

Wider issues

- 8.1 In the course of the inquiry several issues emerged that, while not strictly part of the Committee's Terms of Reference, are relevant in terms of achieving the stated policy objectives of the government in regard to these reforms: encouraging shared parenting, reducing the adversarial nature of proceedings, making court processes less traumatic, and protecting children from family violence and abuse. These matters are discussed briefly in this Chapter and in the Committee's opinion would benefit from greater consideration by government.
- 8.2 Specifically, this Chapter examines:
- The possible 'unintended consequences' that may arise from the proposed amendments and the need for evaluation of the impact of the legislation.
 - Issues that may arise in the implementation of the Family Relationships Centres that will be critical to the success of the government's aims.
 - The accreditation and resourcing of children's contact centres.
 - The need for longer term community education about the new family law provisions.
 - The role of case law in family law proceedings.

Impact of the legislation

8.3 In evidence to the Committee, several organisations raised concerns about the ‘unintended consequences’ of the 1995 family law reforms and their concern that the changes proposed in the exposure draft would have a similar effect.¹

8.4 Concern was also expressed to the Committee that the proposed amendments in the exposure draft would lead to increased litigation, rather than less:

I remain concerned that history has shown that whenever the Government has sought to amend the Family Law Act in the past in significant ways, such as in 1996, it led to an increased number of contested applications being filed. I am concerned that this legislation will result in an increase in litigation over parental responsibility...²

8.5 While some research had been done on attempting to quantify the nature of those consequences and whether the impacts were of immediate or continuing impact, the Committee is concerned that many of the claims were anecdotal in nature. Former Justice Richard Chisholm observed:

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. ...

1 See for example, Law Society of New South Wales, *Proof transcript of evidence*, 21 July 2005, p.16; National Association of Community Legal Centres, *Proof transcript of evidence* 21 July 2005, p.50.

2 Queensland Law Society, *Submission 30*, p.1.

I would envisage a kind of staged exercise...³

- 8.6 The Committee supports the proposal for quantitative and qualitative research into the impact of the Bill as part of the evaluation of these reforms, both in terms of their immediate and short term impact and for their longer term effects.

Recommendation 55

- 8.7 **The Committee recommends that the Government task an independent organisation to monitor and evaluate the effect of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 after its enactment. The evaluation should have both qualitative and quantitative components.**

Establishment and operation of Family Relationship Centres

- 8.8 In its initial briefing to the Committee on the Exposure Draft, the Attorney-General's Department indicated that they viewed the proposed legislation as the third tranche of the government's response to the *Every Picture Tells a Story* report. The first part of the response was the May 2005 federal budget announcement of an extra \$400 million for additional services, including 65 Family Relationship Centres (FRCs) to be rolled out over the next four years. The second stage was the Child Support Task Force report, publicly released in June 2005 and which is currently being considered by government.⁴
- 8.9 On 31 July 2005 the Attorney-General announced the location of the first 15 FRCs. The selection process for organisations to run these first centres is to start around October 2005. The initial 15 centres will be located in each State and Territory, in regional centres as well as capital cities.⁵
- 8.10 While the Committee strongly supports the establishment of the Family Relationship Centres as a key mechanism in changing the

3 Hon Richard Chisholm, *Proof transcript of evidence*, 26 July 2005, pp.35-36.

4 Mr Duggan, *Proof transcript of evidence*, 4 July 2005, p.2.

5 *Family Relationship Centres unveiled*, Press release, Attorney-General, 31 July 2005. The first 15 FRCs will be in Lismore, Sutherland, Wollongong, and Penrith (NSW); Mildura, Sunshine, Frankston and Ringwood (VIC); Townsville and Strathpine (QLD); Joondalup (WA); Salisbury (SA); Hobart (Tas); Darwin (NT); and Canberra (ACT).

culture of dispute resolution within the family law system, the Committee is troubled by issues related to the establishment and proposed operations of the FRCs. The Committee commented earlier (Chapter 3, paragraphs 3.93 – 3.105) on the roll-out of the FRCs and expressed concern that the phasing in of the family dispute resolution mechanisms would be adversely affected if the establishment of the FRCs was delayed for any reason.

