here. That is what we need to pursue—we are going to look at that.

Dr McInnes—It would be useful.

Ms ROXON—Can I take you to another part that I have been asking the other witnesses about this morning as well? It is the proposed changes that relate to a later parenting plan where there has been a court parenting order. I am sorry if you can point me to somewhere where you have dealt with this in more detail. I was initially concerned that, particularly for parents where there is a high level of conflict—and presumably for a large number of the matters that have to go a court hearing that is the case—there might not be sufficient protection in the way that a parenting plan is formed. We have heard different feedback this morning. Are you satisfied with the provisions that a later parenting plan will obviously vary a court parenting order? If you are satisfied, let us know. If you are not, could you tell us what you would propose to be in there to make that adequate in your view?

Dr McInnes—I do address the issue of substantial time with each parent in recommendation 10 and then specifically in recommendations 11 and 12. There are issues for us in terms of parenting plans around whether children's interests are foregrounded—that is, there is no sense that children have any right to a continuity of residence within the proposals. The requirement that they spend maximum time with each parent could lead to an outcome for children where they virtually have a shuttle bus existence and there is no home as such, simply the places they

travel to to spend time with each parent. That is one concern: whether that significant change will enable children to have any kind of continuity of home and home life.

With respect to parenting plans and court orders, we have two issues. One is that currently court orders are quite often made so that an order for supervised contact becomes an order for unsupervised contact, in order for the child and the parent to become reacquainted. The outcomes can sometimes run counter to the purposes of the order—that is, for instance, rather than being a reacquaintance the relationship deteriorates and so the outcomes for the child are not those envisaged by the court. There is no opportunity to see if what the court wanted to happen is in fact happening that way for the child. There does not seem to be any structured mechanism within this for children to express their views or any requirement to take account of them, which is another concern.

Ms ROXON—Could you explain that to us? So if a later parenting plan is just agreed between a mother and a father there is no capacity in the way that there is in the court for the children's views or interests or whatever to be specifically dealt with?

Dr McInnes—That is right. In terms of what is being proposed in this bill there does not seem to be any systematic recourse to try to ascertain children's views. There does not seem to be a proposal that it become part of the family relationship centres, as a structural part of making a parenting plan. The other thing goes to the fact that there does not seem to be a place where children are able to make their own views clear on their own behalf. Quite often, as children get older, they do not want to do what the adults in their lives could organise for them when they were younger. They have changing priorities as they become teenagers and there does not seem to be any provision for children to signal that they would like the parenting plan or order changed or that they should have any say in how the situation is working for them. That seems to be a concern, because they are the ones who actually have to live with what is allegedly being done in their best interests.

Mr PRICE—So basically the parenting plan should have a timeline—that is there should be a requirement that they be updated periodically? If so, what sort of period would you suggest?

Dr McInnes—Again, we would go to the right to continuity and home life. If we made it nominally two years, for instance, every two years your whole way of living would be up for change. Is that fair to a child? Is it fair to a family?

Mr PRICE—I was really trying to pick up on the very important point that you made that at the time of the original parenting plan it might be quite appropriate, but as the children get older they should not necessarily be hidebound to it. Circumstances and children's needs change, and they should not be hogtied to the original parenting order.

Dr McInnes—That is what happens in practice now. Many families have an order from the court and, 10 years on, their actual practices as agreed without dispute are very different from what was ordered. In practice they are living out what suits them. However, to me there seems to be risk in setting structured periods for review, in that you force people into processes that they would not have sought, and you might introduce an element of uncertainty for a child or a family that would not have existed previously. Saying, 'In two years time we have to see if you can still live here,' becomes the sword over their heads. That is an equally undesirable outcome. This

does provide that people can seek a change to a plan by using a relationship centre process and, provided people's rights are protected, that seems to be reasonable. However, it has to go to what is in the child's best interests, what the disruption to their lives will be and what has been happening. For example, if a parent disappears for five years and works overseas and then reappears and wants to have half time residence, should they be able to claim that?

Mrs HULL—Primarily your concerns are domestic violence and child abuse in relation to any changes that are to be made in the future. You do not oppose, for those people in situations where all things are okay, being able to have a shared parenting role as to responsibilities—I am not talking about residency. If that is working and there is no violence or abuse taking place then you do not oppose those sorts of things, but you would like to see the process around abuse strengthened?

Dr McInnes—Certainly. We believe there is already provision for people to come to reasonable agreements and we have no opposition to services to help people come to them.

Mrs HULL—And to family relationships being able to do all of that if they can get in there and try to resolve those issues.

Ms Hume—However, a presumption of any arrangement being the ideal for all children is something that we would oppose.

Mrs HULL—But that is not the presumption, neither in the report nor in the proposed changes. There is no presumption like that. It certainly recognises that abuse and violence occur.

Ms Hume—One of the issues that I would be concerned about, for example, is the provision in the bill that family relationship centres and mediators should explore with parents the possibility of shared care. That puts an onus on and makes a priority of shared care, regardless of whether there has been abuse or violence. That might not fit for an individual child.

Mrs HULL—That is certainly not the intention, because it is about ensuring right at the beginning that there is no abuse or violence. I think you have to read that in it; there is no way you could not read that.

