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REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 2

INQUIRY INTO EVIDENCE GIVEN DURING BUDGET ESTIMATES ON 7 AND 13 NOVEMBER 2006

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At Sydney on Thursday 21 December 2006

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The Committee met at 2.00 p.m.

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PRESENT

The Hon. R. M. Parker (Chair)

The Hon. Dr A. Chesterfield-Evans
The Hon. A. Fazio
Ms S. P. Hale
The Hon. M. J. Pavey
The Hon. C. M. Robertson
The Hon. H. Tsang

CHAIR: Thanks for coming in at this time of the year, which demonstrates how hard we work in the Legislative Council, right up to Christmas. Welcome to the first public hearing of the General Purpose Standing Committee No. 2 inquiry into aspects of evidence given by Dr. Shepherd during Budget Estimates hearings on 7 and 13 November regarding the Community Services portfolio. We are all aware of the purpose of today's hearing, but I will run through that for Hansard. It is to question the director general on his evidence during the Budget Estimates inquiry 2006-07 regarding the need for an amendment to the Children and Young Persons (Care and Protection) Act 1998.

Dr. Shepherd gave evidence that the amendment had been introduced following a decision on appeal to the District Court that concerned the use of similar fact evidence in care proceedings. Dr Shepherd subsequently provided the committee with a copy of the relevant District Court judgment and transcript which related to the closed court proceedings of a child protection matter. With the consent of the Chief Judge of the District Court, the committee published the judgment and transcript in an amended form with the suppression of any material likely to identify the parties.

I remind all those present that in child protection matters the utmost care is taken to protect the privacy of individuals, especially children, and that in certain circumstances the publication of the name or any identifying material regarding a child is an offence. For this reason, no reference should be made to material likely to identify the parties involved in the relevant case by members in their questions or by witnesses in their answers. If this occurs inadvertently I will direct the media not to report the name or identifying materials referred to.

Before we commence I will make some comments about various procedural matters. In accordance with the Legislative Council guidelines for the broadcast of proceedings only committee members and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of filming or photos. For the reporting of the proceedings of the committee, the media must take responsibility for what they publish or what interpretation they place on anything before the committee. Those guidelines are available at the door. The delivery of messages needs to go through the members of the Legislative Council secretariat staff or committee clerks. Evidence given before the committee and any document presented to the committee that has not been tabled in Parliament may not, except with the permission of the committee, be disclosed or published by any members of the committee or by any other person. I welcome Dr Shepherd, Ms Rygate and Mr Best.

NEIL CRAIG SHEPHERD, Director General, Department of Community Services, affirmed and examined, and

DONNA THERESE RYGATE, Executive Director, Strategy, Communication and Governance, Department of Community Services, and

RODERICK CHARLES BEST, Director, Legal Services, Department of Community Services, sworn and examined:

CHAIR: If you should consider at any stage that certain evidence you wish to give, or documents you may wish to tender, should be heard or seen only by the committee, could you please indicate that fact and the committee will consider your request? Do you want to make an opening statement?

Dr SHEPHERD: Given the nature of the inquiry, and given the fact that we will traverse in both the opening statement and I presume in answers to questions, case material, and as your own committee clerks would have found when they were trying to de-identify the written material in front of them, it is much harder to do that when you are giving oral evidence. At least for the material that we are dealing with in relation to the matter of the similar fact evidence it, I believe, would be better for all concerned if we took that in camera. I guess I have a second question for you that I do not know how to deal with, that is, how we deal with the Hansard material that may inadvertently be identifying?

CHAIR: In normal circumstances Hansard and the committee would resolve to suppress that sort of information. That is the usual course of events that we would take, and the committee would need to decide in terms of the in-camera presentation what its view about that is. Are you suggesting that the whole of this hearing today be in camera?

Dr SHEPHERD: It depends on whether we are traversing the factual situations that sit behind the cases because clearly we need to do that. If we do that, as your people will have found, it is very difficult to not have material in there that would identify people. Now at the moment we do not have a problem because the two people at the back of the room are known to me but I am conscious that we need to be careful with this material because some of what I will talk about involves active cases where the person who is being observed, if you like, does not know.

CHAIR: The committee members have before them de-identified information only. They do not have any information that is identifiable, and that is the information that has been published. My understanding of some committee members, but not all of them, is that they do not intend to go into specific details. Perhaps we can make that decision at the time when that issue arises. But committee members do not have identifying material that would cause, I would think, a slip-up in terms of revealing information because they only have received de-identified information in the first instance.

Dr SHEPHERD: I guess I am more concerned about slipping up on this side of the table when giving oral evidence than I am about members of the committee.

CHAIR: Perhaps you could let us know if that is the case.

Dr SHEPHERD: You might want to have a look at the letter that we were sent which basically suggested this course of action.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: From the Crown Solicitor?

Dr SHEPHERD: No, from the secretariat.

The Hon. MELINDA PAVEY: We did receive advice from the secretariat advising that you would want to give in-camera evidence, but not everything in camera.

Dr SHEPHERD: Correct.

CHAIR: This has clearly taken up a lot of the time that we have for questioning today. Our view is that we have only got de-identified material. We have published that information. That is the basis of what our questioning will be about today. Perhaps you could indicate if there is a point with which you feel uncomfortable but the message I am getting from the committee is that they feel very confident that the line of questioning is not going to be an issue.

The Hon. MELINDA PAVEY: The issue is if there is a slip-up on your behalf, and it is recorded by Hansard, you want some way to cleanse the identifier?

Dr SHEPHERD: Yes, I just want to make sure that we do not wind up with a problem.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: It depends on what the problem is we are talking about. If we are talking about a problem of the confidentiality of the suppressed case, that is one thing, but if we are talking about what has been happening with the department in the way it has managed it, then my view that is very much in the political arena and ought to be kept public.

Dr SHEPHERD: That is fine.

CHAIR: If an issue arises we will deal with it at the time. If something is published we can always take that from Hansard. If any media should attend they are very clear about, and I gave instructions at the beginning about their responsibility. Given we have now taken a quarter of an hour from that short time, do you have an opening statement you wish to make other than that clarification?

Dr SHEPHERD: Yes. If the committee wishes to extend time by a quarter of an hour then I am comfortable to do that. There is nothing to hide here. I will make an opening statement. Similar fact evidence has been around as an issue in child protection and child law for a considerable time and there are numerous cases on it both in New South Wales and elsewhere. There is also significant academic comment on similar fact evidence. Given the committee's interest in the subject, I would propose that Mr Best and I take you through the material at least in broad terms so that you can see why it has been important to codify the law as the Parliament has done.

When I was giving evidence previously I tried to simplify the material in the interests of time. The Committee hearings were designed to cover a wide range of issues in a fixed period and, therefore, I gave a very general description of a case that I thought would illustrate the point that I was making about similar fact evidence, and I also described, in general terms, how the appeal process works. The case I had in mind, although I was very careful not to cite it at the time, was the one that I will discuss in more detail in a moment. It is also the one that you have published on the web site, because we provided it to you. However, there are others and Mr Best will take you through those other cases, if you wish. I had been aware of the view of our legal experts on the impact of this case for quite some time. It is a 2002 case. However, given the complexity of the fact situation that led to it, it is important that I give the Committee a bit more background about that case.

In that case, three previous children have been removed in the 1990s and the consistent feature was emotional abuse characterised by persistent violent verbal abuse. At removal the youngest child was six and the oldest child was 10. The cause sitting behind that was basically mental illness with a diagnosed personality disorder, and that particular personality disorder manifests itself once the children are old enough to challenge the affected carer. There were other factors present, at least in the case of the last two children, and they were alcohol, drugs, neglect and domestic violence. Those things were present as well. In 2000 the fourth child was born to this mother and, based on history, DOCS removed that child two weeks after birth entirely based on the history and the fact that we believed there had been no change in relation to the circumstances around the child. We then went to the Children's Court and got a 12-month order for parental responsibility to the Minister. We then went back at the end of that time and got an order for parental responsibility to the Minister until age 18.