- 8.11 The Attorney-General's Department did advise the Committee that the FRCs will not be the sole providers of family dispute resolution services, as '...the services will also be provided by individuals who meet the requirements for family dispute resolution practitioners under the Regulations and by other approved organisations'.⁶ However, the Committee has already raised concerns about accreditation standards and professional standards for those providing family dispute resolution and other services earlier in the report (see Chapter 3, paragraphs 3.190 – 3.211).
- 8.12 Despite consultation by the Attorney-General's Department in late 2004/early 2005,⁷ there appears to still be a high level of uncertainty about the FRCs and how they will operate. A number of other concerns were raised about the FRCs, based largely on the lack of information publicly available in regard to their location, the tendering process, staffing, provision of services to families in rural and remote areas, and the interaction of the FRCs with the rest of the family law system.
- 8.13 In regard to the quality issues in relation to the FRCs, Family Services Australia noted the following requirements:
- need to establish an industry driven approach to quality assurance...;
 - an ongoing monitoring process needs to be identified and clear criteria established to take action in relation to providers that fail to meet quality assurance standards;
 - ongoing research and evaluation of the new FRCs is critical;
 - success of the first FRCs will be critical to the long term viability of the model and the promotion of positive public perception – it is critical to resource FRCs with

6 Attorney-General's Department, *Submission 46.1*, p.35.

7 Attorney-General's Department, *Submission 46.3*, p.2.

appropriately skilled and experienced staff and to monitor the performance through national accreditation;

- priority must be given to existing FRSP providers with significant expertise in the area of working with separating parents in high conflict and are familiar with child protection issues in the selection process for FRCs; and
- best practice standards must be identified and implemented nationally...⁸

8.14 It is not clear what evaluation mechanisms will be put in place for the FRCs once they became operational. As one member of the Committee commented:

...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.⁹

8.15 It may well be the case that as the first FRCs are established under Phase 1 of the roll-out that many of these concerns will be addressed. The Committee does note with concern, however, the following comment by the Attorney-General's Department:

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 be coming in. We will not be stopping the roll out while we wait to see how those first ones operate;** we will be using them as demonstration models to help develop the

8 Family Services Australia, *Submission 78*, p.3.

9 Hon Duncan Kerr SC MP, *Proof transcript of evidence*, 26 July 2005, p.74.

different ways they might operate in rural and metropolitan areas.¹⁰ (emphasis added)

- 8.16 On the basis of this approach, the evaluation of the first round of centres will not necessarily be able to inform the second round, and any problems that have arisen may be in danger of being repeated.

Services for rural and remote Australia

- 8.17 The geographic distribution of the FRCs was of concern to some witnesses, particularly as the exact location of the centres is still being determined.

- 8.18 Typical of the concerns was the comment by the Women's Legal Service of South Australia Inc:

A common obstacle faced by regional, remote and rural communities is access to services — government or non-government. Are we to burden struggling families from remote or rural areas with few resources and on low or no income to access and where applicable compulsorily attend mainly metropolitan based FRC? Such impracticality will undoubtedly ensure that Indigenous and rural families fall through the cracks again.¹¹

- 8.19 Catholic Welfare Australia also raised concerns about the level of service outside urban centres:

...we ask what rural and remote children are offered by these proposals. The current proposals are exclusively metrocentric—that is, they revolve around metropolitan and large regional centres with significant resources and a diversity of services on call. If our rural and remote children are to be assisted, we must develop programs and interventions that are designed specifically for their circumstances and resources appropriately. Metropolitan services adapted to fit into a remote or rural setting are unlikely to yield significant benefits.¹²

- 8.20 Family Services Australia also noted that:

10 Ms Pidgeon, *Proof transcript of evidence*, 26 July 2005, p.62.

11 Women's Legal Service of South Australia Inc, *Submission 61*, p.5.

12 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.2.

