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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Family Law Amendment Bill 1999

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Tuesday, 9 November 1999

Members: Senator Payne *(Chair)*, Senators Coonan, Cooney, Greig, McKiernan and Mason

Participating members: Senators Abetz, Bartlett, Bolkus, Brown, Brownhill, Chapman, Crane, Eggleston, Faulkner, Ferguson, Ferris, Gibson, Harradine, Knowles, Lightfoot, McGauran, Parer, Stott Despoja, Tchen, Tierney, and Watson

Senators in attendance: Senators Cooney, Greig, McKiernan, Mason, and Payne

Terms of reference for the inquiry:
Family Law Amendment Bill 1999

WITNESSES

Committee met at 9.04 a.m.

CHAIR—Welcome to this hearing of the Legal and Constitutional Legislation Committee of the Senate and our inquiry into the provisions of the Family Law Amendment Bill 1999. On 29 September 1999, on the recommendation of the Selection of Bills Committee, the Senate referred an inquiry into the provisions of the Family Law Amendment Bill 1999 to the Senate Legal and Constitutional Legislation Committee. This committee is required to report by 29 November 1999.

The committee advertised the inquiry in the *Weekend Australian* of 16 and 17 October this year. The committee also wrote to interested organisations and individuals and to persons inviting them to lodge submissions on the reference. The committee has received 50 submissions as evidence to the inquiry. All the submissions have been made public.

KAY, Justice Joseph Victor, Judge Administrator and Judge of the Appeal Division, Family Court of Australia

NICHOLSON, Chief Justice Alastair, Chief Justice, Family Court of Australia

CHAIR—Welcome. The Family Court has lodged submission No. 25 with the committee. Do you wish to make any amendments or alterations to that submission?

Chief Justice Nicholson—No.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite senators to ask questions.

Chief Justice Nicholson—I note that quite a lot of time has been allowed for our appearance. I am not sure that we will take up quite as much time as we did on the last occasion, on the magistrates bill. There are a number of what might be described as fairly piecemeal matters that we have dealt with in our submission and I wonder whether, rather than using the technique of an opening statement, it might be convenient to you if I was to go through the submission—to amplify, not to read it—and perhaps ask Justice Kay to pick up on particular points.

CHAIR—That would be helpful. I have had the opportunity to look at the submission. It is obviously technical and there are some complex areas which it would be appropriate to address, so perhaps we will go that way.

Chief Justice Nicholson—Perhaps questioning as we go.

CHAIR—Certainly. Thank you.

Chief Justice Nicholson—You will see the first one is section 65DA, which provides for an explanation when a parenting order is made. Let me make it very clear that I am very much in favour of courts explaining what they are doing to people or what they are doing in relation to people. I can understand the concept behind the amendment. In fact, I think you would find that most judges would give this sort of explanation anyway, so it is not a great problem in a contested type matter.

Insofar as there is a problem, it arises more in relation to consent orders where quite often the parties are not present—for example, a solicitor may come in and present consent orders that have been signed by the parties and they may be away some distance from the court. It is quite clear that in those circumstances it is extraordinarily difficult to explain the effect of an order to a non-represented party. You are bound under the section to request the practitioner to explain the effect of the order to the person, but if there is no practitioner acting for the person, and they are not there, it rather defeats the object.

We felt that perhaps a better way to go would be to ask for the section to provide that the court should provide, either by way of explanation or by written document such as a pamphlet or something like that, the effects of such orders.

CHAIR—A sort of plain English document which is readily accessible?

Chief Justice Nicholson—Yes.

CHAIR—And easily understood?

Chief Justice Nicholson—Yes. Do you have anything to add to that?

Justice Kay—A couple of bits. There is, in the Child Support (Assessment) Act, a requirement to give reasons, but there is also a section, 118(5), which says that if you do not give reasons it does not affect the validity of the order. If there is to be imposed upon the court an obligation to do something as a result of making the order, such as explain the order, I

would still like to see a section that says that if the court does not do that it does not affect the validity of the order. That is the first thing.

Apart from the general overview that we have expressed—and I do not necessarily perceive it as part of the judicial function for the judges to be explaining to parties, giving them legal advice as to what the effect of the order is—to say to most Australian parents who are law-abiding at the end of pronouncing an order, 'We hope you realise that if you do not comply with this order, we can send out someone on a locational or a recovery order to make sure you do,' is, I think, very patronising and insulting to most of our customers who are genuinely law-abiding people. It is only the rare occurrence of cases where you have problems. That troubles me.

CHAIR—So, if it were set out clearly as the Chief Justice has suggested, in a pamphlet or a publication form, that would obviate that problem?

Justice Kay—Yes.

Senator McKIERNAN—What percentage would not be in attendance when an order is made? Have you got a rough idea of that?

Chief Justice Nicholson—It would be very difficult to me to express any view about that. But with consent orders it would be quite high. For example, if the people come from some distance away from the court and they have agreed, they usually do not turn up at the court; they may send a letter or something like that indicating their agreement. It would be quite a substantial percentage. After all, there are only a very limited number of cases that actually go through a contest in the court. It is those other cases where they consent that I think this sort of section may create some difficulties in relation to those sorts of areas.

Justice Kay—The other issue is that parties may have been in court but once they have negotiated their settlement the lawyers may stay around and the parties leave. It is the lawyers that hand the consent minutes up and the parties are no longer there anyway.

Senator McKIERNAN—Thank you.

Chief Justice Nicholson—Perhaps I will ask Justice Kay to deal with items 7 and 16, which are the next two matters.

Justice Kay—We are concerned about the contravention provisions. They create a three-stage process: firstly, to establish that a contravention has occurred; then, for the first contravention, unless there are special circumstances to order, effectively, an education process; and then, if there is a further contravention, to begin to impose sanctions. The second stage is said to be discretionary, with the use of the word 'may' and the third stage is mandatory, with the word 'shall'.

The stages and different processes carry with it different onuses of proof, and these onuses vary from determining whether you are dealing with children's matters or non-children's matters. It is a very technical area that we have spent some time on in our submission. There seems to be some significant confusion about what is on the edge of each. The drafting method in children's matters is to include anything that has got a little bit of a children's matter, even if it has got mainly non-children's matters. You can have the effect of the method of enforcing an identical order and, depending on whether there is a little bit of children's matter in it or no children's matter, the whole onus of proof changes. The defences change—whether there is a reasonable excuse. The issue, as you will see from our submission, is who has to prove the existence of a reasonable excuse.

In non-children's matters, the person alleging the breach has to negate a reasonable excuse. In the children's matters, it is up to the respondent, once the breach is proven, to establish a reasonable excuse. This seems to us to be unacceptable, that on exactly the same factual situation the onus of proof changes. You will see that that is expanded on significantly in the course of our submission.

Perhaps, significantly, we deal with a problem that as you move from stage 2 to stage 3—that is, determining whether you are going to punish somebody—one of the bases upon which you would determine whether they are to be punished under this drafting is if a person required to participate in an education program refuses or fails to participate—that can be measured objectively—or does not participate fully—

CHAIR—So it was past attendance to a question of degree of participation that was your concern, I think.

Justice Kay—Yes. That seems to us to be something incapable of being measured. If it can be measured, it is a trial within a trial about an issue that has really got nothing to do with the problem that is created, and that seemed to us to be an unnecessary basis.

The third matter that is of significant concern is the issue of mandatory punishment in any event. Given that the court has a range of sanctions which can include notional sanctions such as a suspended sentence, a sentence to the rising of a court or the fining of one dollar, you can do that, and there is good reason why you should be able to, because the facts of the case may be a technical breach but might not demand the imposition of a penalty. The actual creation of mandatory penalties seems to us to add nothing. That the court must exercise its punitive powers does not seem to add anything to the exercise if the punitive powers can be responsibly exercised by notional penalties in any event. Those are the matters which I want to specifically enlarge with the paramountcy issues in section 70NG(1)(b).

CHAIR—You are concerned about the use of the word 'forgone.'

Justice Kay—No, paramountcy has got a couple of issues. There is the paramountcy issue with the question that, if you are going to add extra contact or change the nature of the orders, are you doing it having regard purely to the paramountcy issue—is it best for the child—or are you doing it for some other reason such as a punitive measure? One could say, 'Seeing that you did not allow the father to have the children live with him last weekend, we are going to give him two make-up weekends which would double the amount of contact.' Are you doing that because that is best for the child or are you doing that because it is a punitive power? That is not spelt out clearly in terms of the legislation as to what the test is to be.

There is another area where paramountcy is set in addition to the best interests the court shall take into account, and I was just looking for that section. That troubled us because of what we understand the law to have been. This is 70NJ(5).

Chief Justice Nicholson—We started with 70NG(1)(b). They are both illustrations of it but section 70NG(1)(b) gives the court the power to make a further parenting order.

Senator COONEY—I cannot see it. Yes, sorry.

Chief Justice Nicholson—It is starting to read a bit like a tax act.

Senator COONEY—Yes, or the Workplace Relations Act or something like that.

Chief Justice Nicholson—Section (1)(b) empowers the court, when the person contravenes an order, to make a further parenting order that compensates for contact forgone as a result of the contravention concerned. That may be a perfectly proper order in some cases, but it may not be in others, depending on the interests of the child, and the interests of the child are not

referred to in this section. It is not clear whether the court should take the child's best interests into account or not. It in fact gives rise to a difficulty that is associated with the Family Law Act generally since the passage of the 1995 act, the reform act, in that the previous act used the welfare of the child as an overarching provision that dealt with nearly all of the relevant sections so that you knew in each case that the welfare of the child was the paramount consideration even though the particular section did not say so. There was an overarching section which dealt with it. The reform act changed that by attaching best interests, so you have to keep expressing it in different places and, if you do not express it in different places, it does not follow that the best interests are paramount. That has been a troublesome aspect of the reform act.

There is one decision of the High Court, for example, in a case involving the Northern Territory—I cannot quote the case offhand, but it is a fairly recent case—where the issue related to the court's power to subpoena material from a child welfare department. The High Court held that the paramountcy principle did not apply in relation to that issue. Because it was an evidentiary procedural issue and because the act had been amended, there was no specific requirement that the best interests of the child should be paramount in that sort of context. We have a powerful dissenting judgment by Justice Kirby, who points out the difficulties that come from that. I am not asking this committee to fix it all up at this stage; I am simply pointing out that that is an example of the problem that has been created by the lack of an overarching section.

CHAIR—We will take that on board.

Justice Kay—In proceedings under this act on best interests, section 65E of the act used to read 'in deciding whether to make a particular parenting order'. So the High Court has limited the best interests down to what the parenting order should be. It may well be said that an order for compensatory contact is a parenting order, in which case you would apply best interests only, but this is not clear and that causes a significant problem with what we are doing.

There is one other aspect of this, and we have tried to cover it in the notes. The act which is being amended saw the difference in enforcement proceedings as those between orders for residence contact and specific issues and all other orders. Money orders were treated differently. A parenting order is defined under the act as including those three things: residence contact, specific issues or maintenance for some purposes. For some reason, the draftsman here has moved into the inclusive definition of 'parenting order' and included 'maintenance' and then tried to exclude it in parts or differentiated between it. It seems to us that maintenance really has little to do with this particular part of enforcement.

To spell out the consequences of orders when making a parenting order means that in every maintenance order you are going to have to spell out each one of the compliance obligations, which would include the availability of location and recovery orders, which has nothing to do with maintenance, and then there is the availability of programs to help people to understand their responsibilities under maintenance orders. So it seems to us that the inclusion of child maintenance and child support, I suppose for that matter, and other maintenance areas is inappropriate. I think it is probably a drafting problem. The draftsmen may not have turned their mind to it.

CHAIR—Under the heading 'Orders under this Act affecting children', you say:

This should be amended to exclude orders for child maintenance or to include orders for payment of child support. There appears no reason to discriminate between the two.

So go one way or the other, not halfway in between.

Justice Kay—Yes, but probably to exclude maintenance orders—

CHAIR—That is your preference?

Justice Kay—That is our preference, because it really has nothing to do with what they are trying to achieve here. This is the section that is aimed at enforcing contact and residence orders, and it is only because there is an inclusive definition of parenting order. Its history, when you go to 112AD(1A), had nothing to do with maintenance. The section it is replacing did not include maintenance.

CHAIR—We will have a look at that in our consideration.

Senator COONEY—We were on 70NG, and then we went back to the parenting definition. Where is the parenting definition?

Justice Kay—A parenting order is defined under the existing legislation, under 64B of the existing act.

Senator COONEY—That is in the act.

Justice Kay—Yes. The act states:

(2) A parenting order may deal with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) contact between a child and another person or other persons;

(c) maintenance of a child;

(d) any other aspect of parental responsibility for a child.

Peculiarly, it does not include child support. That is taken out of the act, in a different legislation. So you can have an order for maintenance, which is a stage 1 child, but you cannot have a child support order. And there is no reason in enforcement to differentiate between the two. But this part of the act, about telling people what their obligations are and sending out location orders, has really got nothing to do with maintenance.

Senator COONEY—In 70NG, there seems to be a provision that wants to leave some discretion to the court and but then wants to bind it. Does the court at any stage get the feeling that it is being squeezed in terms of the width of its discretion?

Justice Kay—The discretion problem comes into 70NJ, where you must do things.

Senator COONEY—If you look at 70NG(3), it seems to almost set out a code:

(3) If the court makes an order that person is to participate in a specified post-separation parenting program, the court must cause the provider of the program to be notified, in accordance with the applicable Rules of Court . . .

It leaves it up to the rules of court to get that part of it dealt with but, for the rest of it, it—

Justice Kay—That is putting the onus on the court to tell the provider. I do not think it does any more than that.

Senator COONEY—Are you happy enough with that?

Justice Kay—That is a mechanical issue. Rather than putting the onus on the parties, it says the registrar has got to send off a letter, effectively.

Senator COONEY—I am sorry; I should have read all this, I know. Who is the provider?

Chief Justice Nicholson—That is still to be determined, as I understand it.

Senator COONEY—Yet to be decided?

Chief Justice Nicholson—Yes.

Justice Kay—By the Attorney-General, as you will see in paragraph 70NG(4).

Chief Justice Nicholson—Some of these provisions will have some difficulty if there are not appropriate providers available. Again, one tends to have those difficulties in provincial areas more than in city areas.

Senator COONEY—That seems to me to be what is wrong with a lot of the legislation in this area—that you somehow try to legislate wisdom. I do not think you can. You either have people of some ability deciding these cases or not. Do you see what I am saying? You say, 'We will have a provider.' Section 70NG says, 'Look, we will set up a system,' which will have a provider of the program. So what is the provider of the program? You say, 'We don't quite know what the provider of the program is or who it will be, but it will be good. Why will it be good? Because we have put it in the legislation.' I do not think you can run a system on that basis. Who is the provider of the program?

Justice Kay—That is 4(a)—somebody the Attorney-General thinks is to be the provider.

CHAIR—Which is, I suppose, to prevent you, Senator Cooney, and I setting up as providers in regional Victoria if we took it upon ourselves. Rather, it is for the Attorney-General to compile.

Senator COONEY—But what (4) says is:

(4) The Attorney-General:

(a) is to compile, for each calendar year, a list of post-separation . . . programs;

That does not talk about providers of a program. He is to publish a list in such matters. I can understand that bit. That talks about the parenting programs. What about the providers? You go on to 70NH, which says:

(1) If the provider of a post-separation parenting program makes an initial assessment . . .

Are there any provisions as to who the providers are to be?

Chief Justice Nicholson—No, I do not think so. In fairness, though, I think there has been quite a bit of work done, certainly by the court itself, in relation to post-separation programs. We have had quite successful ones in Parramatta, in particular. I would envisage that the court itself would be providing at least some of these programs through its counselling service. But we would be more than happy to have others provide them if they could do it as well.

CHAIR—And if the compilation of the list could be done in cooperation with the court and those who knew which were the best.

Chief Justice Nicholson—Yes.

Senator COONEY—Is there any provision to that effect, though?

Chief Justice Nicholson—No.

