The Senate

Legal and Constitutional Legislation Committee

Provisions of the Family Law Amendment Bill 2003

August 2003

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The Committee recommends item 29 in schedule 7 concerning child representatives' costs not proceed until after appropriate wide-ranging consultation has been conducted with relevant interest groups and any relevant concerns addressed.

Recommendation 2

The Committee recommends that schedule 6 be given a delayed commencement of 12 months to allow the Attorney-General's Department to consult with the relevant stakeholders, ascertain the likely consequences of orders made under the proposed provisions and take action to appropriately address those consequences.

Recommendation 3

The Committee recommends that the term 'shares' be defined to include a legal or beneficial interest held in the capacity of trustee or otherwise in the share of the capital of a company.

Recommendation 4

Subject to the preceding recommendations, the Committee recommends that the Bill proceed.

Senator Greig calls for further amendments to the Bill as outlined in his additional comments to this report.

ABBREVIATIONS

WLRC	Women's Legal Resources Centre
NCSMC	National Council of Single Mothers and their Children Inc
ABA	Australian Bankers' Association
IFSA	Investments and Financial Services Association
NADRAC	National Alternative Dispute Resolution Advisory Council

CHAPTER ONE

INTRODUCTION

Background

1.1 On 12 February 2003, the Attorney-General, the Hon. Darryl Williams, introduced the *Family Law Amendment Bill 2003* (the Bill) into the House of Representatives. The second reading debate in the House of Representatives on the Bill was adjourned on that day.

Purpose of the Bill

1.2 The Bill makes a range of amendments to the *Family Law Act 1975*. In his second reading speech, the Attorney-General stated that the Bill is part of the Government's ongoing reform of the family law system which is consistent with the Family Pathways Advisory Group's report, *Out of the maze: pathways to the future for families experiencing separations*.[1] He also stated that the Bill clarifies and refines changes to the *Family Law Act 1975* that were made by the *Family Law Amendment Act 2000*.[2]

Reference of the Bill

1.3 On 14 May 2003 and on the Selection of Bills Committee's recommendation[3], the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 13 August 2003. The Selection of Bills Committee noted the following issues for consideration:

> The impact of proposed changes to:
>
> - Parenting plans
> - The parenting compliance plan
> - Financial agreements
> - Orders and injunctions binding third parties
> - Disclosures and admissions of child abuse

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1 Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, 20 July 2001.

2 House of Representatives Hansard, 12 February 2003, p. 11571.

3 Selection of Bills Committee Report No. 5 of 2003.

Other family law issues relating to the Bill.[4]

Submissions

1.4 The Committee advertised its inquiry in *The Australian* newspaper on 16 June and 2 July 2003. It also wrote to over 170 individuals and organisations, including the Family Court of Australia and the Attorney-General's Department, who were identified as possibly being interested in the Bill. They were alerted to the inquiry and invited to make a submission. A list of the parties from whom submissions were received appears at Appendix 1.

Hearing and evidence

1.5 The Committee held one public hearing on this inquiry in Parliament House, Canberra on 22 July 2003. Witnesses who appeared before the Committee at that hearing are listed in Appendix 2.

1.6 Copies of the Hansard transcript are tabled for the information of the Senate. They are also available through the Internet at http://aph.gov.au/hansard.

Acknowledgment

1.7 The Committee is grateful to, and wishes to thank, all those who assisted with its inquiry.

Note on references

1.8 References in this report are to individual submissions as received by the Committee, not a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

4 *Senate Hansard*, 14 May 2003, p. 11070.

CHAPTER TWO

BACKGROUND TO THE BILL

The family law system

2.1 The family law system has been defined very broadly:

> It includes the many service providers and individuals who help families experiencing separation to resolve legal, financial and emotional problems, and is centred around the family members themselves.[1]

2.2 The *Family Law Act 1975* provides avenues of dispute resolution in relation to the breakdown of spousal relationships. In particular, it establishes the Family Court, provides for the Court's management, empowers the Family Court to make orders on various matters in family law including parenting arrangements, property settlement and counseling and also provides for those orders' enforcement.

The *Family Law Amendment Act 2000*

2.3 The *Family Law Amendment Act 2000* provided a three stage parenting order compliance regime and binding financial agreements to enable the commencement of private arbitration of disputes about property. The aims of the Act were to streamline and enhance the enforcement of parenting orders, to provide greater choice for parties in property settlements and to provide a more efficient and less costly means of dispute resolution in property matters than that which was available through the Family Court at that time.[2]

The Family Law Pathways Advisory Group report

2.4 In May 2000, the Government established the Family Law Pathways Advisory Group to advise it on how to achieve an integrated family law system that is flexible and builds individual and community capacity to achieve the best possible outcomes for families.

2.5 The Group's report, *Out of the Maze – Pathways to the Future for Families Experiencing Separation* was launched in August 2001. In summary, the report concluded that the right sort of help and information was not always available to families at the time and place they needed it most. It found that some people managed their separation with little interaction with the system at all. Others felt frustrated by it, believing in some cases that the system was biased against them. It found that there

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1 Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, 20 July 2001, p. 5.

2 Senator Kay Patterson, *Senate Hansard*, 3 October 2000, p. 17707.

was little assessment of all of the needs of separating families and too much adversarial behaviour. Some parts of the system work well, but overall it is not as effective as it could be, or should be. The Group made a wide range of recommendations directed not only to government but also to the courts and to private professionals and organisations working within the family law system.[3]

2.6 The Government supported the Group's recommendations.

The Bill

2.7 In his second reading speech, the Attorney-General stated that the Bill is part of the Government's ongoing reform of the family law system which is consistent with the Family Pathways Advisory Group's report, *Out of the maze: pathways to the future for families experiencing separations*.[4] He also stated that the Bill clarifies and refines changes to the *Family Law Act 1975* that were made by the *Family Law Amendment Act 2000*.[5] The main provisions of the Bill:

- remove the requirement to register parenting plans with the Family Court (schedule 1 to the Bill);
- allow the Family Court to use audio and video links (schedule 2 to the Bill);
- change the Family Court's management structure (schedule 3 to the Bill);
- change the parenting compliance regime (schedule 4 to the Bill);
- change the operation of financial agreements (schedule 5 to the Bill);
- allow orders and injunctions to bind third parties (schedule 6 to the Bill);
- require parties to proceedings to bear the costs of child representatives (item 29 of schedule 7 to the Bill); and
- allow an adult's admission or child's disclosure in mediation of child abuse to be used in legal proceedings (Items 7, 13 and 19 of schedule 7 to the Bill).

