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

THURSDAY, 21 JULY 2005

SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 21 July 2005

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

Members in attendance: Mr Cadman, Mrs Hull, Mr Murphy, Mr Slipper and Mr Turnbull

Terms of reference for the inquiry:

To inquire into and report on:

The provisions of the draft Bill.

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

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

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

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

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

The Committee should not 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 9.00 am

ALTOBELLI, Dr Tom, Member, Family Issues Committee, Law Society of New South Wales

PLASTIRAS, Ms Maryanne, Responsible Legal Officer, Family Issues Committee, Law Society of New South Wales

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 whether they implement the government's response to the report of the Standing Committee on Family and Community Affairs *Every picture tells a story.* The committee has been explicitly directed not to re-examine policy issues already canvassed in the previous inquiry. The committee is grateful that witnesses have been able to attend at short notice and make submissions where possible. We are sorry that the time frame is quite constrained. However, the Attorney-General is particularly keen to introduce this legislation, and we have to report by 11 August. A lot of people have gone to a lot of effort and worked under great pressure either to be here or to make submissions. I welcome the representatives of the Law Society of New South Wales. I ask you to make a brief opening statement and then we will proceed to questions.

Dr Altobelli—The Family Issues Committee of the Law Society of New South Wales appreciates the opportunity to appear before this committee, and we do indeed recognise and acknowledge the pressures that you are under. The committee represents the interests of the many hundreds of family lawyers practising in New South Wales who work at the coalface of the many issues that are covered in this bill. The vast majority of our members are unequivocally and unreservedly committed to resolving the conflict of their clients and helping them and their families get through a very difficult, stressful time in their lives.

CHAIRMAN—Are you saying that a small minority of your members are not? I am sorry; I was once a lawyer too.

Dr Altobelli—Our core business is settlement, and we want to be part of a legal system that facilitates early, efficient, cost-effective and child focused settlements when its comes to children's matters in family law. Our members want to be seen as positive supporters and facilitators of changes to the legal system that make it better for our clients. As a general proposition, our members support the bill that is being considered at this time. However, we believe that a legal system should be relatively simple to navigate. It should be accessible to all parts of the community and should involve legal principles that are clear, relatively predictable in terms of outcomes and child focused. We also support reform that is adequately considered. In my office at the University of Western Sydney, where I teach part time, I have a little, bright-green poster. It is by the door so that every time I walk out I read: 'Has it marinated long enough?'

CHAIRMAN—You're not a cooking lecturer, are you?

Dr Altobelli—No; family law, Mr Chairman. 'Has it marinated long enough?' is an admonition to think things through, without unnecessarily delaying things. Whilst our support for the bill is there and is publicly stated, our concern is that perhaps some parts of it have not been thought through. In other words, it has not marinated long enough.

We have concerns about further changes to family law that have the potential impact of shifting the cost away from the legal system itself and onto the client and their lawyers. Our experience has been that a lot of what has happened in family law in recent years has involved a cost shifting back down to lawyers and clients. Our members are conscious of the limits of the law as an instrument to regulate human behaviour, especially when people are under such intense pressure. Let us face it: family law has been the focus of much legislative reform since 1976 and the fact that we are here today is simply another example of what a difficult area of law we are working in. Regulating human relationships, especially when those relationships break down, is very complex and it may well be that law of its own is not enough. Our members do the best they can within a legal framework to help families but it needs to be recognised that families who go through separation need much more support than just legal support and they need support of a non-legal nature after they have exited the legal system. We believe there is much more scope for effective educational and support programs for parents, especially in relation to post separation parenting. We are hopeful that the family relationship centres will in fact facilitate some of this support, but the law is not necessarily the way of dealing with the types of problems that we have here.

We have two main concerns about this legislation. Having already stated that in general terms we support the bill, we have two concerns: firstly, as a general proposition it is not adequately child focused and, secondly, its current drafting may lead to unintended consequences. Mr Chairman, with your leave I will briefly address those two points.

CHAIRMAN—Please do, Dr Altobelli.

Dr Altobelli—The first point is that the legislation is not adequately focused. We have come up with a few examples of this in the short time that we have had to look at the bill. For example, let us look at section 60B 'Objects and principles'. In section 60B we have the objects and principles of part VII of the Family Law Act dealing with children. Our concern with section 60B is that it can be interpreted in such a way that the child's best interests are actually subsumed by parents' rights. For example, in section 60B(1) the objects are not stated to be subject to a child's best interests. The legislation actually assumes that it will always be in a child's best interests for those objects to be fulfilled. That is just not so.

At the pointy end, in that relatively small category of cases that have to be litigated—those difficult kids cases if I can call them that in plain English—it is not necessarily the case that fulfilling those objects results in the best interests of the child being protected. This is just one example of interpreting a key provision of the legislation in such a way that the best interests of the child seem to be subsumed or could potentially be subsumed by a new principle: the best interests of the parents. This is one example of how the legislation might not be adequately child focused.

CHAIRMAN—You are referring to 60B, are you?

Dr Altobelli—Yes.

CHAIRMAN—If you look at 60B(1)(c), the last few words of (c) are 'consistent with the best interests of the child'. Do you have a comment on that?

Dr Altobelli—Certainly. Paragraph (c) says 'to ensure that children have the benefit of both of their parents having a meaningful involvement', and there is no doubt that it captures the best interests of the child there. But (a) and (b) do not have those words. That could be very simply fixed up.

Mr CADMAN—The 'full potential of the child' in (a) does not imply the best interests of the child—to allow the child to meet their full potential? Surely that does.

Dr Altobelli—What is being suggested is that there could be certain circumstances when both those paragraphs (a) and (b) could be invoked in a hard case—and I do stress we are talking about the pointy end here—in such a fashion that the kids' interests actually became subsumed by other interests.

CHAIRMAN—I find that difficult to appreciate but I do respect your point of view. When you leave here today could you give some reflection to the point you have made and maybe let the secretary have a note on those particular points?

Dr Altobelli—Yes.

CHAIRMAN—I do not mean to be rude by intruding at this stage but if you have a point of view we respect that and if you can articulate it we will consider it.

Dr Altobelli—It is interesting to note that our concerns would be easily rectified by including that. All we do is move 'consistent with the best interests of the child' from (c) through to the objects part and there is no room for doubt whatsoever. I guess it is one thing for lawyers to engage in a discussion about legislation: let us not forget that this legislation sends out messages to the community and will be read by people who are not lawyers. That is why it is so important that we have as little room for doubt as we possibly can about these matters. Another example of our concern that the legislation may not be adequately child focused relates to the definition of abuse. The definition of abuse is in fact found in several key places throughout the legislation.

Mr CADMAN—Excuse me: I wonder whether in your consideration of the point you made previously you could consider whether part (2) and part (1) could be interchanged. When you come to consider that at your leisure, could you see if there is an advantage in moving those two around.

Mrs HULL—Putting (2) before (1)?

Mr CADMAN—Making (2) the prime clause.

Dr Altobelli—Yes, that is something I will come to shortly. That is an idea that would address some of the other concerns that I have. I was mentioning the definition of abuse. Our concern is that the definition of abuse is a little too restrictive. In practice at the coalface we find that abuse

is not just a perfidious concept, but it just comes up in so many different ways that it would be a tragedy if, when abuse actually occurs in the context of a child, it were not captured by the legislation. We are suggesting a broader interpretation of the concept of abuse. Perhaps the family law section has suggested some wording to assist here. That was the second example I had of how the legislation may not be adequately child focused by not having an expansive and very inclusive interpretation of what abuse is in the context of the child.

The third example of how the legislation is not adequately child-focused involves looking at the presumption of joint parental responsibility, and the consequential obligation on a court to consider the child spending substantial time with each parent; these are fairly fundamental concepts in this bill. Our concern here is that, again in those cases—the tough cases—where there are child protection issues, the legislation could be interpreted in such a way that these principles need to be given effect to, even though there are concerns of a child protection nature.

For example one of our members, who is substantially involved in state child protection work, is concerned that the relevant provisions here could put pressure on the people deciding these cases—magistrates, judicial registrars—to facilitate contact even in cases where there are substantial child protection issues. In the context of child abuse the test used in family law is one of unacceptable risk. If there is an unacceptable risk of child abuse then there should be no contact, or the contact should be very, very closely circumscribed—for example, supervised—so that the child's interests are always protected.

The concern here is that the presumption of joint parental responsibility—and what flows from that—may not be clearly expressed as being subject to the child's best interests; that there might be cases where contact happens even though there are serious child protection concerns. This is something that is very easily fixed up through careful drafting; drafting that simply makes these considerations always subject to the child's best interests. The principle that we are talking about, the principle of joint parental responsibility, is not something that our members are terribly concerned about. It is the application of that principle in the hard cases, where there are child protection issues, where we would like to see a more explicit reference to the principle being subject to a child's best interests.

Mrs HULL—In what area do you think this is lacking or leaves children open to being put with a parent who may be abusive? Everything that I have seen always covers the area of physical and psychological harm. Could you tell us what area you are speaking of?

Dr Altobelli—Yes indeed. The example that I have is in section 65D and 65DAA. So 65D is the section that grants the court power to make parenting orders, and the amendments to 65D(1) incorporate the presumption of joint parental responsibility.

In the next section, 65DAA, we have the principle that the court is to consider the child spending substantial time with each parent in certain circumstances, and again our members do not cavil with that as a principle. The concern is that, on reading that amendment, it does not adequately articulate that the principle is always subject to the best interests of the child. That is the concern of my committee in that regard.

Mrs HULL—Does 65DA currently do that?

Mr Altobelli—I presume you mean 65DAA. We actually do not have a 65DA at the moment.

Mrs HULL—No, but you are saying that you currently have a position where reasonable doubt exists. We are not removing that, are we?

Mr Altobelli—Yes.

Mrs HULL—What I am saying is that you are concerned about 65DAA:

Court to consider child spending substantial time with each parent in certain circumstances.

Mr Altobelli—Yes.

Mrs HULL—But you are saying that you are currently covered to a degree and that after this you will not be covered because we are not looking at the child's best interests. What I am asking is: how are you currently covered?

Mr Altobelli—I think it is a good point. Our concern though is that at the moment all of part VII is subject to a supervening and overwhelming principle of 'everything must be done in the child's best interests'. We are not sure what the impact will be on decision making and family law once we have such clear messages in the legislation about presumptions of joint parental responsibility. For example, will the new message about the presumption of joint parental responsibility be read in such a way as to displace, or render subservient, the former message about what was clearly in the best interests of the child?

Mr CADMAN—Wouldn't the objectives override subsequent clauses? Wouldn't the objectives and principles, if they included the child's best interests, override the consequent clauses in application. You know the applications. I do not know the way in which they are going to be applied.

Mr Altobelli—It is not always the case that the principles are applied in that fashion.

Mr CADMAN—So at every point you want to see the child's best interests restated?

Mr Altobelli—It would be as simple as that. It would be a relatively simple matter of restating the principle in the context of this particular section. I am sure that by including just a few words such as 'subject to the best interests of the child', it would not weaken the new message about the presumption of joint parental responsibility. We have no problems with the substance of the draft bill. What we are careful about is making sure that there are not unintended consequences. As it reads, our members' concern is that the focus has gone off the child and seems to be back on the parents, whereas the trick, of course, is to balance it.

Mr TURNBULL—I do not see how the parliament can express its intention in this proposed legislation more clearly than under section 65E. It is literally on the next page of the draft bill. How could the court be under any misapprehension that the paramount consideration is the best interests of the child.

Mrs HULL—Exactly.

Mr TURNBULL—My impression is that the committee is very sympathetic to the concerns you are expressing and agrees with the substance of the concerns but I think the language is adequate to the task.

Mr Altobelli—If the question is, 'How could we do it better?' then one simple answer is: do not have 65E after 65D. If the most important message is 65E then, for goodness sake, let us put it right up the front so there is no misunderstanding whatsoever that everything that follows in the course of this legislation is subject to the principle that the paramount consideration is the child's best interests.

Mr TURNBULL—That is a drafting suggestion.

Mr Altobelli—Yes.

Mr TURNBULL—It is almost a stylistic one. I think it would be a mistake to have the best interests of the child as the paramount consideration recited in every section because if one section were overlooked, that could be interpreted as meaning that it did not apply there. It is probably better to have it treated in this way. Your amended or revised suggestion is that section 65E should be moved up to the beginning of part VII.

Dr Altobelli—Yes, so that the messages are clear and cannot be misinterpreted. I think the problem is that in this era of the self-represented litigant—an era that we are going to see continue into the future—we have to make sure that the messages that the legislation sends out are clear, are consistent and can be understood by a non-legal audience.

Mrs HULL—I do not want to be belligerent or argumentative with you, but I wonder about this. We have the Family Law Act in place. Section 65DA starts off with parenting orders and stages of compliance, et cetera. Then 65E—the current one—comes in with the child's best interests, yet you are saying that this is all still in place and is not being removed. I do not understand where your argument comes from, that anything additional to this is weakening it, because anything that you are discussing and debating now is not in place in the current system.

Dr Altobelli—Yes, but the new system proposes to introduce this new presumption and I guess we would want to make sure that that does not weaken the message about the focus on the child.

Mr TURNBULL—Dr Altobelli, is this a fair way to summarise what you are saying: you accept that the paramount consideration being the best interests of the child is adequately, for legal purposes, reflected in the legislation but you believe that, for expository purposes, particularly given that there are many litigants in person who are obviously not lawyers, that principle would be usefully expressed at the beginning of part VII, presumably in the new section 60B?

Dr Altobelli—Yes—or thereabouts.

Mr TURNBULL—Or thereabouts. So it is a stylistic point.

Dr Altobelli—With respect, Mr Turnbull, I could not say it better myself.

ACTING CHAIR (Mr Murphy)—Dr Altobelli, I would like to draw your attention to the terms of reference—in particular, the first term of reference, which says, in part, 'encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate'. That term implies a voluntary outcome with no binding force. The term also denies any direct responsibilities that are owed in natural justice and natural law to the child. The term implies voluntary adherence to the reaching of an agreement, with no punitive or other remedies if the parents do not reach an agreement. The continuous rise in contravention of Family Court orders is testimony to the fact that the state makes a poor parent. The state is an even poorer parent than the natural parents of the child, I would submit. As a remedy it is recommended that the courts have the power to make orders, including serious repercussions on the parents, if the parents do not agree and perform a minimum prescribed set of parental responsibilities. I would like your response to that, in terms of that term of reference. What are your views?

Dr Altobelli—My committee has not actually considered that. If I were to express an opinion it would be a personal opinion and I am not sure that that would be of any—

ACTING CHAIR—A personal opinion is a valid opinion.

Dr Altobelli—I am an academic as well as a practitioner and I have been thinking about family law and the role of the state in the family. Historically, the state has adopted a hands-off approach to the regulation of the family and has trusted the family to do the right thing, particularly in terms of children. In more recent times, we have seen the state intervene and that is, I think, to reflect the fact that some families are incapable of looking after the interests of their children.

ACTING CHAIR—Precisely.

Dr Altobelli—Therefore there has to be a balance between the state's right to intervene and the family's autonomy, for want of a better word. One of the harsh realities of family law practice is that one often encounters at the pointy end parents who are not child-focused, who, quite frankly—if I can be down-to-earth—could not give a stuff about their kids. Thankfully, it does not happen very often. But when you encounter those parents, you count on legislation that protects the interests of those children and you are very thankful that the state has legislated to intervene in the autonomy of the family. It is a question of finding the right balance. I think the balance we have at the moment is not bad. As a matter of principle, I would not cavil with your point that the state does not make a really good parent, but there are times when the state has to intervene to protect kids' interests because the parents simply cannot. I am not sure whether that adequately answers the question.

ACTING CHAIR—Yes, that is a valid opinion.

Mr CADMAN—Dr Altobelli, you have raised the point of abuse, the protective factor, and as a remedy you have proposed that the legislation give greater prominence to the clause about the best interests of the child being dominant. I refer you to section 60KI(3). One of the factors we came across in a previous inquiry was the inability of the court to always gain accurate information about and verify claims of violence or abuse partly because of the jurisdictional separation between the Commonwealth and state. Here we are proposing something that is

applicable only to Aboriginal and Torres Strait Islander children. I wonder whether you see anything inhibiting this from being applied more broadly—that is, the capacity to take into account proceedings before the court or other courts and tribunals, or other factors which may draw some factual information into the court's consideration rather than the speculative accusations that are made at the moment.

Dr Altobelli—There are two points there. Firstly, our committee is concerned about whether section 60KI should be limited only to Aboriginal and Torres Strait Islander children. Perhaps consideration could be given to broadening it. Let us deal with the substantive point.

Mr CADMAN—Yes, remove that limited provision.

Dr Altobelli—The challenge involved in relying on proceedings in other courts is that courts operates in different ways—there are different standards. Running a family violence case in a local court is very different from running a fully contested children's case in the Family Court. One is often very much done on the run, in a highly pressured environment, by a local court magistrate who has an incredible list to deal with and very few resources.

Mr CADMAN—So it is better to ignore that material?

Dr Altobelli—Not to ignore it in its entirety but to take it into—

Mr CADMAN—Is it not often the case now that people can make assertions that are not tested by the court? It is a very subjective environment.

Dr Altobelli—It is, and that is one of the weaknesses in our system. For example, often the record of those proceedings is not adequate. It is very hard to get a transcript of local court proceedings nowadays. Often, it is done at the cost of the parties and the transcript is not reliable because of that. The challenge is in finding a balance between getting the information and the weight to be given to it. Receiving the information into evidence is fine—there is no problem with that in principle—but the weight to be given to that evidence is probably the more important thing. Perhaps we should simply trust the judicial officer at the time to take all the factors into account.

Mr CADMAN—The introductory sentence says that, in child-related proceedings, the court may adopt any recommendation, but there is no provision that it must adopt any recommendation.

Dr Altobelli—That is right. It goes on to say that it may 'draw any conclusions of fact from that transcript that it thinks proper'. So I think that leaves the discretion probably where it should be.

Mr CADMAN—Just remove the narrow application to Aboriginal and Torres Strait Islanders.

Dr Altobelli—Indeed. That is our view as well, Mr Cadman. The second point that the committee wanted to make to this committee is about possible unintended consequences. With your leave, Acting Chair, I will carry on with that. I mentioned before that our members are in the business of resolving conflict. Our core business is settlement. We recognise the intention of

this legislation to facilitate and encourage early settlement of family conflict. But there are some situations where we think that it may actually encourage more disputation. For example, can I take you to section 68F(2). In section 68F(2) we have the additional considerations for determining what is in a child's best interests. Paragraph (j) refers to family violence orders. It says specifically:

(j) any family violence order that applies to the child or a member of the child's family, if:

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

So it seems to be that as presently drafted the intention is that the order is only relevant if it is a final order or if it was contested. Thus, an interim order or an order that was made by consent without admission is irrelevant. The experience of our members in the context of litigated cases—and again I stress that this is the pointy end; we are talking about the difficult kids' cases; we are talking about a minority here—is that family violence is often an issue. In those cases where violence is relevant, paragraph (j) may actually encourage litigation at the local court level because the only way to get the order considered as relevant is to make it a final order—or a contested one at least. Has that been adequately considered? In those tough cases where violence is relevant, doesn't this paragraph actually send the message that it is important to get a final order? Doesn't it actually encourage litigation at the local court level in relation to family violence?

We need to make sure that family violence is a relevant consideration under section 68F(2). That is already there in paragraph (i). Our members are wondering whether we need (j) at all. If our members are right, what this is going to do in those tough cases is actually encourage litigation at the local court level in relation to family violence. The local courts where I practice are busy enough already. The last thing they need is more litigation about family violence. Do we need (j) at all, especially when we have (i)? Is it possible that (j) will in fact encourage more litigation at the local court level about family violence?

Mrs HULL—With respect, wouldn't this relate back to the purpose of the family relationship centres in determining the issues of family violence right from the commencement of the process? You cannot see it in isolation. You are seeing it as a singular process when there has been a myriad of processes along the way. I would see this as being one of the down-the-pathway processes after the family relationship centre guidelines and processes have taken their course.

This is my opinion: what you and your members are saying would be reasonable if you were looking at it in isolation, if there were no other processes prior to this other than what is written in 68F. But you do have other processes that begin within the family relationship centres and the direction of any family violence issues there, and having to determine family violence prior to the filing of family violence. So I could see this as applying after all of those processes have gone through. You do not have a stand-alone item here.

Dr Altobelli—You could be right. I guess our perspective is different. We are looking at it from further down the process when one is looking for legitimate forensic advantage for a client in a case where violence is an issue.

Mrs HULL—What we are looking at, with due respect, and I am not arguing with you, is cutting out how many of those cases are down the pathway you have gone. Those that are down the pathway are predominantly the ones that are going to be with you. Hopefully the rest of them are going to be sorted out through the family relationship centre actions.

Dr Altobelli—We trust so.

