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

TUESDAY, 26 JULY 2005

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 26 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, Mr Kerr, Mr Murphy, Mr Price, Ms Roxon, Mr Secker, Mr Slipper, 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 9.02 am

BRYANT, Chief Justice Diana, Chief Justice, Family Court of Australia

CHISHOLM, The Hon. Richard, Honorary Consultant and Retired Judge, Family Court of Australia

O'RYAN, Justice Stephen, Judge, Family Court of Australia

CHAIRMAN (Mr Slipper)—I declare open this public hearing of the House of Representatives Legal and Constitutional Affairs Committee inquiry into the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005. The Attorney-General has asked the committee to examine the provisions of the exposure draft to determine if they implement the government's response to the report of the House of Representatives 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 on short notice and make submissions where possible. I welcome representatives of the Family Court of Australia, particularly the Chief Justice. Although the committee does not require witnesses to give evidence under oath, I should advise that these 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 have received your submission and it has been authorised for publication. I invite you to make a brief opening statement and then we can go to questions and have an exchange of views.

Chief Justice Bryant—Firstly, we thank the committee for the opportunity to appear before it. We come voluntarily, of course, because we hope we can be of some assistance to the committee. I should tell the committee why the three of us in particular are here. I would think that my appearance is self-evident. Justice O'Ryan is the chair of the court's Law Reform Committee and the Hon. Richard Chisholm, although no longer a member of the court, is on that committee and has been of great assistance to it.

CHAIRMAN—You cannot get too much of a good thing, Judge?

Mr Chisholm—Just cannot stay away.

Chief Justice Bryant—The responsibility for preparing the submission on behalf of the court was primarily that of the Law Reform Committee; hence, the three of us are here today. It is of course a submission of the entire court. We understand that there has been at least one submission by an individual judge of the court. I am not sure if there are any more. I know of one, and we are happy to address that, if you would like us to, when we come to the section on child related proceedings.

We are conscious of the limitations on the task of the committee—that is, it is not dealing with policy but rather the implementation and drafting of that policy. In our submission, we have suggested some changes to the drafting which we hope will be self-evident. We do not intend,

other than in passing, to spend any time this morning dealing with those matters, because we are assuming that they will be picked up by the drafters once the bill goes back to them. But, as we go along, I might make some reference to them. We think some of them are fairly self-evident and would just assist in drafting.

We have highlighted what we think will be some problems in implementation of the law and have made some comments about the likely effect on litigation itself. That does not necessarily go directly to policy, but we thought it important to bring to the attention of the committee what we see as some likely effects if the legislation were passed in this form and some concerns that we have about the structure, wording and complexity of the act itself as now drafted. I will start on that topic because we think it is an important topic.

I am holding up the most recent copy of the CCH Family Law Act, which has just been published—unfortunately, I suppose, for CCH because it looks as though there will be significant amendments and they will have to do another one. It is quite a large document. Those of us who practised in 1975 with the Family Law Act will recall that it was quite a thin volume and quite readable. We are concerned that, because of the amendments over the years to the legislation, a document which of all documents—perhaps of all acts of the parliament— should be the easiest document to read is one of the most complex, and this legislation will make it even more complex.

We think the whole structure of part VII, which is the part relating to children, needs some rewriting. I am conscious of the fact that the Family Law Section raised this matter with you as well. We really do think that it is a problem in its current form. There are some considerable complexities in the structure of it. It is quite difficult to find particular parts of the act that should be read together but are in different places. We like to think that we are quite good at reading legislation and finding sections, but there is no doubt that, in our committee meetings, we spent considerable time searching through to find sections that should have consistently been in the one place. We think there would be enormous value in trying to get part VII rewritten in a way that puts the relevant sections together and makes it a much more readable document.

I notice that, in their submission, the Family Law Section raised the fact that there are a large number of—I think they said 40—definitions in the sections of the act, which would probably also be better put in a dictionary section so that it is easy for people who are reading it to find what the definitions mean.

Mr TURNBULL—Chief Justice Bryant, I would like to ask you a question. You always have competing arguments in a legislative context like this. On the one hand, adding sections to an existing act means that the practitioners are dealing with a familiar document with sections that still have the same numbers as they had last week and so forth, even though there may have been some additional ones added. But over time that sort of incremental amendment becomes unwieldy, and then it is a big step to literally say, 'Let's sit down and write a new act.' Are you saying that the Family Law Act has got to the point where that really should be done?

Chief Justice Bryant—I think the Family Law Act has, but you could confine it to part VII. I suppose that, really, part VII is the most complex part of the act so in a sense you are talking about a significant rewrite. But I do not think there is much doubt, Mr Turnbull, that it has got to

that point. When you have section 65DAC(1) through to 65DAC(3) and so forth, it is just getting quite unwieldy.

Mr TURNBULL—It is no match for the Income Tax Assessment Act.

Chief Justice Bryant—It might be running a close second. But apart from that, even if you were not going to rewrite it completely, there are parts that could be better placed. For example, in the middle of parental responsibility and the factors that the court has to take into account in determining what is in the best interests of the child, there is a big section on child maintenance, which just does not sit well there at all. It could be put somewhere else. My first preference would be to rewrite the whole act; my second preference would be to rewrite part VII in a better way; and my third preference, I suppose, would be that we fix up part VII so that it is a bit better, and taking out the maintenance section and putting it in a different part would be one of those suggestions. Richard Chisholm has some particular comments he would like to make about the way in which some of the sections are drafted, which we think might be improved as well.

Mr Chisholm—Thank you. This is a small point, and of course I do not know what is feasible for this committee's time and resources and so on.

CHAIRMAN—We are on a very tight time frame to report to the Attorney-General. He is very keen to get the legislation into the House. I agree with the Chief Justice in that, when you look at all the descriptions of the various sections, it has got to the stage where it ought to be redone.

Mr Chisholm—For my part I would assume that, if you are satisfied that there is some need for the act to be revised in a fairly thorough way, you might usefully want to say that, even if you yourselves are not in a position to do it. I want to give one example of the kind of simplification that I at least have in mind—that is, section 60B(2). I am not sure whether you have that handy. If you look at paragraph (b), you will see that it says, 'The principles underlying these objects are ...,' and then there is (a), and then there is (b), which says that 'children need to be protected from physical or psychological harm caused, or that may be caused, by ...', and then there is (i) and (ii).

My own view is that it would be possible and desirable to amend that by simply saying, 'Children need to be protected from physical or psychological harm,' and then you would delete the rest of the words and substitute the words, 'from exposure to abuse, neglect or family violence.' It seems to me that those words are easy to understand and would comprehend everything that is in subparagraphs (i) and (ii).

CHAIRMAN—You are suggesting that those words would not alter the meaning?

Mr Chisholm—I am. Of course, one could have a debate about those particular words—for example, 'exposure to abuse.' 'Abuse' as a verb is defined in the act in a somewhat narrow way, so I have slipped in 'neglect' as well, and of course one might argue about whether that should be there. So there could be a lively discussion about the fine detail of that.

I want to use this essentially as an illustration of the fact that that fairly simple phrase, 'from exposure to abuse, neglect or family violence', could substitute for what is in my view a

complicated paragraph (b), which has these awkward phrases like 'caused', or 'that may be caused', and then breaks up into two parts. Looking at that, it may not be very difficult to understand what is there, but the cumulative effect of a lot of very complicated provisions broken up into parts (i) and (ii) makes the whole thing less easy to grasp. A simple and forceful phrase, such as the one I have suggested, would make it apparent at first reading what this bit of the act is all about. My general argument is that, if that sort of exercise was carried through, then the effect of the act on the reader would be likely to be much more powerful. You would have an act where, even at the end of long, trying day, you could work out what it means. It does not hit you in the eye in that way.

CHAIRMAN—It is not exactly a masterpiece of drafting excellence, is it?

Mr Chisholm—I merely put that as an illustration of an argument for simplification. Mr Chairman, you made a remark but I didn't quite catch it.

CHAIRMAN—I said that what we see before us is not exactly a masterpiece of drafting excellence.

Mr Chisholm—Yes. While I am on this, can I say something about section titles. I think you will find a little one-page document attached to the end of the speaking notes document. I only put this is in writing to save time. When I was looking at the headings, or the section titles, it seemed to me that some of them were written in a curious way. I have tried to indicate what the problem is. It is, I suggest, that section titles should not attempt to actually state the law but indicate the subject matter or general import of the section. For example, section 10C says, 'Communications in family counselling et cetera are confidential.' That is the statement, which is like a statement of law. Then of course if you look at the section itself you find that they are only sometimes confidential, or confidential to some extent. It seems to me that the section title would be better expressed something like, 'Communications in family counselling to be confidential', or 'The confidentiality of', or something like that. There is a series of section titles which are in the form of actually stating the law rather than telling you what the section is about.

Mr KERR—That could be misleading—greatly misleading.

Mr Chisholm—Indeed. And lawyers being what they are, there could be a problem of competition between the section title and the section itself to determine its meaning. Whereas the title, however phrased, should say to the reader, 'This is what the section is about,' then you look at the section to find out what the law is. Without wishing to labour that point, in this document I have indicated the sections that I think—

CHAIRMAN—That would be quite uncommon, wouldn't it, for this to appear in this way in legislation?

Mr Chisholm—Indeed. In my little paper I have given various examples of satisfactory headings. For example, 'The Court may', or 'The Court to', or 'Rules not to apply'. If you skim through the act, you see lots of perfectly satisfactory headings and these are the exceptions. I think perhaps I do not need to say more about it. I have given some suggestions as to how to fix the sections that I have indicated. There are one or two other sections where I have suggested

some fiddling with the section title. I would be happy to speak to that if anyone wants me to but I would not suggest that we take time with it.

Chief Justice Bryant—Section 65K is a very good example of that. The heading says: 'What happens when parenting order that is or includes residence order does not make provision in relation to death of parent with whom child lives', which is a very long heading indeed and, again, tries to state the law. I do not know whether this is helpful to the committee, but I suppose it depends upon the time frame in which the government wishes the legislation to be passed. If this committee thought it was useful for at least part VII to be rewritten but there was no time to do that—and I think I am, to some extent, an apologist for the drafters; I am sure it must be difficult to draft not knowing exactly what legislation will ultimately be the legislation that the government wants to pass, so in a sense I can see why they had some difficulties with it. If the legislation were passed in this form if that became necessary, it might be easier for a fairly quick rewrite, because everyone would know what the legislation was and there would not be any jurisprudence about it at that point. So, if it is to be rewritten after it has been passed, it would be useful to do that as soon as possible before there is any jurisprudence about the meaning of words.

CHAIRMAN—I think there will not be time to rewrite the bill before it goes to the parliament. But, without wanting to pre-empt anything the committee might decide, I hope that in our report we would recommend that resources be allocated to redrafting the act, as it will then be, to update it, given the fact that it has been around for a long time and has been changed in an ad hoc way.

Chief Justice Bryant—I think the point is: sooner rather than later so that we do not get jurisprudence about the meaning of words, which then might create some complexity about changing them. That would be useful.

CHAIRMAN—Sure. Mr Turnbull has a very interesting point that has come up in evidence over the last day or so.

Mr TURNBULL—A number of witnesses and members of the committee have expressed concerns about the reliance by the court on case law, which of course is fundamental to the common law tradition under which Australian law operates. The criticism seems to be that, notwithstanding that the cases are published in the law reports and so forth, they are much less accessible to the public than a statute is, even a statute as complex as this one. The issue was raised as to whether we should codify the law more so that the statute required in order to understand the way the law and the statute operate meant that less reliance was needed on case law. That is the proposition that was made. The question of accessibility is a fair one. I remember many years ago practising in the defamation area in New South Wales. There was a cult of unreported judgments, which only the in group had access to. That was an extreme case and, of course, with the internet and so forth case law is readily available. Nonetheless, it is difficult for lay people to pick it up. Before you answer the comment on that, is there something to be said for simplified texts on family law being made available? Does the answer perhaps lie in textbooks or commentaries that are simple and accessible? There it is; how do you react to that?

Chief Justice Bryant—I will answer for myself first of all, if I may. As to accessibility, I agree with you. Certainly in the last 12 months that I have been Chief Justice I have been concerned that not enough of the court's first-instance decisions are being reported either in hard copy publications or on the AustLII site or on the court's web site. There was a feeling that unless decisions were of some jurisprudential value there was no real value in reporting them. Personally I do not agree with that; I think it is an area in which the public do need to see the decisions of the court. I have implemented a policy which I cannot say has been as successful as I would like it to have been but I am monitoring it to make sure that we get as many cases as possible reported on the internet and on AustLII. These days most people do their research on the internet, so it is really important that we get the decisions there. That is the first thing about accessibility, and I am monitoring that. There are not as many as I would like to see.

We have a problem with the anonymisation of decisions. That is one of the issues for us. Section 121 of the act prevents publication which would identify parties or witnesses and so forth. There is a good argument that it certainly does not apply to reported hard copy publications and it arguably does not apply to cases put on the AustLII site. But in relation to children's cases we have taken the view that there is a bit of a privacy issue because friends of schoolchildren can come along and do a Google search and then get access to their friends' parents' cases. So we are mindful that there is now a bit of a privacy issue. The cases need to be anonymised—

CHAIRMAN—Is that a word, Your Honour?

Chief Justice Bryant—It seems to have become a word.

CHAIRMAN—It is a word now.

Chief Justice Bryant—It probably was not a word 10 years ago, but it is a widely used word these days. It simply means that within the text we have to remove references to names, place names and identifying features, and the case names themselves have to be given some anonymity by letters. We all find that pretty frustrating because it is very hard to remember—there are a number of B and Bs and A and As. We are still grappling with the nomenclature. That is just one of the issues about making cases accessible but, notwithstanding that, we need to do it.

The second part of the question is: would there be any benefit in some quantification or simple texts? For my own part, the difficulty with all of that is that the very fact that the best interests of the child are paramount makes every case its own case. The reason that a lot of decisions have not been made available or accessible in the past is that people have thought that there is no real jurisprudential value in a single decision. I think that the value in a single decision is that people can read about a decision and then say: 'This is like my case' or 'This isn't like my case.' For my part, I am not sure that you can do much more than that.

If people had more access to cases and could read more of them, then they would get a feel for the cases and be able to ask: 'Is this case like mine or isn't it? Why isn't it? What are the things that the court takes into account?' To a degree, this legislation is trying to quantify as much of it as it can. But when the best interests of the child are paramount, it means that every case is decided on the facts of that case. That is the very advantage of the system that we have. The

other side is that it does not allow for a formulaic response to individual cases. For my part, the answer is to get as many decisions as possible out there that people can have access to and can see.

CHAIRMAN—We have questions from Mr Kerr and Mr Secker, but before we go there, we had a witness yesterday who said that there was nothing really wrong with the 1995 act; what was wrong was that 30 years of accumulated case interpretation was superimposed on that act, which in effect destroyed the ability of that act to do what it sought to do. We have had people suggest that we ought to somehow legislate away 30 years of case law, which I know is a bit dramatic. Do you have a view on that? The suggestion seemed to be that it did not matter how good the legislation was, the judges will interpret it in accordance with what they have done for 30 years. You have to be very precise in your legislation to offset the accumulated impact of all those years of interpretation.

Chief Justice Bryant—I have to say that I do not really agree with that. Perhaps I can explain it in this way: I do not think that applies in children's proceedings. There are very few cases that have precedent value. I can illustrate it in this way, I think: when the Federal Magistrates Court was being set up, we wanted to assist the federal magistrates by giving them a template for judgments, so we worked out some judgment templates. In a property judgment template for example, when dealing with what the law is so it is set out in the judgment, you would typically refer to some cases which had precedent value. In dealing with what the law was in relation to children's matters, I think there was one reference to B and B in our template, which only went back to the objects and principles. The section which dealt with the law referred to the act and not case law, other than that one instance. I think that is a pretty good illustration of the fact that, in fact, we do not rely on precedent value. From what I have read in the press and so forth, there seems to be a view that there is some inherent line, if you like, that judges take based on precedent. In my experience, that is not the case.

CHAIRMAN—Just before I call Mr Kerr, we also have heard it said that the Family Court operates in different ways in different parts of the country. For instance, we heard a good report and a bad report about the Family Court in Queensland. We had a good report about the Family Court particularly in Queensland where they encourage parenting plans, but in South Australia it is nowhere near as good, apparently. Also, there was evidence that, when people choose to take a child away from the locality where the child has been, the court will almost always order that the child be brought back for the proceedings but will not necessarily order the fleeing party, who has taken the child, to bring the child back to reside adequately close to the child's other parent so that the child can have meaningful ongoing contact with both parents. Do you have a view on what is the Family Court approach to those matters?

Chief Justice Bryant—That is a nice little potpourri of matters. As to the practice of law in different parts of the country, I think there have always been some individual differences. I am not sure that one should try to stamp them out or whether you should leave them. Over the years there might have been views that we should try and be more uniform. Uniformity is achievable sometimes but not always. There are different cultures in different places that you will probably never change, and it may not be desirable to.

As to comments about how the court operates in different places, I do not think that I can comment on a comment as broad as yours was. People have different views for being critical or

being supportive of decisions of the court and I am not sure that I could add anything useful to that. I think parenting plans, which you raised, are good examples of culture in some places. The court does not have a role in parenting plans; that is a matter for the profession, so it would be very much a matter of how the profession in different places used different things.

Relocation cases are the hardest cases that the course does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved; a dilemma is insoluble. They are the sorts of cases that they are. I think there is, generally, in interim proceedings where somebody goes away without permission with a child, a culture that they are to be returned to the place that they were until the hearing. In my experience that generally happens. There is a strong view that people should not be entitled to remove children unilaterally but, of course, when you have a full hearing about relocation, it is the most difficult area. I do not know how you resolve that dilemma other than in the individual case. As I said, every case will have in it a comment that these cases are quite difficult and really heart-wrenching.

Mr Chisholm—I agree with the Chief Justice, as you might expect. I just wanted to add something. That is, for my part I am aware of the sorts of comments that you refer to. I actually found it extremely difficult to think how the 1995 amendments were intended to change actual outcomes in particular cases. Although there is a lot of general comment about the court and of course a lot of people are dissatisfied with particular decisions, what I have never really seen is a comment that says, 'Here is a decision of the court in a particular case and the outcome should have been different.' If I ask myself, for example in relocation cases, whether the 1995 amendments intended to actually change outcomes, I am genuinely uncertain. For example, before the 1995 amendments, in relocation cases the court was torn between competing matters—to some extent, the right of the parent to leave, although in my view and I think in the High Court's view, that really cannot compete with the child's best interest, which is the paramount consideration. But in trying to work out what is best for the child, if the child is going to be living with a mother who, because she cannot relocate, may face poverty or loneliness or other difficulties, is it better for the child to be with a mother who is more able to cope with the child somewhere else, perhaps with family or a new husband or something like that, at the cost of a much-attenuated relationship with the other parent? They are terribly difficult issues, and I am sure that other judges, like me, really agonise about those cases. We groan, frankly, when a relocation case comes along because they are so awful and difficult. But, at the end of the day, we make the decision as best we can. We try to work out what is best for a particular child.

If I were deciding a case just before or just after the 1995 amendments, I actually would not know whether the parliament was telling me that the outcome should be different. The act could have dealt with that section head on and made a presumption about the outcomes of relocation cases one way or the other, in which case I would have known, but the combination of lots of general things, like the things in 60B, and lots of principles, combined with the paramount consideration principle, which in some sense seems to be central, leaves a judge ultimately having to do what is best for the child. So you get this odd situation where the legislation seems to be saying, 'This is important and we want something to happen,' and yet for my part it is not actually clear whether, in a particular case, the outcome should be changed. I wonder whether, a

few years down the track, people might look at this legislation in some respects and wonder about that as well.

CHAIRMAN—So what you are saying is that, if the parliament wants to change the law, it should do so clearly rather than vaguely.

Mr Chisholm—Yes, that is so—and it should really address the problem that, in these cases, if you have the basic proposition that the child's best interest is the paramount consideration, rather than some rule that says that children should be with their mothers if they are below age X or any rule at all, you have to look at all the evidence very carefully, take everything into account, weigh one thing up against another and try to work out at the end of the day what you think is best for the child. If the parliament says things like, 'Don't forget about this,' or 'This other thing is particularly important,' or 'Children have a right to be protected against physical harm or to have their relationships with parents and other people preserved,' while you say, 'Yes, I am taking those things into account; that is important,' and judges might say, 'Thank you for reminding me; I would have forgotten about those things,' at the end of the day the court is trying to do what is best for the child and it is not clear that the 1995 amendments are actually asking the court, when it comes to the bottom line, to do something different from that.

Mr KERR—I am reflecting on the modern language, 'child residence'—

CHAIRMAN—Weren't you the minister in 1995 responsible for those changes?

Mr KERR—Yes, with my colleague Michael Lavarch. I am thinking about using the more modern language of child residents in that these issues have been singularly difficult to resolve since the judgment of Solomon and are not going to get any easier notwithstanding whatever legislative formulae we prescribe. Coming back to the point that Malcolm Turnbull raised, I think the fundamental proposition that has been put to us is that in the Family Court jurisdiction the court—and the parliament—ought be open to a different approach towards judicial method, one much closer to the civil law tradition where case law is not routinely referred to by advocates or indeed reflected in judgments so, as in the civil law tradition, it is very rare to get a reference to any precedent: you go to the text, you address the substance of the matter and you certainly have to give reasons, but the fact that a statute, for example, is interpreted in a different way in a different judgment does not give an appealable ground.

This is completely different from the tradition in which we have grown up and been educated—as lawyers and advocates and then as judges—in the rest of the judicial system, and of course into the family law jurisdiction we tend to bring all those other traditions with us so that our first instinct, as advocates and practitioners, is to look at the text of the act but in a sense only as a vague starting point from which we then try to narrow down the judge's options by looking to those other judgments that have been had on a point to suggest to the judge that a particular course that might appear open on the statute is not open because of what His Honour So-and-So said or His Honour Such-and-Such said.

This is the judicial method that is commonly used across the rest of our system but in the area of family law, where essentially we are trying to set down social norms in legislation, there may be a case for a quite different approach. I think it is not something that has been given any large attention but certainly it has come through, particularly from people who have come from an

unrepresented litigant point of view, that they come into the court and then find, if the other party is represented, that they simply cannot be effective in an environment where this kind of tradition is dominant. They simply do not know what the ropes are or what the rules are. I appreciate what the Chief Justice has said—we can make them available on the Internet—but truthfully it took me several years of university to learn judicial method to a degree to which I became a sophisticated adept of the art to do this. The environment is such that increasingly people feel that they ought to be able to go before the courts and get a just outcome referential to the statute without this gloss on the statute, being a whole set of narrowings or widenings of the text encrusted on it by precedential common law techniques.

Obviously, this is not going to be the forum in which to resolve this but I am wondering whether any thought has been given to judicial method in the Family Court and whether anything would prevent further discussion of that. It would certainly confront the higher courts that have constantly approached appellate decisions on the basis of the idea that there must be judicial consistency across the board, that appealable error can be detected in the way in which statues are interpreted and the like. It may be difficult, but I can understand where people start from when they say in this kind of jurisdiction the normal judicial method that we apply in other forums simply is not appropriate. I do not know whether I am yet persuaded of that but I think there is an interesting discussion to be had.

Chief Justice Bryant—I actually do not agree with the premise behind what you are saying—that is, I do not disagree with what you are saying, Mr Kerr, but, rather, I disagree with the complaints that have been made. I simply do not think they are right. I would be interested if people had actually given you judgments and said, 'Look, here the court is relying on precedent,' because that is not my experience of what happens. Speaking for myself, in the four years I sat at first instance in the Federal Magistrates Court I hardly ever referred to a case in children's cases, because you do not. This is the area in which the statute is actually of such importance. You are required to go through the factors, for example, in section 68F(2). The full court has said on a number of occasions that that is what parliament said one should do in assessing the best interests of the child and that is what you see in every judgment. You do not see cases relied on for precedent value; you see the court doing exactly what you are suggesting it should do. My colleagues may disagree, but I doubt it.

I am aware of the criticisms. I have read them myself. I wonder where they come from. I think they come from the perspective that, in the end, there is no precedent value for saying what, in an individual case, is in the best interests of the child. My feeling is that people do not agree with the court's interpretation—that is, the individual judge's interpretation—of the best interests of the child. That is where the criticism comes from. I can give you a current example of that. I am certainly not being critical of the author, but I think it highlights the problem. There was an essay in the *Quarterly Essay* recently—and you have probably read it or been referred to it—by John Hirst, an academic who is very critical of the court.