3 *Government Response to the Family Law Pathways Report*, p. 3 (available at http://www.law.gov.au/www/budgethome.nsf/csmAttachments/grflpr2003-doc/$file/grflpr2003.doc).

4 Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, 20 July 2001.

5 House of Representatives Hansard, 12 February 2003, p. 11571.

CHAPTER THREE

ISSUES RAISED IN THE INQUIRY

Overview

3.1 This chapter deals with the issues that were raised during the inquiry:

- the recovery of child representatives' costs;
- the removal of registered parenting plans;
- the binding of third parties to orders and injunctions;
- the parenting plan compliance regime;
- the changes to financial agreements;
- the availability of, and costs for using, video and audio links;
- admissions and disclosures of child abuse; and
- other issues outside the scope of the provisions of the Bill.

Recovery of child representatives' costs

3.2 Subsection 117(1) of the *Family Law Act 1975* (the Act) provides that, with the exception of certain circumstances, each party to proceedings under the Act must bear his or her own costs. Item 29 of schedule 7 of the Bill proposes to replace subsection 117(1) with a provision which will require parties to bear their own costs and bear the costs of child representatives in such proportions as the Family Court (the Court) considers 'just'. However, proposed subsection 117(1A) will provide that parties who received legal aid funding or would suffer financial hardship if the order was made are not required to bear their proportion of the child representative's costs. In considering the proportion of the child representative's costs bourne by the parties, proposed subsection 117(1B) requires the Court to disregard the fact that a child representative is funded under a legal aid scheme.

3.3 Section 68L of the Act empowers the Court to appoint a separate representative for a child where the Court is of the view that a child ought to be separately represented. According to the Attorney General's Department[1], the Court has appointed more child representatives since the Full Court's decision in *Re K.*[2] That decision sets out the grounds on which the Court should appoint a child representative—for example, cases involving allegations of child abuse, cases where there is an apparently intractable conflict between parents and cases where the child is apparently alienated from one or both of the parents.

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1 *Committee Hansard*, 22 July 2003, p. 6; Attorney-General's Department, *Submission 12*, p. 9.

2 (1994) FLC 92-461.

3.4 The relevant legal aid commission may decline to fund child representatives, including in circumstances where one or both of the parties are also receiving legal aid funding for their own representation. However, representatives from both the Department and Family Law Section of the Law Council of Australia (the Law Council) explained that child representatives are, on all but rare occasions, funded by legal aid.[3]

3.5 The assistance that legal aid commissions provide to people on family law matters is governed by Commonwealth guidelines.[4] Those guidelines require the legal aid commission to seek to recover the cost of a child representative from the parties where that representative was funded by legal aid.[5] Where parties do not agree to contribute to the cost of the representative, the child representative seeks a costs order from the Family Court that will require the parties to contribute to the cost. National Legal Aid states that the Family Court rarely gives such orders.[6] However, the Legal Services Commission of South Australia stated that this was not the case in South Australia and pointed out that:

> the Family Court in South Australia does make orders for costs and invariably orders the parties to share costs where appropriate.[7]

3.6 The Department explained that the Government's view is that 'it is appropriate that a party should contribute to the cost of a child representative where that party has the financial capacity to make that payment'.[8] It also stated that the proposed amendment implements recommendation 14 of the Family Law Council's 1996 report, *Involving and Representing Children in Family Law*. The Department also explained that the provision will clarify the law in relation to the Court's power to award costs to the child representative.[9] Different judgments of the Family Court have made varying observations on this issue—for example, in *Harris v Harris*[10] and *Cripps v Cripps*[11] Justice Faulks commented that if the legislature intended parents to bear the costs of the child representative it would have enacted a provision to that effect, whereas, in *Telfer and Telfer*[12] Justice Lindenmayer commented that parents

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3 *Committee Hansard*, 22 July 2003, pp. 2, 7, 28; see also Attorney-General's Department, *Submission 12*, attachment B.

4 *Commonwealth's Legal Aid Guidelines*.

5 *Commonwealth's Legal Aid Guidelines*, Part 2 – Family Law Guidelines, guideline 1.2; See also *Submission 12*, attachment E.

6 National Legal Aid, Letter dated 1 August 2003, p. 3.

7 Legal Services Commission of South Australia, letter dated 28 July 2003, p. 2.

8 *Submission 12*, p. 8.

9 ibid.

10 Unreported, Family Court, 2000, Justice Faulks.

11 Unreported, Family Court, 4 April 2002, Canberra, Justice Faulks.

12 (1996) FLC 92-688.

should contribute to the costs of a child representative in light of the finite resources of legal aid.

Issues raised

3.7 Both the Women's Legal Resources Centre (the WLRC) and the Law Council opposed item 29 of schedule 7. Legal Aid Queensland stated that the item would potentially 'undermine a number of basic principles'.[13] The issues raised were:

- the best interests of the child;
- impeding agreement on parenting issues;
- departure from existing principle; and
- lack of appropriate consultation.

Best interests of the child

3.8 Legal Aid Queensland pointed out that if a party must consider increasing costs in potentially protracted proceedings 'then parties may make agreements which meet and reflect the parents' needs rather than those of the children.'[14] The WLRC expanded on this by arguing that the threat of contribution of costs may discourage the mother from continuing the proceedings contrary to the best interests of the child.[15] Victoria Legal Aid also anticipated that determining an order for the child representative's costs would, of itself, significantly contribute to the costs of the litigation.[16]

3.9 The Law Council expressed similar concerns and argued that 'the amendment may cause litigants, particularly those who are self-funded, to oppose the appointment of a child representative where it otherwise might seem appropriate' and consequently result in a reduction of cases where child representatives are appointed.[17] This view was supported by Victoria Legal Aid's experience.[18]

3.10 The Legal Services Commission of South Australia also argued that privately funded child representatives would be detrimental to the best interests of the child because it could lead to 'parties selecting hired guns' and selecting child representatives who do not have appropriate qualifications.[19]

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13 Legal Aid Queensland, Letter dated 31 July 2003, p. 3.