Mr KERR—Isn't it also the case that you do not get through that threshold if there has been—

Ms Hume—Exactly. I am not talking specifically about violence and abuse. What I am saying is that the bill is telling family relationship centre mediators that they have to discuss shared care arrangements with parents. That is putting forward a supposed ideal arrangement for every child, when we should be looking at what each unique child needs. My background is as a Family Court counsellor. If I am aware that that kind of thing is law then it imposes on me an obligation to discuss that, when it may not be suitable or in the best interests of children, regardless of whether there is violence or abuse.

Mrs HULL—I am not quite with your thinking there. But I want to come back to the protection issue that you are talking about. You are concerned that does not go far enough. That has been recognised for a long time. When we were doing the previous inquiry, much of the

evidence we heard was about the difficulties—and Mr Cadman has pointed them out—arising between state and federal jurisdictions. More often than not, if a case is going to the Family Court of Australia and there is violence or abuse against children involved, you might not have that investigated by the state agencies because they leave it to the Family Court. And the Family Court is not resourced well enough to investigate that. There is a recognition of that.

Do you have a considered position on how that may be overcome? We have recommendations and recognition that there needs to be a federal child protection service. In *Every picture tells a story*, the committee notes that a federal child protection service has been recommended by the Family Law Council. We supported that. Are you saying that a federal child protection child unit might be a possible addition to strengthen what we are doing?

Dr McInnes—Yes, definitely. There needs to be a family violence service so it takes account of violence against members of the children's family as well as the child. However, our concern goes back to the screening mechanisms for the family relationship centres and the escalation of barriers and punitive requirements around people claiming violence. It seems that, within this, raising issues of violence is more difficult. It ups the ante, rather than making it simpler for people to reach safety.

Ms Hume—The Family Court's Magellan project is a good project. The problem with it is that it only deals with a very small percentage of cases that go to the Family Court. How do they make the assessment of what things go into the Magellan project? They only deal with what they call serious child abuse—I do not know any child abuse that is not serious. They also do not deal with domestic violence at all. My concern would be how you determine which cases need to go to that investigation unit. That needs some careful consideration. What kind of screening process should you have? What kinds of risk assessment tools are the court going to use in making a determination of what is investigated properly?

Ms ROXON—I want to ask a question about abuse and entrenched conflict, which is another term that was used previously. The committee's original report talked about the categories of cases that needed to be treated differently being ones that involved abuse, violence and entrenched conflict. The bill has picked up the concept of abuse and, in some places, violence, but not entrenched conflict. Do you have a view about whether entrenched conflict is a useful term and whether any consideration should be given to the definitions being broader? It would apply in a case like this when you work out the threshold for which cases go to the court and which ones should go to mediation and other things. Is entrenched conflict a notion we should explore further?

Dr McInnes—The research certainly shows that the worst outcomes for children of separated parents arise when the children are exposed to violence, abuse or continuing conflict. One of the things that a number of children say when they talk about the outcomes for them of their parents' separation is, 'It's better now, because I'm not living with the fighting.' Certainly, the outcomes for children and the relief that they experience around not having exposure even to parents arguing all the time—as opposed to parents harming each other in a violent or abusive way—are still quite significant. The concern I have is that abuse and violence are often redefined as conflict and are seen as a kind of mutual activity by each party; whereas, in terms of abuse and violence, we would see one party who is in fear, is harmed and does not have any access to equality of power in that process.

Ms ROXON—Do I gather from that that it would not be an appropriate term to use as a broader, more general term but it could be an additional category rather than a—

Dr McInnes—Yes.

Ms Hume—Again, what you need is people who are very well trained in violence, abuse and conflict issues to be able to determine which of those categories people fit into.

Mrs HULL—Coming back to this assertion that there are vexatious claims of abuse, in 2002 in New South Wales 18,926 domestic violence orders were granted. Is that how many were applied for or is that how many were granted, and do they then have to be proven? If you apply for a domestic violence order, is it given to you and then do you go to court to determine whether it should stand? Could you help me out with that?

Dr McInnes—I am a South Australian. In South Australia you have to present the court with three events—which are documented—where you have had occasion to feel fear in order to have an order issued. So you have to have survived at least two previous violent episodes in order to get up with the third. In general, a minority of victims of domestic violence apply for restraining orders. In fact, many women see them as useless. There were orders in the Kongsom case that has been in the papers. Because the orders are not enforced, it often leads to a much more enraged, angry person coming at you. In taking out an order, many women reach the point where they think they are going to be killed before they seek to involve the courts and, in involving the courts, they are still not effectively protected.

Mrs HULL—I am trying to get some notes down so we can get some proof. If 18,926 domestic violence orders were granted in New South Wales in 2002, I would like to know how to work out whether they were proven and, if they were proven and able to be substantiated, how many there were. That would probably give me a fairly good idea as to whether there is a vexatious use of AVOs at times.

Ms Hume—Another way of looking at that would be to perhaps look at that number in comparison to the general population and then look at the research about the extent of domestic violence within the population. If you have 10 per cent of the population applying for AVOs and 20 per cent of the population are subjected to violence, that tells you something as well.

Dr McInnes—In some jurisdictions, you can take out domestic violence orders against people other than your partner. I think you can seek an order in New South Wales. Nicole Kidman could seek one against her photographers.