I notice that Mr Hirst wrote an article in the *Sun-Herald* in Melbourne this week which highlights just this issue. He talks about his concern about allegations of abuse. He homed right in on it this time. His most recent article tempered what he said previously a bit. He said that an allegation of abuse had been made and there were some interim orders which protected the child. He was certain that at the final hearing, where the court would look at everything, the allegations would be established not to have been proven and things would be all right. He was critical of

the interim decision, however, and postulated that, really, we should have legislation that says that, unless somebody proves an allegation right from the start, there should be no change to the existing contact or residence arrangements.

That I think highlights the very problem. Where the legislation says the court will take into account the best interests of the child, that is what the judges do. They actually do what the legislation tells them to do. We have to protect the child. We appreciate that this might be trampling on the rights of a parent who is ultimately cleared of an allegation. We appreciate that it may not be fair to a parent. But, as long as the act tells us that we must do what is in the best interests of the child, that is what we have to do, having regard to all of the other things in the act. Yes, we will try to retain the relationship as much as possible and protect the child at the same time and we will have regard to the objects. But I think that is the problem as I perceive it; it is not in cases being referred to for precedential value. I think it is really a criticism about the court perhaps taking its responsibility to promote the interests of children to a degree that many in the community do not think it should be taken. That is my take on it, anyway.

Ms ROXON—I want to follow up on that particular point. In your submissions you seem to be very strong on the best interests of the child. There are actually things that you would like this committee to recommend that would improve that. In that defence you are not suggesting that you want the court to have some other obligation than looking after the best interests of the child?

Chief Justice Bryant—No, not at all. I know where Mr Kerr is coming from because I have heard that comment before, but it just is not the case that we rely on precedent value. One has to then reflect on why people are saying that. The reason, I think, is the concept of really giving significant weight to the best interests of the child, particularly where they are seen to be at odds with the rights of parents.

Mr Chisholm—Can I add that I completely agree with the chief justice's description. In my experience on the bench—and I had lots of children's cases, of course—it was, at a trial level, exceptionally unusual for anyone to cite any precedents. It was just a matter of reviewing the evidence and people arguing that, because of one factor or another, the result should be a particular outcome.

In particular, where one often had cases of a represented versus an unrepresented litigant, I cannot remember a case in which the represented litigant started citing cases. A barrister who did that might have got a fairly short shrift from a judge. I think it is probably true that people do cite cases occasionally. Sometimes litigants in person who have done a great deal of research and got cases off the internet want to point to factors that are similar to some decided case from 15 years ago and their own, but that is the exception that proves the rule, I think. At the appellant level it is a bit different. I am talking about the trial level—I could develop that, but I will not. At the trial level, it is exceptionally unusual for people to be citing precedents for the actual outcome of a case, saying, 'Because this case was similar to that, the outcome should be X.'

Chief Justice Bryant—My point, Mr Kerr, about cases being on the internet is that it is not for precedent value but so that people can look at a decision that has been made on certain facts and be able to say, 'Those are like my facts,' or 'Heavens, my case is completely different from that case.'

Mr SECKER—I notice, Honourable Justice Bryant, that you mentioned section 68F, and I wonder what your feeling is about the changes to 68F(2)(j) and how that would impact on any interpretations that a justice might make. Instead of it just being about a family violence order or an AVO, there is the addition 'if the order is a final order' or if 'the making of the order was contested by a person'. Not being a lawyer, I am not quite sure how subparagraph (ii) does not mean (i) plus everyone else.

Chief Justice Bryant—I do not know that we had anything significant to say in our submission about that. I appreciate why it is intended to be there. I think there is a concern in the community—at least there is concern expressed by some of the community—about family violence orders that are made by state courts in circumstances where there is not necessarily a hearing of both parties. Sometimes there are ex parte orders made and sometimes people consent to a final order being made without a finding on the facts, simply because it is convenient to do so and so forth.

Mr SECKER—Or they cannot afford to.

Chief Justice Bryant—Or they cannot afford to, yes. It is expedient to do so for whatever reason. I think the argument is that there should be caution about acting upon those orders per se. I personally have no difficulty with that argument. My own experience is that members of this court do look carefully at those orders to see how they were made. It would be most unusual, in my experience, for a Family Court judge to apply facts which might have been alleged in those cases without knowing whether those facts were proved. Even if there had been a hearing, those facts are not per se going to be relied on by the judge. The orders themselves have to be given some weight, insofar as they may already have some effect on the rights of contact, but there are provisions within the act which enable the court to make different orders and override those provisions, provided that there is an explanation. Again, in my experience, that has not been a problem. I do not think we had anything to say about it, because we do not really think that it is going to make much difference to the way things are dealt with at the moment. It makes sense, it does not offend me being there and if it makes it clearer then it is a good thing.

Mr SECKER—Many of the complaints we get as members of parliament are that court orders are not enforced. Whether that is true or not, I have heard plenty of evidence, so there must be a bit of fire where there is smoke. Yet the argument is that the Child Support Agency are bang onto them for getting the money out. Could you explain how that works, whether there is much effort put into court orders being enforced and whether there are different set-ups, shall I say, for how that happens?

Chief Justice Bryant—That is a really big topic, Mr Secker. I will try to deal with it, and my colleagues can fill in the bits that I leave out.

CHAIRMAN—If you feel at any stage that you would prefer to let us have something in writing rather than go into something at length while you are before the committee, we are more than happy to receive any information you may want to send. But, equally, feel free to answer that question now if you prefer.

Chief Justice Bryant—I am happy to answer because I think it really is a general question. The contravention sections are and have been some of the most problematic, and I think that is—

in part, at least—because they deal with a spectrum of contraventions. To start with, you can have an order for contact with a father that has a number of components to it. You might have four days every fortnight, half holidays and telephone contact—a range of things. You can have before you a contravention application which relates to one of those things. I have seen this often as I did a lot of contravention applications in the Federal Magistrates Court, so I am familiar with what comes with them. You might find a contravention where 90 per cent of the order is working perfectly and there is a breakdown with the telephone contact. That is one area.

That goes right through to the other end of the spectrum, which is where you have a parent who, for some reason, really is not complying with an order. We do not often see cases where a child is saying, 'I want to go' and the parent is saying, 'You can't go.' You do not see that; it is much more complex and subtle than that. There will be cases where the children do not want to go and the parent is not requiring them to go. It is never black and white, but they are the ends of the spectrum and you have everything in between. The compliance sections deal with the whole lot. There is the same system, at the moment, for dealing with the whole lot, and it seems to me that that is problematic. We can, in legislation, move the people at the 'lower end', if I can call it that, out into community organisations where they can not come to court but try to resolve their issues. Sometimes the issues come about because children change. An order is made, but children change as they get older and it does not always work. What worked yesterday does not always work today or tomorrow. We think we should be trying to get people to not come to court about those issues but go and try to resolve those issues.

I think we also have a good opportunity with this legislation to do something else which has been a bit of a bugbear of mine, which is that many people resolve disputes either by a judicial determination or by agreement on a particular day. They have a lot of personal issues between them; they resolve the issues on that day; they leave court with an order, which is often made by consent; but they are the same people, and so as soon as a problem arises their order is not necessarily the solution to all of their problems. The very issues that they had before arise again, and they have the same difficulty in sorting things out. The Family Court is looking at changing its child focused resolution processes. We are going to start to focus on some post-order interviewing with a family trained specialist with the same person. I think that is really important because, if people can learn to live with the orders that they have, then I think we will prevent many of the arguments about contravention.

That is dealing with the lower end of the spectrum, I suppose, and I think it is important to get those cases out of the system because they do, to an extent, muddy the water. What we need, I think, is a provision whereby people come to court for the serious cases and the court should impose penalties on them—and the act should enable those penalties to be imposed. I noted the family law section had a suggestion for a system along those lines, where someone could apply simply for compensatory contact, which I thought was perhaps one way of trying to do that. But that is the challenge: to keep the people who really just need some help to make the orders work better out of the system and to get into the system only those who really do need the imprimatur of the court to ensure that people comply with orders. That is our challenge. I do not know if you want us to deal now with the contravention?

Mr SECKER—No. I have only one more issue. Again, what we as members of parliament get is the complaint that one party goes to the court and lies through their teeth and there never seems to be any action on perjury or that sort of thing.

Chief Justice Bryant—That is certainly a perception that has been around for a long time. Lawyers all understand what perjury means. Interestingly enough, the court does send cases, not infrequently, to the department for consideration. The court does not prosecute for perjury; the matter has to go off to the relevant DPP. So it is ultimately not the court's decision. The court refers but does not make the decision. Rarely are those prosecutions made, usually because it is very difficult to prove that somebody actually is about to lie. I suppose we only need to look at the recent press about Mr Vizard and why he was not prosecuted to understand the difficulties that there are in mounting a criminal prosecution. People often misunderstand that just because the court accepts one version does not mean that the other party has committed perjury. If I say, 'This is what the parties tell me; they are different stories and I prefer the evidence of the husband,' or 'I prefer the evidence of the wife,' that does not mean that I think the other person is a complete liar. So that is a misunderstanding.

I suppose you would have to add in any event that family law proceedings are the last kinds of proceedings where one would want to be all the time sending people off to be prosecuted for perjury. You are trying to send people away, if you can, after a judgment. With a judgment which might have to make findings adverse to a party's parenting skills, we all try to do that gently because we all understand that these people have to have a relationship for their children. So it is an area in which I would have thought you would not want to be too hard on people. People are much harder on each other than I think we want to be on them.

Mr SECKER—Yes, and you are dealing with warring parties, with high emotion.

Chief Justice Bryant—Exactly. They want to continue the war; we would like to see it ended.

Mr MURPHY—What does the Family Court say is the relationship between the United Nations Convention on the Rights of the Child and the Family Law Act?

Chief Justice Bryant—I gave a paper at the World Congress on Family Law and Children's Rights in Cape Town on this very issue. If it is of any assistance I can send my paper to you. Interestingly enough, there is very little take-up in the act itself except in the principles section. That is where we see the only real invocation of the United Nations Convention on the Rights of the Child contained in the legislation. There have been cases in which the Family Court has referred to the international obligations that we have, as there have been by the High Court over the years and in various sorts of legislation. But to the extent that it is already picked up in the act, I think that is really where we see it.

Mr MURPHY—I would like a copy of that paper if you could get it for me.

Chief Justice Bryant—Certainly. I would be happy to give you that.

CHAIRMAN—You can send it to the secretary. We all might be interested in seeing it.

Chief Justice Bryant—I will.

Mr MURPHY—Does the court espouse that the only rights that a child or a parent holds are those prescribed in statutory law, common law or international instruments to which Australia is

a signatory or does the court recognise that children's and parents' rights are intrinsic, as found by the application of reason through the natural law?

Chief Justice Bryant—I said before that we generally follow the legislation. Given that the best interests of the child are paramount, in a way it is harder to think what might elevate a child's rights any higher. The principles of the act assist us by providing that children have a right to know and be cared for by each parent. That does come from the convention.

To the extent that it is necessary to look beyond that, the court has done so at times, but because of the nature of the legislation and the best interests of the child it is not always necessary to do so—probably, it is rarely necessary to do so. The rights of parents do intersect at times. I think Justice Kirby encapsulated that very well in the relocation case of AIF and AMS, where he said that the paramount consideration of the best interests of the child was not the sole consideration, but in the end it is the paramount one. I do not know if that answers your question.

Mr MURPHY—In your opinion, do the proposed amendments to the Family Law Act impose further parental duties and responsibilities on parents whilst preserving and in fact increasing the powers and rights of the state over the control of the parents' children?

Chief Justice Bryant—For my own part, I do not think the act does really increase them; I think they are perhaps spelled out in more detail than they were previously, in particular the principles, but I do not see them as being changed otherwise. With states' rights, I am not sure whether you are referring to the fact that when a state order is made in relation to a child then the Family Court does not have the right to make orders. That is a constitutional issue and can really, I think, be changed only by a reference of power on that point. 'Good luck' is what one might have to say if you were trying to do that!

Mr MURPHY—Do you think the proposed amendments discriminate against the parent in that they impose further statutory responsibilities on the parent whilst concomitantly not recognising the intrinsic rights of the parents?

Chief Justice Bryant—There is one section that I have concern about which might do that, and we refer to a good way of dealing with it. It is section 60D(1), the conjunction of the definition of 'major long-term issues', which you will find at section 18 on page 6 of our submission, and the implementation of that later on in section 65DAC. That was a reasonably significant point from our point of view. In the definition of 'major long-term issues', the legislation is now trying to spell out—it has not done so before—what that means. I think, certainly for judges and lawyers, there is no real difficulty in paragraphs (a) to (d) of section 60D(1); that is what we understand is meant by 'major long-term issues'.

However, section 60D(1)(e) says that major long-term issues include 'significant changes to the child's living arrangements'. We think that that was meant to be about location. We may be wrong, but we had a look at some earlier drafts and we think that was meant to be about location. It is difficult to phrase it in a way that does not impinge too much on things. It has been extraordinarily broadened now to say that a 'major long-term issue' means any 'significant changes to the child's living arrangements', which is arguably pretty broad.

Proposed section 65DAC, which is where this comes in, tells you about the effect of a parenting order that provides for joint parental responsibility. It is also on page 30 of our submission. Proposed section 65DAC(1) tells us:

This section applies if, under a parenting order:

(a) 2 or more persons are to have parental responsibility… and

(b) the exercise of parental responsibility, or that component of parental responsibility, involves making a decision about a major long-term issue …

That is where we get back to the definition. We will jump over subsection (2) for the moment. Subsection (3) says:

The order is taken to require each of those persons:

(a) to consult the other person in relation to the decision to be made—

for instance, if you think for a moment about a change of school. So the parents are required to consult. They are also required:

(b) to make a genuine effort to come to a joint decision …

All that is fairly logical and understandable. However, subsection (2) states:

The order is taken to require the decision to be made jointly ...

That is a bit more difficult to understand. It would be nice if they could agree, but if they do not agree it is a bit hard to imagine how they would make the decision jointly. It becomes even more problematic if you go back to the definition and look at the last subsection, which states that they are supposed to be doing all these things in relation to significant changes to the child's living arrangements. We raised the example of a father who has, say, shared time. The father wants to remarry and move his new wife and her children into his household. The way that section is drafted means that would certainly be a significant change to the child's living arrangements. Section 65DAC would require him to consult the other person about it and make a genuine effort to come to an agreement that he should marry this person.

Mr TURNBULL—It would not require the ex-wife to consent to the ex-husband remarrying; it would require her to consent to living in a—

Chief Justice Bryant—Yes, exactly, but in a way it is the same thing. Some people have a problem with the requirement to consult about it. I do not have a problem requiring parents to consult—I think they should—but to require them to take that the decision jointly is a big leap of faith. We suggest you might remove subsection (2) altogether and not require them to make the decision jointly. But if you decide that that should be left in then I think that section 60D(1)(e)—'significant changes to the child's living arrangements'—ought to be narrowed a bit more. We have suggested in our commentary, in paragraph 20, that you might change it to read 'any

substantial changes to the location of the residence in which the child usually lives'—if that is what is intended.

Mr CADMAN—If there are other children in the second marriage and there is a need to move residence to some distance away, that is going to impact on the children—

Chief Justice Bryant—Yes, it is.

Mr CADMAN—and that should be discussed. It should not be left to the court.

Chief Justice Bryant—Yes, absolutely. I think that all these things should be discussed, but there are others who would not think that. To then have a requirement that they make the decision jointly, which can arguably be the subject of a contravention—that is the whole point about it being in the legislation—might be a little difficult. I am not sure—and this is a matter for the committee—that paragraph (e) in section 60 D(1) was intended to go that far. That may have been the intent but I do not know. My feeling is that it was really about location. The explanatory statement says that it relates to location, not to everything.

Mr KERR—Maybe that is an area where a little bit of helpful judicial gloss on the statute might be required.

Justice O'Ryan—A precedent?

Chief Justice Bryant—A very helpful precedent.

Mr MURPHY—Yesterday, at the conclusion of the public hearing, I was having a conversation with my colleague Mr Turnbull and we were advocating the virtues of the holy state of matrimony. It is against the background that I ask you the following question. If we generally accept that the state makes a pretty poor parent, do you believe that the government or the court should be given some assistance to educate the public as to the sacredness and the indissolubility of marriage and that marriage should be revered and given statutory protections and safeguards that compel prospective couples to give greater care to their marriage preparation? If so, would the court be prepared to advocate that?

Chief Justice Bryant—I think I can answer that by saying that in the end it is a matter for the parliament to decide what it does. The act already contains section 43, as I recollect, which is probably as strong as you would need it to be in any event. I am not sure that you would need to go further than that. The principles to be applied by the courts under section 43 include:

> The Family Court shall, in the exercise of its jurisdiction ... have regard to:
>
> (a) the need to preserve and protect the institution of marriage ...

et cetera. So it is already there. I do not think that I could usefully take the matter any further.

Mr MURPHY—Do you think these proposed amendments give satisfactory, or any, recognition to the immediate rights of the parents?

Chief Justice Bryant—I do not know that I could answer that any better than I already have, which is to say that, in the end, the rights of the child, particularly the fact that an order should be in the best interests of the child, is obviously paramount. There will be times at which that will be at odds with parental rights. Insofar as it is necessary, whilst the act is as it is, those parental rights will have to give way to the best interests of the child.

Mr MURPHY—Yesterday, the Shared Parenting Council of Australia raised the issue of 65DAA. You refer to it at page 29 of your submission. I am interested in your views, because the reference to 'substantial' in the view of the Shared Parenting Council of Australia is not adequate, and 'equal time' or 'substantially equal time' is more appropriate in the context of the intent of the bill to comply with the government's policy. We were having a discussion yesterday about the words 'substantial' and 'significant' and we thought that perhaps, like 'significant', five per cent could be 'substantial'. Accepting that the Shared Parenting Council of Australia have come at it from 'shared' being 'equal' time, do you have any views about the use of the words 'substantial time'? You have made some comment, but I am more interested, bearing in mind the location of the respective parents and the custodial parent—and superimposed on that, the best interests of the child—in whether the use of the word 'substantial' is adequate. Or are we making a rod to beat our own backs where, as I will move onto in a minute, the Lone Fathers Association will say, 'There again the mothers have got it all over us'—and 'substantial' for them might only mean they get five per cent equal time with the child.

Chief Justice Bryant—I think it is a useful term because it provides flexibility. As I understand it, what *Every picture tells a story* said was that you really cannot have a formulaic response where the best interests of the child dictate what will happen in an individual case. But I do not think it is a problem. You have to remember that people bring to court a particular case. In one case, the parties will determine what the issue is. So no-one who wants shared time, 50-50, for example, is going to have any reticence about putting that proposition to the court. The court is going to be determining a case in which the court is being asked to give 50-50 or something else. So I do not think that the fact that the act says 'substantial' really makes a lot of difference, because the parties will determine what the issue the court will be deciding is.

Where you have a case in which it clearly would not be appropriate to give a large portion of time, for whatever the reasons may be, to one or other parent, then you would want the flexibility that is contained here to be able to take account of that case as well. We should not lose sight of the fact that the parties bring their cases to the court and they do not have any hesitation in telling you what they want. That is the milieu in which the decision is made.

Mr Chisholm—Could I add briefly to that. The law lives with words like 'substantial' and 'considerable' in other contexts as well, such as property allocation. Those words are flexible but not completely meaningless. Experience shows that we can live with this sort of word and, despite its lack of precision, it is better than nothing and it does tend to point people in a particular direction.

Mr MURPHY—Finally, yesterday the Lone Fathers Association came before us. Amongst their exhibits was a letter written by their adviser, Mr JB Carter, on Monday, 18 July to Mr Richard Foster, the Chief Executive of the Family Court of Australia, following his address to the Lone Fathers Association's national conference on family law on 22 June 2005.

They were fairly critical of Mr Foster and they cited his claim in his speech that women are almost always the victims of domestic violence. They made the link that if this is a view also held by judges of the Family Court there is a major credibility gap between the Family Court and many fathers. They raised a number of issues in that paper in relation to the family violence professional development program, saying that if the court has such a program in place it will be bound to seriously distort the court judgments and hurt families, particularly fathers and their children.

They concluded by saying to Mr Foster that they—or Mr Carter, as the writer—would appreciate the opportunity to discuss with him the issues in that paper and requesting that copies of this material be circulated to all members of the Family Court. Bearing in mind that in this paper they argued that women are not almost always the victims of domestic violence, I am interested in whether you have had a chance to see that paper and whether you have any comments to put on the record for the purposes of this inquiry. Every time we hear from the Lone Fathers Association they say that they are getting a pretty bad deal from the court. That is not my opinion; I am just expressing that on their behalf. I said to them yesterday that I would be asking you for your comments today. If you do not want to extemporise now, I would be happy to take something in writing.

Chief Justice Bryant—I will say two things. I have seen the paper but I cannot recall offhand precisely what was said. My impression was that what was being said was that of the matters that the court sees there is more often than not violence alleged by the wife than by the husband. I do not think it was a statement that was intended to say that as a general proposition either all violence was towards women or that no men are ever violent. I think it was simply a statement of fact. What the court sees is that more often than not the allegations of violence are made by women. That is the first thing. The second thing I can certainly say is that we do have a family violence strategy for the court but it is non-gender specific. Again, I think it takes account of the reality that more women than men come to the court to complain of violence. That is a fact—it is nothing more than that. I will take on notice for the moment whether or not we think it is useful to give you a copy of Mr Foster's paper—it may be; I am not sure. If you do not mind, I will think about that.

Mr MURPHY—I think it would be useful for the committee to get some feedback on the Lone Fathers Association's view of what Mr Foster said. We are not sure of the reading material but—

Chief Justice Bryant—I think you might find it interesting, because he referred to a number of programs that the court has established recently. One of them is the family violence strategy and the other is the mental health awareness project. Although, again, that is not gender specific, I think it is fair to say that the latter program was largely aimed at assisting men who come to court at a different stage than women do—this happens often. It is generally said that for various reasons women often have accepted the breakdown of the relationship before it actually ends and men are often taken by surprise by it. Therefore, they come to court at a time when they have not come to grips with the issues for them and are more vulnerable. We are aware of that, and this mental health awareness strategy was designed to try and identify when people might need assistance and ensure that there are ways in which they can be assisted. So I will take it on notice, if I may, but if it is helpful I will give you a copy of the paper.

Mr MURPHY—Thank you for answering my questions and for your very thorough 41-page submission, particularly your final comments about the courts' concern being that the amendments to the act, particularly the recent one, make it a very difficult document to comprehend. Your contribution to making it a little simpler and easier to understand is welcomed.

Ms ROXON—I have four areas that I hope the court could deal with. I will take you through them one at a time. I want to deal with the issue of parenting plans, which you go into some detail about in your submission, on pages 25 to 28. We have not had a chance to deal with that. Can you explain ultimately whether your recommendation is the paragraph that you have put in, paragraph 89, and tell me if I am paraphrasing this correctly? You essentially have no dispute that parents will reach agreements that vary parenting orders but your concern is to make sure that either a change in practice or a later agreement that is reached can be taken account of by the court.

Chief Justice Bryant—Yes.

Ms ROXON—We have had a couple of submissions that have raised the issue of how people will know what their legal status is if they have a parenting order from the court but they have agreed to some other practice or reach some parenting plan. You do not seem to think that that is a particular concern. Is that because it is a reality that people do vary it and we should phrase it more clearly to reflect what the reality is?

Chief Justice Bryant—Absolutely. You see this quite clearly again when you do a lot of contravention applications. People vary arrangements not just by parenting plan—it would be easier if they did—but a lot of the time you have a contravention and someone might say, 'I haven't contravened the order because in fact we agreed to something different.'

Ms ROXON—I must admit my concern was from the opposite direction: the proposal left it as fairly vague; all you had to do was have it in writing. It did not have to be signed, witnessed or seen by anybody and it did not explain what sort of pressure might be brought to bear on different parties. In fact, your practice is clearly the opposite, that people do agree to a whole range of things, and the court has to take account of those.

Chief Justice Bryant—Yes.

Ms ROXON—It does not seem to resolve the problem that people have with contravention applications being made in circumstances where there has been an agreement reached and then people have changed their mind. Your suggestion will not make it any easier for people to know whether their contravention order application will be successful or not, I presume.