There would need to be a whole suite of services in rural and remote areas around family relationship centres for them to work because they cannot provide any long-term work with families. So if you are going to plonk a family relationship centre in Broome, for example, there are not any services that are going to be able to support a relationship centre. You have to put the services in as well, wherever you put them.¹³

8.21 The Attorney-General's Department responded to those concerns, indicating that it was looking at outreach services:

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 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. ...

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 want face-to-face services.¹⁴

8.22 In further evidence tendered to the Committee, the Attorney-General's Department indicated that the package of funding for the FRCs also included \$10.6 million over four years specifically for outreach service to rural and Indigenous communities. The Department explained:

This will enable visits to more geographically distant areas than would otherwise be possible. In addition, it is intended that flexible outreach service delivery models be developed, for example through partnership, brokerage or sub-contracting arrangements. Where possible and with appropriate training and resources, organisations in rural areas may be used as agents. Alternative means of

13 Ms Hannan, *Proof transcript of evidence*, 25 July 2005, p.65.

14 Ms Pidgeon and Mr Syme, *Proof transcript of evidence*, 26 July 2005, p.61.

communication, such as telephone, video-conferencing or internet, will also [be] used. A specific Indigenous outreach strategy will be developed.¹⁵

- 8.23 The Committee notes the geographic distribution of the first 15 centres announced by the Attorney-General (see paragraph 8.9 above). The distribution of the remaining 50 is not publicly available. The Department did indicate the type of factors to be taken into account in deciding the locations of the centres.¹⁶

Service delivery

- 8.24 Although non-judicial dispute resolution is strongly welcomed in principle, there is a concern that the dispute resolution services will not be available to facilitate the new requirements. In order to be effective, the Family Relationships Centres must be equitable and accessible.
- 8.25 The government has committed to providing separating couples with an assessment consultation and thereafter the first three hours of dispute resolution sessions will be free. Some witnesses expressed the concern that in some cases three hours will not be sufficient to make any substantial progress in dispute resolution and that there should be sufficient flexibility so that the three hours is able to be increased in cases of need.¹⁷
- 8.26 Another issue is the availability of skilled workers to provide the highly skilled dispute resolution services required. The first concern is whether sufficiently qualified persons exist to fill the roles of family dispute resolution practitioners, and a resulting concern is the draining effect that the establishment of Family Relationship Centres might therefore have on the highly skilled staff at existing family services program providers.¹⁸

15 Attorney-General's Department, *Submission 46.3*, p.3.

16 These were: population of the catchment area; proportion of divorced or separated people with children; proportion with oldest child under 5 years old; the number of blended families; separations in the last 6 months and 3 years; Child Support Agency clients; people receiving parenting payments; Domestic Violence Hotline referrals; the accessibility of the proposed FRCs to people elsewhere in the region; the location of courts and other government funded services. Attorney-General's Department, *Submission 46.3*, p.4.

17 See for example, Relationships Australia, *Submission 37*, p.5.

18 See for example, National Alternative Dispute Resolution Advisory Council, *Submission 60*, p.1; Catholic Welfare, *Proof transcript of evidence*, 25 July 2005, p.14.

- 8.27 The Lone Fathers' Association considered that the government should ensure that the organisations responsible for running the Family Relationship Centres are not gender or ideologically biased.¹⁹

Screening for abuse

- 8.28 The FCAC report recommended that one of the important roles of service providers at the new centres (and all family law service providers) would be to screen for issues of entrenched conflict, family violence, substance abuse, child abuse and to provide direct referral to the courts for urgent legal protection.²⁰
- 8.29 The government's response was that the staff in the Family Relationship Centres will be trained to screen for a range of issues, including family violence and child abuse, and to make the appropriate referrals to other services or to courts. New accreditation standards for counsellors and dispute resolution practitioners will include skills in screening for such issues.²¹
- 8.30 The Attorney-General's Department submitted that screening for family violence and child abuse will be an important role for Family Relationship Centres, who will provide information and advice to victims of family violence. There is also considerable funding to specialist family violence services and additional contact services to protect parties from violence and abuse during contact.²²
- 8.31 Family Services Australia (FSA) perceive the role of family dispute resolution practitioners as critical to establishing a system that can fast-track cases where it is in the best interests of children:

The role of Family Dispute Resolution (FDR) Practitioners is critical in assisting the court to identify those cases where lengthy court waiting periods would endanger the health and well being of children and provision needs to be made for practitioners to be able to convey this information when required. It is critical that these practitioners are highly skilled, qualified and resourced in order to identify situations of family violence and determine a path of action that is in *the*

19 Lone Fathers Association of Australia, *Submission 48*, p.6.

20 FCAC report, recommendation 15.

21 Government response to FCAC report, p.13.

22 Attorney-General's Department, *Submission 46*, p.6.

best interests of children. These skills need to be linked to best practice guidelines and competency standards.²³

- 8.32 FSA recommended that a system be developed to identify and manage priority cases in the best interests of children. The Committee supports this view and anticipates that in any evaluation of the FRCs this issue will be addressed.

Evaluation of the FRCs

- 8.33 In regard to assessing the success of the Family Relationship Centres, the Sole Parents' Union noted:

[There is mention of]...an implementation review after 12 months but does not provide any indication as to how the success of the family relationship centres will be measured. We strongly believe that such measures and key performance indicators need to be developed prior to implementation....²⁴

- 8.34 FSA, the largest national industry representative body for community based family and relationship sector organisations, also noted that 'an ongoing monitoring process needs to be identified and clear criteria established to take action in relation to providers that fail to meet quality assurance standards'.²⁵

- 8.35 Catholic Welfare Australia supported the need for monitoring of the FRCs as they were rolled out:

...the timetable for the roll-out is less important than the adequate monitoring and development of those procedures and policies as they are rolled out. Realistically, a staged roll-out gives us some time to monitor and evaluate the impact of the family relationship centres and the way in which they operate and the sorts of commercial models that are used to develop them and so on. The staged roll-out approach gives us some time to do that, provided that ongoing monitoring is occurring as they are rolled out. ...

I am not convinced yet that there are solid structures in place to assess, monitor, evaluate and consider the interface between the application of the bill and the broad raft of

23 Family Services Australia *Submission 78*, p.2.

24 Sole Parents' Union, *Submission 38*, attachment p.5.

25 Family Services Australia, *Submission 78*, p.3.

existing services that are on the ground at the moment. That is going to be an ongoing challenge for us...²⁶

8.36 The Committee is also concerned as to whether there will be some mechanism for clients of the FRC to provide feedback on their operation, not just to the particular centre itself, but to an independent body, perhaps involved in accreditation of the centres.

8.37 Professor Moloney from La Trobe University, while strongly supportive of the FRCs, warned that the manner of their roll-out, their ease of identification and the publicity they receive will be crucial to their long term success. To assist in maximising the effectiveness of the FRCs, Professor Moloney suggested:

...the family relationship centres need at this stage to be pulled together by an individual in a senior chief executive officer position who can take senior executive responsibility for family relationship centres. ... I strongly urge the committee to think seriously about having a senior chief executive officer who can pull this together in a way that makes sense and that links in ... with the Family Court and the Federal Magistrates Court.²⁷

8.38 In discussions with the Committee, Professor Moloney acknowledged that the CEO model might not be the most appropriate given that the services will be provided on a contract basis following an open tender process, with the Commonwealth not having line responsibility for the day to day operations of the centres. However, the Committee supports Professor Moloney's observation that 'some sort of overarching accountability around best practice' needs to be considered.²⁸

Interaction with the rest of the family law network

8.39 Another issue related to the FRCs was the way in which they will interact with the courts and existing services.

8.40 Catholic Welfare Australia expressed the following concern:

The messages given at meetings with the Departments are that the FRCs would be one of many places that families can enter the Family Law system. However, in the Explanatory

26 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.5.