14 Legal Aid Queensland, Letter dated 31 July 2003, p. 4.

15 Women's Legal Resources Centre, *Submission 1*, p. 2.

16 Victoria Legal Aid, Letter dated 30 July 2003, p. 3.

17 Law Council of Australia, *Submission 8*, p. 2.

18 Victoria Legal Aid, Letter dated 30 July 2003, p. 2.

19 Legal Services Commission of South Australia, Letter dated 28 July 2003, p. 3.

3.11 The Department and the National Legal Aid argued that the decision to appoint a child representative was made 'notwithstanding the wishes of the parties' and therefore would not adversely affect the interests of the child.[20]

Impeding agreement on parenting issues

3.12 Legal Aid Queensland indicated that pursuing a child representative's costs may impede agreement on parenting issues. It stated that the child representative would be placed in a difficult negotiating position in promoting agreement between parents if they are obliged to recover costs. Additionally, it commented that there are likely to be fewer final agreements because the issue of costs may be a stumbling block to full agreement.[21] The Law Council added that legal aid commissions may interpret the proposed provision as intending that costs be recovered in most cases, including those resolved by consent.[22]

3.13 The Department stated that 'there is a high level of conflict present before the child representative is appointed'. This is because the appointment takes place where at least one of the parties can no longer carry out their parental responsibilities because of the level of that conflict.[23] The National Legal Aid held a similar view.[24]

Departure from principle

3.14 Legal Aid Queensland pointed to the existing principle in section 117 of the Act that each party is to bear their own costs. It argued that the proposed amendment will result in increased litigation in relation to whom and in what proportion each party should be liable for costs. It also added that the role of the child representative could be compromised or perceived as biased.[25] The Law Council similarly stated:

> The amendment is the first major change in Family Law Act cost principles since the Act began operation in 1976 and there would be a range of stakeholders who are likely to have a view about whether the long-standing principle that each party should pay his or her own costs (subject always to judicial discretion to order or otherwise) should be altered.[26]

3.15 The WLRC were concerned that the amendment would leave women who are on a low income liable to pay a proportion of costs. They explained that women are

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20 Attorney-General's Department, *Submission 12*, p. 7; National Legal Aid, Letter dated 1 August 2003, pp. 3-4.

21 Legal Aid Queensland, Letter dated 31 July 2003, p. 4.

22 Law Council of Australia, *Submission 8*, p. 2; see also Legal Services Commission of South Australia, Letter dated 28 July 2003, pp. 2-3.

23 *Submission 12*, p. 7.

24 National Legal Aid, Letter dated 1 August 2003, p. 4.

25 Legal Aid Queensland, Letter dated 31 July 2003, pp. 4-5.

26 Law Council of Australia, *Submission 8*, pp. 1-2.

commonly self-represented litigants because they are unable to get legal aid funding, or else represented through funding by loans or a second job.[27]

3.16 The Department pointed to the government's view and the general national increase in numbers of applications and approvals for legal aid funding of separate representatives in family law matters. The total costs for these cases including disbursements for the 2001/02 period was $11,545,807, an increase of $2,532,462 from the previous year.[28]

3.17 Victoria Legal Aid suggested various measures to minimise conflict on the child representatives' costs issue. These suggestions included that:

- proposed paragraph 117(1A)(b) be removed because a parties' receipt of legal aid funding may be considered as evidence of financial hardship notwithstanding contemporaneous property orders made in their favour;
- certificates from the Managing Director of the relevant legal aid commission be considered as conclusive proof of costs in order to minimise the cost in determining child representatives' costs; and
- child representatives' costs orders be made at the conclusion of hearings.

Consultation

3.18 The Explanatory Memorandum stated that the Bill 'has been subject to extensive consultation with a range of stakeholders over a period of about 12 months.'

3.19 However, the Law Council and WLRC argued that the Department had not consulted broadly enough on the proposal to recover child representatives' costs. They stated that the Department had not included this proposal in the exposure draft circulated in 2002.[29] They pointed to a range of groups that they felt should have been consulted.

3.20 The Department's representative explained that the amendments proposing to recover the child representatives' costs were added at a late stage. They had anticipated an appeal to a judgment which would have the effect of clarifying the law in this area.[30] No appeal was made and it was seen as necessary to clarify the law.

Committee view

3.21 The Committee notes strong concerns about the impact of the proposed change on the interests of the child. The Committee considers that insufficient consultation has taken place to elicit the relevant views on the change in principle.

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27 Women's Legal Resources Centre, *Submission 1*, p. 2.

28 Attorney-General's Department, *Submission 12*, attachment B.

29 Women's Legal Resources Centre, *Submission 1*, p. 2; *Submission 8*, pp. 1-2.

30 *Committee Hansard* 22 July 2003, pp. 22-23.

Recommendation 1

The Committee recommends item 29 in schedule 7 concerning child representatives' costs not proceed until after appropriate wide-ranging consultation has been conducted with relevant interest groups and any relevant concerns addressed.

Removal of registered parenting plans

3.22 Parenting plans are described in section 63C of the Act as a written agreement between the parents dealing with one or more of the issues set out in subsection 63C(2). Generally, these issues are the residency of the child, contact with the child, parental responsibility and maintenance. The child welfare provisions of a registered parenting plan (provisions dealing with the residency of the child, contact with the child and parental responsibility[31]) have effect as if an order of the Court.[32] Parenting plans that are registered in the Court under section 63E may be set aside, discharged, varied, suspended or revived by the Court in accordance with section 63H. Section 63D provides that parenting plans cannot be varied by agreement between the parties.

3.23 Item 5 of schedule 1 to the Bill proposes to replace section 63D with a provision which allows parties to vary or revoke parenting plans. Item 7 proposes a provision which will allow existing registered parenting plans to continue in force until revoked on application to the Court by the parties or set aside, varied or discharged in accordance with section 63H. Item 8 proposes to replace section 63E with a provision that will remove the ability to register parenting plans in the Court.