Mr CADMAN—I will follow through on what Kay is saying. You make an interesting point. If an order has just been issued and not contested, surely that can be done almost frivolously? One factor could be that the person that it applies to does not feel sufficiently strongly about it. The other factor could be that they do not have the resources. A contested order means that there is an intensity of feeling. It is not just an order; it is a contested order. Isn't it a higher bar?

Dr Altobelli—I am not sure that it is a higher bar to simply contest the order.

Mr TURNBULL—The only type of order that this does not include is an ex parte one.

Dr Altobelli—Yes.

Mr TURNBULL—Ex parte orders by definition have been given without the other party being present. This says the court will not take account of ex parte orders by virtue of them being orders but, if there is a set of facts that involve family violence, they can still be taken into account under (i).

Dr Altobelli—But surely it is the (i) consideration that is important. It is the fact of violence—

Mr TURNBULL—That is true.

Dr Altobelli—rather than—

Mr TURNBULL—But surely what Mr Cadman is saying is demonstrating that (j) will reduce litigation because, if the parties have had it out in the local court, it has been contested, both sides have been heard and an order has been made, it is reasonable for the Family Court to say, 'We'll take account of that order.' That does not preclude the parties saying, 'Facts have changed' or 'I wasn't properly represented.' They can make an argument, I suppose. Nonetheless, there has been a contested hearing and there has been a determination. Surely it is conducive to the economy of the court's resources to be able to take that into account. That is your point, Alan.

Dr Altobelli—Having had this discussion, I can see where this section is coming from. I take the point.

Mr CADMAN—Would you like to consider this? The implications are there, and I think that the intention may be to limit the court's consideration to serious matters rather than matters that may not be so serious but are claimed matters. I do not know whether that is right; it is the way I would see it.

Dr Altobelli—I think that is what actually happens in kids' cases at the hearing level. These allegations of violence are frequently made, and you often have the interim orders, the ex parte orders and the final orders attached to the affidavits. But, at the end of the day, the violence is one factor that is taken into account in the overall context of the decision making.

Mr CADMAN—But it must be. It is a serious matter.

Mrs HULL—Absolutely.

Dr Altobelli—Absolutely, yes. Nonetheless, we will take that on board. As I say, it is an interesting perspective. It is worth thinking about. If our members are right and this does in fact encourage litigation on the ground rather than do precisely the opposite then it is a serious unintended consequence of the legislation.

Mr CADMAN—It is a pre-existing factor. It has not occurred five minutes before they hit the steps of the court, so it is a pre-existing matter.

Dr Altobelli—Indeed.

Mrs HULL—That is why I would ask you to take into consideration the entire process rather than this in isolation.

Dr Altobelli—We will. There is another example of unintended consequences. Let us stick to section 68F. What we have in section 68 is a hierarchy of considerations. When we read section 68F with section 60B, this is what I think we get: we get objects, we get principles, we get primary considerations and then we have additional considerations. Indeed, because section 68F(2)(l) talks about 'any other factor', we actually have additional additional considerations. We have that whole spectrum of things that are taken into account. Listen: we are creating a paradise for lawyers here. Our members are saying: 'Look, we don't need it; we don't want it. We want a simple legal system to navigate with our clients.'

Mr CADMAN—Some of it is even repetitious, isn't it?

Dr Altobelli—It is. With great respect, yes. The idea of having these principles is fine, but the way they have been done—the drafting—is perhaps conducive to more disputation, not less disputation. Our view and the view of our members is, 'We don't want incentives to litigation; we want simple principles—as simple as possible under the circumstances.'

Mr TURNBULL—This is just a list of considerations that the court is required to take into account. What is so hard about that? Why can't the judge simply say, 'I've taken these issues into account, set them out and referred to them,' or whatever and demonstrate they have been taken into account?

Dr Altobelli—That might eventually happen after we have a full court decision, or a couple of full court decisions, to tell us how each of these factors are supposed to relate to each other.

Mr TURNBULL—Dr Altobelli, you know that in administrative law there is a wealth of jurisprudence—it could probably fill many of these shelves—on whether a decision maker has taken into account relevant considerations or irrelevant considerations. Of course, that always begs the question of what is a relevant consideration and what is irrelevant and so forth. Isn't it helpful in a statute to actually have the parliament say what the relevant considerations are and set out quite a comprehensive list of them so that the judge knows that if he or she takes into account these considerations—and it is very easy to do so because it is a laundry list of items—then basically all those boxes have been ticked and the decision cannot be impeached for failing to take into account something that is relevant?

Dr Altobelli—We do not cavil with that.

Mr TURNBULL—Why is that creating a paradise for lawyers?

Dr Altobelli—That is not what you have here, with respect. What you have under section 68F(2) is what I call in my teaching a shopping list of factors. But you have not just got a shopping list; you have a shopping list that says that some things are more important than others. If we want to have a shopping list of factors that judges take into account, let us just have a shopping list that does not have a hierarchy but that simply says—

Mr TURNBULL—You would like to amend section (1A) and merge section (1A) and (2) so that there will just be a long list of considerations?

Dr Altobelli—Yes.

Mr TURNBULL—So your objection is in fact to the words 'primary considerations'.

Dr Altobelli—Yes, the creation of a hierarchy. We think that makes it harder—more complex rather than simpler. Again, it is not just about us lawyers. Let us not forget that this legislation is about people who will be doing the best they can without legal advice, so the simpler we can make it—

Mr TURNBULL—Let me just ask you this question: looking at that list of considerations in (1A) and (2), could I ask you, as a professional with great knowledge in this field, whether you would agree that the considerations mentioned in (1A) and (1B) are more important than the considerations listed in subsection (2)? They are the primary considerations, are they not?

Mr Altobelli—I would need to give that some consideration.

Mrs HULL—Could you take it on notice and respond?

Mr Altobelli—Certainly.

Mrs HULL—We had this discussion yesterday as well, with the Law Council of Australia. Isn't it the case that you have in 68F, subject to subsection (3) in determining what is in a child's best interests, that the court must consider the matters set out in subsections (1A) and (2)?

Mr Altobelli—Yes.

Mrs HULL—So they must consider all of these things. Having the relationship with the parents above the child's protection was also criticised yesterday. Isn't it the case that all of the way through here, in subsections (1) and (2), what the amendments are clearly trying to say is that these things must be considered. You say 'outside any other fact or circumstances that the court thinks is relevant' in (l), but that was not prescriptively saying, 'You must consider these issues.' Isn't it just a strengthening rather than something making things more difficult? Doesn't it just strengthen the intention of (l) anyhow? It is just being far more prescriptive, saying, 'These are additional things you must consider.' I cannot understand why there would be a major problem with it. I can understand the issue about whether you should have it as one complete list so that they are all just a prescriptive set of conditions that you must consider, but I really do not understand why you would conclude that it is making it even more complicated.

Mr Altobelli—Our concern is about the hierarchy and saying that you have primary and additional considerations. There is no objection in principle to having these considerations clearly articulated, even as the first two. But it is the hierarchy that causes concern. What happens in a difficult kid's case if you have a case where the primary consideration is the benefit to the child of having a meaningful relationship? So you have a big tick at (1A)(a) there, but you have maybe two additional considerations under subsection (2) that seem to suggest that there should not be an ongoing relationship. Do two factors under subsection (2) weigh more than one factor under (1A)?

Mrs HULL—So you are taking it to mean that (1A)(a) is the priority?

Mr Altobelli—Yes, because it is stated as being a primary consideration.

Mrs HULL—Yes, it is the first thing that is written. So you are saying that you look at it as being a priority. You are saying that if you put the protection of the child from physical or psychological harm in the front you would consider that to be the No. 1 issue.

Mr Altobelli—Our concern is with the words 'the primary considerations' in section 68F(1A). It is about the distinction between the primary considerations in (1A) and the use of the phrase 'additional considerations' in subsection (2). That is our concern—we could have everything else in the one comprehensive list—or 'shopping list', to use another phrase—and we would be quite content with that. I wonder whether the effect would be the same. The principle is one of keeping it as simple and predictable as we possibly can.

Mr TURNBULL—Are there any circumstances in which you believe, in determining what is in the child's best interests, the primary considerations would not be the matters listed in (1A)? Are there any circumstances in which a matter listed in (2) would be more in the forefront of the judge's mind than the matters listed in (1A)?

Dr Altobelli—I am just thinking out loud here. What if you had a convincing relocation case where there were really good reasons that, say, dad, who has the kids, should go from Sydney to Perth?

Mrs HULL—It would still have to take second place to (1A)(a), wouldn't it?

Dr Altobelli—As this is presently drafted, yes. It is interesting, having thought it through, that this could completely change the jurisprudence about relocation because you are elevating—

Mrs HULL—That would be good.

Dr Altobelli—There is something to be said for that—not in all cases but in some cases.

Mr TURNBULL—You have not answered my question. You made a criticism of the drafting of the statute. I am just trying to understand whether or not the complaint, if you like, that the items in (1A) should not be listed as primary considerations is one that you really believe is a substantive criticism. You do not seem to be springing up with examples of why items listed in (2) would be of more importance than the items listed in (1A). Isn't the whole purpose of the amendments really reflected in (1A)(a)?

Mrs HULL—In the same vein, if you had them in a running order, some of those areas in (2) would then be considered equally as important as those in (1A). For example, grandparents would be equally as important or other persons.

Dr Altobelli—If it is equally important, why are we using the hierarchy of primary and additional consideration?

Mrs HULL—But that is what I am saying.

Dr Altobelli—Mr Turnbull, I am troubled by my inability to come up with examples. I think it is something that we will take on notice. Perhaps if we can come up with some case studies or something, that might be of assistance to the committee.

ACTING CHAIR—What do you say is the relationship between the United Nations Convention on the Rights of the Child and the Family Law Act?

Dr Altobelli—We find that a lot of the principles contained in that convention are reflected in the language of the legislation. Section 60B is an example of that. I think the convention is reflected in the act. The convention has not been incorporated into Australian law. I think there have been attempts by the judges to elevate that convention into domestic law, and that has failed, and probably correctly so. It is probably a matter for the legislature. I think the legislation has simply done the best it can to reflect principles. Does that answer the question?

ACTING CHAIR—Yes. Finally, His Honour Justice Alistair Nicholson, in an address given to the Law Institute of Australia on 24 October 2002, argued the case for a children and young people's commission in Victoria. Do you have any views about that?

Dr Altobelli—Not specifically in relation to what the former chief justice said. In terms of protecting the interests of children and ensuring that children have a voice at all levels of government it is certainly my opinion, and it is probably the opinion of our members as well, that children should have a voice at all levels of government. It is probably a good thing. That is not to say that their voice has priority over any other policy matters but it is probably important that there is somebody there who is articulating a view on behalf of children at all levels of government. We cannot see any harm in that. It would probably only make it better. It is interesting that there is talk of family impact statements. That is giving a voice to families. It is recognised that that is important—of course it is. One wonders whether the same should be said for children as well.

Mr MURPHY—Thank you.

Mr CADMAN—Can I refer you to section 10K—on page 55.

CHAIRMAN—We are pleased that your meter is turned off. We are pleased you are not charging us on an hourly rate.

Dr Altobelli—I am conscious of the time. I am here at the committee's disposal, but I am conscious of the fact you have other witnesses.

CHAIRMAN—You are doing very well.

Dr Altobelli—And my fees are very reasonable.

Mr CADMAN—They all say that.

CHAIRMAN—Is that touting for business, or has that professional offence been abolished?

Mr CADMAN—Dr Altobelli, what do you understand by the expression 'et cetera'?

Dr Altobelli—It has something to do with Rodgers and Hammerstein, hasn't it?

Mr CADMAN—I have never seen it in legislation in my life, particularly in a heading, and it is sprinkled through this legislation in a way that I find quite disconcerting.

Dr Altobelli—I think it is unnecessary. Perhaps, because of the haste, it has not marinated enough.

Mr CADMAN—I would hate to think about a marinated 'et cetera'.

Dr Altobelli—Mr Turnbull, you may have missed my joke earlier on today about marination. I will tell you another time.

Mr TURNBULL—All right.

CHAIRMAN—I am inclined to agree with you. I am disturbed by the 'et cetera'.

Mr CADMAN—It is not the only place; there are other places as well. I think it is such an imprecise expression that it should never appear in any legislation at any time.

Dr Altobelli—If we had time to consider this legislation properly, there are so many little bugs that could be ironed out. As I said at the beginning, we agree with the policy behind this legislation. We agree with it; we support it; we just want to see it implemented in a way that works—that makes it simpler, not just for our members but for the clients who we deal with. We do not want unintended consequences. We need to face up to the fact that the Family Law Reform Act 1995 had some pretty serious unintended consequences. We want to make sure that it does not happen again in the context of this.

CHAIRMAN—I think that was before our election to government.

Dr Altobelli—I am certain it was.

Mrs HULL—I know the time is short now, but when you come back to the committee with the various items that you have indicated, could you come back to us with what you believe were the unintended consequences of the Family Law Reform Act 1995?

Dr Altobelli—Certainly we can do that. It will very easy. We will refer you to some of the research that was undertaken afterwards that articulated it very clearly.

Mrs HULL—That is what I would like.

CHAIRMAN—If between now and next week—or whenever—you have further insights into the legislation, on matters we have not discussed, could you get in touch with the secretary, because we really seriously want to make sure this legislation is the best that it possibly can be. We do understand you have been working under extraordinary time frames and we can only apologise for that.

Dr Altobelli—We understand.

CHAIRMAN—Thank you very much for appearing before the committee this morning. If you could allow for the information you are putting together for us to be passed to the secretary as soon as possible that would be great.

Dr Altobelli—Thank you. My committee wishes your committee well in its deliberations.

[10.04 am]

GEE, Mr Tony, Family and Child Mediator, Relationships Australia

HOLLONDS, Ms Anne Inkeri, Chief Executive Officer, Relationships Australia, New South Wales

MERTIN-RYAN, Ms Mary, National Director, Relationships Australia

CHAIRMAN—On behalf of the committee, I welcome you to our deliberations. Thank you for your time and for your very expeditious consideration of the legislation. At the outset, allow me to congratulate you on your detailed submission, which was put together in a very short time. I see that in your submission you were strongly supportive of the principles of the legislation and you do have some concerns. I would like you to outline your position in a brief opening statement. Do not read the submission but outline an executive summary of it or anything else you would like to tell us, and then we will ask you some questions.

Ms Mertin-Ryan—We do have a brief opening statement. We are pleased to be here today to contribute to shaping these major family law reforms. Relationships Australia are a national value based secular organisation with highly skilled, qualified staff who provide family and relationship services across Australia in over 100 locations. For over 57 years we have been helping Australians save their marriages and build positive relationships. Last year, we provided family support services to over 90,000 people, almost half of whom were men. Our track record for success in building positive relationships is strong. In our work with families who are separating, agreement was reached in mediation for about 80 to 85 per cent of voluntary clients and 60 to 65 per cent of court ordered clients.

We welcome the review, and overall we have a high level of satisfaction with the outcomes and recommendations outlined in the government's response to the *Every picture tells a story* report. We appreciate the consultation process the committee has followed in seeking the input of relevant stakeholders, including ourselves and our community partners. We fully support the government for being committed to improving outcomes for families and ensuring that the focus is on the best interests of the child involved in family disputes and breakdown as well as recognising the importance of providing assistance in building and strengthening relationships. We strongly support the principle that an ongoing, meaningful relationship with both parents is important in a child's life.

We believe that the Family Law Reform Act will be strengthened considerably by the recommendations in the government's response to the report and the draft bill. We fully support shared responsibility for parenting. The proposed reforms make it very clear that this is a key component in the changes. Relationships Australia believe that shared parental responsibility and continuing involvement are the things that make the difference for children of separated parents. Individual solutions need to be tailored to individual families. We support and agree with the establishment of family relationship centres.

Although Relationships Australia support the majority of recommendations, we have outlined in detail some areas of further improvement that could be considered to make the operational implementation of the draft bill more effective. These include the fact that we recognise that family violence, including male to female, female to male and other forms of violence, continues to be a significant challenge. We are also particularly concerned that the title of 'adviser' in the proposed amendments has significant ramifications for the sector, due to indemnity cover and insurance. We strongly recommend that this issue be addressed and an alternative title, such as 'consultant', be adopted so that our practitioners can actively provide appropriate information and advice without concerns over legal action—and this is outlined more in our submission.

In relation to the concept of shared parental responsibility in the bill, the public awareness campaign should clearly explain the use of this terminology, to reduce confusion. We believe that this will ensure a positive interpretation. We believe that there is a need to actively engage and assist fathers in separating families. We also believe that compliance and reporting measures should not compromise the community's perception of Relationships Australia and other similar organisations as being welcoming and safe. Therefore, reporting requirements should be minimal and reduced to merely reporting attendance. We also believe that the process for ensuring the standards of practitioners should remain at a high professional level and should be up to date across all family relationship centres and support services. We understand that this is a challenge, particularly in rural and remote areas.

Some important issues that need to be addressed in the development of a family relationships centre include: family violence; child inclusive practice; privacy and confidentiality; and shared parental responsibility, including shared parenting time. Parenting plans need to be flexible to allow for updating as children grow and their needs change. They need to allow for extended family involvement and they need to cater to culturally and linguistically diverse and Indigenous people. It is important that the community has a choice. Relationships Australia have the expertise and experience to run the family relationship centres and to work in collaboration with other organisations around the country. We believe that the choice of provider is an important element in a fair and workable system. We believe there is a need to actively seek collaboration between the state and federal governments, the courts, the legal profession and community organisations, to ensure that the reforms are accepted and embraced and can work smoothly in practice.

We reiterate that Relationships Australia welcome the majority of reforms proposed for the draft bill, but we would like the committee to consider our concerns. These concerns, if addressed, would support the underpinning philosophies, language and intent of the draft bill. We understand that some of the concerns directly address the practical implementation of the bill but believe that these are serious issues that need to be clearly outlined for the public record. Relationships Australia would like to state our deep satisfaction with the committee's consultation process and the recommendations outlined in the government's response to the report and the draft bill. We would also like to emphasise our commitment to continuing to work with our partners and stakeholders in the sector to further improve services to all Australians requiring assistance to strengthen and build their relationships during times of distress and separation. In summary, Relationships Australia would like to emphasise that we believe the interests of children should be paramount; families should have access to support to save marriages and prevent separation; safety for all members is crucial; and, in the event of family

breakdown and separation, all family members should have access to support services, which prevent future life problems.

CHAIRMAN—Thank you very much. Yesterday we had some evidence from other witnesses which seemed to suggest that in their view there was an inadequate balance between the desirability of contact and the safety of the children. The suggestion seemed to be that the bill did not quite get the balance right and that the presumption of contact tended to override the question of safety. That is not my preliminary view, but I am interested in whether Relationships Australia has a point of view on that.

Ms Hollonds—I think the issue here is that the legislation can only go so far in terms of what it can control or specify. We have tried to address some of the implementation issues which go to how the safety elements are identified, screened for and managed. We believe that there needs to be more work done on the addressing of family violence in all its forms and that that will be crucial to the success of the implementation. We are not in a position to comment on the legislation, as we do not come from a legal background. However, we do believe it is important to continue to work on the violence and safety issues.

CHAIRMAN—I think the government considers it to be important, and that was why the provisions were put in the bill. Evidence was also given yesterday that there is really a low level of spurious claims of sexual abuse or abuse of children.

Mrs HULL—Or violence.

CHAIRMAN—Or violence. There seems to be coming through to me through my electorate office—and I suspect to other members—a lot of complaints from what used to be called non-custodial parents that the other party who wanted possession of the child was prepared to make any sort of allegation, however false, with a view to gaining an advantage, and the court would say: 'The interests of the child are paramount. We can't possibly allow either contact or possession because of this allegation.' My impression is that there have been a large number of spurious allegations, but the witnesses we had yesterday said that there was no evidence of any significant level of spurious allegations. I did tell those witnesses that other witnesses would be appearing before the committee and I would put that question to them. Given the fact that you are Relationships Australia, there would not be much that would go on in relationships that you would not have seen over the last 57 years, so maybe you have a point of view on that.

Ms Hollonds—I am not aware of any accurate research that has been done on this issue. Maybe that should be done, because there are of course different stakeholder perspectives on this matter. We know that separation as a process is such a distressing one that it can give rise to actual violence as well as alleged violence. In terms of the actual prevalence, I am not aware of any accurate research that has been done on that matter, but perhaps one of my colleagues would comment on what we observe.

CHAIRMAN—I am really asking: in your experience, is it a problem that parties will make false allegations about abuse or violence simply to cut the ex-partner out of either possession of or contact with the child?

Mr Gee—In general, Relationships Australia deal with voluntary clients—people who walk in the door and wish to pursue our services. In my experience, there is some research to say that there have been spurious allegations of violence and sexual abuse, but it is contained more in the intractable or the very high conflict situations, which tend to be dealt with at the moment by the Family Court. So, from our perspective, we tend not to work with the high-conflict couples, because they are entrenched in the court system. Relationships Australia tend not to come across those situations in our work.

CHAIRMAN—Is the fact that you tend not to deal with those high-conflict situations why you have such a high success rate?