CHAIR—Not specifically, that I am aware of.

Senator COONEY—So the provider can be anyone?

Justice Kay—Then we have got the peculiar NH, which is part of the problem we have already identified, which states that the provider of a post-separation program must inform the court if the person fails to participate in any one or more discussion or activity. Well, if somebody sits there quietly with their hands behind their head or behind their back and just listens but does not talk back, are they participating or failing to participate? Who is to

measure? Do you then have a trial within the trial to work out whether they have or they have not? The person says, 'I participated. I concentrate best with my eyes closed.'

CHAIR—Is that the concern you identified before?

Justice Kay—That is part of the concern we identified.

Chief Justice Nicholson—There is that. And it seems to me that it should be if a person fails to attend without reasonable explanation. Obviously someone might be sick or have a perfectly good reason to not attend.

Senator COONEY—It sounds like the old probationary system. Do they still have a probationary system going, where the probationary officer says you've breached your probation? Is that idea still around?

Chief Justice Nicholson—Yes, I think so. I have been out of that field for a while.

CHAIR—We need a criminal lawyer, Senator Cooney.

Senator COONEY—Yes. You would put somebody on probation. This reminds me of it: does the person on probation turn up to the lessons they are supposed to have, and how do you know? And that depends on your officer, and you have breached the probation and it gets all over the place. It has got that sort of ring about it, in a different way—not the same by any means, but that sort of ring about it.

Chief Justice Nicholson—I think probably one of our concerns—and I think Justice Kay has mentioned this—would be with section 70NI, which states:

> If it appears to the court that a person who has been ordered to participate . . . has not participated, or is not participating or fully participating . . . the court by order, give further directions to the person with respect to the person's participation . . .

When you are getting to this stage, you are dealing with people who are often quite difficult. I would be concerned that we are throwing a few more opportunities into the ring to have a forensic contest in relation to it. That troubles me. We have all wrestled with the concept of how we can better enforce parenting orders in relation to children. I am not knocking it in the sense that this is not a valiant attempt. But I am not sure that it does not carry as many difficulties with it as what it is trying to overcome. I think that is really what we are saying. It may be that a simpler system might be a better system in terms of achieving these objects.

CHAIR—In the comments that you have made in your submission and here, you have commented on the provisions of the bill but not necessarily gone down the road of suggesting what would be a simpler way to do some of the suggested things. I am not suggesting that is necessarily your role, but you have made the observations.

Chief Justice Nicholson—True; and that is a fair comment. Frankly, if it was thought to be of any assistance, we would be prepared to do that, without necessarily putting any policy issues on the thing. I would be happy to accept an invitation to do that, if that would be of any assistance.

CHAIR—Is that of interest to the committee?

Senator McKIERNAN—It might be worth while taking that up at a later time, after we test these provisions with the Attorney-General's Department itself.

Chief Justice Nicholson—Yes.

Senator McKIERNAN—Because I see that NJ(2) actually gives the court the option of making the orders rather than making it mandatory.

Chief Justice Nicholson—Oh, yes. I am not troubled about that, Senator. I am more troubled about people coming back to court to argue over whether they have participated, then going back again and so on.

Senator McKIERNAN—Yes. I have just been going between amendment and the explanatory memorandum. I must say I do not necessarily share your degree of concern with the matter at this particular time. Before asking the court to come back with alternatives, I would like to hear what the Attorney-General's Department has to say in regard to the matters that you raise. Then perhaps we might come back at a later time.

CHAIR—Yes. We have not taken evidence from the department yet. In fact, this is our first hearing.

Senator COONEY—I would like some comments from the court at some stage. In my view, what we are getting is legislation promulgated by people who are absolutely not understanding.

You might not have had it, but I have had people who have come from the court sitting in my office insulting people I might have known in the past in big ways. I have had to sit there and listen to these people. You begin to wonder whether all this legislation is being prompted by people who find it difficult to exist peacefully in society. It would be bad to have a lot of legislation aimed at a very narrow lot of cases. I have a feeling that that is the way we are going.

I would be interested in the court's wisdom at some time, but I am happy to hear the Attorney-General's Department first. I would like to know how many people in the Attorney-General's Department have actually practised in this field as distinct from writing legislation about that.

CHAIR—You might ask them when they appear, Senator Cooney.

Chief Justice Nicholson—I should have mentioned that in the second paragraph on page 4 we do refer to a single application under which an array of remedies could be available.

CHAIR—Yes, I noted that. We might, as Senator McKiernan has suggested, take you up on that at a later date and pursue Senator Cooney's interest as well. Shall we proceed so that we do not run out of time.

Justice Kay—We deal with this in our submission, but 70NJ(1) is the confusion within the legislation. It says:

> If . . . the person has . . . without reasonable excuse, contravened an order . . . and the person does not prove on the balance of probabilities that he or she had a reasonable excuse for contravening the order . . .

Well you cannot have both.

Senator COONEY—This is 70NJ, is it?

Justice Kay—It is 70NJ(1)(a) and (b). You cannot have somebody without reasonable excuse having contravened an order if they can prove that they have not contravened the order. There is excess verbiage in there that needs to come out.

Chief Justice Nicholson—I think that could be fairly easily fixed in the next drafting.

CHAIR—Thank you.

Senator COONEY—This is what worries me. If the court having jurisdiction under this act is satisfied that in respect of them an order has been made but they are considered by the provider of the program to be unsuitable, that seems an extraordinary thing to place on a court.

It is not whether in fact the person was unsuitable but whether the provider considered the person to be unsuitable. It seems a very strange test to apply. The bill states:

(1) If a court having jurisdiction under this Act is satisfied:

(a) that a person

. . . . . .

(iii) is considered by the provider of the program to be unsuitable to take any further part in the program;

and the person has afterwards, without reasonable excuse, contravened an order under this Act affecting children . . .

I do not know what that is all meant to mean.

Justice Kay—You are the provider, one of those persons you have just described comes into the program, and you as the provider do not feel that you can usefully provide for them so you tell the court that. It makes the provider the judge as to whether or not that person is suitable. It has got nothing to do with the court determining their suitability.

Chief Justice Nicholson—I do not want to spend too much time. There are a couple of more substantive issues I would like to go to. Section 70NL is mirrored in the Magistrate's Court legislation. It states:

A community service order made under paragraph 70NJ(3)(a) may be varied or discharged:

(a) if the court that made the order is the Family Court—by the Family Court; or

(b) if the court that made the order is the Federal Magistrates Court—by the Federal Magistrates Court . . .

So the only variation that can be made or discharged if the Magistrate's Court has made an order is by the Magistrate's Court and, if the Family Court has made an order, by the Family Court. I am just wondering how realistic that is in circumstances where time may have passed and why it is necessary. I would have no problem about the Magistrate's Court varying a Family Court order at a subsequent time if a matter had conveniently come on before a Magistrate's Court. Similarly, there seems to me to be no purpose in preventing either court from varying orders in subsequent proceedings.

Senator COONEY—That would be consistent with 70NL(c) because, if it is made otherwise, then the Family Court can vary the order whereas it cannot if it is the Magistrate's Court.

Chief Justice Nicholson—Yes.

Senator COONEY—I do not know why that is.

Chief Justice Nicholson—It just seems to be an unnecessary barrier between the jurisdictions of the two courts. It cuts both ways. It is not just the Family Court; it is a barrier to the Magistrate's Court.

CHAIR—We will pursue that in our further hearings as well.

Justice Kay—If you look at section 47, which we have highlighted, it says:

All courts having jurisdiction under this Act shall severally act in aid of and auxiliary to each other in all matters under this Act.

That is in direct conflict.

Chief Justice Nicholson—It really raises again a broader issue. I appreciate the committee has already reported on the Federal Magistrates Bill, but one of the concerns that we expressed earlier related to transfer provisions and that when one matter is in one court it is locked there

unless it is transferred to the other. It occurred to me when I was considering this that perhaps a useful analogy is the cross-vesting scheme. Leaving aside the legality or otherwise of the scheme, one of its great virtues was that you did not have a dispute over whether one court or another could exercise jurisdiction. It was particularly useful in family law matters where someone would say that you were making an order affecting a third party. You could say, 'I'll exercise the jurisdiction of the Supreme Court of the state in which I am in and make that order.'

I am not arguing for a reappearance of the cross-vesting scheme, but I am using it to illustrate that a lot of the concerns that we have about the magistrate's bill could well be overcome by something akin to a cross-vesting between the two courts, so that each court could vary or discharge orders of the other. It normally would be done—I would hope—sensibly, and usually it would be much more convenient than having to send people back saying, 'You're in the wrong court, and you ought to go back there,' particularly if you are talking about provincial and country areas, where quite often this court may be giving a much bigger coverage to those areas the Magistrate's Court. I simply mention that in passing, but this is illustrative of one of the problems I see.

Senator McKIERNAN—Might that provision be inserted to stop forum shopping—one litigant going to one court and then moving on to a different court and vice versa, prolonging the agony?

Chief Justice Nicholson—It might be. But, again, if I may hark back to the cross-vesting scheme, that is one of the things that did not occur very much. It actually was a lot more convenient a system than the one that has now replaced it. This is a mini form of it, in a sense.

Justice Kay—I understand it is suggested that there will be two federal magistrates for Victoria. Assume that the magistrate sitting in Bendigo has dealt with an issue and about six months later there is a breach and the only court sitting there is the Family Court and the magistrate is not due back in Bendigo for another six months. Under this provision the Family Court judge could not deal with the magistrate's order. You would have to wait for the magistrate to come back again. You might be in the Family Court fighting over a maintenance issue or you might be fighting over property or other issues, but on the issue of whether or not a community service order should be varied or discharged you have to wait for the magistrate to come back again.

Chief Justice Nicholson—And there might even be an argument in relation to one child. It is not uncommon for an order to have affected one child to be made earlier and then a fresh argument arises about another child and the first child. So you have got those sorts of things.

Senator COONEY—And I suppose the magistrate might not necessarily be in Melbourne; he or she might be in Mildura or Bairnsdale.

Justice Kay—It seems to us that there is a not dissimilar provision in the Child Support (Assessment) Act, section 115. Under that act you cannot go and get a departure order from the Family Court unless you have first been to a review officer, except if you are in the Family Court doing other business and the court is satisfied it is in the interests of the parties to hear, at the same time as the other business, the review application.

CHAIR—Perhaps the provision could be couched in terms such as, 'unless you were already in the other court'.

Justice Kay—Or unless it is in the interests of justice—which is the clause that comes out of the cross-vesting legislation—and the interest of the parties that you actually get on with it.

CHAIR—I understand that point.

Chief Justice Nicholson—Would it be convenient, then, to go to agreements?

CHAIR—Certainly.

Senator COONEY—This is the business that knocks romance out of relationships.

CHAIR—You are just an old romantic at heart, aren't you?

Senator COONEY—I am. I have argued this before.

CHAIR—It is ever a joy for this committee that you are.

Senator COONEY—Just imagine being on the banks of the Yarra. There you are with your future wife, and you say, 'Let's get an agreement done here.'

CHAIR—We might be about to get too much information, I suspect.

Senator COONEY—Mind you, Lillian might just do that.

CHAIR—See, we did get too much information. I knew that was going to happen.

Senator McKIERNAN—That is on the record now, Barney.

Chief Justice Nicholson—In relation to agreements, the court has actually not taken any official line about whether there ought to be agreements or not, on the basis that that is a policy matter; although, if I may say so—speaking entirely personally on this occasion—I have read in draft the submission by Dr Fehlberg and I could not better it. I think it is first-class in terms of what it has to say.

Leaving that aside for the moment, we have two concerns but I think the major concern is the methods by which the agreement can be set aside. In our submission we have said:

This proposed section contains elements of the current sections 79A(1) and 87(8).

Leaving aside the issue of whether you have had legal or financial advice, our concern is that it is just too difficult to set aside one of these agreements. We can understand, and certainly I can understand, the desire to have the agreements stand up and not be things that you can walk away from, but if you look at the history of section 79A of the Family Law Act, you can see that the court itself has been extremely conservative about allowing people to walk away from agreements under that act. What is provided here is really a much more rigorous system than section 79A required.

Section 79A relates to an order that has been made by the court after a full trial. One would think that there would also be a public interest in maintaining such an order. Section 79A was drafted with a view to making it difficult to set aside orders that had already been made, but it does contain some provisions that I think really ought to be replicated in this legislation. If one looks at (a), it says:

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

What is missing here is the other circumstance. I think it is very difficult to isolate miscarriage of justice without providing for some broader provision such as 'any other circumstance'. It seems to me that there are so many ways in which there can be a miscarriage of justice that it should not be limited in this way.

Speaking anecdotally by way of experience, there is certainly one full court decision where the miscarriage of justice that was found by the court did not fall into those categories. It was simply that a person had not disclosed the fact that they were about to receive a very substantial superannuation payout on retirement at the time of negotiating, which led to a consent order. It was a simple case of non-disclosure, but it was not a case of fraud. You could not have proved fraud, and you could not, in the circumstances, have proved suppression of evidence, because the matter never went to that point.

To have the capacity to say that, whatever the circumstances, the fact that this was not known and was not taken into account by the parties amounted to a miscarriage of justice seemed to me to be pretty important. I am concerned that the present legislation does not allow for that.

There are other sorts of circumstances that really need to be capable of being taken into account. One of them is: what happens when the parties reconcile or partially reconcile? That is not as fanciful as it may seem. After all, there is a public interest in encouraging people to do that anyway. There is a judgment of mine—which has been tabled—in the matter of Sommerville, which I think is a very clear example of the sort of circumstances. I will not go into all the details, but the simple facts of that case were that a couple had been together for quite a number of years, they fell into dispute, and, after being carefully advised on both sides, they had consent orders made that distributed the property. They in fact did distribute the property in accordance with the orders, and one month later they went back and started living together. They then proceeded as if the orders had never been made and continued with their lives.

Under section 79, I was able to imply an agreement to set aside the orders. We were able to do that under section 79A(1)(a). The conclusion was—and there are a couple of full court decisions to this effect—that you can have an implied consent in those terms. That section was introduced to overcome the rigidities of section 79A in its original form, because there were cases that did not cover the sorts of circumstances that I am dealing with. I think these are really the factors that I am trying to say ought to be available in relation to these agreements.

Justice Kay—Section 90J, as it is presently drafted, says that the agreement may be terminated only by another agreement, not by the implied consent of the parties. So you would be stuck with the agreement.

Chief Justice Nicholson—And that is not the way people behave. That is the problem. The sections seem to assume that people will always consult their solicitors, and when they have a reconciliation they will go and draw up further agreements. That just does not happen with normal people in most cases. It might with businessmen but, taking the circumstances of that case, it was a gradual reconciliation. I should imagine if someone had started producing agreements it would have had a very detrimental effect on that process. I am just concerned about that.

Senator McKIERNAN—Couldn't you use section 90K(1)(c)?

Chief Justice Nicholson—No, because that is only where 'it is impracticable for the agreement or a part of the agreement to be carried out'. Usually you can still carry it out—it is just that it may be very unjust to do so.

CHAIR—The explanatory memorandum, at point 134, refers to circumstances for termination or setting aside, and it says that it is in:

. . . essentially similar terms to existing subsection 87(8) that provides for the revocation of an approval of a maintenance agreement made under section 87.

So it would be your contention that that is an inappropriate description and that it should be extended to include the sorts of things that your submission canvasses?

Chief Justice Nicholson—Yes. There are different types of agreements, of course. If it is an agreement made before marriage, it is looking down the track a long way, and there may well be difficulties associated with that. If it is made after a marriage has terminated, or in the course of the termination of a marriage, there may be considerable imbalances of power. It is not the sort of agreement that is made by two people at arms length entering into a commercial contract, and yet this seems to lock you into a much tighter arrangement than most commercial contracts. That, I think, is troublesome.

Justice Kay—And the law is replete with cases of unconscionable conduct. Many spouses walk away from marriage, saying, 'You can have everything.' That is how they feel the day they walk away. But six months or a year later, when they have had time for their passions to cool down and the guilt has gone away and the reality sets in, there may be a different picture as to what is justice in the circumstances.