Chief Justice Bryant—I suppose that is true, except that I think we probably would accept that if people are encouraged to enter into parenting plans then there is more likelihood that there will be a document that they have both agreed to. A lot of the trouble with contravention in this area is that you have to make findings of fact sometimes about whether there has been an agreement. One party says, 'We agreed to vary the order to do this,' and the other says, 'No, we didn't.' You have to then hear the evidence and do fact finding. Of course, you do not have to worry about that if you have a parenting plan.

Ms ROXON—The second area is in relation to the best interests of the child. The court seems to have two different views. In paragraph 11 of your commentary you are suggesting a primary object for the court in promoting and fulfilling the best interests of children but then in the discussion of the provisions in the new 68F, where there is a sort of two-tiered approach, you express some concerns that you should not have primary and secondary objects. Can you perhaps deal with both of those things together?

Chief Justice Bryant—Yes. In relation to what we say about the primary object in paragraph 11, I am not enormously wedded to that—probably none of us are. I think what we were trying to say is what the Family Law Section said in their submission as well. I noted that it probably needs something in the objects which reminds people that the best interests of the child are paramount. I think that is all we are trying to say. The Family Law Section probably said it better than we did, I think. They suggested that, whereas in section 60B(2) the principles say 'except when it is or would be contrary to a child's best interests', that line could just be inserted in the object as well. For my part, I would see that as solving the problem.

Mr Chisholm—I think we have cooled on the elegance of that sentence in paragraph 11.

Ms ROXON—I understand that is a good object to have in there, but then you have concerns about the way the best interests of the child are determined being broken down into primary and secondary considerations. Could you just take us through your views on that?

Chief Justice Bryant—Yes, certainly. The first thing we would say is that it is as a structure getting very hard to understand. Arguably, you have to consider what the objects are of section 60B(1), then you have to consider the principles in section 60B(2), then you have to juxtapose the two of them, and then you have to juxtapose both of the principles and the objects with the matters in section 68F(2). You have to do that now, but I think it is done reasonably neatly. I think we have got used to the fact that we understand the principles and that it is important that children know and have a relationship with both parents, and then we look at the factors in section 68F(2). But now you will have another layer, which has primary considerations and additional considerations. So you will then have to look at the juxtaposition of the objects and the principles and the primary considerations and the additional considerations.

Ms ROXON—Would you envisage that there would be argument then that you should give more weight to one rather than another?

Chief Justice Bryant—Absolutely. I think there could be argument about what they all mean and how they all relate to each other—as I said, the juxtaposition of all those.

Mr KERR—Where precedential weight is given to these matters, we could end up with a dog's breakfast as a result of this.

Chief Justice Bryant—Yes, I think that is right. So that is the structural problem. But the real problem with section 68F(2) is that it elevates some things above others, and you just do not really know what that means. I do not know that there is any easy way to work that out. If the legislation is passed, I guess that one day I will be on a full court which will have to work it out, but I do not much relish that task. We have posed some questions. Does it mean that the primary objects always trump, if you like, anything else, that they are always the most important? Is it

simply a question of weight? If it is simply a question of weight, how much more weight do you give to those factors than to other factors? Is it twice the weight; is it a bit more weight? If you do not give it much more weight people will say: 'What's the point? You haven't given enough weight to it.' What is enough weight? So I think it will be very difficult in practice to apply.

Mr CADMAN—Isn't that there already?

Chief Justice Bryant—It is there already, yes.

Mr CADMAN—Are you saying that this current section is also flawed?

Chief Justice Bryant—No. We have learned to live with the logic of the current principles and objects.

Mr CADMAN—Maybe you are more familiar with it and that is part of the problem.

Chief Justice Bryant—This legislation will expand the objects to an extent in the principles, so to that extent it makes it a little more complex. But I think the real problem is the considerations, having primary considerations. No-one really knows quite what you will do with them. Then you have the additional concern about their overriding some quite significant things. The views of the children are now an additional consideration, not the primary consideration. The right to know other people such as grandparents is now an additional consideration, not a primary consideration. I do not think we see any real problem with the application of the principles in section 68F(2). As Richard Chisholm said, it is a checklist to go through. In one case a factor might be more important than another, but that is a matter for the individual judge in the individual case, as it should be because every case is different. You have the opportunity in every case to apply the weight appropriate to that case to a particular factor. Now we are being diverted to some extent, and it is being said that you do not just look at the factors in this case, that there are some factors that are more important than others, and it is very difficult to say how you would apply that.

Mr KERR—I would like to ask about section 60I and the provisions that relate to circumstances in which people can approach the court directly as opposed to going through the relationship centres. One of the threshold issues we started our discussion on some while ago, and we sought briefings on it from the Attorney's department, was my concern that one of the circumstances that will permit people to apply to the court directly is where the court is satisfied there are reasonable grounds to believe inter alia that they are at risk of family violence. I wondered how in practice the court would address that threshold issue and whether we would have a subsidiary body of litigation emerging.

My starting point was essentially that, where an allegation is made which is supported by an affidavit or a statutory declaration, that would suffice to take the matter in. And it may be that, at a later stage, you discover that there is no merit and you say, 'Off you go back to a family relationship centre.' I would be interested to see your reaction as to how in practice a court could address that issue without having a substantive hearing going to the truth or otherwise of those matters—and, if you were to do that, that might in fact be provocative of greater dissent between the parties rather than a settlement of the matter, because nobody likes a finding made against them that they are violent or potentially violent.

Chief Justice Bryant—The problem is that, with the proposed changes, that has a presumptive effect because, if they do have a finding made, the presumption works against them in relation to joint parental responsibility.

Mr KERR—At that level, does it?

Chief Justice Bryant—If you make a finding, that is going to be a problem.

Mr KERR—I just want to work out how you would address that in practice.

Chief Justice Bryant—We struggle with this enormously and have spent quite a bit of time talking about it because we think it is a problem. The words 'reasonable grounds' have a meaning, and we set that out at paragraph 23, where we say that it requires the existence of facts sufficient to induce that state of mind in a reasonable person. We looked at whether you could have a registrar or someone making those decisions. We thought that because of the way it was drafted it really requires some sort of judicial determination; that you could not leave it to a registrar to decide when someone files the document. There would be some cases where it would not require a separate hearing of any kind. If there were an interim application, for example, you would deal with it as a threshold part of the interim application. But not every case has an interim application, and I think that because of the way the legislation is drafted you would need some sort of interim determination, in many cases as an extra step.

Mr PRICE—In relation to AVOs and DVOs that the state courts churn out, would it be of assistance if they were required to indicate in granting such an AVO whether they felt that the parties were still capable of undertaking compulsory counselling or mediation—in other words, at the most likely point where the issues are generated, you get the court to accept some responsibility for a view about whether they can? You would presumably need to change section 60I(8)(b)(iii) and (iv).

Chief Justice Bryant—That might be of assistance. I must say that, when we considered this, I do not think we were thinking that the existence of an AVO would necessarily be the reasonable ground for belief. But you may be right: it may be that people would file an affidavit which simply says, 'I've got an AVO.' We did not really address the issue on that basis. We were thinking that we would have to make some independent inquiry—

Mr PRICE—If you do not do it then, as you say, you then have to spend some judicial time trying to determine the matters.

Mr Chisholm—And the AVO would be problematical anyway. The order might have been made where one party did not appear or by consent or without admissions and the situation may have changed since that order was made. So it is not clear to me that we would be able to draw much of an inference from the AVO, at whatever time it was made, about the present circumstances at the time the matter comes before the court.

Proceedings suspended from 10.39 am to 10.58 am

Ms ROXON—We have had quite a few witnesses talking to us about violence and the interpretation of violence and whether or not the wording in the act is too general or too specific. We got into a rather silly debate yesterday about what was 'serious violence', as opposed to I am not sure what other sort of violence. Could you give me a comment from the court's point of view about whether or not there is any difficulty with the existing interpretation. I will give you an idea of the range of things that have been raised. The original House of Representatives committee talked about 'entrenched conflict' as well as violence, but that has not been picked up in the bill. Yesterday some of the submissions talked about the term 'serious violence' being preferable to the term 'family violence'. I think Justice Chisholm was suggesting, with one of the changes he talked about to start with, that maybe we should talk about violence, neglect and abuse.

I noticed that in your submission about section 60J you say that there is no real difference between abuse and the risk of abuse and that the court has to essentially treat those things as the same. It is a broad question because it has run through a range of submissions that we had but I just want to know whether you are comfortable with the provisions in the bill as they currently are, whether you think they have any impact and whether we need to revisit this as a definitional issue because it comes up in lots of different sections.

Chief Justice Bryant—Can we take that on notice? We might want to say something further about it but in broad terms, insofar as we have not specifically commented on it, we were not entirely comfortable with the redrafting of it but in the end we did not think that it was significant enough to make a comment about it, largely because of what Richard Chisholm said earlier: we are used to words and giving them a meaning in the context of a case. For my own part I would not want to see terms like 'serious violence' because it suggests that other violence is all right but again for those of us who have to consider it we are reasonably comfortable that we can do that within the rubric of the normal use of the word.

Ms ROXON—That leads to another question which has run through a number of comments that have been made by committee members and to the committee about concerns about false allegations. Obviously, the bill makes some changes. Could you tell us whether this is really an issue that the court is dealing with all the time? Is it as big an issue as it seems in the public's mind? What sorts of allegations are you dealing with when a matter comes before the court?

Chief Justice Bryant—There is no doubt that determining allegations of abuse where there is significant evidence at a final hearing is always difficult—perhaps I will come back to that. In my experience there is some mythology about the sorts of allegations the court will act on. By the time a matter came to court it would be most unusual for it just to be one word against the other. So you would almost never see a case in which a mother, for example, simply made an allegation that the father was abusing the child. You would almost never see that. I suspect that if you did you would not be acting on it. We normally see, by the time a case gets to us, a range of different pieces of evidence.

For my own part, the typical case might be where the mother will say that she was not the first person to notice this; perhaps the school reported some unusual behaviour by the child. The mother might report that to a relative such as her mother, who might then say, 'Yes, the child

said something to me last week.' That might otherwise have been equivocal but when added to the first piece of information gives rise to some concern. You then might have other statements being made—other people might say things. There might be some physical indication. The mother might then take the child to the doctor. If the comments were concerning enough, the mother might then take the child to a psychologist. So by the time the court gets the actual allegation, it is not just an allegation that something happened, it is an allegation supported by four, five or even six pieces of evidence. And therein lies the dilemma.

There is normally, even at an interim stage, some corroboration of what is being said. That leads to the difficulty in deciding what you do pending a final hearing. There is the interim issue: given that the best interests of the child are paramount, how do I protect the child whilst interfering as little as possible with the contact that the child is having with the person who is alleged to have abused them? That is the way we approach it: how do we protect the child yet retain as much contact as possible? That is what we will do.

Ms ROXON—That is useful.

CHAIRMAN—I will allow Mr Turnbull to ask a couple of questions because—

Ms ROXON—I have one more to go and then I am going to go. I am afraid Mr Turnbull will have to wait for a moment.

Mr TURNBULL—And he will do so with great grace and happiness.

CHAIRMAN—I was not aware that you were going, Ms Roxon.

Ms ROXON—It is very important that we have been able to ask the court these questions, because people are making significant allegations that a number of committee members have been very interested in.

Chief Justice Bryant—To add to my comments: that is the interim proceedings. At the final hearing of abuse allegations you get an opportunity to have all of the evidence tested and then you have to make decisions about whether it is or is not happening. There are occasions on which the court finds that the allegations are completely untrue and without merit. Most cases—and research supports this now—are not maliciously false allegations. In the majority of cases the person who is making them believes for various reasons that something has happened, probably because there are all of these little bits of information. There are some but they are much less frequent than the ones that are malicious. I would not say that there are none but the more common ones are where the party simply believes that it has happened—maybe erroneously—and at the final hearing the court will make those findings. If it is the case that a party has mischievously made allegations, or believes them to such an extent in the face of overwhelming evidence that they are simply not true, then the court will in appropriate circumstances remove the child and the child will go to the other parent.

Ms ROXON—The last question is about two provisions that direct that the court has to disregard other matters. One is that they must disregard an uncontested AVO—if that is the right terminology—and the other is the provision, which I think you mentioned in your submission, that interim decisions about residency must be disregarded. I am concerned that they must be

disregarded rather than your giving them weight. Could you give us the court's view of whether that presents problems? Is that what happens anyway? Are they disregarded? Is this an issue we need to look at?

Chief Justice Bryant—For my part, I do not think that is such a problem. Other than where the legislation says that you must have regard to the terms of an apprehended violence order which is inconsistent with it and you have to apply section 65R, it is not the existence of the order that is important—it is the facts that underlie that. The court would almost invariably hear about those facts. That is the case now and that will be the case with the proposed amendments. That is why we really do not see any great—

Ms ROXON—So if this bill says 'must regard', the court will disregard the actual order but will still go to any evidence that might have been presented for that order or those circumstances?

Mr Chisholm—If the evidence is before us, yes.

Ms ROXON—Doesn't that run the risk of serious matters also falling through the cracks? I know this is the 60 million dollar question, but how do you make sure that serious evidence that might have already been brought before another court can be used in the court and you do not have to redetermine it—

Chief Justice Bryant—You have to redetermine it now—that is the point that we were making. Just because another court made a finding, it is not binding on us, so you do redetermine. If you have evidence of what happened in the state court and the other party admits those allegations, certainly you can act upon them. But if they do not admit them then you have to rehear it anyway, because the finding that was made there is not binding on you. That has always been the case. If violence is an issue then people will bring that issue and the evidence before us.

Mr TURNBULL—I will just flag these points. The first one was related to section 60D(1), the list of items and major long-term issues. You have suggested in your submission that factor (e) should be amended to refer to the location of the residence—so substantial change to the location. I would like to put this to you for your comment, Chief Justice: surely it is a more significant factor in a child's life if the parent with whom they are living brings a new adult into the family, say, a new husband or a new wife, and perhaps new children. That is a much more significant change, I would submit, than just moving house from one side of town to the other. If you agree with that then why would it be appropriate to limit paragraph (e) to just a geographic change?

Chief Justice Bryant—For my part, again I agree with you. If that is what parliament wants to do, then I do not think that is inappropriate.

Mr TURNBULL—What do you think parliament should do?

Chief Justice Bryant—I think it is a matter for parliament. The explanatory statement refers to type and location. I think there is a mismatch between what the explanatory statement says 'long-term major issues' are intended to be and what has actually been drafted. Our first point

was that you need to sort out the mismatch. Is it meant to be about location? If it is, it should be. If it is meant to be wider, then so be it, I would say. But you need then to be careful about the effect of section 65DA, which requires people to make joint decisions.

Justice O'Ryan—I do not think we disagree with your summary of what would be a matter of even more concern. There is no question about that. It would be a totally unsatisfactory new partner or something or other which is a change in the living arrangement. But we thought you intended it to be confined to relocation. The real point is the one the chief justice has made about how it is dealt with in 65DAA, rather than necessarily in the definition of major long-term issues.

Mr TURNBULL—I want you to comment on the new section 65DAA. A number of parties have contended that this section should be amended so that the court is required to consider the child spending equal time with each parent as a starting point.

Chief Justice Bryant—I thought that the previous parliamentary inquiry, which culminated in *Every picture tells a story*, dealt pretty comprehensively with that. To that extent, I guess, it is a matter of policy. But, insofar as you have asked for a comment, I will comment, with the caveat that it is a matter for parliament. What is often forgotten in these cases is that when we talk about the best interests of the child it becomes a little formulaic of itself. What we need to remember about these cases is that they are about children and they are about how children cope with arrangements and they are about how people get on with their lives in a real way.

Children are very different and indeed children in the one family are different. When we talk about the possibility of a presumption of sharing time, that may work extremely well for one child. A week about may create no problem at all for one child if they are an organised child, a child that gets themselves organised for school and things like that. Another child in the same family might have enormous difficulty coping with that arrangement and it just would not work for them. That is the problem about trying to be formulaic in that way: we tend to lose sight of what is workable. 'In the best interests' in a sense is an aspirational comment, but it has to be translated into what works for this child in this case.

Mr TURNBULL—I think the criticism was that section 65DAA currently makes, in effect, the starting point each parent spending 'substantial time'. 'Substantial' could be five per cent of the time. Mr Chisholm, I think you said it is not entirely meaningless but it gives a lot of scope for interpretation. Recognising that every child is different and every decision will be based on its facts, would it pose a problem for the court, in your view, if the starting point were to be equal time instead of substantial time?

Chief Justice Bryant—I think it would, because—I have not really thought about this before—the problem is that there are so many different factors in families that if you start putting in a word like 'equal' you will really create huge problems. I am thinking off the top of my head. If you have somebody who lives three or five hours away from the other parent, what do you do? How do you start off with that presumption, what happens to it and is it possible to have equal time? All of those problems with using terms like 'equal' immediately spring to mind.

CHAIRMAN—With respect, in the original terms of reference of the committee we were not allowed to reopen the proposal of 50-50 custody. It is within the ability of this committee to make a recommendation with respect to equal time, but Mr Turnbull was not asking you whether that should be an absolute situation. You have outlined cases where equal time would not be appropriate, depending on where the residences of the people are and so on. We are only looking at this as a possible starting point. Your Honour, in your wisdom, looking at the circumstances of the particular case and taking into account the fact that the interests of the children are paramount, would determine whether that starting point in this or that case was appropriate. You would still have the flexibility.

Chief Justice Bryant—The problem with starting points is that they create a contest of their own. If you have a starting point of equal time, even if it is simply a presumption, you are going to have all of the argument that surrounds whether or not it is applicable in a case before you get onto everything else. For my part, and I am answering without notice, in a sense that is the difficulty. You lose the flexibility of looking at the real problem, the arrangements for the child and the competing proposals the parties are making, and you start to focus at the beginning on whether a case is or is not one where it should be equal before you get to the other things. That would be my problem with it, and it is probably a reasonably significant problem.

Mr TURNBULL—I have a final question on section 68F. Your submission is that the two-tier approach be abandoned and there just be a list of considerations without any distinction as to which have greater priority.

Chief Justice Bryant—Yes. The primary considerations are already in the act, so you have to look at them anyway. Mr Chisholm might wish to answer your question about the starting point.

Mr Chisholm—It seems to be very much a matter of policy. The only thing I would want to say is that proposed subsection (2) seems a little peculiar to me. Proposed subsection (1) provides the starting point, and (2) says it 'does not apply if it is not reasonably practicable for the child to spend substantial time with each of the parents'. The reason that seems a bit peculiar to me is that proposed subsection (1) just says that the court must consider making the order. This is in 65DAA, and I refer to page 29 of our submission. No doubt it is in various other places as well.

Mr TURNBULL—Reflecting on this section, I wonder, if it is going to be left in the form it is, whether it adds anything at all.

Mr Chisholm—Indeed. It is a curious mixture. If it were to be amended to say 'equal time', it would be a curious mixture of confidence and diffidence—confidence in saying 'equal time' and diffidence in just saying 'the court must consider it'. The point I wanted to make in relation to proposed subsection (2) was that, having considered it, there might be all sorts of reasons why the court might think in a particular case it is a bad idea. Why specify 'not reasonably practicable'? That might be No. 27 of the possible reasons why in a particular case it might not be a good idea. It strikes me as slightly odd.

Mr TURNBULL—Let us go right back to section 60B and the objects of 60B(1)(c): 'to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child'. If both parents

said, 'I want to have the child 100 per cent of the time,' for example—they wanted sole custody, to use the old term—that object could only be achieved by giving them equal time, because that is the maximum extent that each of them can share, unless the court took the view that it was in the best interests of the child that one of the parents should have less than half of the time. So there does seem to be a watering down of that commitment to or principle of equal responsibility and 'maximum extent possible' as you go through the sections.

Chief Justice Bryant—I do not think so, because that argument, with respect, ignores the practical realities. Parties who live in different states could not possibly have equal time—

Mr TURNBULL—No, but you have a provision that was just cited here a moment ago, subsection (2) of section 65DAA. Whether the presumption was of equal time or substantial time, there has obviously got to be a consideration of the practicalities.

Justice O'Ryan—It is more likely that you could find that it is not reasonably practicable if you had the phrase 'equal time', as opposed to 'substantial time'. In other words, there may be more discretion to find it is reasonably practicable if you leave the phrase 'substantial time'. That is just an argument. If you have 'equal time' then it might be easier to find that the presumption should not apply.

Chief Justice Bryant—Also, on the comment I made earlier, I think you have to bear in mind that parties do still bring their cases to court, so the argument between the parties is going to be that there should be equal time. Certainly the act talks about substantial time, but that has to be interpreted in the context of the case before you, in which the parties will make the argument for equal time.

Mr PRICE—Chief Justice, we are dealing with these objects and principles underlying the act in relation to children, but the actual principles to be applied by the court have not been changed at all. I am referring to section 43 of the act. It seems to me to be odd that, if we have this parliamentary report we are trying to implement, there are no changes reflected at all in that section of the act. I was wondering if you have a view about that.

Chief Justice Bryant—I do not have a view, Mr Price. I have no idea why they are not reflected, but it is a matter for the government or the parliamentary committee, I suppose, as to why they are not. I am not privy to their views on that.

Mr PRICE—Fair enough. In relation to Nicola's questions about false allegations, you talked about the hearings in the court—and thanks for the response—but you did not comment about the 25 per cent of cases, as I understand, that do not go to a hearing. That is, they file but are settled before a full hearing stage.

Chief Justice Bryant—There are a lot more than 25 per cent that are settled.

Mr PRICE—Sorry, whatever the figure is.

Chief Justice Bryant—I think 13 per cent get to the door of the court, so the rest is 77 per cent. I suppose the comments apply equally to final hearings and to settlements, because people look at the evidence that emerges—

Mr PRICE—That is fine. Going over the violence issues that were raised—and thanks for your response there—you will appreciate that the family relationships centres are going to be the first port of call for those wanting to vary parenting orders or to get a new parenting plan. With the way the act is constructed at the moment, I get the sense that with the current wordings as they apply to violence there are going to be a lot of people locked out who will not get through that front door. Do you have a view about that?

Chief Justice Bryant—I think there will be under the act. I can see the rationale for making it an exemption. We certainly do not have any criticism of that. It is the application of it that is difficult.

Mr PRICE—I will get back to the point I was making about those AVOs. You are indicating that the court is quite capable of handling it, forming its own judgment and making its own arrangements but, if a rider were put on AVOs for people who are going through a relationship breakdown, then you have something that the family relationship centres are able to act on or not act on and therefore fast track it through the court process. What I am worried about is that if we preclude the whole wash of people with an AVO from going to a family relationship centre, its capacity to make impacts are dramatically diminished. There is really no change. Again, you do not want them handling—and I apologise for the language—the most serious cases either, or cases that should be fast tracked into the court. So it is that impact. That is the area about which I have a concern, and I am wondering whether you might have a response, might wish to take it on notice or might wish to provide any suggestions to the committee.

Chief Justice Bryant—We will take it on notice. I think that is a reasonable concern to have. I have not given any thought to that.

Mr PRICE—One of the issues that has arisen a couple of times has been the issue of contact centres, not so much the ones funded by the Commonwealth but the non-funded ones. I have to say that the committee has heard evidence of the most serious allegations of repeat abuse and violence through those centres. If I may be frank with you, I was a bit shocked that there seems to be no accreditation process and protocols that apply to contact centres, yet they fill an extremely important role in our family law system. Again, I was wondering whether you had a view on that.

Chief Justice Bryant—That is something we might take on notice as well. From the court's point of view—I am speaking from personal experience here; my colleagues may have some different experiences—the contact centres that you would normally use would be the mainstream government funded ones. I am not really aware of the others, but I have no doubt that parties themselves can make agreements to go to those centres, and that is probably where the problem is arising. Our experience has probably been that we would make orders that utilise the government funded ones. The accreditation point is a good point.

Justice O'Ryan—As you say, the contact centres play a very integral role—they are very important—and hopefully will progress. For my part, I must say that it is disturbing that those allegations are made about certain of them. We would be grateful if we could take that on notice and respond to that aspect of it.

Ms ROXON—The suggestion was that lawyers were—

Mr PRICE—Yes, there are two types—both recommending individuals and also centres that are not Commonwealth funded but may be state funded, as I understand it.

Justice O'Ryan—It could be a distinction between contact centres and contact supervisors.

Chief Justice Bryant—Yes.

Justice O'Ryan—Sometimes an order may be made that the contact is to be supervised and there is an issue about who the supervisor is, as opposed to a contact centre.

Mr PRICE—It was both.

