QUESTIONS TAKEN ON NOTICE
FROM HANSARD TRANSCRIPT
House of Representatives Standing Committee on Family and Community Affairs: child custody inquiry
Monday 15 September 2003 Canberra
Attorney-General's Department

Question 1

Mr Quick—On page 18 of your submission you state:
It is the Department's view that the introduction of a rebuttable presumption would lead to a further increase in litigation because of the need to rebut the presumption in many cases.
Can you explain what you mean by 'a further increase in litigation'? Can you quantify that?

Answer
The Department bases this view on what occurred after the concept of 'joint parenting' was introduced into the Family Law Act in 1995.

The Family Law Council has published statistics on applications for child related matters for some time. In 1995-96 the number of applications for custody were 12, 595 and for access there were 13,814. From 1996-97 onwards the orders available were residence, contact and specific issues. Comparison can be made between the number of custody applications filed in 1995-96 with residence applications filed in 1996-97 and the number of access applications filed in 1995-96 with the number of contact applications filed in 1996-97.

Residence applications filed in 1996-97 were 18,503, representing a 47 percent increase over the number of custody applications filed in 1995-96. In terms of contact applications filed in 1996-97, there were 21,897 representing a 60 percent increase on the number of access applications filed in 1995-96.

The following table indicates the number of residence and contact applications that have been filed between 1996-2000.

Year	**No of residence applications filed for all children's matters**	**No of contact applications filed for all children's matters.**
1996-97	18 503	21 897
1997-98	20 947	23 958
1998-99	22 362	25 993
1999-2000	23 956	27 307

Question 2

Mr Price – How much are we spending on the Family Court and the Family Court of Western Australia per annum?

Answer

Commonwealth expenditure for the Family Court of Western Australia was $9.6 m in 2002-03, and $9.5m in 2001-02. The Budget appropriation for the Family Court of Australia in 2001-02 was $107.8 m, in 2002-03 was $111.6 m and in 2003-04 was $112.4m.

Question 3

Mr Price – What about the legal aid that goes predominantly to family law matters?

Mr Price – I need a dollar figure, if you could take that on notice.

Answer

In 2002-03, the total figure for family law case expenditure in Legal Aid Commissions was $49,366, 408. For 2001-02, the total figure for family law case expenditure in Legal Aid Commissions was $50, 909, 408. The total figures exclude costs of Legal Aid Commissions' in-house practices because these figures are not reported by Legal Aid Commissions.

Question 4

Mr Price – How much are parents paying on solicitors, lawyers and barristers in family law matters?

Answer

The Department has no figures available on this question. We have consulted with the Family Law Section of the Law Council of Australia which has indicated that it has no data.

Question 5:

Mr Price - ...In regard to Mr Andrews committee 'to have and to hold', I noticed that the department – not your department - estimates that it is costing the Commonwealth $3 billion a year in terms of family break-up. I think that committee, if my memory serves me correctly, said that it was costing in the order of $6 billion a year to the economy. Is that correct?

Answer

The Department of Family and Community Services submission to the Inquiry states on page 2:

> The Government provides significant financial and other support to separating families. The 1998 Parliamentary report *To have and to hold*, conservatively estimated that the Federal Government spent $3 billion annually on direct costs related to family breakdown, including social security payments, court costs, legal aid, support services, the child support scheme and taxation rebates for

lone parents. An updated figure using similar parameters estimates Government expenditure conservatively at around $3.6 billion.

Question 6

Mrs Irwin – Has the department any statistics on families who have reached arrangements in other ways and have not gone through the court system?

Answer

Recent estimates by the Family Court suggest that only around 6-7 per cent of all Family Court applications for children's matters (other than Consent Orders) end up before a judge. However, the court has no data on those who do not make applications to the court.

The Australian Institute of Family Studies has advised the Department as follows.

Three large-scale national random samples of the general population of separated and divorced parents (described below) indicate that a sizeable proportion of parents avoid the use of a third-party in relation to children's matters. Together, these surveys suggest that for half of all children of separated parents, arrangements for parent–child contact were made privately between their parents, while around one quarter to one third of parents make private arrangements in relation to children's residence.