In 2002 there was a variation sought to that order, which was declined and the natural mother appealed that decision, which is the basis of the case you have had a look at. The District Court opened all the findings of the previous decisions. When you know that DOCS case is based entirely on the history of what happened to the siblings and the fact that there was no change—remember, this child was removed at two weeks of age so, clearly, none of those other factors have had an

opportunity to operate—we were clearly seeking to use similar fact evidence to prevent future harm to a child. The District Court judge in fact acknowledges this if you look in the judgment. Then he finds that the child should never have been taken into care, and the Chief Judge in the District Court in his letter to you makes exactly the same point. He says the judge focused on the capacity of the mother to care for this child and, basically, in brackets behind that you should have "at this time". If that is not squarely in line with what I said to the Committee in earlier evidence then I am prepared to eat this blue folder. I do not know what else is squarely in line with what I said to the Committee earlier. In the same vein, I should read out to you the Counsel's opinion who dealt with that case.

The Hon. MELINDA PAVEY: Legal counsel?

Dr SHEPHERD: The legal counsel's opinion.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: For DOCS?

Dr SHEPHERD: Yes, but not a DOCS employee.

Ms SYLVIA HALE: And this was a comment subsequent to the judgment?

Dr SHEPHERD: Yes. This is his comment subsequently on that case.

CHAIR: After the District Court judgment?

Dr SHEPHERD: After the District Court case.

Ms SYLVIA HALE: When was that comment obtained?

Dr SHEPHERD: October 2002.

Ms SYLVIA HALE: So it was soon after.

Dr SHEPHERD: It is proximate. He said, "His Honour's disregard or, at best, scant regard for historical matter is wrong. Authorities such as Cormack v. Burton established that in proceedings alleging neglect based on incompetent guardianship, the issue will necessarily involve consideration of events over an undefined period prior to the date alleged in the complaint. In my opinion His Honour has discounted the historical features of this case, especially evidence of the difficulties experienced by the appellant's three other children while in her care. In my view His Honour was wrong in this regard." The sad fact is that both we and the Children's Court are bound by the decision in that case. We must now wait with this child until circumstances change significantly before we can take the matter back before the court. Basically, what we are doing at the moment is sitting on our hands waiting for this child to be damaged.

In that context there is now a fifth child [*Evidence omitted by resolution of the Committee, 21 December 2006*] We cannot reopen that case until some significant change occurs, and that significant change will be the child gets a little bit older and something unpleasant happens, which will be in exactly the same vein, in our view, as what happened to the three previous children. That is the opening statement I wish to make. However, there is one other thing, and that is that the Chief Judge of the District Court raises the fact that he knows, and he is careful with his words, of no other judgments on this issue. In fact, there are a substantial number, both in the Family Court, in New South Wales courts and in the English courts. Mr Best will take you through those, if you wish. We are quite happy to leave you with a paper that covers in more detail than he will those cases and the implications of those cases.

CHAIR: You said that you provided the transcript and judgment to the Committee. It was my understanding that they came from the District Court.

Dr SHEPHERD: No. We were asked to provide it. The Minister, in fact, provided it to the Committee, but for all this, we provided it to the Minister.

CHAIR: It is my view that we are here today because you suggested to us at estimates that we needed the transcript to understand the judgment because it was the precursor to the Government taking legislation on parental control before the Parliament. When we asked for that information to be presented we had difficulty in obtaining it. We wrote to the Chief Judge who told the Committee that, in his view, that was not the case, that past history had been taken into account. That is why we were then concerned and wanted to ask further questions. That was our understanding.

Dr SHEPHERD: I accept that.

CHAIR: That there was a conflict of interest. If this case is so significant that we needed legislation that changed the onus of proof why, in a 2001 and 2002 case, did it take so long to get to the point where the significant legislation was rammed through the Parliament late at night without consultation with a wide range of groups? The only indication of the legislation was through the *Daily Telegraph*. Why did it take so long for that to happen if this was such a significant case with such significant information that required it?

The Hon. AMANDA FAZIO: Point of order: My understanding is that our terms of reference relate to evidence that was given by Dr Shepherd on the two occasions when he appeared at supplementary budget estimates hearings. For you to ask Dr Shepherd to comment on the process and the timetabling of legislation to go through the Parliament is completely outside the terms of reference of this Committee and, in fact, is quite a cheap political shot that Dr Shepherd cannot be expected to answer.

CHAIR: To the point of order: It was Dr Shepherd who raised it in estimates with us, and raised for the very first time that it was this case, and this judgment that led to the legislation. If it is not pertinent to what we are doing today I do not know what is.

The Hon. AMANDA FAZIO: Further to the point of order: Of course, the legislation is pertinent to what we are discussing today. Your comments and your opinions about the way in which the legislation was timetabled and passed through the House is, clearly, outside the terms of reference.

CHAIR: In my view it is relevant, and I think Dr Shepherd is prepared to answer it.

The Hon. AMANDA FAZIO: That is your ruling, is it?

CHAIR: That is my ruling.

The Hon. AMANDA FAZIO: You have to remember that you are in the chair.

CHAIR: Yes, that is my ruling.

The Hon. AMANDA FAZIO: And, in fact, you should step aside when someone takes a point of order on a question that you ask.

CHAIR: Thank you for that. Do you wish to take it any further?

The Hon. AMANDA FAZIO: It depends on your future behaviour during the terms of this hearing.

The Hon. HENRY TSANG: Further to the point of order—

The Hon. MELINDA PAVEY: Stop wasting time, Henry.

The Hon. AMANDA FAZIO: We are not wasting time. We want a bit of decent process here.

The Hon. HENRY TSANG: I thought that Dr Shepherd, in his opening remarks, explained that the judgment itself had prevented DOCS from looking after the children, and that they are waiting for something more damaging to happen. That is why the new legislation is required. That is very simple in those terms.

CHAIR: That is not a point of order. I think Dr Shepherd is prepared to answer the question. Would you mind?

Dr SHEPHERD: I do not think it is appropriate that I answer that part of the question that relates to parliamentary process. However, as I said at the beginning, the issue of similar fact evidence has been around for a long time and there are earlier appeal court decisions in the 1980s that ought to have settled the question of similar fact evidence forever. However, those cases do not get followed all of the time in the lower courts. So, we have a situation where this issue keeps coming up and keeps coming up again. As Mr Best will tell you, if you give him an opportunity to take you through the other cases, there is a relatively recent Family Law Court case of the full bench of the Family Court that basically goes the other way and would prevent the introduction of similar fact evidence. There is serious academic comment on that particular case. So, there is a long history to this. It is not one case. I used one case as an illustration. Certainly what I did in coming to the Government with a proposition, that case was very much in the back of my mind as a case that illustrated the point I was trying to make. I think I have made it very clear that that does illustrate that.

Why four years? The Act was due for review, as you know, in this year. We have been working on a review of that. We did take similar fact evidence to a committee of the key stakeholders—the Children's Court, Legal Aid Commission, the Department of Community Services and the Attorney General's Department—much earlier this year, and no objections were raised by them in relation to similar fact evidence. Legal Aid is the agency we would have anticipated would have raised serious concerns about similar fact evidence if it had been an issue. It is not as though we have not taken it anywhere. It is not as though we have not talked to other stakeholders in framing this similar fact evidence proposal and it is not as if the whole thing is based on a single case. It is not. I simply used that case to illustrate to the Committee how the thing worked and what the problem was. If you look closely at the transcript of my evidence that is exactly what I did.

CHAIR: So there was not a sense of urgency that it needed to be dealt with as there was a past history of similar cases?

Dr SHEPHERD: It is complex. You anticipate in a sense that the earlier cases, which Mr Best will take you through, would bind all the courts in New South Wales in relation to similar fact evidence. The fact is it keeps coming up and they find ways around that as well. We had a case even last week where we could not get similar fact evidence in front of the Children's Court or at least get it considered with any weight. We decided there was no point in taking any of those cases on appeal; we would be better to codify the law. That is the proposition that we put to the Government, that we codify the law. You could make the same point that you made a moment ago, going back to 1980, which would cover governments on both sides, because this matter has been bouncing around since then.

CHAIR: You mentioned DOCS sitting on their hands and waiting for something to happen to this child and siblings. Surely there is a care plan in place that involves more than sitting on your hands?

Dr SHEPHERD: When I say sitting on our hands, I guess I should not use colourful speech in this place because it is likely to lead to another inquiry. What I mean is we are bound by the terms of the District Court decision and we cannot go back to seek to reopen that case in relation to that child on the basis of similar evidence.

CHAIR: But part of that transcript that I read, and the judgment, there were undertakings in terms of future care of that child that the appellant made.

Dr SHEPHERD: No. Because there are no orders in relation to that case. Remember, the judge gave the child back to the natural mother, therefore there is not a care order in relation to that child.

CHAIR: I thought there were some undertakings about future care.

Dr SHEPHERD: No, there is no care plan, as I understand it anyway.