Justice O'Ryan—Even with contact centres it can be monitored and supervised, and there is a distinction. If it is the latter, even at the centre, there is somebody who is the supervisor of the association.

Mr PRICE—I will also ask you about section 121 and the publication of proceedings in the court. The last parliamentary committee made recommendations which gave effect to section 121 to promote further publication of the court proceedings. I would like to ask you a couple of questions. At the heart of them, again, is the protecting of children, but given the effluxion of time with the Family Law Act, would you agree that the stigma of one child finding out that another child comes from a separated family has somewhat diminished?

Chief Justice Bryant—That refers back to the point that I made previously. I do not think that it is the stigma; it is the information that is in the judgement. Take for example a case where there are nasty allegations of sexual abuse which may turn out to have been unproven. A schoolmate does a Google search, the judgement comes up and they read all about it. So it is not the stigma of the divorce itself; it is what they might learn by reading a judgement in children's issues about that child and their family that concerns us.

Justice O'Ryan—There is probably a difference between identifying the person as opposed to publishing what we do. The Chief Justice's policy, as she outlined earlier, is one of accountability by letting people read everything that we do.

Mr PRICE—I will put it two ways. Firstly, we covered the issue of perjury. The Family Court is unique in its difficulty with perjury. I am not being critical, but I am not sure that other courts have necessarily operated this way. But if there is this lack of public accountability—I am not saying that there should be in all cases, far from it—with almost a zero reporting of cases, there is not that same public accountability that other courts go through. Secondly, the court becomes a victim of mythology in relation to a whole raft of other things—for example, alleged bias or false allegations et cetera. So the court in itself is a victim of the process.

Chief Justice Bryant—I can answer the latter part of your question by saying that when I was appointed I said that in the term of my tenure I wanted to be able to imbue some respect for the court in the community, which I felt has been wrongly lost. It is an educative process that will take some time. In relation to the reporting of cases, the cases that we decide are the window to the court's work and people should see them. To the extent that we are not putting everything on at the moment, I think we should be and I am encouraging that, but identifying people is not a

necessary part of that. It is the information in the judgement, not the names. That is emphasised by the fact that reporting is available—the press can come into the court, they can sit there and they can report, as long as they do not identify the parties. But they do not because the interest in the newspapers is in identifying the parties, not, in most cases, in telling the story of what is going on. That is unfortunate but it is a fact of life.

CHAIRMAN—Chief Justice, you said that you were endeavouring to ensure reporting. If you are the Chief Justice, would it not be a matter of mandating all reporting?

Chief Justice Bryant—I try to do things without ordering people around to that extent. We needed to change the culture of putting judgments on people—they were a bit reticent to do it because they thought it was of no value. People have to then get their staff to anonymise the judgements.

CHAIRMAN—Do individual judges have a veto on the reporting of their decisions or do all the transcripts and judgements come into it?

Chief Justice Bryant—It is individual at present and they are being encouraged to report everything.

Justice O'Ryan—We should clarify what we mean by reporting. There is reporting from the legal publishers' perspective—LexisNexis, Butterworths and so on—and they are not going to report every judgment of every day. Then there is the reporting from our perspective, where we make available on the net every case that is decided. It is the Chief Justice's policy that every case decided should be available for the public to read. They may not necessarily find it, though, in a hard copy or in electronic form from a legal publisher.

CHAIRMAN—I understand that.

Mr PRICE—That limits the reading audience, to be frank. I know we are becoming computer literate and what have you, and maybe that is not a comment I would make later on. In an electorate like mine, yes, I would have those who were perfectly capable of doing it, but it would preclude a significant number of my constituents.

Chief Justice Bryant—I don't know how else you would publish. People will go to a library and look at what is in the hard copy, but they can go to the library and search the internet. The beauty of the internet is that it does make things a lot more accessible to people.

CHAIRMAN—Judgments of other courts are not all reported either.

Chief Justice Bryant—Exactly.

CHAIRMAN—What proportion of Family Court decisions would now be following your policy? In other words, what proportion would be reported at least on the net?

Chief Justice Bryant—I cannot tell you that. I can frankly say that, in my view, not enough, and I am going to continue to ensure that we get more and more—

CHAIRMAN—Would it be something like 95 per cent now?

Chief Justice Bryant—I do not know the figure. I suspect it is not that high.

Mr Chisholm—Some distinction would have to be drawn—I suppose; I am now an outsider. There are lots of cases where the judgments consist of, 'I make the consent orders in terms of the documents the parties have filed.' There would be lots of others where somebody makes an application for costs and there is a two-sentence judgment about it. There would be some other cases where it is a clearly hopeless application, the evidence is inadmissible or someone abandons the case. On any view, I think there would have to be some sensible working out; we would not want to flood the web site with material that could not possibly be of any interest. There are some judgments that would have to be made.

Chief Justice Bryant—We took the view, and the appeal division judges probably came to the view, that, while section 121 did not strictly require us to anonymise—although there may be a distinction between the court's web site and the AustLII site; it is a bit of a grey area—we would do so for privacy reasons. If it were the view of this committee, and it wanted to express it, that we should put judgments up without anonymising, which would be an awful lot easier, then feel free to express that view. The impediment really is that you have to make sure the judgments are anonymised. If you do not, it is very simple—it would automatically go on.

Mr PRICE—For my sins, I did have a private member's bill on 121. I did not get anywhere with it, I might add. The thrust of it was to give the judges discretion.

Chief Justice Bryant—That is what we have, of course.

Mr PRICE—Yes, but in terms of an even wider reporting of the proceedings. To be frank, my children—I am sure this is the same with other members of parliament, and we are not a unique profession; this would apply to judges as well—cop it quite a bit for being children of an MP. That is part and parcel of the occupation, and other people have notoriety. You cop your knocks about that. I have a fundamental belief that, except where there are the most serious of allegations—not for every case—there should be that public scrutiny, including reporting by the media. As difficult and irresponsible as they are, that is part of our society. With great respect, I think the court in a sense is a victim of this. Anyway, let us move on. You may have got me on the hook, but I do not know whether any other committee member will take that up.

On the subject of costs, one of the bar associations made the point that there is plenty of capacity within the current act in relation to costs but that, for good reasons, costs are not usually awarded against parties. Do you have a comment about that?

Chief Justice Bryant—In our committee we started out by taking that view, but we changed our minds in the end. I think we thought that all that was being provided for in the legislation was that, where there was a serious disregard for an order on a contravention, there should be a presumption of costs unless it was in the best interests of the child not to order them. We thought that there were relatively few cases and that, if that was what the parliament wanted to do—if it wanted the message to be loud and clear that you should not contravene orders in those cases—that was a good message and, provided that there was sufficient to allow you to depart from that

in a case where it really required it, that was all right. So we did not think that there was any real difficulty with that limited provision.

Mr PRICE—I guess the legislation is not through, but, given that this is a draft, there will be some tweaking and changes. How are parliament and the people to assess the success of these changes? How will we be able to say in 12 months, two years or whenever that the establishment of these family relationship centres, the compulsory mediation associated with it and the changes to the act and the way it impacts on the Family Court have or have not been successful?

Chief Justice Bryant—First of all, I think if you want it to be a significant change in the way that people behave towards each other—and we are looking at two things here: the way people behave and then the court—it is generational change, and I tend to look at the Family Court in decades of that change. It took about 10 years to get used to no-fault divorce—and some people have not yet, but I think it was 10 years for most of the community. So I do not think you can really assess that sort of impact in two, three or even perhaps five years; I think we have to look at it longer term, in all fairness. That is my first point.

The second is that it is about the way that people behave. I suppose that one way would be, say, to look at the number of applications that come to court, that are filed. I can tell you that we have already had some success with the court's pre-action protocols. The number of applications filed in both the Federal Magistrates Court and the Family Court dropped, and that has stayed down. So there does seem to be some effectiveness in the pre-action protocols. That is a measure.

With respect to the third thing about the orders of the court, I do not know that there will be in the end much of a change in the kinds of matters that come before the court, because, more and more, these changes will properly—in my view—keep out of court those matters that should be out of court and push into court only those most difficult matters. So I am not sure that you will actually see a change anyway, but perhaps it comes back to what Richard Chisholm said earlier: if there were some particular aspect of the decisions that were now being made that the parliament wanted to change and it did so in clear terms, then that would be a measure. But I do not think that is in the legislation.

Justice O'Ryan—But unquestionably the hope would be, from our point of view, that the filings would drop—

Chief Justice Bryant—Yes.

Justice O'Ryan—on the basis of the success of the relationship centres.

Chief Justice Bryant—It may not be that the work that comes to the Family Court would vary much, because we will be doing the more difficult cases—entrenched conflict, violence—

Justice O'Ryan—Yes, the ultimate number that get to a judge.

CHAIRMAN—Talking about the work that is coming to the Family Court, what impact has the establishment of the Federal Magistrates Court had, in your view, on the workload of the Family Court and the ability of the Family Court to get through its previous heavy workload?

Mr PRICE—Have they overcome the difficulty of the appointment of the first chief magistrate?

Chief Justice Bryant—No, Mr Price, I am afraid that they are still struggling under the weight of that!

Mr PRICE—Right.

Chief Justice Bryant—There are two questions there, I think, Chairman. The first is certainly in relation to final hearings. The Family Court is doing already the longer, more difficult cases and the Federal Magistrates Court is dealing with the less difficult and shorter cases. I think it is working and that the proportionality issue—that is, cost and time—in the shorter cases is effective. I would like to see it costing less money for people to come to the Family Court, but the procedures are going to be more complex. It is working to that extent.

There are some adjustments in the middle with interim hearings and so forth. At the moment we are, as the government has required, looking at the best way we can have a combined registry and the best way that we can stream cases so that it is easier for litigants coming into the process to know what is going to happen. I think it is suggested that ideally most matters would start off in the Federal Magistrates Court and then be transferred to the Family Court as appropriate, but that requires resourcing and it looks as if that will have to be a staged process rather than something that can happen immediately.

CHAIRMAN—How would you have a joint registry, bearing in mind that the Federal Magistrates Court does partly, as I understand it, Family Court matters and partly matters which would otherwise have gone to the Federal Court?

Chief Justice Bryant—At the moment—and there is no proposed change to this—the Federal Court provides registry services for those matters which are federal law matters and the Family Court provides registry services for the Family Court matters, and that works perfectly well.

Mr Chisholm—Can I just add one comment in relation to Mr Price's question about how we are going to know if it works. If I may say so, I think that is a tremendously important question. I would want to make a plea for evidence based law reform like people talk about evidence based medicine. I think it would be tremendously valuable to set up some serious monitoring or assessment of the impact of this legislation. There are a number of organisations that would have the structure to do it—they would need to be resourced—for example, perhaps the Australian Law Reform Commission or the Institute of Family Studies. I could imagine a project that would be substantial, although not overwhelming, which might involve some things that you can count, like how many applications are being made and that sort of thing, but would also involve a qualitative component of taking a cohort of people going through the system, interviewing them and interviewing their lawyers and people at the family relationships centre to get a feel for how it is working as well as the number crunching.

CHAIRMAN—How long after the changes came in would you recommend that that process take place?

Mr Chisholm—In principle you could do it usefully at a number of points. You could do it, say, looking at the first six months. That would tell you some interesting things. There are some things you would not know for perhaps decades, but there are certainly some things that you could find out relatively soon. I would envisage a kind of staged exercise—it would depend entirely on resources and so on. I am not a researcher, but I can imagine that some sort of project like that could be extremely useful.

CHAIRMAN—Thank you.

Mr PRICE—I would like to ask one other thing about relationship centres. What will be the relationship—maybe that is a bad word—between the relationship centre and your own court counselling?

Chief Justice Bryant—That is a very good question, Mr Price, and it is one that we are all asking. It is under discussion. There is liaison between the court and the groups. I suppose, until we know exactly what the constitution of the family relationships centres will be, it is difficult to be more specific than that. But there is a definite concern that we should work cooperatively as far as is humanly possible.

Mr CADMAN—If I can understand what you have been saying regarding the objects and principles in 60B(1) and 60B(2), and best interests in 60KB, 65E and 68F(1) 68F(2), is there any advantage in bringing them forward in that section and consolidating them into something a bit more precise? Is that what you propose?

Chief Justice Bryant—Yes, that is what we are saying.

Mr CADMAN—And perhaps making more prominent the interests of the child?

Chief Justice Bryant—Yes.

Mr Chisholm—Yes.

Mr CADMAN—There are two parts—61DA and 61DB—on joint parental responsibility. You are saying that when you have to consider this matter it may be a problem because you have to go back de novo and start all over again, even though it might be just on a point of residency.

Chief Justice Bryant—Yes.

Mr CADMAN—It is a simple matter: why do we have to go back and look at joint parental responsibility? I guess part of the intention of the report and the amendments is to make sure that everything is done in the context of joint decisions in the best interests of the children. Does it really matter that in one or two cases out of a myriad there may be an encumbrance?

Chief Justice Bryant—We thought there would be a lot more than just one or two and that it might create unnecessary friction where there was not any. That was our only concern. Again, it is in the context that people will bring their argument to court. If they have an argument about parental responsibility they will bring it; there can be no question about that. These are the cases in which there is not one and we are being asked, in a sense, to create one. That was our concern.

There is no doubt that if people want to have changes to the existing arrangements for parental responsibility in the context of another residence issue they will bring it. We did not want to have legislation which required us to raise the issues for them and create a problem where there was not one. That was our concern about it. The wording we suggested was that, when making a parenting order allocating parental responsibility—that is, when you are asked to do it—in relation to a child, the court must apply the presumption. It becomes more complex when you have the presumption as well. Not only are you creating a problem where there perhaps was not one but also you are creating a problem where there is a presumption that you then have to apply. So you might really be creating—

Mr CADMAN—I understand that aspect, but the evidence that we have received seemed to indicate that, despite the intention of the 1995 changes, the impact on shared parenting and shared physical care had been little indeed. The courts have basically ignored those amendments in that area and, in fact, there is some evidence that there are even fewer decisions in that regard since that time. You cannot question that if the intention of the parliament is to bring the focus of the court on the people involved in shared responsibility then it should be somewhat repetitious.

Chief Justice Bryant—It is a laudable objective of parliament, but I would have seen it as parliament's obligation—the government's obligation—then in some way to educate people about what that means.

Mr CADMAN—Including the court?

Chief Justice Bryant—No, the court knows what it means. If parties have an argument about it the court will make an order, but where they do not have an argument about it I think our point was: why would you encourage people to litigate about something that they do not want to litigate about? The point you make about there not being many cases on parental responsibility is a well-made point, but it goes back to the issue of the parties themselves. There is joint parental responsibility under the act and it has been relatively unusual since 1995 to see people arguing about that. Normally they come to court to argue about the time spent with the child and they have agreed that there will be joint parental responsibility. I suppose you could require the court to give them a little lecture about what that really means, which is educative—and one might argue that the courts are not supposed to be educative; I might argue they are—but the parties accept they have a joint parental responsibility.

I think the complaints are that people are not living up to what they themselves have agreed—not that the court would make any different order. It would make an order of a joint parental responsibility in most of those cases where they have already agreed to it. It is a matter of bringing it home to the parties the obligations created on them to really do something to make it work. In my view, that is an educative role. If parliament sees it as an educative role for the court, so be it. But perhaps there is a better way to do it than by creating litigation. Perhaps we should be thinking about how we can best educate people about what it means rather than making them have an argument about it when they do not need one. That is how I think I would answer that. I do not know if Mr Chisholm wants to add anything.

Mr Chisholm—No.

Mr CADMAN—Because there are often inordinate delays between the interim order and final settlement and there is no presumption available in the interim order process as proposed here, to ignore the interim decision seems a logical process to reinsert the presumption. Is that right?

Chief Justice Bryant—Yes and no, if I can answer it that way. It might be a drafting problem. You can ignore the order, but you cannot ignore the facts that underlie that order. If a child has been living with a father pursuant to the interim order for nine months or 12 months, part of the father's case at trial will be, 'I have been looking after the child for the last 12 months. I have been doing a good job and so forth.' They are facts that the court must take into account in deciding what is in the best interests of the child.

Mr CADMAN—Is that ignoring the order or ignoring the facts?

Chief Justice Bryant—I think that is how the court does operate—that is, it looks at facts, not at orders. The fact of the interim order itself is not usually taken into account at a final hearing; it is the underlying facts that are taken into account.

Mr CADMAN—Maybe we should then consider putting the presumption in the interim process as well.

Chief Justice Bryant—As I said, it might be a drafting issue that could be resolved. We thought the problem at the moment is that it suggests that you cannot look at the thing including the facts that lie underneath it, which you would clearly want to do.

Mr CADMAN—Because there would be consistency if you had a presumption both in the interim and then in the final decision.

Chief Justice Bryant—Presumption of what?

Mr CADMAN—Shared parenting.

Chief Justice Bryant—Does it—

Mr CADMAN—No, it does not.

Chief Justice Bryant—It does not apply to the interim order. That is true.

Mr CADMAN—It says you exclude it in the interim orders, I think.

Chief Justice Bryant—Yes. You might need to for various reasons.

Mr CADMAN—Maybe to include it would resolve that conflict and then the whole range of activities, compliance and all those things could be considered when the final decision comes.

Chief Justice Bryant—I am not sure about that. I do not see—

Mr CADMAN—Would you like to have a think about it?

Chief Justice Bryant—All right.

Mr CADMAN—It seems to be a dilemma that you either have to ignore the impact of the interim order, which excludes an important component—

Chief Justice Bryant—I am not sure that we fully understand the evil that this is intended to overcome. If someone articulated the evil to us, we might be able to answer the question.

Mr Chisholm—I am going to have a go at this topic. I am looking at section 61DB, which I think is the one that we are talking about, on page 21 of our submission. I certainly found it hard to understand. In my experience, what happens is that, at a final hearing, one hears about the history of the matter. The history of the matter will be where the child has been living at different periods and what has happened. If the child has gone to live with one person or another as a result of an interim order, that would be part of the history. It seems to me that the court would need to know the history, including the making of the interim order and what happened as a result of it. That says nothing about what the court should now decide would be good for the child. The court does not assume, in my experience, that an interim order is now in the present time likely to be good for the child. Taking into an account an interim order is just taking into account part of the history, so a section that says, 'You don't take into account part of the history,' seems a peculiar section.

Mr CADMAN—I agree with that, but then part 61DA(3)(b) precludes the presumption being considered as part of issuing an interim order, as I read it.

Mr PRICE—You were asking why, and that is not to lock in percentages associated with an interim order. I suppose that is the real intention.

Mr Chisholm—I am suggesting that just does not happen. When the case comes before a court, the court looks at the history, looks at the evidence, hears submissions and tries to work out what is best for the child. In my experience, the court does not say: 'If Judge Bloggs last year made this interim order, I should assume that that is likely to continue to be in the child's interests.'

Mr CADMAN—I would hope so. I am curious about the practical implications of excluding the presumption applying to it for interim orders, as it does in 61DA(3)(a) and (b).

Mr PRICE—I will ask you a different question. If you took out (3)(a) and (b), would that make an impact?

Mr Chisholm—If you took out subsection (3) from section 61DA entirely?

Mr PRICE—Yes. That has been suggested to the committee.

Mr CADMAN—That would be my preference, if we are going to be consistent.

Justice O'Ryan—I think I can understand why it was done, and that is not saying that your view is an incorrect one. The limited nature of the inquiry that can occur when making an interim order is probably why, but that is not necessarily why it should not apply.

Mr PRICE—If we take subsection (3) out, it actually strengthens your ability to maybe even go a tad further than you might otherwise.

Mr Chisholm—To be perfectly honest, I am not sure that, on the run, I can follow all these intricacies, but one important difference between an interim situation and a final situation is that typically in interim proceedings you do not have much time. Each side produces some hastily prepared affidavits.

Mr CADMAN—It could be done on the papers, even.

Mr Chisholm—It has to be done in a rush and on the papers. In those circumstances, presumption looms very large because, whatever the presumption is, you are unlikely to have the evidence that will enable you to rebut it. So, if the presumption says that unless the court is satisfied of X it should do Y, in interim situations you are likely to do Y because you will not often have the evidence to be satisfied of X.

Mr CADMAN—It has been brought to our attention that often in the final proceedings the shift tends to be in favour of the non-custodial parent using past terms because all the factors were not available when the interim was issued. In order to rectify that, if you have a presumption at that beginning point, maybe you will get a happier transition.

Mr Chisholm—One might expect that to happen. If someone raises a worry about a child's safety in interim proceedings, you have got some evidence that causes you concern and you cannot resolve it, the natural approach of a court would be to take some short-term protective measures. If it turns out at the end of the day, when all the evidence is there, that there is no problem or that the problem can be circumvented by supervised contact or something like that, in a sense that seems the natural course of things.

Mr CADMAN—But if you have a two-year delay, by the time you come to the final it is very stressful. That builds a lot of stress into the system.

Mr PRICE—Could you take on notice then the impact of the removal of subsection (3). I think that it might overcome some problems.

Chief Justice Bryant—We will take it on notice. You might even do it by just taking out (3)(a) and providing it in (3)(b) in an interim proceeding if the court considers that it is not appropriate to apply the presumption. That might even overcome the problem. We will take it on notice but will think a bit more about that. That might be the solution.

Mr PRICE—And then leaving section 61DB there as just a reinforcement that, whatever is done in the interim, you are expecting a more thoroughgoing examination and are not necessarily bound. It might be a bit of theatre.

Mr Chisholm—My own view would be that section 61DB might be better omitted. I just find it deeply puzzling. People should be getting on with the job rather than sitting there being deeply puzzled.

Chief Justice Bryant—I think the problem with that too is that, if we are puzzled by it, it is likely to create argument. People will then be using it as one of the things they argue in the final hearing, whether or not you are supposed to be looking at the interim or whatever.

Mr PRICE—I suppose you are strengthening the argument for removing 61DB if you are taking out 61DA(3) or 61DA(3)(a)—

Chief Justice Bryant—Yes.

Mr Chisholm—Yes.

Mr PRICE—and making the change to 61DA(3)(b). You can do both.

Justice O'Ryan—I think I understand what 61DB was going to—namely, a concern about the status quo that is built up by demand.

Mr PRICE—Yes, we understand that.

Mr CADMAN—Parenting orders and parenting plans are under 64D. You have expressed some concern about subsequent parenting plans overriding orders. I am afraid I cannot understand the basis of your concern, except that you say that it has not got legal status. I understand that, but does that really matter if they are sort of moving on and making adjustments to a court sanctioned arrangement?

Mr Chisholm—I thought it may not have been obvious to the committee that the parenting plan itself cannot create legal obligations, and so there is the slightly odd situation of a document that cannot by itself create obligation but can destroy them. In working out that example, I just wanted in a sense to alert the committee to the fact that it is a slightly odd, messy and non-intuitive situation which could cause some confusion. Then the text went on to ask: 'Do we really need to do it this way? Would it not be easier to do it in a simpler way by just saying, in effect'—and the details are there, but this is my shorthand summary—'when it comes to a contravention application, isn't it enough to say the court at that stage can look back and say that if something has been done in breach of an order but consistent with a later parenting plan, then there is a reasonable excuse or there is no contravention or something?' So if one focuses on the contravention end of things—

Mr CADMAN—So, you will look back at the plan and the order only in circumstances where there is a future contravention?

Mr Chisholm—And you say, 'There has been no contravention,' because, unless someone brings a contravention application, there is no problem.

Mr CADMAN—Just let it go?

Mr Chisholm—Yes.

Chief Justice Bryant—We are certainly not troubled by the concept that people should revisit their orders and adapt—in fact, we encourage people to do this. They need to. The only concern for us is what happens when it comes in at the end and there is a contravention so it should not be resolved in that way.

Mr PRICE—You are talking about the status of it, which is worrying. Is a parenting plan not effectively a contract between two parties and therefore would have status?

Mr Chisholm—My understanding of the law is that it does not create enforceable legal obligations. The history of it is that the act previously had parenting plans as something which you could register, and when you registered them they created legal obligations. A few years ago, as a result of the recommendations of the Family Law Council, the act was changed so that old parenting plans remained enforceable but, as of the last couple of years, any fresh parenting plan could not create legal obligations.

Chief Justice Bryant—Part of that arises from the High Court decision of Harris v Calladine and the court's ultimate requirement to make orders that are in the best interests of the child. If there is no supervision by the court in a sense, then you would not want to afford what people did on their own, without supervision, the status of an order, which would require the best interests of the child to be taken into account when the court could not do it.