Mr Gee—It is partly how you define high conflict too. We deal with some extremely distressed and problematic family situations. It tends to be that, if there have been allegations of abuse, violence and so on, the matters are dealt with in a more formal way in the Family Court.

Ms Hollonds—There is variation across the country, and we do in places deal with the very high conflict end—breaches of orders and court ordered matters. I was trying to say that we do see some false allegations, just as we do see real violence, but it is hard to judge the actual prevalence of that just from the work that we have done in any particular place. I would want to refer to research that was done on that to be able to assess that accurately. If such research has not been done, it should be done.

CHAIRMAN—You can understand the high level of concern that a father might have if he is denied contact with a child because the mother of the child has made a false allegation and the court says, 'We just can't risk it.'

Ms Hollonds—Absolutely. If that false allegation of violence leads to a denial of contact—

CHAIRMAN—Or a denial of the level of contact that would otherwise be there.

Ms Hollonds—Absolutely. This is obviously one of the major problems going forward that needs additional concentration. The fact that false allegations are not resolved one way or the other through the judicial process is a problem. That there are some men who end up living the rest of their lives with this cloud over them is a terrible situation that we need to address. The problem of false allegations is a serious problem that needs to be further addressed.

Mrs HULL—I have three simple questions. Firstly, what would Relationships Australia's views be on an established child and family protection unit within the Family Court of Australia? Secondly, do you think that there would be more successful contact arrangements between parents if all parents were directed through a contact service immediately after separation rather than trying to pick up or drop off at mum's, dad's, auntie's, brother's or sister's place, where argumentative type behaviour might occur? I am not specifically talking about any violence; I am talking about all changeovers. Do you think there would be a benefit and perhaps a long-term better outcome for successful contact changeover if everybody was directed through a contact service in the beginning—this came up yesterday in Melbourne—to diffuse things and get people onto an emotional level plateau so they can get themselves to a position where they can accept what has happened in a breakdown?

Thirdly, I note Relationships Australia, Centrecare and a host of groups that are currently out there will be performing the kinds of tasks associated with the family relationship centres. If family relationship centres are taken on by the existing service providers, do you think they should be clearly shopfront identified and situated in mainstream areas, to develop a psyche that this is not a divorce centre, so to speak, where you go down a back alley so no-one knows you are going in there? Do you think they should be genuine family relationship centres where information can be gleaned on all aspects of family relationships, including separation? What would you consider to be the best chance for success of educating the public that these are centres that all members of the public should access without concerns? They should feel they can walk in there as they could walk into a Medicare office to collect their Medicare rebate, without feelings of finger pointing. They are my three questions.

Ms Hollonds—The first question was about a child and family protection unit within the court. By that do you mean a unit that focuses on abuse issues generally, whether it be child abuse or violence?

Mrs HULL—I mean family abuse. There is a criticism that the current Family Law Court does not protect those at risk. The statement was made that people are dying every day due to the Family Law Court's actions at times. Would a child and family protection unit that could investigate—with an investigative arm—be of benefit? It could be of benefit to people who think they have been wrongly accused of violence but it also could be of benefit to those people who are genuine targets of violence. What are your thoughts on that?

Ms Hollonds—I guess it would depend upon the parameters of the work of the unit, what its duties and responsibilities were and how it worked with state authorities.

Mrs HULL—Yes.

Ms Hollonds—But in principle we would think that any improvements to the way that violence and abuse are addressed and to the interface between federal and state authorities should certainly be looked at. But we would need to see the detail of how it would work and perhaps come back to you on that. If you would like us to consider that more we would be—

Mrs HULL—I certainly would. I think it is important.

Ms Hollonds—We would like to. But in principle, yes, that idea would be a useful one.

Ms Mertin-Ryan—On the second question about whether it would be more successful if parents were directed through a contact service, I assume you mean a children's contact service.

Mrs HULL—Yes.

Ms Mertin-Ryan—I think the answer varies. There are some parents who have developed a good parental relationship and can work with each other quite well. There are others that need some coaching through mediation, and some parameters set out in their parenting plan in quite a lot of detail, such as how the drop-offs will happen, who will do the transporting and who will be there, so they can come to agreement about those things. For parents where there is higher conflict that is more entrenched the children's contact services are a fantastic resource. So it does

vary. There are also issues for people in rural areas who may not have access. Often the CCSs have long waiting lists. Also, clients really need to develop their skills where they can so that eventually they can have a handover of children without the need to use a CCS, unless one is needed because there are domestic violence issues involved.

Mr Gee—To the best of my knowledge, around half of the separating population manage to work matters out. There is about another 30 per cent who need a high level of assistance, as Mary was saying, through mediators or legal intervention and so on. Then there is the 20 per cent which characterises high or enduring conflict. If that population could be marked early and be directed straight to services where there is a high level of assistance, it would greatly assist early intervention to prevent things from becoming entrenched.

Ms Hollonds—My understanding is that you want all families to start from a baseline.

Mrs HULL—It was put to us yesterday that every family should be directed through conferences.

Ms Hollonds—The philosophy of trying to get in early, before conflict becomes entrenched, is a good one, but that might not be the way to achieve that solution. We would probably promote the idea of encouraging people to seek early coaching on how to behave with each other in a positive fashion in the interests of the children and on how to manage handovers. That can be done through counselling and mediation services. To require people to attend what is currently known as a children's contact service would have a lot of practical problems and probably would not be warranted for the majority of people. We believe that almost universally parents need some help if they have children and are separating. If they got that help early on it would avoid a lot of those conflicts escalating to a very destructive point such as we are seeing now.

Mr TURNBULL—My question is related to the point you made about the definition of 'adviser'. Could you take me to the part of the amendments that you are concerned about.

Mr CADMAN—It is on page 183.

Ms Mertin-Ryan—We are looking at section 63DA. In simple language—because we are not lawyers—currently, our practitioners practise in this role currently defined in the bill as 'advisers'. Our concern is that if you then look at the indemnity issues where the advisers are not covered—

Mr TURNBULL—I am sorry; where is the indemnity?

Ms Mertin-Ryan—It is section 10M, part 1, schedule 4. We do not have page numbers, I am sorry.

Mr TURNBULL—I have that. What is your point?

Ms Mertin-Ryan—Our point is that if our practitioners are to continue their practice under the term 'adviser' they will not have the protections and that it would cost us a lot in the sector to get the coverage. We would be very reluctant to put up our practitioners—

Mr TURNBULL—Section 10M says, 'A family dispute resolution practitioner has the same protection and immunity as a judge of the Family Court.' Is that correct?

Ms Mertin-Ryan—Correct.

Mr TURNBULL—Are your people family dispute resolution practitioners?

Ms Mertin-Ryan—Yes.

Mr TURNBULL—Then they are covered by the section.

Ms Mertin-Ryan—If they act in a facilitative capacity.

Mr TURNBULL—That is right. I do not think anything in section 63DA changes that; it just uses the word 'adviser' to make the drafting simpler so that we do not have to recite in every paragraph 'legal practitioner, family counsellor, family dispute resolution practitioner or family and child specialist'.

Ms Mertin-Ryan—I think we were looking at the note under 10M, which states:

> A family dispute resolution practitioner does not have immunity while conducting advisory dispute resolution.

CHAIRMAN—That leads to a question I would ask in relation to 10H, on page 54 of the draft, where it goes into this advisory dispute resolution and facilitative dispute resolution. I would like you to perhaps just reflect—after you go away from here—on how these two dispute resolution processes will work in practice and let us have some thoughts. I think I know the answer to this question, but will professionals be clear about the extent of their obligations and immunities—and from what you are telling me, you are not, currently—and will it be easy for facilitative dispute resolution practitioners to understand that their role does not include advice, but that they have an obligation to provide information about non-core place services under 12G?

Further, does the definition of 'dispute resolution' make the dispute resolution process clearer or easier, and what will be the other things, along with the giving of advice, that the advisory dispute resolution practitioner will use to resolve disputes? I can understand, in particular, your concern at the note in 10M. I wonder whether you might go away and give us a response on behalf of your organisation. I see that your organisation has had such a long history of involvement in these sorts of matters that we would like you to be part of the process and not feel excluded by the provisions of the bill.

Ms Mertin-Ryan—Thank you. We would be happy to come back to you on that.

Mr TURNBULL—Can you have a look at proposed section 10H, which provides a series of definitions: family dispute resolution, advisory dispute resolution and facilitative dispute resolution. There may be other purposes for which it is used, but it seems that one purpose for the distinction between an advisory dispute resolution and a facilitative dispute resolution is the application of the indemnity in 10M. Are there other applications of it that we are aware of?

There do not appear to be. Do you think that definition is workable? It seems to me, I would have thought, that in a practical situation somebody would be tripping from one—

CHAIRMAN—That is a similar question to the one I was asking. They are going to come back to us on it.

Mr TURNBULL—Can you come back to us on that?

Ms Hollonds—Yes.

Mr TURNBULL—How practical is that? Has that been raised elsewhere; was it raised in Melbourne?

CHAIRMAN—No. We would also be interested in hearing from the department on the genesis of that division.

Mr Gee—I guess part of the heart of mediation practice is the fine lines between advice and information and where they lie. That is the gist of your question: where the specific differences lie.

CHAIRMAN—That is why you want to be able to consult an adviser, presumably.

Mr CADMAN—You would want to be able to stray across the whole lot without saying, 'I'm now acting in a different role.' It would seem to me that you are not going to halt something and say, 'Come back next week, because I'm going to be somebody else when you get back here.' You cannot do that.

CHAIRMAN—At what stage in that process does your immunity evaporate?

Ms Mertin-Ryan—That is right.

Mr TURNBULL—There are plenty of situations where a mediator, given the way the mediation process works, could be seen to be providing advice on outcome and subject matter. It depends on what you mean by 'advice'. But the mediator is trying to get an agreement and the mediator will be talking and bringing the parties together. We understand how it works. I just wonder how realistic that distinction is in practice. Is it workable?

Mrs HULL—Doesn't advisory dispute resolution provide advice on things like the subject matter of the dispute, the possible outcomes, the application of the law and an area of professional expertise besides the law, whereas facilitative dispute resolution is defined as not giving advice in relation to one of those areas but providing help to resolve the dispute, but they are independent parties. We have ascertained that there are two distinct areas: facilitative dispute resolution and advisory dispute resolution.

Mr TURNBULL—I struggle to see how easy that will be to determine in practice.

Ms Mertin-Ryan—I will make a quick comment on that, but we are happy to come back to you. There are two distinct processes. The advisory dispute resolution process includes what are

called conciliators. We are getting tangled up with the obligations of advisers, who can be dispute practitioners. If they take on this role—under the heading 'Obligations of advisers'—of inadvertently giving information, I think that is where we are coming unstuck rather than understanding what the difference is between the two processes. But we will come back to you.

Mrs HULL—One is a mediation process where you are mediating with the people in the room. The other one is providing specific advice, which you are saying does not then cover you under the footnote.

Ms Mertin-Ryan—That is correct and, on top of that, under the heading 'Obligations of advisers' it talks about informing, which is then linked to the—

CHAIRMAN—Perhaps you could just update your response.

Mr CADMAN—I will take it one step further—that is, the role of the arbitrator. We are told that that will be defined in regulations. It would seem that an arbitrator could easily be a legal practitioner and may in fact be a family dispute resolution practitioner. Is that the way you see it? An arbitrator is involved in a process—other than a judicial one—in which parties to a dispute present arguments and evidence to an arbitrator who makes a determination to resolve the dispute. So they might come along to one of your dispute resolution people and say: 'We both think that you're great. We trust your judgment and whatever you decide—you know both sides of the argument—we'll go along with. We will make that our parenting plan until it fails to work.' Do you see arbitrators coming into this process as well?

Ms Mertin-Ryan—From my knowledge, we do not have arbitrators in the family law system.

Mr CADMAN—No, we do not. It is a new provision. We thought that conciliation and arbitration in the Family Court was a natural progression.

Mr Gee—Could we include that in our consideration?

Ms Mertin-Ryan—Could we consider that?

CHAIRMAN—If you could let us have that, it would be good.

Mr MURPHY—Before I ask a question, I would like to congratulate you on your work to support relationships. I think what you do is very commendable. I am interested in your submission—it is a very good submission—in which you refer to parenting plans and the public awareness campaign. In conclusion, you state that the public must also be informed of the legal status of parenting plans so that their expectations match reality. I would like your views regarding their unreal expectations from your experience, so we can have better insight into this.

Ms Mertin-Ryan—I think what that statement was specifically referring to is that parenting plans do not have any legal status unless they become court orders, as is the case now. I understand it will be the same under the proposed legislation. We are concerned that, with the campaign around family relationship centres and with more people coming through the door, they may have an expectation that the parenting plans do have a legal status. That is the specific concern.

Mr CADMAN—What status should they have?

Ms Mertin-Ryan—It really depends on the parent, whether they are happy to have it in a contract form.

Mr MURPHY—So the reality referred only to the fact that it was not legally enforceable. Is that right?

Ms Mertin-Ryan—That is correct. We wanted some transparency around that issue for people.

Mrs HULL—So could it be registered as a legally binding document?

Ms Mertin-Ryan—If they are turned into court orders, yes.

Mrs HULL—So the intent would be, I would imagine—from being a member of the last committee—that the preparation of a parenting plan is one of the very basic and really important processes of the changes going into the process of family relationship centres. I would have thought that the parenting plan could then be registered and made a court order. But then to change your parenting plan, due to the ages and the different needs of children, you would not go back to the court; you could go back to the family relationship centre, revise and amend those plans and then they would become the next working court orders. Is that the way you would see it work?

Ms Mertin-Ryan—They could become court orders. Many parents are happy just to have the plan and to have the flexibility to come back to services such as ours to update them and amend them, without them being registered.

Ms Hollonds—I do not think there is any evidence to suggest that more people should have court orders where it is not necessary. Many families are able to come to negotiated agreements quite successfully.

CHAIRMAN—It would become very bureaucratic, wouldn't it, if all parenting plans had to be registered? The whole idea was to be flexible and to be able to respond to changed needs.

Mr TURNBULL—Proposed section 64D says that parenting orders are subject to later parenting plans, so the parents have the ability to make new arrangements.

Mr CADMAN—It is a by-consent process, isn't it?

Mr Gee—Yes. Many parents we work with are very clear: because they are separated parents, they do not feel they need any higher level of legal involvement. They still parent their children, but they parent them from separate households and they are quite comfortable with the plans or the assistance and the sorts of directions they take.

CHAIRMAN—I suppose in a perfect world it would be great if everyone could have that sort of parenting plan.

Mr Gee—Yes.

Ms Hollonds—That is right. We would not want the new reforms to shift more people in the direction of the courts.

Mr Gee—Some parents do it very well; sometimes they can be forgotten in discussions.

CHAIRMAN—I think it is important that parents realise that the upbringing of children is unfinished business. Whilst it is a tragedy that many marriages collapse, it is great when parties are able to appreciate that the most important thing that they have to show for their marriage is their children and that they both have a shared responsibility to take an important role in the upbringing of their joint child.

Mr Gee—Absolutely, yes.

Mrs HULL—Following on from Mr Turnbull's question, when you come back to us with respect to the dispute resolution process and the adviser process could you add something about how many of your work force are involved in only dispute resolution—that is, mediation and conciliation—and how many are involved in the dispute resolution advice process. It is important to understand how it works and under what cover you need to be placed. Are the majority of your people giving advice? What number are giving only conciliatory assistance?

Mr CADMAN—Having been on a past committee, I am wondering whether you think it would be detrimental to include something along the lines of what you say at page 2 of your submission, under the heading 'Shared parental responsibility': "However, we support the concept of shared responsibility as a starting point.' Would including the word 'equally' be a problem? It has been dropped out of some of the stuff from which the previous committee—from which this inquiry flows—made its findings. Including the word 'equally' would give a balance at that starting point which has nothing to do with time spent but relates to the long-term arrangements for the children and their upbringing which, following the processes we have looked at already, may be considerably changed once you get into the process of considering the practical realities of the change. Is there a problem with that?

Ms Mertin-Ryan—We did not include the word 'equally' because it is often confused with 'equal time'.

Mr CADMAN—That is not the intention of the legislation, nor could it be mistaken to be so from your comments—not from my point of view, anyway.

Ms Mertin-Ryan—We are supporting shared parenting, which does not equate to equal time.

Mr CADMAN—Exactly.

Ms Mertin-Ryan—We were just trying to make that point.

CHAIRMAN—But you might support equal parenting?

Ms Mertin-Ryan—Yes—and equal responsibility.

Mr CADMAN—Equal responsibility in parenting?

Ms Mertin-Ryan—Yes.

Mrs HULL—But that is not what you are saying in your submission—that you support the concept of equal parenting. Mr Cadman is saying that the committee, under recommendation No. 1 of *Every picture tells a story,* is in favour of equal shared parental responsibility as the first tier in post separation decision making.

CHAIRMAN—And that is not necessarily equal time, is it?

Mrs HULL—That was a rebuttal of equal time in favour of equal shared parental responsibility. Mr Cadman's point is that, somewhere along the way, the concept of equal shared parenting responsibility has been lost. It has now become shared parenting. We want to reinforce that we would like equal shared parenting where it is possible.

CHAIRMAN—You say in your submission that you support the concept of shared parenting. That could mean you support one parent having 99 per cent of the parenting and the other parent having one per cent of the parenting. That is clearly not what you mean, and that, I think, is why Mr Cadman is suggesting that the words 'equal shared parenting'—

Mr CADMAN—As a starting point.

CHAIRMAN—should be included as an indication that both parents have an equal responsibility for the upbringing of their children.

Ms Mertin-Ryan—Yes. We support equal shared parenting in that context.

Mr CADMAN—Thanks. It has been helpful to clarify that matter. You say in your second paragraph—I think, for the sake of public presentation—that almost half your clients are men. How close to half?

Ms Mertin-Ryan—Out of 90,000 clients, 40,000 are men.

Mr CADMAN—That is a little over 40 per cent—42 or 43 per cent.

CHAIRMAN—We had witnesses yesterday who virtually seemed to suggest that domestic violence was a situation where men were always the perpetrators and women were always the victims, whereas I think in your opening statement you said that you have violence by men against women and women against men and both against children.

Ms Mertin-Ryan—Yes. We are acknowledging that, yes.

Mr CADMAN—We heard yesterday about confidentiality and the capacity to subpoena files. The files that were subpoenaed, or the files that were kept, really contained nothing but attendance times. There were no other observations. But access by the courts to some material could advantage a decision. I understand that this environment is very dangerous and that you do not want people to think that suddenly anything they say is going to finish up in court as part of a

sworn statement by somebody or other. But positive achievements or goals—even parenting plans, I guess—have to come before the court with the consent of both parties. That is the only practical way to make it work, isn't it? I cannot think of any other avenue. For instance, what about the professional judgment of, say, a father, who has great difficulty relating to his children where there is supervised contact?

Ms Mertin-Ryan—Yes. I think that is the exception in the privilege where there are any allegations of abuse that can be reported to the child representative in the court.

CHAIRMAN—I think, Mr Cadman, yesterday the lady from the contact centres gave evidence that their files were often subpoenaed by the court.

Mr CADMAN—Yes.

CHAIRMAN—I asked how often this occurred and she said it depended on the situation but sometimes up to 10 times a week or sometimes more.

Mr CADMAN—Ten a day, I thought she said at one point.

CHAIRMAN—Maybe she did, but it seems as though there is a practice by the court to get access to this sort of information which the court finds useful in making a determination.

Ms Hollonds—We do receive subpoenas but we would normally successfully argue that the files are not admissible.

CHAIRMAN—You say you successfully argue that, so I wonder why your files are not admissible but files from contact centres would be.

Ms Hollonds—I am sorry, we cannot comment on that.

CHAIRMAN—Maybe they take a different approach. Maybe they acquiesce in the subpoena.

Ms Hollonds—We cannot really comment on that, sorry.

Mr Gee—I can make a personal comment on that.

CHAIRMAN—It would be interesting to have some advice from the Attorney-General's Department in due course on that particular matter—how often that occurs and how often files are subpoenaed. We had evidence yesterday that files were successfully subpoenaed from the contact centres on a highly regular basis, and Relationships Australia are saying that when they receive subpoenas they are usually able to argue legally that in some way their files are privileged.

Ms Mertin-Ryan—Yes.

Ms Hollonds—With respect, Mrs Hull had a third question that we did not get around to answering.

Mrs HULL—It was on the shop fronts. I was not going to pursue it but, if I could, that would be very helpful.

Ms Hollonds—Yes, I would like to make a comment on that. We would certainly support the new family relationship centres as being very much seen as a hub in the community, and if that means being in the main street or wherever we think that would be an excellent idea. We believe that one of the problems at the moment is that there is a very negative attitude to divorce. In fact there is even a negative attitude to seeking parenting advice. It is believed that somehow you should not have to access that sort of help. Whereas we would see that people at all stages of life should be able to access help early on in a process that would benefit their family relationships and that this should be normalised and encouraged in our community. Whatever we can do to achieve that through the role of the family relationship centres we think that would be a very positive thing.