3.24 The Explanatory Memorandum explains the reasons for the proposed changes:

> Advice in 2000 from the Family Law Council and the National Alternative Dispute Resolution Advisory Council found that the use of registered parenting plans to date was minimal, and concluded that registration makes parenting plans too inflexible and difficult to change. In practice, most parents who wish to have their agreement legally binding do so by having consent orders made, in preference to the registration of parenting plans. Nonetheless, the advice emphasized that parenting plans remain a practical but informal arrangement to guide parents following separation. The amendments made by Schedule 1 of the Bill remove the registration provisions for parenting plans.[33]

3.25 A representative from the Department added:

> [registration of parenting plans] was clouding the use of the agreements when there was quite an appropriate mechanism in the consent orders to

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31 Subsection 63C(4).

32 Subsection 63F(3).

33 Explanatory Memorandum, p. 1.

> deal with matters which should be legally enforceable. It was more appropriate to exhort couples to reach agreement in relation to their parenting arrangements through a formal agreement, if that was their choice, but it was unnecessary to involve the court. It is the Attorney's view, in much of the work he does in this area, that we will reduce the need for court involvement to the maximum extent possible.[34]

Issues raised

3.26 Evidence was divided on the need for the removal of the ability to register parenting plans. Issues raised in relation to the schedule included whether the proposed changes would:

- increase the risk of inappropriate and unworkable plans; and
- decrease parent's choice in enforcing parenting plans.

Inappropriate and unworkable plans

3.27 The WLRC and National Council of Single Mothers and their Children Inc (the NCSMC) opposed the proposed amendments on the grounds that the new regime would increase the risk of inappropriate and unworkable parenting plans. For example, Ms Catherine Carney stated:

> There is a big problem with all sorts of orders coming through from certain mediation and so on that are just not going to work for either party, which should have been obvious at the beginning but at no stage did anyone or any lawyer see them. …
>
> They might resolve something for that day when all the parties say, 'Okay, we've got an agreement; put it in and let's get out of here,' but if they are totally unworkable, they are the ones that will always blow up, come back and end up costing more for the system, the children and the families involved. That would not happen if proper orders had been entered into which had been subjected to scrutiny by a registrar.[35]

3.28 Both submissions argued that scrutiny of the agreements would likely minimise this risk by prompting parties to seek legal advice and to ensure plans are for the best interests of the child.[36] Also, this scrutiny would minimise the risk of coercion—especially in relationships involving violence.[37]

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34 *Committee Hansard* 22 July 2003, p. 23.

35 *Committee Hansard* 22 July 2003, p. 11.

36 Women's Legal Resources Centre, *Submission 1*, p. 3; *Submission 5*, p. 1.

37 Women's Legal Resources Centre, *Submission 1*, p. 3.

3.29 The NCSMC also argued that a 'level of formality in registering parenting plans and their provisions assists determinations of changes of care patterns and reduces the risks of child abductions and trauma to parents'.[38]

3.30 However, these arguments were at odds with the comments of the NSW Commission for Children and Young People which stated that parenting plans are 'designed for the assistance of separating parents at a low level of conflict, where the potential for the manipulation or inappropriate involvement of the children is minimised.'[39] Also, a representative of the Department pointed to the low and decreasing usage of registered parenting plans.[40]

Choice

3.31 The Family Mediation Centre argued that registration of parenting plans provides parents with a choice in making parenting agreements legally binding. The benefits included enabling parties to agree on one document which included matters not intended to be legally enforceable but promote a better fashioned arrangement which is the child's best interests—for example, communication, schooling and discipline.[41] The Centre also highlighted that registration of a parenting plan is a cheap, straightforward procedure in comparison to obtaining consent orders.[42] The Centre argued that registration encourages a greater understanding, commitment and compliance by parents.[43]

3.32 However, the argument that most parties who agree to a parenting plan also register them was not supported by the Department's statistics. A representative from the Department stated:

> We have statistics—from the last year we actually had them—which indicate that there was a 26 per cent drop in the registration level of parenting plans from the year before. There has been a consistent drop in numbers ever since they were introduced, from about 337 in the first year down to 201 in the last year which we have figures for. There has been a very consistent drop off in the registration of those parenting plans. The advice from NADRAC and the Family Law Council was that, given that you basically had to have a high level of agreement before such plans were registered, it was an unnecessary position.[44]

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38 National Council of Single Mothers and their Children Inc. *Submission 5*, p. 2.

39 NSW Commission for Children & Young People, *Submission 11*, p. 6.

40 *Committee Hansard,* 22 July 2003*,* p. 23.

41 Family Mediation Centre, *Submission 2*, pp. 1-2.

42 See also Australian Institute of Family Studies *Submission 3*, p. 1.

43 Family Mediation Centre *Submission 2*, pp. 1-2; see also Office of the Commissioner for Children *Submission 10*, p. 1.

44 *Committee Hansard* 22 July 2003*,* p. 23.

3.33 Also, the representative of the WLRC expressed concerns in relation to separating the enforceable provisions from non-enforceable provisions in parenting plans.[45]

Other issues

3.34 The NSW Commission for Children and Young People supported the proposed amendments. However, it recommended an additional paragraph be added to section 63B that would encourage parents to include children in the process of reaching agreement. They also recommended that paragraph 63B(e) be amended to encourage parents to regard the interests of the child as the paramount consideration in reaching agreement, implementing their parenting plan and resolving parental conflict.[46]

3.35 The Department saw these recommendations as unnecessary and potentially inappropriate.[47] They stated that nothing in the provisions would prevent a child's involvement. However, the Department was of the view that there were circumstances where the child could be inappropriately involved—for example, making a choice between parents and voicing that preference in front of them. The Department was also of the view that proposed paragraph 63(e) was intended to cover all issues considered by parents in reaching their agreement.

Committee view

3.36 The Committee considers that an appropriate balance between encouraging parents to agree on parenting plans with minimal Family Court involvement and protecting the best interests of the child has been struck with the proposed amendments as currently drafted. Accordingly, it recommends no change to these provisions of the Bill.