The Hon. MELINDA PAVEY: Dr Shepherd, you would be well versed with this judgment. Were you happy with the way your department handled this case?

Dr SHEPHERD: Yes, I was. Do not forget, the earlier cases in the Children's Court occurred before I took over DOCS.

The Hon. MELINDA PAVEY: When did you takeover DOCS?

Dr SHEPHERD: July 2002, and the earlier cases were in 2000 and 2001. This has occurred pretty much straight after I arrived in DOCS. I certainly had conversations with the Director of Legal Services about the case and the implications of the case. I certainly did not read the transcript of the case at that time. There would be no need. I do not do that, legal staff do that.

The Hon. MELINDA PAVEY: The reason we are here today, in your evidence you did say:

> The reason that the legislation is in there is because the judges said they would not consider the evidence of the previous three.

It is clear from the judgment of Judge Phelan that he did consider the parenting history. I have read the judgment. It said there was discussion and there was evidence from the transcript about the other cases. I just refer to Judge Phelan's comments in relation to lack of management from DOCS through this case as being his greatest concern, which resulted in the decision he ended up making of giving the child back to its mother. I would be interested in your comment about the criticism of DOCS management in the judgment and why they are not there.

Dr SHEPHERD: I am not in a position to answer that for the simple reason that all of that would have occurred before I took over DOCS and there is nobody here in an operational capacity who would be able to answer that. However, the points made earlier about the judge considering, and considering properly, that evidence, I would say that the extract I read you from the counsel's opinion would suggest otherwise. So, what we get into here is an argument backwards and forwards based on legal opinion and we can go into any court or any legal academic arrangement and we will have never-ending arguments about some of the material I have given you today or what the District Court judge has said in his letter to you, because quite clearly Mr Best is happy to outline the fact that he disagrees with what is written in there, as do a number of academics. So, we can just go backwards and forwards on the point of legal interpretation.

The Hon. MELINDA PAVEY: We could go backwards and forwards for days on legal interpretation, but as a non-legal person reading this judgment I should think that even though you were not the Director General of the Department of Community Services at the time, there is enough reason to be concerned about the way the case was managed which resulted in the decision by Judge Phelan?

The Hon. AMANDA FAZIO: No, it did not.

The Hon. HENRY TSANG: That is your personal judgment.

CHAIR: You may answer the question, Dr Shepherd. Interjections are disorderly at all times.

Dr SHEPHERD: I have already made it clear that I cannot answer that question in relation to this particular case at the time that the things that the judge was talking about occurred. I am not in a position to do that and nor would I seek to do so. That was commenting on the administration of a previous director general and previous government and previous Ministers, and I am not going to go there.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I am very concerned about this. We were asked to reverse the onus of proof based on precedent cases, and getting these cases was like pulling teeth. We could not get them from the Minister when the thing was in the House and we had difficulty getting them from you. When we got them from you they were couched in secrecy and now they are completely de-identified such that it is difficult to read them and you are still asking for

secrecy. The thing that comes out very clearly from this transcript is that DOCS did an extraordinarily bad job of managing this case. The woman had improved, according to the medical evidence, such that she was much better with this child than with the others and DOCS seemed absolutely unwilling to acknowledge that she had improved and to let it keep her own child. Now, because this child was taken away this case is given as evidence as to why DOCS should be allowed to make the decision without the court or without having to go to court or with the woman having to do all the proving in court and not DOCS. All I can say is it looks to me very like DOCS is extremely embarrassed by cases like this, does not like the time or expense and simply wants to avoid the courts. What do you say in answer to that?

Dr SHEPHERD: There are a lot of things I would probably say in answer to that.

The Hon. CHRISTINE ROBERTSON: Especially seeing some of it was not true.

Dr SHEPHERD: Yes. From my point of view a lot of that is nonsense. In terms of the de-identification of the case, you might ask your own Committee clerks who de-identified it, and not us. So, you can work out amongst yourselves where the level of secrecy applied. We did not de-identify that case.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: No, I am not saying you did.

Dr SHEPHERD: Then you are accusing me of secrecy based on the de-identification of—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: De-identification has nothing to do with it. We could not even get the citation for months. That is what the hearing is about, because I wanted the citation. We were given no evidence of cases on which to base the fact that the onus of proof was reversed by this Parliament, Dr Shepherd.

The Hon. HENRY TSANG: Madam Chair, can I ask you to ask Hansard to go back to the accusation made by the Hon. Dr Arthur Chesterfield-Evans, because what he has said is outrageous?

CHAIR: No. Dr Shepherd has been asked a question by the Hon. Dr Arthur Chesterfield-Evans. I am sure he understands that question and I am sure he is capable of providing an answer.

Dr SHEPHERD: I find the framing of the question of offensive. I need to make that point. The second thing is that in terms of the de-identification of the material, that was done by the Committee or the people who service the Committee, and not by DOCS. The only reason we seek to de-identify material is to protect the people who may become known as a result of the material being published. I would not have talked to you about the case in the first place nor would I have agreed to provide you with the judgment—and it is DOCS who provided you with the judgment—and it is also DOCS, me, who suggested you probably should look at the transcript as well. I do not know what is secret about that.

Secondly, what you were trying to do in terms of obtaining this, as far as I am aware, does not run to months. I was asked on 7 November, or whatever the date was, could I provide the citation to the case. I said I would get the case for you. I was asked again about that on 13 November and I said yes, because I had a look at only an extract of the judgment at that time, which was the stuff around page 39 to 41, and I said okay, it is going to be difficult to understand what the import of that is. Then Mr Best explained to me in some detail why the case has stood, from his perspective, for what we have said it stands for, and he said to me at the time, this is between 7 and 13 November, it will probably be clearer in the transcript. So, openly, I said to you on 13 November, in order to get your head around this case—and I think they were the words I used—it would be better to get the transcript, or words to that effect, and then we got the transcript for you. I do not know who you were talking to for months but you got that in less than 10 days, which is what, six or seven working days, after I said I would get you the transcript. So, I take that question as being exceedingly offensive.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Let me speak about that. I asked about this. When the legislation was introduced, which was the first time that I came across it, I asked the minders to give us some citations to back their proposition. We never got those. It was all highly secret. Indeed, I pushed for the hearings that would try to get to you because I could not get an answer

as to these citations. This was the only citation we got. In fact, I think I cross-examined you and ran out of time and Robyn was the one who asked for a citation.

Dr SHEPHERD: It was Catherine Cusack.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Was it?

Dr SHEPHERD: Yes.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Then we got this document and we could not use it because it had to be de-identified. And on it went. Now you are asking for more secrecy again. The thing that stands out—

The Hon. HENRY TSANG: There is no secrecy. Do not use those words.

The Hon. AMANDA FAZIO: Open government does not equal a lack of right to privacy for people in the community.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The main privacy it seems is that DOCS wants not to have to be accountable to the court.

The Hon. HENRY TSANG: That is rubbish.

The Hon. AMANDA FAZIO: That is rubbish. You are making a fool of yourself today.

CHAIR: Dr Chesterfield-Evans, if you want to frame a question and continue.

The Hon. HENRY TSANG: Do not make accusations because the witness will not sink to your level.

Dr SHEPHERD: I reject completely the idea that we have brought similar fact evidence before, or put to, the government that similar fact evidence should be dealt with in the way we have asked for it to be dealt with in the amendments in the legislation in order to promote secrecy. That is nonsense. What we have done is to seek to make it necessary for the court to consider and give due weight to similar fact evidence when we present it. That is all we have asked to do. Now the reverse onus of proof is a completely different issue and it was dealt with in a different part of the transcript. If we want to talk about reverse onus of proof I am happy to do that as well. But we have been talking solely about similar fact evidence so far.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: My understanding was that this case was evidence for the proposition that the onus of proof had to be reversed. That was my very clear understanding from the beginning in the facts of case, and my understanding is that is why the new chief judge in the absence of Judge Phelan has said that this is not evidence for that proposition.

Dr SHEPHERD: I do not recall—and we would have to go back through the transcript—but my recollection is that when I was talking about this case I was talking about similar fact evidence. The Clerks or someone might be able to help me, but I am pretty sure that is the case. However, my view would be—and I am happy to be corrected by the Director of Legal Services alongside me—is that this case is not at odds with the proposition that reversing the onus of proof is a good idea because all that reversing the onus of proof does, as I thought I made clear the last time, is to require the person with the greatest knowledge of what may have changed to raise in the mind of the court the possibility that there has been change. "Reverse onus of proof" is a bad expression—it is the legal expression—because you are not actually reversing the onus of proof. But—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The—

Dr SHEPHERD: Do you want the rest of that or not?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you mean the rest of your answer?