Combined with community education campaigns that promote positive family relationships, they should highlight to people that they will need help and that it is acceptable to seek assistance and that this is beneficial rather than shameful. Parenting, for example, is a very complicated, difficult task these days, as is trying to sustain a long-term relationship or marriage. The more we can normalise this activity—and in fact encourage people to see it as a positive step and a positive investment in the quality of their lives—the better. We need to promote the idea that they will actually benefit and their children will benefit from them seeking that help.

Mrs HULL—Thank you for coming back to that because that is one of the very significant issues that these changes are likely to make. It is a change in the attitude of the public and not a stigma to be looking for advice and direction on early intervention with a child's behaviour or with a family's behaviour through a child's behaviour for a whole host of different reasons. It should be no more difficult to walk into a family relationship centre to seek paperwork, administrative advice or pamphlets than it is to walk into your Medicare office or chemist or any other particular place.

Currently we have many NGOs working out of areas where there is a definite appointment process and a definite feeling of apprehension about stigma in case anyone sees them walking in because people only go in there if they need desperate help. I would like to try to dispel that in the interests of future family lives in Australia. I am attempting to ensure that it is a very open, accessible, warm and inviting place, as any shopfront would be, and that it is not labelled as a divorce centre—that it is traditionally a family relationship centre. That was my concern. If some of the current organisations, which obviously offer very good services, tendered for this, would you agree that part of the requirement should be that they really should be accessible, open and available to the public to be able to carry out this task?

Ms Hollonds—Yes, and your words 'warm and inviting' I think were very important descriptors.

Mr CADMAN—I suggest that you also investigate some impersonal first contact process by either web site or internet or something like that. One of the problems I found in my community is that there is a certain shame factor about being unemployed and a reluctance to even admit that you had lost a job. The way that was gradually dealt with was through people being able to make an inquiry about unemployment benefits without identifying themselves. So I am talking

about the internet and Q and A that can lead people through a whole series of questions which may have them then deduce for themselves that maybe they could ring up and make an appointment to see a person on a confidential basis out of hours so that they are not spotted going in, for instance.

Ms Hollonds—That is a very good suggestion. We will look into that.

Ms Mertin-Ryan—We are hoping that the national advice line that will be tendered as part of this package would encompass those issues, yes, and provide resources for people.

CHAIRMAN—Thank you very much for appearing before the committee this morning. If you could let us have the additional material you have undertaken to let us have as soon as possible that would be great.

Ms Mertin-Ryan—Thank you for the opportunity.

Ms Hollonds—Thank you.

Proceedings suspended from 10.59 am to 11.16 am

GRIFFIN, Mrs Denese Maxine, Coordinator, National Network of Indigenous Women's Legal Services Inc.

QUAYLE, Ms Cleonie, Member, National Network of Indigenous Women's Legal Services Inc.

CHAIRMAN—I welcome the next witnesses. Thank you very much for your attendance. The committee does not require witnesses to give evidence under oath, but I advise you that the hearings 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. We might lock you up in the cells under Parliament House! There are two there, would you believe? Are you prepared to make a brief opening statement in relation to the provisions of the bill before we subject you to some scrutiny and questioning?

Mrs Griffin—The network has a statement here that it has used in previous hearings. The impact of colonisation still reverberates in neo-colonial forms, especially regarding first-nation women—that is, Australian Indigenous women. With a history of discrimination that has mutated to the disadvantaged landscape, Indigenous women strive to maintain and sustain their traditional practices as women in these modern times. In our view, nothing has changed. Society still upholds the discrimination, biases, and prejudices from Australian history. The National Network of Indigenous Women's Legal Services aims to address this disadvantage, discrimination, bias and prejudice. It aims to empower and promote social justice for Indigenous women and Indigenous people, with particular emphasis on law and justice issues. The national network comes here today to raise its concerns in relation to the changes to the Family Law Act and reiterates the following points in its submission. The network has built unity amongst

Indigenous women working in legal services towards assisting our people to deal with and address the issues surrounding their legal disadvantage.

The network provides a central point of contact not just for the Indigenous women's legal services but also for Indigenous women working in community legal centres. It has proven to be a valuable resource to non-Aboriginal practitioners, policy makers and the Australian legal fraternity. The national network lodged a submission, *A legal presumption of joint residence: Indigenous women, children and families,* in response to a legal parliamentary inquiry into joint residency arrangements in the event of family separation in 2003 and in response to the government's *A new approach to the family law system*. The network was also consulted by representatives from the Attorney-General's Department in Perth in December 2004.

The network maintains strongly in its submission the importance of the best interests of the child. The network maintains this even more strongly here to ensure that this remains the most vital factor, given the amendment relating to shared care by both parents, particularly where family violence is present. The time frame provided to lodge this submission to the standing committee was very short, so it was not lodged by the due date. We do have copies here.

Overall, the network is pleased that the standing committee has recognised that Aboriginal and Torres Strait Islander children still need to have connection to their culture in a positive way after separation. However, there are a number of recommendations in the submission to support the amendment in relation to services for Indigenous people. Issues for Indigenous workers in rural, regional and remote areas revolve around access to quality legal firms and solicitors, along with the quantity of time to be consulted and advised appropriately by legal aid solicitors. In some rural, regional and remote towns there is no legal service or access to lawyers. For the family relationship centres this is going to be an issue. Our submission requests a coordinated and intensified effort by the minister to address the identified family law needs of Aboriginal and Torres Strait Islander women and children, particularly where family violence is present.

CHAIRMAN—Thank you very much for that opening statement. Yesterday we had the Law Council of Australia give evidence, and they were suggesting—and we would like your guidance on this—that the definition of 'Aboriginal child' be amended from 'Aboriginal child means a child of the Aboriginal race of Australia'—that is section 60D—to 'Aboriginal child means a child who is a descendant of the Indigenous inhabitants of Australia.' The Law Council is coming back to us with additional reasons for that. I am sorry to catch you on the hop, but I am wondering whether you might take that on notice and give us a consideration of what you think is the better description of Indigenous children and advise the secretary in due course.

Mrs Griffin—Yes.

CHAIRMAN—Yesterday we also had some evidence from another Indigenous organisation in Victoria, and they were saying that Indigenous women were some 40 times—or 40-something times—more likely to be the victims of violence than non-Indigenous women. Does that statistic surprise you, or do you find that to be more or less what you would think to be the situation in New South Wales?

Ms Quayle—No, that is pretty much the situation nationally.

CHAIRMAN—There was also evidence given yesterday that, partly because of violent situations and partly because of Indigenous traditions, grandparents play a more important role in the upbringing of Indigenous children than in the case of non-Indigenous children. I think all of us know that in our society more generally these days, unfortunately, grandparents often have to bring up their grandchildren. But the evidence that was given to us yesterday was that, partly for reasons of Aboriginal culture, where you have the extended family, and partly because of the higher level of violence—the parents of the children might have an alcohol problem or some other disability—grandparents have to step in. Do you think the legislation, on your reading of it, given the fact that you have only had a short time to look at it, adequately covers the situation of grandparents and their needs, particularly Indigenous grandparents? Maybe that is something you would like to consider and come back to us.

Mrs Griffin—We might have a look at that, yes.

CHAIRMAN—From your opening statement it seems that you support the principle of shared parental responsibility. Do you have any views on whether the bill that we have before us adequately strikes the balance between the desirability to encourage parental contact and the need of course to ensure safety in situations of violence? Have we got the balance right?

Ms Quayle—We are a bit concerned, that it really has to say that the child's safety is paramount, mainly because of the violence that does happen in Indigenous communities. Whilst we do encourage fathers to partake, the violence is that extreme that the child's safety has to be the main issue. If the man has shown violence then some other arrangements are needed—we have not actually thought about what needs to happen when they separate. What we find is that women are often disempowered, and you cannot conciliate or mediate violence. If you try to mediate and get people to come to some agreement the women will often say yes because they feel disempowered at the time. You will probably have to look to separate the husband and wife if mediation is going to happen.

CHAIRMAN—This might be a facile question: do your legal services only assist Indigenous women or do they also advise Indigenous men?

Mrs Griffin—Most of them advise women, but increasingly in the family violence units they are advising men as well. The feedback that we had for this submission was from a service that does advise men as well.

CHAIRMAN—Maybe you need a new name.

Mrs Griffin—A new name?

CHAIRMAN—To cover what you are increasingly having to do.

Mrs Griffin—Yes. On the point about the gap, with the amendments you are talking about a family relationships centre going there, sitting down, talking and coming up with a parenting plan. The experience of the lawyers is that it is going to be really difficult. Work has to be done before they can sit at the table. The experience now is that they will not get together and they will not talk about it because of the family violence issues. It is going to be a really big problem.

CHAIRMAN—It is probably not directly a question on our terms of reference, but why is it that you consider violence in Indigenous society, Indigenous communities and Indigenous relationships worse than violence in the broader Australian community?

Ms Quayle—A lot of that is due to colonisation. Australia was colonised through violence. A lot of Indigenous people have actually learned that power is gained through violence. Then what you saw through the stolen generations was children removed and placed into institutions and other situations devoid of love, security and family. They actually learned that violence was acceptable, too. Our incarceration rate is quite high. If you have people going into incarceration, they learn violence within the prisons. Unfortunately violence is quite high in our community because our community does not really know any better. We find we have to educate people not to use violence as a form of communicating.

CHAIRMAN—I respect the sincerity with which you express those comments, but it is a pretty long bow to say that violence today is a result of colonisation, the stolen generation and incarceration. I know that we have far too high a level of Indigenous people in jails. I used to be chairman of a major parole board in Brisbane. I suspect that while people undoubtedly do learn violence in prison, many actually learned violence outside and that is partly why they go to prison. Do you think it could be something to do with alcohol as well?

Ms Quayle—Certainly alcohol plays a part in it. I want to correct you on the stolen generation: it is not a very long bow that is being drawn mainly because you are seeing the effect of that today. People often think it happened years ago, but it actually finished in 1970, so what you are seeing are the effects of that now in the community. If you have been brought up without knowing how a family structure works, you are devoid of that.

CHAIRMAN—I know; I can see that point.

Ms Quayle—I just want you to know that I was not drawing a long bow.

CHAIRMAN—I was principally referring to the colonisation argument.

Ms Quayle—I know, but it is society generally; I think society as a whole is a quite violent community.

CHAIRMAN—Violence in our society is a problem, yes.

Mrs Griffin—Yes, it is recognised that it is not just Aboriginal families that have violence. But the point is that it is where the violence has been perpetrated, from that point of colonisation, so it is a matter of not just having to try to deal with violence at one level but also having to go back to deal with the issues from way back. So it is about that different level, and about how they have to deal with those issues that are still there.

Mr TURNBULL—That violence was learnt from the colonial experience. There was no history of violence in relationships before the colonial intervention?

Ms Quayle—I am sure there was but there were intervention measures that you could use. Unfortunately you see customary law breaking down. In some situations that is where the

problem starts. You will often read or be told about how they used to get speared if they were violent, so people would not be violent and they would be very reluctant to use violence. We would be silly to say violence did not exist. I am sure it did, but it was certainly not at the level that it is today; it has increased over time.

Mrs Griffin—The way it was dealt with traditionally was in a proper manner. It was breaking the laws and there were laws to deal with it; it was not that people were just violent.

CHAIRMAN—Presumably, the sanctions for violence would have been fairly severe.

Mrs Griffin—Yes, very much so.

CHAIRMAN—You are not arguing for stronger penalties?

Ms Quayle—Some women have said that the problem that you have in society today is because violence is accepted. They do want men to be punished for their behaviour. You are more likely to see violence in public, and those involved get a tougher penalty, as opposed to violence in the home. People accept violence in the home.

CHAIRMAN—Sometimes there is the difficulty of proving it in the home environment, whereas in the public arena normally if someone is to be convicted of violence then it is easier to stitch together the evidence.

Ms Quayle—Sometimes when the police go in and see that a woman has been bashed horrendously no action is actually taken. They say one of the issues with Indigenous women is that police still see them as criminals and not victims of violence. That is what a lot of Indigenous women were coming forward and saying: whilst police do go into the home they do not really see the man as being the perpetrator of violence.

CHAIRMAN—Do you see Indigenous men sometimes being the victims of violence by Indigenous women?

Ms Quayle—Yes.

CHAIRMAN—The other point that a person made to me yesterday—I do not think it was in formal evidence but in discussions with the witness—was that in Indigenous society where there is violence Indigenous people usually prefer consultation and discussion and conciliation rather than a prescriptive sort of legal intervention. They would prefer to talk the matter through rather than call in the police. I am wondering if you would like to comment from your experience on whether or not that is an accurate statement.

Ms Quayle—I would say it is an accurate statement if you look at how many Aboriginal organisations have actually asked for funding for intervention before, rather than for going through the court system. As well, a lot of Aboriginal people will not go to the police, because of the history of the police with violence and all the rest of it.

CHAIRMAN—Does your organisation operate throughout the country?

Ms Quayle—Yes.

CHAIRMAN—But it is principally based in New South Wales?

Mrs Griffin—No, we are based in Perth, but we have got members all over Australia.

CHAIRMAN—I am well aware that 20 or 30 years ago Indigenous people were reluctant to go to the police because they were concerned about a lack of fair treatment. I would be absolutely appalled if, in 2005, we still had the same level of concern. Is that your view? Are people still reluctant to go to the police?

Ms Quayle—I would say that there is still the same level of concern.

Mrs Griffin—Yes, there definitely still is. Increasingly, that is with the younger generation as well. Unfortunately, although when they are in primary school they are taught that the police are the people to go to—I remember my daughter being taught that—by the time they have left school they have realised that the police are not the ones to go to. It is still happening.

CHAIRMAN—Why are the police not the ones to go to? I think the police do an extraordinarily difficult job under very trying circumstances and, largely, do it well. That is not to say that at times you will not get bad police, but these days police activities are very transparent. Why do you still have the same concern about going to the police today? If a policeman did the wrong thing then you could go to your local politician or to someone else. There are all sorts of bodies to which the police services are now accountable.

Ms Quayle—I think there is quite a bit of research around police violence towards Indigenous people recently. I think the media certainly does not help, in regards to promoting certain groups that are breaking the law. I do not know if you are aware of the report *Racing for the Headlines: Racism and Media Discourse* that the Anti-Discrimination Board released where it talked about how the media stereotypes certain people's behaviour and therefore are likely to cop more police attention because of the hysteria around it. Around public space issues, you find that police often stop and search young Aboriginal children. One of the reasons why Aboriginal children go into the criminal justice system is that they swear at a police officer, telling them to 'ping off'—only with much more colourful language—because they are searching them for no reason. They see it as an invasion of their privacy. You will see a lot of Aboriginal kids get charged with offensive language, resisting arrest and assaulting a police officer.

CHAIRMAN—A lot of them would be dealt with by the Juvenile Aid Bureau rather than the court system, wouldn't they? I do not know what they call it in New South Wales, but in Queensland it is the Juvenile Aid Bureau. It essentially diverts young people away from the court system into a mediation—

Ms Quayle—Yes, but what you also find is that a lot of Aboriginal children are not getting access to those services.

CHAIRMAN—I find that a concern.

Ms Quayle—There has been research around that issue which has found that the criminal justice system is seen as the first option as opposed to diversionary programs.

CHAIRMAN—Maybe we had better get back to the bill now, but thank you for those points.

Mr MURPHY—In recommendation 2 of your submission you call on the minister to explore ways of putting into place processes to:

... deal with the continuing violence and abuse against Indigenous women and children and their culture after separation.

What would you like to see the minister do in response to your recommendation?

Mrs Griffin—For one, I would like to be able to see a discussion. It is not just for us to say, 'This is what you have to do.' There needs to be a discussion on what could be put into place, like information and education. There need to be steps put in place to deal with these kinds of issues. In the amendment you say that the culture of Indigenous women and children will be respected and they can be part of their culture and identity. But if there is a non-Indigenous father or spouse involved then they are still open to the abuse. As I said, even though these amendments are made, there will not be any immediate change in how Indigenous women and children are treated in a relationship with a non-Indigenous father. What happens then? What steps can be taken? What will happen? If they experience the same thing, where do they go from there?

Mr MURPHY—I suppose another way of putting it is, if you had the minister here and you could put a prescription into the legislation, what practical things do think the minister could do to meet your recommendation?

Mrs Griffin—Maybe look at some sort of penalty, or something to deal with breach of that amendment.

Mr MURPHY—Is that the best way to look at it—imposing a penalty rather than providing information and education , which you talked about?

Mrs Griffin—That is probably just one way of looking at it but, as I said, if that happens we would have to look at it. It really comes back down to the fact that, if there is family violence and if there is abuse involved in that—and this is what that case would involve—it is about sitting down together. Until you can sit down together you cannot get anywhere. I guess we would have to sit down and talk about what would be the best way. The only thing I could think of first off was information and education but, as far as any other penalty goes, what do you think, Cleonie?

Ms Quayle—You are right about education programs having to happen. Most Aboriginal organisations do not have the funding to actually go out and educate communities and so that becomes a problem, because we are actually dealing with things after the event. So it would be really good if we could go out and educate people on how to be a family. There are certainly initiatives that are being taken up where that is taking place. But there is not enough on the ground at the moment. The Family Law Court should certainly have community educators who can go out.

Mr MURPHY—In your opinion, who are the best people to do that education?

Mrs Griffin—Indigenous people.

Ms Quayle—There are Aboriginal people employed by the Family Law Court at the moment. There are not enough. There are only five for the whole of Australia, I think. So they are very busy—they are flat out. One of the workers who works in Queensland has often said, 'If I came down to New South Wales I might see things differently, because it is not my region—that is, she might see things differently from where she comes from. The Federal Court certainly has to recognise that there have to be Aboriginal people from each state to assist. I know that Daisy, who is from Queensland, was saying that she did not feel comfortable coming down to New South Wales.

Mr MURPHY—Initially, in response to my first question, Mrs Griffin, you mentioned penalties. Do you think a stiff penalty is a deterrent?

Mrs Griffin—It depends on what the penalty is. I do not know that it is a deterrent. In a violent situation it probably would not be a deterrent, but at least then, even if a penalty for the breach is not imposed, there should be something that ensures the safety of mothers and children. The other thing that we talked about too was some sort of a cooling-off period, as has been discussed in New Zealand's family court. There, there is a cooling-off period of about 24 hours or something—somewhere between that and maybe two years. There should be something that gives mothers and children a sense of safety, so that they are not exposed to that abuse time and time again.

Mr MURPHY—Do you have a view about what would be a preferable penalty, other than imprisonment?

Mrs Griffin—It could come back down to the father or whoever the perpetrator is having counselling, maybe—or some sort of cultural awareness information—

Ms Quayle—Or anger management.

Mrs Griffin—Yes. But obviously at one stage this person fell in love with the mother and they had children, so they must have some understanding. They would have known where the mother came from—her culture and identity and so on. They need then to be able to see today the abuse that they—this father or person—are giving out to the same woman and the same child that they are supposed to have loved. Maybe some sort of cultural awareness—which he should already have—could be useful. If you are talking about the family relationship centres, maybe they could be a part of the process of education—part of going through and exploring and asking 'Why are you doing this, why are you committing these abuses and why are you attacking that person's culture and identity?'

Mrs HULL—That brings me to the process that is in front of us. We have the family law amendments here and in them we are also implementing family relationship centres, as you know. As there is specific capacity in family law relating to Indigenous people, would you consider it to be more important to establish a better framework within the family relationships

centres—because that is going to be the first port of call? Do you think that there should be more emphasis placed within the family relationships centre area, which covers off Indigenous issues?

Mrs Griffin—Yes, definitely.

Mrs HULL—We need to bear in mind that in Queensland there is the peacemakers course, where you have mediation and conciliation training going out into Indigenous communities. The Family Court of Australia has been funding that Indigenous program, but it is a limited process. Do you think that it is as important for us to concentrate on specific frameworks within the family relationship centres that relate to how Indigenous cultures work as it is to incorporate Indigenous specific behaviour or determination in the Family Court?

Mrs Griffin—Yes, definitely. I do agree with that.

Mrs HULL—What would you envisage that the family relationships centres should include in order to deal with the issues of Indigenous culture and Indigenous separation? Bearing in mind that there are fewer Indigenous couples going to the Family Court of Australia than there are from the broader community, it is obvious to me that there would have to be more concentration of activity in the family relationship centres. I do not have a copy of your submission in front of me and you may have already done this, but, if you have not already, could you provide to us a list of suggestions of what might be included as a requirement in the setting up of family relationship centres to give you comfort that the Indigenous community would be able to relate to those centres.

Mrs Griffin—In our submission there are a number of recommendations. Basically what we are saying is that, where there is a high percentage of Indigenous people, especially in remote areas, there should definitely be Indigenous people working in those services. That is the first thing: if you are going to provide services to Indigenous people, you have got to have Indigenous people working in those centres, particularly where there is a high percentage of Aboriginal people.