27 Professor Moloney, *Proof transcript of evidence*, 20 July 2005, p.26.

28 Professor Moloney, *Proof transcript of evidence*, 20 July 2005, p.31.

Statement to the Bill, the emphasis appears to be that once rolled out, the 65 FRCs will be the 'single entry point' for the vast majority of cases, except for those dealing with family violence or abuse, 'serious disregard' for a contravention order, circumstances of urgency, and where a party is unable to participate effectively in family dispute resolution.²⁹

- 8.41 Concern was expressed as to whether the FRCs will have appropriate structures in place to engage with broader family services providers. In oral evidence, the Executive Director of Catholic Welfare explained:

It is uncertain precisely what model the 65 centres will adopt in the end—whether there will be a lead agency with funding to manage other agencies in a geographic area, a consortium of agencies or a national approach. There is a great deal of uncertainty about that. It has great potential to have a major and detrimental impact on the sector more broadly if that process is not managed appropriately and carefully.³⁰

- 8.42 This concern was also expressed by Family Services Australia, who argued that the FRCs:

...need to be heavily connected and the services provided in those centres need to be provided by people who know and understand the work that is involved. They should not simply be administrative centres; they require some high-level intake and assessment services to enable that triage to happen appropriately.³¹

- 8.43 As with other implementation aspects of the FRCs, the Committee believes it will be extremely important for there to be effective monitoring of the FRCs as they are established, to meet these concerns.

Services for specific groups

- 8.44 Representatives from Aboriginal and Torres Strait Islander groups also raised with the Committee their concerns that the existing court and support facilities were not adequately resourced to deal with the needs of Aboriginal and Torres Strait Islander communities and this

29 Catholic Welfare Australia, *Submission 45*, p.2.

30 Mr Quinlan, *Proof transcript of evidence*, 25 July 2005, p.8.

31 Mr O'Hare, *Proof transcript of evidence*, 25 July 2005, pp.64-65.

needed to be addressed when the FRCs are tendered for and established. The Victorian Aboriginal Legal Service (VALS) argued:

...there should be Koori [sic] counsellors or mediators available to the Indigenous Australian community if people are to be directed to compulsory Family Dispute Resolution before they can go to Court. There should be funding for Koorie mediators and funding for Koorie organisations to help Indigenous Australians use the new system as a result of amendments to the Act. What exactly the Relationship Centres will look like is unclear at this stage.³²

- 8.45 VALS went on to make a number of suggestions including the possibility of Koorie Outreach Workers, additional funding for Indigenous organisations to provide new services, and to ensure that the tendering process maximises the capacity of Indigenous organisations to participate in the tender process for the establishment of FRCs.³³

Recommendation 56

- 8.46 **The Committee recommends that an independent review of the operations and location of the Family Relationship Centres be conducted after the first centres have been in operation for 12 months.**

Contact Centres

- 8.47 The Contact Orders Program is funded by the Australian Government to assist separating families in high conflict over contact arrangements. The FCAC report recommended the significant expansion of the contact orders program as part of measures to support shared parenting.³⁴
- 8.48 In May 2005 the government announced 15 new services to be established under the Contact Orders Program, bringing the number of services around Australia to 20.³⁵ While this is to be commended, the provision of the additional services will be over a four year period, and will still not address the level of demand for such services.