Dr SHEPHERD: The rest of the answer to reverse onus of proof.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Yes.

Dr SHEPHERD: Okay. It does not require the person on whom that onus has been placed to prove either on the balance of probabilities or beyond reasonable doubt that circumstances have changed. They just have to raise a reasonable likelihood—you can give me the exact words, Rod, if you would like—that circumstances have changed and then the onus flips back onto the State to prove on the balance of probabilities, which is the standard that is used in the Act, that the circumstances have not changed. So it is really a relatively minor adjustment that simply puts in the hands of the person who would know most about it the requirement to convince the court that something is a bit different.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: In this case the woman—

CHAIR: Can I clarify before you go on that, Dr Shepherd, you did raise reversing the onus of proof in estimates following a question from Hon. Dr Arthur Chesterfield-Evans? If you would like a copy of that we can give it to you—your actual wording.'

Ms RYGATE: Was it 7 November?

CHAIR: Yes.

Dr SHEPHERD: Yes, okay.

CHAIR: Transcript pages 14 to 15, where you discuss reverse onus of proof in relation to the legislation.

Dr SHEPHERD: That is okay. In fact, what we have got is in the same—yes, okay; my apologies. What I have done is you have asked a question and then the first part of the evidence, which is the piece I was remembering, my answer is around similar fact evidence.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: We are getting along a whole lot of different lines here. Let us stick to two things. First, there is the reverse of the onus of proof. My understanding is that if a number of children have been removed in the past and another child comes along the presumption is that that child will be removed if DOCS thinks it is necessary unless the mother proves her case that she is a better and different mother than she was before or that circumstances have changed. So the onus of proof is on her because the presumption is the other way. That is what the legislation was about. That was my understanding, and that is the understanding of the lawyers that I have spoken to.

Dr SHEPHERD: We would require to have a case that raised sufficient concern in our mind that the new child would be at risk of harm because the circumstances that led to the removal of the previous child had not changed, and so the new child would be at equivalent risk to the child who was removed. This is not about, "A child has been removed, oh well, every other one that comes along will automatically be removed". That is not what this does. Certainly that is not what we would be doing either. Removal is the last resort.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: This is what you did, with respect.

Dr SHEPHERD: It is what we did here, yes.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: This is what you did here. You continued to try to take the child away. You have just told us here today that in this psychopathology, to paraphrase you, she will attack these children verbally where they stand up to her. In other words, you are sitting on your hands. When they get old enough to challenge her she will damage them as she has damaged the others. So your position actually is the same as DOCS' position in the case: that the mother has a psychopathology that still exists and therefore the children should be taken away. That is

your position despite this judgment it seems, and despite the medical evidence in this case. You have just told us the same thing this afternoon.

Dr SHEPHERD: I think you will find that there is conflicting medical evidence about the condition and what was happening with the condition at that point in time.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: There is some doubt about whether she had the condition.

Ms SYLVIA HALE: If I could just follow up on that point. Dr Shepherd, this case is the one that you introduced and said was the basis and provided all the material we needed—or implied that it was all the material we needed—to make a very substantial change to the law; a complete change to a fundamental principle of law that the onus of proof should be on the people laying the charges and the reverse. So I would like to ask you: Anywhere in this transcript can it be shown that the department challenged the view that the mother's conduct had not changed after the birth of this child? Where in this transcript is that evidence?

Dr SHEPHERD: Mr Best has gone through the transcript in some detail and I think he would be happy to try to take you through that—bearing in mind that it is a fairly thick document.

Mr BEST: Do you have the transcript?

Ms SYLVIA HALE: Yes, I have it here. The page number will do.

Mr BEST: It is page 184 on 27 September 2002. You will see that counsel for the Director General [*Name omitted by resolution of the Committee, 21 December 2006*] —

Ms SYLVIA HALE: I do not think you should name that person.

Mr BEST: He is raising with His Honour the issues about what information—

CHAIR: If I may interrupt for just a moment, I need to make a short statement about procedural matters. If information during the hearing is disclosed that leads to identification of the parties involved, as I stated earlier, it is important in terms of child protection that we maintain privacy. I direct members of the media and the public who may not have been present earlier that they are not to reproduce or report any identifying material in the public domain. I ask Hansard to omit any such identifying material from the transcript of proceedings. If anyone has a question about that they can approach the Committee staff. Committee members only have identified material in front of them.

Mr BEST: So counsel for the Director General at the time—this was one of a number of passages throughout the transcript—is bringing His Honour back to say that the Director General's case, the department's case, in this matter is about what has happened to the other children. So he—

Ms SYLVIA HALE: No-one disputes that.

Mr BEST: So he is saying, "The baby in this case has met the milestones. We are not disputing that. But what happened then, Your Honour, was that the child No. 1 was looked after well as a baby yet by the time he is 10 he is suffering all these problems". So he is trying to bring it in. His Honour is then responding by saying, "What you may be saying is true but I can't take this into account".

Ms SYLVIA HALE: Where does he say, " I cannot take that into account"?

The Hon. AMANDA FAZIO: Line 50.

Mr BEST: "That it is very difficult for me, on the basis of the information from hearsay, to elevate it in the absence; to use it to assist me".

Ms SYLVIA HALE: But the point he is making there is that it is hearsay evidence. He deliberately talks about the problems of untested, unsworn evidence which may have another explanation. So he is talking about how difficult that is to take into account.

Mr BEST: Yes, and the counsel is saying the laws of hearsay do not apply in care proceedings and it is only hearsay in this case because it does not apply to this child. That evidence that he is actually leading was accepted in the care proceedings concerning child No. 1. So it was not hearsay in the case of child No. 1 but it is hearsay in the case of this child. Therefore, it is the material that was used in relation to that other child that is not being taken into account here.

Ms SYLVIA HALE: But there is no question throughout this entire judgment that the judge is aware of both the previous history of the mother and also of the treatment of the earlier children. What he says—I think you will find this at about page 162—is the real issue in the case is trying to establish the probabilities of whether past harm is indicative of future harm. So it seems to me that there is no evidence in this case of a refusal to take into account similar fact evidence. The case depends solely upon the judge's weighing up of the probabilities of past harm being a reflection or being an indicator of what will happen in the future.

Mr BEST: No, I disagree—and the advice of counsel we used at the time also disagreed—because what the judge has said is he has classified this evidence as hearsay and he has said that he cannot therefore take that into account and weigh it up as appropriate evidence—not because it is untested because the evidence in fact was tested, and was tested in the earlier care proceedings. So it is not untested information. It is, in fact, information that was accepted in relation to child No. 1 before another judicial officer. And he is saying, "No, I can't take that information into account here because for this matter and this child it is hearsay. Therefore in terms of balancing it for the probabilities"—and he has had his attention drawn to section 93, where the Act says the rules of evidence do not apply—"yes, I understand all of the points that the department is putting before me and I am still saying that, in terms of balancing this up, I am giving this very low evidence because in terms of this matter I regard this as purely hearsay evidence".

Ms SYLVIA HALE: But he does say on page 162, "Of course, the department is heavily relying upon the past as a predictor of the future, which historically is the method of assessing the future but it is not necessarily a valid one." He is challenging, in fact, the department's contention that you can predict the future on the basis of the past.

The Hon. HENRY TSANG: That proves exactly the point.

Ms SYLVIA HALE: My original question to you was that there is evidence that the mother's behaviour has substantially changed; there is evidence that in fact her borderline personality problem with maturity may improve or even disappear. Nowhere does the department challenge any of that analysis and, therefore, it seems to me that the department's contention that the past is a suitable predictor of the future is an invalid one?

Mr BEST: With respect, the passages that I just read from counsel is just on that point because counsel was clearly saying if you look at child No. 1 at the same age of two weeks, you would not identify problems. You look at child two at two weeks and you would not identify the same problems. You look at child three at two weeks and you would not identify the same problems. Why, therefore, when you are looking at this child at age two weeks should you try and identify those problems.

Ms SYLVIA HALE: Except those observations are made right at the very end when the summations are being made whereas the evidence about the improvement in the mother's condition came much earlier in the case.

Mr BEST: I can take you through the transcripts right from the beginning where counsel for the department was doing so.

The Hon. HENRY TSANG: Please do.