Mrs HULL—That is an AVO—an apprehended violence order. I think a domestic violence order is basically—

Dr McInnes—As I understand it, in New South Wales an AVO is an AVO. You have those complexities of the figures. Professor Patrick Parkinson did a review article on the research into child sex abuse allegations and has given some attention to that, as did the researchers for the Magellan project and they found—as has been replicated across international research—that around one in 10 reports of child sex abuse have no basis, and that does not vary whether or not there are divorce proceedings. In fact, if you found your partner in such an activity with your

child, you might hope that the relationship would break down rather than survive and allow the practice to continue. So it makes sense that we are going to see a much higher incidence of relationships breaking down, featuring violence and abuse, than the general population or the population which is happily partnered.

Ms ROXON—We got off track on a few different things, but are there any other specific issues that relate to the bill that you wanted to raise? I know you have some in your submission. I am concerned that this bill is not dealing with the big-ticket item of a federal child protection authority or investigative authority. If there are any other aspects of the bill that you think are particularly lacking or particularly harmful that you have not had a chance to address, would you like to do that now?

Dr McInnes—There is the contravention issue, the increase in penalties that is made out there and the clarification that there will be a lower standard of proof applied—

Ms ROXON—For the contravention orders?

Dr McInnes—for the contravention. I would be very concerned about that. We know, for example, that in South Australia a woman was jailed, and she did not have the benefit of a lawyer representing her in court. We also know that there is a chronic shortage of access to legal aid. So we are talking about having a lower standard of proof in a context where research into contravention applications identified that 62 per cent of applications were without merit. That was the Rhoades, Harrison and Graycar assessment of the Family Law Reform Act.

We are explicitly saying that by requiring a lower standard of proof in this bill we seem to encourage people to have a go at claiming contravention. In a context where people are being sent to jail now without legal representation, the proposal to up penalties again increases the risk to parents who are seeking to take protective action where their situation warrants it. I would (a) caution against increasing penalties, (b) require that people have access to legal representation in these proceedings, and (c) I would not want to see any lower level of justice around contravention proceedings or any lesser application of the law.

Mr KERR—In relation to those contravention questions that were asked: as I understand it, the lesser burden of proof does not relate to the more serious matters. It relates to the less serious matters that may sometimes engage the court rather than the sorts of issues that I think you are focusing on. If I could come back to one of the foundations—I was not on the committee, so I do not have any history or form—

Mr PRICE—You have plenty of form. That is a misleading of the witnesses!

Mr KERR—What is the fundamental argument you are making about this presumption of joint parental responsibility? The proposal, if I understand it correctly, is not to mandate that equal time be granted to separated parents; rather, it is to start out with the intellectual idea that a child should have some significant input from each of the parents, if that is appropriate. I am wondering what the objection to that is, in the sense that in this area it is inevitable that some starting point will be applied. Either it will be applied implicitly through built-up precedent and practice or it will be enacted statutorily. If this is not the correct presumption, what is the correct presumption?

Dr McInnes—I do not think we have argued against the principle of joint parental responsibility. When children are born the parents are both equally responsible. That is the de facto legal status unless the Family Court rules otherwise. We have that. We have that in the Family Law Reform Act. We are again iterating it here.

Mr KERR—But you are arguing against it, because you say there should be no presumption of joint parental—

Dr McInnes—It is around the presumption issue, yes. We consider that that is the status when a child is born. We are now looking at family law provision and we would argue that each child's situation should be uniquely considered, full stop—that is all. I guess it is that nuance to do with the legal language of a 'presumption'. We would want a presumption that every child's unique circumstances should be considered for that child.

Ms Hume—And the basis of decision making should be in the best interests of children—not on any presumptions.

Mrs HULL—But isn't that what this is saying? This is the entire purpose of the thing: that everything should be in the best interests of the children and there should be a presumption that, all things being equal, aside from domestic violence issues and abuse issues, a child has the right to know and be involved with both parents.

Ms Hume—I guess what I would say is: why is it that the 1995 reform act has not worked? The right-to-contact principle, which sounded reasonable, and provisions to deal with domestic violence were put into that act. The result of that was that in practice the priority was given to right to contact, and that put children and women at risk. That has been shown by research. Our concern is that prioritising joint parental responsibility will take precedence over children's and women's safety. That has been our experience. That is what happened with the reform act in 1995. Here we are doing this again without considering why that occurred—without looking at what we did back then and what went wrong with that.

Mrs HULL—Your evidence says that more children were abused because of the 1995 act?

Ms Hume—The number of cases that got contact at interim hearings increased considerably after those changes.

Mrs HULL—I am asking a different question. You are saying that the number of cases of contact increased considerably. What about the number of cases of abuse during that contact?

Ms Hume—If your percentage of people who have contact increases and you look at the percentage of cases where children are being abused, that will increase as well—that is part of that population.

Mrs HULL—But has it? Have you got the research that says that happened?

Dr McInnes—Rhoades, Harrison and Graycar reports 1 and 2 into the Family Law Reform Act do make that argument, yes.

Ms Hume—There is also research by Rendell, who said it was an unacceptable risk.

Dr McInnes—And by Kaye, Stubbs and Tolmie. Of course the children's contact services evaluation also clearly identifies that there are children who are being abused while they are attending children's contact services. The outcomes have been documented.

Mrs HULL—Relevant to the increasing contact awarded after 1995, there is an increase in abused children?