You can also look at any Aboriginal organisations that are already set up—they may already be providing some sort of family counselling. In some of the remote or regional towns there are family centres, so you could use those organisations to provide those family counselling services if there are no family relationships centres that have all the requirements. The recommendations come back down to employing Aboriginal people, providing the training and the funding—providing the funding to SNAICC, because they have family and child specialists who could actually assist with some of the matters in the family relationship centres.

I would like to be able to come up with a list of requirements specifically for the relationship centres but, with regard to providing a service for Aboriginal people, there are recommendations in our submissions about having Aboriginal people employed in the service. Those Aboriginal people need to be able to do more than just sit in the relationship centres; they need to be able to go out to the communities as well. I understand the relationship centres are only going to be in the regional towns or the main towns. What about the rural and remote communities and towns? You have to have people going out to those.

There has to be flexibility in the relationship centres. I know that they have an appointment system but, if Aboriginal people are coming in from a remote town or community—and they might be coming in just once a month or so—and they have an issue they want to deal with, they need to know there is a centre that can help them. Whether that is the family relationship centre or another service, it needs to be flexible enough to allow them to be able to walk through the door and say, 'I need some help.' We need to set up a structure which helps them, without them having to go through being told: 'You have to make an appointment. You have to do this.' It is those sorts of things that become a barrier to Aboriginal people accessing services.

Mrs HULL—In preparing a parenting plan in an Indigenous family's case, should there be an expansion of capacity with the mediation process and conciliation process in family relationship centres? Should there be the ability to expand that to represent the culture of Indigenous communities, recognising that more than just two people—as in a mother and a father—are responsible for raising a child? Living in a world of difference, should we establish different practices for Indigenous communities or families—not excluding aunties and elders, say, in parenting plans, but adding them? Should they be allowed or included in there, or should it just be mums and dads making those future plans for a child?

Mrs Griffin—I think parenting plans should include the extended family—the grandparents, the sisters, the aunties and the uncles—because quite often children may not have the grandparents there or the mother. They may have a father and they may have lost their mother. It may be that a sister is going to be looking after a child, so the process has to be expanded to consider that. In our submission we say that cultural ways of doing things have to be taken into consideration when you are putting together parenting plans and when you are setting up the family relationship centres, because not everybody is the same. There is diversity within Aboriginal culture. There are Aboriginal people who live in the town. There are traditional people who live out in the community and in the town itself. The relationship centres have to be flexible enough to be able to deal with whoever comes through the door, rather than having one blanket approach and treating everybody the same, saying, 'This is what we are going to do.' That is so important.

CHAIRMAN—In your submission you cite a case study of a relationship where there was a non-Indigenous male and an Indigenous female and you describe the sort of violence that took place in that relationship. In your experience is there more or less violence in dysfunctional relationships where both partners are Indigenous than where one partner is non-Indigenous? Or is it simply impossible to generalise?

Mrs Griffin—It is probably impossible to generalise. That particular case study came out because the Indigenous women's legal services were increasingly having to deal with Indigenous women coming in with that same problem. Violence is probably happening where there are two Indigenous people, but the legal services were increasingly having to deal with those sorts of cases.

CHAIRMAN—So you cannot say whether there is more or less violence in, for want of a better term, mixed relationships?

Mrs Griffin—Violence is violence, no matter who does it.

CHAIRMAN—I agree.

Mrs Griffin—But, when you have a situation with a non-Indigenous person and an Indigenous person, the person's own culture and identity are attacked—on top of the violence. We are all who we are, but when, on top of being abused, your identity is attacked—because you have done this or you have not done that, or because you are a woman or whatever—

CHAIRMAN—That is the reason I asked that question. You were talking about culture and, if you have a relationship where one partner is Indigenous and the other non-Indigenous, obviously the culture will only be relevant to one partner in that relationship.

Ms Quayle—Section 68F in the Family Law Act has provisions that identify that culture should be maintained. Unfortunately it only invites them to decide, when dealing with disputes between Indigenous and non-Indigenous parents, whether a particular child has that need. We want that to be strengthened.

Mrs HULL—To say what?

Ms Quayle—To say that culture is paramount, that children with one Indigenous parent maintain their culture and that the non-Indigenous parent, if taking shared residency, has to actively play a part in promoting the child's culture. It is no good if children are feeling bad about themselves. When a couple separates, the father might start putting the mother down because she is Aboriginal, which certainly impacts on the child.

CHAIRMAN—That puts the children down too, doesn't it?

Ms Quayle—That is right. That is what they are indirectly doing. Whether they have separated or not, each parent still has to promote the child's culture and make the child feel proud—because that child is going to be Aboriginal, regardless.

Mr CADMAN—I have just a couple of questions. Generally, blood parents are not the perpetrators of violence or abuse against their own children. They may take it out on a partner, but they are very unlikely to take it out on the kids, to the point of really abusing them. Is that the general experience in the Indigenous community?

Ms Quayle—I would not want to say that that is the case, because we have seen—

Mr CADMAN—Is a non-blood relative, like a de facto or somebody like that, more likely to knock the kids around?

Ms Quayle—No. Research is starting to show that violence in communities is cross-sectional, and so on. So I certainly would not want to say the blood relatives do not do it.

Mr CADMAN—I am not talking about whether it is males or females who are violent; I am talking about whether blood relatives are violent toward their children. A father with his own children, or a mother with her own children, is less likely to be violent toward them than somebody else in the relationship, such as the de facto. Can you offer an opinion on that?

Ms Quayle—We would have to go and see if there is anything written, because I would not want to say anything at the moment. There is research being conducted.

Mr TURNBULL—Is violence by biological fathers or biological mothers against their own children significant in your communities?

Ms Quayle—Yes.

Mr TURNBULL—Does violence by other parties, who are not biological parents—for example stepfathers, stepmothers or relatives—constitute a larger percentage of violence against children?

Mrs Griffin—I do not know that it constitutes a larger percentage, but it definitely does happen. When it happens, it is—

Mr CADMAN—Would you like to have a look at that, to see whether you can sound out the community? It is our impression from a previous inquiry that, despite what is sometimes written in the press, biological parents are the people least likely to damage their own kids. The press says it is the mothers and fathers but, when you examine it, the person doing the damage may not be a biological parent.

CHAIRMAN—That is true of non-Indigenous parents and Indigenous parents.

Mr CADMAN—The only figures I am aware of are for non-Indigenous communities. I suspect it is the same in Indigenous communities but I am not sure.

Mrs HULL—I do not think that is what the witnesses are saying here today. In answer to Mr Turnbull's question, they said that violence between biological mothers and children and fathers and children in Indigenous communities definitely does happen. Is that what you are saying? In answer to the other question, are you saying that it would not follow that violence committed by non-biological mothers and non-biological fathers against children is any higher in your communities?

CHAIRMAN—If we are verballing you please correct us, but I think you also said you were not aware of the situation and you would go away and think about it and let us have some more information.

Mr CADMAN—If you change your opinion, just let us know.

Ms Quayle—There has been so much research around sexual assault and violence towards children. Children certainly are exposed to violence. The Kids Help Line actually stated that it receives quite a few calls from Indigenous kids, and family violence was a concern.

Mr CADMAN—Sometimes it is hard to determine what family violence means.

Mrs HULL—That is right.

Ms Quayle—I would say that would mean immediate violence.

CHAIRMAN—If you could come back to us, that would be excellent.

Mrs HULL—I want to come back to the issue in the Family Law Court of recognising and establishing cultural practices. We talked specifically about a non-Indigenous person marrying or partnering an Indigenous person. They will always be Aboriginal. Would it not cut the other way as well? We had evidence in front of us yesterday of an Italian woman who was married to an Aboriginal man. The children considered themselves Aboriginal but they also spoke Italian. So they identified with two cultures. I would just like to clarify that you would not have any expectation that, when a non-Indigenous person marries an Indigenous person, non-Indigenous culture is not considered as well—that it would only be the Aboriginal culture that would be considered. You say that one party should know there is an Indigenous culture, but at the same time the Indigenous party should know the other culture, whether it be Italian, Greek or whatever.

Ms Quayle—We should just say 'mutual respect' with regard to—

Mrs HULL—Good. That is not what has been coming out up to this point.

Ms Quayle—I am sorry about that. There was an incident where an Aboriginal woman married an Indian man and he took the children and the children could only speak Indian. So the mother could not even communicate with her children anymore.

Mrs HULL—So there should be mutual respect.

Ms Quayle—Yes, certainly, but it is just so easy to denigrate Aboriginal people. That is what we are more concerned about.

Mr CADMAN—Is marriage a declining occurrence in the Indigenous community? It is in the general community at large. Are fewer people getting married and more living together without marriage?

Ms Quayle—I would say there are fewer people getting married. De facto is probably becoming more common.

Mrs Griffin—At the same time, what do you consider marriage?

Mr CADMAN—In the Family Law Act it is very specific. That is what we are looking at.

Ms Quayle—It recognises de facto relationships too.

CHAIRMAN—Building on that question, would you say that more Indigenous children are now being born in a situation where their parents are not in a de jure or de facto marriage—where they are not actually married or living together?

Ms Quayle—I would say they are in a de facto relationship if they are not married.

CHAIRMAN—But if they just happened to be fleeting partners?

Ms Quayle—I do not think so. I cannot say it does not happen in any—

CHAIRMAN—The relevance of that was that we were talking about parenting plans and all that sort of thing, and I think you said at one stage that, if the partners in a relationship once loved one another, they should be able to. My understanding is that in the Indigenous community it would be the same as in our general community: most children will be born either of legal marriages or de facto marriages. Sadly, a lot of those break up, in both situations. Is that a fair comment?

Ms Quayle—I would say it would be the same with Indigenous people.

CHAIRMAN—If there are no further questions, I just have one. Yesterday we had evidence from the Victorian Aboriginal Legal Service Cooperative and the Indigenous Women's Service. We looked at the impressive list of affiliate organisations you have and we were wondering whether those people who gave evidence to us yesterday were in any way, shape or form connected to your umbrella organisation.

Ms Quayle—Not the Victorian legal cooperative.

Mrs Griffin—Not the organisation itself, but it used to have a women's network within its organisation. They were connected through that. The Indigenous Women's Service is a member of the national network. Is the one you are talking about the one here in New South Wales?

CHAIRMAN—I was actually talking about your organisation and these two organisations who appeared before us yesterday in Melbourne. But, from what you say, they may not be connected.

Mrs Griffin—Which one? The New South Wales one?

CHAIRMAN—No, this is the Victorian Indigenous Women's Service.

Mrs Griffin—The Aboriginal Family Violence Legal Service cooperative?

CHAIRMAN—We will get the secretary to pass on to you exactly what they were.

Mrs Griffin—Yes, because the Aboriginal Family Violence Legal Service co-op is a member of the network. But if it is the Aboriginal Legal Service—

CHAIRMAN—I have their business card here. It was called the Elizabeth Hoffman House Aboriginal Women's Services, which deals with Aboriginal family and domestic violence services. Rose Solomon is the Chief Executive Officer.

Mrs Griffin—No.

CHAIRMAN—It also calls itself the Women's Domestic Violence Crisis Service.

Mrs Griffin—No, they are not associated with us.

Mrs HULL—Could I ask a question about the breakdown of a partnership, relationship, marriage or whatever it is in Indigenous communities. In the questions that we have been trying to answer, is violence the greatest reason for breakdown in partnerships and relationships? In Indigenous communities, would you say marriages, partnerships or relationships break down predominantly through violence or would violence be, say, 20 per cent of the reason for breakdown? I am trying to determine how we can actively protect and put in place mechanisms in the family relationship centres that adequately deal with those subjected to violence so that they are clearly streamed in a particular area. In order to do that, you need to know about the breakdown cycle. Is it primarily due to violence, particularly in Indigenous communities, or would it be for a myriad of reasons, with violence being only a small component?

Mrs Griffin—When you say 'Indigenous community' and you ask that question, I think to myself: there are Indigenous communities and there are traditional communities. This is about the diversity of Aboriginal people—do you mean living in the city or living in a regional town?

Mrs HULL—Just, the breakdown of families in a community generally .

Mrs Griffin—I would not be able to say because we do not have any statistics on that.

Ms Quayle—It is really hard to separate. When you look at high unemployment—the government just released a report called *Overcoming Indigenous disadvantage*—Aboriginal people are disadvantaged because they are unemployed and all the rest of it. We are not sure what is triggered at what stage. We have not actually asked. Family violence is certainly high.

Mrs HULL—Is it high?

Ms Quayle—Yes, it is very high. I would say that we do not actually have stats. We have never asked women, 'Did you separate through violence?' We have never actually asked that question. If you would like us to research it, we are happy to.

Mrs HULL—It is an issue because it seems that it comes up time and time again that we are not doing enough and we are at risk of exposing people who have come out of a violent situation to further violence. It is hard for us to get an understanding of whether we are making laws for just five per cent of Australians that impact on 95 per cent of Australians or whether there is a genuine, very high level of violence in partnerships, marriages and relationships that is the cause of breakdown. You are representing Indigenous communities specifically, so it would be a question that I would ask. You are saying that it is high, but you do not know if it is the cause of breakdown. But there is actually a high level of violence in those relationships?

Mrs Griffin—Yes. At the end of the day they may break up, but there may be reasons why the violence is there in the first place. The network has always strongly said that, whilst we have family violence units and Indigenous women's programs, there are other legal needs and legal issues for Indigenous women around finance and housing. If some of those issues are not addressed then it can lead to violence, disruption in the family and parents not feeling they can actually support their families.

Ms Quayle—I would say that Indigenous people are very much the same as non-Indigenous people in that, when they go to the Family Court, communication has totally broken down. The

woman does not feel comfortable and they cannot negotiate anything so they rely upon a judge to come up with a decision. Most families make arrangements on separation. You would only see a few, I imagine, that would go through the Family Court. Those who do go through the Family Court usually do that because of violence and that issue about culture not being respected. The ones that I imagine would go through the Family Court are where there is a total breakdown of communication.

Mrs HULL—That brings me back to the relationship centres and trying to determine the level of requirement needed in relationship centres to deal with violence. I guess that is going to be the sixty million dollar question.

CHAIRMAN—Thank you very much for appearing before the committee this morning. You will be sent a draft *Hansard* of your evidence for checking. If you could let us have the additional information you have undertaken to give us as soon as possible we would very much appreciate it.

Ms Quayle—Would you like some additional information because there actually has been research around—

CHAIRMAN—Whatever you have we would appreciate. We are very keen to fully take into account your point of view. We have received a submission from the National Network of Indigenous Women's Legal Services. Is it the wish of the committee that the submission be received as evidence and authorised for publication? There being no objection, it is so ordered. Thank you.

Proceedings suspended from 12.13 pm to 1.05 pm

FINN, Ms Katrina Lorraine, Policy Officer, National Network of Women's Legal Services, National Association of Community Legal Centres

FLETCHER, Ms Joanna, Law Reform Coordinator, National Network of Women's Legal Services, National Association of Community Legal Centres

CHAIRMAN—We welcome the National Association of Community Legal Centres. We have a second manifestation or body called the Women's Legal Resource Group—is that right?

Ms Fletcher—The National Network of Women's Legal Services. We are a network of the National Association of Community Legal Centres.

CHAIRMAN—Are you representing two bodies or one?

Ms Fletcher—We are representing the National Association of Community Legal Centres.

CHAIRMAN—Is the Women's Legal Resource Group represented as well?

Ms Fletcher—Is that the New South Wales Women's Legal Resource Group? No, not here.

CHAIRMAN—So you ladies represent the National Association of Community Legal Centres.

Ms Fletcher—That is right.

CHAIRMAN—Thank you for coming to the hearing today. Thank you for looking at the bill. I know there has been a very short time frame. Are you both lawyers?

Ms Fletcher—Yes.

Ms Finn—Yes.

CHAIRMAN—I have to point out to you that, while we do not require you to give evidence under oath, 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 the parliament. I wonder whether you might like to outline a brief opening statement—maybe 10 minutes or so—and then we will subject you to gruelling questioning.

Ms Fletcher—Thank you very much. Chair, members of the committee, thank you for inviting us to give evidence to this important inquiry today. As I said, the National Network of Women's Legal Services is a network of the National Association of Community Legal Centres and we, the National Network of Women's Legal Services, have provided a detailed written submission on the exposure draft which has now been formally endorsed and adopted by the National Association of Community Legal Centres, on whose behalf we are speaking today.

It is the experience of women's legal services that women's safety and that of their children is jeopardised by the way the current family law system operates. The prevalence and devastating effects of family violence both on individuals and on our society are well documented. The government is about to rerun its Australia Says No campaign in recognition of this fact. Unfortunately, families where there is or has been violence are overrepresented in the family law system, making up half of the cases that proceed to the midway point in the family law process. They are not, unfortunately, exceptional and they cannot safely be treated as exceptional.

The current culture of the family law system strongly promotes rights to contact over the rights of children and their parents to safety. We believe that this actively undermines the child's best interests because it does not properly prioritise the well documented negative effects on children of being exposed to abuse either directly or by witnessing the abuse of their parent. In our submission, clear and prescriptive changes to the Family Law Act are necessary to ensure that greater weight is given to the need to protect family members from violence and abuse.

The current raft of amendments this inquiry is examining presents an opportunity to make the necessary changes clearly and unambiguously. On the other hand, our principal concern about the exposure draft is that a number of its provisions may well lead to even less protection for children and their parents who have been subjected to violence. It is for that reason that I want to focus on those families—families where there is violence—in our opening submission and to look briefly at how the exposure draft measures up against the government's aims for this legislation for those families.

We acknowledge the attempt that has been made in the exposure draft to address the issues surrounding violence and abuse. However, we are concerned that a number of provisions in the draft which seem to be intended to promote the benefit to the child of both parents having a meaningful role in their lives may directly conflict with and override the provisions that are intended to recognise the need to protect children from family violence and abuse. In particular, I refer the committee to the proposed changes to section 60B of the act, the objects and principles underlying decisions about children, and the proposed changes to section 68F of the act, the criteria for determining the best interests of the child. In our view, the proposed new object in section 60B of 'ensuring that children have the benefit of both of their parents' meaningful involvement in their lives' will override the proposed new principle that children need to be protected from physical or psychological harm and may well lead to even greater prioritising of contact over safety. We believe that the act already promotes shared parenting and recommend that the meaningful involvement objective not be introduced.

In relation to the proposed changes to section 68F of the act—the criteria for determining the best interests of the child—the two new primary considerations, namely, the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm, are likely to conflict with each other and may well result in a strengthened focus on contact being maintained at all costs. At best, these two considerations may just cancel each other out and lead to no improvement in the protection of children and their parents from violence and abuse. We recommend that the need to protect children from harm should stand alone as the primary consideration in decisions about what is in a child's best interests.

The amendments made to the act in 1996, similarly to this exposure draft, had a bet each way. Some provisions were introduced that specifically required consideration of family violence in decision making. Other provisions were introduced emphasising rights of contact. Our clients' experience—and this is well-supported by research—is that these changes had the unforeseen consequence of placing women and children at greater risk of violence and abuse. Changes that can appear to be relatively minor can be interpreted in a way that has a significant and unintended impact on the operation of family law. This is an opportunity to give appropriate recognition to a child's right to safety. Clear and prescriptive changes are necessary to ensure that this occurs.

Still looking at how the exposure draft measures up against the government's aims for families where there is violence or abuse, we note that, whilst the provisions that are directed towards a less adversarial court system may make the court process easier to navigate and less traumatic, other provisions in the exposure draft actively undermine these aims in family violence and child abuse cases. Our most fundamental concerns about this relate to the provisions in section 60I, which require all parties to attend family dispute resolution outside the court unless they can satisfy the court that there are reasonable grounds for believing that violence or abuse has occurred, amongst other exceptions. This provision and the associated section 60J appear to create significant obstacles for a potential applicant to negotiate to issue a court application where they allege there is violence or abuse. On their face, they leave scope for requiring multiple court hearings to determine whether cases should be allowed to proceed. This makes the court process harder to navigate for applicants who fear violence or abuse and risks causing significant delays that may endanger the potential applicant or their child.

Any provisions directed towards requiring parties to attend family dispute resolution should avoid those pitfalls and should not increase pressure on people not to disclose concerns about violence or abuse. A party should be able to elect to use the court system if they disclose violence or abuse. A sworn statement could be given if necessary. At a minimum, we believe that there should be an additional provision in section 60I, subsection 7, that allows for family dispute resolution practitioners to certify that a dispute is not suitable for family dispute resolution due to family violence or other issues. We also believe from information received about the Children's Cases Program, on which these less adversarial processes are based, that these processes may undermine the recognition of family violence issues.

Our third and final point, in assessing the exposure draft against the government's aims for families where there is violence or abuse, is that a number of other provisions that seem to be intended to encourage agreements to be reached and to promote shared parenting may further undermine the protection of children from violence and abuse. We therefore question whether the exposure draft does 'encourage and assist parents to reach agreement on parenting arrangements ... outside ... court ... where appropriate.'