Ms SYLVIA HALE: But you would agree that this judgment is really quite scathing of the department's handling of the case. The judge on page 19 refers to the department's parsimony; on page 34 its intransigence; on page 35 he says that it has been hypocritical and on page 28 he says that its action is being proscribed upon hypothetical rather than factual grounds. He talks on page 36 of the department's unilateral decision and the department attempting to delegate its statutory responsibilities. It seems to me that the department in this judgment comes out in an extraordinarily bad light.

Mr BEST: Whatever the comments of the judge might be and however well deserved or otherwise they might be in relation to performance of the department in a case does not impact upon the relevance of the case for similar fact evidence. The fact that it is a warts and all decision is clearly a matter that we are putting the matter out there to say that these are difficult cases and, yes, there will be criticisms of the department, and there was in this case.

Dr SHEPHERD: That criticism relates to cases in 2000 and 2001. That is before the Government introduced its reform package for DOCS and before substantial changes to the organisation. We are talking about a very old case in terms of what has happened to DOCS over the last five years and whether the judge was right or wrong on those matters—and there are a couple of things you read out there that I would take issue with—does not affect the importance of how we deal with similar fact evidence. And do not forget the accusation that has been made earlier about similar fact evidence. It does not take it away from the courts. It is in fact seeking to introduce a particular kind of evidence into the courts and give it due weight.

If we cannot get evidence in to the courts of what has happened previously to children in order to try and protect the next child, then I would have to say it is a pretty sorry state in New South Wales, because that might be all that stands between a child living and dying, or a child being seriously injured or not. We are not seeking to take the decision away from the court. All we are seeking to do is to have the court take that information into account. And, yes, we are batting around this particular case, but remember what I said in my opening statement. That case is simply illustrative. There are other cases and we are happy to take you through a significant number of other cases that deal with similar fact evidence.

The judge is plainly wrong when he says he should not take it into an account. He ought to have looked at some of the previous Supreme Court decisions, which said precisely the opposite, and counsel's opinion—you heard me read it out—said His Honour was wrong on this point.

Ms SYLVIA HALE: Why did the department not appeal then if it had that advice?

Dr SHEPHERD: We appealed the case but under a different set of circumstances. When you take a case on appeal, you can only take it on appeal on certain grounds. When we took it on appeal the Supreme Court basically declined to deal with it. There was a particular reason for that. The way we took it in there was because the District Court judge had opened up all of the—this is my recollection and you had better correct me if I am wrong, Mr Best—or I can decline to answer, which ever you like, but if we want to talk about this, I am happy to keep going.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Go on. You have covered yourself.

Dr SHEPHERD: Okay. We took it in there on the basis that he had, in our view, incorrectly opened up all of the other matters and the Supreme Court rejected that part of it and therefore the judgment stood. You can add to that if you wish—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So you did try to appeal, is the bottom line?

Dr SHEPHERD: Yes, because we thought it was a significant problem and when we could not get the Supreme Court to consider the point that we wanted them to look at, we thought the best way to deal with this was, in fact, through a change to legislation.

CHAIR: But it took four years to change the legislation.

Dr SHEPHERD: No.

The Hon. AMANDA FAZIO: Madam Chair, it is time for Government members to ask questions. I would like to be given that opportunity.

CHAIR: Dr Shepherd was finishing his answer.

Ms SYLVIA HALE: And I think Mr Best was about to enlighten us.

Mr BEST: If I could just add to what Dr Shepherd has said? As Dr Shepherd said in his opening, the matter got to the District Court by an appeal from the mother, who was seeking to overturn the refusal of the Children's Court to grant her leave to vary the care orders so as to enable her to have increased contact. By opening up the entire matter, what the District Court judge did was to find that the child had never been in need of care and protection, and there are words to that effect in the judgment. On the advice of counsel, what the department did was to take the matter to the Supreme Court to seek a prerogative writ from the Supreme Court to say that the District Court was wrong in reopening the entire matter and that what the District Court should have done was just to deal with the leave application.

If the District Court had not reopened the entire matter, that would have left the Children's Court finding intact, which was that the child was in need of care and protection and would therefore have just left the matter to be dealt with as whether contact should have been increased for the mother. The Supreme Court, when looking at that prerogative writ, said, "We have a discretion as to whether or not we give a prerogative writ and we have decided not to exercise this prerogative writ because we consider that the child has been moved around sufficiently often. The child has now been back with the mother and by the time it has been heard by the Court of Appeal, we think the order should stand and the department has a power to remove the child when the department gains further evidence that the child is again at risk."

So it refused to consider the application for the prerogative writ, which therefore left the District Court judgment standing. The District Court judgment was that the judgment was not in need of care and protection and therefore there were no care orders made in relation to that child and therefore there was no role for the department to maintain any ongoing relationship with that mother or that child.

CHAIR: Would Government members like to ask some questions?

The Hon. AMANDA FAZIO: Mr Best, could you go through some of the other cases that Dr Shepherd referred to in his opening statement that illustrate these points?

Mr BEST: Yes. There are a number of court cases, both within New South Wales and elsewhere. I suppose the leading case from a New South Wales perspective is the Court of Appeal decision in Wales and Tomkin. I am happy to table the case and I have attached copies of the judgment so you do not need to track them down or get citations.

CHAIR: Are they published judgments?

Mr BEST: This one is a published judgment and it is referred to in the reports as Wales and Tomkin.

CHAIR: You are happy to table those?

Mr BEST: Yes.

Ms SYLVIA HALE: There is no need to de-identify anyone in that?

Mr BEST: No. This was a case where the evidence concerned physical abuse of the child. The Children's Court had not allowed into evidence material from the schoolteacher for the child, basically commenting upon the number of times the child had come to school showing bruises and other physical harm. That had gone on appeal to a single judge of the Supreme Court, who had said he

was bound by the rules of evidence, which were that he should not take into account information which was not related to the particular incident of abuse. It was looking very much at the particular incident. It went to the Court of Appeal and the Court of Appeal said, "No, this is the care jurisdiction. You should look holistically at the situation. Guardianship is an ongoing relationship. You should therefore look at all of the arrangements and all of the circumstances." The evidence in that case of the schoolteacher concerning a series of bruises and the like to the child over a considerable period of time should therefore be taken into account. Another case is Cormack and Burton.

Ms SYLVIA HALE: Does not that decision therefore say that the court should take into account all of the evidence?

Mr BEST: Yes.

Ms SYLVIA HALE: Similar fact evidence?

Mr BEST: That is right, but the fact is that the court is not.

Ms SYLVIA HALE: Why did you need to change the law?

Mr BEST: Because the court is not doing that and I can keep going on to show you the examples where the court is not taking into account all of the evidence. The court is saying, "We want to look at the specifics, the individual incidents that are bringing this child before us on this occasion", and that is what happened in the matter under discussion. Phelan was saying, "What is the relationship now between this mother and this child? Yes, you have given me all this other information but, no, I am not interested in looking at it. I am discounting all of that. I am not taking that into account because I am looking at the current information about what is the relationship."

These other judgments, there are whole string of them, and Dr Shepherd referred to Cormack and Burton—which again is a reported judgment and those names are there in the reported judgment—which was a case that this particular counsel had appeared in which was undoubtedly why he referred to it in his subsequent advice, where again it was clear that the Children's Court had not taken into account the information which was there which was, in this case, the mother being unable to control the behaviour of the children over a considerable period of time.

The Children's Court on that occasion had said, "This is all old material. We will only take into account information which is relevant for this particular case. Therefore we will discount it." That matter went on to the Supreme Court. The Supreme Court again said, "This is a care jurisdiction. You need to take all of this into account and you have to consider this information." That was Cormack and Burton. Another case was that of "W". That name was not reported. That was a case where the department tried to introduce evidence of what happened prior to the child's birth and how the mother had related to other children. Again, the Children's Court in that incident dismissed that, did not take that into account and proceeded to discount that and said, "That is not appropriate information for us to consider." We took the matter of "W" on appeal and the Appeal Court again said, "You should take it all into account."

The matter of BC went to the District Court on appeal on this occasion. That was a matter of excessive physical punishment over a period of years. The Children's Court said, "I will only consider the evidence over the last X number of months"—therefore, it did not look as though the punishment was excessive over that period of time—and deliberately came out and said, "I am not considering information prior to a certain date." We took that on appeal to the District Court. Again, the District Court said—

Ms SYLVIA HALE: But if you are winning all the time at the appeal court and your problem is with the District Court, how is changing the law going to alter the situation?