Dr McInnes—That is what the Rhoades, Harrison and Graycar account says. The use of contact services is now seen as the 'solution' to protect children from violence, but the evaluation of those centres is showing that they are not effective in protecting children from violence; in fact, they are a mechanism for exposing children to continuing violence. The evaluation makes a number of recommendations to the government to change those outcomes for children.

Mrs HULL—I will check that out. Thank you.

CHAIRMAN—Thank you very much for appearing before the committee. The secretariat will send you a draft *Hansard* transcript of your evidence. Please check it and get it back to us. The committee may have asked you some extra matters. Could you let us have those responses as soon as you can.

Dr McInnes—On the relevant section of the act, yes.

CHAIRMAN—Thank you very much for appearing.

Proceedings suspended from 3.05 pm to 3.18 pm

HANSON, Ms Barbara Anne, Convenor, Australian Children's Contact Services Association

CHAIRMAN—Welcome. Currently we do not require people to swear an oath prior to giving evidence, but I wish to advise you that the hearings of this committee are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I now invite you to make a brief opening statement for about 10 minutes, if you wish, and then we will move to questions.

Ms Hanson—Most of this document was put together very quickly. They are my personal views and not necessarily the views of all ACCSA members—I would like to make that point to start with. I am not quite sure whether the panel understands what contact centres do, so I will give a little blurb about what parental separation is. When parents separate, children usually live mainly with one parent and regularly spend time with others. 'Contact Centres Australia', 'ACCSA New Zealand' and 'visitation' are legal words used for children's post separation contact with non-residential parents or any significant person such as a grandparent, sibling or relation.

In some cases, certain concerns arise about the safety and wellbeing of children during contact visits. Sometimes contact occurs against a backdrop of incidents of conflict and a changeover can become a flashpoint. In some cases, changeovers involve safety issues for one parent. In appropriate cases, children's contact centres assist in the practical management of facilitating contact. You can also go onto our web site for further information. Turning to the inquiry, the special requirement cases of child abuse and family violence—

CHAIRMAN—Excuse me; at the risk of being rude: are you going to read what you have just given to us?

Ms Hanson—I can, or you can ask questions from what—

CHAIRMAN—If we might just pause for a couple of minutes to allow the members of the committee to read the document, it might save your voice for answering questions. I think everyone has a copy. We are going to have to move a motion later to accept it as a submission and authorise it for publication. Maybe we can look through it and then, if you would like to add anything else, you can and then we will ask you some questions. We will pause now for a few moments to read what we have before us. Thank you. Would you like to add anything to what is here, before we ask you some questions?

Ms Hanson—Going back to the two ladies that were just speaking before me: I have not read that report, but they were saying that child abuse occurs in contact centres. I would probably have to jump up and down on the spot and ask where that came from. I would assume that they are saying that it may continue when the centres are used for drop-off and changeovers. So it may be that when parents are seeing their children by themselves the domestic violence continues, but I am assuming that it is not while the children are being supervised. As I said, I have not read the report, so I cannot acknowledge or not what is in it.

CHAIRMAN—We saw you shaking your head, in the back of the room.

Ms Hanson—I also note that there are contact centres in Australia that are not federally funded and there is a very big difference—

CHAIRMAN—Are or are not?

Ms Hanson—Are not federally funded; and if they are not federally funded there is no accreditation or anything in place to monitor what happens at those services. The courts are using those services without having a look at what accreditation they might have. There are some people who are doing private contact and the courts do not even know who they are or where they are from; they are just being put up by solicitors to say that they can do contacts. So be very aware that there are contact centres that are not federally funded, at which there may be things happening over which we have no control, and over which A-G's would have no control either.

CHAIRMAN—So how many federally funded contact centres are there in Australia?

Ms Hanson—There are 30 the moment.

CHAIRMAN—Including one in my own electorate—

Ms Hanson—Sorry, 35 at the moment, and 30 more to come on board.

CHAIRMAN—How many, currently?

Ms Hanson—Thirty-five.

CHAIRMAN—Thirty-five. That would include the one in my electorate at Maroochydore?

Ms Hanson—Yes.

CHAIRMAN—They do a very good job. It struck me, when I first went there, that it was very sad that parents were not able to work out an arrangement for handing the children over. But you can only admire the work the centre does in allowing both parents to play an ongoing role through acting as a conduit under very difficult circumstances.

Ms Hanson—Thank you.

Mrs HULL—You have raised a really relevant point here: where do contact services fit into the reporting situation of the family law court? You have said that currently there is no standard practice for the provision of reporting. Obviously we are looking at changing the Family Law Act. How would you frame your preference? Under what circumstances and how would you like to see contact services reports being used by the Family Court?

Ms Hanson—Ten years ago contact centres were set up for children to have contact with their parents. We were very clear that we did not want them to be used as an information collecting agency. We only see one party in a supervision of contact. It is probably my personal view and

not an expression on behalf of ACCSA, because lots of people have different views on it, but I find it very prejudicial and discriminatory in the sense that we are only doing one report on one person in that family—the person we are seeing at the contact centre. We should be using report writers that go into the home and come to the contact centre to see how the family is. They should also be going to where the children are going to be taken when the orders are written that the person is allowed to see the child without a supervisor.