Binding of third parties to orders and injunctions

3.37 Schedule 6 of the Bill proposes to introduce a new Part VIIIAA to the Act. Proposed subsections 90AE(1) and (2) and 90AF(1) and (2) aim to empower the Court to make orders under sections 79 and 114 and grant injunctions under section 114 that are directed to or alter the rights, liabilities or property interests of third parties.[48] (Section 79 of the Act generally provides that the court may order the alteration of parties' interests. Section 114 of the Act generally provides that the Court may grant an injunction or make a declaration in relation to the interests of the parties, amongst others.)

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45 *Committee Hansard* 22 July 2003, p. 9.

46 NSW Commission for Children & Young People, *Submission 11*, p. 6.

47 Attorney-General's Department, *Submission 12*, pp. 1-2.

48 Proposed section 90AA.

3.38 Proposed subsections 90AE(3) and 90AF(3) aim to protect third party interests by restricting the Court's powers to bind third parties to circumstances where the order or injunction: is reasonably necessary or appropriate to effect a property division; concerns a debt to a third party and at the time of that order it is reasonably foreseeable that the debt would not be paid in full; and, would not be granted before the third party is accorded procedural fairness. The Court is also required by section 79 not to make an order unless the Court is satisfied that 'in all the circumstances, it is just and equitable.'

3.39 The Explanatory Memorandum explains that:

> Third parties must be accorded procedural fairness, which primarily means they must be notified and be given a right to be heard before any order is made against their interest. [49]
>
> [subsections 90AE(3) and 90AF(3) are] intended to apply only to the procedural rights of the third party. It is not intended to extinguish or modify the underlying substantive property rights of third parties.[50]

Issues raised

3.40 While no submission or witness opposed the policy underlying schedule 6, significant concerns were raised about its operation.[51] Issues raised were:

- credit providers' exposure to credit risk;
- the potential for unintended adverse effects of other legislation;
- the implementation costs for business;
- the Department's consultation; and
- the definition of shares.

Credit risk

3.41 Both the Australian Bankers' Association (the ABA) and the Investments and Financial Services Association (the IFSA) expressed strong concerns about the Court's power to bind third parties in relation to debt products and risk.[52] The ABA expressed its concern as:

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49 Explanatory Memorandum, p. 22.

50 Explanatory Memorandum, pp. 24-25.

51 *Cf.* Women's Legal Resources Centre *Submission 1*, p. 5; Hobart Community Legal Service *Submission 4*, pp. 1-3; Office of the Commissioner or Children *Submission 10*, p. 1; *Committee Hansard* 22 July 2003, pp. 14 and 21.

52 *Committee Hansard* 22 July 2003, p. 14.

> the potential for the court to substitute its commercial judgment for the commercial judgment of the bank and to leave the bank exposed involuntarily to a credit risk. [53]

3.42 The ABA argued that subsection 90AE(3), 'fails to adequately protect a bank' as the Court is not required to consider:

- either any undue hardship or borrower's cash flow as required by the bank under the national consumer credit code,
- whether the bank would be willing to continue to provide products on the same terms as provided to the original borrower, or
- the possible non-compliance with other legislation.

3.43 Additionally, the ABA suggested that other third parties may be disadvantaged also—for example, other debtors and guarantors who are jointly and severally liable for the parties' debt and incoming parties in derivative contracts.[54]

3.44 The ABA pointed to the 'erosion of the value of a bank's substantive right of property in debt'.[55] They argued that this 'reduces the bank's ability to recoup the debt from parties whom the bank had originally determined were credit worthy', deprives the bank 'of recourse to one of the parties either fully or proportionally' and increases the exposure of the bank to credit risk'.[56]

3.45 The ABA suggested that the increased credit risk could possibly result in higher prices, restricted credit availability and shortening of loan terms.[57]

3.46 The Department stated that:

> … the Government is prepared to consider the possibility of further amendments that might be made to further protect the interests of third parties. In particular, the Government is considering whether a provision might be inserted to make clear to a court other matters that it should consider before an order is made.[58]

Unintended adverse effects of other legislation

3.47 The IFSA was also of the view that schedule 6 did not sufficiently consider the possible consequential effects of orders directed to third parties.[59] Further, it would

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53 *Committee Hansard* 22 July 2003, p. 13.

54 Australian Bankers' Association, *Submission 6*, pp. 3-5; see also *Committee Hansard* 22 July 2003, p. 16.

55 Australian Bankers' Association, *Submission 6*, p. 3.

56 Australian Bankers' Association, *Submission 6*, pp. 2-3.

57 Australian Bankers' Association, *Submission 6*, p. 5.

58 Attorney-General's Department, *Submission 12*, p. 4.

59 *Committee Hansard* 22 July 2003, pp. 14 and 17.

not sufficiently protect third parties from being bound by orders which are inappropriate or overly difficult to implement.[60] The result of which may lead to inequitable treatment of certain products, unclear and uncertain provisions resulting in unintended non-compliance with other financial, taxation and social security legislation and excessive implementation costs.[61]

3.48 The IFSA indicated that subsections 90AE(3) and 90AF(3) would not sufficiently protect their members' interests as they could not advise the Court of the ramifications of an order. This was because the treatment that is given to parties' interests affected by the proposed Court powers was not provided for in other legislation, such as tax, social security and superannuation law. This had the potential to lead to unintended adverse consequences. IFSA pointed to the changes surrounding the Court's power to affect superannuation interests as an example of the scope of legislative and business system change needed to effectively implement possible Court orders without undue adverse effect.[62] A representative of IFSA explained that the systems' changes to accommodate those changes took months.[63]

3.49 The Department has since advised that the

> 'Government is prepared to consider delaying the implementation of the provisions of Schedule 6 for up to 6 to 12 months to allow for any consequential amendments that might need to be made to other legislation.'[64]

Implementation costs

3.50 The ABA and IFSA's evidence indicated that schedule 6 would have a substantial impact on their businesses. In addition to the discussion above, the ABA and IFSA pointed to considerable compliance arrangements that would have to be put in place: training, development of policies and procedures, and changes to contract terms.[65] However, no regulation impact statement was included in the explanatory memorandum because 'there will be minimal impact on business'.[66]

3.51 A representative of the Department acknowledged that the Department 'did not appreciate the extent to which' the impact of transferring of debt and ownership between parties would have on business. The Department has since advised that 'the Government is prepared to consider making an amendment to delay the commencement of Schedule 6 for a period of up to 12 months.' In their view such an

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60 *Committee Hansard* 22 July 2003, p. 14.