Our main concerns here are fourfold. Firstly, we are concerned about how the proposed family dispute resolution services will actually operate in practice, in relation to screening for violence and in actually conducting dispute resolution. Secondly, we are concerned about what the effect will be of a presumption of joint parental responsibility with a specifically legislated requirement to consult. Thirdly, we are concerned about the proposed emphasis on parenting plans and the capacity for parenting plans to override court orders. And fourthly, we are concerned about the addition of a new consideration in determining 'best interests' in section 68F(2), being the

willingness and ability of the child's parents to facilitate and encourage a relationship between the child and the other parent.

Those are the basic issues that I would like to flag at this stage in relation to how the exposure draft measures up against the government's aims for this legislation for those families where there has been violence. I would like to conclude by saying that we are able to provide the committee with three specific areas that could be addressed in this bill to improve the family law system's response to family violence and child abuse. We would be very pleased to have the opportunity to discuss these and to expand on the points that we made towards the end of our opening submissions that we have only been able to put in outline to the committee. So if the committee would like to do that now, or to direct questions to us on those issues, we would be—

CHAIRMAN—Maybe you could just continue and tell us what you would like to tell us about those matters.

Ms Fletcher—Certainly. I have tendered to the committee a list of those areas. Perhaps I will start with what we say could be done to improve the family law system's response to—

CHAIRMAN—Just before you get to that, does your association support the thrust of the bill, in the sense that you support what the government is seeking to achieve—that is, the move towards a greater degree of shared parenting whilst still protecting children from violence? I mean, do you support the thrust of the bill or are you damning it by faint praise? In other words, do you prefer the current system to what is being proposed in this bill? I think what you have given us is very professional. But are you, in effect, opposed to what the government is seeking to achieve and seeking to ameliorate what we are seeking to achieve by maybe trying to water it down?

Ms Fletcher—Certainly we fully support the measures outlined in the terms of reference as the measures the government is trying to achieve. Our concerns relate to what our experience has been of the effect of the amendments in 1996. It simply was not anticipated that the emphasis that was given, for the first time, on the presence of family violence would be watered down in the way it was by the emphasis given at the same time, in the principles section, to the right to contact. So our concern is really to flag to the committee that sometimes trying to balance those two competing considerations can actually lead to things being made worse rather than better. It is very difficult for us to say whether the practical effect of this bill, in the sense of the legislative changes that I mentioned to section 60B and section 68F, will make things worse or not. It appears to us that there is a risk that they might.

CHAIRMAN—Please proceed.

Ms Fletcher—We think there are three areas in this bill that could be addressed to improve the way family violence and abuse is dealt with in the current family law system. Firstly, in relation to the legislation, we have flagged that we believe that priority should be given in decision-making to the presence of family violence or abuse. We also support models used in New Zealand and the United Kingdom, which promote early decision-making in family violence cases.

The committee may be aware that an issue that currently arises for the Family Court is that interim hearings are only given a two-hour time limit. Decisions are made purely on affidavit evidence. Frequently, family reports are not available at the time those decisions have to be made. So the current emphasis on contact over safety tends to mean, as a lot of the research highlights, that contact is maintained until a final hearing. At that point, the research also shows that, although there was a change in the amount of contact that was happening in the interim period, when it came to a final hearing—when the court had all the information—as many more-restricted contact orders were made at those final hearings. So we say that there should be the capacity, and indeed the duty, to address those issues early in proceedings. Clearly, the new procedures that are included in the exposure draft might be able to be applied in that way, but there is nothing prescriptive in the exposure draft as it currently stands that applies that to family violence and child abuse cases.

Ms Finn—In relation to the proposals that have been made to give effect to that measure that the safety of children be protected, there are some concerns about the way that it has been outlined in section 60B and section 68F, where the measures that focus on children spending more meaningful time with both parents could well and truly override the emphasis that is given to safety.

CHAIRMAN—It was given to us by an earlier witness today that the words 'consistent with the best interests of the child' could be moved from section 60B(1)(c)—and you probably do not have it in front of you—to the commencement of section 61. So it would say 'consistent with the best interests of the child, the objects of this part are ...' and then it would have (a), (b) and (c).

Ms Fletcher—Would you mind repeating that question now that we have the relevant section in front of us?

CHAIRMAN—The last words of section 60B(1)(c) are 'consistent with the best interests of the child'. Mr Cadman and I had a vigorous discussion with an earlier witness suggesting that implicit in that wording of (a) and (b) was the fact that the interests of the children were paramount. However, it seemed to be agreed by the witness that, if we added the words 'consistent with the best interests of the child, the objects of this part are (a) to ensure' et cetera, it would address the concern.

Ms Fletcher—What do you intend would happen with the end of paragraph (c)?

CHAIRMAN—I presume the words following 'consistent' would be moved from there, because those words would then refer to (a), (b) and (c).

Ms Fletcher—And the suggestion by the previous witness was that that would improve things?

CHAIRMAN—The suggestion was that that would address the concern. The previous witness—if I recall and am not verballing the previous witness—was Dr Altobelli from the Law Society of New South Wales.

Ms Fletcher—I think there would still be some reservations with the framing of paragraph (c) if the words 'to the maximum extent' are going to remain there without the proviso 'consistent with the best interests of the child'.

CHAIRMAN—But, if the words 'consistent with the best interests of the child' are moved up to the top and refer to (a), (b) and (c), clearly 'to the maximum extent' must be subject to 'consistent with the best interests of the child'.

Ms Fletcher—Yes. To my mind, paragraphs (a) and (b) are, as you have pointed out, already objects that are clearly framed and are consistent with the best interests of the child, so I do not see that that would solve the problem.

CHAIRMAN—That was our view too. Mr Cadman and I agree with you on that.

Ms Finn—Our concern is that the issue of safety is only raised in the principles which underlie the object. It is our experience since the 1996 reforms that the objects tend to be given more weight.

CHAIRMAN—But surely the best interests of the child would, by necessity, include safety.

Ms Finn—They do, but since 1996 that has not played out in the way decisions that have been made by the courts have prioritised contact over safety. From our interpretation of learning from those experiences, we feel that the only way to properly give effect to safety and protecting children from that harm is to make sure that they are equally placed inside the objects clause.

Mr TURNBULL—But this whole part of the act is full of references to the safety of the children. If you look at new subsection 1A of section 68F, there are two primary considerations which are of equal weight—the meaningful relationship with the parents and the protection of the child from harm.

Ms Fletcher—Yes, and, as I indicated in the opening submission, the concern with that is that, at best, they may just operate to cancel each other out in a particular case, because there seems to be an implicit assumption within family law that it is in the best interests of children to have contact unless there are extremely significant concerns about violence. So you are starting from an assumption that contact is always good and you are not actually looking carefully at whether, in cases where there has been violence or abuse of a child or their parent, it really is the best thing for a child.

Mr TURNBULL—But the only way to be completely certain that a child will not be subject to violence from a parent is to deprive it from all contact with that parent. There is always a risk that a relationship with a parent can become unsatisfactory. It seems to me that the bench has been given the tools to do the balancing act here.

Ms Fletcher—When there is past evidence of significant violence, there is a real question as to whether it is in a child's best interests to have any contact. I am talking about extreme cases here. In the current system, a child who has actually been sexually abused by their parent is likely to be sent on supervised contact. I can give you an example of a child who was sexually

abused by her father, who penetrated her using a pencil, and during supervised contact visits he would bring out the pencil and play with it in front of the child.

CHAIRMAN—How old was the child?

Ms Fletcher—The child was four.

Mr TURNBULL—But is that really an issue for the statute? That is the point. That sounds like a clearly inappropriate decision. Let me put this question to you: would the judge in those circumstances have the tools in this statute to not allow that contact to take place?

Ms Fletcher—As it currently stands, yes, and in the new system, yes. I accept that absolutely.

Mr TURNBULL—Doesn't that answer the question then? How can you legislate away any discretion on the part of the judiciary?

Ms Fletcher—I am not suggesting that at all. We are just suggesting that the discretion should be guided by the primary consideration that it should be the child's safety that is protected.

Mrs HULL—What if we said in 60(1)(b) 'to ensure that parents fulfil their duties and meet their responsibilities concerning the care, safety, welfare and development of their children,' adding in the word 'safety'?

Ms Fletcher—Speaking off the cuff, I imagine that that would assist to some extent. I would be grateful for some time to think about that some more.

CHAIRMAN—Perhaps you could give us a supplementary thought on that upon reflection.

Ms Fletcher—I would like to do that.

Mrs HULL—To date, that is the main issue that you are raising.

Ms Fletcher—Yes.

Mrs HULL—If we were to put 'in the best interests of the child' as part of the objects under 60(b), then there was 'inclusive of the parents fulfilling their duties', I can see that that would be where it would come into play to meet their responsibilities concerning the safety, care, welfare and development of their children. Could you have a think about whether that would suit your purposes?

Ms Fletcher—I certainly will. I go back to the point I was making in relation to the three areas that could be addressed in this bill to improve the situation. As I said, the first area is a legislative model that gives clearer priority to the presence of violence and encourages the court to determine those allegations early on in the process. The second area is that parties should not be required to attend family dispute resolution—though they should still be able to elect to—if they state that there has been family violence. That could be a sworn statement if that was felt to be necessary. The third area is that, with this focus on alternative dispute resolution mechanisms—and we emphasise that we welcome the greater availability of those

mechanisms—the compulsion raises some concerns for us. With this emphasis on that, there needs to be a realistic alternative path for cases where there is or may have been violence or abuse.

The committee may be aware of a project in the Family Court, which has now been expanded nationwide, called Project Magellan, which deals with child abuse allegations. The extension of that program to domestic violence cases, which I believe is under consideration by the government, might assist with that, because it is actually a realistic alternative pathway for these cases rather than saying, 'You don't fit in here,' so you are just going through the normal system. When you do not give that realistic alternative there is a risk that the cases that we recognise should not necessarily be going to alternative dispute resolution will end up there. That has been the experience in other compulsory mediation systems.

At a minimum, we think that an actual alternative dispute resolution path outside the court could be created that had specific recognition for violence cases, including the need for legal representation on the same basis as the free services that are being proposed by the government. There is a good deal of evidence in the research in relation to mediation in violence cases that legal advice and representation can assist to redress the power imbalances in those cases. Fundamentally, we think that we need a focus in our family law system on dealing with the difficult cases, because unfortunately those are the cases that cause the most grief and conflict in families, rather than the families who are to a large extent sorting it out for themselves already.

Mrs HULL—But aren't the families who to a large extent are sorting it out for themselves sorting it out under this unnamed process of family law? That has been the problem to date. Many families are feeling as though they have been almost coerced—that was a word used yesterday in an opposite way—into accepting less than what they believe should happen, because they are operating under this out-there family law process. We are trying to build a system for all people, not just those people who are involved with family violence. It comes back to the question that we asked: do we have rules for five or 10 per cent of Australians—I am not saying that is the number—that impact on the other 90 per cent of Australians? That is the issue. We would like to have this all encompassing. Every one of us wants to protect any child or person that would be subject to any violence, but we need to take into consideration that the laws also need to operate in fairness and equity for all other people as well.

CHAIRMAN—I do not think anyone would say that safety, as an object, should be put behind contact with parents. However, I am finding it very difficult to see any justification in what you and a number of other witnesses have said about this bill—namely that it pushes contact with parents ahead of safety. It seems to me when I look through the bill that safety is mentioned in many and varied ways, as if it is a high priority. You yourself have said that the judge could make a decision both in accordance with the current law and this proposed law which would protect children.

Ms Fletcher—Certainly. As I said, unfortunately we cannot give the committee a definitive answer to the question: will this make it worse or better? We just raise that when those changes came in in 1996—

CHAIRMAN—It was 1995, wasn't it?

Ms Fletcher—They actually came in in 1996 but it was the Family Law Reform Act 1995. Those changes gave recognition to family violence that had not been there previously. At the same time, they put in the principles rights to contact that had not appeared there previously. The research is clear that the ultimate effect of that was that, at least at interim hearing stages, children were being placed at risk. So we are attempting to flag to the committee that—and I will take Mrs Hull's question and respond to that later—especially with the current placing of only the meaningful relationship requirement in the objects, with the safety requirement in the principles, there is a risk that those changes could change that emphasis further.

Mrs HULL—Basically, all you want to ensure is that all the acts actually interrelate to one another so that there are no overlooked or unintended consequences by having contact with somebody who has clearly been determined as not being safe to have contact with.

Ms Fletcher—Yes.

Mr CADMAN—To some degree, wasn't the pre-existing case that we are trying to set to one side in part driven by the payment benefits—the 109-nights, 110-nights factor? That is a point of high dispute in all the statistics we have seen.

Mrs HULL—In child support.

Mr CADMAN—Yes, in child support. So child support could hinge to a significant degree on whether there was demonstrable violence or not. I am just wondering about what would happen if some of those economic factors were removed. There is another factor that I would like your opinion on at the same time: the provision that is currently in the proposed changes to allow the courts to receive transcripts and evidence from the same court and other courts and tribunals in order to allow them to draw factual evidence on violence—at the moment it is a speculative process. I think everybody we have spoken to finds the way that works pretty unsatisfactory.

Ms Fletcher—Could you direct me to the provision you are referring to?

Mr CADMAN—It is section 60KI(3).

Ms Fletcher—That is specifically in relation to Aboriginal and Torres Strait Islander children.

Mr CADMAN—I am just wondering whether it should not be broadened so that those provisions apply to the whole community.

Ms Fletcher—That is a big question, and I would be very happy to take that as a question on notice.

Mr CADMAN—Will you have a look at that for us? We would welcome your comments on that section.

Ms Fletcher—Yes.

Mr CADMAN—From my perspective, it seems that that is a provision that would benefit instances where there is real violence and it is refuted in the family law court hearing and hard evidence is not produced or cannot be gained because of the differences in the jurisdictions.

CHAIRMAN—I think we have the department looking at that in order to give us a view as to why that provision was only put in concerning Indigenous children. There must be a reason for it.

Mr TURNBULL—Ms Fletcher, I would like to raise with you the comments you made about the new section 60I. You said that an applicant should not be obliged to go through the alternative family dispute resolution process if there was violence. You said that an applicant should be just able to file a sworn statement and that should be sufficient. If there were circumstances where an applicant were to file a sworn statement, being one of only two parties to the marriage, surely that would constitute in almost any circumstances the reasonable grounds referred to in subsection (8) paragraph (b).

Ms Fletcher—Certainly if that is the way the court interprets that provision, then—

Mr TURNBULL—How could it be interpreted in any other way? There are two parties to a marriage relationship. One provides a sworn statement saying, 'I have been or my child has been the subject of violence.' How could that not be reasonable grounds to believe that there has been family violence? Perhaps you could answer that question.

Ms Fletcher—I would certainly think that a sworn statement should be considered to provide reasonable grounds.

Mr TURNBULL—Can you imagine circumstances in which it would not be regarded as reasonable grounds?

Ms Fletcher—I suppose if a counter-statement were filed by the other party for some reason. But then they would still be caught by the other exception to attending mediation, which is that the other party is potentially not willing to.

Ms Finn—It is hard for us to present our views without referring to what has happened over the last eight or nine years, because family law did change substantially on the face of it with those 1996 reforms. The reality is that, notwithstanding the fact that since 1996 in section 68F(2) there has been a factor that is family violence and that is the section that the court refers to when it makes final and interim decisions in relation to children and regardless of how the evidence has been presented at interim hearings, we find that the court is still prioritising contact over safety.

Our concern is that, without actually making specific provision for an example—such as the one we propose where somebody puts in a sworn statement—that would be reasonable grounds, we are only opening ourselves up for the same kinds of decisions. That is exactly why we have made that specific suggestion.

Mr TURNBULL—Isn't it right that depriving parents of contact with their children in some cases can lead to violence? We are not living in a bubble here. Part of the rage and anger that has

been expressed by many people in the community about family law—and obviously it is a difficult jurisdiction because it is dealing with very unhappy circumstances—relates to parents, most typically fathers, being deprived of access to their children. Couldn't you make a case that ensuring that there was access, to that extent, actually worked against violence? You seem very sceptical about that.

Ms Finn—I think each case needs to be examined on its own. Certainly I would be very reluctant to introduce the kind of philosophy that you are talking about because we know that violence is not an isolated thing in only a few family law cases. It does raise concerns for me about why it was presented in that way and why it had an effect on that person. I can understand that a number of the other reforms that the government has introduced at this time, such as some of those other relationship services and counselling services, will assist parents to maybe deal with some of that grief and anger that they have around separation. But certainly when one looks at the decisions around contact, residence, spending time with parents or having other communications, they do need to be centred around, as you have all rightly said, the best interests of children. A very significant factor of that must be the safety of those children.

Ms Fletcher—In relation to your question, it needs to also be remembered that contact may have been denied in the first place because the resident parent had concerns about violence and that they have actually just come to pass in the way you have described.

Mr TURNBULL—It can become a vicious cycle, can't it, because the deprival of contact produces more anger, which can produce a violent manifestation of that anger.

Ms Fletcher—I think we are on very dangerous ground to be suggesting that that is a legitimate reason to respond with violence.

Mr TURNBULL—The whole philosophy underpinning these amendments—and this is where the chairman's question to you at the outset really drove to the core of your submission—is that it is in everyone's best interests, and in particular the children's, to maintain contact with each parent. Therefore, that should enable the parties to be less unhappy with an unhappy circumstance than they otherwise would be.

Ms Finn—The thing that concerns me most about the proposal you are putting to us is that it shifts the focus to the rights of the parents and what they are comfortable with.

Mr TURNBULL—I have asked you a question about whether the deprival of contact contributes to unhappiness and anger, which can contribute to violence. I have asked you that question; you have not answered it. You seem to suggest it is a question that should not be raised.

Ms Finn—I am sorry; I have not explained myself very well. What I am trying to say is that, if it is not in their best interests, regardless of what that means for the way the parties respond to it, that should be the right outcome—whatever is in the children's best interests.

CHAIRMAN—Could you please respond Mr Turnbull's question with a yes or no answer? You know what Mr Turnbull was asking you. Essentially it was: is the deprival of access,

custody or contact likely to create a situation of unhappiness which in turn could lead to other undesirable consequences?

Ms Fletcher—The difficulty with talking about violent relationships, and I imagine that you might be hearing from some domestic violence organisations through this process, is that there is an unlimited range of things that could spark violence between people who are in a relationship.

CHAIRMAN—I understand that. We can come later to what you are saying now, but could you please answer Mr Turnbull's question for the record?

Ms Finn—I think it is yes or no depending on the individual case that you are dealing with.

CHAIRMAN—So what you are saying is that deprival of access or contact with children would not lead to a higher level of anxiety in some cases.

Ms Fletcher—But it could in others. It might well lead to a higher level of anxiety, but that might not lead to violence, which I think is the next step that Mr Turnbull is taking.

CHAIRMAN—But it would in every case lead to a higher level of anxiety. I do not know a parent who would not feel that way.

Ms Fletcher—Yes.

Mr MURPHY—I think you said in your opening statement that you support the UK and US models of family dispute resolution.

Ms Fletcher—The reference in the opening submission was in relation to the United Kingdom and the New Zealand models and the requirement on the court to make an early determination of violence, not in relation to family dispute resolution.

Mr MURPHY—Okay; thank you.

CHAIRMAN—Do you have a view on penalties for noncompliance?

Ms Fletcher—We have expressed in our written submission some concerns about the increased emphasis especially on cost penalties in the amending bill. We were very pleased to see, since the government put out the discussion paper, that the much more dramatic suggestion of a requirement to consider changing contact or residence arrangements has been taken out and that, although we have some reservations about it, the system is not as prescriptive as had been floated in the discussion paper. We are very pleased to see that change.

Mrs HULL—You have made reference to the fact that the post 1996 introduction of the 1995 family law changes led to contact being made available in undesirable cases. Whereabouts in the act did that take place? What act changed and how did it change? I want to look at how it currently sits now to determine where that enabled this contact to take place, particularly in interim areas.

Ms Fletcher—It is very difficult to pinpoint the exact place because, as the committee would be aware, quite a range of changes were made in 1996. They are discussed in some detail in the research by Rhoades, Graycar and Harrison on the first three years of the Family Law Reform Act. But the provisions that currently appear in section 60B, which include the child's right to contact and so on, were introduced as part of the Family Law Reform Act 1995.

Mrs HULL—Do children have a right of contact on a regular basis?

Ms Fletcher—I believe all of the provisions in section 60B were inserted in 1995.

Mrs HULL—And that has all been repealed by us? Are you looking at 60B, 'Object of part and principles underlying it'?

Ms Fletcher—Yes.

Mrs HULL—Are we are looking at (1) and (2) and then (2)(a) and (b) as they currently stand? (2)(b) says:

... children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development ...

Is that what you are talking about?

Ms Fletcher—Yes. That section was inserted in the 1996 act. The other major change, of course, was the shift from 'custody and access' to 'contact and residence', which was a difference not only in name but also in substance in that custody was considered to give greater parental rights to the custodial parent than are now given by residence rights. That may have also contributed to that shift. It certainly contributed to a massive increase in litigation.