So you have an agreement signed before the marriage between two young people who have no idea what life is going to carry for them, and in hindsight the agreement can be grossly unfair. You have an agreement signed during the course of the marriage to keep the marriage stable. That may have a different connotation but, then again, it may be full of guilt problems. It may again be full of the problems of who knows what is going to happen in years to come. Then you have an agreement signed immediately after the breakdown of the marriage or some time well after the breakdown of the marriage.

You have a tremendous range of situations. The one I have just described is someone walking out and saying, 'Where do I sign?' And the other one is after they had legal advice and thought about it and there has been a year or two of litigation. That is a different agreement, which ought to have different connotations. Yet this is catch-all stuff here, which does not allow for escape clauses to deal with the justice of any individual situations.

Senator COONEY—From a public policy point of view—and this is not of direct concern to you, I suppose—if you make an agreement which impoverishes someone and that person then has to rely on the social security system to maintain some sort of living, are you going to say, 'There's the agreement. It's binding, and that is that'? You would think the social security people might—

Justice Kay—That might be covered by the agreement; 90F covers that.

Senator COONEY—What does that say?

Justice Kay—It says:

(1) No provision of a financial agreement excludes or limits the power of a court having jurisdiction under this Act to make an order in relation to the maintenance of a party . . . if the court is satisfied that, when the agreement was made, the circumstances . . . were such that, taking into account . . . the party would have been unable to support himself or herself without an income tested pension, allowance or benefit.

With 90F(1) you look at the circumstances of the party at the time 'when the agreement was made'. Perhaps that is not broad enough. I think the draftsman is conscious of what you are concerned about—protection of the public purse.

Senator COONEY—That is interesting. So the parliament that passes this is happy to put certain restrictions on the agreements, and it is just a matter of how far they go.

Justice Kay—Yes. I would have thought it necessary to broaden 90F so that not only when the agreement was made but at any time the effect of the agreement is to put someone on the public purse then to that extent the agreement would be unenforceable as a defence for a maintenance claim or a property settlement claim.

Chief Justice Nicholson—There are perhaps just two other points I would like to make about 90K. One is that it is not uncommon in family litigation for someone to say, 'If you don't make this agreement, I am going to fight you as hard as I can over those kids, and you are going to have a real struggle to get those kids.' Is that duress? It might be unconscionable conduct, but is it duress and would it, in any event, be caught by this provision? I am not sure it would. If you had a miscarriage of justice provision it might, and that is a general miscarriage of justice provision—because those sorts of negotiating tactics are not unknown, as you would appreciate, in this jurisdiction.

Senator COONEY—It is comparable in a way. A whole lot of contractual stuff comes in here, and also some comes in with the Industrial Relations Act or the Workplace Relations Act. It raises an interesting question of comparison. To use a phrase that has become famous, is 'all fair in love and war'? This is particularly love and war. In the negotiating stages, why shouldn't it? It puts all sorts of problems on the court, doesn't it?

Chief Justice Nicholson—It does. The second point I wanted to make on this, which is touched on in our submission, is: why should the circumstances relating to a child have to be 'exceptional'? It would seem to me to be sufficient to say, 'in the circumstances that have arisen since the making of the agreement relating to the care, welfare and development of the child of the marriage, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside.' It is difficult to see why it should be exceptional. What does 'exceptional' mean?

Justice Kay—That is just a straight pinch, however, of 79A(1)(b). It is existing. But 79A is a court order that has been made after the facts have been fully examined or the parties have negotiated. This is an agreement made well before the event.

Senator McKIERNAN—There is a view in the community that financial agreements would be more applicable to persons entering into a second or subsequent relationship rather than the starry-eyed individual who wandered the banks of the Yarra.

CHAIR—It is too crowded on the Yarra would be my observation.

Senator McKIERNAN—Would that be a view the court would agree with and, if so, do you perceive so many difficulties with that scenario as there would be for people entering untested into a marital relationship when they had never experienced it before?

Chief Justice Nicholson—Not as much the second time around, although it is amazing that people make the same mistakes twice in these situations—or three times. But, yes, I think that is a fair assessment but it is an assumption that does not necessarily follow.

Senator McKIERNAN—I accept that and I took the other concerns into account, but I think it is an important one. As I recall it that is where the demands were coming from that led to the recommendations in the 1992 report.

Chief Justice Nicholson—Yes. If I could conclude with it, that is one thing that I wanted to mention and, again, it is in the submission, and that is the alternative of legal or financial advice. It does not seem to me to be appropriate. I would have thought that it is highly desirable to have both but, certainly, the absence of legal advice, I think, could be disastrous in a situation like this.

CHAIR—Did you wish to make any comments in relation to schedule 3 or are you happy for your submission to stand?

Justice Kay—I just wanted to clarify the Hague position. I was fortunate enough to attend a fortnight ago in Canberra the meeting of the state central authorities convened by the Commonwealth central authority biennial meeting. Stephen Bourke, who conducted the meeting—and I understand his department is responsible for the generation of these particular sections—accepts, as I understand it, my point. The words 'to the child's country of habitual residence' are words that should not be there. They are not consistent with the convention.

By way of example, in Hobart, Tasmania two weeks ago there was a case involving a Canadian couple whose children were governed by orders of the Canadian court. One order said the mother could take the children to Israel for six months to do some study. The father was in Tasmania and he overheld the children on access and the mother wanted the children sent back to Israel. The issue is whether the children should be sent back to Canada or Israel. Under this order they have to go back to Canada even though the Canadian court said they could live in Israel. The convention specifically says the children should be returned but is silent on where they are to be returned to cover that very situation. So that is just technical stuff.

CHAIR—We will take those on board and will consider those in the process.

Justice Kay—There is the costs material and the rest is all self-explanatory.

Chief Justice Nicholson—I would have some personal concern about section 68L(2)(a) specifying the exceptional circumstances that warrant representation. It seemed to us that the court ought to be able to form its own view as to whether there ought to be representation. It has never been particularly generous in ordering representation in these matters anyway.

Senator COONEY—Is that the one where the High Court had made a decision?

Chief Justice Nicholson—The High Court, in fact, was strongly of the view that there ought to be child representation in Hague proceedings. It probably went further than we ever had.

Justice Kay—I think I am speaking for the Chief Justice—I may be wrong—in that it is the last words in 6 and 68L(2)(a) that trouble us.

CHAIR—I am sure he will tell you if you are not.

Justice Kay—It is the last words, 'must specify their circumstances'.

CHAIR—It has previously been the case that the court can make the order where there are exceptional circumstances, but it has progressed to requiring the court to specify those exceptional circumstances.

Justice Kay—No. It has previously been that the court could make an order in any circumstances but the High Court said it ought to be used more often than not and the government are now saying it ought to be exceptional. The Hague convention does not require separate representation. From a judicial point of view why we need to say what the exceptional circumstances are is a strange addition to the requirement.

CHAIR—We will pursue that.

Chief Justice Nicholson—It is a policy matter, of course, as to whether the High Court is right in that there ought to be more separate representation or whether the government is right in that there ought to be less.

CHAIR—One which we will not explore in these proceedings.

Chief Justice Nicholson—Indeed.

CHAIR—Thank you very much for appearing before the committee today. Your submission has been very helpful in addressing a number of technical aspects which we will pursue in the course of the proceedings. Thank you very much for your time. When we do come to the point of pursuing the question of simpler options, if that is what the committee is minded to do, we will come back to you and take up your very generous offer. Thank you very much.

[10.08 a.m.]

FEHLBERG, Dr Belinda Louise, Senior Lecturer, Faculty of Law, University of Melbourne

CHAIR—Welcome. I understand that, apart from speaking to and answering questions on your own submission, you have been authorised by the Australian Institute of Family Studies to answer questions on its participation with you in work on financial agreements. Is that correct?

Dr Fehlberg—Yes, that is correct. I want to emphasise that my own submission is separate and based on other data than the AIFS data, so they should be viewed that way.

CHAIR—Yes. You have lodged submission No. 5 with the committee. Are there any amendments or alterations you wish to make to that submission?

Dr Fehlberg—No.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite my colleagues to ask questions. I again note that you are authorised by the institute to answer questions on its submission.

Dr Fehlberg—What I plan to do this morning is just take you through the main overall points made in my submission, not to read it out. What I would say initially is that my submission is concerned only with financial agreements, particularly prenuptial agreements. I do not look at other aspects of the bill. My submission falls into two parts, firstly looking at the policy objectives and whether they are likely to be met by the proposed provisions and then looking at specific aspects of the legislative changes on financial agreements.

When I looked at the policy underlying the proposed changes, my understanding of that policy was that the government was seeking to give people greater control, greater choice, over how to divide their property to reduce conflict and also to reflect changed community attitudes and needs. When I looked at the overseas literature and also the Australian Institute of Family Studies data, I felt that some concerns arose as to whether or not those policy objectives were likely to be met as a result of these changes.

What I found when I looked at the overseas evidence, especially the US evidence where there is quite a body of literature on prenuptial agreements, was that some of the policy objectives seemed in doubt as to whether they were going to be met for Australia. In particular, the issues of greater control for people in reducing conflict did not seem to be supported by the US evidence that I looked at, particularly an article by Katz in 1998 suggesting that in the States people are now more inclined to argue about the construction of their agreements. So they do not argue about their property, they argue about the wording of their agreements. He even says, at 1263 of his article, that at the present time, due to the uncertainty of enforcement of agreements as written, some lawyers refuse to draft them for fear of malpractice actions. I wonder if there is a risk that we are just moving conflict from one realm to another. So there is that concern.

The other concern I have is about the control and choice argument. That is that the available evidence—again, mainly US evidence—suggests that control and choice is that of the economically more powerful party and that that is usually the male in these sorts of agreements. I should emphasise that the US evidence is small scale empirical evidence. To my knowledge, there has been no large scale empirical study of prenuptial agreements, but the evidence that does exist in the States suggests that prenuptial agreements are usually working to women's disadvantage due to their tendency to have an economically weaker

position within marriage compared with men due to their work lives being disrupted, child-raising responsibilities and so on. I refer to a small study by Barbara Atwood as evidence for that.

One thing that I want to draw to the committee's attention is the notion of independent legal or financial advice and its limits. This is an area that I have done research on in the UK in the context of spousal guarantees. My doctoral research was an empirical study of what is now called in Australia sexually transmitted debt—people within marriage giving third-party loan security for the business debts of their spouse or partner. In that context, too, independent advice is viewed as the great protection, potentially, for people signing contracts. I have looked at this issue of the effectiveness of independent advice in that context over some period in the UK.

What I found in the research that I did in the UK—which is the research I refer to in my submission—is that, in the context of intimate personal relationships, independent advice is very unlikely to have any impact on a person's decision on whether to enter one of these agreements, and it will not necessarily result in them entering an agreement which is in their best interest, which the explanatory memorandum seems to suggest will happen. This is trying to get underneath this notion that independent advice necessarily solves problems, and I do not think that it does.

With regard to the fourth policy objective, which is that we should change the Family Law Act to reflect current community attitudes, what I would say there is that I do not think there is any conclusive data on whether community attitudes are really changed and are in favour of these agreements. I mention in summary form in my submission the recent AIFS data as providing some indication of the use and attitudes toward prenuptial agreements by Australian divorced couples. This data in fact suggests that prenuptial agreements are rarely used. In this study there were 650 respondents and only 13 said they had a prenuptial agreement. There was a general perception, both amongst those who had agreements and those who did not, that these agreements were not useful in reaching fairer outcomes about property. The third finding that we had in this research was that, when people were asked about the circumstances in which these agreements should be altered, most suggested that the interests of children were a basis on which they would favour alterations.

The findings from this AIFS data are somewhat inconclusive. I do not think they tell us very much. They perhaps suggest some qualified support for pre-nuptial agreements, but they certainly indicate a general pessimism currently about their usefulness. That might be consistent with the current non-binding legal status of these agreements or it might indicate that people have doubts for other reasons—that is, they do not think their bargaining power within their relationship could ever be up to negotiating a fair agreement. There might be other reasons for their uncertainty.

I also raised concerns in my submission about whether these sorts of agreements are consistent with features that we tend to associate with marriage relationships—as one of a financial community—compared with de facto relationships. That has been established by the Australian Institute of Family Studies research, which shows that de facto couples tend to keep their finances more separate than married couples. Are we undermining that sense of community for the majority of married people by introducing this legislation? Trust and confidence were certainly acknowledged by the High Court recently in the National Australian Bank Ltd v. Garcia in relation to married couples, and the complex emotional and long-term commitment which means it is hard to look ahead and know what the future holds.

In relation to specific aspects of the proposed changes, I made a number of comments in my submission about this. I suppose the main one is that it is too easy to sign one of these agreements and too hard to get out of one once you have signed it. It is fairly clear from the bill that entry into agreements is going to be relatively straightforward and inexpensive, and I suspect that the bill has been drafted with that in mind—you do not want people to have too many costs with lawyers and advisers.

However, I think there is a need for greater safeguards at an entry stage. I have suggested that, ideally, court approval should be required in order to enter an agreement—so there is some sort of threshold before people can enter. I do not know that we can rely on independent financial advisers and legal advisers to provide the same level of scrutiny of these agreements as a court.

The second set of arguments that I put forward are that the grounds to avoid agreements are too narrow at present. I contrast the grounds in the bill with the current UK proposals, which are much broader. Recent advice I have had from John Eekelaar, a family law academic in the UK, is that the UK proposals have not gone anywhere—they are still at this stage, as I said in my submission—but they are certainly offering a much broader range of ways around these agreements.

I think the narrow grounds that are currently in the bill result from the fact that basically what the drafters seem to have done is lifted the section 87 grounds and the 79A grounds and put them into the bill. So they have lifted the current grounds for avoiding property orders and section 87 agreements and just put them into the bill. I do not know that that works because these are grounds for avoiding all financial agreements. I would agree with what the Chief Justice said: there is a continuum of agreements covered by this bill—agreements made before marriage, during marriage and after divorce—and I do not know that a set of grounds that at current apply basically to court orders and agreements made on separation are appropriate for agreements which, under the bill, could be made in a much wider range of circumstances. I think they are perhaps a little too strict.

Also, it concerns me that these narrow grounds are not appropriate, given that you can enter these financial agreements under the bill without any legal advice, without any court involvement, as is currently required, and, as I said, in very different circumstances at the start of your relationship compared to the end. So I have suggested in my submission amendments along the lines of the proposed UK reforms.

I agree and I acknowledge that, if you introduce a broad range of grounds for avoiding pre-nuptial agreements, that does undermine the choice and control arguments. There is a balance to be struck. However, I must say that I am more concerned about the substantial injustice that might occur if the grounds are not a little broader than they are at present.

My particular concern, especially given the Australian Institute of Family Studies research, is that proposed section 90K(e), which requires exceptional circumstances relating to a child, is too narrow. I would agree with what the Chief Justice said on that point. I would add that I think the position established, especially by the Australian Institute of Family Studies data on the economic consequences of divorce for women with children in their project 'Settling up and settling down' several years ago, was that hardship is typical for female headed sole families in relationship breakdown rather than an exception. The legislation is not quite reflecting that situation.

CHAIR—I am conscious that we are going to run out of time to ask you questions, and I am sure that my colleagues have questions.

Dr Fehlberg—I am quite happy to stop. My final point was in relation to non-disclosure and just that it should be a clear ground for avoiding financial agreements.

CHAIR—Thank you. As I understand, the report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975 and the report of the ALRC have argued from the opposite position to the one you take. You note that the starting point of inequality concerns you, and they argue from the opposite direction. Do you have a comment to make on that?

Dr Fehlberg—I am aware that any report is based on submissions made by particular bodies.

CHAIR—Which you call partisan, I think. What do you mean by that?

Dr Fehlberg—Submissions tend to reflect particular interests. From what those particular bodies said, the submissions made were strongly in favour of these sorts of agreements and as a consequence the reports reflect that. I refer in my submission to the problem of those who claim strong public support for prenuptial agreements. They claim they are strongly supported in submissions and consultations, but my concern is that those submissions and consultations do not reflect general public opinion—nor might they mine—but we have no broad understanding of what Australians want at the moment. We just have particular interest groups which are saying that they think they know.