The Hon. AMANDA FAZIO: Madam Chair, it is Government question time.

The Hon. CHRISTINE ROBERTSON: What is the time factor that occurs when it is taken to the Court of Appeal after one of these decisions from the Children's Court?

Mr BEST: At present we are running roughly at about 18 months to get it before the District Court. If we want to get in before the Court of Appeal we are probably looking at another six months to 12 months after that. If we are looking at a baby, we have now looked at something in the order of—look at the child in this case. This child was born in 2000. The judgement was handed down at the end of 2002. When we took it to the Court of Appeal we were halfway through 2003, which is why the Court of Appeal said, "Looking at the circumstances of this child, it is taking too long." If we have to constantly take matters on appeal, that is not a case of resources; it is a case of what is in the best interests of this child.

The Hon. AMANDA FAZIO: Can I just go back to some of the information included in the transcript of the case? What I want to talk about was that particular quote on page 162 of the transcript, where the judge said, "If we cannot say the balance is equal unless there is some more indicative factor that makes it more likely than not, of course the department is heavily relying upon the past as a predictor of the future, which historically is the method of assessing the future but is not necessarily a valid one". Is that the type of attitude that you encounter from the judges throughout when you had to take these cases on appeal?

Mr BEST: Yes, that is the sort of approach that we are getting. We get it in those sorts of words or we are getting responses coming back saying, "All you are trying to do is bring forward colourful information or prejudicial information" or "That is just historical information. Excuse me, I want information relating to the particular incident that has brought this child before the court. Why have you brought this child before the court, Mr Best? That is what I want to know." So they are discounting that information. Just last week there was a matter in a country court where five children had been removed; we are looking at the incident for the sixth child. The comments of the magistrate were, "You are using too colourful a language. The examples that you are giving are there to try to prejudice the court because you are not trying to look at the incidents for this particular child and the reasons that this child was removed on the particular night."

The Hon. AMANDA FAZIO: We often hear comments from people saying that magistrates should be re-educated about certain aspects. Obviously, when you have the issue of children, and particularly very young children at risk of harm, did you see that there was any other way out apart from changing the law so that previous evidence of parental behaviour and abuse was taken into account?

Mr BEST: Clearly, legislation is not the only approach that is adopted. Clearly, you are looking at educational programs. Clearly, you are looking at commencing discussions with the Judicial Commission, and you also look at publishing articles. The paper that I tabled sets out that the most recent issue of the *Australian Journal of Family Law*, has an interesting article by Justice Fogarty where he talks about the same sort of issue which exists in the Family Court and about the relevance of historical information, the relevance of similar fact material and how it is not being appropriately received in the Family Court at present, through certain cases that he is citing. He talks about a dichotomy in the Family Court about the approaches that they are currently adopting. So it is not just a case of talking about magistrates. Clearly, we are talking about a more general approach if we have similar sorts of comments coming through from the Family Court.

Those avenues of publishing articles, looking at judicial responses and the sort of material that the department is likely to put before the magistrates—you try to tailor the information so that you get as much information across and you run the arguments where you can—are all different avenues that you can adopt in terms of trying to change it. Having said that, of course, if you have something in the legislation which states that this is the approach that should be adopted, clearly that is the hook that the rest of the things hang off.

The Hon. AMANDA FAZIO: I think Dr Shepherd also said there was a case from England, a judgement from England, that related to this same sort of issue. Can you tell us a little about that and whether they have changed their laws in response?

Mr BEST: The House of Lords—I just handed across my paper so I would have to go looking for it. I think it was about 2004. It is the case of Re O in the House of Lords, so it is a quite recent decision. That looked at the question of historical evidence, and they brought down some rulings in terms of the use of historical information and similar fact information relating to other

children. Their situation, the facts of those cases, are very similar to the facts here. They are looking at what has happened to other children in the family, what has happened to this particular child to see whether that is relevant for the circumstances. For example, Dame Elizabeth Butler-Sloss, in the case of Re H—she was head of their family law division until her recent retirement—said that all the information relevant to the welfare of the child must be weighed in the balance and all relevant factors and assess the relevant advantages and risks to a child of each of the possible courses of action. She went on to give some considerable detail in that case, which related to sexual abuse, of the history of the behaviour of the adults concerned and the history of what has been going on for the child.

CHAIR: Mr Best, are you happy for the Committee to publish the document you have tabled?

Mr BEST: Yes, I am.

Dr SHEPHERD: I might just add to what Mr Best has said, and that is just to reiterate that we have a large number of cases and a substantial amount of information that shows that similar fact evidence is a problem. So what we were seeking to do was to codify the law to make it clearer for both caseworkers and judges as to what they needed to put before the court and what they needed to consider. That is all that has been done here with similar fact evidence. It is not about a single case; it is about a lot of cases, and they are still occurring in New South Wales and elsewhere.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Your point about reversal of the onus of proof, are you saying that it is not the case that if the presumption is that in this case is she has had a number of children taken away, she would then have this one taken away, the reversal that the Parliament has done it does mean that the woman then has to prove that she has changed and can now look after the child. Is that not what she has to prove?

Dr SHEPHERD: You are obviously not prepared to take it from me. I will let Mr Best explain it to you.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: No, my advice is the exact opposite to yours.

Mr BEST: The amendment which was passed said that evidence adduced is prima facie evidence that the child or young person the subject of the care application is in need of care and protection. All that does is give prima facie evidence. That is the wording of the section. There is prima facie evidence.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Does that not mean that the woman must prove that the prima facie evidence is not true?

Mr BEST: If the court is not satisfied that that prima facie evidence is not high enough, the court, as it does with all other evidence, must weigh that up and make the decision as to whether it accepts that information. Sometimes we will have care applications where the parents do not appear at all, and in that case the only evidence before the Children's Court is the evidence of the Director General. It is still up to the court to make a decision as to whether the evidence the Director General has led in that matter is sufficient to justify the making of the orders.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But in this case the mother has surely swum against the tide. She has had a council against her. She is unrepresented. She has turned up on an extraordinary number of occasions: "28/3/02, 3 April, 19/4 … 17/5 … 29/7, 28-9/8, 11/9, 26-7/9/02". So she has had all those times when she has gone into bat against the might of the department unrepresented. How many mothers would be able to do that if the onus of proof is reversed? And often when they get there, my understanding is that the legal aid solicitor arrives five minutes before if you are lucky and tries to put something together. They are very overloaded and underresourced.

Mr BEST: The information which is available from the various surveys of care material indicates that in fact this is an unusual situation, that most mothers will be represented and legal aid is there representing most parents in the Children's Court. Certainly, from anecdotal experience, it would be an unusual situation for a parent who is appearing not to be represented by legal aid or with a grant

from legal aid. I also totally disagree that legal aid is giving a lesser service to those parents, particularly by the time you have got to hearing. So Legal Aid, either by way of grant to a member of the private profession or by way of a commission's solicitor, will fight very vigorously with considerable skill and knowledge and have worked very closely with the parents to bring that matter. We do not have easily won orders in the Children's Court. Legal aid, when it represents parents or when it funds representation for the children, does an excellent job in my opinion.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: This still makes it considerably more difficult for a disadvantaged person, does it not, in terms of the equity of the legal process?

Mr BEST: They have to produce evidence to establish why they can look after this child. That should be what they are doing in any event.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But it is very difficult to prove a positive, is it not? You have to say, "Have you stopped beating your wife?" It is very difficult to prove that you have. "Can you look after your child?" Surely if the child is not being looked after it should be easy to prove. If the child is being looked after, that is harder to prove.

Mr BEST: What you are looking at establishing is the evidence which counters the prima facie evidence which has come in through this amendment. If the prima facie evidence is that it is domestic violence, then the record will be there that the police have not been called to that home for a domestic violence incident for some period of time. If you are a saying that it is a mental health issue, then it is the individual who will have the records to establish that they have been going through a particular program. If you are looking at drug abuse or alcohol abuse, again it will be the parent who will have the details to say, "This is what we have been doing."

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: You were talking about similar fact evidence. Dr Shepherd says the department is forced to sit on its hands until this child goes wrong like all the others did, which is more or less what the case has been saying which was rejected by the judge. Yet in this case the doctor said, first, he did not think that more therapy was needed because he was not sure that the diagnosis was too bad, and he had done some personality inventory which said she was not far off the normal scale anyway. It was not clear whether he was wanting to treat her; the department had not done the referral. The mother did not accept that there was anything wrong with her. The department did not appear to want to pay for any treatment, and, conspicuously, the regional head of department, as shown at page 15 of the evidence of 29 August, said that no other agencies could be brought in. I gather there were two other possible agencies and they were simply dismissed out of hand.