61 Law Council of Australia, *Submission 9*, p. 3; *Committee Hansard* 22 July 2003, p. 18.

62 *Committee Hansard* 22 July 2003, pp. 16-17.

63 *Committee Hansard* 22 July 2003, pp. 17.

64 Attorney-General's Department, *Submission 12*, p. 5.

65 Australian Bankers' Association, *Submission 6*, p. 7; *Submission 8*, p. 3.

66 Explanatory Memorandum, p. 3.

amendment would minimise any impact on business.[67]Additionally, the Department advised that:

> the Government is also considering the insertion of a provision that would require the court to consider making an appropriate order as to the costs of the third party in being involved in the proceedings and carrying out any order that might be made by the court.[68]

Consultation

3.52 The Explanatory Memorandum stated that the Bill 'has been subject to extensive consultation with a range of stakeholders over a period of about 12 months.'

3.53 However, the ABA and the IFSA stated that they had not been consulted on schedule 6 of the Bill before its introduction into parliament.[69] A representative from the Department did not dispute the ABA and IFSA's claims. Although the Department pointed[70] to a meeting on 4 July 2003 between representatives from the ABA, IFSA, financial companies and 4 government departments, the representative acknowledged that further consultation on schedule 6 was needed.[71]

Definition of shares

3.54 Proposed paragraph 90AE(1)(d) provides:

> (1) In proceedings under section 79, the court may make any of the following orders: …
>
> (d) an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.

3.55 The Committee identified some potential for uncertainty in relation to the application of the term 'shares' in this paragraph—for example, whether it was limited to a share in the capital of a company and not applicable to an interest in a share of a company's capital. The Department was of the view that the provisions would be given its ordinary commercial meaning.[72] However, a representative from the IFSA indicated that this term was uncertain and was of the view that it would not apply to share options.[73]

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67 Attorney-General's Department, *Submission 12*, p. 9.

68 Attorney-General's Department, *Submission 12*, p. 4.

69 *Committee Hansard* 22 July 2003, p. 13; *Submission 9*, p. 1.

70 Attorney-General's Department, *Submission 12*, p. 9.

71 *Committee Hansard* 22 July 2003, pp. 25-26.

72 Attorney-General's Department, *Submission 12*, p. 6.

73 *Committee Hansard* 22 July 2003, p. 18.

Action recommended by submissions

3.56 Both the ABA and IFSA recommended that either schedule 6 be withdrawn to allow further consultation with industry and the relevant government departments or that the Bill provide for a third party's consent before orders can be made which bind that third party.[74]

3.57 If the option of consent was taken, the ABA suggested that provisions requiring the bank not to unreasonably withhold its consent could be included in the proposed amendments. The terms of this provision could be drafted along similar lines as State property law legislation that requires a lessor not to unreasonably withhold consent to an assignment.[75]

Committee view

3.58 The Committee acknowledges that although most evidence focused on the financial service and banking industries, other types of third parties could also be adversely affected by the amendments.

3.59 The Committee considers that insufficient consultation has taken place to appropriately address the concerns of the banking, investments and financial services industries. In the Committee's view it appears to be likely that there will be adverse consequences resulting from possible orders under the provisions proposed by this schedule, that would have undue adverse effect on the interests of third parties and parties to family law proceedings. The Committee considers that delaying the commencement of schedule 6 for 12 months is sufficient time for the Department to further consult with relevant stakeholders, to ascertain the likely consequences of the schedule and to take appropriate action to address those consequences.

3.60 The Committee has previously alerted the Department to its concerns about the short time frame the Department has given for consultations on amendments to the Act. The Committee reiterates its comments in paragraph 6.11 of its report on the provisions of the *Family Law Amendment Bill 1999*:

> The Committee's experience in this matter would indicate that there are significant concerns about the time allowed for consultation. The Committee suggests that in future the Department make it clear when releasing a Bill whether or not time will be allowed for consultations.[76]

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74 Australian Bankers' Association, *Submission 6*, p. 1; *Submission* 9, p. 4.

75 *Committee Hansard* 22 July 2003, p. 21.

76 Senate Legal and Constitutional Legislation Committee, *Consideration of legislation referred to the committee - provisions of the Family Law Amendment Bill 1999*, tabled 6 December 1999, p. 36.

Recommendation 2

The Committee recommends that schedule 6 be given a delayed commencement of 12 months to allow the Attorney-General's Department to consult with the relevant stakeholders, ascertain the likely consequences of orders made under the proposed provisions and take action to appropriately address those consequences.

Recommendation 3

The Committee recommends that the term 'shares' be defined to include a legal or beneficial interest held in the capacity of trustee or otherwise in the share of the capital of a company.

Parenting plan compliance regime

3.61 Item 1 of schedule 4 of the Bill proposes to insert a new section 65LA. This new provision aims to empower the Court to order, at any time during proceedings for a parenting order, that any party attend before a post-separation parenting program provider in order to assess that party's suitability to attend such a program and, where assessed as suitable, to attend that program. A post-separation parenting program is defined in subsection 65LA(3).

Issue raised

3.62 No submission opposed schedule 4.[77] However, the WLRC suggested a technical change to the proposed provisions to allow post-separation parenting program providers to alert the Court to their concerns over the unsuitability of any referrals.[78]

3.63 In answer to the WLRC's suggested technical changes referred to above a representative from the Department commented that:

> If the program provider had to provide a detailed list of reasons why someone was not appropriate and have a court potentially second-guess that issue, that would require a lot of resources from the parenting program provider to make that assessment and it would open them up to a range of litigation for which they are not currently liable.[79]

3.64 In relation to unsuitability to attend the program on the basis of apprehended violence, a representative from the Department stated:

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77 See Women's Legal Resources Centre *Submission 1*, p. 4; Australian Institute of Family Studies *Submission 3*, p. 1; NSW Commissioner for Children and Young People *Submission 11*, p. 9.

78 *Committee Hansard* 22 July 2003, p. 12.

79 *Committee Hansard* 22 July 2003, p. 24.