CHAIR—It puts us in an invidious position.

Senator McKIERNAN—I am very reluctant to defend a report but, before you make statements like that, you should analyse the submissions that were presented to the committee and see whether the submissions were all one-sided. You should also examine the evidence that was collected during the public hearings of the inquiry and see how the scenarios were tested at the public hearings, rather than jumping to conclusions. That is enough in defence of a very old report.

Dr Fehlberg—I have said that the evidence is likely to be partisan. I have been rather careful.

Senator McKIERNAN—I thought you were stronger than that. Be that as it may, in part you are relying on evidence to the Australian Institute of Family Studies and, from what I can glean from reading your submission and the articles supplied from *Family matters*, you are relying on 13 persons who had prenuptial agreements out of a total of 650. Is there any other data within the Australian Institute of Family Studies on the matter of prenuptial agreements, or is this article reliant upon something consequential that was not the main focus of that survey in 1997?

Dr Fehlberg—The data is on use and attitudes toward prenuptial agreements, so all of the 650 people were asked about their use and their attitude toward prenuptial agreements. For example, the question was, 'Do you think a prenuptial agreement helped or would have helped you to reach a fair and more equitable settlement?' The 13 people who had prenuptial agreements were answering on the basis of whether it did help; those who did not have prenuptial agreements—the remaining 630-odd—were answering on the basis of whether it would have helped. I agree with you: the number of people who had prenuptial agreements was certainly very small, but we were also looking at the attitudes of those who had not had them about whether they would have helped.

Senator MASON—Only two per cent had had that experience.

Dr Fehlberg—Exactly—but there is no other data.

Senator McKIERNAN—Were the divorces in first relationships, second relationships?

Dr Fehlberg—Both.

Senator McKIERNAN—Do you have a breakdown of that?

Dr Fehlberg—I do not, but I could certainly provide that to you. When we tried to find out whether amongst our very small number of 13 there were any particular features that defined them as a group, we were not able to establish anything. We did look at that question.

Senator McKIERNAN—I may be wrong in this perception, but you are also heavily reliant on the experiences in the United States, which is a very litigious society and is perhaps not a useful one for Australia to measure our performances against. You mention that there is an ability in New Zealand to enter into binding prenuptial agreements; yet in your submission there is very little comparison between what is proposed for Australia and what is happening in New Zealand, which would be a more equal society for comparison. Can you tell us the reason for that?

Dr Fehlberg—I have certainly done a literature search to try to find some information about what is happening in New Zealand, but I have not been able to locate anything. The only evidence that I know of is Margaret Harrison's piece in *Family matters*—in the same edition as my Bruce Smyth piece—in which she refers to anecdotal evidence from New Zealand to the effect that these agreements are not being used very much. Once again, that is anecdotal. I am not aware of any definitive statements that have been made.

Senator MASON—This is perhaps a broad question of principle: what is wrong if I, before entering into a contract of marriage, want to protect my financial position? You talk about inequality of bargaining power, but what is wrong with me wanting to protect my financial interests before entering into an agreement, perhaps subject to possible court approval, as a matter of principle?

Dr Fehlberg—There is nothing in isolation wrong with you wanting to protect you financial interests. I look at you and your betrothed as a pair, and look at that position as well. The starting point for you wanting to protect your financial interest is that you have an advantage, therefore potentially you have a power with which to make demands. The other party is at a starting point of vulnerability. That concerns me. They might find it very difficult at the start of the relationship and in the context of a marriage about to happen to question why that is necessary and to talk about the whole thing.

Senator MASON—But perhaps people should. This is not very romantic, Senator Cooney, but perhaps people should. Couldn't you even argue on public policy grounds that if you are not able to protect your financial interests you might be less likely to marry?

Dr Fehlberg—That is possibly correct, but then maybe the more separate regime of de facto arrangements is more suited. I cannot really go into that; that is uncharted territory.

Senator McKIERNAN—It does indeed happen in de facto relationships on a more frequent basis.

Dr Fehlberg—Yes.

Senator McKIERNAN—I think it is a reinforcement of the point Senator Mason made.

Dr Fehlberg—It is allowed under the legislation in most states. What I was saying by referring to the AIFS life transitions data on the different arrangements between de facto and married couples was that, according to that research, it is more consistent with financial arrangements between de factos that finances are kept separate. I take your point that people

should be able to make financial arrangements, but I worry about the consequences of that further down the track for children in particular and their parents.

Senator MASON—Philosophically, it worries me when we want to take away the right of people to take responsibility for themselves. I know it is a philosophical point, but it is a fairly fundamental one.

Dr Fehlberg—I acknowledge that point. It can be patronising to people to remove their agency from them. I suppose there is a balance between offering adequate protections and allowing them that freedom. That is why my submission is in two parts: in the first part, there is concern about the notion of pre-nuptial agreements; and in the second part, it says that, if they do go ahead—and I understand the reasons in favour of them—the protections need to be there.

Senator MASON—You mentioned court approval for agreements. Firstly, is it practical? Secondly, isn't that, once again, paternalistic?

Dr Fehlberg—It is certainly the current situation for both section 87 agreements and consent orders in the Family Court. So far, the only way people have been able to enter binding financial agreements has basically been to go through the court, so this is an exceptional position that is being proposed.

Senator MASON—But would it be practical for all newly-weds to have court approval for their agreements?

Dr Fehlberg—Practical in what sense?

CHAIR—What does the court say—'You can't get married if you don't like this agreement'?

Dr Fehlberg—I could just express an opinion on that. It would be that your agreement will not be binding until a court approves it. You can certainly get married but, if getting married is contingent on a binding agreement, that would be the practical impact of what you are suggesting.

Senator GREIG—Can I explore the issue of the disadvantage of women economically and socially within relationships. I am interested in your argument that pre-nuptial agreements would not, in most cases, be to their advantage. I am curious because I had always worked on the assumption that, in terms of property and assets, coming to an agreement with their partner and formally signing a pre-nuptial would be to their advantage in the scenario of a breakdown within the relationship, whether they are going into a relationship or have been in one for some months or years. Is your argument against pre-nuptials on the basis of the imbalance of power at the beginning of the relationship or during the relationship?

Dr Fehlberg—I think my submission suggests both: that there is likely to be an imbalance of power as a basis for wanting the agreement in the first place and that, according to the available evidence, the imbalance, especially economic, is likely to be increased throughout the marriage—that is, if the couple have children and the wife takes the still fairly accepted path of being the main caregiver for the child.

Senator GREIG—Do you think that could be resolved if, prior to going into a pre-nuptial agreement, there were a mandatory counselling period—either legally or financially—so that it is clear to the authorities that both partners understand exactly what they are going into?

Dr Fehlberg—The research that I did in the United Kingdom on spousal guarantees, although in a different context, suggested that understanding what you are signing does not necessarily result in you entering an agreement that is fairer and that there are all sorts of

reasons—more subtle factors to do with the relationship and preserving it—why people might sign these things. So I do not necessarily think a period of counselling would help. I think having a full understanding is of some assistance and having counselling would be of some assistance, but I do not know that it would necessarily resolve the problems faced by many people.

Senator GREIG—Do you feel then that the status quo is a better scenario, whereby people can try to resolve their issues with legal recourse after the fact?

Dr Fehlberg—The current position has in its favour that, at least on the breakdown of the relationship, people know where they are at. They have not tried to work out many years ahead what should be happening; so, at the time their relationship breaks down, all has been revealed, in a sense. They might be vulnerable in other ways, but they are in quite a good position to bargain. They know that they have got children and they know that that has had an impact on their respective incomes. Once again, I say that there is no large scale research to establish this, but the work that I have done would suggest to me that they are in a better position to be realistic about what they are bargaining for, than before marriage.

Senator COONEY—You have been asked about evidence. How much evidence is available in this area—not only the evidence that you have got, but generally? Or do you get the impression that most people come down on evidence that is not hard and fast but may be impressionistic?

Dr Fehlberg—The most evidence is available in the United States, where there have been a couple of small scale studies on who the users are of these agreements and who is likely to complain about them. One study was done in the 1960s, which is a very long time ago now, on the likely users of prenuptial agreements.

Senator COONEY—I can remember the 1960s.

Dr Fehlberg—It's not long ago! The Barbara Atwood study that I referred to was a study involving 39 cases, and it did suggest quite strongly that women are particularly likely to object to these agreements; but it has to be acknowledged that it is a small scale study.

Senator COONEY—And that is the answer?

Dr Fehlberg—The evidence that we have so far points in that direction, but we would need some more before we—

Senator COONEY—So, no matter which way you go, there is not a great deal of evidence to support a particular line of attack?

Dr Fehlberg—It is worth emphasising that the evidence that exists is consistent in suggesting that these agreements are unlikely to further the interests of women.

Senator COONEY—I want to explore another thing with you, seeing that you specialise in family law but that you would incidentally know a bit about contract law. Have you got any comment to make about the dexterity or the sweetness with which contract law is being imported into this area? In other words, the Trade Practices Act deals heavily with contract law. Do you think you can simply bring those concepts across into family law? Or are there additions—such as commitment, personal relationships and emotions—that come into it that complicate that transfer?

Dr Fehlberg—Yes. In my submission I spend some time talking about the difficulty in applying contractual norms to the marriage relationship. I do see some problems with that. I am aware that, with the way the bill is structured, it is in a modified form, but I still see difficulties: spouses do not contract at arms length in the same way as contracting parties

normally do. Normally, contracting parties do not envisage a relationship of the duration of what it is hoped in marriage will be a lifelong relationship where so much will change. So I do see difficulties with this.

Senator COONEY—Have you discussed this with people who, say, lecture in contract law at the university?

Dr Fehlberg—No. I am aware, though, that there is a second year essay topic this year on prenuptial agreements in the contract course; so I could get back to you on what the students have to say. Obviously the contract law lecturers are curious about it, or it would not be set as an essay topic.

Senator PAYNE—Dr Fehlberg, thank you very much for appearing before the committee this morning and for your submissions, which have been of assistance to us in our deliberations; we appreciate your time.

[10.43 a.m.]

STRICKLAND, Mr Steven Andrew, Chairman, Family Law Section, Law Council of Australia

WATTS, Mr Garry Allan, Deputy Chairman, Family Law Section, Law Council of Australia

CHAIR—Welcome. The Family Law Section of the Law Council of Australia has lodged submission No. 1 with the committee. Are there any amendments or alterations you wish to make to that submission at this stage?

Mr Strickland—There are a couple of minor amendments. If I can take you to the summary of recommendations commencing on page 14—I am not sure whether that is the same numbering that you have now.

CHAIR—We in fact received a summary of issues on 1 November, and I am not sure that we have received the complete document.

Mr Strickland—That was sent either on Thursday or Friday to Parliament House.

CHAIR—That is fine.

Mr Strickland—I do not have a clean copy, I am sorry.

Mr Watts—I will give you the summary; that is clean.

CHAIR—We have the summary.

Mr Strickland—I am sorry about this. I know it was sent to the Canberra office on either Thursday or Friday last week.

CHAIR—As long as they follow a similar vein, we will not have any problems in terms of questions. But you do have some amendments you wish to make. Are they only to the substantive submission?

Mr Strickland—Yes. Looking quickly at the summary, which you have before you, that is not affected.

CHAIR—I invite you, Mr Strickland and Mr Watts, to make a short opening statement. At the conclusion of that, we will pursue some questions with you.

Mr Strickland—I will start with a short opening statement. The way we would like to handle it is that Mr Watts will be fielding the majority, if not all, of the questions and I will jump in where needed.

CHAIR—The Adam Gilchrist of the Law Council!

Mr Strickland—Is he?

CHAIR—I don't know; you tell me.

Mr Strickland—No, the Shane Warne of the Law Council.

CHAIR—We will watch for the flipper then!

Mr Strickland—Our substantive submission, as opposed to the summary of issues, is presented in six parts. We deal with enforcement of parenting orders, binding financial agreements, arbitration, the Hague Convention and what we call ancillary matters. There is a summary at the end of the recommendations and issues, which you will see when our full submission is finally tracked down. In relation to the enforcement of parenting orders, we have identified five areas where we say consideration should be given to this bill. They are

flexibility, resource cost implications, explanation of parenting orders, parenting programs and a catch-all general issues of concern.

The major topic is that of flexibility. The section is concerned with the proposed three-tiered scheme, which is seen as discouraging parties from initiating enforcement proceedings when the only sanction that may be available, after an established breach of the order, is to direct the offending party to attend a relationships program or a post-separation parenting program. Our submission is that the court should have a discretion to apply the various tiers of the scheme only where they are appropriate in each individual case. As it is now, the moment the scheme is set up a first breach will see you off to a parenting program and the next breach will see penalties imposed.

To repeat: we are looking for the court to have some discretion at those levels so that, at the second level, for example, instead of the majority of matters going off to a post-separation parenting program, the court would have a broader discretion than the bill provides to impose penalties at that stage. Senators would know that there is a provision that allows for the court to impose penalties in exceptional circumstances. We are looking at that phrase and saying that that is too limited.

The concern we have goes back to what I said earlier about what we see as the discouragement as opposed to the encouragement to parties to initiate enforcement proceedings. Let us take the situation of a wife faced with a breach of a parenting order. She may be on social security or have limited funds and she has to convince a legal aid authority to provide her with funds to take those enforcement proceedings. Our concern is that legal aid might very well not be in a position to provide aid at that first step because of the prospect that the only thing that can happen is that the offending party is sent off to a post-separation parenting program.

We suspect that what legal aid might have to do with its limited funds is direct them to the third stage, which is where the offending party has gone off to a post-separation parenting program but then offended again. There is then the need to take the matter back to court. You then have what we see is the daunting prospect of someone—I am not particularly saying that it will always be a wife, but the statistics are such that they are the parties who bring enforcement proceedings—being faced with the prospect of having to come back to court twice in an enforcement proceeding, when all they want is enforcement of their particular parenting order.

Do not forget that we have reached the stage in family law proceedings where an order has been made. It might have been after a long trial or it might have been by consent, but there would have been counselling processes applied to that couple right up until that point. Counselling in the Family Court prides itself on early intervention, so it is not as though, when you have got your order for a parenting order and you come to a breach of it, there has been no counselling or intervention from the social science field or the behavioural science field. That is our major submission in relation to the flexibility of the scheme. We support the scheme and, indeed, we did so in response to the Family Law Council's paper on which this is based, but we are asking for a bit more flexibility in the court particularly to apply penalties earlier in the process if warranted.

I have touched on the second aspect of resource and cost implications. The obvious problem we see is with the limited legal aid funding situation and, of course, even the private litigant having the prospect of taking the matter back to court twice to maybe achieve a result which would be ultimately successful. Everyone would hope that going off to a post-separation

parenting program would do the trick, but frankly we have some scepticism about that being the panacea that it would need to be to prevent the second stage—that is, the next court proceeding—taking place.

In terms of costs and resource issues, we also raise queries about who pays the cost of the programs. Is it meant to be on a commercial basis where parties pay to attend? If not, where is the money going to come from to set up the post-separation programs? It even goes down to—not necessarily a minor point, but on a relative basis—who pays the costs of the program provider notifying the court regarding a person's suitability for or participation in a parenting program. Who would meet the expense of the program provider coming to court to give evidence about the person's participation in a program? Those questions are not addressed in the bill.

It also has to appear to the court that the person has not participated in a post-separation program. How does that happen? How do you get it back to court? Who pays the cost of that? They are matters which we raise in the cost and resource section of our substantive submission.

Moving to the explanation of parenting orders: there is a requirement at stage 1 that parenting orders be explained, either by the court or by a legal practitioner. The legal practitioner can only be involved in that process if indeed there is one. Currently, we have approaching a 40 per cent rate of litigants-in-person in the Family Court so, invariably, you are going to have a number of litigants-in-person where the court will have to take the responsibility to explain the parenting order.