Some context

To date, no solid 'process' research has been conducted in Australia on the extent to which separated parents reach arrangements over children's matters without the Family Court's assistance. (By 'process' research, we mean an investigation into the ways in which couples arrive at decisions about whether or not to access formal legal services in relation to parenting arrangements – eg whether to seek solicitors' advice and possibly go to court.) Without asking former couples directly about why they chose a certain pathway, it is unclear whether one or both of them wanted to go to court but were unable to do so because of a lack of money, information, a fear of hurting their children, a desire to avoid escalating conflict, etc.

Moreover, there is a wide variety of paths taken *prior to* arriving at a certain course of action (eg. having some mediation and going to court vs a litany of protracted litigation) and these different pathways are unlikely to be identified by a descriptive snapshot at a single point-in-time. To complicate things further, divorcing couples are often uncertain about the exact nature of legal proceedings they experienced.

Until longitudinal research is conducted that specifically focuses on parents' pathways, and the reasons behind their decisions, it is difficult to understand what is happening or predict individual behaviours.

Evidence from empirical data sources

1. 1997 Family Characteristics Survey (ABS 1998)
National population sample of resident parents (mostly mothers)
Foci: residence, contact and child support

These 1997 data indicate that around one million children in Australia under 18 were living with only one natural parent and had a parent living elsewhere (ABS 1998). For 52 percent of these children, arrangements for parent–child contact were made privately between their parents (ie without help from a 3rd party); for 18 percent of children, contact arrangements were made by parents with help from mediation, counselling, consultation with lawyers and/or court proceedings.[1] Around 30 percent of children had contact with non-resident parents less frequently than once per year. For this group, the question of how the visiting arrangement was organised was not asked of these children's resident parents as contact was so infrequent (ABS 1998, p 36).

2. Australian Divorce Transitions Project (ADTP; AIFS 1997)
National random sample of resident and non-resident divorced parents
Foci: economic and social consequences of divorce, residence, contact, and child support

The ADTP data suggest that one third (34%) of 237 resident mothers and non-resident fathers with dependent children in the sample had made no specific 'plan' regarding their children's living arrangements – that is, their arrangements "just happened", while another 9 per cent had a written agreement or plan but did not register this in court. More than half (57 percent) of the divorced sample reported using some kind of formal legal process to settle a dispute about children – be that through having a written agreement or plan registered in a court, or by going to court.

3. Caring for Children after Separation (AIFS 2003)
National random sample of 1,028 resident and non-resident parents
Foci: residence, contact and child support

Preliminary data from the Caring for Children after Separation Project suggest that a quarter (25 percent) of separated or divorced parents did not make any arrangements about children's living arrangements – that is, the arrangements "just happened"; two-thirds (65 percent) of parents reached agreement with or without mediation or legal assistance, while 10 per cent reported a court decision. Of the 90 percent of arrangements not involving court processes, three quarters were made *verbally* between parents (with or without help from mediators, counsellors or lawyers).

Question 7

Mr PRICE—I just want to understand the argument, so I apologise. You are saying that, in terms of a tribunal facilitating parents in relation to a separation, these are administrative matters and they can be set up in a tribunal.
Mr Duggan—There would be a requirement for there to be a review by a court at some stage, much the same as there is in a final situation in relation to the Child Support Agency.
Mr PRICE—Are you saying this would be de novo or would the tribunal be able to ensure that matters that are settled are not reopened in a court?

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[1] Note that this ABS publication does not disaggregate involvement by mediators, lawyers or the court but the ABS could provide these data in the form of customised tables if requested.

Mr Duggan—You are getting to the stage of significant legal advice in relation to constitutional issues, but it seems to us that there would be significant scope for some administrative involvement in attempting to resolve these matters in a non-adversarial sense.

Mr PRICE—Could I just indicate that, like Mr Dutton, I am keenly interested in this, and anything that the department may be able to take on notice and come back to us with would be most welcome.

Answer

The concept of an administrative scheme to deal with contact orders is not Government policy nor has the Government made a decision that this is the best solution. The Department in its evidence indicated that there could be a role for a body funded by Government to become involved in the management of contact issues for separated parents.