Mr Chisholm—I am fairly confident of the proposition that, as a general principle, the parties cannot by contract change the legal situation in relation to matters that used to be called 'custody' and 'access'. I will chase that up, if you would like me to, but I think what I have said about the parenting plan is right.

Mr PRICE—But I would think that the legislation we are trying to create is, in a sense, establishing agreements, parents exercising proper responsibility and having experts there to assist and facilitate their developing a plan, which will be implemented as soon as it is signed but also, of course, always subject to the scrutiny of the court to ensure all the normal safeguards, including considerations about children et cetera.

Mr Chisholm—In my mind it is actually a relatively straightforward thing, namely that you cannot criticise people for disobeying an order if they are acting in conformity with a later parenting plan.

Chief Justice Bryant—If you look at paragraph 92 of our submission, you see that is where we encapsulate it. It is on page 28. We actually suggest that section 70NG(1)—that is, the contravention section—be slightly amended to provide that, when considering what order to make under this section, the court may, or if preferred must, take into account the terms of any parenting plan and any arrangements agreed to or acted upon by the parties since the parenting plan was made.

Mr CADMAN—What is the status as to contraventions of the intervening parenting plan? Say you have got the order, you have got the intervening plan and then you have got a contravention of the original order. Say there is an agreement in the plan that is in contravention

of something ordered by the court and then one partner says, 'I want to go back to what the court put in place.' How does that in fact play out? I do not understand it.

Chief Justice Bryant—I will start the other way around, if I may. With the section we have suggested, then it would be clear that the court would take that into account.

Mr CADMAN—It would take the plan into account?

Chief Justice Bryant—It would take the plan into account. There is real confusion at the moment because, if someone says that they have agreed to an order, that might form a reasonable excuse when you get to that part of it, but often you have to deal with it in the first part: is there a breach of the order? One party will say, 'There is not, because we reached agreement about these things,' and sometimes it depends on what the actual order itself said. Many orders will say 'or as the parties otherwise agree', in which case you would say, 'That is fine. I find on the evidence they have agreed this and that is now part of the order.' If the order does not say 'as the parties otherwise agree', you might have some difficulty with that argument.

Mr Chisholm—If you had a complicated situation where you have got an order and you have got a parenting plan and then somebody wants to go back to the order and practise changes and it becomes a messy and perhaps ambiguous situation, it seems to be that the ordinary contravention provisions would work quite well because if you breach an order then proceedings can be taken but you can prove you had a reasonable excuse. You would go through that story as to it to see whether you had a reasonable excuse.

Mr PRICE—But what about the situation that you have described and there is a desire to change, in effect, the parenting orders? After the establishment of the family relationship centres we would be encouraging people to go to those. What is the impact where one partner just refuses to participate?

Mr Chisholm—Refuses to go back to the counselling?

Mr PRICE—No, to the family relationship centre. If the parties apply directly to the court for a variation, would you insist on sending them back to the family relationship centre in the first instance?

Chief Justice Bryant—If it is an application to vary, then the provisions of the act would apply and the court would have to look at sending them there. All the usual provisions would apply. At the moment the pre-action protocols apply, the provisions of the act would apply.

Mr PRICE—So what sort of penalty is there on a non-participating parent?

Chief Justice Bryant—I suppose they would come to court, because they would get a certificate from the family relationship centre saying the other party would not come or would not cooperate. The penalty is in costs. In the end that is the penalty.

Mr PRICE—Wouldn't there also be compensatory time or something?

Chief Justice Bryant—Yes, if time were an issue. If time were lost, yes, you would compensate. If it was a contravention then you would have all of the provisions that you have got.

CHAIRMAN—I think the idea of section 64D was to bring about a sense of flexibility that is not currently there and to encourage ongoing agreement.

Chief Justice Bryant—Yes.

CHAIRMAN—I believe that what you have suggested—namely that the parties could vary the matters set out in the order and then if one party wanted to go back to the order there would be an investigation as to whether there was a reasonable excuse for contravening the order—probably gives too much power to one party or the other. It is probably better that it should be as it is, namely that the parenting plan to which they have agreed gets rid of the previous order and then of course there will be provisions in the act that if the parenting plan fails then other arrangements can be made.

Mr CADMAN—Are you suggesting that the parenting plan will override the order?

CHAIRMAN—That is what has been provided for in 64D. It says:

Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

(a) entered into subsequently by the child's parents;

and so on. That is proposed section 64D.

Chief Justice Bryant—I think the problem with that is that one asks the question: what is the effect of that? The only time it is going to come before the court is on a contravention. The parties can do what they like. They do not even need a parenting plan. They can go away and make whatever arrangements they like.

CHAIRMAN—But there can be no contravention, according to this section, if there is a later parenting plan. So it would not go back before the court for a contravention.

Chief Justice Bryant—I suppose to the extent that it gives the parties more certainty it might be valuable. One might wonder now why, if parties have reached some different agreement, they still come to court about contraventions. In any event—

CHAIRMAN—They might have a subsequent fight over something else!

Chief Justice Bryant—Yes, exactly.

Mr Chisholm—Yes.

Chief Justice Bryant—I do not think that we have a strong view about it. To the contrary—if it is felt that it gave sufficient certainty so that the parties knew the effect of it. It is only when it comes to court that it will be an issue for the court.

Mr CADMAN—Could we tease out the 50-50 presumption. There is a belief out there that there is a presumption and that it is 80-20. We have heard that time and time again, from both sides of the argument—we went to our solicitor and they said: 'You're going to get 80-20, and that's it; don't fight it. Save yourself some money and go for 80-20 and get it over with.' If you are going to have presumption at all, and there seems to be a subculture assumption that we are going to, why not make it something that is reasonable, as a starting point only? Rather than having a mandatory process it could be a case of saying: 'Can this work out? First of all, let's work out our parenting plan and our relationships with the children and their future. Then we can move to time after that, carrying over the work already done on schooling and all the other factors. At the latter part of that discussion, we can then move to discussing where it is practical for the children to spend time.'

Mr Chisholm—Can I say something about one aspect of that—that is, the 80-20 presumption. It seems to me that it is important to clarify what exactly is being asserted. If it is said that solicitors advise people that 80-20 is going to be the outcome and therefore they should save their money, then I would say that I do not know if that is true. I would think that the solicitors I know would not give blanket advice like that but maybe other solicitors would. I would question whether that is an accurate account of solicitors' advice, especially the family law specialists. I would just raise a question about that.

Another thing that it could mean is that the court will treat the appropriate outcome as 80-20, unless there is some special circumstance suggesting something different. I truly believe that that is wrong. I just do not think that is the case. It was certainly never the case when I was a judge. In my experience, every case was different and one just did not start off with that assumption.

A further thing that it could mean is that 80-20 is a very common outcome. That is true, but it is certainly true of settled cases. Lots and lots of people actually settle their cases on the basis of something like: half school holidays and every alternate weekend. It is an interesting question as to why they do that. It may be that it suits a lot of people and it may be that quite a lot of people, mistakenly in my view, think that is going to be the outcome. I would want to tease out the various possible meanings of the statement.

Mr CADMAN—I think you are right in every case. The 50-50 presumption that is negotiated starts from a point of equality rather than from a supposition of the starting point. I would suggest that, in practical circumstances, the number of 80-20 cases would change very little. But the starting point indicates an equality in the process of settlement. I think what we are hearing is the community saying, 'What we would like to have is an understanding that both parents have an equal responsibility right at the beginning.' The practical ramifications may be at settlement and it is most likely to be in many instances an 80-20 settlement.

Chief Justice Bryant—I think we would probably like to take that question on notice if we may. We will have a look at that. I know that when we were talking about it we had some concerns about using that terminology.

Mr CADMAN—It is the process of conceding to practicalities rather than an assumption, however gained.

Mr Chisholm—Yes.

Mr CADMAN—I agree with what you have put to me because I think all of those factors have appeared in evidence. In some instances they have produced evidence that this is what the solicitor said and in other instances it was what a particular court had been in the practice of doing—most of the cases from a particular stream seemed to go in a certain way.

Mr Chisholm—It is a large and fascinating question, but my own sense of things is that it makes quite a lot of sense to say that parents are equally responsible for children and that one should not be more important than the other. I have no problem with all of that sort of stuff. On the other hand, as to the proposition that it is most commonly good for children to spend equal time with each parent after separation, I just doubt whether that is true.

Mr CADMAN—It depends on the age of the child, probably, and a whole lot of other factors that we could discuss.

Chief Justice Bryant—One of our concerns with even using the term 'equal' is that it is difficult to apply. 'Equal' means 'absolutely equal'.

Mr CADMAN—'Equal' is a starting point. I think that is our attempt—maybe a somewhat unsatisfactory attempt—to diminish the conflict point and flashpoint of a supposition at the beginning of a process which will probably finish up with the same number or a similar number of 80-20 decisions.

Justice O'Ryan—If I may express a personal view, I hope your pessimism is not founded. When one looks at the total package of reform, there are differences of opinion about technicality. But for my part I would like to think that there will be that change, although you may not necessarily see instanta, or within a very short time, statistical corroboration of that. That goes back to what was discussed earlier about when you would evaluate. You can do a qualitative and a quantitative evaluation. You may see some quantitative evaluation outcome earlier, but it may take some time before you see some qualitative outcome.

CHAIRMAN—I certainly think the concept of evaluation is very sensitive.

Justice O'Ryan—Yes, it is. But when you look at the package of relationship centres, presumptions in section 61DA and the like, together with new processes and the like, for my part I would like to hope that there was some optimism that you will see some change. You as a parliamentarian may continue to receive the complaints, but I would hope that this does represent a significant reform.

Mr PRICE—It is very nice to hear you say that. It is very encouraging.

Justice O'Ryan—I am just saying that I do not want people to be so pessimistic about what may happen—that is all.

Mr PRICE—Are you happy with the compliance provisions? Do you have any concerns about them?

Chief Justice Bryant—The compliance section is a difficult one. The whole issue of contraventions and proving them is quite difficult. As we try to explain a bit in the paper, there is the complexity of the thing itself—for instance, whether there is a breach of the order and you have to hear evidence about it. Then if there is, is there a relevant excuse? And you have to hear evidence about that, and the onus changes. All of those things are quite complex and I am not sure whether there is any short or easy answer.

In broad terms, as I said before, we would like to see the cases that do not have to come to court at all—the ones that can be sorted out somewhere else—pushed out there and only have us dealing with the difficult cases. What we have said in relation to this is that there is a proposal to change the standard of proof. We think that there is a misunderstanding of how that is applied. It is suggested that the standard of proof be different, that it be a higher standard where the punishment is going to be greater and a lower standard where it is not. But the problem is that you do not get to the punishment stage until you hear all the facts about the contravention and that is when the standard of proof applies. The Brigham Shaw test at the moment, which is a sliding scale, works pretty well.

Mr PRICE—You are doing a pilot on children's cases, and clearly there is a whole raft of legislation impacting on children. Referring to Nicola's question, are you happy with us making all these changes ahead of the completion of the pilot? Are there things already in the pilot that we should be taking note of?

Justice O'Ryan—For my part, speaking personally, I am very happy to make the changes because I think they represent part of that significant package I am talking about. In fairness, the Attorney-General's Department has been enormously supportive of the approach and you will see when you read our paper that we have made a number of further technical recommendations. They are ones that arose after consultation with the department. I do not want the department or you to think that we were in conflict with the department or that the department failed to pick up something that we had suggested. We picked those up ourselves in our final run-through.

Mr PRICE—The last question will need to have perhaps a couple of parts. There is the issue of parents with significant mental illness. Breakdown involves trauma and often leads to mental illness—depression, low self-esteem et cetera. I think the point was being made about serious mental illness and the suggestion was that no sector of the family law system was really adequately taking these people into account in the way we were handling their matters. Do you have a comment about that? The other thing concerns the suggestion that was made earlier that we should tidy the act up. I think that we need to get all these changes through as quickly as possible but then, as a separate exercise, try and put like provisions in the same section and have a tidy-up process. And last but not least—

Mr CADMAN—That is three questions.

Mr PRICE—It is all the one thing, mate, about improving family law. In some ways the parliament flies blind because we do not have an accurate figure on what the people of Australia are spending on family law practitioners. Anecdotally we know that quite substantial amounts of

money are spent by quite ordinary people. The point I am getting at is: to provide solutions to a problem you firstly have to know what the dimensions of the problem are, and we are not even at that respectable starting point. If you want to take any of those on notice, I am quite happy. I would have asked you about child support and linking it with residency, but I will not.

Chief Justice Bryant—Go on, Mr Price—

CHAIRMAN—Why ask the question when we can have it on notice?

Mr PRICE—I have always had a view not to link it. I think that there is a real push now to say that, if there are contraventions and parties not acting properly and given some extremes—that is, a reasonable fear of likely abuse or something like that—there should perhaps be a link made. One would hope that it was not too heavy.

Chief Justice Bryant—That is a question we might take on notice. Off the top of my head, I do not know that you could easily solve that by making it part of the Child Support Scheme, but in matters that come to court there is probably no reason why you could not have a discretionary factor that enabled the court to consider it. That would solve the problem.

Mr PRICE—One of our difficulties—like yours—is that family relationships centre are being set up but we do not know exactly what they are going to do and exactly what they are going to offer—and we have consultation on the changes proposed by Professor Parkinson that have been advised to be linked. All three are very much interconnected.

Chief Justice Bryant—Yes.

Mr CADMAN—It is a moving target.

Chief Justice Bryant—It is. On the mental health issue, we do the best we can with the evidence before us. Often we have evidence from medical practitioners, which is helpful. One of the worst problems is when you have someone who clearly has some mental illness which is untreated and for which they do not seek treatment.

Mr PRICE—That is right.

Chief Justice Bryant—One of the real problems that needs some urgent attention is that sometimes it is impossible to get someone to act on their behalf. The court makes application: you approach legal aid, you might approach the public advocate and the public trustee, and sometimes you just cannot get anyone to help them.

Mr PRICE—That is terrible.

Chief Justice Bryant—They come before the courts as litigants in person. That is terrible.

Mr CADMAN—I want to go to the comments on 65DAA in regard to the prospect of people coming back into the system because of the shared parenting process—a flood of reapplications. In considering these changes, the committee that Roger Price and I were members of really felt

that some time should expire before that was permissible, and that only new cases should deal with the amendments that are coming through for a period.

Chief Justice Bryant—That would be helpful.

Mr CADMAN—How do we do that? We cannot legislate, can we? How can we assist the court? Is there a process we can use?

Chief Justice Bryant—I would prefer to take that question on notice. I think it is a drafting issue and could be addressed.

Mr CADMAN—Everybody should ultimately have access if they can come back and want to do so. I do not know how many will.

Chief Justice Bryant—You could legislate to provide that for a period of time the effect of the act did not provide a change in circumstances that would otherwise have enabled the case to be opened. I think you could draft something along those lines.

CHAIRMAN—Thank you very much for coming along today.

Chief Justice Bryant—I think the committee has raised all the matters we wanted to raise, save for one, and I think it is important that I raise it. In the context of child related proceedings, there seems to have been some difference within the court, I think, as to the effect of changing the provisions of the Evidence Act. Certainly, the profession opposed any change. The first question is whether the provisions as drafted, in which the court does not apply certain provisions of the Evidence Act unless in a specific case it thinks it should, is integral to the new way in which children's cases should be dealt with—that is, less adversarial. Certainly, it was the court's view with the Children's Cases Program that this should be a different way of hearing cases—not just a change in the case management process but a real change in the way these cases are dealt with. If that were the view that this committee took, it would probably come to the view that the provision is integral to the proceedings. If you thought it was not integral then I suppose the question arises, as the court has put it, as to whether or not you made it optional for a judge to dispense with the provisions of the Evidence Act rather than the other way round.

Mr Chisholm—You might mention the state legislation.

Chief Justice Bryant—If there is any concern about that, we should bring to your attention the fact that all of the states, I think, have a similar provision in their child protection legislation—that is, the provisions of the Evidence Act do not apply.

Mr Chisholm—And in the adoption legislation.

Chief Justice Bryant—And in the adoption legislation. That applies also in the United Kingdom and New Zealand, so it is not unknown.

Justice O'Ryan—We can provide you with references, if necessary, for all that legislation, which is arguably of long standing.

Chief Justice Bryant—It is fair to say that, while there are different views in the court, the views of those who have had experience with the Children's Cases Program is that it is helpful and in fact enables them to control the evidence that comes in, so that the argument that a lot of extraneous hearsay comes in does not occur.

CHAIRMAN—Thank you very much for appearing. If you could let us have any material you have undertaken to provide to the committee as soon as possible. This has been a very useful exchange this morning. Thank you for giving us so much time.

Chief Justice Bryant—It is a pleasure. We have enjoyed the opportunity.

CHAIRMAN—Before we suspend for lunch, we have received some additional submissions and correspondence, and I need someone to move that material from the Victorian Aboriginal Legal Service Cooperative Ltd and the Men's Rights Agency be received as submissions and authorised for publication—

Mr CADMAN—So moved.

Mr PRICE—Seconded.

CHAIRMAN—and that we accept as confidential a submission we have received from an individual but not authorise it for publication.

Mr CADMAN—So moved.

Mr PRICE—Seconded.

CHAIRMAN—The motion is carried. Thank you.

Proceedings suspended from 12.37 pm to 1.25 pm

MILLER, Mr Tony, Founder and Director, Dads in Distress Inc.

CHAIRMAN—Welcome. Mr Miller, representing Dads in Distress, has been kind enough to have travelled from Coffs Harbour. Mr Miller, where does your organisation operate?

Mr Miller—We are based in Coffs Harbour but we are in three states—New South Wales, Victoria and Queensland. We have what we call authorised contacts in all states and we will be national by the end of the year.

CHAIRMAN—Mr Miller, although the committee does not require you to give evidence under oath, I advise you that these 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 have received your submission and it has been authorised for publication. I invite you to make a brief opening statement before we proceed to questions.

Mr Miller—The submission we put forward supported the SPCA, the Shared Parenting Council of Australia. We are behind them 100 per cent. In addition, we had a number of issues, including unjustified relocation—which has been omitted from the bill and should be added.

CHAIRMAN—That was in the Shared Parenting Council of Australia submission.

Mr Miller—That is right. We are possibly reiterating what they said. Other issues include the word 'serious' in front of the word 'violence' and the strengthening of contact enforcement options around continual breaches. Basically, we are asking that the legislation be given some teeth. From our point of view, the legislation does not have enough teeth to enforce anything and it can still be manipulated by those in the system, as it has been in the past.

CHAIRMAN—Is there anything else you would like to add in your opening statement?

Mr Miller—I have a document that I would like to read out, if that is possible.

CHAIRMAN—How many pages is it?

Mr Miller—It is only two pages. Is that possible?

CHAIRMAN—Yes.

Mr Miller—It is a brief overview of who we are, what we are and what we are asking for from this committee. Dads in Distress was founded in 1999 in response to my own separation and divorce. Since that time, we have established 17 groups in three states across Australia. New groups are opening at a fast pace, with 10 or more planned before the year ends. In Coffs Harbour, we have established the Mens Survival Centre, where we equip guys to survive the trauma of divorce and separation. We receive calls from men from all over the country. Many of those men are devastated about the lack of fair opportunity to be a dad for their children. Some

of those men are suicidal. DIDS has received 20,000 calls from Australian men in the past six months—in fact, it is a bit over 20,000—since we opened that centre.

DIDS has also received many thousands of emails from devastated dads. Our web site has received well over one million hits in the past six months. Many of the calls and emails we receive are from female partners of dads in distress. They want to know how to help their partner recover from the effects of a previous relationship breakdown. Grandparents also contact us. Children contact us looking for a dad they do not know and ask for help and advice on how to contact that father. We facilitate that through the work we do with people like the Salvation Army and their tracing service.

Our research indicates, as does the ABS statistics, that five Australian males commit suicide in Australia every day. We are not saying that they are all dads in distress, but we certainly know that a large percentage of the five are. Suicide is often the result of depression and social isolation. Men in Australia experience both of these during a family separation. DIDS has found that most fathers are not allowed to maintain their desired level of contact with their children. Some men do not know where their children live; others are denied contact by their partners even when Family Court orders are in place. This has a devastating impact on the dads, but it is ultimately damaging to the children.

Family law in Australia has historically awarded residence to the mother, with the father and children afforded contact on 20 per cent of the nights. Most men find that their relationship with their children is strained when they see them for only 20 per cent of nights. It is simply not enough time to have a meaningful and productive relationship. In contract law there are two parties, and both parties are provided with equal rights in legal disagreements. A marriage is a contract; however, when this contract is broken the Family Court currently awards 80 per cent of a child's time to one party. DIDS have serious objections to this, not merely on legal grounds but on many grounds. DIDS believe that this is not the best course for the psychologically healthy development of their children. Dads given the opportunity to be truly engaged in the lives of their children will be much less vulnerable to the social isolation and depression that leads to suicide.

Another message routinely received by DIDS is that dads are falsely accused of violence, sexual abuse and other atrocities merely to gain an apprehended violence order and legal advantage. Michael Green, President of the Shared Parenting Council of Australia, documents evidence of this behaviour in his book *Fathers after Divorce*. Michael writes that the 'denial of access, apprehended violence orders and false sexual allegations are common strategies in the armoury of custodial mothers who want to limit or terminate the contact of children with their fathers'. The Family Court, DOCS and the local police respond by further isolating the dads from their children. The dad is placed in the unbelievable position of defending his own integrity while not having contact with his children. The court and associated agencies are not under any obligation to evaluate the truth of the allegations. When the Family Court judge makes final orders 12 to 18 months later, it is common for the ruling to cite little contact between the dad and the children and to order continuance of the same.

This all occurs without any investigation or proof of any guilt. Innocent until proven guilty does not apply to false abuse allegations against a parent. The allegation destroys relationships between dads and their children and leads to male suicide. The protection process that children

deserve in cases of genuine abuse is itself being abused, resulting in a far more common human tragedy. DIDS proposes that family law rules be changed to mandate that an expeditious assessment be made of all allegations of child abuse that restrict parental contact with children. A beyond reasonable doubt that abuse has occurred assessment should be completed no later than 60 days from the restricted contact with the accused parent. If the allegations prove to have substance, then the restricted access would continue. Without proven confirmation of abuse, the children should be allowed normal visitation with the accused parent.

As mentioned a few moments ago, denial of access between a dad and his children is a commonly experienced event in separation. Unfortunately, some men experience little or no contact with their children, despite having Family Court orders in place that direct the contact. When their partners deny contact despite the orders, dads often have few avenues to resolve the dispute. The police will not enforce the orders. The Family Court may make more orders, but the custodial parent will reject the new orders as they did with the previous orders. This can easily go on for years. Just in the last few days one of our own guys said that he has 67 breaches in the Family Court, and this guy is ready to walk away from seeing his children. He has had enough. We hear this day in, day out—98 per cent of the calls that we get at DIDS are from dads who say, 'I just want to see my children. Why can't I see my children? What have I done wrong?' It seems to be that the minute you are a divorced male in this country you have got Buckley's. You can go to the court and get orders, but enforcing those orders is just hopeless. It happens time and time again.

We hear it every day of the week. This guy has had 67 appearances just to see his kids. He was repeatedly denied contact by his partner. The judge refused, citing a need to proceed to final orders and not get too concerned with the current contact. So the guy is in interim orders and has final orders coming up. She has breached them 67 times and the judge is saying, 'We'll adjourn it again and we won't hear it until the final orders.' The guy is saying, 'What is the point of going to final orders? What is the point if she is knocking it back now—I'm not getting to see them now; why should I even bother proceeding? It's just cost me $5,000 for a solicitor to stand there for the day to have it adjourned again. Here we go again.' It is a merry-go-round. This happens over and over again. We hear it day in, day out.

DIDS would like to recognise the efforts of the other mens' groups in Australia: Michael Green and Wayne Butler of the Shared Parenting Council of Australia, Barry Williams and the Lone Fathers Association, and Warrick Marsh and the Fatherhood Foundation. Historically, mens' groups in Australia have been independent, lacking the cohesion to join as a single voice. Yet, independently, these mens' groups have arrived at a near common message to the Attorney-General and parliament—that message being that shared parenting of an equal nature is the right of the children and men of Australia. We are simply saying that equal time takes the punch out of the argument. It takes the fight out of it. At the moment, that is what is happening.

CHAIRMAN—Part of our terms of reference is that we are not allowed to open the 50-50 custody provision.

Mr Miller—What we are asking, though, is that we put reference to equal time in the bill that you have put forward.

Mr PRICE—It is the same thing.