This section raises the question of what the consequence is if the court explains it inadequately. Does that mean that the order cannot subsequently be enforced? The bill is silent about that. Indeed, it applies equally to what happens if the legal practitioner does not satisfy his or her obligation in that regard—does not explain it adequately or correctly. Does that mean the order cannot subsequently be enforced? Will it be a defence, call it that, by the alleged offender that it was not explained properly either by the court or the legal practitioner? Does that then mean that you have to have the legal practitioner give evidence as to what they said? Obviously, you will have a court transcript of how the court explained it. Is that transcript going to be brought to the enforcement proceedings and assessed and analysed as to how properly or otherwise the explanation was given? We see problems with that exercise.

The other aspect of it is that you will have to have both parties attend for a consent order to be made because there will need to be explanations given of the order. We see that as adding extra costs. There are facilities and availability of administrative processes where both parties do not have to attend when a consent order is made. We see this as requiring, more often than not, both parties to attend.

We raised issues such as how can the explanation be given? Does it have to be given verbally? Can it be given in writing? Might it not be better to create a pro forma type arrangement which can be used by the court and the legal practitioner? That might be a way, and we suggest that as a positive thought to make this bill work in that regard. Without those sorts of things, we see difficulties, some of which I have just enumerated.

The next topic was that of parenting programs, and we see various technical issues arising out of the way the bill is framed when you look at section 70NG and subsequent. For example, the phrase 'reasonable distance' is used. It is not defined in the bill. Will that need to be an ad hoc circumstance where, on each occasion, you will have to determine whether in that fact scenario there is a program within a reasonable distance or not?

There are no criteria in the bill for the program provider to assess the suitability of a person to attend or take part in the program. There is no provision for developing the criteria. We are going to have, presumably, program providers around the country, not all of the same ilk, yet there are no standard criteria in the bill or postulated as being by way of rule or regulation to provide criteria to assess the suitability of a person. What if there is an argument about that? What if the person going to the program says, 'I am suitable'? Does he or she have any say about it? Is it the program provider who has the definitive say as to whether that person is or is not suitable for a program?

The bill does not indicate what the consequence will be if the program provider does not notify the court as to a person's suitability or participation in a program. There is no penalty for not participating in a post-separation program. In other words, what happens if you get to that stage and the court makes an order that you attend but you do not? There is no consequence, no penalty to put it at its highest.

In section 70NI, the court can make further orders in relation to participation in a program. But how does that get over the problem? Do you simply repeat the first order, or do you say, 'Go to another program?' It seems to us that that does not provide an answer to what happens if you do not participate in the post-separation program. Importantly, when you get to the punitive powers in section 70NJ, they can be invoked only when a party has not participated and there has been a further proven contravention. So you cannot apply punitive powers if you do not participate; you can apply punitive powers only if you do not participate and there is a further proven contravention. We see that as a gap in the legislation.

'General issues of concern' was the next topic. What we raise here, for example, is that there are currently difficulties in establishing a contravention. There are difficulties of proof. There are technical difficulties which cause problems, particularly for litigants in person, of which in this field there are a number. We raise the suggestion in our substantive submission that the introduction or the development of this bill might be a good opportunity to look at better ways of parties being able to establish a contravention.

For example, do you need to have the same level of proof at stage 2 as with stage 3, stage 2 being you are sent off to a relationships program? Do you need to actually have the person prove the breach to the same level as at stage 3, where the result is a penalty and a quasi criminal penalty? Clearly, you need to have a strong method of proof at that stage but do you need that at the start? We suggest it is an opportunity to look at that and how you establish a contravention in the context of introducing this bill—because all the bill does is simply import the existing contravention requirements as to proof into the new bill. It does not address any problems and difficulties that have arisen on a day-to-day basis in the Family Court with establishing contravention. That is an example of what I have called 'general issues of concern'.

Can I move to binding financial agreements? There are four topics which we elaborate on in our submission. One is that parties are not required to obtain independent legal advice before entering into an agreement. Secondly, there is no provision for registration of agreements. Thirdly, we see the setting aside provisions as being inadequate and confusing. The fourth point is again a catch-all: there are various technical drafting issues which we raise in our submission.

In relation to the first topic of requirement to obtain independent legal advice, as senators would know, it is an either/or situation. You do not have to have independent legal advice to make the agreement binding. You can have either legal advice or financial advice. Yet, if

you think about it for a moment, what is happening here is the parties are contracting out of their rights under the Family Law Act. They are not contracting out of their rights to enter into financial arrangements with banks and other financial providers; they are contracting out of their rights under the Family Law Act. Yet, to be binding, neither party has to obtain independent legal advice as to those rights. Clearly, the binding financial agreement will play a determinative role in any future family law settlement. But, without legal advice, how do the parties know how that agreement will impact upon any future settlement?

We have no difficulty with the requirement that there be a financial adviser who provides financial advice. That is warranted. However, we suggest that, because of the fundamental nature of what is being done here—contracting out of rights under the Family Law Act—there should be a requirement for independent legal advice. We are not talking about competition policy. We are not talking about a situation where, for example, lawyers have to be in there and be involved. We are not talking about a situation where lawyers are competing with financial advisers—as has been stated in announcements about this bill. The intention is that financial advisers will give financial advice and lawyers will give legal advice. There will be no crossing of that line. It is not intended, and clearly stated not to be the case, that lawyers will give financial advice and financial advisers will give financial advice. But where does the young couple, in a prenuptial agreement, or the couple who are married, in an agreement being done during the course of their marriage, get the legal advice if all they do is go and see their financial adviser and the financial adviser certifies the agreement? We see that as a major issue in relation to this bill, particularly—I stress—as what you are doing is contracting out of your rights under the Family Law Act.

In our substantive submission, we have taken extracts from pages 6 and 7 of the explanatory memorandum where there is an analysis of the impact of the bill. What is said there is that, under the bill as it stands, people will be fully aware of the financial and legal effect of any agreement they think of entering into and not unknowingly enter an agreement that is not in their best interests. Yet there is no requirement for them to obtain advice as to the legal effect. They can enter into a binding financial agreement like obtaining financial advice only.

The explanatory memorandum goes on and says:

> Any potential costs to parties arising from this option—

that is, the option in the bill—

> are likely to be outweighed by the benefits associated with ensuring that parties are aware of the legal effects of the agreement proposed and that it is in their best interests and the savings associated with not proceeding to litigate a dispute about property.

But where is the requirement that they obtain that legal advice? They do not have to.

To provide for independent legal advice is the only way that you will 'ensure'—to take the wording in the explanatory memorandum—'that the parties are aware of the legal effects of the agreement'. So the section suggests that the bill be redrafted to provide that parties must seek independent legal advice before a financial agreement becomes binding. You have the example of the various de facto legislation around the country where the only way you can contract out of your rights is to have a certificate signed by a legal practitioner saying that you have been advised of your rights—creating a difference here between de facto couples and the legislation that binds their agreements and married couples or parties about to enter marriage.

The second major point we make about this section of the bill is that there is no provision in the bill for registration of financial agreements. All that has to happen is—and, to take one

example, I quote from section 90G, 'When financial agreements are binding', subparagraph (1)(e):

(e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

That is a requirement to make it binding. That is all that you have to do.

What if the original agreement is lost? What if the copy is lost and 20 years down the track the parties break up? What are they going to do? Also, if a copy is inadvertently not given to the other party, does that mean it is not binding? On the strict wording of this section of the bill, it does. The original agreement has to be given to one of the parties and a copy to the other.

What we are suggesting is that registration of an agreement provides formality to the process of entering into the agreement and, obviously, if agreements are held by that repository, that will overcome circumstances where, as I have said, perhaps many years down the track parties are unable to find their agreement, or their copy of the agreement, or there is a dispute about the genuineness of the agreement produced.

I haved another example. Say one party has lost their copy: how do you know that that is the agreement that was actually signed? The court, it seems to us, should be the one where those agreements are registered. It is a simple process. We are not talking about getting approval of the agreements, we are not talking about any proceedings in the court. All we are doing is saying, 'Lodge that agreement'—as simple as that—'with the court.' The court has the facilities to do it.

The court has the facilities to do it. Indeed, under the existing section 86 agreements, there is provision for them to be lodged with an affidavit. You do not even need an affidavit, it seems to us. It could be a simple administrative process. The court has told us—the family law section—that the court would have no difficulties, resource-wise, in catering for that requirement. It seems to us that it solves so many problems that might arise with that simple process that we suggest, with respect, that that should be given serious consideration. There seems to be no good reason why something like that should not be done.

Mr Watts—Can I just add that the other thing it will avoid is the horrendous spectre of somebody going through a property proceeding for two years, getting to their final hearing and on the morning of the hearing the other party going, 'Bingo! Here is the agreement that was signed 20 years ago and this court no longer has any jurisdiction to hear this matter.'

If the documents are lodged with the Family Court a search can be done right at the beginning of any proceedings to make sure there is not any financial agreement that would be relevant to ousting the jurisdiction of the court to hear the 79 application.

Mr Strickland—And why I suggest that the court is the appropriate repository for these agreements is that under section 90G(2) it is the court that is given the power to make orders for enforcement. I mean, you could suggest other places—another Commonwealth department or some such thing—but it is the court that has the power to enforce. It is logical, we suggest, that that should be where the agreement is lodged.

It does not involve any overseeing process and does not involve any approval. The court has nothing to do with the efficacy or the circumstances surrounding the signing of the agreement. It simply receives it and keeps it.

Setting aside provisions is the next topic. Our submission seems to be along the lines of other submissions I have read and heard but we suggest the setting aside provisions are too

narrow. What is being done is trying to take bits from here and there; that is, to pick up something from section 79A, which is the setting aside of the orders, to pick something up from section 87(8), which is this revoking approval for section 87 deeds, and what we have got is inconsistency. It seems to us that, if this bill was passed in its current form, there would be inconsistency between how you set aside consent orders, how you set aside financial agreements and how you set aside arbitrators' awards.

We see them as being all of a similar nature in the sense of the effect they have on the particular family. Why not have consistent provisions for setting aside and why should not those provisions be taken primarily from section 79A which provides the miscarriage of justice topic? That would cover and deal with problems of power imbalance between the parties and matters of that nature which I am sure have been put to this committee already.

Mr Watts—Particularly a non-disclosure; that is the other big area.

Mr Strickland—Yes, particularly non-disclosure. That is a big issue and has caused a number of amendments to the Family Law Act along the way to try and deal with it appropriately, both at legislative level and how the court approaches it, but it is a big issue in this day and age.

The other matter that we raise in our submission is that section 90K only allows for the setting aside of the agreement. It does not allow for variation of the agreement or for substitution of the agreement. Section 79A of the Family Law Act allows for setting aside, variation and the substitution of a new order for property settlement. Why should it only be that it is all or nothing with a binding financial agreement? Why should it be that, where perhaps just one area of the agreement is needing to be changed, you have to set aside the entire agreement?

Senator MASON—It is more flexible.

Mr Strickland—Yes. So our submission is that the setting aside provisions should mirror the existing provisions in the Family Law Act regarding setting aside property orders—section 79A. If necessary, if it is thought that you need to bring it all together with a general catch-all discretion to do with unconscionability, then you can just tack that on at the end—it does not impact upon and it is not inconsistent with anything that you might grab from section 79A.

CHAIR—Mr Strickland, I am conscious of the time, as I do want to provide my colleagues with a chance to ask questions.

Mr Strickland—I am happy to stop at that point.

CHAIR—Where have I interrupted you? How much more did you want to put?

Mr Strickland—I was not going to deal in any depth with what I am calling the technical drafting issues of the binding financial agreements part of the bill. The issue of arbitration has two things. We are opposed to the referral by an arbitrator of questions of law to the federal Magistrate's Court; we see that as needing to go to a single judge of the Family Court. We also take issue with the setting aside provisions of the arbitrators award, for the same reasons as I have said so far. We see the need for consistency between the orders, binding financial agreements and arbitrators awards and for there to be a need for using, as a basic model, section 79A.

Mr Watts—If I can quickly talk about the Hague convention issues: the section is very much opposed to limiting the ability of the court to order separate representation for children.

CHAIR—Similar to the manner in which the Chief Justice and Justice Kay raised?

Mr Watts—Yes, although I think Justice Kay was of the view that it was a good thing that what the High Court said in DeLowinski be overridden by the legislature. That is not the family law section's position. We think that it is inappropriate for the government to make the defences under the Hague convention harder. That takes us totally out of step with all the other convention countries. That is what is actually happening with this piece of legislation. It makes it harder also by importing into this new legislation the concept of parental responsibilities being the same as custodial responsibilities under the Hague convention.

The Legal Aid Commission have made a submission that you will probably read at some point which gives this example. Let us say a person, a father who has been found to have sexually abused his children and who has had all contact with his children suspended, is allowed the right to receive school reports and to send Christmas presents to the children once a year. Under the definition in this draft of the legislation, that would give him parenting responsibilities within the definition of the Family Law Act and would then mean that he could require those children to be brought back to Australia, even though he was incarcerated. That is an extreme example of the effect of these changes but it does highlight how this legislation makes the existing position under the Hague convention far more difficult.

CHAIR—Do you also have a view, Mr Watts, in relation to the concerns put by the Chief Justice and Justice Kay about section 111B(1)(b)—that is, that it refers to orders to return to the child's country of habitual residence as opposed to orders for the return of a child, as currently drafted in the convention?

Mr Watts—I heard what Justice Kay said about that. I have nothing to add to that. We agree with that.

CHAIR—Submissions presented both by the Family Law Section of the council and obviously by the Family Court are, in many aspects, technical in approach, and we will be wanting to pursue those technical aspects with the department when we finally have the department before us. In terms of questions, we will begin with Senator Greig.

Senator GREIG—Could you clarify a little further what you meant by your concerns with the non-disclosure?

Mr Watts—Let us just say that, at the end of a relationship, two people sit down across the kitchen table and the husband has a banker mate who he brings into the kitchen and the husband says, 'Darling, this is your financial adviser. I have prepared this document. He will tell you what it says, and I want you to sign it. You have done this terrible thing—committing adultery with this other man—and I just want you out of here.' The financial adviser explains the document, and the wife signs it and leaves. She thought when it was explained to her that it was relatively okay, although she had no independent legal advice and she did not know what her real rights were. What she did not know was that the husband had just had a lottery win of $100,000 or that he had just had a retrenchment payout of $200,000. He did not tell her that. That is not a fanciful case. In fact, it is the Suiker case, which the Chief Justice referred to.

So non-disclosure means that somebody knows something about the financial circumstances of the marriage that the other party does not know, yet an agreement is entered into without that disclosure being made. Under 79A, if consent orders were made, they would be able to be set aside because there has been a miscarriage of justice due to suppression of evidence, giving a false evidence or some other circumstance—and the other circumstance is the non-disclosure.

CHAIR—I want to seek some information from you on the registration of binding financial agreements. Are you able to advise the committee what the approach is internationally, particularly in relation to prenuptial agreements and things like that?

Mr Watts—I think it is a novel suggestion we are making. Registration is not required in New South Wales in de facto relationship agreements.

CHAIR—Is?

Mr Watts—Is not. There are provisions in other legislation. There is a provision, in fact, to register wills. Not that most people do it, but it is available to be done. Because these agreements can be entered into over such a long period of time, we think it is important for people to be able to put them in a place where both parties will then be able to find them if they need them.

CHAIR—I am interested in the logic and, I guess, the prudence which would be involved in that process. What about the bureaucratic administrative requirements that might be attached to that? Do you think they would be onerous?

Mr Watts—The court has said to us that, if this is introduced, their computer system will receive the agreement, give it a number and it will be lodged in an archive. I would think that, within a year or two, it would actually be digitally imaged and it would be on some—

CHAIR—As we all are eventually.

Mr Watts—It would be on some computer record, and you would not have to go into some musty building to find it one day.

CHAIR—Just to clarify, you are not suggesting a court approval, as was suggested by the previous witness, for example?