An example of an overseas model is that used in Denmark. This is summarised below from Christina Gyldenlove Jeppesen de Boer, 'A comparative analysis of contact arrangements in the Netherlands and Denmark', in K. Boele- Woelki (ed), *Perspectives for the unification and harmonisation of family law in Europe*, (Intersenia, Antwerpen, 2003, p 390). The Danish model is presented for information only. The constitutional differences between Australia and Denmark mean that there could be significant constitutional limitations on adopting such a model in Australia.

Danish family law – approach to joint residence and contact

General provisions

- Joint parental responsibility has been presumed under Danish law since January 2002 for married couples. It is presumed to continue after divorce. The courts may grant sole custody to one parent if so requested.

- In the case of unmarried couples, only where paternity is registered do the parents automatically acquire joint parental authority. Otherwise the mothers will have sole parental authority (46 percent of children are born to unmarried mothers).

Administrative determination

- A distinctive feature of the Danish system is that administrative authorities deal with a number of matters to the exclusion of the court (contact, maintenance, and adoption). There is only limited legal review going to whether the decision is within powers and does not contravene 'fundamental administrative principles'. Few contact cases have been reviewed and none have been held invalid on the two grounds.

- An administrative authority (the *Statsamt*) has sole competence to determine questions of contact. It may make use of expert evaluations and evidence concerning the parent child relationship (experts may be employees or external).

- The *Statsamt* has very informal procedures. A parent wanting contact needs only to write a letter. When the initial request for intervention is received by the *Statsamt a* conference involving both parents is convened. Lawyers are not required and no costs are payable. This is suggested as the explanation for the fact that Denmark, with one third of the population of the Netherlands, has the same number of contact cases (and has more than other culturally similar Scandinavian countries). It is also noted that 22 percent of the cases concern changes to the arrangements, reflecting the simple procedures.

- If a parent is dissatisfied with the decision they may appeal to another administrative body and there is then a limited appeal to the court on the issue the lawfulness of the decision. The court is not permitted to make a contact order but if a decision is found to be unlawful it is sent back to the administrative authority to remake the decision.

Judicial determination

- The issue of Cases in which the parents cannot agree about who should have sole parental responsibility for the child are always decided by a court.

- The Danish system only provides for judicial resolution of conflict between parents with joint parental responsibility in relation to contact.

Enforcement of contact

- An enforcement court decides whether measures enforcing contact should be taken. It is seen as a 'backstop' in difficult cases and provides a second review of the case. While physically fetching the child, with the assistance of the police, is not the first option, anecdotally it occurs more often than in the Netherlands.

- It is not uncommon for a conflict about parental responsibility and contact to be fought concurrently in three forums: the *Statsamt* court; the administrative authority and the enforcement court.

Contact

- The *Statsamt* has a duty to provide supervised contact whenever this is deemed necessary.

- In cases where one parent has sole parental responsibility, Danish law provides the non-resident parent a right of contact with the child. Other significant people eg grandparents, aunts, uncles and siblings have no right of contact even though they may have a significant influence in the child's life. Contact can be excluded where it is not in the child's best interests.

Mediation/counselling

- Since 1986 the *Statsamt* must *offer* counselling in cases concerning contact. The results are reported to the case officer unless the parents agree otherwise. In 57 percent a positive outcome was reported.

- From 2001 mediation has been offered as an alternative to counselling. This has a success rate of 67 percent and partial success in another 18 percent of cases.

The general principle applied under Danish law is that non-conflict (consensus) cases are dealt with administratively and conflict cases are dealt with judicially.

Possible constitutional limitations

The Federal constitutional difficulties of providing determinative powers to administrative bodies were illustrated by the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.* Originally decisions of the Human Rights and Equal Opportunity Commission were able to be registered in the Federal Court and after a designated period to allow for review, those decisions became orders of the Federal Court without further judicial consideration. In that case Mason CJ, Brennan and Toohey JJ said at para 44 of their judgement

> It follows from what has been said in these reasons that the Act, in providing for registration of a determination of the Commission and its enforcement as if it were an order of the Federal Court, purports to provide for an exercise of judicial power by the Commission and that the jurisdiction conferred on the Federal Court to review a determination of the Commission does not provide a sufficient answer to this conclusion.