CHAIRMAN—Not necessarily. Equal time might not mean—

Mr PRICE—Fifty-fifty.

CHAIRMAN—I think there could be differences.

Mr PRICE—I know I am not good at maths, but I would like to know what school you went to!

CHAIRMAN—I might beg to differ on that. Is there anything else in your opening statement?

Mr Miller—There has been talk about equal time or substantially equal time. Our concern is that the word 'substantially' can be deciphered in a court by the lawyers and the judges and again we end up with the same thing. What is substantial? Substantial at the moment means you are getting 20 per cent—that is substantial. That is not good enough. That is what we are saying. We simply want to take the punch out of the argument—both males and females do it. We get many calls from mums who have kids where the dad is the custodial parent and the mum is trying to get access and is going through the same stuff. I have said it many times, and I know people do not like to hear it, but it is unfortunate that we have put a dollar value on our children's heads: we are prostituting our children. Whoever has got the kids for the most time gets rewarded. They get money for it. We have got to take that away.

CHAIRMAN—Could you tell us a little about what changes you want with respect to the description of violence? I see you want the addition of the words 'proven' or 'serious'. How would you define 'serious' as opposed to 'non-serious' violence?

Mr Miller—I think the Shared Parenting Council has put that to you: basically, at the moment AVOs are handed out like lollies—it is just so easy. A guy gets angry because he is being denied access to his children. Guys go to war for their families and children—they defend their children and they risk their lives for their kids. Yet, in a divorce, you are asked as a male to walk away. If you are lucky you might get every second weekend or half the holidays. Most times, even that will be denied to you. Men do get angry and thump on desks and say, 'I want to see my kids'—that gets them an AVO.

CHAIRMAN—What level of violence would you consider to be serious?

Mr Miller—We abhor any violence towards women or children and we will stick by that. But you are the experts—I am simply a dad in distress: surely you can word it in such a way so that if there is violence towards the woman or the children then the fathers should not have the kids. We would be the first ones to stick by that. But if it is just a case where a guy is standing out the front yelling or screaming because he wants to see his kids—what can you do?

CHAIRMAN—So you would like a better definition of 'violence'?

Mr Miller—I think there needs to be. It is too open-ended. You are able to be manipulated again and you do not get to see your kids because you raised your voice or pointed a finger.

Mr MURPHY—I would be interested to know what wording you would like in terms of shared parenting and whether 'substantial', 'adequate and equal' time or 'substantially equal' time would be more appropriate. What words would you like? Would it be something like 50 per cent?

Mr Miller—It would be wonderful, but are we going to get that? The words I would like are just 'equal time' and simply that.

Mr MURPHY—We had the Chief Justice of the Family Court here this morning. We raised that with her and the other members. They did not seem to think that we should try to apportion something such as equal time as a starting point because of the many and varied circumstances with the application of the law. It could be the location of the parents—

Mr CADMAN—No, later on they modified that and they are going to have another look at it.

Mr MURPHY—Yes, but they did not spell it out here today. Someone has to have the discretion. I am not disagreeing with you, because we raised this very issue and we raised it even yesterday. 'Substantial' could be five per cent.

Mr Miller—Exactly. That is our concern.

Mr MURPHY—Where the parents live, who has custody of the children and what is in the best interests of the children are very difficult things and it is very difficult to be prescriptive. I do not know whether you can come up with anything that is better. The judges are prepared to have another look at it, but I just feel that they are probably not going to have a starting point of equal time.

Mr Miller—I just see that having equal time in there takes the punch out of the argument. Most guys will not take 50-50. Most guys will be working and will not be able to take that equal time. But it starts at that point and you can work back from there. It takes the punch out of somebody saying, 'You're not going to see the kids unless you behave and do what you're told and unless we get what we want.' That is what is happening. We have many cases where our own people turn up to get access to their kids and they pay money because it is much cheaper than going through the Family Court. You are guaranteed to see your kids—it costs them while they are there and they are happy to do that. If you have not seen your kids for a month, you will do it.

Mr MURPHY—The trouble is that we are not always dealing with people who are full of commonsense and reasonable. In many instances, the parties are at war with one another and it is all about winning. It is intractable. Someone has to decide. Of course, the court and the state are not the best parents—we know that. What do we do about it?

Mr Miller—The minute you put in substantial time then, as you said earlier, it can be deciphered in a court and we are back to where we are now. It is up to the judge and the lawyer as to what they decide and what they come up with. 'Substantial' time could mean five per cent or 20 per cent—it could be anything. That is where we come back into the hole again.

Mr MURPHY—So you support the Shared Parenting Council of Australia and their submission in relation to this matter?

Mr Miller—I certainly do. My only question with the Shared Parenting Council is about 'substantially equal' time. I would like to take that out and just have it as 'equal' time. The word 'substantially' to us is a worry. It can be manipulated. Then we are back to square one again. We get back into a court system that has not been fair to us in the past. Then where are we going to go to?

CHAIRMAN—Just because the judges might want something, that does not necessarily mean that the committee will recommend it. Judges obviously come forward with their own views, which are sincerely held. There is a range of views in the community. I have to say that I am attracted by the concept of equal parenting as a starting point, but we clearly have to look very closely at the terms of reference given to us by the Attorney. It could well be that Mr Price is right on that particular point. I just want to reflect on that.

Mr PRICE—Perhaps 'equal parenting responsibility'—

CHAIRMAN—Yes. In most cases it would be good if there were equal time, but I understand that our terms of reference might well preclude us actually recommending that. We will just have to look very closely at that particular matter.

Ms ROXON—I wish to ask a question about the range of changes that relate to the family relationship centres and whether the Dads in Distress group has a view about those being an option that will be constructive—or not—and taken up by the members of their organisation. Obviously, there is a fair bit of dissatisfaction with the court, and the intention of a lot of these changes is to move a lot of the disputes out of the court. Mr Miller, do you have a view as to how effective they look to have been structured? Do you think that they will work? Do you think that they will keep your members out of court?

Mr Miller—We hope so. It costs a guy on average anywhere between $15,000 and $25,000 to get access to his kids, and usually that is to have them every second weekend and half the holidays. On average that is what it costs.

Ms ROXON—That is to fight it through the court?

Mr Miller—Yes, to go through the court system. By the time he gets a lawyer and gets through the court system that is what he is up for. Often they do not even get that or if they have got that it is denied them. The orders are not worth the paper they are written on at the moment—it is that simple. We would be all for these centres. All that we asked for in the initial thing as to the centres was that the people that you put in to run these centres work with us. There were concerns over some of the groups that had been suggested to possibly run these centres because of some of their views in the past. I am hoping that is changing. Hopefully we can get in and get the message out there that, even though you are a divorced father, you are still a father. We believe we have got a window of opportunity to spend with our kids when our kids want to be with us. It is only at a young age. When they get to the age when they want to go and do their own thing, they do not want to be with mum or dad. So we have got a very small window of opportunity to be with our kids and that window of opportunity is being denied to us

at the moment. It is that window of opportunity that we are fighting for. It is a very small one and it is becoming smaller.

Mr CADMAN—While we are not inquiring as to family relationship centres, the establishment of them is set out in the legislation. Have you got any picture in your mind about how they should operate?

Mr Miller—I would leave that to the experts. I am simply a dad in distress. What we are after is somewhere where we can go and sort this out without—

Mr CADMAN—Yes, that is what I want to hear—somewhere where dads can go and what?

Mr Miller—Just sort out this mess, rather than have to go and engage a solicitor and get into an adversarial system. We do not want that. We simply want to see our kids. If we can solve that through a family relationship centre, all the best. Many of the guys that we see come into our groups are still married and are going through relationship breakdowns. If we can save a marriage, we do, and that is a mark on the board for us. That is part of what our group is all about, so to us the centres are a godsend. We hope they happen, and the sooner they happen the better. The biggest worry is where they are going to happen. Certainly that should be in rural Australia. That is our big concern because there is a huge gap out there in rural Australia where they are not getting any support at all.

CHAIRMAN—And your organisation has a concern that these centres are going to be metro-centric, if that is a word?

Mr Miller—Definitely.

Mr CADMAN—Would it work for them to have people go on tour to, say, a regional centre and spend a week there once a month or something like that?

Mr Miller—I think a mobile type of unit would be ideal if that is possible. If that is possible, it should certainly be in the outback of rural Australia—most definitely.

Mr CADMAN—How would it be better than trying to do it over the telephone?

CHAIRMAN—We will be seeing the Attorney-General's Department witnesses, who I suspect are lurking at the back of this room at this moment, and we will ask them that question as to whether they are contemplating mobile centres for regional areas or what services they are looking at for areas which are more remote.

Mr Miller—We have even heard that Coffs Harbour is going to miss out, as a centre is going to go to Lismore, yet Coffs Harbour is in a much bigger growth area than Lismore and a centre is certainly needed in Coffs Harbour. There needs to be some talk with the A-G's department and with the people who are out in the field at the coalface to find out where it is needed. Let us work together and let us get this happening.

Mr CADMAN—It appears from the way in which the act is worded that the people who will actually operate the centres will be Unifam, Relationships Australia and groups like that and that

they will be remote from government: there will not be public servants in the centres. How do you feel about that process? Do you think that is a satisfactory arrangement?

Mr Miller—Yes. I would like to see some men's groups getting involved in some way. I do not know how, but if there is some way that we could at least be part of that—

Mr CADMAN—Do you think you could team up with, say, Relationships Australia and work in cooperation with them?

Mr Miller—Relationships Australia had a very strong feminist viewpoint in the past. Hopefully that has changed. With what is coming on now, let us hope so. If they are willing to work with us, we are happy to.

Mr CADMAN—They have made an assertion that about half of their clients are men and that they have a very balanced outlook, and now is a good time to come forward with any evidence that you have that they do not. If it can be established, then now is a good time to get all of that settled, not after the whole thing rolls out.

Mr Miller—Certainly.

Mr CADMAN—Do you have instances that you can refer us to? Are there individuals that you can tell us about? Are there staffing procedures that lead you to say that?

Mr Miller—Only the feedback that I get from the guys, and I do not have it here with me. I do not have any hard evidence here now.

Mr CADMAN—Could you get back to us with that? It would be a good time to do it.

Mr Miller—I could get back to you, for sure.

Mr CADMAN—Perhaps consider whether or not you could work in partnership with them.

Mr Miller—We are more than happy to. The bottom line of this is to come up with a better system than is there at the moment. It is not working at the moment. I think this is a breath of fresh air.

CHAIRMAN—Do you think there are many false accusations of violence or abuse being made by parties to a marriage that has broken down that are designed to outmanoeuvre the partner as far as time with the children is concerned?

Mr Miller—Definitely, without a doubt. We hear about it every day. The first thing that goes on is an AVO over domestic violence. That is one of the key issues to stop you from seeing your kids. The next one is child sexual abuse. Recently, I sat in a family law court, six years after a separation and divorce, to answer a judge who asked, 'Mr Miller, do you find it inappropriate that your nine-year-old son climbs into bed with you at night?' I answered, 'I am sorry, Your Honour, no, I don't. I love him—I'm his father, he's my son—and if he wants to get into bed with me at night then that's okay.' That is the sort of stuff that we have to get in the dock about. These sorts of questions are asked of dads. It is devastating to us.

CHAIRMAN—Thank you very much for appearing before the committee today. A transcript of your evidence will be sent to you which you could check. If you could let us have the additional material, we would very much appreciate it. We thank you for coming here at very short notice.

Mr Miller—Thank you. I just ask that, when you go home tonight and you give your kids or your grandkids a cuddle, you close your eyes for a couple of minutes and just imagine that they are gone the next day—all of a sudden those kids are not there any more—and imagine what that feels like. You will have no say on what they are doing and you do not know where they are going. Mum possibly has another boyfriend and he is calling the shots—he is handing out the presents from under the Christmas tree—the children go to a different school and you have no say in where they go to school. You have no input. As a dad, a whole range of things happen.

CHAIRMAN—And yet you are hit with child support.

Mr Miller—And you are hit with child support. Ninety-nine per cent of our guys have no problems in paying child support. That is not the issue. The issue is the perception that I am paying child support and I am not seeing the kids. Why should I pay child support? Rightly or wrongly, that is the perception. Fathers ask: 'Why should I be paying child support when she won't even let me see the kids? I have had enough of this.' Fathers get fed up and walk away or suicide—and they do suicide. We only have to look at the statistics: five a day. We are not saying that they are all dads, but there are five suicides a day. We are in the middle of an epidemic of male suicide in this country. This is going to go a long way towards solving some of those problems, if we can get this right. That is why it is so important. Thank you.

CHAIRMAN—Thank you.

[1.54 pm]

DUGGAN, Mr Kym, Assistant Secretary, Family Law Branch, Civil Justice Division, Attorney-General's Department

NOAD, Miss Susan, Acting Senior Legal Officer, Family Law Branch, Civil Justice Division, Attorney-General's Department

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

SYME, Mr David, Family Relationships Centres Development Section, Attorney-General's Department

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

CHAIRMAN—The committee welcomes officers of the Attorney-General's Department. Although the committee does not require you to give evidence under oath, I should advise you that the proceedings of the committee are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and it has been authorised for publication. We understand that there is other material that you may yet be going to send to us. Do you have anything else that would like to circulate today?

Mr Duggan—We have prepared to some responses to the issues that were raised with us by the committee the other day, and I am happy to start with those. I am sure there are one or two questions that you might like to ask us. I do not want to use up too much time in an opening statement, but I am happy to deal with those first six items. Would that be useful?

CHAIRMAN—It would probably be okay if you just circulated those, if you have copies. If you have one copy, we could arrange to copy them.

Mr Duggan—They are mainly in the form of a dot point response. Perhaps if we undertake to get that to you first thing tomorrow?

CHAIRMAN—That would be fine. You mentioned that you did not want to take too much time on an opening statement, but maybe you should give us a couple of minutes—or else we could just move to questions.

Mr Duggan—I am aware of the time constraints of the committee. I am quite happy to just take questions, if that is acceptable. We did have an opportunity at our earlier briefing of the committee to outline the government's position in relation to the legislation. I think a fair bit has happened since then and I have no doubt that there are a fair number of questions. I am aware of the demands on your time, so I would be happy to take questions.

Ms Pidgeon—I would like to add my apologies. I am going to have to leave at about 20 minutes to three. I apologise for that, but Mr Syme and Ms Warner will be able to answer any questions that I otherwise would have answered.

Mr PRICE—It is not because of any dissatisfaction with the committee?

Ms Pidgeon—No, not at all.

CHAIRMAN—It is not a walkout, is it, by the department?

Ms Pidgeon—No, I thought I had better tell you now in case you thought it was.

CHAIRMAN—Thank you for that. This has been a very interesting inquiry. It has been a very rushed inquiry. The time frame under which the committee has been operating has been somewhat difficult. We are doing the best we can to meet our deadline. It may be that I will have to see the Attorney-General for a short extension. We certainly have received lots of submissions. At the outset I would just like to raise the matter I foreshadowed a moment ago. In regard to the family relationships centres, what services are you looking at for rural and regional areas? Is the concept of a mobile centre something you are looking at?

Ms Pidgeon—Some of the centres will be located in regional centres, but because there will not be enough to be in every regional centre, we are looking at outreach services—about providing services in other parts of the region and providing specifically services to rural areas that may not have any real access to services at the moment. We would hope to have a range of different ways of doing that. There may be a combination of having a sort of travelling circuit or regular visits. But we could also, with the appropriate training and resources, use organisations in smaller towns and smaller regional areas to provide some of the services as agents.

Mr Syme—There are a range of strategies, not relying on telephone but using face-to-face services backed up by telephone communications technology—not relying on telecommunications technology. We heard very clearly that people wanted face-to-face services.

CHAIRMAN—Would you be looking at contracting out the provision of those services?

Ms Pidgeon—We would expect the family relationships centres—

CHAIRMAN—I am sorry; would you be calling for tenders for people to operate the centres or organisations?

Ms Pidgeon—We will have an open and competitive tender type process, yes.

CHAIRMAN—There has been some concern expressed about the time it is going to take to get all the centres up and running. I understand it is a logistical problem. I imagine that partly there would be the logistics of getting so many set up in a certain period of time. Also, I imagine you would like to look at how the first ones are operating when looking at subsequent centres.

Ms Pidgeon—It is a logistical issue but, as you have suggested also, we do not want to roll them all out in one year, even if we had the ability to do that, because we want to see how they

operate. We will be rolling out 15 in this coming year to be up and running by the middle of next year, 25 in the following year and 25 in the year after that. Certainly we regard the first 15 as places to see how the specifications that we are currently developing actually work in practice. We will be well into the next round of the selection process while the first results will be coming in. We will not be stopping the rollout while we wait to see how those first ones operate; we will be using them as demonstration models to help develop the different ways they might operate in rural and metropolitan areas.

CHAIRMAN—There have been submissions—you have probably read them—in relation to violence and the definition of violence, and that maybe that definition could be defined more accurately as to what level of violence is deemed to be violence for the purposes of the bill. Have you given any consideration to that?

Mr Duggan—The breadth of the definition of violence and child abuse and those sorts of issues are regularly with the department and the Attorney. The dilemma, however, is precisely the issue this committee was grappling with earlier this morning—that is, what is an acceptable level of violence? The definition that is in the legislation at the moment has been there for a long time and is well understood by the courts. You may have noticed the family law section of the Law Council suggesting in fact that it should be broader. This obviously is a matter for the Attorney, and he will clearly take it on board. I recognise that it has been a theme through a number of the submissions to this committee, but it is a very difficult issue from a policy point of view to put a definition that says some violence is appropriate.

CHAIRMAN—In my view, to stand outside a house and yell, 'I want to see my kids,' is not a very high level of violence.

Mr Duggan—The court has to determine that there was actually a risk to people as a result of that. That is a matter for the court on a case by case basis. As you would be aware, a threat to commit violence is an assault under the criminal law in Australia. It is determined on a case by case basis as to whether in fact the mere shouting represents a threat or a risk to the parties concerned. That needs to be dealt with, in our view, on a case by case basis.

Mr PRICE—There is confidence that the court can handle that, and that is what the Chief Justice said. It does not present a problem, whatever definitions you put in. The issue is about how many people are going to be eligible or ineligible to go to the family relationships centres.

Ms Pidgeon—No-one will be ineligible to go to them. People can go to the centres whether or not there is violence involved. It is only about whether they will be required to go through some sort of dispute resolution. Whether it is mandatory or compulsory to go through dispute resolution either at the centres or somewhere else is where violence comes in. Even if it is a case with violence, under the proposed legislation they can opt to go through a process like that. They can opt to go to a family relationships centre. There is absolutely nothing that prevents them. It is not a door being shut against them at all; they will not be compelled to go to either the centre or another dispute resolution process if it is a case involving violence. I do not think it should be seen as a thing that blocks people using that service; it just says that they are not compulsorily required to go to such a process.

Mr PRICE—Are we talking about the victim here, or are we talking about the perpetrator?

Ms Pidgeon—Either. You can opt to go to a centre; you cannot force anyone to go through a dispute resolution process if there is violence involved. In a case of violence, if the perpetrator wants to but the victim does not, the victim cannot be forced to. Similarly, if the victim wants to and the perpetrator does not, you cannot force them to. If they decide they want to go—

Mr PRICE—Have you done a study on how many AVOs have been issued and how many people could potentially opt not to participate in family relationships centres, or do you not see that there is a problem there at all?

Ms Pidgeon—There is nothing in the legislation that will prevent them. It may well be the judgment of the professionals involved that it is not appropriate for that sort of service—and that is a different question—but the legislation is not preventing them.

Ms ROXON—In terms of what you are saying about people being able to opt to go, what sort of security do you intend to have at the family relationships centres for the handling of highly emotional and potentially difficult clientele?

Ms Pidgeon—The sorts of security measures that a service would need to have in dealing with such clientele include things like separate entrances, duress alarms, careful use of and placing of furniture, separate waiting rooms. All those sorts of things are normal in a service that is going to be dealing with separated parents. The details will still need to be developed. I have to say that no service would put together people where there is a history of violence. I am saying that it is not the legislation that does that; it is the professionalism of the service and the screening. We will require very thorough screening as part of the normal professional practice of these centres. It would be quite appropriate for them to see the centres individually and to get assistance as they can, but it may well not be appropriate to have two people involved in a dispute resolution process. It is not the legislation that prevents that; it is the fact that we will have normal professionalism and screening requirements.

CHAIRMAN—There was talk about whether three hours would be long enough. I think there is an assessment period plus three hours. Are you wedded to the three hours? Do you feel that you can justify that?

Ms Pidgeon—The government has made a policy decision on that issue. If they need more then three hours, it does not mean that everything stops; it means they can either continue at the centre if it has capacity or be referred to another service. It may well be that, if it looks like a case at that initial assessment for which three hours is just not going to be enough and it is the sort of case that is going to take longer, it can be referred immediately. They do not have to go through three hours and then get referred.

CHAIRMAN—I have one question emanating from the evidence by the judges this morning. They were suggesting that, after 30 years, the Family Law Act is in need of a re-write and a renumbering system. When I see 'A's, 'AA's and so on—and I think, in one place, you had 65DAC and then skipped 65DAD and went to 65DAE—it seems very convoluted. While this legislation clearly has to go through without a re-write, if the committee were to recommend that a re-write be seriously looked at, what sorts of resources could the department put into that?

Mr Duggan—It would be entirely a matter for the Attorney to determine what priorities such a re-write might have in terms of what resources we would then put into such a task. If I could express a personal view, to the extent that we are able to in these sorts of situations, I think there is absolutely no doubt that the legislation would benefit from a re-write. The dilemma is what resources can be applied to it, how long such a process would take and what sorts of expectations would be raised if you did start to revise the legislation in that way. As you know, the government is extremely keen to move quickly to respond to the committee's report. It is getting on for two years now since the committee reported, and the government is extremely keen to put forward its legislative response to back up the response in relation to the family relationships centres. Clearly, the Attorney would take on board any recommendations this committee might make in relation to a re-write of the legislation but, if that were to include all of the legislation, it is a very large task and would take some time.

CHAIRMAN—The judges, I think, said that part VII was a priority.

Mr Duggan—Part VII is an area that has been amended a number of times since it was enacted in 1995 or 1996. Again, it might well be done in isolation of the other parts of the legislation, but we query the value of dealing again in a piecemeal approach with reform of that nature. It is not just part VII that has been amended a lot of times since 1975, as most members here would know. It seems to me—again, as a personal point of view without having consulted the Attorney—that, if you were thinking about rewriting the legislation, it would be a task that would best be done including the whole legislation and not just one part.

CHAIRMAN—I imagine you have been watching the proceedings. I think Mr Kerr has a quite relevant question.

Mr KERR—I thought that we might shortcut some things by observing that you have been at the rear of the hearings on most of the occasions and no doubt have copies of the material. It would seem that it is quite likely that through these proceedings you yourselves may have taken a view that certain submissions that have been put to us are valid and ought to be supported and that there are others you would resist. Given our time constraints, it seems to me that it would be very helpful if now or very quickly you could identify those aspects of the evidence that you think should be picked up and then let us look at bits that you are not being persuaded on. It would be very helpful if the department, having heard the responses to the exposure draft, said whether certain suggestions that have been made are worthy of support. They could then be dealt with with less contention and we could then focus on the submissions that have been put to us where the view that you hold is that the original measures should stand as they have been drafted.

Ms ROXON—To be fair to the department, I think the submission that they have given us has done a lot of that except with regard to the most recent evidence.

Mr KERR—That is all I am saying.

Ms ROXON—I was just going to explain to the department that most of us got the submission only today or late yesterday. So, in a way, I think Duncan is asking you to perhaps highlight some of those because people have not read it.

Mr KERR—I have not read it.

Ms ROXON—I know. That is why I thought I might—

Mr KERR—Point out that it has been done.

Ms ROXON—To give the department credit because they have tried to do that—but, obviously, there are more recent things that are not in it. It might be helpful if, before we start a lot of our questions, the department could highlight some of those things, because all of us are likely to ask things that come up in the contentious areas.

Mr Duggan—To some extent, the dilemma is that we have not had an opportunity to consult with the Attorney about these matters, and many of these matters are matters for the Attorney. In fact, all of these matters are matters for the Attorney, not for the department. A range of issues were raised by the court this morning, including, for example, the definition of major long-term issues and the vexed question of (e) of that definition—that is, the one about living arrangements for children. There are significantly different views about what is a significant issue in relation to living arrangements for children. Some would say that those issues should only relate to where the change in living arrangements means that it is more difficult for the non-resident parent to get contact with the child. That is one view about those provisions. But, as Mr Turnbull mentioned this morning in his discussion with the court, there is also the situation where a new partner is introduced into a home and there are all the difficulties associated with that particular individual. If we are talking about what tends to happen in a lot of situations, to most fathers that is probably a very significant issue and, from that person's point of view, if we are going to give joint parental responsibility a real meaning, they would expect to be consulted in that regard.