If you are saying that this woman is okay now but she is going to go wrong in a few years, surely you would be bringing in the support agencies now. But they were dismissed out of hand by the regional head of the department, and that is in the transcript also.

Mr BEST: Clearly those materials, in terms of how particular services were provided—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Or not provided.

Mr BEST:—or not provided for this mother, as the case may be, and whatever might have been found, are not relevant to the question of similar fact evidence. The similar fact evidence case will be: What was the harm that happened to the other three children?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: With respect, the similar fact evidence is as stated by Dr Shepherd earlier: Because the last three kids went wrong, this one will disapprove it. In the disapproving—

The Hon. HENRY TSANG: Madam Chair, would you allow Mr Best to answer the questions?

CHAIR: Are you taking a point of order?

The Hon. HENRY TSANG: I am taking a point of order that I am interested to hear Mr Best's evidence, rather than him being interjected on all the time.

CHAIR: That is not a point of order.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Similar fact evidence is what was being opposed by the appellant, is that correct?

Mr BEST: No. When you look through the transcript you will see that the appellant was not leading evidence about that. The appellant, in this case the mother, all the evidence she led was about her current relationship with her child.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: She is not leading the evidence; she is countering it.

Mr BEST: But she is not countering that argument either. Her argument is: I can now prove that I am now a good mother.

Ms SYLVIA HALE: Dr Shepherd, the department obviously attached great importance to this case and said that this was an exemplary case which justified the reversal of the onus of proof. What strikes me as significant about this case is, first, we have an example where the mother is unrepresented. You may say this is a rarity, but in the very case you select the mother is unrepresented and this obliges a judge at one stage to talk about the difficulties of lay people dealing with the rules of evidence.

As a result of the judge's examination of the psychological evidence that the department produces, there seems to be almost a misrepresentation of that evidence. I am not in any way challenging the importance of similar fact evidence; I think that is absolutely essential. What I am focusing on now is the reversal of the onus of proof. At one stage we have the department taking a formal objection when the appellant tries to introduce a letter and the department's counsel objects to that. Here is someone who is very experienced objecting to a lay person trying to produce evidence which they regard as being important. Yet the department itself produces a witness without any formal statement outlining the evidence, and there is testimony about that. Then, when there is that formal statement outlining the written brief of evidence, it is given to the appellant at 10 minutes to 10, 10 minutes before the hearing is to recommence.

What I find interesting is that there are legal counsel here, one representing the department, and then there is Ms P who is representing the interests of the child. Her evidence is, I believe, strongly contrary to the department's evidence. Where you have two legally trained people up against each other, as it were, certainly they have conflicting views. But in the middle of all this—or at least what will be the case from now on—you have the onus of proof being placed upon an individual, who in this instance is unrepresented. I consider that in some ways this is laying the basis for a travesty of justice, and it seems to me that this case, rather than supporting your view, tends to undermine it.

Dr SHEPHERD: I am not sure whether that is a statement or a question. My view is that the case that has been provided, plus the other cases, strongly supports the use of similar fact evidence in child proceedings. The reason for that is that we are here, supposedly, to protect the interests of children, and that should be the only concern of the child protection legislation.

Ms SYLVIA HALE: With respect, I am not interested in the similar fact evidence aspect; I am interested in the reversal of the onus of proof.

The Hon. HENRY TSANG: Madam Chair, I am trying to hear the answer. People should not be called upon to give evidence if they are not allowed to finish their answer.

CHAIR: I am not sure that that is a point of order. However, Ms Sylvia Hale was simply clarifying that her question was about onus of proof, not about similar fact evidence.

Dr SHEPHERD: Madam Chair, I was simply laying the groundwork for dealing with the second part of the issue. The reversal of the onus of proof came as a second issue that we believed

would assist the administration of the legislation or the proposition that had been brought forward. The reason we did that, as I have said numerous times in this hearing, was to put the person who was in the best position to say whether these circumstances had changed in the position of having to provide that information to the court.

At the end of the day, we are not in a contest here—which is what you seem to think it is. What we are concerned about is whether this child is going to be safe with this mother into the future. What we want to do is to be in a position to get the best evidence about that in front of the court. We have no interest in removing a child that does not need to be removed. You will notice if you look at the media from time to time that we are far more roundly criticised for not removing children than we for removing children. If we go back through the transcripts of the previous hearings, I think that might have even come up in the estimates committee hearings. We are not in the business of taking children away from their parents when they do not need to be removed.

We have massive programs in place to support parents. For example, the early intervention program, at $90 million-odd a year, is not designed to remove children; it is designed to support parents, to allow their children to develop as normally as they possibly can when they are at risk of coming into the child protection system. The child protection system itself goes through an elaborate process in order to try to support children and prevent them from coming into care. At the end of the day, the ones we take into care are the ones in respect of whom we believe there is no other option but to remove the child. Clearly, it is preferable to keep the child at home with adequate supports—bearing in mind, though, that we want long-term solutions for these children; we do not want them chopping and changing all the time.

I was not there at the time the original decisions were made in relation to the child in the case we are talking about, but I suspect that the reason they would have made that decision was that, based on the three previous children, it was likely that at age six there was going to be a disaster and the child would need to be removed. Therefore it was better that the child did not go through that, and that the child had a stable placement for a long period of time, and in fact that was the decision of the Children's Court.

The only reason we went down the path of reverse onus of proof, as I said, was to get the best evidence in front of the court. We do not have an interest in doing anything other than that. We are not in there beating up parents; that is not our task. On all the information I have seen, it is very rare for a parent not to be legally aided. My view is the same as the Director of Legal Services: that Legal Aid these days is a very good organisation that provides very good service to people in the care jurisdiction.

Ms SYLVIA HALE: Dr Shepherd, would you not agree that legal aid is very much subject to the resources that a government makes available to it, and that whilst one government may be benign another may not? Yet, the law has been changed, so that the onus of proof has been reversed so that a parent who may be illiterate, may be totally unfamiliar with court proceedings, or may be bamboozled, is held to be somehow deficient because they do not understand court processes. Do you not believe that we are going down a very rocky path when we reversed the onus of proof and base it on the comfortable assertion that they will get access to legal assistance?

Dr SHEPHERD: No, I do not agree with that proposition. It is my firm belief that the reversal of the onus of proof, in the vast majority of the cases where it gets used—and I do not anticipate it will be used all that often—will lead to a better outcome for the child that we have taken before the court than not having the reverse onus of proof. If I thought for one moment that the advice I had given the Government would lead to a worse outcome for children, I would be appalled, because that is not my objective. It is quite clearly not my objective; you only have to look at everything I have done and everything I have said. It is my firm belief that reversing the onus of proof in these cases is most likely to lead to the best outcome for the child.

In legal cases you cannot have 100 per cent certainty. We have had a discussion across the table about differences in legal opinion. We have been debating all afternoon the nuances of one legal view versus another. So it cannot be 100 per cent. But in the vast majority of cases, my firm belief is that this is the way we should go. If a subsequent government, of either persuasion, decided to do something nasty to legal aid, it is likely that the courts would recognise that problem and would work

out how they might want to deal with the changed circumstances. Courts do move things around in response to different sets of circumstances that they know people are faced with.

Ms SYLVIA HALE: But they can only take into account evidence that is before them, and an unrepresented parent may be totally unable to muster that evidence. They may not have the access to the psychologists' reports that the department can pay for, if it chooses to pay.

Dr SHEPHERD: If there were a psychologist's report, the psychologist will be a person who is registered in order to provide a proper assessment. They do not come in on one side or the other. They are used by one side or the other. But that is not the way they draft their report and that report would be available to the court. Remember that in the Children's Court, at least, it is often the Children's Court clinicians themselves who either do, or arrange for, the psychological assessment. So it is not necessarily a DOCS assessment that would even be there. But remember again our objective is to put the best evidence that we can put before the court. We are not trying to do anything different to that.

The Hon. MELINDA PAVEY: Page 2 of the judgment discusses undertakings that the appellant was to undergo which involved psychiatric care. His Honour said:

> Despite the impression given that these undertakings were given to the court, counsel for the department conceded that they were oral undertakings given by the appellant to the department.