As a result of this decision the Commonwealth made changes to the functions of the Human Rights and Equal Opportunity Commission and to the National Native Title Tribunal. In both cases the purported determinative functions of these bodies was removed and that power was vested in the Federal Court. In both cases these bodies continue to have alternative dispute resolution functions.

In relation to the Human Rights and Equal Opportunity Commission no application can be made to the Federal Court or the Federal Magistrates Court alleging discrimination under Commonwealth anti-discrimination legislation[2] unless the matter has first been the subject of an attempt at conciliation by the Commission or the Commission has decided that such conciliation is unlikely to be successful[3]. The purpose of the conciliation is to attempt to resolve the matter between the parties by agreement. Where the complaint is terminated the President of the Commission and an application is made to a court the President may provide a report on the complaint to that court[4].

In relation to the *Native Title Act 1993* section 86B of that Act requires the Federal Court to refer applications for a determination of native title or for determination of compensation to the National Native Title Tribunal for mediation unless the Court decides that it should not make such an order.

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[2] *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992*

[3] See section 46PO of the *Human Rights and Equal Opportunity Commission Act 1986*

[4] See section 46 PS of the Human Rights and Equal Opportunity Commission Act.

The enforcement or child contact officer model

In 1976-77 the Family Law Council recommended to the then Attorney-General that enforcement officers be appointed under former section 64(12) of the *Family Law Act 1975*. The role of these officers would be mainly to assist in the recovery of abducted children but also to assist with the enforcement of access orders. The officers were to be officers of the Family Court.

That proposal was considered by the Joint Select Committee on the Family Law Act which reported in July 1980 and it made a similar recommendation involving the state police. The report noted that the setting up of a new force of enforcement officers would be a very costly and formidable undertaking.

The model proposed by the Joint Select Committee was an outline only but provided for the formalisation of the use of state police forces to assist in the enforcement of custody and access orders, principally for the location of children not returned to the then custodial parent.

A further model was proposed by the Family Law Council in its report *Child contact orders: enforcement and penalties* (June 1998). The model has not been extensively articulated but involves allowing parents who are having difficulty maintaining contact with their children having the option of contacting a conciliation counsellor or mediator who would be able to initiate and facilitate remedial action wherever possible and appropriate (recommendation 40).

Question 8

Mr Duggan—We have had some of this discussion previously, Mr Cadman. Only six per cent of matters that go before the court eventually get a final order.
Mr CADMAN—But if there is a presumption, as I say—
Ms GEORGE—What about the other 94 per cent?
Mr Duggan—Most of those matters are resolved amicably between the parties.
Ms GEORGE—Do you have evidence of that?
Mr Duggan—Certainly the statistics the court has indicated to us suggest that most of those matters are resolved through PDR. We can provide some of those statistics to the inquiry.

Answer

The Department understands that the Family Court of Australia has addressed this and similar questions in its submission to the Inquiry.

On page 6, Part B of its submission to the Inquiry, the Family Court shows that only 21 percent of those who initiate an application reach trial preparation and around six percent have their case heard to judgement. Seventy nine percent therefore resolve their matters during the primary resolution phase which includes case conference/directions hearings; mediation/conciliation events; and prehearing conferences (Figure 1 Survival Pattern of Application by Stages - 2000-01). The reasons for those who file an application not proceeding to a hearing vary and may not be directly related to the primary dispute resolution event.

Question 9

Ms George - ...In one of our documents, we have been advised that the mediators who currently practise under the Family Law Act are required to advise clients to seek legal advice in the course of mediation. Is that a statement of fact?
CHAIR—It says that currently mediators who practise under the Family Law Act are required to advise those clients. That was one of my major issues, because it seems to me that it encourages an adversarial process.

Answer

The *Family Law Act 1975* does not require mediators to advise clients to seek legal advice during mediation. Regulation 63 of the Family Law Regulations sets out the information that is to be given to parties before mediation. Section 63(1)(f) states that a mediator must inform clients that a party has a right to obtain legal advice at any stage in the mediation process. Section 64(d) of the Family Law Regulations states that mediators must not provide legal advice (except advice about procedural matters) to any of the parties.