Mr KERR—I think the point made by the court was not in relation to consultation; it was that the decision be joint and therefore to proceed with a new partnering relationship would be bring you, subject to the enforcement provisions, in contempt of the order were you to re-partner in the face of objection from your former partner. I think most of us would suggest that that might be social engineering to a point beyond which we really thought the legislation was intended.

Mr Duggan—My only problem with that, and the reason for raising that as an issue, is that that is a policy question. It is not a question to which I can give you an answer.

Mr KERR—But was it intended that a former spouse be able to veto their partner, who has some share of the residential arrangements with the children, forming a new relationship?

Mr Duggan—Not at all. The question is whether that person coming into the home will effectively be parenting the children in some way. That is a matter that the other parent should have a right to be consulted about and where a joint decision should perhaps be made. Whether the provision now goes too far is an issue of policy for the Attorney to decide.

Mr KERR—I think the point that was raised was that the explanatory note does not go to that issue. In other words—

Mr Duggan—No, the explanatory note talks about where we thought the majority of these issues would arise.

Mr KERR—But you had it in your mind that this might be one such issue?

Mr Duggan—Indeed.

Mr KERR—It is a bridge further than most of us would have thought.

Ms ROXON—I will follow that up with regard to major long-term issues. In your later submission—I think, in answer to some questions that I or someone else had asked about whether even forming a relationship with a new partner might be considered in this legislation—it says that is not a major long-term issue. When the definition is not exclusive, how can that be asserted? It does not say, 'This is the only thing that is a major long-term issue.' I am following on from what Duncan was saying. It seems to me that every issue potentially could be in there. Isn't that one of the questions we have to grapple with—whether this is going to create a whole new area of litigation for people rather than removing one? I just wondered if you could explain to me how you confidently say, 'No, it is not a major long-term issue,' when the list is not limited to the five items that are in the definition?

Mr Duggan—Because it does not of itself need to impact upon the children. It is only where there is a parenting issue that the parents need to consult each other. If you choose to form a different relationship outside the original relationship, that does not necessarily impact on the parenting of the children. It is when it does impact on the parenting of the children—

Mr KERR—What about if your partner moves out of home every Tuesday, Thursday and Friday, when you have the children? This is absurd.

Mr Duggan—My difficulty is that what you are really asking here, in my view, is that the department make policy decisions we have not had an opportunity to talk to the Attorney about.

Mr KERR—It is quite routine for the Attorney-General's Department to give advice to committees that does not bind the Attorney. It is not uncommon. In fact, it is more common than not that it is the department's advice. You come before us and say, 'We can't give you any advice because we haven't consulted the Attorney.' If we needed the Attorney, we would have the Attorney. We have the Attorney-General's Department, which has a high level of expertise. We have asked, 'Where has the department been persuaded of the merits or otherwise of particular submissions,' and Nicola has kindly pointed out that my oversight led me not to notice that you had substantially done some of that work. We are not trying to say that anything you say will bind the Attorney. He may well have a different view and I would not hold him to any representation you made. It is simply asking, 'Can you assist us?'

Ms ROXON—It is pretty crazy: although we have a reference from the Attorney to do this inquiry and advise him of recommendations, we are going to be in a very circular process if we cannot get any advice or information from you to make that faster.

Mr Duggan—From my point of view, a possible model for this provision is the recommendation made by the Family Law Council which you are probably aware of. It is my personal view that that might be a model that we could go forward with. That talks about whether a change in circumstances means that there is an impact on the contact arrangements with the other parent. I think that is a possible model to be considered.

Mr PRICE—Does that formula work both ways—with both parents?

Mr Duggan—Absolutely. It would recognise the reality that many changes of living arrangements—I am talking in the very narrow sense of where you actually live—are actually forced on parents. It is not by choice but because of diminished circumstances once you separate.

Ms ROXON—I have just two questions, at this stage, that come from your latest submission. One is on the concerns about the bill leading to increased litigation. The department says that it expects that there might be an increase in litigation in the short term but that it will result in a decrease in the medium to long term. I assume that that means that the department acknowledges that new provisions and different thresholds and things will be tested, and really it is just a kind of a statement of aspiration that it will eventually drop off in the future.

Mr Duggan—No, it is more than that, I think, because the government's major intention in this regard—and it is reflected in the legislation—is that, to the maximum extent possible, matters that can be resolved outside the courts are resolved outside the courts. That is why the thresholds to actually get into the courts in the first place are quite high. We had that discussion this morning as well. The government has put together a very significant package of resources that Ms Pidgeon is looking after. The fundamental tenet, if you like, of this legislation is that, to the maximum extent that they are able to be, these disputes should be resolved outside of the court process. The hope of the government is that the influence that court decisions have on parenting decisions in the longer term will in fact diminish over time. We had the other discussions—

Ms ROXON—I understand what you are saying about the other resources that support it, but we are not inquiring into that, although we have quite a lot of questions about it which I know will get asked because we are all keen to know. But, in terms of the bill, have you not actually indicated your view that there is likely to be an increase in litigation? The intention of keeping people out because you will have put resources elsewhere is not really the same as whether or not the bill will have that impact.

Mr Duggan—It is more than just an intention, with respect, because we actually say that you must go through a family dispute resolution process before you lodge. So it is not just aspirational, in these circumstances. I think it is legitimate to say that the legislation puts that hurdle—if that is the right word—or that gate through which you must go before you actually get to the court. It is the legislation which does that.

Ms ROXON—The department is not worried that the new thresholds, the different exceptions and the new definitions will actually increase litigation? I find it very hard to believe, especially with some of the other evidence that we have been given, that there are not now more than a handful of new thresholds. Any litigious party could triple or quadruple the sort of litigation that is involved in any Family Court matter. I think that is a pretty worrying consideration for anybody who has been through the system or is at risk of going through the system.

Mr Duggan—The intention of the legislation, together with the family relationships centres and other services, is to change the culture of dispute resolution within the family law system away from court based approaches. The whole package of government amendments is intended

to work in that direction, so, whilst there will be—if the 1995-96 experience is any guide—some initial testing in that regard, we do not believe that there are masses of people in the community waiting to get to the Family Court. I might be wrong about that, but we do not think there are. People will, in fact, choose to use the family relationship centres, particularly as they will be, at least initially, a free service for most people.

Ms Pidgeon—Not 'at least initially'—it is a government policy.

Mr Duggan—For the three hours, I mean. Up to that level it will be a free service. We think that will be very attractive to most people. Most people are not queuing up to go to the Family Court. That is our view.

CHAIRMAN—Is that one of the reasons for 64D, which means that parenting orders are subject to later parenting plans? That section essentially says that a parenting order is deemed to effectively include that the order is subject to a subsequent parenting plan.

Mr Duggan—Absolutely. I will ask Ms Pidgeon to talk briefly about the Contact Orders Program in a second. To some extent that provision is built upon the experience that the government has had with services which can interact with parties who have long-term entrenched conflict. It is not a treadmill, a hopeless cause. There are very successful programs, which the government is going to expand, which can deal with clients in exactly that circumstance.

Ms Pidgeon—That is absolutely right. It is not just the family relationship centres. The funding package includes expanding some other services, and one of them is the Contact Orders Program, which is only available in a small number of places currently. We will be expanding that so that it is available—there will be 20 services around the country—though it is still not going to reach everyone. That particularly deals with people who have been churning through the courts, going back to court with breach after breach. The court is not the most effective place to deal with those sorts of high levels of conflict because even when you have a court order it can be breached again. The Contact Orders Program becomes a circuit-breaker and it has been shown to be very effective in reducing conflict and helping parents focus on the impact that conflict has had on the children. That is often the trigger for the parents then finding other ways to deal with their conflict and re-establish contact. They also work with children's contact services to help re-establish contact.

Mr KERR—Questions arise out of what both Mr Duggan and Ms Pidgeon have been saying. The template involves requiring people to go through a process which is intended to lead to conciliated outcomes if possible. But there is a mechanism by which that is bypassed if the court is satisfied of certain criteria. We had a discussion this morning about the efficacy of that mechanism, and I think that I raised it at our threshold meetings as to whether or not this might be productive of greater conflict and litigation at that threshold stage where one party asserts that there has been either child abuse or family violence or the potential of abuse or violence.

There is one alternative model that commends itself to me and I would just like to run it past you. You start out on the proposition that all you need to do to take yourself outside the otherwise required process is a document that is sworn which carries with it a penalty for false testimony—a statutory declaration or whatever the appropriate form is, that clearly carries with

it some legal sanction if it is falsely sworn. That then takes you out so there is no necessity for a hearing. Undoubtedly the allegations will be raised by way of issues relevant to the custody itself or—in the new language—the residency and the like. If at any stage in the proceedings the court believes that there is not a sufficient basis for a fear of violence, they then go back to step 1. In other words, they get displaced out of the system and they must go through the conciliation process before they return to the court. Getting through that hoop in the first place does not take you out of the obligation if later it is shown, through the way in which the proceedings emerge, that in fact you have tried to bypass an arrangement that you should have gone through.

I wonder whether that would be more satisfactory. I can certainly see why people would start to litigate these things as threshold issues, trying to take advantage, for example. If there is any weight in the argument that people sometimes tell fibs about family conduct—and I suspect there is some weight in that at least in some instances—that would put it front and centre. In the circumstances the previous witness just deposed to when he said that in the heat of the moment most people are rawest, that is the most likely time when they are going to come up with the biggest whoppers about their circumstances. It seems to me that that might be a neater way of dealing with it and trying to avoid the court having to have a fact-finding exercise early on and yet still defending the principle that everyone should go through a mediation process or a conciliation process where there is no real substance to the concern.

Mr Duggan—It is fair to say that this is one of that most difficult provisions we have had to draft, for precisely the sorts of reasons you have just outlined. We are trying to make sure that there is a real gate you have to go through, not just a symbolic one. From the viewpoint of certain stakeholders in this debate, the dilemma is that the proposal you put forward involves a relatively low threshold. The government's point of view, and the reason the provisions are set the way they are, is that we want as many as possible to be taking the other route. It ought not be an easy route to go down. We have had quite significant discussions about the level of this threshold.

Ms Pidgeon—It is also important to note that the proposed provisions do provide for the court to refer people back out again. If they do get past by claiming one of the exceptions and the court is satisfied that they should still go through the process in the community, even if one of the exceptions is actually met but it is a case where there is an appropriate service they could use, the court should be sending them back out again. That is actually provided for.

Mr KERR—What I am saying is that it should be mandatory. I do not know the degree to which people make these kinds of allegations. To hear some people, you would think it happens all the time and that everyone lies about it, saying, 'He thumps me' or 'He's abused the children' or 'She exposes them to drugs,' or what have you. I honestly have no idea about the weight to give those kinds of submissions. But, assuming that in at least some instances these kinds of things occur, particularly in the immediacy of a separation, it seems to me that there is a pretty good case to maybe lower the threshold. I accept that you want everybody to go through this, and 90 per cent will anyway. But getting the extra five per cent would be at the cost of setting court up to have a whole series of determinations, because it can only make these if it is reasonably satisfied that abuse or family violence has occurred. If such an allegation is put down on the papers, the court will have to devote substantial time to that. There will be a whole delay in the process. It does not help any of the things that the government and I want to happen, which are that people do actually start thinking through what the best outcome is. It diverts them

into a fight about whether somebody is violent or potentially abusive of the child or, as a witness said before, what is the consequence of someone sleeping with his nine-year-old and what have you, at that stage. That then becomes a fiercely contested and divisive issue.

The court has to form a view on reasonable grounds. People will not concede these things, because to do so may then form a basis for the way in which the matters proceed later. My intuitive reaction is that this is going to cause monstrous trouble. I may be wrong, but if I am wrong I would like to be persuaded as to why I am wrong. If I am right, I would like to be persuaded why the remedy I propose would not in the end have the same effect that the government wants, because if at any later stage it is shown that somebody has sworn a false affidavit then you can have enforcement procedures. You can go right back to the beginning again and that would then get taken into account, I suppose, in terms of credibility and everything else. So by making that false allegation up front someone would get through the door quickly but they would potentially place themselves in a situation where they would lose out substantially in the long run.

Mr Duggan—There is significant evidence through court practice and other studies to show that, once allegations of this sort are actually documented in affidavit or other form, the conflict is entrenched. It may be done through an application with a supporting affidavit, often by perhaps a not-disinterested third party. I am just trying to explain to you that there may not be a whole lot of difference in terms of entrenching the conflict between the parties. The government's view is that alternative dispute resolution in that broader sense, as opposed to judge-made decision-making, ought to be done progressively outside the court. That is the model that we are moving towards.

Mr KERR—We are all broadly agreed.

Mr Duggan—What we ought to be doing is setting a reasonable threshold before you get into that process. Those who are in that process ought only to be those who really do need the court's assistance in making decisions. There is an argument that, once you actually set these things on paper, whether you do it in the way you have done or as it is perhaps required in legislation, you have already entrenched that conflict between the parties. By setting a higher threshold an argument is that you keep more people out of that process. That is one argument. Obviously, I take the view the court raised this morning seriously. I cannot speak for the Attorney, but clearly the Attorney will take that on board. That was a significant issue that they raised this morning and it needs to be given further consideration. But that is the rationale and the concept behind this. Progressively, we are not looking at the courts to—

Mr KERR—I understand this. We are in massive agreement, I think. It is just a question as to the most appropriate strategy for achieving this and whether these issues could be resolved simply where they could be raised. That is why I asked the court how they would address this. It seems to me that, if they are raised, you are going to have to have a full-on hearing. That means evidence. It does not mean just doing it on the papers. How can you tell on affidavit evidence, where one person says A and one person says B, whether you have a reasonable basis? You cannot do it on the papers.

Mr CADMAN—They do it now for interims on the papers.

Mr KERR—I know, but this is a different thing. This is effectively a judgment that will run right through in terms of the consequences to the parties. The court is making judgments about one party being responsible for, or being reasonably apprehended as being responsible for, violence.

Mr Duggan—The court indicated this morning that it thought this sort of issue could well be dealt with in an interim hearing. I am just quoting from the chief justice this morning. It might well be done on affidavit evidence. I think that is a possibility.

Mr KERR—I would not accept that if I were one of the parties. Seriously, assume such an allegation was made against me or Ms Roxon or anyone else and the court says: 'We'll decide this on the papers. They've put in an affidavit. We're going to find that we have reasonable suspicion that you've abused your child.' Goodness me—I am not going to cop that. I would be demanding a full hearing. I think I would be absolutely entitled to it, because everything follows on that.

Mr Duggan—It may well be that, once you have an allegation raised against you even at an interim stage, you would also want to have that sort of determination made. As I have indicated to you, these were difficult issues that were grappled with.

Mr KERR—Yes. I do not want to take this any further.

Mr PRICE—What I do not understand is this: we are being prescriptive about judges and how they should act, having no regard for their professionalism, but we are saying that, in family relationship centres, we are not going to put anything in the act—it is up to the professionalism of those working in the centre. I do not understand it.

Ms Pidgeon—It is not just the professionalism in the sense that we will be—

Mr PRICE—But you are saying to me that there is nothing in the act—

Ms Pidgeon—No, we will be having—

Mr PRICE—You said that.

Ms Pidgeon—It will also be dealt with in the agreements that the government will have with providers.

Mr PRICE—But that is beside the point. You are saying that members of parliament should be responsible—and I think we should be—for looking at legislation that determines how a judge acts, but, as to the way the family relationship centres work, you are going to do it in some bloody contract that will be commercial-in-confidence. Mr Duggan says, 'Don't worry about the court, because we are throwing $400 million at these centres and we are going to solve all of your bloody problems.' You have not even bothered to brief the committee about how these centres are going to work when that is fundamental to the changes in this act.

Ms Pidgeon—What are you asking me?

CHAIRMAN—Could you give us an idea as to how they are going to work?

Mr PRICE—I think at some point it would be a real courtesy to the committee to brief us about how you anticipate these centres are going to operate. I understand that the government is consulting on child support proposals; it is a pity they are not on the table at the same time, because they all interact. But we have to make an assessment, and you come here today and say that there is nothing in this act that determines how the relationship centres are going to operate.

Ms Pidgeon—With respect that is why it was not in our submission, because it is not part of the legislation. There was an extensive public consultation on the family relationship centres last year.

Mr PRICE—It is funny that the groups that appear before us do not tell us about it. They are complaining about a lack of consultation.

Ms Pidgeon—No.

Ms ROXON—The consultation last year was before a lot more detail was out, including the legislation.

Ms Pidgeon—The consultation was for the purpose of our being able to take on board people's views about how they would operate. So that consultation has been undertaken. We are very happy to provide the committee with a written outline, given the time frames, of the intentions for the family relationship centres.

Mr PRICE—Thank you for that.

Ms Pidgeon—Essentially it is set out in the government response, tabled on 23 June, to the report entitled *Every picture tells a story: inquiry into child custody arrangements in the event of family separation*.

Ms ROXON—But none of that has the detailed operation. One of the big questions we have been grappling with among ourselves is the sort of accreditation that a person or an organisation would require. That is something that links in with the bill, where all the accreditation required is that they be in receipt of funding. If you are in receipt of funding you are suitably accredited. Again, in relation to the point that Roger was making, I think all of us have some concern that people who are going to be intimately involved in negotiating arrangements between parties in difficult circumstances, often supervising care of children and other things, do not have any process for proper accreditation.

Ms Pidgeon—The approval processes are currently under the act, and they essentially rely on the detail in the funding agreements and the quality assurance that we have. This is administered by the Department of Family and Community Services on our behalf, and in contracting organisations there is a quality framework and quality providers that are independently audited on a rolling basis.

Ms ROXON—But you can see the difference when we are being asked to advise on a bill that will make it compulsory for people to go to these centres. We were quite surprised, at least Roger and I were, that there is no accreditation process for the children's contact centre.

Ms Pidgeon—That would be a good point to address now. The bill does not make it compulsory to go to a centre. I think that is a really important point. It makes it compulsory to go to a dispute resolution practitioner, not necessarily in a centre. That can be a private practitioner, it can be an unfunded service or it can be a funded service.

Ms ROXON—But there is a wider group of unaccredited people who will be able to meet the requirements.

Ms Pidgeon—That is right.

Ms ROXON—That does not give us a lot of confidence.

Ms Pidgeon—The intention is that they will have to meet an accreditation process which we intend to bring forward into the legislation once we have developed it. At this stage, the detail of that still needs to be developed. They will be in place in time for the compulsory dispute resolution processes coming into play, and July 2007 will be the initial part of that. A certificate will have to be provided by an accredited family dispute resolution practitioner before it is accepted that they have met that compulsory requirement. So that is not something that relates just to the family relationship centres; it is right across the service system, and private practitioners will have to meet those accreditation standards.

Ms ROXON—Ms Pidgeon, why would we as committee members agree to the provisions that the government has put forward for the schedule of times phase-in, if you like, for when it will become compulsory if there is intention to put into either a future bill or perhaps regulations the necessary protections that were there? Why would we not make those other changes later, at a time when we can be confident that the centres are set up and accredited and there is a proper process in place? Why not then take the step of making it compulsory?

Ms Pidgeon—The main answer to that is that compulsory dispute resolution was a very important recommendation by the committee in *Every picture tells a story*. The government has accepted that recommendation. I think it would be very unfortunate if a very important recommendation was not at all addressed in the legislation that is being put forward now.

Mr KERR—Can I spring to your defence and say that once you legislate it at least there will be a lot of pressure on you to bring forward the money and the other elements—

Ms Pidgeon—Yes, to make sure the accreditation is in place.

Mr KERR—but I do think that the points that Roger and Nicola have raised are entirely with merit, because what we are buying is the pig in the poke. This is a legislative framework that refers everybody through an unascertainable process where we are not certain whether there will be any uniformity. We know it will be tendered out to a number of different providers, some of which have different cultural values, different religious values and different social values. They operate in different circumstances and we do not know what the administrative arrangements

will be. So we are basically buying the requirement to send people through this without having the slightest idea of whether or not we are going to be satisfied with the ultimate outcome.

Ms Pidgeon—Can I stress again that it is not the family relationship centres that will be compulsory; it will be a range of accredited practitioners, including, for example, private lawyers who also have mediation training qualifications. So we are not really talking about the family relationship centres here; we are talking about the accreditation process. I accept that that is a very important issue in terms of standards and quality.

Ms ROXON—Obviously there are political issues involved that we do not expect you to be able to comment on, but if you are a constituent in Footscray and you do not have very much money and you are not in a marginal government seat, feeling confident about having access to a centre that is yet to be determined, with no idea where it is going to be placed, no process for accreditation and not knowing who is going to staff it will not fill you with a lot of confidence that the government is acting on the response to the inquiry. I know you cannot answer that, but you need to understand that that is part of our frustration. We are trying to take seriously the responsibility of having a view about the bill itself. That might be fine if we knew what was going to happen all around it, but we do not. For example, everybody on the committee has been talking about the three hours. As far as I know—and correct me if I am wrong—there is nothing in the legislation which requires three free hours of advice, consultation or support to be given to anybody. Is that right?

Ms Pidgeon—It is not legislated; it is government policy.

Ms ROXON—The things that are being built into the legislation are meant to be supported by government policy, and we have not really seen that roll out. It makes it really hard for the committee to feel confident about the recommendations that we are going to make if we are just on a promise that these things are going to happen.

CHAIRMAN—I do not think that there is any suggestion that the government is only going to put these centres in marginal government seats. I do not think that anyone should suggest that.

Ms ROXON—We do not know where they are.

CHAIRMAN—We do not know where they are either.

Mr KERR—I am not going to make that inference. There is enough here for this issue to be treated very seriously on the administrative side. It leaves me with some doubt, particularly as I was quite genuinely shocked by the evidence we received in Melbourne about the contact centres, where there is no accreditation in place. Knowing that contact centres existed, were being referred to by courts and were required for over a decade, it is shocking to know that we have not put in place any accreditation and that people are probably being exposed. At the time, Mr Price and I were making scathing comments to each other. As one of the witnesses said, 'This is actually placing people in danger,' we said, 'That sounds completely implausible.'

Mr PRICE—Over the top.

Mr KERR—Then we had somebody who runs one of these, and subsequent witnesses, all saying, 'Yes, it does. They are unaccredited. Some are unprofessional. Some do not have proper standards.' The problem we have is that you are asking us to have confidence in administrative arrangements that are not in place, that make all these things compulsory and that we are not really able to identify. We have put the laws in place but the laws on their own do not really answer this.

Ms Pidgeon—I will clarify something here. I know you are just using that as an example but, in fact, the funded children's contact services are—

Mr PRICE—It was not a complaint about the funding; it is the Commonwealth funded ones.

Ms Pidgeon—Yes, that is right.

Mr KERR—We were excepting the funded ones. The point is, the court is actually referring people and obliging them to go to unfunded centres because they are the only things that exist. They are not accredited; they are holding themselves out for this function. The courts are directing people to undertake services—

Ms Pidgeon—But we will not be doing that under the compulsory dispute resolution system. They will have to be accredited. I agree that we do not have that—

Mr PRICE—I make the point that I do not recall in *Every picture tells a story* that we were saying that they could bypass a family relationships centre or the entry point and go to a private practitioner. I do not recall that being part of the recommendations. I do not recall the government's response accepting that.

Ms Pidgeon—The government response certainly says that.

Mr PRICE—Does it? The other thing is that I think the committee would want to have a view about the training of these private providers, like their actual qualifications. The idea of just giving someone a bit of mediation training and saying, 'You are now an expert in family relationships, having a fundamental understanding of the best interests of the children, developing parenting plans and what have you as a result of having some mediation training,' causes me a great deal of concern.

Ms Pidgeon—In fact, that is why we have not yet got something in the legislation. We realised pretty quickly that putting in something about the accreditation in the legislation as the framework for this, which we thought we would be able to do, is important. There is going to be a lot going into this accreditation; it is not just going to be that somebody has had a bit of mediation training. There are already provisions in the regulations setting out requirements for mediators. We will be broadening those. At the moment, the regulations do have that in there, but we want to have something that is more specific in relation to the requirements, including things like screening, to make sure that they have got the right sort of training. At the moment, the regulations for mediation talk about—

Mr PRICE—I would like to see those regulations.