32 Victorian Aboriginal Legal Service, *Submission 73*, p.3.

33 Victorian Aboriginal Legal Service, *Submission 73*, p.3.

34 FCAC report, recommendations 8, 10.

35 Press release, *Contact Orders Program expands to help families in crisis*, Attorney-General, dated 21 July 2005.

- 8.49 The Committee was shocked to discover that only those small number of contact services that are government funded are currently accredited and monitored. The majority of private services receive no federal funding and are not subject to monitoring or assessment. Standards therefore varied enormously, and there was an increased risk they were exposing their clients and staff to risk of violence on a daily basis.
- 8.50 Ms Barbara Hanson, Convenor of the Australian Children's Contact Services Association informed the Committee that when contact centres were first established about 10 years ago, 'ACCSA tried to encourage all contact centres to use ACCSA standards...There are lots of things that contact centres need to address. We actually have people who are doing this privately. All they are doing is ringing up and saying to solicitors that they are quite prepared to do it, which is quite scary'.³⁶
- 8.51 Catholic Welfare Australia noted:
- We operate four child contact centres. ...we would support the accreditation of the centres. Their staff needs to be highly skilled. I think when they were conceived it was thought you could get child-care workers to do this role. We know that is not in the best interests of the children who pass through these centres, so we would endorse accreditation and high standards for these centres wholeheartedly.³⁷
- 8.52 The Attorney-General's Department advised the Committee that a process to develop accreditation standards has commenced. The Department has funded the Community Services and Health Industry Skills Council 'to develop competency-based accreditation standards and a suite of qualifications for family counsellors, dispute resolution practitioners and workers in Children's Contact Centres'. The Department expects that the accreditation requirements will be introduced into the legislation in about 18 to 24 months.³⁸
- 8.53 The Committee believes it is essential that accreditation and the associated training and resourcing of contact centres, both funded and non-funded, be a high priority for the government.
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36 Ms Barbara Hanson, *Proof transcript of evidence*, 20 July 2005, p.74.

37 Mrs Roots, *Proof transcript of evidence*, 25 July 2005, p.11.

38 Attorney-General's Department, *Submission 46.1*, p.35.

Recommendation 57

- 8.54 **The Committee recommends that the government introduce a system of accreditation and evaluation for all Contact Centres as a matter of urgency.**

Public education and awareness

- 8.55 The FCAC report recommended that in the lead up to the implementation of its recommendation there should be a public awareness campaign to inform the community about the reform and its benefits.³⁹ In its response the government agreed that there needed to be a community education campaign to accompany the family law reforms. The 2005-06 Budget contained an appropriation of \$5.7 million for a community education campaign. The government noted 'Family Relationship Centres will also have an important role in promoting and educating the community on positive shared parenting'.⁴⁰
- 8.56 A number of submissions commented on the need to improve the community's understanding of the operations of the family law system and the proposed new changes. For example, the Commonwealth Department of Family and Community Services recommended that:
- ... a user-friendly guide to the new Family Law Act be developed for a broad community education campaign and for reference for separated parents. The guide needs to be written in a plain English style, providing explanation and examples of the key concepts such as 'meaningful involvement', 'the best interests of children', 'abuse or family violence or other such behaviour'.⁴¹
- 8.57 Relationships Australia commented that at the moment:
- ...there is a very negative attitude to divorce. In fact there is even a negative attitude to seeking parenting advice...
- Combined with community education campaigns that promote positive family relationships they should highlight

39 FCAC report, recommendations 6 and 22.

40 Government response to FCAC report, p.7.

41 Commonwealth Department of Family and Community Services, *Submission 59*, p.9.

to people that they will need help and that it is acceptable to seek assistance and that this is beneficial rather than shameful.⁴²

- 8.58 The National Network of Indigenous Women's Legal Services reinforced the importance of educational material and information from the FRCs being culturally appropriate.⁴³
- 8.59 The Committee believes that the quality of the public education campaign and the ongoing information provided to clients of the FRCs will be crucial in determining the public acceptance of the centres and the new model for family dispute resolution. The Committee notes, however, that the funding allocated for a national education campaign on the new family law system is only for financial years 2005-06 and 2006-07.⁴⁴ This is of concern to the Committee, particularly as only the first phase of compulsory dispute resolution will be in place by June 2007. The Committee believes that the public education campaign, provided that it focuses on information explaining government policies, programs and services in the area of family law, will need to be extended beyond the two years currently allocated in the Budget.