Does the court—and I am not too sure because I have had several discussions with judges and they have said that contact at contact centres is a small thing in the whole gamut of issues—want to know dates and times if someone is five minutes late or five minutes early? What do they really want to know? Obviously, contact centres do incident reports when there is an allegation of child abuse. If a child discloses at a service we do an incident report and we let the court know that that has happened at the service and also let the appropriate state child protection guys know what has happened—whether it be DOCS or Family Services.

The important thing is that when we are supervising we have one person that we are supervising and it is the non-residential carer. It is very clinical. Even though Mr Slipper said that the service at Maroochydore is very child focused—that is my service; we allow families to go off-site and to do lots of different things—it is still clinical. There is still a supervisor standing there and they can hear the whole conversation. To do a report on a family that is at our service is not looking at the big picture. They are not going to misbehave at our service, are they? There are too many people looking. I would hate to think that we would make a decision on a family from their spending two hours a week at our service. But I still believe that the family report writers should be going to these families and having a look. When there is a high level of conflict, domestic violence and allegations of sexual abuse, let report writers go to these families and have a look at what is going on.

Mrs HULL—Do you think there should be a mechanism of reporting contact services to the Family Court?

Ms Hanson—Yes.

Mr KERR—It surprises me that the family courts are making orders for people to have supervised access or access through contact centres without them being subject to the management profile that comes with being a Commonwealth centre. Has this happened by accident? What has actually happened? I had assumed that when orders were made for contact to be made through contact centres it meant through ones operating with a higher level of credibility and where you could be confident that violence would not occur and the safety of the people would be managed correctly.

Ms Hanson—I am not going to jump on my soapbox and say that there are not enough contact centres, because obviously there are not, but in places where there is high need contact centres are being set up because of that need. The court uses contact centres because they make everybody safe. Solicitors bring up the matter of whether to use a contact centre because they know it is in their area. Unfortunately, our service has had a really bad experience with the Magistrates Court at Maroochydore. Both solicitors spoke to their clients and said that they had both agreed to use our service but the magistrate at the time said he felt that there was a stigma attached to contact centres. I have a real problem when you have two lawyers appearing for both

parties saying that they need to use a contact centre because there is conflict and the magistrate says that they cannot use it because there is a stigma attached to it. Surely you use a contact centre to make people safe, especially when both parties have asked for it.

We are saying that, if there is an allegation of domestic violence or child abuse or a threat to people's safety—whether grandparents or anybody else—anybody who is picking up children for changeovers or supervised contact needs to be made safe. It is especially so for children who are seeing so much conflict. You cannot imagine what it is like for a child to be dropped off. I was unfortunate to see outside a police station many years ago two parents each holding an arm of a child. They were both pulling at this child outside the police station. There were no police there because they did not want to get involved. The parents were saying, 'No, it's my turn' and 'No, it's your turn.' We need to make these children safe. As soon as there is an allegation of domestic violence or child abuse—and it does not matter who makes it—when children are being exchanged they have to be safe. They need to not see conflict. They do not want to see their parents fighting all the time. We do not want to see that either and that is why we have two separate entrances. It is imperative that we make all children in Australia safe when they are exchanged and on contact.

CHAIRMAN—You mentioned that there are five funded centres and 30 coming onstream and that there are a number of unfunded centres. How many unfunded centres are there?

Ms Hanson—I really do not know. Some people do it privately. In Queensland there is one at Ipswich and there are lots of them popping up all over—

CHAIRMAN—My understanding of my discussions with your centre is that, while you are funded to a certain extent, you have given a lot more contact than you are funded for, bearing in mind the fact that you have been able to rope in a large number of volunteers.

Ms Hanson—Yes. This financial year my service and most of the services in Queensland that I have spoken to are funded for 100 families. For the last financial year my service did 300 families. We are a very big service. We also have an outreach at Gympie. Our funding for that year was 60 families and our outreach at Gympie did 55. I do not even put anything in the paper to say that people can use our contact centre. It has always been word of mouth. We are very proud, as an organisation, to say that we can service 300 families a year. My problem is that not all communities are like Maroochydore, where I beg, borrow and steal. It is very hard to facilitate contact when you have a six-month waiting list.

You cannot imagine going through a court process that takes up to eight months, or three months for an interim hearing, and then ringing a contact centre and finding out that you have to wait another six months to get into it. I have spoken to clients of mine who have said that there was no domestic violence at all until they separated. As soon as the separation happened the conflict occurred. They have gone from having their child 24/7 to fortnightly or monthly or whatever it may be. There has got to be conflict. No-one is safe when you have as much conflict as that happening.

The biggest problem in this is to get parents to focus on the children. It does not happen overnight. It is a very long process. We allow our families to use our centre for as long as they like. There is no six-month limit, because they have to go through the process themselves. One

person leaves the relationship. That does not mean to say that the other person is ready, so the conflict is already there. We have to make recommendations to say that, no matter what happens in family law, all children are safe. We have to allow children to go to safe places to see the other parties that they are not living with, and we can only—

Ms ROXON—Can I ask a question on the parenting plans. Obviously your experience through your service is dealing with families who have been in extreme conflict, but your submission seems to be very comfortable and supportive of parenting plans being used to transition families into another sort of arrangement. Could you explain to me how you think that would work? I notice that you said that with your services you require there to be written agreements between the parents. The proposal in the bill is that a later parenting plan in writing will be able to vary a court order. Do you think that is adequate? Do you have views about what else would need to be in a parenting plan for it to be sufficient to operate well in a family situation where there has been a lot of conflict? Obviously you have some experience in that area.