Mr Watts—No. We are not even suggesting the current section 86 arrangement, which requires an affidavit to be signed saying, 'This is a true copy of the agreement that we've entered into.' We are just saying, 'Lodge the agreement.' Of course, if lawyers are involved with having to certify these agreements—and we are really strongly suggesting that it would be a really good idea if people knew what their legal rights were before they gave them away—then the lawyers would send it to the court. If there is a requirement for lawyer certification and there is no administrative problem, the lawyers will just send it to the court.

CHAIR—I will just come back to section 65DA—explaining parenting orders. You have referred to some of the difficulties involving unrepresented persons and things like that. Were you here when the Chief Justice and Justice Kay were giving evidence on perhaps the provision of a pro forma document—a pamphlet, I think they referred to it as?

Mr Watts—No, we arrived just after that.

CHAIR—One of their suggestions was that that might be provided on a consistent basis to parties both, I suspect, personally and through their legal representatives if appropriate, and that would explain aspect of the orders. Is that the sort of thing you envisage?

Mr Watts—It depends whether you are going to, on an in globo basis, explain what happens if you breach orders generally or whether you are going to attempt to be a bit more specific in individual cases. It is unclear to us what the legislation really intends. Are you actually going to have a judge or a registrar say, 'What you've agreed to in these 10 orders is: (1). . . Now let me explain to you exactly what that means. And (2) . . . '? I am not sure that that is necessarily what the legislation was intending or whether you would satisfy the requirement just by giving a general pamphlet.

Senator McKIERNAN—Your recommendation 1.6.3 says:

The Section recommends that the current difficulties in establishing a contravention of a parenting order be resolved as part of the reform proposed in a three-tier scheme.

You said in your comments that you are supportive of what has been put forward but you are also critical of the fact that there are no sanctions or use of punitive measures in the earlier stages of it. I am not exactly sure where the council is going on this matter.

Mr Watts—There are three tiers: one, explain orders; two, send them off to parenting programs once the first breach is shown; and, three, the quasi criminal penalties. We are saying that if you are at stage 2, then there should be some simpler ways of proving your breach than exist at the moment. The procedures that exist at the moment, which are stage 3 procedures, are based on the concept that you are dealing with a quasi criminal matter, there is possible imprisonment, and you have to strictly apply procedures to prove a breach. That creates great difficulty. So that is our submission in relation to creating some simpler procedures at stage 2. That is not inconsistent with us saying that you should be able to jump from stage 1 to stage 3 without having to visit stage 2 if the court believes that is the appropriate thing to do in an individual case. That is our argument about flexibility. At the moment you have to go to stage 2 unless there are exceptional circumstances under the legislation.

Senator McKIERNAN—If the parliament were to accept your recommendation, you might be putting a barrier in the way of couples wanting to take advantage of the opportunities offered to them at stage 2, and leaving the court and the system open to further abuse and further criticism, mightn't you?

Mr Watts—No, I do not see that you are putting a further barrier in the way of couples taking advantage of stage 2. Couples will be given the advantage of stage 2 by the court if the court considers it necessary on our proposal. Both parties do not get sent to parenting programs, as I understand it; it is the offending party who gets sent to the parenting program. So it is the offending party who is given the indulgence. If the court believes that is appropriate, we believe that is fine. If the court, however, thinks in a particular case that it is not appropriate and that they should go immediately to stage 3, we think that flexibility should be there. At the moment the judge's hands are tied because he or she has to find, 'This is an exceptional case where I can go to stage 3.' He or she may believe the parenting program is an absolute waste of time in a particular case, but that it is not an exceptional enough case for him or her to ignore the legislation which says that this person has to be sent to a parenting program.

Senator COONEY—I will just ask your views on a few things. With section 65DA, you have to explain not the order, but the effect of the order.

Mr Watts—That is why I said that I have some doubts whether a pro forma type of advice is going to be good enough.

Senator COONEY—Thanks for that, because that is what I was getting at. You have to say that this means if you approach the child on Wednesday instead of Thursday the other partner may be able to do such and such. How long would it take you, do you think, to explain the effect of an order, particularly if you had to race off to another case? How do you do it? Do you take them back down to the office or send them to the chambers? As soon as the barrister has finished, do they come down to you?

Mr Watts—No, we do debriefing. Most of the time we debrief with a client for 15 or 20 minutes after orders are made. Of course, if they are consent orders, we have already done

that process in the context of taking instructions and discussing what the settlement proposal is. The parties in that process get the advice as to what the orders mean and what they say.

Senator COONEY—You would think that would be fairly fraught with opportunities for a person, particularly in this jurisdiction, to allege that he or she was told in a particular way. Isn't that your problem?

Mr Watts—As Steve said, if it is a litigant in person, the court has got to do it. There is going to have to be a transcript. Otherwise, you are quite right. If this person, man or woman, breaches the order, that person's first defence is, 'It was not properly explained to me.' Unless you have got a transcript of what the registrar said in chambers or it is in court, you are not going to be able to meet that challenge to the failing of the requirement under the legislation.

Senator COONEY—I suppose you would have to go back actually to the judgment of the judge to see whether the explanation was consistent with the judgment. If it were not consistent with the judgment, what prevails: the judgment or the explanation?

Mr Watts—I think what you need is an explanation that accurately says what the effect of the orders are, notwithstanding what the judge's reasonings might have been.

Mr Strickland—A lot of these will be consent orders. There will not be any judgment to have reference to. They will be orders that the parties have agreed upon which are then presented to the court for the making of those orders simpliciter.

Senator COONEY—In the agreements, the prenuptial agreements or the agreements about the division of property, how long do you think it would take to explain the ramifications of those so as to be fair, if you were a lawyer? It is not the sort of thing you can do in five minutes, I should imagine.

Mr Watts—No, it is not. Normally, if you are a lawyer, you are participating in the drawing up of the terms of the agreement and you are discussing with the client what those terms are. So, again, part of the explanation process is, of course, involved in taking the instructions and negotiating what those conditions are. If you were just presented with an agreement that some other lawyer had drawn and you needed to explain it to the other side, I would think that it could take you half an hour to explain the agreement, depending on how complex it was. Certainly, you would need 10 to 15 minutes to acquaint the person as to what his or her legal rights would be under the Family Law Act and what he or she is, in fact, giving away or giving up.

Senator COONEY—Let me ask your comments on 90H on page 35. This is where it says that a financial agreement that is binding on the parties persists. Has the section given any thought to what happens if there are wills left or even mutual wills left?

Mr Watts—The current situation is that if consent orders are made for property, then those orders bind the estate of the deceased spouse. 90H is simply putting the effect of financial agreements in the same basket as the effect of consent orders.

Senator COONEY—Even though that agreement may have been made when there were no children?

Mr Watts—Yes. I appreciate the logical difficulty of that because most consent orders are made at the end of the marriage.

Senator COONEY—Yes. I just noted that 90L says that no duty or charge under any law of a state or territory—

Mr Watts—No state stamp duties commissioner ever takes any notice of section 90 or other sections of the Family Law Act. So I do not know that you need to worry too much about that. If it is not provided in state legislation, they do not think it exists. In Gazzo's High Court case many years ago, it was decided that the then section 90 was constitutionally invalid. It was then re-enacted and has never been tested since. So we do not really know whether or not this section is constitutionally valid or not.

Senator MASON—Your submission says that 'the section supports making financial agreements binding', subject to quite a few conditions that you have outlined in your evidence. I think it is fair to say that Dr Fehlberg was not keen on the idea of making those financial agreements binding, nor was the Chief Justice, nor Justice Kay. Why do you think it is appropriate that that now be done?

Mr Watts—We do not agree with their position. We think that if people are properly informed then they should be able to make the choice to order their own affairs. Since it was proposed, we have always been in favour of financial agreements as long as they were similar to the type of scheme that exists for de facto couples in most states in Australia. In fact, when the Attorney-General first announced this proposal in February, he said that people would have to get financial and legal advice. The press release some months later then changed the word 'and' to 'or.' That came as an enormous shock to us. It was at that point that we withdrew our support for this piece of legislation in its current form. But we have always supported a similar scheme for married couples as has existed since 1984 for de facto couples.

Senator MASON—So arguments of inequality of bargaining power and so forth do not persuade you?

Mr Watts—We also, of course, want the variation provisions changed as well so there are proper safeguards put in to cater for those cases where there has been a travesty of justice notwithstanding the fact that both parties have got legal advice.

Senator MASON—So: you are well advised, plus there are safeguards—that is enough?

Mr Watts—Yes.

CHAIR—Before we conclude, may I ask a question of you both, as practitioners of longstanding in the area? A number of submissions received by the committee indicate that there is a strong view that there are gender implications in this legislation—that is to say that some of its provisions have been pursued by concerned, aggrieved parties in the Family Court processes, and that will result in legislation which impacts badly on women in terms of violence and a whole range of suggestions. I am wondering whether either of you have a view on those propositions.

Mr Watts—In relation to financial agreements, I think there is a real risk that the kitchen table agreement with the financial adviser who is a mate of the husband may become a feature. Let us think about it. You might, even as a family lawyer, employ on contract a financial adviser whose sole role is to go out and advise the wives of your clients—or the spouses of your clients if you are acting for a financially superior wife. So yes, there are those power imbalances there if there is no legal advice being given to anybody when they are entering into the agreement.

In relation to the three-tiered step or process in relation to enforcement, is that a sop to certain men's groups? Perhaps that was its genesis but we, as a section, think that it is a worthwhile strategy to attempt to improve what is undoubtedly an unsatisfactory system in relation to enforcing contact orders and parenting orders at the moment.

CHAIR—Mr Strickland, do you have a comment?

Mr Strickland—I have nothing to add.

Senator McKIERNAN—Could I ask about this Hague convention? We are lacking because we have not got your full submission here. You are of the view that further public consultation is required on this particular matter? Is there another body, other than this committee, that could engage in that consultation and get the views of the community, the professions and the various interests?

CHAIR—That is at 4.2 in your summary of recommendations.

Mr Watts—Could I just say that these amendments—

Senator McKIERNAN—It is not amending.

Mr Watts—This part of the legislation was not something that there was a lot of notice given about. It is something that really has been put in to the miscellaneous amendments without a far-reaching consultation, particularly with groups that you would think would have been consulted about this. There is an extensive submission on this that has been put in by National Legal Aid. I am not sure if you have seen that yet.

CHAIR—No, I do not think so. It would be on its way.

Mr Watts—It may be something you catch up with in Sydney. That submission articulates a concern about watering down the ability to appoint separate representatives for children in these proceedings, particularly in circumstances where one of the defences that is being raised is the objection of the child to going back to the overseas jurisdiction, and the provision in the amendment that makes it far harder for that defence to be actually successful. The amendment in the legislation makes the objection defence far more difficult to actually achieve or be successful in.

CHAIR—Just finally, there was one other question I wanted to ask, which relates to your view that review on a point of law of an arbitrator's award, rather than being referred to a magistrate of the federal magistracy, should be referred to a judge of the Family Court.

Mr Watts—Yes.

CHAIR—Not having the benefit of your full submission, why do you make that point?

Mr Watts—Because once private arbitration comes in, it is highly likely that the people who will be doing the private arbitrations will be people like the Hon. Justice Eric Baker who sat on the Full Court for 20 years of the Family Court. We are just suggesting that it is inappropriate to have an appeal from a decision of an arbitrator of his standing—and all arbitrators will have to be specialist accredited family law specialists and specialist arbitrators—to a federal magistrate, who is a very junior chapter 3 judge. We just do not think it is the correct direction in which the appeal should be sent. It is a point of law, don't forget. I am not saying that the new federal magistrates will not be able to determine points of law. But we just think that, given the status of the private arbitrators that were doing this work, it is more appropriate to have the appeal to the more superior court.

Senator COONEY—If you look at the sort of people who are arbitrators, not in this area but right across-the-board—say, in Sydney, which is your jurisdiction—are they mainly people who were judges?

Mr Watts—Yes. Do not forget this is a system that is going to work by the consent of both parties coming to the arbitrator, so the marketplace normally chooses an arbitrator who has some level of seniority in experience. I mean Sir Laurence Street down. Most of the arbitrators

are fairly senior practitioners, and we do not think it is appropriate that the appeal be to a federal magistrate. That is our view.

CHAIR—We note that view. On behalf of the committee, Mr Strickland and Mr Watts, I thank you both very much for your time this morning and for your submission. It is gratefully received by the committee and of assistance to us in our deliberations. If we do need to follow up anything with you, I hope that would be agreeable. Perhaps you can provide us with further information if we need it.

[11.49 a.m.]

McINNES, Ms Elspeth Margaret, Co-Executive Officer, National Council of Single Mothers and Their Children

CHAIR—Welcome. The National Council of Single Mothers and Their Children has lodged submission No. 8 with the committee. Are there any amendments or alterations you would like to make to that submission?

Ms McInnes—Yes. in footnote No. 4, where I detail a failure to file a notice of risk of abuse, I made an error about the allegations. Cigarette burns were in fact suffered by that child and were subsequent to rape allegations, which had been investigated. So in that instance it was not rape; it was burns. But the issue as detailed remains.

CHAIR—Thank you, Ms McInnes. I invite you to make a short opening statement, at the conclusion of which we will ask you questions.

Ms McInnes—Thank you. As I noted in the covering letter, the time frame to comment on this legislation was very short. A consequence is that I have had some difficulty in contacting the Attorney-General's office to get some clarification of the explanatory memorandum and I have not been able to achieve a return phone call at this stage. So, on that level, I have had to edit some of the things that we might want to put in at more length. I have focused more on issues that I think have not been raised in other submissions that I have seen or that have not been raised in as much detail.

I would clarify also that the Council of Single Mothers and Their Children, who were going to come along here today and share this presentation session with me, have made a separate submission. I want to clarify that they are a member organisation of ours but that they are a separate organisation. Each organisation that is part of our membership and that has put in a submission has put in that submission as generated from the kinds of clients and issues that arise in their practice. I have referred to the issue of child sexual assault and the Family Court because we have a referral whereby we see people from around Australia who have been through the court process and who are experiencing their children coming back and making complaints of continuing assault. So the reason for focusing on that a little is that I do not feel this issue has been adequately addressed for children in the drafting of these orders and that there are still issues of concern. I confirm that we believe that this bill will be detrimental to the interests of women who are experiencing violence and also that it will financially disadvantage women. I think I will rest there and let you ask me questions.

CHAIR—Thank you very much, Ms McInnes.

Senator McKIERNAN—I have to start with your first dot point in your submission, which says:

. the measures in the Bill have been argued for and promoted by men and men's interest groups.

Ms McInnes—One of the instances is reflected in my access to the Attorney-General's Department—that is, we were not consulted in the framing of this bill specifically whereas the Lone Fathers Association President, Barry Williams, informed me that he has appointments regularly with the Attorney-General. That to me represents a differential in consultative access and process that is heavily skewed in favour of fathers' interests. As a national peak body for single mothers we have a vital interest in this bill, and we would need to be able to clarify and talk to the Attorney's office about what is happening. As I say, I have had difficulty simply getting a return phone call to get more information. That is one issue I base it on: the differential access to consultation processes.

I also did an analysis of submissions to the two reports prepared by the Family Law Council into the enforcement of contact. The interim report received 45 submissions. 76 per cent of those presented the perspectives of non-custodial fathers, four per cent were from custodial mothers and the remaining 20 per cent did not have a clear standpoint identification from a gender perspective. The final report showed a more balanced approach. In submissions to the final report, again, men comprised 72 per cent of the 18 individual submissions, but women's organisations put in 41 per cent of submissions and legal organisations put in a further 41 per cent of the submissions from organisations, so there was some balance in that process. But, once again, at the beginning of the process of inquiring into contact enforcement, we were not even advised that this was being initiated. I find that extraordinary, given that single mothers or separated mothers are going to be the people who are most concerned with issues of contact.

CHAIR—Could I interrupt briefly, Ms McInnes. What I failed to ask you to do was to just perhaps identify your organisation and its role, how you operate as a peak body and how long you have been in existence—the number of members and things like that.