Question 10

Ms GEORGE—Finally, has there been any argument in legal circles that the outcomes may reflect a time when women were at home as the primary caregiver and that the law has not kept pace with changes in society? We see this in other parts of law. Has there been anything written on this by any of the reform commissions? Maybe we just carry in our head a very stereotyped view of couples and separation that was predicated on the caregiver at home and the man in the work force.
Mr Duggan—I am not aware of any of the law reform commissions making such a suggestion. There is, of course, significant literature from parties advocating change to the system which suggest that point of view. Certainly the Australian Law Reform Commission has considered the family law system on a number of occasions. We could check to see whether they have made such a suggestion. We will do that and get back to the committee.

Answer

The Department has been advised by the Australian Law Reform Commission (ALRC) that there has not been any empirical research in, for example, men's involvement in child rearing, nor has the ALRC made any statement that the Family Court is not accounting for changes in society in its decisions about residence.

In its 1994 report *Equality before the law: justice for women*, (ALRC 69, Part 1, paragraph 2.8) the ALRC said the following:

> 2.8 **Women's child-care responsibilities.** A significant proportion of the female population (almost a third) have dependent children. For women with dependent children, the extent of participation in the paid workforce is related to the age of the youngest child in the family unit. In couple families, the participation rate of women with the youngest child aged less than five years is 47.1% of which 16.1% work full time and 31% part time. Once the youngest child reaches school age participation rates increase to 66% of which 29% is full time work and 37% is part time. In sole parent families, 95% of which are headed by women, participation is even less at 33.4% of which

> 12.6% is full time and 20.8% part time where the child is less than five years. This increases to 55.1% of which 20.8 % is full time and 34.3% part time when the child is of school age. Women are also more likely than men to be responsible for the provision of informal child-care to other people's children. Grandmothers are the most frequent main providers of care (43%). In a gender breakdown of all main informal child carers 57% were identifiable as female. These statistics show that for a significant period of most women's lives as mothers and as grandmothers they are at home full time or part time caring for children. The implications of that fact are not fully acknowledged either by the law or within the legal system generally. The legal system must accommodate the needs of those women and to a lesser extent those men who are part or full time carers of children.

Question 11

Mr PEARCE—But my question was whether you think there is room for the court to take a wider range of evidence. We have heard some evidence—and each of us in our respective constituency roles would have heard from members of the community who have been concerned about this—that certain facts are not taken into account. My question is: do you think there is an opportunity to broaden the spectrum of admissible evidence in the Family Court? Do you think it is appropriate?
Mr Duggan—Earlier we spoke about the Australian Law Reform Commission considering the family law system. They have made some suggestions in this regard and in the past there has been some consideration by government of allowing the court to take greater cognisance of published research material, for example. There are some difficulties in that regard, but we could provide you with some of the literature which indicates that there have been these considerations in the past. I am not sure that that is getting to the point that you are making, but certainly in the past there have been these considerations of allowing the court to take a wider range of information into account.

Answer

The following is summarised from publicly available Family Law Council advice of 16 March 2001 to the former Attorney-General, the Hon Daryl Williams AM QC MP, with regard to recommendation 109 of the ALRC report no 89 *Managing justice – a review of the federal civil justice system* (January 2000).

Recommendation 109 stated:

> The Attorney-General should request the Family Law Council to report on whether the Family Law Act should be amended to provide specifically that whenever the best interests of children are being determined, the Court may have regard to any relevant, accredited and published research findings. Any such material relied upon should be expressly acknowledged by the Court.

The current situation under the *Family Law Act 1975* and under the laws of evidence does not prevent the Court from using available and useful information that it should be able to use.

The Family Law Council commented in its advice that: 'This is perhaps the greatest difficulty: just what institutions or social science research should the Court accept? There would need to be some type of accreditation process in relation to the published research upon which the Court desires to rely. Who would be responsible for accrediting such research?'

The Family Law Council concluded that there would be more disadvantages than advantages in amending the Family Law Act in accordance with Recommendation 109. The Family Law Council commented that the issue appears to Council to be more one of judicial education. The Family Law Council recommended that:

1. The Family Law Act not be amended in accordance with Recommendation 109; and,

2. Consideration be given to the preparation and maintenance of a database summarising relevant social research and associated issues.