Ms Hanson—As I said, I understand the mind-set of the fifty-fifty shared responsibility. You are asking parents to have the mind-set that once they leave a relationship, they have a fifty-fifty shared responsibility. It takes a long time for parents to get that. The old saying is: I have brought you into the world; I will take you out. I understand what you tried to do in 1995 by changing custody laws, but this is about changing the mind-set of people who think that once they have children, they are theirs to do what they want with: 'If I leave, they are mine and I am taking them with me.' I understand the mind-set.

CHAIRMAN—There is not a presumption of fifty-fifty, but there is a presumption of shared parenting.

Mr KERR—Responsibility.

Ms Hanson—Of shared responsibility—that is what I said.

Ms ROXON—I am trying to focus on the new mechanism proposed for these parenting plans and whether you have any views about what needs to go into a parenting plan or how it needs to be agreed to for it to work in families where there has been a lot of conflict.

Ms Hanson—The only time when there really is agreement is when they start to concentrate on the children.

Ms ROXON—And you are saying that that takes a period of time and then you need to be able to agree on something.

Ms Hanson—We have families come to interim hearings and there are huge amounts of conflict. Sometimes they are at our centre for up to two years. It varies for everyone and it depends on the conflict—there may be child abuse issues or other issues. They really need to go through the stages themselves. We allow our families to go off site and we do off-site supervision. A couple of years ago we did a research paper into what changed for these parents when they used off-site supervision. The change was that they both become child focused, which really blew us out of the water because we did not set out to do that. But that is what happens

because being off site allows children to go to the beach and the park. Obviously, parents have to look at what is in the best interests of the child.

To sit parents down and say to them, 'If you do this, this and this, it will be in the best interests of your child,' will just go completely over their heads when they are in so much entrenched conflict. It has to be when parents can actually see that they are going to get something out of this for both of them. When they see that, they then see that their child is going to get something out of it as well. I am not too sure about time frames—it would depend on what is happening in both of their lives. Again, it goes back to whether one person has a new partner. All those things really make a huge difference when you are doing parenting orders.

Mr KERR—I have two questions. One is about accreditation. From what you are saying, I take it that at the moment there is no accreditation for what is a children's contact centre.

Ms Hanson—The accreditation that we get is under funding, where we get validated by meeting the criteria of our funding. At the moment, we are also having discussions with a steering committee—I am on that committee—about accreditation and we are working out modules so that all people working with contact centres are going to be accredited. I think we have 16 months to work out what sorts of degrees you need. It is the same with counselling and dispute resolution, there is a steering committee being set up to work out what degrees and things workers have to have. That is being looked at, but having accreditations as such for contact centres has not been looked at. It may be under the same umbrella.

Mr KERR—I do not know whether this is within the remit of the legislation but in a sense the legislation assumes that there will be safe places where people can do these things. In a sense there has been this difficulty. We heard the evidence of the two previous witnesses—I am sorry; I have forgotten their names. At the time, it seemed to me quite difficult to conceive that contact centres could be a point at which violence might emerge or wrongdoing might occur. I had in my mind that contact centres were funded by the Commonwealth and were operating in a way which I assume yours is. But if that is not the case in the universe of all contact centres then some thinking has to be done because we are broadening the number of circumstances, presumably, where contact will be ordered.

Ms Hanson—That is right. Back in 1995 or 1996 when contact centres were actually established, or after the 10 pilots were done and the other 25 services were brought on, ACCSA tried to encourage all contact centres to use the ACCSA standards, which were done in 1993-94. Those standards specify one supervisor for two children, for example. If there are three children, there need to be two supervisors. There are lots of things that have to go in with accreditation, such as the standard of what you are going to be doing. Is it okay to have two supervisors for five families? There are lots of things that contact centres need to address. We actually have people who are doing this privately. All they are doing is ringing up and saying to solicitors that they are quite prepared to do it, which is quite scary.

Mr KERR—I remember this well because I was one of the ministers who set up the first contact centres. But I had assumed that that pattern of service delivery was continuing. The other point I raise is about strengthening the parenting compliance regime, which you refer to on page 2. I am not sure what you are referring to. You say that currently all services voice concerns with

regard to the length of time it takes for breaches of orders to be dealt with. Do you mean matters that arise in circumstances in your centres or do you mean generally?

Ms Hanson—We have families where one party will come and do their intake assessment and we never hear from the other party. I will use a non-residential carer as an example. The non-residential carer will come and do the intake. We do not get any documents from the court; we only get what the parent actually brings to us. It is very hard for us to then write to the other party and say: 'It's your turn to come and do an intake.' The court has said that they need to use our service, so they should be the ones who are actually coming in to use our service. But the non-residential carers come. I think we have half a filing cabinet full of cases of people who do not turn up for contact. Courts are making decisions but it still does not make these parties come to contact centres.

We have parents who may have weekly contact who will not bring the children for three weeks and will bring them once a month. There is nothing that we can do, not that we would ever want to do anything. They are breaches of orders. We have actually had to put in our service agreement a request that if they do not bring their child to please supply us with a doctor's certificate. We also ask them to make up that weekend. But that puts us in the middle as mediators to try to get these families to understand that if you do not bring the child for one week you should be making up the next week. There is a lot of mediation done in trying to make these things work. It is the same if they want to change weekends. All those sorts of things are done from the contact centre because we do not want the parties talking to each other, which may make the conflict escalate again.