Recommendation 58

- 8.60 **The Committee recommends that the National Education Campaign associated with the new family law provisions be extended beyond financial year 2006-07, provided that it focuses on objective information explaining government policies, programs and services in this area.**

Case law

- 8.61 The submission from the Shared Parenting Council of Australia raised the question of the role of case law and precedent in outcomes for cases in the family law courts. The SPCA recommended that
- ...the legislation includes a clear statement to override existing Case Law precedent, which effectively could prohibit

42 Ms Hollonds, *Proof transcript of evidence*, 21 July 2005, p.30.

43 National Network of Indigenous Women's Legal Services, *Proof transcript of evidence*, 21 July 2005, pp 37-40.

44 *Portfolio Budget Statement 2005-06*, Attorney-General's Department, p.28.

an equal shared parenting order in cases where, for example, the parties have been or are in legal conflict.⁴⁵

- 8.62 In evidence before the Committee representatives of the SPCA expanded on the reasons for this recommendation:

Where that act has caused a difficulty is in the case law precedent that has been developed over 30 years. The point we are making in our submission...is that, even though there are new provisions and amendments made for providing for the government policy, I have not yet seen and have been unable to identify a provision in there that legislates away the case law that prohibits this occurring.⁴⁶

- 8.63 The SPCA subsequently provided some examples of where they felt case law had adversely affected decision making in the courts.⁴⁷

- 8.64 The Committee raised this matter with the Chief Justice of the Family Court, who responded in the following terms:

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. ... 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. ...

You do not see cases relied on for precedent value...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. This is where the criticism comes from.⁴⁸

- 8.65 In commenting on the issue of whether the law should be more codified and less reliant on case law, Mrs Davies from the Family Law Council observed:

My concern in relation to that is the fact that it is, as we know, a very changing environment and case law is able to respond to different circumstances, whereas the legislation may not be reviewed at such a regular interval. It provides guidance for

45 Shared Parenting Council of Australia, *Submission 70*, p.5.

46 Mr Greene, *Proof transcript of evidence*, 25 July 2005, p.37.

47 Shared Parenting Council of Australia, *Submission 70.1*.

48 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.7-10.

people who were providing information and advice, whether they are lawyers, social scientists or other practitioners, as to the way the law is being implemented at any particular time.

...

My understanding is that if there is legislative change subsequent to case law, it is the legislative change that takes precedence.⁴⁹

- 8.66 In a later submission to the Committee, the FLC argued strongly against the removal of case law:

A possible consequence of removal of case law would be increased litigation as parties litigate issues that are currently considered to be settled.

Therefore the Family Law Council would not support an amendment that removed case law and notes that it would be likely to go against the government's objective of 'encouraging and assisting parents to reach agreements on parenting arrangements after separation outside of the court system where appropriate'.⁵⁰

- 8.67 The Chief Justice referred to her policy of having as many family law cases as possible reported on the internet and elsewhere, with identifying details removed.

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.' ...If people had more access to cases and could read more of them, then they would get a feel for the cases... 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.⁵¹

- 8.68 The Committee supports the Family Court's attempts to better publicise the decisions in cases as a way of assisting members of the
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49 Mrs Nicola Davies, *Proof transcript of evidence*, 25 July 2005, p.91.

50 Family Law Council *Submission 33.1*, p.2.

51 Chief Justice Bryant, *Proof transcript of evidence*, 26 July 2005, pp.6-7.

community to understand the way in which the legislation is applied. In regard to the impact of case law, the Committee notes the range of opinions expressed, summarised as follows: the SPCA arguing that it had an adverse impact on decision-making in the courts; the Family Court asserting that there really wasn't any useful case law as such, with decisions decided on the individual facts; and the Family Law Council indicating that case law played a useful role in decision-making. The Committee notes that, if the views of the SPCA are correct, then existing case law had the potential to frustrate the policy innovations proposed by the government in this Bill. The Committee believes that the impact of case law should be examined as part of the review of the implementation of this legislation, as recommended at Recommendation 55 above.

Recommendation 59

- 8.69 **The Committee recommends that an examination of the impact of case law be included as part of the review of the implementation of these legislative reforms (see Recommendation 55).**

**The Hon Peter Slipper MP
Chairman**