Question 12

Mr Duggan - ...Secondly, I might point out that the Commonwealth took a leading role in the development of the Australian Judicial College, which is taking a national perspective on, for want of a better word, the training of judges and is developing best practice in that regard. There are a couple of aspects to that. Whether that would satisfy the people you are concerned with, I do not know, but certainly there are a number of facets to this and we would be happy to provide you with this information about the Judicial College.
Mr PEARCE—I would like that, please.

Answer

The **National Judicial College of Australia** was established in May 2002 as an independent entity, funded by contributions from the Commonwealth and some State and Territory governments. Its Constitution provides that the College is to assist judicial officers to administer the law in a just, competent and speedy way by offering them opportunities to:

(i) share lessons learned from experience, leading to identification and adoption of best professional practices;
(ii) broaden and enhance their general and legal educational standards;
(iii) participate in educational programs intended to broaden their understanding of the processes and consequences of change in our society;
(iv) participate in educational programs intended to broaden their understanding of the extent and consequences of diversity in various aspects of society and to help them acquire skills to deal with that diversity;
(v) undertake individual learning programs;
(vi) develop their skills in management (including case management), conduct of trials and appeals, and judgment writing;
(vii) develop other skills relevant to judicial office ;
(viii) participate in educational programs which will help judicial officers develop substantive and procedural law, thus shaping for the future the law and its administration; and
(ix) participate in educational programs which will help judicial officers maintain physical and mental health while exercising judicial office.

Prior to its establishment, the availability of judicial education programs varied considerably according to jurisdiction. The College provides professional development programs to all judicial officers in Australia. Its programs focus on their legal skills, their practical judicial skills, their approach to their work and programs which help them to maintain fitness and enthusiasm for the work.

Question 13

CHAIR—... In 1996 changes were made to the Family Law Act, particularly relating to the use of the concepts of custody and access. As a result, according to your submission:

> In particular, instead of using the concepts of 'custody' and 'access', which foster a notion of property or ownership in children by parents, the Family Law Act now refers to the broader concept of 'parental responsibility' and provides for the court to make 'parenting orders'.

I ask for your opinion as to whether or not this has been successful in real terms in shifting the mind-set away from ownership and property. In 1994-95 you had 77.8 per cent of residence orders in favour of the mum, and in 2000-01 you had 74.6 per cent, so there has been almost a three per cent drop. But do you think that the mind-set has changed? It is a change of words but is it a change of mind-set?

Mr Duggan—I think it is a very interesting debate that we are now having, given that this committee is basically looking at issues of child custody. I think that is an indication—and I mean no disrespect to the committee at all or to its terms of reference—of perhaps the fact that the terms 'residence' and 'contact' have not permeated into the community as perhaps government would have liked. It is an indication also, if I might be so bold, that while the government of the day promoted a very active education campaign about the changes and spent significant amounts of money on it—and I would be happy to provide you with the details of that; I do not have them in front of me—it was a one-off campaign. ...

Answer

In 1995-96, $2.1m over four years was allocated as part of the Justice Statement for court reforms and community education arising from the amendments to the *Family Law Act 1975.*

95-96	$1.55m
96-97	$159,000
97-98	$162,000
98-99	$166,000

Question 14

Mrs IRWIN—What provisions does the Family Law Act currently make for children to be separately represented in family law proceedings?

Mr Duggan—Section 68L, I think it is, of the act allows the court to make orders in relation to children being represented by a child representative. We have some statistics in relation to how often that is done. I think there were 3½ thousand orders, or about that number, last year. In those cases the court orders and the procedure is, effectively, that the legal aid commissions in the various states fund a representative to act on behalf of the child or children in those cases.

Mrs IRWIN—If we could get those stats that would be good.

Answer

The Federal Magistrates Court has advised that the number of child representatives ordered in the last financial year (2002-03) was 1,269.

The Family Court of Australia has advised that for the financial year 2002-03, the Family Court made 2,824 orders to appoint a child representative.

Question 15

Mr PRICE—We talk about what is decided on separation, but things move on and people repartner, so what is the rate of repartnering? In that rate of repartnering, aren't there grounds to review an original decision because there is presumably perhaps a greater capacity to fully exercise full parental care that may not have been available in the beginning? If you want to take it on notice I am quite relaxed about that.