Mr PRICE—Do you report that to the Family Court? When there are breaches, does the Family Court ever ask you about whether or not a particular family has a clean record or if there are breaches?

Ms Hanson—They subpoena our files.

Mr PRICE—Do the parties do that or the court itself?

Ms Hanson—Usually the solicitors acting for the parties will subpoena the files. If there is a separate rep involved, the separate rep will subpoena the files. On those files it basically just says dates and times that they were actually at the service.

Mr PRICE—How often would your files get subpoenaed?

Ms Hanson—Really it depends on how many people are going through the court process. Sometimes it is 10 a week and sometimes fewer. It just depends.

Ms ROXON—When you say that the dates are on the files, is that because they are going to be subpoenaed and therefore you only keep the dates on the files? Presumably there are sometimes serious incidents and, if you are keeping a record of what happens to a family, you would want that to be on the files?

Ms Hanson—If there is a critical incident, depending on the critical incident, we would tell both parties and the court that that critical incident had happened.

Ms ROXON—So there is not an issue, then, as to whether that is on the file?

Ms Hanson—It is not an issue. Child protection and safety for everyone is not an issue. They would be reported by that contact centre to the courts. On most critical incidents we would stop contact. But the trouble we had in the past—and I can only talk about my centre—is that, for example, we have stopped contact because a non-residential carer was non-compliant with our service agreement and was then allowed to pick the children up from a vacation care centre, where he then went on to bash the mother and the child. The contact centre said that this particular person would not follow our service agreement, but the court still allowed the contact to go ahead at another venue, which put the mother and child at risk again. When contact centres say that they cannot do something, it is usually because we are all at high risk. If we cannot facilitate something, how can a mother facilitate that by herself? It is just not practical.

Ms ROXON—That is a sobering example for us. There is not much in the bill that is actually going to pick up on that.

Mrs HULL—You are obviously seeing people after contact has broken down or after the agreements have broken down or when agreements have never been in place. Is there any particular pressure that results in the need to use contact services and not just a personal agreement? Are there any particular issues that you think could be addressed that would see a better transition or a better capacity for people to have their own drop-off and pick-up arrangements?

Ms Hanson—Within two weeks of separating, people have come to use our service. Those guys were actually doing it for six months by themselves. That was only for a changeover. There was not any supervision of contact. But they were at such loggerheads that they could not talk to each other and they did not even want to see each other. That is why they used the contact centre. They did not go through the adversarial process because the father was seeing the child and the mother was happy not to have someone in her face when she was exchanging the child. Therefore, they could leave all of the decisions with the solicitors and not be at it when they saw each other.

When they see each other, of course they are going to tell each other how much they dislike each other and what the other person has done. If they do not see each other, they seem to be able to move a lot more quickly through the process, for example, of going from an interim hearing to final hearing without going through that really big conflict. We will always need the adversarial part of it because of the safety issues for children. Some of the families that have used our service have come up to me—some of non-residential carers especially—and said, 'Thank you so much, because the conflict has stopped.' We allow them to actually write in communication books to each other. If they need to talk about the children, they do that in a communication book. But you can see the transition in them because it takes the load off both people's shoulders in regard to arguing and bickering all of the time.

Mrs HULL—So would you be suggesting that a better way forward would be that, on separation, you would use a contact service to get you to a level plateau of emotional wellbeing and then, once you get to a level plateau of emotional wellbeing—this is the old cooling-off or cooling-down period—you are better able to deal with each other on a personal basis?

Ms Hanson—And you can make clear decisions as well.

Mrs HULL—So you should not be just having referral to contact services because of extreme pressure and circumstances; it should be your first port of call to relieve the pressure to prevent it from getting to boiling point and exploding.

Ms Hanson—That is right. To be honest, that is the reason why we went into the domestic violence issue in the court at Maroochydore. We said to the court, 'Please use our centre as soon as you write a domestic violence order out,' because in that order they are still allowed to have contact. How bizarre is it that they actually write an order and the exclusion is when you are exchanging your children! The most likely time of conflict in anything is when people are exchanging their children, so we actually went to the Magistrates Court and said, 'Please use us. We'll worry about getting them to write out agreements and so forth.' We then went to all the shelters and said, 'We'll help you write out an agreement.' That agreement is just to work out the drop-off arrangements. It is not working out residential caring and it is not working out for how long. All it is about is if they agree Friday afternoon to Sunday afternoon. I am not talking about the picture of going or not going to court, because residency still has not been worked out. It is about allowing these children to have contact when the rest of their lives is in total turmoil.

Mr CADMAN—The matter broadly goes in three steps before the Family Court. These are information provision, mediation—although that is not quite the word that is used here, but it implies mediation—and arbitration. So somebody is laying down the rules and saying, 'You guys have got to get it together, otherwise you're going to finish in court with a lot of trouble.' Do you think that is an appropriate process?

Ms Hanson—I do not think it is appropriate when there are domestic violence and child abuse issues.

Mr CADMAN—It does not imply that either. It says you do not even get to the first point if there is child abuse.