Ms McInnes—I will read from our pamphlet, which I will leave with you. The mission of the National Council of Single Mothers is to fight 'for the rights of single mothers and their children to the benefit of all sole parent families'. The aims of the organisation are:

. To ensure that children of single mothers have a fair start in life.

. To recognise single mothers and their children as a viable and positive family unit.

. To promote the understanding and acceptance of single mothers and their children in the community so that they may be free from prejudice.

. To work for improvements in the social, economic and legal status of single mothers and their children.

Our objectives are:

. To advocate for the interests of sole parent families in the government, legal and community sectors.

. To act as a central focus for those concerned with sole parent issues and to facilitate discussion and co-operation between relevant government and non-government agencies.

. To promote and facilitate positive parent/child relationships where appropriate to the safety and well-being of the child.

. To conduct, promote and participate in research on matters affecting sole parent families.

. To encourage and support existing organisations and the formation of member organisations in any state or Territory where they do not already exist.

We provide information; policy planning and formulation; linking and support between members, government and other agencies; community education; policy analysis; advocacy; research; consultation; representation; and information and referral.

Our history is that we were formed in 1973 to bring together different state groups of single mothers who formed to advocate for women who gave birth to a child, or were pregnant outside of wedlock, to be able to keep and raise their own children instead of having to relinquish them for adoption. When the organisation formed at the beginning of the 1970s, four out of five single mother pregnancies resulted in adoption. At the conclusion of that decade, after the introduction of the sole parent pension, only one in five single parent pregnancies was put up for adoption.

It is in that grounding of relinquishing mothers, adoption issues and the rights or abilities of single mothers to raise their own children that our organisation is very much grounded in women's interests and also in children's interests. But, as we specify in our objectives, we work for the benefit of all sole parent families—that is, we would consider that lone father

families have similar issues and concerns around poverty, around parenting and around access to services with respect to their children, but we do begin from the position of single mothers.

CHAIR—Thank you.

Senator McKIERNAN—With regard to consultation on this matter, particularly on the financial agreements aspect of it, the regulation impact statement that is tabled in the parliament talks about consultation with a variety of government departments and also—and I will quote this, because it is worthy, for the record:

The Family Court of Australia and the legal profession have been consulted on the draft Bill.

Broader public consultation was not undertaken because of the significant consultation on the issues covered in the Bill during the consultation and public hearings of the Joint Select Committee in 1991-92.

It does not mention what Mr Williams said in regard to consultation on this part. Your response was more about lack of consultation rather than it being pro consultation on this. You were very strong in your presentation that the measures in the bill had been argued for and promoted by men and men's interests groups, whilst there are others who would argue differently.

Ms McInnes—They have been promoted for and argued by. Whether that has been to the Attorney-General—as I say, the list of submissions in the Family Law Council reports on the enforcement of contact do provide that men comprise the majority of individual submissions in both the first and second reports. I can see where we would have different constructions of that statement.

Senator McKIERNAN—On binding financial statements, you make reference to research commissioned by the Office of the Status of Women and then state that the research has not been publicly released. Did you have access to that research?

Ms McInnes—No I did not. I have seen it quoted in other research by the Australian Institute of Family Studies, and I have sought it when it is released from the OSW. It is by Sheehan and Smyth, and we have not at this stage been given any reason as to why it has not been released. However, there is a document *Fair shares? Barriers to equitable property settlement for women*, and I refer to that in Community Legal Service research. It is by Nicola Seaman and it was researched and sponsored by the Women's Legal Services Network and the National Association of Community Legal Services. It documents some of the barriers under the existing system to women gaining equitable property settlements.

Senator McKIERNAN—I am aware of that. There are three tiers of proposals contained in the bill about the enforcement of parenting orders. The previous set of witnesses argued for more flexibility—to perhaps jump over the second stage. Do you think what is being proposed would in any way alleviate those acts of violence that occur in the breakdown of some—though not all—marriages?

Ms McInnes—Sorry, are you referring to the proposal put by the previous speakers or the proposal in the bill?

Senator McKIERNAN—I am referring to both of them. Which proposal do you think would be most beneficial to alleviating the problem of domestic violence after the marriage has broken down?

Ms McInnes—I am much more in favour of the extended process—that is, that there be an education process. Where there is an instance of violence, it is possible that that process may enable the parent who is expressing violence to gain access to some kind of therapeutic assistance to better manage their behaviour. Conceivably, that could happen as a referral out

of a parenting education program or it could identify serious risks around that person's behaviour. So I actually see that second stage as a very important clearing house around issues of violence, but I do not believe that, where there is violence and a person is seriously pursuing a course of violence, it will interrupt that significantly. But it may for some.

Senator McKIERNAN—In their appearance earlier this morning, witnesses from the Family Court said that the proposed measures in the bill could be used by some to drag out the proceedings and stifle any settlement or resolution of the difficulties. That is putting the violence argument to one side. How would you see the measures impacting on that proposal?

Ms McInnes—That capacity is eminently open to any litigant who wishes to do it at present, in any case. I do not see that this will change it.

Senator MASON—I have two sets of questions. First of all, on page 3 of your submission you say in a very strong, powerful statement:

> There is a level of obscenity in the legislative rush to imprison parents ahead of measures to improve the safety of children at risk of abuse due to court-ordered contact.

Do you believe that court-ordered contact insufficiently takes account of the protection of children?

Ms McInnes—I know the systems at the moment are leaving children experiencing abuse during contact. I know that through the cases that are referred to me. The way that that occurs is very complex because there are elaborate systems set up to try to prevent it. In fact, the Magellan project initiative is attempting to work more adequately on this issue.

The issues with protecting children, particularly with reference to sexual abuse, are canvassed very well by Professor Patrick Parkinson in the paper *Family law and parent-child contact: assessing the risk of sexual abuse*, presented at the last Family Court conference. In there he details some of the legal issues problematic for the judge in approaching the unacceptable risk test. But the committee would be aware that the Family Court is reluctant to make positive findings as to the fact of sexual abuse, and it bases its unacceptable risk test on post facto findings—that is, if it has been established that abuse has occurred, then we can assert an unacceptable risk in the future.

In that context, unacceptable risk establishment rests on establishing something that the court is reluctant to establish and that it in fact seeks to have established in a different jurisdiction—that is, the state criminal jurisdiction. The problems with the state criminal jurisdictions in securing convictions of perpetrators are documented in the Australian Institute of Criminology Report No. 99, *Child sexual abuse and the criminal justice system*. It was also documented in the *Four Corners* report of 19 July 1999, 'Double Jeopardy', which detailed the across-Australia problems—even when you have witnesses and forensic evidence—in gaining convictions around child sexual assault.

Given that the Family Court relies on a positive finding in the criminal courts and that that is extraordinarily difficult to achieve, the processes whereby a sexual assault allegation, particularly one by a young child, can be substantiated and the child subsequently protected, are very narrow. The report by Rhoades et al., which has been a reference in my submission and in numerous others, details how interim reports are much more likely to order contact under section 60B post the reform act and give greater weight to the benefits of continuing contact with both parents, against a risk that has not been substantiated or established in fact before the courts.

I have also brought a Georgina Parker paper which was presented in the Children and the Law 1999 seminar papers: *The Family Law Reform Act 1995: has it made a difference?* That looks at the situation for children post the reform act and again confirms the experience that children in interim situations are being ordered more often into contact which is later revoked on review. But the whole process of establishing child sexual assault and the interface with the state systems remains a problem. The Magellan project attempts to address that, but it still does not address the evidentiary barriers.

Senator MASON—That is the problem, isn't it. We could be here all day. It is a very emotional issue. I remember when I was a prosecutor that some people argued that the evidential test had to change in order to secure prosecutions; but that has its own risks.

Ms McInnes—That it is a criminal justice issue.

Senator MASON—It is a criminal justice issue and it is outside our umbrella here this morning. But it is a very emotional issue. When I read your statement, it just brings that back. I do not know that there is an easy answer to that.

Ms McInnes—My concern is that where a trial judge has had a difficult decision and has ordered contact—particularly where there are young children and non-invasive assaults and there are no definitive statements one way or the other—it can be appealed. However, the appeal will only look to points of law; it will not look to the judge's review of the evidence. The child in that situation has no avenue to prevent or change what is happening to them.

With subsequent and repeated allegations, the alleging parent is usually the parent with whom the child resides but may be a non-custodial observing a stepfather interaction; but I am actually looking here at custodial biological contact. Those children have no way of changing what is happening to them. Their mother will not be believed; that has been established for them. They have no avenue of talking to the court or to anyone beyond a family report or a child counsellor.

I hear regularly from older children who report that, when they make clear statements to court counsellors that they do not want to see their father, the court counsellor has argued with them that this has been put to them by their mother and that it is a view that they do not really hold, and how would they feel if, in 10 years time, they had been banned from seeing their father: would they blame, et cetera?

My concern is that there is no way out. The court—and I am not canning anyone here, but I am very much looking at processes—has made an order on the best of its ability, however the fact is that the child continues to be assaulted and so there is a discrepancy between the child's experience and the court's position and there is no way for the child to remedy that. There is simply no avenue and so there is a continuing exposure by federal court order which will be backed up by imprisonment and the full weight of federal law. There is no avenue out. That is my concern.

It remains in the face of the Magellan project, which is described in detail in the paper that was presented to the Family Court conference. That simply provides for time lines on the interface between the state protection system and the Family Court. It provides a managing counsellor and a counselling counsellor. The managing counsellor manages the case through the systems and makes sure all reports are presented in time and the counselling counsellor attempts to assist resolution. But in itself it does not affect or address the problems with the evidentiary process.

This paper by Patrick Parkinson picks up that one of the key problems is that child protection systems have a brief to keep the child safe in the immediate sense. If it is residing with a protective parent and that is established, then the state child protection system's job is over. It has established that the child is residing with the protective parent; it is not at risk—all over, red rover. The Family Court has a different question. It is asking, 'If the child has contact with this person at some future date, will that be a safe interaction for the child?' They are asking different questions and getting not very satisfactory results.

A further point I raised is that in the act we have a reference to the best interests of the child and we have a reference to the court on how that may be determined, but I have argued for some time, and will continue to argue, that safety should be put as a first priority. At the moment, courts are weighing up whether, while the child might have had an abusive interaction with a parent, it is worth terminating the relationship—lots of children have abusive interactions with their parents. At the moment the court is coming up with the statement, 'No, we in court, in our robes, must take the risk that the child out there is not being abused.' In fact, the child bears all the risk of the court's decision. The court bears none of the risk and, in fact, there are no avenues of redress or compensation for that child when it attains majority for the order that has put it in that position.

I make reference to that in footnote 4 around the obligations of the officers of the court to fulfil duties to the court. I raise that under the requirement that lawyers or the legal representatives of persons have a duty to the court to explain the effects of contact orders. Currently, if an officer of the court does not fulfil that duty that is specified for some reason or another—and in the case I referred to it was simply a failure to act rather than a positive invalid action—then there again is no avenue to ask why that was not done, except when you go back to the state legislation which constitutes the powers of legal practitioners. There is no avenue to bring to the court's attention that you believe that an officer of the court should have done something, as they are obliged to under the act, and they did not.

I am not saying that with a view to being punitive towards officers of the court but rather to identifying areas where officers of the court may need more training in fulfilling their obligations or equally where people feel that services are falling down with respect to the obligations which the officers of the court are obliged to carry out. By officers of the court, I do not mean only legal practitioners but also counsellors, mediators, et cetera. Again, I would like to see some kind of process whereby that came back to the attention of the court and people could actually say, 'Well, I think this should have happened. I did not get the explanation I wanted to.'

On the idea of explanation, I would say that a pamphlet would not be adequate. People would need verbal briefing wherein they could ask questions as to the meaning of orders, and it does not address the issue of cultural difference, NESB or lack of access to English as a first language. The judge sitting in court giving a legal argument and then handing someone the transcript of what was said is not going to be sufficient because that person needs to have the opportunity to clarify any issues that they may be confused about. They would also need to be able to hear those orders in their first language.

Senator MASON—An issue which has come up today and about which the committee has expressed concern is that of binding financial agreements. You mention in your submission that women and children might be disadvantaged by the introduction of binding financial agreements. You say, I think, in recommendation 7, that binding financial agreements should be delayed for consideration as part of pending legislative reform to matrimonial property settlements. I have two questions. Firstly, what is wrong with giving people the power to order

their own financial affairs and protect their financial interests? Secondly, what are the pending legislative reforms to matrimonial property settlements and why should we wait?

Ms McInnes—The Attorney-General in his National Press Club Telstra Address of 27 October 1999 refers to continuing research needed into the way property processes are decided at the moment. We have also had discussion papers on superannuation and family law reform—superannuation as property. We have also had discussion on violence and property in the Family Law Act and financial remedies. There is also the discussion paper on whether we begin from a fifty-fifty starting point or some other starting point.

Senator MASON—What, in principle, is wrong with someone ordering their affairs such that they can protect their financial interests prior to entering marriage?

Ms McInnes—I believe it will have unfair outcomes. I do not think you can predict all of the exigencies that may take place over time in the course of a relationship. Under this current proposal, there would be no way of scrutinising or ensuring that a binding financial agreement did take account of all exigencies and specific events. I refer back to CEDAW, which I referred to in my submission. Article 16 of CEDAW provides that—

CHAIR—Just for the purposes of *Hansard*, that is the Convention for Elimination of Discrimination Against Women.

Ms McInnes—Yes. Article 16 requires countries to ensure freedom for women in choosing a spouse and entering into marriage; the same rights and responsibilities, including those related to property both within marriage and upon divorce; and the same rights in all matters relating to children, including number and spacing of children. The article also states that the betrothal and marriage of children has no legal effect and should be eliminated.

Senator MASON—That is not contrary to entering into a voluntary pre-nuptial agreement.

Ms McInnes—It is if the effect of that agreement is that they do not have equal rights to the property arising out of the marriage; that is, they contracted away their rights to property arising from the marriage or contracted away their rights contingent upon certain events in the marriage. For example, if you commit adultery, 'That's it, baby; you get nothing.' It is conceivable that contracts could contain provisions which would utterly disenfranchise one partner.

Senator MASON—I see.

Ms McInnes—There is no legislative provision that that should not be the case. People are advised that they should get financial or legal advice—and, again, we would agree with the previous speaker that financial advice is not sufficient and not the same as legal advice. People could contract away their rights to equality in the marriage, as it were, but certainly in property equality. One of the reasons I would want it to be delayed is that the Attorney refers to the need for more research into the way the current property situation is working in the Family Court. There is very little hard data as to what those outcomes are.

Senator MASON—Hence your recommendation 7.

Ms McInnes—Yes, hence the recommendation that it should be delayed. Referring to the discussion paper on matrimonial property reform, the Attorney said that neither option received significant support but that one of the difficulties is the lack of comprehensive statistics about the outcome of property settlements. He said:

We have some information, but . . . we need . . . to better understand the matrimonial property laws under which we operate. To this end, I will be talking with the Australian Law Reform Commission and the Australian Institute of Family Studies . . .

So the Attorney is signalling that he wants more research and more statistics on outcomes of property settlements under the existing regime, yet we are providing a new regime where people can, if you like, contract out of family law governance. I am concerned that we might end up with a law which entrenches an already unfair situation.

This paper by Nicola Seaman suggests that there are significant gender barriers to equitable property settlements, made more difficult by the current legal aid climate. Our belief, given the relative disparity in financial power and earning capacity and responsibility for children over the course of a lifetime in our current social arrangements for gender roles in society, is that women will be substantially at a greater financial disadvantage as a result of binding financial agreements.

CHAIR—Ms McInnes, in your recommendation 9 you suggest:

That binding financial agreements be scrutinised for fairness and reasonableness before being registered with the Court.

Is that registration in the terms suggested by the previous witnesses from the Family Law Section of the Law Council? When you say 'scrutinised for fairness and reasonableness', do you actually mean approved by the court so that each agreement would be scrutinised and judged as yea or nay—that is, 'You can go ahead with this one' or 'You cannot; you have to change on the following grounds'? How would you expect the court to manage such a responsibility?