Answer

It is not possible to determine the rate of repartnering for those with existing Family Court orders.

For 2000, ABS statistics show that the rate of remarriage per 1000 of divorced and widowed men in all age groups is 553.10. The rate of remarriage per 1000 of divorced and widowed women in all age groups is 505.5. Therefore about half of all divorced men and women remarry.

Question 16

Mr PRICE—Do you see an anomaly in the fact that if we are dealing with one parent on child support there is no external review, but if we are dealing with the same parent or the other spouse and they are dealing with Centrelink there is external review? How is that appropriate, consistent or just? With no disrespect, you are saying that the first law officer of the land and his department do not have a view about these things.
Mr Duggan—We are quite happy to refer this matter to the Attorney-General as to whether he would wish to make a formal response to the committee, which we will do.

Answer

The Department has referred the matter to the Attorney-General and will advise in due course.

Question 17

Mr CAMERON THOMPSON—Have there ever been any changes in this list of what is in the best interests of the child?

Answer

In 1975 section 64 of the *Family Law Act 1975* provided:

64(1) [Factors considered] In proceedings with respect to the custody or guardianship of, or access to, a child of the marriage-

(a) the court shall regard the welfare of the child as the paramount consideration;

(b) where the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so; and
(c) subject to paragraphs (a) and (b), the court may make such an order in respect of those matters as it thinks proper, including an order until further order.

In 1983, section 64 was expanded to provide that:

64(1) [Factors considered] In proceedings with respect to the custody, guardianship or welfare of, or access to, a child

a) the court must regard the welfare of the child as the paramount consideration;
b) the court shall consider any wishes expressed by the child in relation to the custody or guardianship of, or access to, the child or in relation to any other matter relevant to the proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case;
(ba) subject to paragraphs (a) and (b), the court shall, unless in the opinion of the court it is not practicable, make the order that, in the opinion of the court, is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child;
(bb) the court shall take the following matters into account:
  (i) the nature of the relationship of the child with each of the parents of the child and with other persons;
  (ii) the effect on the child of any separation from-
    (A) either parent of the child; or
    (B) any child or other person, with whom the child has been living;
  (iii) the desirability of, and the effect of, any change in the existing arrangement for the care of the child;
  (iv) the attitude to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent of the child;
  (v) the capacity of each parent, or of any other person, to provide adequately for the needs of the child, including the emotional and intellectual needs of the child;
  (va) the need to protect the child from abuse, ill treatment, or exposure of subjection to behaviour which psychologically harms the child;
  (vi) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account; and
c) subject to paragraphs (a), (b), (ba) and (bb), the court may make such an order in respect of those matters as it considers proper, including an order until further order.

The *Family Law Reform Act 1995* which commenced in 1996 changed the factors that must be considered by making the best interests of the child the paramount consideration. The matters that the Court must take into account when considering the best interests of the child are contained in section 68F(2):

68F(2) [What court must consider] The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
(b) the nature of the relationship of the child with each of the child's parents and with other persons;
(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  (i) either of his or her parents; or
  (ii) any other child, or other person, with whom he or she has been living;
(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

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

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

Question 18

Mr DUTTON—You may have to do this in conjunction with the CSA or Centrelink or whatever, but I really want to get an understanding of the number of parents—either married, in a de facto relationship, in a casual relationship or any other description of relationship that children are born from—that separate each year? I would like to know how many children are involved in that process and how many then go on to the courts? We know that, of those that initiate proceedings, five per cent go through to the other end, but what number of people get to a hearing and resolve the matter on the day or wind it back before then—if those people do not need to engage the court process at all? Could you break it down by each stage please. ...If it is possible from there, particularly regarding those specific issues orders that are made by consent, what sort of access arrangements would be arrived at there?

Answer

ABS figures show that in 2001 55,330 divorces were granted. 28,345 divorces involved children (51.2 percent). In 2001, approximately 50,000 children were affected by divorce.

The Federal Magistrates Court (FMC) advises that the information sought about matters resolving without a hearing is not kept in the form asked in the question.