Ms Pidgeon—They are in the existing act.

Mr Syme—They cover both the training and qualifications of the mediators.

Ms Pidgeon—I will hand over to Mr Syme. Unfortunately, I have to go.

Mr KERR—Before you go, good luck with your travel.

Ms Pidgeon—Thank you. This is an area that Mr Syme has a lot of expertise in.

Ms ROXON—There is a change in the bill that is relevant to this and accidentally led to us uncovering this in one of the inquiries—that is, the change that is being made to voluntary, not-for-profit organisations being the only ones that can currently be approved under the act. That is going to change. One of the reasons that I would like you to address this for our information is that, obviously, if the only tool at the moment to provide quality control is linked to funding, that is quite effective if the only people that you can approve are not-for-profit organisations because, essentially, they cannot really get their money from anywhere else other than funding from the government. If you are opening up to for-profit providers and they say, 'We can make money out of this irrespective of whether the government gives us funding to run this centre or this service,' what sort of quality control will exist for the for-profit providers if they are not dependent on a funding agreement with the Commonwealth? From the participants' point of view, they are unlikely to make a distinction as to who is funded by the Commonwealth and who is not as long as they are accredited or get the tick that they can provide this service as far as the court is concerned. How will it work?

Ms Warner—Until the accreditation requirements come in, the regulations under part 5 of the family law regulations will still be in effect. We are intending to amend them to reflect the new terminology, but we will not be making any substantive changes. Those regulations set out things like the qualifications that mediators must have and the screening processes they are to use. They will still apply until the accreditation requirements come in. To be a family dispute resolution practitioner or a family counsellor under the act, you will still have to meet those quality requirements in part 5 of the regulations.

Ms ROXON—Will there be the next link? If your staff are running an FRC—I think you said it would also cover a private individual—will they still have to comply with that?

Ms Warner—Anyone who holds themselves out as being a family dispute resolution practitioner, a family counsellor or an arbitrator under the act would have to. So family relationships centre staff who are family dispute resolution practitioners or counsellors would have to. Obviously it would not apply to the administrative staff of the centres, but if people intend to provide family dispute resolution under the act they would have to meet those qualifications.

Ms ROXON—What about the people who will supervise contact?

Ms Warner—If they are not a family counsellor or a family dispute resolution practitioner, they would not have to meet these requirements. That is one of the gaps that are going to be addressed when we formulate the accreditation requirements.

Ms ROXON—It is a big gap, isn't it?

Ms Warner—Yes.

Mr PRICE—What consultation have you undertaken, in relation to what should or should not be a requirement?

Ms Warner—We have appointed the body to look into the accreditation standards, but we have only just started that process. We will be conducting consultations all around Australia.

Mr PRICE—What is the name of that body?

Ms Warner—The Community Services and Health Industry Skills Council.

Mr Duggan—It is under the VET, the Vocational Education and Training scheme. It is part of that process.

Ms Warner—We are funding them to develop their standards and they have a usual process where they go out and consult around Australia.

Mr Syme—There are two aspects to standards. There are organisational standards, and they are controlled through the approval requirements which are administered by Family and Community Services. They are usually linked to funding, in the sense that if an organisation is unfunded it is very hard to get them to comply with the fairly stringent requirements they need to comply with in terms of quality of service, safety of staff and clients, and governance—a whole series of quality steps need to be put in place. Complementary to that is the accreditation of individual practitioners, which would be both for the funded organisations and also for private organisations that provide dispute resolution services.

Mr KERR—There will then be a gap, which will be the supervision and auditing of the unfunded sector—the for-profit sector—if that comes in?

Mr Syme—Yes, that is right.

Mr KERR—Ms Roxon says people will come in and make decisions about choice of agency—if there is a choice; some people will not have a choice because of geographical location or all sorts of other issues, like income. But if we have a system like this, which is imposed by statute, then you want to have a certain kind of template of professionalism, manner of approach and outcomes that can be assumed across the board. The funded organisations are subject to audit and checks, aren't they?

Mr Syme—That is right: a quality audit.

Mr KERR—As well as accreditation. They must be individually accredited, but they are also subject to audit to check that these outcomes are properly delivered. I think there will be a gap that needs to be addressed, which is: how do you audit the for-profit sector? If you do not do that, you can have quite inappropriate performance, even by accredited people, with no redress

and no effective check. As somebody said the other day, it is another *60 Minutes* story in the offing.

Ms Warner—The changes we have made to the approval process will allow for-profits to be approved. They will have had to have received funding to be approved, so they will have to comply with the funding requirements to get approval under the act. But if they are not an approved organisation, every person they employ who is a family dispute resolution practitioner or a family counsellor will have to meet the requirements in the regulations.

Mr KERR—They will have to be accredited.

Ms Warner—Until the accreditation requirements come in, part 5 of the regulations will still apply and that sets out the qualifications they must have and processes they must go through. So everybody who is not an approved organisation, everyone who is employed by those other organisations, will have to meet those requirements.

Mr KERR—Yes, but that does not get audited, does it? It is a different thing. As a lawyer, I am licensed, but there is also, whether effective or not, some disciplinary superstructure that sits over the top and can deal with complaints and address all those sorts of things. I am just looking at how you would actually manage the for-profit sector.

Mr PRICE—How do people complain? Do they take a civil action? Is that the only remedy when we are compulsorily referring them to private practitioners?

Ms Warner—When the accreditation system comes into play, it will have a complaints process built in. But at the moment, if the for-profits received funding to provide family relationship centre services, there would be a complaints process built into that, because FaCS—the Department of Family and Community Services—already has complaints processes in place.

Mr KERR—All I am saying is that in the future this issue will need to be addressed, and I am not satisfied it is on the horizon yet to be addressed.

Mr Syme—Could I point out that there was an earlier discussion paper put out called *Raising the standard* that looked at the feasibility of mechanisms whereby a range of organisations, whether funded or unfunded, could go through quality audit. The feedback was very much that it would be unwieldy and, in the current circumstances, it would not really be workable, and that we are really restricted to looking at quality auditing those services that were funded and looking at a system for accrediting individuals.

Mr KERR—I think you will get your volume up under this new legislation to a degree which would justify saying that it could be justified.

Mr Syme—There was certainly strong feedback from the sector that it would put unreasonable hurdles in the way of certain organisations.

CHAIRMAN—I think we have made our point in relation to this.

Mr KERR—Yes, I think so.

CHAIRMAN—If there are no particular questions on this point, it would be good to move on.

Ms ROXON—Maybe it would be helpful, if the department can do this, to give us a slightly clearer briefing of what the existing provisions cover and the changes. I for one am not comfortable about signing off on a whole new range of people being able to provide these services if there is going to be a big gap in quality control. I am concerned enough about the quality control—or lack thereof—for existing services to not want to give a tick to the new ones, if we cannot have confidence in what sort of system will apply.

CHAIRMAN—Can you let us have that information?

Mr Syme—Yes.

Mr PRICE—As was also discussed, can someone provide us with a copy of the regulations that cover the current situation? Ms Pidgeon undertook to give us some form of written briefing about the family relationship centres and how they would operate. I know it is of particular interest to Mr Secker and others how they are going to address geographic remoteness to overcome the disadvantage of the parties in that way. Can I just flag this with you: you would have heard in Melbourne real concern being expressed about making sure that you get the same ethos operating out of every family relationship centre. How does the department plan to tackle that, given that it is a contractual relationship as opposed to line management responsibility?

Ms ROXON—You might as well for good measure include in there some advice about how an assessment will be made about where centres are going to be placed.

CHAIRMAN—Thank you for that.

Mr MURPHY—Mr Duggan, I invite your attention to page 5 of your submission dealing with compliance with court orders. I note where you observe:

A large number of breaches of parenting orders are due to the inappropriateness of existing orders, many of which are made by consent. The new regime of assistance that will be available to separating families and the greater flexibility given to the courts should reduce the numbers of such unworkable orders.

My question to you is: how?

Mr Duggan—There is a range of responses to that question. Firstly, parties will have a much greater level of knowledge and access to information because of the existence of the family relationship centres and the wider services that are to be funded under this package. So there will be significant resources available for people to get advice about the sorts of things that work for parents. The dilemma that we find at the moment is that many parties will, for a whole range of reasons, simply agree on certain arrangements and seek to make those into consent orders. Those orders happen and then they find that they do not work, as they had not had the opportunity to discuss with professionals in the area what might be best for them and what other options there might be. We think that, with the ability of the family relationship centres and other services to provide advice, people will be much better informed about what orders will in fact work for them.

There is also provision in the legislation to allow the courts to vary orders where it is clear that the orders do not work, and they can do that on their motion—so where the court becomes aware that the orders that were originally made were, for reasons that have become obvious later, not appropriate. It is not really an enforcement issue but rather a correcting of the original order issue. We think there is a whole range of strategies that the legislation and the package put forward that should diminish significantly the number of orders that are made where parties have not really had the time to reflect on or had the ability to discuss with others the efficacy of those orders.

Ms ROXON—On page 21 you deal with the way family violence orders will be treated if they were not contested or final. I am not 100 per cent sure—only having had a quick look at this—whether you are saying that, as a result of the other issues that have been raised, the government is now proposing a change to what the bill has in it or whether you are just talking about the changes that are already in the bill.

Mr Duggan—The intention of what is said on that page is to describe what the changes are already in the bill. You may recall the discussion with the court this morning. Effectively, what we are saying is that the court is not required to take into account an uncontested or interim AVO.

Ms ROXON—But it can.

Mr Duggan—That is right. Clearly, the court, as indicated this morning, would be able to take account of the evidence that was led. It could certainly rehear that evidence or get an affidavit in that regard.

Ms ROXON—So there is not another provision? I thought there was another provision which prohibited the court from considering an AVO unless it was a final or contested one. Or do I have that mixed up with the interim orders for residency—where the court cannot consider the interim arrangements for purposes of making a final order?

Mr Duggan—I suspect that is the confusion.

Ms ROXON—Would you mind checking for me? I want to know whether there is any other provision which is, if you like, presented in the negative—that is, you are prohibited from looking at it? It seemed to me that the court was making a distinction that it was pretty comfortable with it if it could look at the circumstances or at a final order. I just want to be confident that there is not some other provision that I have missed that prohibits what the court was saying that it felt comfortable that they could do.

Mr Duggan—Indeed.

Ms ROXON—On the questions in relation to violence, you said that the department or the government was comfortable with the definitions as they are. We have heard witnesses tell us a range of things from both directions—that is, it should be broader and include more or it should be narrower and include less. Are there any other views that the department wants to put forward about the violence issue? It will be a particular consideration that we will be looking at when we have our discussions.

Mr Duggan—Perhaps the only other issue that we would want to draw your attention to is that the government believes that the less adversarial processes that the Family Court is now introducing—and that arguably the Federal Magistrates Court already has—allow a much greater focus on issues of that nature earlier on in the proceedings, so you are not having them drag on and not be dealt with for significant periods of time. We think that the less adversarial process, based on the children's cases program for the Family Court and the Federal Magistrates Court's own procedures, do deal with issues relating to violence much more appropriately than they have in the past. They require parties to focus on the specific issues. They make it clear what evidence has to be given by parties. In relation to that, we think that the less adversarial approach to dealing with matters should deal with allegations of violence and actual violence in a much more direct manner than perhaps is possible where you have got a purely adversarial approach. That is the only other thing that we would raise, other than that at the moment—subject of course to what the committee might recommend and the government might consider—there is no current proposal to change the definitions as they are.

Ms ROXON—I am comfortable with what is in the written submission. I do not have other questions.

CHAIRMAN—The Family Law Section of the Law Council of Australia has suggested that the hierarchy introduced in the bill for determining the best interests of the child—that is in the new section 68F(1)(1A)—is unnecessary and undesirable and will lead to confusion and maybe give rise to the potential for argument. Does the department have a view on that comment by the Family Law Section?

Mr Duggan—It is an issue that I think you also discussed with the Family Court this morning. I think the point that we would raise is that courts, especially those in this area, are used to weighing factors and being told, as to the effect of legislation, that some factors are more important than others. The classic example of that is the best interests of the child. Let us consider a particularly vexed order, as was discussed this morning—a relocation matter, for example. The court will take into account a whole range of factors. They will be the freedom of movement of both parents, the happiness of both parents and the parents' ability for promotion and to have better work prospects, but in the end the one factor that the court will have to give priority to will be the best interests of the child. The court is regularly, as the Chief Justice pointed out, balancing all these things at the moment. Yes, we are introducing the potential for two further issues to be considered in that regard, but what we would say is that it is not unusual for the court to have to weigh various factors and to give some greater priority than others. It is something that it does all the time. The government's view is that the particular two factors that are mentioned as primary factors are indeed the factors that the court should give most weight to—and that is the intention.

CHAIRMAN—Mr Cadman has taken a particular interest in section 60KI(3). This is currently limited to Aboriginal and Torres Strait Islander children. I suppose it is worth asking if the section should give the court a broader discretion—that is, not limiting it simply to Indigenous children.

Mr Duggan—I will say why that provision is there and then I am very happy to engage in some discussion about this particular issue. The provision is there because of the difficulty in many cases of actually getting before the court evidence relating to the traditional parenting

practices of Indigenous Australians. It is often very difficult for that information to be made available in private law proceedings where there are not significant resources available. Those of us who have been involved in things like land claims know there are significant resources provided to the parties in relation to anthropologists, who gather that information which is then made available appropriately. But that is a very resource intensive practice—in many cases it is over years—to actually go through. It became clear, particularly under the native title system, that being able to receive evidence from other forums like, for example, those under the Northern Territory land rights act is in fact a very useful means of obtaining some of this information.

The idea of putting that in there was to recognise that, because of the changes that are being made in this bill, we are asking the courts to give more consideration to the impact of traditional practices in decisions relating to Indigenous children. For the courts to be able to do that, of course, they need to know what those practices are.

CHAIRMAN—Nobody has been querying the inclusion of Aboriginal and Torres Strait Islander children.

Mr Duggan—I understand that.

CHAIRMAN—Mr Cadman's point is whether that section should be available to the general community as well.

Mr Duggan—Generally speaking, where you are talking about other groups, there is generally not the same problem in finding the information. That does not necessarily mean that we should not give consideration to that.

Mr CADMAN—Evidence was taken in a previous committee that, as a foundation of this, allegations were made time and again about abuse, violence and that sort of thing, and this continual DVO or AVO came up. The court indicated time and again—certainly in private discussion, and I think on the record—that they do not pursue these matters to see whether there is a justified claim of abuse or violence. Witnesses on both sides of this argument in these hearings have said that they wish there was more certainty. From a woman's point of view—and it is generally the woman—if she can get certain evidence into the court that cannot be refuted by her opponent in the court, then that is to her advantage, and it should be. But from a male's point of view—and it is most frequently the male—if it is a claim of violence and it is no more than shouting outside the front gate, then that ought to be known to the court as well. So why should this provision not provide greater certainty for the court to be able to go behind claims that are sometimes manufactured and are often used as part of a weaponry of warfare and nothing more? Why should the court not have the capacity to go behind those?

In the original proposals we put forward an investigatory arm of the Family Court, to allow the Family Court or the tribunal to go behind the veil of Commonwealth-state jurisdictions and have a look at what was really going on. That has not been accepted. In this instance, it seems to me that there is an opportunity for the court to draw aside that veil and have a look at what is actually happening.

Mr Duggan—This will clearly be a matter for the Attorney, but the Attorney's expressed view on the investigation of issues relating to child abuse and family violence is that fundamentally issues of resolving whether there was or was not abuse or violence are matters for state jurisdictions. As the High Court has held, it is not the role of the Family Court to make criminal type determinations about whether a party has or has not committed family violence. In the end—

Mr CADMAN—But the proposal here is only to go to a court or a tribunal. It is not to start up a new case; it is only to look at what occurred in other places. It is not to make a determination but to draw on what has happened in other places.

Mr Duggan—As I said, this is clearly a matter that the Attorney will have a view on, and no doubt we will put that to him. I think what we would say is that, if the evidence is still available, it ought to be tested by the court that is dealing with it.

Mr CADMAN—It is not tested by the court, and that is the cause of a whole lot of unnecessary anxiety and violence—not necessarily violence but fear, abuse and distress. It is the untested nature of assertions or matters that are produced in evidence that cause a lot of pain. If we can reduce it by this method then we ought to do it.

Mr PRICE—I thought the chief justice said that they do test it.

Mr CADMAN—They do not.

Mr PRICE—That is what was said in evidence.

Mr CADMAN—Going back to the previous committee, in discussions with judges of the Family Court they said they do not test it—and certainly, the preliminary hearings are on the papers.

CHAIRMAN—We have a couple more questions. My question relates to how—I refer you to section 63D(a), the obligations of advisers—the immunity will work and apply to family dispute resolution practitioners who are required to give advice under this section. We have had some evidence from other witnesses in relation to the various sorts of advice and how I think immunity relates to one but not the other.

Mr CADMAN—They are all lumped together as advices in four different categories.

CHAIRMAN—Are you able to answer that or would you like to come back to us on that?

Ms Warner—I will answer that one. Under the requirement to provide information on parenting plans, first of all we expect that to be able to be met by the provision of documents. So it will not be provision of advice as such, rather it will be information. But advices under that section is not the same as providing advisory dispute resolution. They are two different processes, and it is only if you are providing advisory dispute resolution that you will not be covered by the immunity if you would otherwise be eligible for that immunity because you are a dispute resolution practitioner. Counsellors do not have immunity under the current act and they will not have it under the changes.

Mr KERR—I wanted to go to an issue that was raised that we have not raised with you before, which is the provisions in relation to confidentiality in 10C. The evidence that we received from those who provide such services said that it would be of use to clarify circumstances in which disclosure was not only permitted but to be expected. It strikes me that that would be a very beneficial thing to do because the general heading says that communications are confidential and there are provisions in 10D saying that you cannot utilise any disclosure in a court. In my view that may go too far having reflected on some of these things, but we have got it and I am not raising that specifically. If you look at subsection 3, it sets out a range of circumstances in which a counsellor may disclose. It seems to me it places enormous difficulty and pressure on counsellors. I would have thought that at least in respect of (a), (b)(i), (c)(i) and to the extent of serious violence that it would be entirely inappropriate if such matters were not actually disclosed.

Mr Duggan—You are talking about obligation on the counsellor to—

Mr KERR—We have done that in a whole range of areas such as when children are taken to doctors in hospitals presenting symptoms that show the likelihood that they have been the subject of sexual abuse. There is a whole range of people who have those obligations currently. I am not trying to widen it out to instances where property may be at risk or something of that kind or I think that you may well say, 'Look, on balance that threat has been made but the worst that is going to happen is somebody is going to smash up somebody's car that has been threatened' or something of that kind. It is not nice but it is not the sort of thing that you would instantly say, 'Look, I must have an obligation to report this to the police.' I think that there should be some pretty clear guidelines as to what is expected of counsellors, for their benefit as much as anybody else's, where serious matters are raised protecting the child from physical, sexual harm; and preventing or lessening serious and imminent threat of a life or health of a person. All I am saying is that that should be done at least with some of those elements, given that we are going to be requiring people to go through a whole series of processes whereby they will be subject to counselling.

Ms Warner—The provision was based on regulations that already existed, but we could have another look at that.

Mr KERR—It is a rewrite of some provisions that already exist. I accept that, but it has been restructured and put into this new act.

Ms Warner—We did add the bit about complying with the law of the Commonwealth, state or territory. When we added that, we were thinking of the mandatory obligation to report child abuse under state and territory laws. But we can consider it.

Mr KERR—Maybe you could come back to assist us, if you think that this is a wise course for us to take, with a form of words that might do it. I do not think every suggested wrong that a person might threaten or suggest in the course of mediation should be reported. I am not suggesting that. Largely, if there is no realistic imminent threat of sexual harm, abuse of a child or to a life, I think they should not be reported. But, if those things are raised, it is really wrong to leave it in circumstances where people do not know whether reporting it or not is the right thing to do. I think it should be reported and then, if it turns out that some mischief has been

avoided, so to the good, but if it was a phoney threat that was just a puff of hot air then nothing has really been lost.

Ms Warner—We would need to consult with the people who offer family counselling and family dispute resolution.

Mr KERR—They said they would welcome a change in this area to clarify that.

CHAIRMAN—If you could get back to us on that, we would appreciate it. I think the fortunate person who is going to ask the last two questions is Mr Price.

Mr PRICE—During the contribution of the Family Court, the suggestion was proposed for a review of how that act was operating and also of dispute resolution centres. To express a personal opinion, I thought that was a very good idea, and one that I am likely to wish to inflict upon my fellow committee members. Do you have problems with it? If not, would you suggest a time frame or take on notice what you see as a reasonable dimension of how it might be reviewed?

The other issue I have raised is the special representative of the child. It seems amazing to me, given we have had a report about a child focus in family law, that you have not suggested any amendments to that section of the act. That is particularly so as some child representatives, as I understand it, manage to undertake their responsibilities to the court without ever having spoken to the child and just do it based on papers by experts. That seems to me to be contrary to the thrust of the report, although it is not specifically taken up in the report.

The last issue I would raise with you is that it seems to me to be highly improbable for the committee to be able to discharge its responsibility of looking at the way the government has responded to *Every picture tells a story* without, on completion of this report, having an inquiry into family relationships, family practitioners et cetera. That fundamentally underpins what the government is trying to achieve in this legislation. Do you have a response to any of those three matters I have raised?

Mr Duggan—In relation to the review, clearly the whole process is currently under a constant state of review. We will get back to you about more formal arrangements in that regard.

In terms of child representatives, you may be aware that the Family Law Council has recently reported to the Attorney, and I am happy to make a copy of that available in relation to child representatives. The Attorney is considering the possibilities of some amendments resulting from the Family Law Council's report. It has not made it into this bill but there are—as you would probably not be surprised to hear—constant recommendations to government about how to change the act. They cannot all be done at once, basically. In relation to the issue about children not being seen by their child representative, you may be aware also that the Family Court has issued guidelines for child representatives, and they should be doing that. If they are not, that is potentially—

Mr PRICE—I just think that the situation is strengthened if it is in the act, and it is not going to take much of an amendment to reflect the guidelines in the act, I would not have thought.

Mr Duggan—It is a question of balance. Once it is in legislation it is much more difficult to change than it is to make a guideline for the Family Court.

Mr PRICE—Perhaps we should get a copy of the guideline, Chair, and see whether we can. With respect to the Family Court—and I know you were discussing this a little earlier—it was suggested in discussion that we should fulfil the government's ambition to get this legislation through as quickly as possible, but that as a second-step process there should be a review of the act not to change necessarily any particular part of it but to have a more coherent structure and to have like provisions in like sections.

CHAIRMAN—We discussed that earlier—I think you might have been out of the room—

Mr PRICE—I thought you were digging your heels in on that.

Mr Duggan—Not at all.

Mr PRICE—So you are quite happy—

CHAIRMAN—Mr Duggan, I think your suggestion was that it is really a matter for the Attorney-General and what would be allocated would be dependent upon what priority the Attorney gave to a rewrite of the act.

Mr KERR—I think Mr Duggan said as a personal view that it would be a good thing, but whether there would be money and resources available to do it—

Mr PRICE—So you would not be embarrassed if it were a recommendation arising out of this review of the legislation?

Mr Duggan—No, but I also indicated that I thought that another arguably piecemeal rewriting of part of the legislation might not be as useful as a more thoroughgoing rewrite, and that is something to be considered.

Mr PRICE—A thorough rewrite to get it all—

CHAIRMAN—The judges said there were three options, didn't they? The best option was a complete rewrite. The second-best option was the rewrite of VII, and the third-best option was fiddling with the provisions. I suspect the best we can do is to fiddle now but we would hope that, if we were to include such a recommendation, the government would look at it with some favour.

Mr PRICE—In relation to the review of those family relationships centres, the credentialing and those sorts of issues, if the committee were of a mind to make a recommendation that it should conduct such a review, at what point in time do you think you will have settled all the issues that you have raised this afternoon?

Mr Duggan—Perhaps we can take that on notice and come back to you.

Mr PRICE—Yes, that is no problem.

CHAIRMAN—Thank you very much for appearing before the committee and I thank members for their contribution.

Mr KERR—Please appreciate that you have come at the end of four days of hearings, three of which I attended, and you got the grumpy end, so excuse any terseness that may have occurred.

Mr Duggan—It was an estimates process—

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

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

Committee adjourned at 3.33 pm