Ms McInnes—In terms of the protection of people's interests and the weaker party's interests, I would prefer the more elaborated method of scrutiny of consent agreements but recognise that there would be difficulties in simply implementing that proposal. But there should certainly be registration—for all of the reasons that were raised by the representatives of the Family Law Section. One of the things that occurs to me with respect to the content of binding financial agreements is that there are no guidelines as to what that content might be or what elements they might include in order to ensure that there was a level of fairness between the parties.

CHAIR—I suppose because each circumstance is so completely different.

Ms McInnes—Correct. However, there are life events, such as children, severe illness or disability, that may be anticipated in some way prior to a marriage or at the start of a marriage that might happen some way down the track. They are relatively common events in partnerships. There might, for instance, be suggested phrases or a kind of a pro-forma approach to what an equitable and fair agreement might look like or what elements it might contain to protect against the variations that could come up.

CHAIR—There is no preclusion to the development of that sort of pro-forma?

Ms McInnes—There is no preclusion, but there is no indication that it would be.

CHAIR—I take that on board, though, as a very constructive suggestion.

Senator COONEY—Can I continue the discussion you were having with Senator Mason and to some extent with Senator McKiernan and take you to recommendation 3. I can understand the basis on which you say that, because of the mountain of litigation people have to go through, particularly if you are not financially or emotionally equipped, it is very difficult. You were talking particularly of child abuse and where the court gets it wrong. It seems to me that the problem that you were highlighting was not so much a matter of principle, because if you asked anybody whether child abuse should be tolerated, they would say no, and if either parent went in for that, then action should be taken. But, in the end, don't

you come down to the issue that somebody has to make the decision, and if the judge gets it wrong, what can you do about it? Otherwise, you are just going to have litigation upon litigation. Have you thought about that? You have, and I would like your comments about it.

Ms McInnes—I differ from your view. The Australian Law Reform Commission report No. 73 *Complex contact cases* details some of the attributes of litigants and their behaviour and so does the Thea Brown/Margarita Frederico research. It makes the point that some people make their lives into litigation in the Family Court. I do not know that those people can be stopped except by refusing applications from them and nominating them as vexatious litigants. I would certainly want to see under this regime that there be some ability to limit the grounds on which a person may bring further applications to the court.

In our experience, when the court gets it wrong it takes a long time for mothers to comply with handing their children into situations where they return with reports of abuse. Some continue to try to resist having to do that. So in that situation, where there are orders which place either the child or the mother into situations of abuse, the mother's situation is often addressed by making contact handover take place at a police station or some other supervised scenario. But the child's situation is not so easily addressed because supervised contact is rarely ordered as a thing of simple duration, and then there are problems with getting people to access that. I guess the thrust of my argument is that where there are persistent concerns with the child's safety, that actually has to be recognised by the court and acted upon according to whether or not the court has made a finding of substantiated abuse.

That is one of the issues raised by Parkinson where he proposes a prospective approach to unacceptable risk of abuse—that is, where there are a number of parameters and indicators which suggest that there are concerns around the way this child is relating to a parent. It may, on a prospective basis, decide to suspend contact in order to protect the child and provide that first proposition of safety.

Senator COONEY—Are you saying that the residence parent should be able to get to the court quicker or that the residence parent should be able to make a decision on his or her own behalf?

Ms McInnes—Residence parents are already empowered, or any person bound by an order under the act is already empowered, to not comply with that order for reasons of a genuine belief of the health and safety of the person concerned. What happens in those instances is that then the contact parent would need to bring an order for breach of that order and then there would be a requirement to demonstrate why those concerns had arisen, and often a child protection investigation arises. But there is no way for the residence parent to bring any kind of application to the court, other than to apply to suspend contact, for instance, if he or she believes the child is being abused during contact. There is no application that covers that. However, the child's separate representative could raise a notice of risk of abuse. But the problem is, of course, that with the legal aid caps, increasingly children are not represented.

Senator COONEY—Are you happy with the present situation where, from what you say, the residence parent can stop contact and it is up to the contact parent to take action? I thought you were not happy with that. There seemed to be an indication from your evidence that you had some concerns about that and wanted that changed.

Ms McInnes—I would always say that if someone had concerns about his or her child being abused on contact, the first place to go is child protection because that is the appropriate jurisdiction to deal with an issue of child abuse. People make the error of believing that the Family Court is an arena to solve child abuse problems, but it is properly raised with child

protection systems. Child protection systems are, in fact, more empowered to act with respect to the child's safety and more legislatively backed up by that. Historically, they have taken a back seat where Family Court issues are involved and on anecdotal responses believe that the Family Court is handling it and that they do not need to do anything. It is a matter of go to the Family Court, go to child protection, and they are asking different questions and answering them differently.

Senator COONEY—Are you saying that the child protection system should be more active? We are looking at it from the point of view of a piece of legislation dealing with the Family Court. Are you saying, 'Look, the legislation as it is is adequate,' and that it is within all the parameters you have spoken about but that the real issue, as far as the child is concerned, is the child protection systems in the various states?

Ms McInnes—I am saying that, in my experience, problems in child contact are intractable where there are issues of abuse to a degree as far as the Family Court is concerned and to a degree that is not present in cases where it is a bit of separation emotion. Those cases will normally be resolved over the current processes unless there is something that is continuing to make contact extraordinarily problematic. Those issues are most commonly, in my experience, abuse of the child.

Senator COONEY—From there, do you say the solution in that lies with the child protection systems around the various states or is there something that you want the legislation regarding the Family Court to do?

Ms McInnes—I would like the legislation in respect of the Family Court to retain discretion with respect to imprisonment. I would like the legislation with the Family Court to ensure that anyone facing imprisonment has legal representation. I would like the Family Court to ensure that any child, where there were allegations of abuse, always had access to a child separate representative. I would like the Family Court to have provisions for a litigant in person to give evidence and argue from a remote courtroom so they did not have to stand next to their abuser and put an argument. Those are some of the issues that I would like to see changed in this legislation.

Senator COONEY—What are you saying about the present changes in respect of that?

Ms McInnes—In the present changes I do not like the non-discretionary approach to imprisonment.

Senator COONEY—I know that you want some change but would you prefer the present system remain rather than the changes take place in terms of this legislation?

Ms McInnes—In this legislation we accept the education component of—

Senator COONEY—Sorry, this would be as far as the child abuse stuff is concerned.

Ms McInnes—In terms of compliance with child contact orders, the first two stages are reasonable. It is the third stage of non-discretionary imprisonment, particularly in the climate where people are not represented, that we find extraordinarily problematic. I am nominating that the reason that contact problems persist is inappropriate contact orders which are made on the basis of inappropriate ways of handling child abuse in the Family Court.

Senator COONEY—That is what I could not quite get. I thought you were saying that that was a problem for the system that looks after child abuse in the various states. I thought you were saying that was the area.

Ms McInnes—Its interface with the Family Court is problematic and it affects the way the Family Court handles child abuse, yes.

Senator COONEY—Do you think that the Family Court is wrong in its decision making? In other words, are the judges going about their decision making wrongly? Are you saying there is something within the law that applies in the Family Court that is wrong or is it a bit of both?

Ms McInnes—It is a bit of both. As for the decision making processes of the judges, Patrick Parkinson canvasses the test of unacceptable risk and how that is applied.

Senator COONEY—That is the issue of how the judges go about it.

Ms McInnes—That is an issue of legal reasoning. But it is also fed into the quality of information to the court that is generated by the actions of child separate representatives, that is generated by child protection systems and the way that those come together in the court, and also the court's position on when and how it will suspend contact.

Senator COONEY—I am sorry to persist but I just want to get this from you. Is there any actual law in the system as it now is—in the Family Law Act as it is now is—that you would change in respect of this particular issue?

Ms McInnes—Yes, I would make the safety of children the primary value that the court has to consider in determining the child's best interests.

Senator COONEY—That is very important. That is the sole one, I should perhaps say.

Ms McInnes—And I would remove the lack of discretion to impose a jail term that is proposed in this legislation.

Senator COONEY—So you are saying we should make the jail term mandatory.

Ms McInnes—No, discretionary.

Senator COONEY—That is not in the present act, though, is it?

Ms McInnes—It is not in the present act but it is proposed in this act.

Senator COONEY—In the present act, what change would you make? Would you make any change to the present act other than the one you have told us about so far?

Ms McInnes—I have not actually considered that question in answering this.

Senator GREIG—I have two quick questions. There has been some debate here this morning and there are obviously divergent views on the whole question of pre-nuptual agreements and the extent to which they may or may not work at the end of the day. If I read you rightly, you are strongly of the view that it is not the way to go, particularly in relation to women and their interests. You suggest in recommendation 9 that, if that were to be the case, if we were to head in that direction, you would strongly encourage that binding financial agreements be scrutinised for fairness and reasonableness before being registered with the court. Do you think that can be done in practice? Do you think at the end of the day it can work?

Ms McInnes—I acknowledge that there are difficulties in implementing that. The suggestion I made was that there be some kind of pro forma guidance provided as to what the elements of a fair and reasonable agreement might be; and that, further, if the circumstances which provided for those elements existed in the case, then you would have grounds to approach a court for variation or suspension at a much more discretionary level than is proposed here, which applies to extraordinary variations that were not foreseen. I am talking about a much more open process or a process guided a little more by some kind of pro forma content that indicated what fairness and reasonableness might be.

Senator GREIG—Finally, on a more unrelated topic, you refer in your submission to the use of virtual courtrooms. My understanding in my home state of Western Australia is that that is used to some extent now and that it has been relatively successful and they are looking at expansion. I would be interested to hear the views of your organisation on the use of virtual courtrooms and whether you feel that they are appropriate and successful and to what extent or not they should be incorporated within this bill.

Ms McInnes—If it is not this bill that they are incorporated in, I would like to see them incorporated in a bill. They are becoming particularly of concern with the absence of legal aid and the increase of litigants in person, because it is precisely those cases which do involve violence, which do involve allegations of abuse, which do not resolve and which are intractable which quickly use up the legal aid cap for each litigant, including the child. We have women who are victims of violence having to go in as litigants in person and be that far away from a person who might have held a weapon to their head and be expected to give cogent argument as to their case. I would suggest that that is not possible. It is akin to saying to a torture victim, 'Come in and sit with your torturer and argue.'

As to the issue of stalking and harassment outside the court in the court environs, we have had some shootings and some stabbings outside family courts. That is not resolved by a closed court. By clearing the court, you still have the court environs to contend with. You still have the litigant in person a few feet from you. It seems to me the only way to resolve that is to have a remote location in which people who perceive they are in danger can be located, without having to attend a building in a street so their locations are known. They should not have to be in physical proximity to a person who has abused them.

We have not had access to remote courtrooms in South Australia, but where women have been able to achieve cleared courts of everyone, including the other litigant in person, they have been able to put their case. I know women who have not attended the court because they could not bear being there, and in that instance they forfeited all contact with their child for a time. One of the complications is that women victims of violence quite often become non-custodial parents over time because sustaining custody of the children in the face of the practices of the other parent sometimes becomes too hard, and they concede custody in order to take off the pressure. It is not reducible to who is the custodial and the non-custodial parent. It is much more organised by violence and gender. It would be a very welcome innovation to the court, particularly given the fact that people die attending family courts.

Senator COONEY—I have a question that goes right back to a question that Senator McKiernan asked right at the start. By the way, thank you for your presentation because it has been helpful. It may come across to people who read this evidence that you are presuming the whole time that this person is the victim of violence, that these children have been abused. The difficulty for the court is to decide whether that did take place. If I say Elspeth McInnes thumped me on the back of the head going down the stairs, everybody would say what a fine fellow I am and think that she has probably done it, which would be unfair. At least, I hope it would be unfair because I hope you would not do it. But do you see what I am getting at?

That is the difficulty for the judges. Out of all this terrible morass that you have known so much about over the years, what is the truth? There might be people reading the transcript who might say, 'This is all right if what Ms McInnes says is true; that this child was abused and that this person was hit.' You would know all about the battered wife syndrome. There may be seen to be a presumption, the way you put it, that this is all fairly easily decided. Everybody ought to be able to see that the kid has been abused and that the husband has been belted by the wife. Do you have any comments on that?

Ms McInnes—I appreciate the question. When we see people, it is quite often at the end of the process. They have been through the Family Court. All of their fears have or have not been realised. They have no access or avenue to change what the judgment is. Therefore, there is very little gain for the people who identify their situation to us in lying to us or misrepresenting it to us. We have no power to change their reality.

Where people have achieved justice, an agreement or an amicable post-separation relationship, we do not see them. They are off getting on with their lives, and that is great. We would acknowledge that there are vast numbers of people who separate who may or may not have some upset at the time who resolve it and come to see that they have a post-separation relationship to get on with. However, equally, there are people who are subjected to persistent, deliberate abuse as a practice by the person who is the harasser.

With child sexual assault, one of the factors—and Patrick Parkinson refers to it—is that a person whose objective sexual gratification is children persistently pursues them over time and is very calculated in their approach. In that respect, they are very different from any other kind of parent who will come before the court. He makes reference to processes such as grooming of both the mother, the family, et cetera and their very use in practice of representing themselves as people other than people who sexually assault children. In that sense, I would argue that they differ as a population of parents. I am by no means proposing that they are the majority.

My concerns arise from the absolute hopelessness of changing the situation for the child who experiences the outcome of being ordered into abuse, coupled with the knowledge that the greatest difficulties arise the younger the child is because the child is less capable of expressing what has happened to it, and the child will have a longer time in the regime of exposure should that occur.

Nobody in the Rhoades et al. research, in the Georgina Parker article, in Patrick Parkinson asserts that it is never the case that a child is ordered into contact where sexual abuse occurs. All of these reports acknowledge that there is a continuing risk. The presence of the Magellan project is an acknowledgment that this problem exists. The Magellan project is a pilot which is being run out of I think two registries, and it is providing very careful management of the situation for a limited number of cases in terms of time lines but not in terms of evidentiary processes or legal reasoning. That remains the same.

There is an acknowledgment within the research, within the Family Court's responses, that this problem is not being adequately addressed at a Family Court level or at a criminal justice level or at a level of interface between child protection and the Family Court. So my concern in this bill is imprisoning parents who persist in attempting to protect their children in the face of inappropriate orders. That to me is a travesty of justice. My strong statement about an obscenity is that we have not had a deliberate and concerted address to remedy the situation for those children in the same way that we are having a deliberate and concerted address to ensuring that contact takes place in the main.

Senator COONEY—This is why you say there ought to be more time given to consideration of the bill before it is passed. Is that part of it?

Ms McInnes—Yes, in respect of binding financial agreements. I think a lot more needs to be discussed around the property end of town. In respect of the child contact regimes, I would want more requirements around representation, where there is a risk of imprisonment. The High Court Dietrich decision provided that, if you could not get legal representation and you were facing prison, you could not have a fair trial. But that seems to be tossed out when we

come to the family law system. People can be popped in jail without a lawyer at the flick of a hat. It seems to me that that is a gross injustice. The current legal aid climate is detailed in this paper by Georgina Parker as exposing children to greater risk because they are not getting the child separate representatives.

The Attorney-General has said that he is going to get a working party together on the content of required activity for child separate representatives, but that has not happened yet. We have had child separate representatives for some years, and the content of their activity is acknowledged by the Attorney-General in that speech as not being adequate to protect outcomes for children. We have a lot of recognition in the research that the outcomes for those children who are adversely affected by orders which expose them to abuse exist. This bill seems to be rushing to ensure they keep going rather than rushing to ensure that they are safe.

CHAIR—Ms McInnes, on behalf of the committee, I thank you very much for your evidence this morning, for your submission and for the detailed references you have made to a number of papers and documents which the committee will pursue. We are hoping to have Professor Parkinson give evidence to the committee next week. That will assist us in that process. The committee will be meeting again to continue its hearings into the provisions of the Family Law Amendment Bill 1999 next Monday, 15 November in Sydney. I thank all witnesses who have appeared today for their assistance to the committee. I thank *Hansard* and the secretariat.

Committee adjourned at 12.49 p.m.