In its submission to the Inquiry, the Family Court stated on page 4 of Part B:

> The vast majority of parties applying for parenting orders resolve their matters before trial. Disputes are settled for a variety of reasons and along a continuum of time and events. Factors that may be relevant to particular families include the assistance of the Court ordered or externally provided mediation, the receipt of legal advice, and a realisation that litigation is not their preferred option, or that a party has little chance of success.

The Family Court statistics show that for the financial year 2002-03, 11,607 consent applications were filed, compared with 16,695 applications for final orders. In the same period, 1,115 parenting and other matters were heard to conclusion and determined by a judge.

Question 19

Mr PRICE—You could probably take these questions on notice. How many family law practitioners are there?

...

Mr Duggan—We can certainly give you the figure for accredited family law specialists.

CHAIR—Accredited ones would probably do.

Answer

There are accreditation schemes operated by the relevant State Law Societies for family law in New South Wales, Victoria, Queensland and Western Australia. The number of accredited specialists in family law are as follows:

NSW - 285
Victoria - 175
Queensland - 123
Western Australia - 43

We have been advised by the Law Society of NSW that both NSW and Queensland are still in the final stages of the 2003 assessment process so these figures may change, although only very slightly, over the next six weeks.

Question 20

Mr Price - ...How many contact centres currently operate?

Mr Price – Could you give us a list of them and where they are?

Answer

Attachment A is a list of Commonwealth funded contact services and their location.

Question 21

Mrs IRWIN—I will put one question on notice. Mr Duggan, you answered a question I asked about the proposal to make parents pay for the cost of child representatives in a higher proportion of cases. I think you mentioned the Family Law Amendment Bill 2003 that is before the Senate at the moment. All I want to know is what the impact will be of making parents pay more for child representatives and whether they will be more likely to oppose or be hostile towards such appointments if they have to pay.

Answer

Since July 2000 the legal aid guidelines have provided for Legal Aid Commissions to seek a contribution by non-legally aided parties and have required costs orders to be sought where a party fails or refuses to pay a contribution. Since this guideline commenced, the number of appointments funded by legal aid has increased from 3,187 in 2000-01, to 3,491 in 2001-02 and 3,876 in 2002-03. These figures come from the Legal Aid Services System Information Exchange (LASSIE), which is a

database that holds the Commonwealth statistical data collection. The system holds data provided by legal aid commissions in relation to the assistance they have provided. Information collected on grants of aid includes identification of the type of matter for which assistance is provided.

The Government believes that it is appropriate that a party should contribute to the cost of a child representative where that party has the financial capacity to make that payment.

LOCATION OF COMMONWEALTH-FUNDED CHILDRENS CONTACT SERVICES

Area	Organisation
NSW	
Campbelltown	Centacare Wollongong
Coffs Harbour	Interrelate
Dubbo	Interrelate
Lismore	Interrelate
Newcastle and Gosford	Relationships Australia NSW
Orange	Interrelate
Sydney	Central West Contact Service
	Relationships Australia Canberra & Wagga Wagga
Wagga Wagga	Family Support Service
Wollongong and Nowra	Centacare Wollongong
VIC	
Albury and Wodonga	Upper Murray Family Care
Ballarat	Child and Family Services Ballarat
Bendigo	Salvation Army Bendigo
Deer Park	Brimbank Community Centre
Frankston and Mentone	Gordon Care for Children
Geelong	Bethany Family Support
Mildura	Mallee Family Care
Morwell	Anglicare Gippsland
Watsonia	Berry Street
QLD	
Brisbane	Logan West Community Centre
Gold Coast	Logan West Community Centre
Mackay	Mackay Childrens Contact Service
Sunshine Coast	Sunshine Coast Family Contact Centre Association
Toowoomba	Toowoomba Childrens Contact Centre
Townsville and Cairns	Relationships Australia Qld
WA	
Bunbury	Anglicare WA
Fremantle	Relationships Australia WA
Perth	Anglicare WA
SA	
Adelaide	Relationships Australia SA
Mount Gambier, Millicent, Kingston, Narracoorte	Anglican Community Care
Onkaparinga and Mount Barker	Anglicare SA
TAS	
Hobart	Relationships Australia Tas
Launceston	Relationships Australia Tas
NT	
Alice Springs	Centacare NT
Darwin	Centacare NT

ACT	
Canberra	Marymead Child and Family Centre