Ms Hanson—That is exactly right. That is why in my submission you saw that the only time that I talked about child abuse was in special cases; it was under that umbrella.

Mr CADMAN—Apart from that?

Ms Hanson —Apart from that, I think it is a wonderful way to get these families from A to Z without having an adversarial position.

Mr CADMAN—If you could scrub all the bureaucracy and hassles that come into a system, what would be the time line that you would choose for parents to have this service available to them?

Ms Hanson—Contact centres?

Mr CADMAN—No, the bill's provisions.

Ms Hanson—The mediation?

Mr CADMAN—Yes.

Ms Hanson—Again it is really hard. You are going to have one parent that has left the relationship and is ready to move on and you are going to have one that is not, and they are going to go into mediation. As Mrs Hull said before, what is the period? Do you do a six-month interim hearing using the old agreement or the parenting agreement? Do you do it after six to 12 months to see how it goes or after six months do you just ring them up and see how that agreement is actually going? You would probably have to talk to the mediators and the guys that do primary dispute resolution to see whether it should be in increments of six months, 12 months or 18 months. Perhaps if it is still working after 18 months we should let that be the agreement. I am not quite sure about this. So much happens in that first six months. As the parents separate, there are two houses to establish. There is a lot of stuff going on for parents and children. Children may have left to go to another school. There is so much going on for them. I do not think parents would be emotionally ready to make any sort of agreement within the first six months of separation.

Mr CADMAN—Should somebody outside, such as a court, make the decision or should they be encouraged to settle for something that they know is going to be a temporary arrangement?

Ms Hanson—Like I said, it should be for six months, 12 months or 18 months and then you see how they are going. One of the things about these court orders—or parental orders, as you are calling them now—that is forgotten is that they are not age appropriate. What is determined for a three- or four-year-old is going to be different to what is appropriate for an 11-year-old. The order is not done with a view to what can happen to children when they get to a different age and where they are at that age.

Mr CADMAN—So a parenting plan that is capable of flexibility and adjustment from time to time might be far better to manage than a court order?

Ms Hanson—Definitely. We are talking about mind-sets of parents thinking that fifty-fifty shared responsibility is fifty-fifty shared care. It is not. They are two different things. I understand your mind-set by saying—

Mr CADMAN—Start at that point, and then just see where it goes to.

Ms Hanson—The problem with that is: how do you have fifty-fifty shared responsibility if you only have contact every fortnight?

Mr CADMAN—The bill seems to say fifty-fifty shared responsibility in long-term things like religion, schooling, that sort of stuff.

Ms Hanson—So you have two parents in conflict and you are asking them to agree on what school they want the children to go to, what religion. That is probably why they separated, in some cases.

Ms ROXON—Can I ask a question about the obvious benefits of the children's contact services and the problem that we have that there are not enough of them. No matter how good they are, it is a problem to try to use that method when a lot of communities do not have access

to that service. Would you like to comment on the proposed family relationship centres and whether you think they should have some role in picking up some of the types of services that you provide—particularly, for example, a pick-up and drop-off point rather than the supervised service and things. I do not think that is part of what the government has intended so far, but do you have a view on whether it should?

Ms Hanson—I think that if you start taking changeovers and change backs from contact centres, you are not going to have the security or the staff in those services. You will not be able to have the two entrances. There are lots of things that go with making a good contact centre.

Ms ROXON—So you are better off to expand that program rather than try to—

Ms Hanson—You are better off to say, 'Here are 100 contact centres; go with it,' rather than trying to incorporate a family relationship centre. It is even hard for us to train staff members, because what we do is so unique. I had to explain to a father the other day what it is like for a supervisor to supervise, when he was saying how hard it was for him to be supervised. I said, 'You must understand how hard it is for a supervisor to supervise you because it is an unnatural process.' When a child falls over and you are standing there, as a supervisor you want to go and pick the child up, but you have to allow the parent to do that. So contact centres are unique in the service that they provide. It is the same with changeovers. Changeovers are not just about picking up and dropping off. There are lots of things provided by our service. In the process, children play before they go back with the other parent. They have had their own little part of debriefing when they separate from one parent and go to another. That is an important process for a child. It is the same from one to the other—it is no different. They need that little bit of space for themselves.

I cannot imagine what it is like for these little guys who see a person for 48 hours and then do not see him for two weeks, for example. How do they understand that when, before that, they saw them 24/7? It is a very hard thing for a child to get their head around. I think that when parents separate, the children are the most important things. Children's safety and the best interest of children should be the paramount concern of any government—not saying, 'There is domestic violence, but it has only been proven that there is 60 per cent,' or whatever it is. If there is domestic violence and they have gone to court, everybody needs to be made safe. Children should be able to go immediately to contact centres because provisions in those domestic violence orders say that the parties are still allowed to have contact. We all know that when they are having contact is when the conflict escalates, because you are talking about their children.

CHAIRMAN—As there are no further questions, on behalf of the committee I compliment you on how passionate you are about the centres. You made out a very powerful case for more of them. Thank you very much for appearing before the committee. A draft transcript of your evidence will be sent to you by Hansard for you to check. Is it the wish of the committee that the submission we have received from Barbara Hanson be accepted as evidence and authorised for publication? There being no objection, it is so ordered. I thank everyone who attended today.

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

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.00 pm