Mrs HULL—So, in effect, if all of section 60B of the current act were removed and we had 60B 'Objects of part and principles underlying it' that we have currently flagged as proposed, it seems that we have to get over the first big hurdle that you have indicated. I am wondering if we have overcome this hurdle, but it seems that the first of these big hurdles of initiating contact during interim orders would be fixed.

Ms Fletcher—By the changes that are being—

Mrs HULL—By the changes that are currently being flagged. If you are saying that those areas under 60B in the current act are the problem, and they are being removed and replaced with our proposals—

Ms Fletcher—The difficulty is that we have reservations about what it is going to be replaced with. As I mentioned in the opening statement, we are concerned that the provisions in 60B as they are currently drafted in the exposure draft, particularly the placing of the object of the meaningful relationship as an object and the safety concern as a principle, might actually make what is currently in section 60B worse—and I will go back to your point about the possibility of putting safety in that subparagraph. I will take on board your question.

Mrs HULL—That was the No. 1 issue. I am concerned that I am not getting the drift of just where we have not addressed these changes. The No. 2 is under what section?

Ms Fletcher—I suppose it is throughout the act, in a sense, but there are a number of provisions in the act that already, as the committee may be aware, mean that the default position where the parents are together or separated is that they do already have shared responsibility for children. The shift from custody and access to contact and residence actually connotes different rights. The rights of custody were much more extensive rights, prior to 1996 giving a custodial parent much greater rights to make decisions themselves about fairly significant issues. Since the 1996 changes, generally residence and contact orders state that both parents have responsibility for the long-term care, welfare and development of the child, the children reside with the mother/father and the other party has contact as follows—

Mrs HULL—That leads me to the proposed changes in the terminology that we were going to use instead of 'contact and access', 'custody and access' or whatever. It will not be 'residence' but 'living with'—everybody knows what that means. It will not be 'contact'; it will be 'having communication with' and—

Ms Fletcher—There is an example in section 60B(2)(a)(ii), if that is of any assistance.

Mrs HULL—No, I am not sure that it is.

Ms Fletcher—It is: 'children have a right to spend time on a regular basis with, and communicate on a regular basis with'.

Mrs HULL—So one is definitely 'living with'. That will be our new terminology. Instead of 'residence' it will be 'living with', and instead of 'contact' it will be 'spending time with and communicating with', so you are clearly identifying what 'contact' means. That leads us to some of the issues around changing that terminology, because many in the legal profession say it does not matter how much you change the terminology, because custody and access are going to be at the forefront. Custody is, 'I have ownership'; access is, 'You can maybe see or do,' but we wanted to clearly signal it. You have been using the words 'contact', 'custody', and 'access'. If that terminology is changed to 'living with', 'spending time with and communicating with' in relation to the person who is the supposed 'nonresident' parent—if that terminology was changed all the way through—would that not resolve that problem?

Ms Fletcher—I do not think so. I think that 'spending time with and communicating with' ultimately does not connote any different rights than 'contact'. Certainly, the intention behind that, which the government has expressed in its explanatory statement, is to let parents know that they can have a relationship with their child in a variety of ways that include face-to-face contact and things like email and telephone calls. We certainly support that intention.

Unfortunately, because of the way subparagraph (ii) of 60B(2)(a) has been drafted, separating out 'time' and 'communication' as specific rights in that section may actually mean that there is a greater emphasis on face-to-face time rather than communication. I do not think that changing from 'contact' to 'spend time with and communicate with' connotes different rights. It was the change in the structure of parental rights in 1996 that may have contributed partly to the prioritising of contact over safety.

Ms Finn—In both subsection (1) and (2) we do have some concerns that the change in language may in fact make it worse. Certainly in the 1995 reform act there was no reference to, for example, having meaningful involvement in the lives of the children to the maximum extent. We feel that that is stressing it in a way that it was not previously stressed in the 1995 reform act.

Mrs HULL—That is exactly what we are trying to do. That is exactly what this is about: trying to give some meaning to this whole process in the cases where things are normal rather than in those where everything or much of it is abnormal. The difficult task of the last committee, as it is this committee's, is to determine how, all things being equal, people can have meaningful relationships with their children without being under the cloud of the unwritten, overarching impacts of the Family Court.

Mr MURPHY—Ms Fletcher, do you believe that the proposed amendments in any way increase the possibility of allegations of abuse being made that are unsubstantiated?

Ms Fletcher—No, I do not think so.

CHAIRMAN—There being no further questions, on behalf of the committee I thank you very much for your courtesy in coming along on such short notice. I must say you were very well-prepared and right across the subject and that is admirable.

[2.00 pm]

DOWEY, Miss Suzanne, Legal Writer, Young Lawyers New South Wales Law Society Family Law Committee

CHAIR—Welcome.

Miss Dowey—My name is Suzanne Dowey. I am here today as an observer from CCH Australia, publishers. I am a writer looking after their family law products. I am also a member of the Young Lawyers New South Wales Law Society Family Law Committee.

CHAIR—The Law Society appeared this morning.

Miss Dowey—I belong to the young lawyers committee, which is separate. I refer to section 61DA(2). It is about the presumption of joint parental responsibility. It says:

The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that person's family); or

(b) family violence.

What I was confused about was why there was this distinction between abuse being only of the child or another child who at the time was a member of the parent's family or that person's family whereas family violence is not given that extra distinction as to against whom that abuse has taken place. What occurred to me was that it could open up a situation where, for example, you have a person within a family who has committed child abuse against a neighbour or who engages in looking at child pornography in the home. That would not be caught by section 61DA(2)(a). But someone who in the distant past may have hit somebody is caught by section 61DA(2)(b). That seemed to me a slightly strange emphasis. What I am not sure of is why abuse of the child is treated differently from family violence.

Mrs HULL—Because it is in the best interests of the child. I would expect that the intention of protection for the child is to ensure that any changes that we make are not going to impact on the child. We are looking at the child's best interests. At times, you may have family violence that does not impact on the child at all. There will be those who will say that family violence will always impact on the child.

Miss Dowey—Whereas child abuse might not?

Mrs HULL—No, but I think that is saying that it does not apply if there are reasonable grounds to believe that a parent of the child or a person who lives with the parent of the child has engaged in abuse. We are talking about that particular child or children.

Miss Dowey—Or another child who is in the family.

Mrs HULL—Yes, not a child outside of this relationship. You cannot deal with the neighbours' children outside of this relationship. This is a Family Court issue. It is about the child in the family, not the child of a neighbour who is not going to be living with that person.

Miss Dowey—Whereas the family violence definition is not given that same distinction.

Mr TURNBULL—I am not sure what point you are making.

Miss Dowey—The point I am making is that abuse of the child is qualified by being abuse of a child or another child who, at the same time, is a member of the parents' family, so it has to be a child that was in the house or the child itself.

Mrs HULL—But you are saying that the family violence guy could have done it down the pathway 10 years ago but we have just put family violence. It is a very good point. It is not family violence within this relationship you are talking about.

Miss Dowey—It seems to me to create a loophole whereby a parent or a person in the child's household could be a paedophile who commits abuse against children outside of the family home or would be a person who engages in watching child pornography or other forms of abuse of children within the home is not caught by that section whereas another person who may have committed a relatively minor act of violence in the family at some distant time in the past and who is not considered a risk anymore is caught by that subsection. On the one hand, the abuser may find him or herself in a loophole there and somebody who may have committed a minor act of violence is not.

Mr TURNBULL—To be clear, family violence is a term of art here and means a lot more than violence. Section 60D states:

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

This definition of family violence would certainly pick up sexual abuse as well because, clearly, it is an issue of safety. Your concern is that this does not pick up a situation where a party to the marriage may have a history of violence to third parties—

Miss Dowey—Specifically child abuse rather than family violence.

Mr TURNBULL—or may have engaged in sexual abuse of a child who had no relationship to the family at all.

Miss Dowey—My concern is simply that abuse of the child is given a different treatment to family violence. Is there a reason behind that? I can see that there are potential risks created.

CHAIRMAN—We will get the department to give us their view on that. There must have been a cogent reason for wording it in that way.

Miss Dowey—I assume there must be a reason, which is why I wanted to ask that question.

CHAIRMAN—The department is here, so it is taking note.

Mrs HULL—I think it is a perfectly reasonable question. Family violence may certainly impact on the child. It may not have any relationship to the child at all, but it may impact on the child. We are talking about the presumption of joint parental responsibility when making parenting orders. You can make the definition of family violence include violence against a child. Family violence, as has been asserted to us, can impact on the child, even though the child may not have been touched.

CHAIRMAN—Absolutely.

Mrs HULL—But then you need to get child specific. Child specific means abuse of the child—putting the child in a position where it is actually child specific. Family violence in itself can also be considered as being abuse of the child. It would depend on the circumstances. To me, that is the reason for having that there.

Miss Dowey—The child may not have witnessed or may not even be aware of the fact of the family violence.

Mrs HULL—That is right.

Miss Dowey—They may not be aware of the fact that the person living in the house is a paedophile.

Mr TURNBULL—Let me see if I can cut through this. Your set of facts are that, if there is a party to the matter—and let us say it is the father, although I do not want to stereotype him—and he has had a history of paedophilia with children who have no connection to his family, you are saying that that would not be picked up by either paragraphs (a) or (b) in subsection (2) of section 61DA? Is that your point?

Miss Dowey—Essentially, yes.

Mr TURNBULL—Let me just make this response to that: subsection (2) of 61DA operates to remove the presumption of joint parental responsibility; however, it is only a presumption and, if there were evidence of a party to a marriage being a paedophile in another context, I would think that that presumption—which, of course, is rebuttable—would be—

Miss Dowey—Would be caught by subsection (4).

Mr TURNBULL—overtaken by the whole mechanism of the statute.

Miss Dowey—You would hope so, but it just appeared to me that—

Mr TURNBULL—I think it inevitably would happen.

Miss Dowey—there was this strange difference in treatment between the child abuse and the family violence.

CHAIRMAN—I think Mr Turnbull is right.

Mr TURNBULL—Can you imagine a circumstance in which the presumption of joint parental responsibility would be applied when a court was satisfied that one of the parties to the marriage was a paedophile?

Miss Dowey—Currently the situation is that both parents have joint responsibility—

Mr TURNBULL—Can you just answer the question: can you imagine a circumstance where a court being satisfied—

Miss Dowey—It is within my imagination. I have practised in family law and seen some incredible decisions made.

Mr TURNBULL—Do you really believe a judge would give joint parental responsibility—

Miss Dowey—The question is more: would the judge take away parental responsibility—

Mr TURNBULL—From a parent that is a paedophile?

Miss Dowey—given that there is an existing legal parental responsibility?

Mr TURNBULL—Are you aware of a judge ever allowing a child to be in the custody—using the old-fashioned term—of a parent who was a known paedophile?

Miss Dowey—Yes.

Mr TURNBULL—Who the court was satisfied was a paedophile?

Miss Dowey—Yes.

Mr TURNBULL—You are aware of cases of that kind?

Miss Dowey—Yes.

Mrs HULL—Was it proven that the paedophile had never touched his or her own child?

Miss Dowey—Yes. Or rather, there was no proof that the parent had.

CHAIRMAN—Was there any suggestion that the paedophile had?

Miss Dowey—There was the suggestion that there was a risk.

Mrs HULL—Was the man, or woman, who was a paedophile—

Miss Dowey—They had been charged and convicted and had served a sentence.

Mrs HULL—And that meant that the child was at risk of that behaviour against them, even though the parent had never—

Miss Dowey—And yet they remained within the—

Mrs HULL—demonstrated it to his or her own child before, simply because he had been convicted or was a person known to be a paedophile? So if that child goes with this person now they are at risk.

Miss Dowey—They are more at risk, yes.

CHAIRMAN—It seems a very strange decision. It must have been decided on extraordinary circumstances.

Mr TURNBULL—Yes.

CHAIRMAN—Is there anything else you would like to tell us?

Miss Dowey—I would like to talk about section 68F(2)(j) on best interests. That follows on from what Dr Altobelli was saying this morning regarding the change to the wording of family violence orders. Dr Altobelli made a point—and it is a point that has sprung out at me as well—about why that section is there at all when the need to protect children from harm is already in the principles. It seems to me that that was already covered and that section 68F(2)(j) is not actually necessary when the protection of harm of the child is one of the principal considerations.

Mr TURNBULL—I think that was pretty exhaustively discussed this morning.

Miss Dowey—In the sense that an allegation, whether proven or not, is still a consideration under the principal considerations. It may even defeat the objective that it attempted to achieve.

Mr TURNBULL—In effect, the new paragraph (j) amends the old paragraph (j) by excluding ex parte orders from the orders that can be considered. Mr Cadman, in particular, discussed that this morning. It is pretty clear what the purpose of that is.

Miss Dowey—Yes, I understand the purpose of that, but is that purpose defeated by the principal considerations?

Mr TURNBULL—No.

Mrs HULL—The primary considerations? No. I would not think that at all.

Miss Dowey—It would seem to me that an allegation of violence has to be taken seriously, whether it is proven or not—

Mr TURNBULL—Yes, it has to be taken seriously.

Miss Dowey—in terms of protecting the child from harm.

Mr TURNBULL—We drew a distinction this morning. The court must take into account an allegation of violence, but, plainly, in acting fairly, it must also take into account the response of the other party. However, where you have contested proceedings in another court and a family violence order has been made, the court can take account of that order because it can say, 'Well, both sides were heard.' That does not prevent a party from saying that an earlier decision was wrong, that circumstances had changed or whatever, but I think you would agree that it is a finding of a very different character than an ex parte one.

Miss Dowey—Is it conceivable that there could be an unintended consequence, whereby people who have allegations of violence made against them would not take that to a contested proceeding or may be advised legally not to do that because it would mean that paragraph 68F(2)(j) would not apply to them?

Mr TURNBULL—No. Dr Altobelli said the contrary. He said that this would encourage people to get final orders.

Miss Dowey—There is a potential contrary consequence whereby the person seeking the order takes it through to final contested proceedings. There is a reason beyond anything to do with children or beyond anything to do with the violent situation whereby they bring in the considerations of potential children's proceedings with respect to how they would conduct the violence proceedings.

Mrs HULL—Could we take that on board to determine whether there would be a problem? You are obviously indicating that you think there could be a problem.

CHAIRMAN—We will certainly look at that. Thank you very much for appearing at incredibly short notice.

Miss Dowey—Thank you.

[2.23 pm]

ADAMS, Ms Rene Marie, Coordinator, Indigenous Women's Program Unit, Women's Legal Services New South Wales

HAMEY, Ms Dianne Patricia, Supervising Solicitor, Women's Legal Services New South Wales

MIFSUD, Ms Karen, Supervising Solicitor, Domestic Violence Advocacy Service, Women's Legal Services New South Wales

WONG, Ms Jennifer Louise Lai-Wah, Supervising Solicitor, Indigenous Women's Program and Walgett Violence Prevention Unit, Women's Legal Services New South Wales

CHAIRMAN—Welcome. Do you have anything to add to the capacity in which you are appearing?

Ms Mifsud—I am the supervising solicitor for the Domestic Violence Advocacy Service, which is a part of Women's Legal Services NSW.

Ms Hamey—I am also a supervising solicitor at Women's Legal Services NSW. We incorporate a number of different programs, including the Domestic Violence Advocacy Service and the Indigenous Women's Program Unit, and we auspice violence prevention units in Walgett and Bourke. So we have representatives from different parts of our particular service here today.

Ms Adams—As well as coordinator of the Indigenous Women's Program Unit of Women's Legal Services NSW, I am also coordinator of the Bourke-Brewarrina Family Violence Prevention Unit.

Ms Wong—I am a supervising solicitor for the Indigenous Women's Program, the Walgett Violence Prevention Service and the Bourke Violence Prevention Service, which are all auspiced by Women's Legal Services NSW.

CHAIRMAN—Although the committee does not 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. I would like one of you to make a brief opening statement for about 10 minutes on behalf of the four of you, and then we will ask you some questions.

Ms Hamey—I thought I would give a general overview of what our service does and why we have come to this forum today to give evidence before you. As I have indicated already, we have a number of different programs. In any one financial year we have about 20,000 client contacts throughout New South Wales. We are a community legal service and we provide legal services to some of the most disadvantaged women in New South Wales. Our priority groups include

Indigenous women, women from culturally and linguistically diverse backgrounds, women with disabilities and women who are victims of domestic violence.

We operate telephone advice lines both within Sydney and in rural areas. We have a dedicated Indigenous women's contact line and we also offer a number of casework services, including representation in local courts in apprehended violence order proceedings, some family law and a variety of other casework, including substantial victims compensation claims for sexual assault and domestic violence. We also provide community legal education throughout New South Wales to women individually and to community service providers. We also conduct advice clinics in the areas that we go to around New South Wales. Between the different programs and services that we provide through the different bodies in our organisation, we travel to some of the most disadvantaged and remote areas in New South Wales, particularly to provide services to Indigenous women.

We come today to raise some of the issues that we have with the exposure draft. We acknowledge that the exposure draft has tried to incorporate changes that reflect the impact of domestic violence and family violence on children and their best interests. We have some concerns with the terminology and language and how the legislation is drafted, and maybe it could be reworded and mixed around a little bit more to reflect the best interests of the children as being the primary consideration to start with when talking about the meaningful involvement of parents in children's lives. We come from the point of view that it would be a good thing if parents could work together to work out good arrangements for children. We have concerns that, because of the way things are worded in the exposure draft, there will tend to be a perception—which may then become a presumption by individuals, if not the court—that there will be more or less equally shared care, even though that has been knocked on the head in the past.

The reason we have concerns about that is that we believe violence is not acknowledged sufficiently in relation to the proposed family relationship centres and the requirement to attend mediation prior to court. It has been shown over and over again in research that many women do not disclose violence. It is particularly important to look at what disclosure of violence happens in Indigenous culture and the impact that that will have. We are concerned that, because it will be so difficult to get to court, women who are victims of violence may well end up agreeing to arrangements that are not safe and are not appropriate for children in the circumstances.

A lot of our concerns are centred around violence in dealing with that process. It seems to me that if women have to go to a family relationship centre for mediation, or to get some certificate saying that they are a victim of violence, it is talked about in a context of having reasonable grounds to show that they can bypass that mediation process. But that is not defined; it is very much open to interpretation. There are a variety of dispute resolution processes and it is not being described in the legislation as to which one would be followed. I think there needs to be substantial training in relation to people working in the family relationship centres to pick up what goes on and the subtleties surrounding domestic violence and victims.

We are concerned that there has not been a real acknowledgment of the importance of how legal aid conferencing works. For example, in New South Wales if a victim of violence is going to go to mediation then that is a preferable process, because most of those proceedings in legal aid conferences do have an independent mediator appointed. I have been in those conferences myself and the mediators do run the show. The solicitors sit there and the mediator very much

talks to the individual clients. The clients then have an opportunity to speak to their representatives outside of the room, but still there, and many matters are actually resolved if the parties are willing and it is suitable at that stage. I think that offers better protection for victims of violence than the proposed family relationship centres do. Legal aid conferencing is even being made available to parties who may not necessarily satisfy the criterion of a means test simply because they know that it is a good process. So we are concerned about the legal representation side of the family relationships centres.

We are concerned about what happens when someone goes to court at the first stage if they have to show the court that there was violence, and that is why they should be there in the first place. It seems to me, from the way things are at the moment in the exposure draft, that it could well end up that the first thing a victim of violence has to do when they get to court on the first occasion is to justify their existence. To me that perpetuates why they are there in the first place—that they have to deal with that violence and the perpetrator, and convincing someone in that first stage at court that the violence actually occurred or that there is reasonable grounds that they brought—

Mr TURNBULL—This is during the original dispute resolution?

Ms Hamey—Yes, and I am not sure if legal aid, for example, would be available for that process.

Mr TURNBULL—Are you saying that, in circumstances where there has been domestic violence, the mediation process would always be unsuitable?

Ms Hamey—No, I am not saying that.

Mr TURNBULL—You said earlier that it would always be the first step then.

Ms Hamey—No. For example, at the moment family relationship centres do not have legal representation.

Mrs HULL—No.

Ms Hamey—For a lot of people that may well be a good thing. But I am saying that a lot of women will not disclose domestic violence if they realise that, rather than what a violent father might propose to them in a family relationship centre, the alternative is to go to court and, on the first occasion, have to say why they are there. Then they will end up back in the family relationship centres looking at arrangements where they are victims of violence.

Mr TURNBULL—Are you saying that women would be reluctant to disclose violence in the family relationship centre environment?

Ms Hamey—They may well be.

Mrs HULL—But then wouldn't they be reluctant to disclose it absolutely anywhere?

Ms Hamey—They would be reluctant to disclose it at court if they have to deal with the perpetrator on that first occasion, because they have not had anyone there as an independent person who is supporting them to actually talk through those issues and deal with that in mediation.

Mr TURNBULL—So what do you suggest?