> It is precisely for that reason that the amendment to section 19N [adults' admissions of and children's disclosures of child abuse] is included in the Bill.[80]

Committee view

3.65 The Committee considers that the amendments, together with other measures in the Act, appropriately balance the government's policy of reducing the Family Court's involvement in reaching parenting agreements and protecting the interests of the child. Accordingly, the Committee recommends no changes to these provisions.

Changes to financial agreements

3.66 Under Part VIIIA of the Act, parties may make a binding financial agreement that provides for the distribution of financial resources in the event of the breakdown of the relationship. Existing subsection 90F(1) provides:

> 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 to a marriage if the court is satisfied that, when the agreement was made, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party would have been unable to support himself or herself without an income tested pension, allowance or benefit.

3.67 Item 1 of schedule 5 to the Bill proposes to replace subsection 90F(1) with a provision that will:

> ensure that, at the time of any financial agreement comes into effect, rather than at the time it was made, if a party is unable to support himself/herself without government income support, then the court may make a maintenance order, notwithstanding the agreement.[81]

3.68 Items 2 and 3 generally aim to remove the requirement for legal practitioners to give financial advice.[82]

Issues raised

3.69 Two issues were raised in relation to these proposed amendments: the retrospective effect of proposed subsection 90F(1) and the removal of the requirement for legal practitioners to provide financial advice.

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80 *Committee Hansard* 22 July 2003, p. 24.

81 Explanatory Memorandum, p. 21.

82 Explanatory Memorandum, pp. 2, 21-22.

Retrospectivity

3.70 A representative from the Law Council indicated their view that the rationale for proposed subsection 90F(1) was to close a loophole in the existing legislation:

> the revenue should be protected against sweetheart deals between parties that might impact on social security entitlements or other income tested allowances by maximising those allowances and minimising the maintenance obligations of a person who would otherwise have an obligation to contribute.[83]

3.71 The Law Council supported these measures but was concerned that the provisions would operate retrospectively. A representative of the Law Council explained that agreements entered into before the proposed changes would now not have the effect that parties intended for them at the time of signing the agreement—for example, the parties agreed that a greater share of property would go to that spouse in consideration or part consideration for them agreeing not to claim maintenance.[84]

3.72 A representative from the Department agreed that proposed subsection 90F(1) would operate retrospectively and there was no way of accurately determining the number of people affected because the financial agreements were not registered.[85] The representative acknowledged that the amendment would have a negative impact but that impact would be limited to those:

> people who have basically decided to rely on the income support payments, as opposed to the parties themselves, to deal with spousal maintenance obligations. The government took the view that that was not appropriate.[86]

3.73 Additionally, the representative commented that this provision would only be triggered in the event that one party sought to overturn the financial agreement.[87]

3.74 The WLRC saw this retrospective effect as beneficial to disadvantaged parties.[88]

Removal of requirement for financial advice

3.75 The NCSMC was of the view that 'the removal of legal protections will disadvantage the more vulnerable parties to the agreement'.[89]

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83 *Committee Hansard* 22 July 2003, p. 3.

84 *Committee Hansard* 22 July 2003, p. 3.

85 *Committee Hansard* 22 July 2003, p. 26.

86 *Committee Hansard* 22 July 2003, p. 26; see also *Submission 12*, pp. 2-3.

87 *Committee Hansard* 22 July 2003, p. 27.

88 *Committee Hansard* 22 July 2003, p. 10.

89 National Council of Single Mothers and their Children Inc, *Submission 5*, p. 7.

3.76 However, Mr Denis Farrar of the Law Council explained that the existing requirements contributed to the slow 'take-up rate' of financial agreements because professional indemnity insurers warned legal practitioners that they could be exposing themselves to insurance claims if they were to provide that advice. He indicated that items 2 and 3 of schedule 5 would 'ameliorate' this position.[90]

Committee view

3.77 The Committee considers that, despite the retrospective effect of the amendments proposed by schedule 5, the amendments are appropriate to prevent the possibility of inappropriate calls on government income support. The Committee also considers that the removal of the requirement for legal practitioners to give financial advice is prudent. Accordingly, the Committee recommends no changes to these provisions.

Video and audio links – availability and cost

3.78 Schedule 2 of the Bill will empower the Court to use electronic technology including video and telephonic links. This will allow judges to sit in separate places but still be part of the one court. Proposed section 102K will provide the Court with power to make such orders as it thinks just for the payment of expenses in relation to use of video and audio links.

Issues raised

3.79 With the exception of providing parties with an entitlement to use the technology[91] and that an exemption from paying the usage costs of the technology availability on the grounds of financial hardship be made clear[92], no submission or witness opposed the measures.[93]

Committee view

3.80 The Committee is of the view that the measures will likely benefit parties in those circumstances of apprehended violence and remotely located parties. It considers it appropriate that the Court retain the power to decide in what circumstances to use the technology. It also considers that the power to make such orders as the Court thinks 'just' will sufficiently protect those parties experiencing financial hardship.

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90 *Committee Hansard* 22 July 2003, p. 7.

91 National Council of Single Mothers and their Children *Submission 5*, p. 5.

92 Women's Legal Resources Centre *Submission 1*, p. 4.

93 See also Women's Legal Resources Centre *Submission 1*, National Council of Single Mothers and their Children *Submission 5* and NSW Commissioner for Children *Submission 11*.

Admission and disclosures of child abuse

3.81 Section 19N, 62F and 70NI of the Act generally prohibit anything said in confidential counselling or mediation sessions to be admitted as evidence in court proceedings. Items 7, 13 and 19 of schedule 7 to the Bill propose to relax these prohibitions in relation to an adult's admission or a child's disclosure that indicate that the child has been abused or is at risk of abuse. The Explanatory Memorandum adds:

> This exception is very limited and does not apply to disclosures by an adult that indicate that a child has been abused or is at risk of abuse by another person. It also does not apply to admissions of a child that indicate that another child has been abused or is at risk of abuse by that child.[94]

Issue raised

3.82 The NSW Commission for Children and Young People argued that the proposed amendments be expanded to cover the circumstances to which the Explanatory Memorandum states the proposed provisions will not apply.[95]

3.83 The Department argued that the confidentiality of counseling and mediation sessions 'ensured the success of the primary dispute resolution provisions'. Additionally, they pointed out that service providers have an existing obligation under section 67ZA of the Family Law Act to notify authorities where they have reasonable grounds for suspecting that a child may have been abused.[96]

Committee View

3.84 The Committee considers that items 7, 13 and 19 of schedule 7 to the Bill, together with section 67ZA of the *Family Law Act 1975*, appropriately balance the interests of children, in ensuring that allegations of child abuse are appropriately investigated and acted upon, and the interests of accused parents, in ensuring only probative material relating to alleged child abuse is used in proceedings.