Ms Hamey—I am suggesting that there should be legal representation available for people, if they choose to have that, in a mediation context, because it works in legal aid conferencing. As I have said, my experience is, in doing those conferences, that the mediators do run the conferences, they do speak to the clients and the clients speak to each other, but they have that added protection of knowing that there is someone there who is with them to help them if things start to get difficult in terms of intimidation. Violence is not something where someone is just hitting someone and it is clearly obvious to everyone that there is violence. There is usually a whole history with these people of intimidation, harassment and controlling behaviour, and that is what is concerning. In the legal aid conferencing context, having that legal representation in a mediation is good because it helps to balance up the power imbalances.

Mrs HULL—Can I just suggest that you appear to be assuming that this is all taking place with the partner. There is a process whereby a person could enter a family relationship centre alone, on their own, and get themselves some advice. They are able to put on the table the fact that they do have concerns and they are a victim of violence. There is a proposal for a whole new process to take place so that, if and when that presents a problem, they are referred to a different stream. My problem is that you are taking it from the assumption that we have to go and sit at the table regardless of the fact that there might have been domestic violence or some such thing taking place. I am saying that there is a procedure of administrative advice and assistance prior to that taking place.

Ms Hamey—Mrs Hull, if that is how it works out, that is a good thing.

Mrs HULL—That is the intention.

Ms Hamey—I am not saying that is not appropriate; I think that is a good thing. However, it is not clear how it will work when it gets to court and what the court will be expected to do with matters that come before it where there is a victim of violence.

Mrs HULL—And I think that this is a very valid concern, and one that we should take on board. We should ask: how do the activities, behaviours and actions of the family relationship centres—I have said this before in the forum today—interrelate with what happens with the new changes in the family law system, and how do they interrelate with one another? That has to be far clearer and we have to determine that as well. What I was trying to say this morning was that you cannot look at the family law court process in isolation as a singular item; it has to take into consideration what has happened on the pathway before reaching the family law court process. I take that on board and that is something that I have been having discussions about over every break that we have had during this hearing. It is the workings and the operation of the family relationship centres that we need to home in on to understand how they all interrelate.

CHAIRMAN—I understand what you said about the need or the desirability for legal advice but, while it might be all right for your legally assisted clients, there a lot of people out there who are not eligible for legal aid. If it becomes seen as being normal to have legal representation at these events, either costs will be built up for non legally assisted people or some people will not be represented and other people will be. Do you have a comment to make on that? As a lawyer, any need for extra lawyers is music to my ears!

Mrs HULL—But not to families who break up.

Ms Hamey—Remember, we are not in the private sector.

CHAIRMAN—But, as elected representatives, we want a balance. I know everyone wants a balance. The question is: where do we draw the line? I am interested in your view on what I just said about (a) built-in costs and (b) some people possibly being unrepresented.

Ms Hamey—That is always a concern. At the moment the vast majority of parents we never see, and I am certainly of the view that that is a good thing. Most of them have tended to work things out and I think that will continue without anyone going near a family relationship centre. If going there does help them to sort something out a bit better, that is a good thing too and it is good to have that opportunity. In terms of the representation, it is a dilemma for me as well in that it is clearly unfair for one party to be represented and one not. I appreciate that. If there is a significant power imbalance for various reasons or if one parent—it could be either parent—is clearly unsuitable for all sorts of reasons as the history shows, that is not appropriate in that sense. Ideally, I would like to see money available, as there is in legal aid conferencing, to facilitate that sort of process in family relationship centres. That might be an unrealistic expectation.

Mrs HULL—I cannot help but comment on this. After visiting every state in Australia, having 25 public hearings with 2,000 private submissions and going through every one of those, without doubt I can say on the record here that, whether their cases were considered to be arbitrated successfully or unsuccessfully, there was an overwhelming desire to take the legal profession away from the process until such time as things could not be worked out. That is the entire purpose of trying to get people to assume the responsibility of their roles and not divest it to other people. Without doubt, even those people who felt that they had a successfully arbitrated matter would have preferred to have done it without legal assistance.

Ms Hamey—If they could achieve the same outcome.

Mrs HULL—Yes. They felt they had no choice because it was an absolute implication and assumption that you must go off and get this amazing legal advice which only led to the deterioration of their discussions because no longer were they relating one on one; they were relating through other people. That was overwhelmingly the case. I cannot remember one case where anybody did not think that. I must make this clear: that was the entire intention of the process. We would liked to have removed the legal fraternity. We recommended a tribunal with no legal representation, except where a tribunal sought it and then they would have a pool to choose from. I would hate to think that we would consider going backward and introducing legal representation at family relationship centres which are supposed to get people talking to one another, rather than through a legal representation. Those people who cannot talk to one another

will get assistance and the referral advice that they require in order to deal with their specific situation.

CHAIRMAN—Mr Murphy has some well-publicised views on judges and the legal profession. Do you have a comment on this particular point?

Mr MURPHY—No.

CHAIRMAN—That is the shortest answer he has ever given.

Ms Hamey—I would not like the committee to think that I advocate that the legal profession must be involved. I work in the community legal sector; I am not a private solicitor.

CHAIRMAN—We are not suggesting that.

Ms Hamey—None of us want to see any client having to spend thousands of dollars on legal fees. That would be absolutely horrendous.

CHAIRMAN—We do not see you as an advocate for the lawyers' union.

Ms Hamey—No, we are not. Mrs Hull, if that process works well, we just have concerns about the fact that there is a lot of nondisclosure or underdisclosure of violence. That needs to be teased out really well in the family relationship centres so that people are not entering into unsafe arrangements for themselves or for their children and that they are directed in the right place. That is what we are on about, and how that fits with the Family Court.

Mrs HULL—Absolutely. We would be concerned about exactly the same thing. Thus, the actual guidelines for family relationship centres are going to be critical.

Ms Hamey—We have particular concerns about how that will actually work for Indigenous women and people with rural and remote issues and Indigenous cultural issues. That is why we have the other speakers today to talk around that.

CHAIRMAN—Your organisation only represents women, by definition.

Ms Hamey—Yes, that is right.

CHAIRMAN—We have had a group called the National Network of Indigenous Women's Legal Services appear before us. We understand they have some connection with you.

Ms Hamey—Yes. I can explain that.

CHAIRMAN—They made a separate appearance and presumably their point of view is not necessarily the one you are espousing.

Ms Hamey—Maybe not, but we have not had the opportunity to talk to each other around the state at that level, given the time frame involved in doing this. We would like the opportunity after today to be able to put forward some written material as to what we would like.

CHAIRMAN—If you could get it in as soon as possible, that would be eminently desirable.

Ms Hamey—There is a Women's Legal Services Network, which is the national network around Australia and which incorporates the Women's Legal Services, which includes the community legal centres in each state. That is the national body; I know Ms Finn and Ms Fletcher represented that body here today. There is also a national Indigenous network for women's legal services. The Indigenous women in our program within our service in New South Wales is part of that national network as well.

CHAIRMAN—So essentially the National Network of Indigenous Women's Legal Services, the National Association of Community Legal Centres with the Women's Legal Resources Group and yourselves are all manifestations of the same group.

Ms Hamey—We are part of it but we are all separate entities and operate separately. But we come together as a network, just like the community legal centres around Australia have a national association of community legal centres. We operate in the community legal sector in that way.

Mrs HULL—If we ensure that the structure and the guidelines of the family relationship centres are such that there is protection for those who are hesitant to disclose family and domestic violence issues and if we ensure that that structure is clear and that it encapsulates and encompasses those concerns, would that relieve some of your—

Ms Hamey—It would in the common or garden situation if you are dealing with people on the east coast. I have concerns about how that will actually work in relation to Indigenous culture. Actually, I do not think it will really work.

Mrs HULL—We put that issue this morning and yesterday; we have talked about the same issues with all of the groups. Some of these people are going to come back to us but I asked the question: what should we embrace and how should we embrace it in order to ensure that family relationship centres, in the setting up of them, are aware of and are accommodating Indigenous culture in the way, say, mediation takes place with extended family members and not just between parents, bearing in mind that traditional Indigenous culture has rather extended families? Your views are very similar to those. They have certainly been put into the melting pot. There are programs in Queensland that are taking place—such as the peacemakers program, I think it is called—which are actually dealing with these types of issues. We will get some evidence or some indication from them as to how we might be able to do it.

Ms Hamey—Rene, do you have any comment on those issues?

Ms Adams—Not really. I think what you have just spoken about with regards to information from the national network as well as the other Aboriginal women's legal services are the same things as we are saying. There are the isolation factors involved in rural and remote New South Wales. Like Diane just said, the east coast is pretty well accessible but country New South Wales

is not in a lot of areas. There are cultural factors, like what the identified needs of the training for mediators will consist of with regards to communicating with Aboriginal people. Also, there is the question of understanding where they are physically located and understanding all the other issues like high illiteracy and numeracy.

Mrs HULL—Those issues have been significantly raised. I am very well aware of the peacemakers course in Queensland that does training and mediation too.

Ms Wong—The question I would be putting about the Women Peacemakers Program in Queensland is whether some people who are trained in that course would be Aboriginal. At the moment there do not seem to be any provisions to encourage Aboriginal people to be mediators within this program. You are looking at people who are tertiary qualified and there are not many Aboriginal people who attend universities. There are great courses like at Tramby College in New South Wales, but that course will not be sufficient to make someone tertiary qualified in order to obtain a job as a mediator.

In terms of providing a mediation service for Indigenous communities, it would be much more ideal to have an Indigenous mediator, but there do not seem to be any provisions about employment standards for mediators in the current proposals. Also, what happens if you cannot get an Aboriginal mediator? What will be the cultural appropriateness of the mediators who will be working in the centres and will they have had cultural appropriateness training or any experience dealing with Aboriginal communities? Encountering the legal system is quite problematic for Aboriginal people. There need to be certain sensitivities and understanding in terms of language and ability to speak up for themselves and feel confident in talking. I am not saying that there needs to be a solicitor but we run a statewide telephone advice line and often for the women who ring us we will be their only interaction with any lawyer. They will be totally on their own because there is a lack of services or they are not eligible for legal aid or they have conflicted out and there is no other private solicitor in the community who will take on their matter.

Ms Adams—I have a further point on that. With our Indigenous women's legal contact line, we Aboriginal women actually take the calls from Aboriginal women throughout the state, because also being Aboriginal we know the best way to get the full story. Otherwise they only tell you little bits of the story and you are expected to read between the lines. This is how it works well for us and our women. We are the vital link between our people and our solicitors who are working for and on behalf of our women.

Ms Wong—So we have an Aboriginal woman who will answer the phone, talk to the client and then refer that person to me, or whichever solicitor is there at the time doing the advice line. That may be the only legal information that they receive before they go to court and they might not get someone who can interpret or adduce what their client is trying to say in the court arena because of the adversarial system.

CHAIRMAN—I apologise if this has already been answered in some way, but do you have the same criteria for eligibility for legal aid as, say, the legal aid office?

Ms Wong—No.

CHAIRMAN—You have a more generous approach. You mentioned the adversarial court processes. Have you had a chance to look at schedule 3 of the proposed bill? Take the question on notice if you cannot give me an answer straightaway, but do you think the changes will make any difference in the way family law trials are run? Do you think it is desirable to place so much more emphasis on judges' involvement and control of cases? In particular, I draw your attention to 60KD, where it says:

The court may exercise a power under this Division:

(a) on the court's own initiative;

Do you see that as being a good thing or a bad thing?

Ms Hamey—You are talking in relation to the pilot Children's Cases Program that is running in Parramatta and Sydney family courts. I think schedule 3 is about more active case management by the judge, yes. That is based on that.

CHAIRMAN—This is division 1A. You may like to have a look at that and come back to me because we would very much value your view about whether these powers being exercised on the court's initiative are a good thing and whether or not they will improve how trials are run. This is not the way that traditionally we in Australia have done things, but that does not mean we cannot find better outcomes.

Ms Hamey—No. It is less adversarial. To start with, the pilot project in the Family Court in New South Wales was called the less-adversarial project for children's cases and it has become known as the Children's Cases Program. Essentially, what is in that schedule encompasses the principles that underpin that pilot project. I know a number of people who have been involved in that pilot program in New South Wales and legal representatives. They have spoken very highly of it. It seems to have been, in terms of clients as well, quite successful, particularly in Parramatta. Parramatta Family Court does have a lot more of the children's cases than the Sydney Family Court registry does. In relation to dealing with children's matters, I do not have a problem with it being a little more inquisitorial, which is where the judge is much more active, stepping away from being the judge and into what is essentially a mediation role, through the court process as it needs to be.

CHAIRMAN—Almost like Bali.

Ms Hamey—It is not quite there, fortunately. If anything can be done to shorten the court process for everyone involved, but particularly where it involves children's matters, it is a really good thing.

CHAIRMAN—How would you see this impacting on the role of solicitors and barristers in those proceedings?

Ms Hamey—The solicitors are involved in the proceedings. From my understanding—I have heard this second-hand—most of the cases in that pilot project have had legal representation or there has been a legal representative involved. It could be that there is a children's representative who is obviously paid by legal aid and one or both of the parties have legal representation, which

may or may not be legal aid. Some of those matters can go to hearing, but the less adversarial way of doing things and the active case management through that process have refined the issues so that there is still a role for legal representation—let us say, the skill of a barrister at that point. Usually with those matters there are really complex issues involved.

CHAIRMAN—You seem broadly in favour of this approach of judges doing this. How would you feel if a non-judicial officer like a registrar were making these decisions in lieu of a judge?

Ms Hamey—In the system already there is a judicial registrar who does make significant decisions particularly in interim proceedings.

CHAIRMAN—No, I am more referring to non-judicial officers.

Ms Hamey—You are talking about what were the deputy registrars. I suppose I have not really given that a lot of thought.

CHAIRMAN—Could you maybe take that on board and come back to us on it?

Ms Hamey—Yes, we will address that.

Mr MURPHY—You mentioned in NNIWLS's submission that as a result of the limited time and lack of resources in your centres your submission is necessarily able to raise only key issues of concern. I am pretty impressed with the 20 pages of attachments addressing those issues.

Ms Hamey—That is from the national network, yes.

Mr MURPHY—I am also cognisant of your reference to the fact that you have provided responses to the *Every picture tells a story* report. Moreover you make this point:

> We believe that clear and prescriptive changes are necessary to ensure that greater weight is given in family law decision making to the need to protect family members from violence and abuse.

You go on to also cite your comments on the government's discussion paper, *A new approach to the family law system*, for the introduction of the New Zealand Guardianship Act model. Not wishing to make a rod to beat our own back, because we are not short of reading material, is there any value to the committee and this inquiry of your making available both those submissions to the committee?

Ms Hamey—The submissions to the original inquiry?

Mr MURPHY—Yes.

Ms Hamey—We are happy to make those available to you.

Mr MURPHY—I suppose I am asking whether you think it could be useful for the purposes of this inquiry. As I said, I am not making a rod to beat my own back or the committee's back, but I am cognisant of the fact that, like everyone else, you have prepared this in a short time

frame and you have addressed the key issues. Perhaps there is something there that might need to be looked at by the committee.

Ms Wong—Are you talking about the submission from 2003? The Women's Legal Services and the national network submissions are available on the internet now.

Ms Hamey—In relation to our own body, the Women's Legal Services NSW, whilst the national network do submissions to each of these things, as we do, we come from the perspective that many of our arguments may be similar, but we try to draw on our experiences within New South Wales and Aboriginal communities in New South Wales and what we have experienced. That is why we do that. I think it could be useful, because there are many things we could say about the exposure draft today if we were able to that we may not necessarily be able to address in full. Some of those things come back to what was in the submissions to the original inquiry.

CHAIRMAN—If you would like to say anything further, feel free to send us something.

Ms Hamey—Sure. One thing that I very strongly feel is that we acknowledge the increased reference to family violence in terms of the objects and the principles. I strongly believe that the new principle about family violence should be put into one of the objects as well. With regard to the way things are framed at the moment, with the objects and then the principles, the inclusion of the object about parents having a meaningful involvement in kids' lives—and I will have something to say about that in a minute—may be given greater weight, or be seen as more important, than the right of a child to protection, to safety or to not being exposed to family violence in some way. We would prefer to see that up there as an object as well. I note that the provisions in those principles and objects very much reflect the language of the United Nations Convention on the Rights of the Child and none of those things are given greater importance or weight in that convention; I think they have equal weight.

In relation to parents having a meaningful involvement in children's lives, I think the wording should be turned around. Where it talks about children having the benefit of parents having a meaningful involvement in their lives, it should start with 'if it is in the best interests of children'. I note that the object about meaningful involvement is phrased in a different way from the new provisions in the first tier of what were the section 68 factors. So looking at the best interests of the child, where it talks about those two principles together as being the first tier, the first one says that children have the benefit of meaningful involvement by parents. That is a much better and clearer way of saying it than is expressed in the objects, because even if it is not intended to be like that, the way it is phrased could lead to a perception that it is about parents' rights. I know that is clearly not what is intended, but I feel that the general focus of the community will be on parents' rights. I think it needs rephrasing.

There are also issues in the best interest factors in the second tier where you are talking about looking at final AVOs. They could be called anything in another state, but in New South Wales they are apprehended violence orders or contested violence proceedings. That does not fit very comfortably with the first tier provision about looking at family violence as a first tier stage. I have real concerns about what could well be a lack of recognition of what really goes on in relation to getting apprehended violence orders that are not contested and the philosophy underpinning the Crimes Act in New South Wales, for example, that deals with the provisions on apprehended violence orders. It very clearly makes provision for AVOs to be made by consent,

and it incorporates a number of provisions which are the objects and principles of an international treaty on the elimination of violence against women.

In any case, when you are looking at family law in the court when dealing with family violence issues or allegations of family violence, the current situation is that they have to go through and show all of that again anyway. The provisions of the justices act or the evidence act—I cannot remember what it is now—state that the fact that there is an interim, final, contested or whatever AVO, or even if there is a conviction, is not in itself proof of anything. If you are in the Family Court looking at the Family Law Act, you have to go through the circumstances and prove them all again anyway. Obviously, you are not proving a crime beyond reasonable doubt, but you still have to prove on the balance of probabilities that those things happened.

If you are restricted to looking at and acknowledging that only contested AVO matters or final orders are important, it is just not acknowledging the subtleties and complexities surrounding getting an AVO. It can take time. There could well be an urgent ex parte interim AVO order made for very good reason and the guy does not turn up to court and they cannot serve him, and that situation goes on and on. If that matter ends up in the Family Court and they say, 'We're not looking at that,' I think that is clearly wrong. It is not acknowledging what is really going on.

Also, in criminal matters, there will automatically be an AVO issued and it is by consent because the defendant is not disputing the AVO being made; they have a criminal charge against them. What happens when that criminal charge has not been dealt with on a final basis? There is an interim AVO order. Does that mean that that is not relevant? What happens when you get to court? I have had experience in a contested, full-on residence matter in the Family Court with two Tongan people, where there were issues around having interpreters and being able to understand what was going on in the court when they were doing the AVO proceedings. There was a prior serious assault conviction against the husband for assaulting his wife and there was substantial evidence about what had been happening in the meantime. But when the apprehended violence order proceedings finally ended up in the local court, the husband ended up giving undertakings and my client thought that that was an enforceable order. When it got to the Family Court it was a part-heard matter. Then, at the end of the part-hearing, the judge actually made injunctive orders which reflected what would have been in the AVO orders, because she had clear concerns about the safety of my client. I wonder how that fits with the provision in the 'best interests' second tier that seems to be trying to restrict that. I think that is not right and it does not reflect what really does go on.

Mrs HULL—We will take that into consideration. You have raised some of the issues that many of the legal people who have appeared here have raised under section 60B, 'Objects', and whether or not the best interests of the child should be put as the basis in the beginning and then everything would be under those three objects. That has been one suggestion. Another suggestion that I have written down that I would make after having heard some of the things today is that we would include in section 60B(1)(b) the word 'safety', so that it says 'to ensure that parents fulfil their duties and meet the responsibilities concerning the safety, care, welfare and development of their children'. They are some of the things that have been raised here today that I have certainly taken on notice and the committee have also taken on notice to have discussions on. We are quite conscious of the fact that there are concerns that there not be

unintended consequences. I certainly appreciate your raising some of those issues to give us further things to consider.

CHAIRMAN—Thank you very much for appearing before us and for your frankness and openness. The draft of the proceedings will be sent to you for you to check. If you do get any other ideas you would like to share with us, please feel free to send them in, even though 15 July has been and gone—we are very aware of the tight time frame.

Ms Hamey—We would appreciate that.

CHAIRMAN—The committee will reconvene in Canberra at 9.30 on Monday, 25 July 2005. The committee issued a media release about those people who were gong to appear this week. We are still organising the program for next week, but we will have Catholic Welfare Australia, Family Law Practitioner's Association of Queensland, Shared Parenting Council of Australia, Lone Fathers' Association, Family Services Australia, Anglicare and the Family Law Council. We have tried to have a balanced series of witnesses and, of course, we will have to undertake our deliberations.

Resolved (on motion by **Mrs Hull**, seconded by **Mr Murphy**):

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

Committee adjourned at 3.11 pm