Other issues

3.85 Submissions raised other issues outside the scope of the Committee's inquiry into the provisions of the Bill. These issues included: the role of the child

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94 Explanatory Memorandum, pp. 27, 28 and 29.

95 Office of the Commissioner for Children *Submission 11*, pp. 4-5.

96 Attorney-General's Department *Submission 12*, p. 6.

representative;[97] a child protection service;[98] implementation of a 'one court' principle;[99] and, repeal of the three-stage parenting compliance regime.[100]

3.86 The Committee acknowledges these comments but considers that they are outside the scope of its inquiry.

Conclusion

3.87 The evidence received by the Committee during its inquiry generally supported the proposed reforms embodied in the Bill. Witnesses before the Committee emphasised the importance of the Bill and the need to reform the existing family law system.

3.88 The Committee considers that with the exception of schedule 6 and item 29 of schedule 7, the provisions of the Bill will provide appropriate balances between the interests of the community in protecting the interests of children and the calls on government funding and the interests of parties in resolving relationship breakdown issues through minimal adversarial forums.

Recommendation 4

Subject to the preceding recommendations, the Committee recommends that the Bill proceed.

Senator Greig calls for further amendments to the Bill as outlined in his additional comments to this report.

Senator Marise Payne

Chair

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97 NSW Commission for Children and Young People *Submission 11*, pp. 7-8.

98 NSW Commission for Children and Young People *Submission 11*, p. 10; National Council of Single Mothers and their Children *Submission 5*, pp. 4-5.

99 NSW Commission for Children and Young People *Submission 11*, p. 11.

100 National Council of Single Mothers and their Children *Submission 5*, p. 4.

ADDITIONAL COMMENTS BY SENATOR BRIAN GREIG

Senator Brian Greig, on behalf of the Australian Democrats, welcomes the vast majority of the changes proposed in the Family Law Amendment Bill 2003 and concurs with the views and recommendations of the Committee, subject to the following exceptions.

The three issues on which Senator Greig takes a different position are as follows.

Removal of registered parenting plans

Senator Greig does not agree that the bill strikes an appropriate balance between encouraging parents to agree on parenting plans with minimal Family Court involvement and protecting the best interests of the child.

In particular, Senator Greig accepts the submission of the Family Mediation Centre that, by maintaining the option of registering a parenting plan, separating families will be provided with a greater degree of choice and a simpler and cheaper, yet legally binding, alternative to obtaining consent orders.

Senator Greig also notes that the WLRC and the NCSMC have raised concerns regarding the potential for unregistered plans to 'leave families more exposed to coercion and fraud and without any scrutiny of children's interests'.[1]

The NCSMC submitted that:

> A level of formality in registering parenting plans and their provisions assists determinations of changes of care patterns and reduces risks of child abductions and trauma to parents.[2]

With these concerns in mind, the Democrats believe that parents should continue to be given the opportunity to register the parenting plans they have agreed to. Accordingly, Senator Greig opposes those provisions of the bill directed at removing this option.

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1 *Submission 5*, page 4.

2 *Submission 5*, page 2.

Retrospective changes to provisions concerning financial agreements

Senator Greig notes the concerns of the Law Council regarding the retrospective application of new provisions relating to financial agreements, contained in Item 1 of Schedule 5 to the Bill. As the Law Council observes in its submission, this

> has the potential to impact adversely on both parties to an agreement who have settled their property affairs in good faith, and on the basis of what was provided in the *Family Law Amendment Act 2000.* It also significantly alters the conditions in which parties may have made settlement. There is no ground to set aside an agreement under section 90K of the Family Law Act on the basis that the legislation is subsequently changed.[3]

Senator Greig also notes the concession of the Department that there is no way of ascertaining exactly how many people will be adversely affected by the new provisions.

Given the significant impact that these new provisions will have on the rights and obligations of parties to financial agreements, the Democrats do not support their retrospective application.

Removal of requirement for financial advice

Senator Greig opposes the removal of the requirement for parties to obtain independent advice in relation to financial agreements.

The Democrats take the view that this requirement provides an important safeguard to protect the interests of those who enter into financial agreements, particularly the interests of vulnerable parties.

Senator Brian Greig
Australian Democrats

3 *Submission 8*, page 2.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Women's Legal Resources Centre
2	Family Mediation Centre
3	Australian Institute of Family Studies
4	Hobart Community Legal Service Inc
5	National Council of Single Mothers and their Children Inc
6	Australian Bankers' Association
7	CONFIDENTIAL
8	Family Law Section, Law Council of Australia
9	Investment & Financial Services Association Ltd
10	Office of the Commissioner for Children
11	NSW Commission for Children & Young People
12	Attorney-General's Department

Additional information

Letter from Legal Aid Queensland dated 31 July 2003

Letter from Victoria Legal Aid dated 1 August 2003

Letter from Legal Services Commission of South Australia dated 4 August 2003

Letter from National Legal Aid dated 6 August 2003

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEEE

Canberra, Tuesday 22 July 2003

Law Council of Australia
Mr Denis Farrar, Treasurer, Family Law Section and
President of the ACT Law Society
Ms Juliette Ford, Solicitor, Farrar, Gesini & Dunn

Women's Legal Resources Centre
Ms Catherine Carney, Principal Solicitor

Australian Bankers' Association
Mr Ian Gilbert, Director – Retail Policy

Investment and Financial Services Association
Ms Helen Brady, Technical Manager, Retail Superannuation and Retirement Incomes

Attorney-General's Department
Ms Phillipa Lynch, First Assistant Secretary, Family Law and Legal Assistance Division
Mr Kym Duggan, Assistant Secretary, Family Law Branch