There was no written plan for the mother in other words. They were oral undertakings given to the department with the appellant. Given that this was before your management of the department—you have been there now for 3½ to 4 years—I read with interest the piece in the *Good Weekend* two weekends ago. I thank you for allowing that to happen. I read within the report that that was a difficult process to happen. I refer to care plans and parental contracts. Are care plans still required for every case that you and your officers deal with?

Dr SHEPHERD: Yes, would be the answer.

Mr BEST: The answer is "yes". This case was under the 1987 Act so care plans were not part of the legislation and I think His Honour commented on the fact that it was under the old legislation and it would not now occur under the current legislation. Prior to a final order being made under the current Act a care plan has to be filed in the court.

The Hon. MELINDA PAVEY: That article was not clear in relation to that matter which could well be explained. How does a parental contract fit in to a care plan?

Dr SHEPHERD: I will get Rod to answer the specific detail of that but it might be worth noting that verbal undertakings were a practise of the department sometime ago. They were a practise of the department probably until two years ago, and clearly they were criticised by the Ombudsman in a number of reports. Most of the people around the table would know that. We have changed the policies and procedures. We do not, as a matter of policy now, use verbal undertakings in order to deal with these significant issues. Clearly they are very difficult to enforce and essentially they do not work, and probably this case illustrates that, but we do not use them now. I will ask Rod to give you the detail of parental responsibility contracts.

Mr BEST: Parental responsibility contracts are prior to the matter actually going to the court.

The Hon. MELINDA PAVEY: If something is going to court you then have a parental responsibility contract?

Mr BEST: No, it is before it has gone to court. So if it is going to court you would not be going for a parental responsibility contract. If you are going to court you would be filing your papers under section 61, or have done a removal, and you would be before the court. Once you are before the court you know that you have to have a care plan and you will have orders of the court coming out saying what needs to go, I suppose, into the framework for the care plan and will lay down arrangements in terms of parental responsibility or court ordered undertakings or supervision or

whatever else might be required and it is court orders which will give the structure and then the care plan fills in the details and a bit more for that.

The parent responsibility contract is where you are not intending to remove the child, you are trying to work with the parents or the carer and the child to try to put in place some arrangements which will hopefully improve the lot for that child. It is only if the parent responsibility contract is breached that that breach then allows for you to take the matter to court, allows you to get in to court as a consequence of the breach. So in terms of, I suppose, the spectrum of care proceedings you have got early intervention and then you have got parent responsibility contracts, and then moving along the spectrum you have got the court ordered arrangements. So it fits in prior to any court proceedings.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Are the verbal undertakings in this case now under the new legislation binding? They are now a written contract—is that the change in the law?

Dr SHEPHERD: Only if you use a parental responsibility contract to do a specific thing. You can still have a formal undertaking with a parent but we make those undertakings formal now rather than verbal or informal undertakings.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is that also a result of this case?

Dr SHEPHERD: Not specifically. We are taking far too big a view of this single case. As we have already pointed out there are stacks of cases around these matters. If you go back to the original transcript, I tried to use it as being illustrative of the sort of material that we were dealing with.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: We understood, with respect, that there was a case which was a binding case—my understanding is that this case is not binding because the District Court does not bind the Children's Court, unless I am mistaken. Is that not right?

Dr SHEPHERD: The District Court does bind the Children's Court, and this case is binding on the Children's Court in relation to its facts.

The Hon. MELINDA PAVEY: In relation to the fourth child only?

Dr SHEPHERD: In relation to the fourth child, yes.

The Hon. MELINDA PAVEY: Not in relation to the fifth?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The verbal undertaking was more or less that the woman has to accept that she has got a borderline personality deficit and get treatment. There was dispute about the borderline personality dispute. There was no formal referral and in the mind of at least one doctor there was no guarantee that he was going to get paid. Is that the case?

Dr SHEPHERD: Again you are taking me back into facts that are way before my time.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you dispute that those facts are in this transcript?

Dr SHEPHERD: Of course I do not dispute the facts are in the transcript. I gave you the transcript. Would you make your point again?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I am talking about the nature of undertakings. In this case the undertakings were: accept you are mad, get treatment and pay for it. If you do that you can have your kid and if you do not, you cannot. It was effectively a Kafkaesque request, surely?

The Hon. CHRISTINE ROBERTSON: They referred her to the GP and she did not go.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: She did go to the GP. The question is whether she would go beyond the GP.

Dr SHEPHERD: I guess my reading of the facts and the judgment are a little different to that and rather than get back into backwards and forwards over specific elements of that, as I said it is way before my time and other than the material you have got in front of you, plus what I have been told from legal staff, I do not have any better information than you have got about the very specific issues in those earlier cases. So leaving that, we certainly would not these days ask someone to undergo treatment under those circumstances and not be prepared to support that treatment. We do support that sort of thing.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: There seemed to be a reluctance to refer in that sense, or to negotiate a referral. It was conceded in the transcript that the mother was not very keen to go anywhere that the department referred her but if it was negotiated through her GP to a situation that might help her, she may have been willing to go. Is it the case now that the department would always pay for psychological counselling and support in a similar situation?

Dr SHEPHERD: Clearly we are in a very hypothetical place now but the Government has provided the department over a five year period with an additional $1.2 billion—a substantial increase in the number of caseworkers—and we have a number of additional programs that were not there in 2002. It is my view that if a person was in those circumstances again that we would try to support that person to make the change that was necessary. Now if the person is not going to make the change then we would take action in the Children's Court. That is what we do, particularly based on the earlier evidence.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: You could say that the undertakings in this case are now much more formalised than they were. There is a reversal of the onus of proof, both of which have acted against this mother with the changes in the law since this case and you are saying that the department is now much less parsimonious than it was at the time of this case in terms of getting help and supporting this lady?

Dr SHEPHERD: This is purely speculation.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I am asking about three features of this case: the nature of the undertakings, the situation with the onus of proof and the parsimoniousness of the department. Do you say all three of those things have changed? I say that the undertakings and the reversal of the onus of proof, two of them, the department has further empowered, vis-à-vis the case?

The Hon. HENRY TSANG: This is clearly out of the bounds of this inquiry?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: No, it is not. I do not know that I should even respond to the interjection but this case was cited by the department as a reason for the change in the law, and that is why I think this case is important. To slide away from this case, which was of such importance when we were putting the legislation through I think was a bit rich. Please let Dr Shepherd come back to the question of the three aspects.

The Hon. HENRY TSANG: It is the Government's time.

CHAIR: It is. If Dr Shepherd has a brief response we will then go to the Government for questions.

Dr SHEPHERD: It is impossible to speculate, given the complexity of these cases.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I was asking about the three aspects.

Dr SHEPHERD: Yes, and you have said two of them have changed—yes, they have. The third one has changed as well. We certainly provide, where services are available, a much greater level of assistance to a wider range of people than we were able to provide in 2002. You have got an early intervention program at $93 million per annum which is designed to deal with cases where early

intervention will make a difference and it deals with a range of circumstances in families, particularly where children are very small. Our whole objective there is to get to the children as early as possible, not take them away, and support the family, to allow the child to develop normally. There has been a significant increase in the budget for child protection, a significant increase in case workers and a significant increase in the quality of the assessments that are being done about those cases. We also refer to a wider range of services. In out-of-home care we are doing the same sort of thing.

The Hon. MELINDA PAVEY: And a significant increase in child deaths, according to the latest Ombudsman's report.

Dr SHEPHERD: No, that is not true. I suggest you have a look at a series of the Ombudsman's child death reports and have a look at the number of deaths and you will see that there was no significant increase in the number of deaths of children known to DOCS.

The Hon. HENRY TSANG: Madam Chair, you are allowing questions to be asked that are taking up Government time.

Bearing in mind that Dr Shepherd has mentioned it is always in the best interests of the child, would Mr Best provide evidence on how similar fact evidence and codification indeed is in the best interests of the child?

Mr BEST: One of the purposes of trying to get the information about similar fact evidence into the legislation was to make it clear what we understood the law from the Court of Appeal decisions on the difficulties that were being encountered in those decisions not being applied in magistrates' decisions. By this means what we are hoping to do is to make it clear to both judicial officers and legal representatives appearing in the court the range of information that should be available to a judicial officer for the judicial officer to make a decision about what is the needs of the child.

The Hon. HENRY TSANG: How does codification help?

Mr BEST: Codification helps by drawing people's attention to what is required, to reinforce in people's minds why it is required, to put it in context, which is where it appears in the legislation, of the types of evidence that should be considered or not considered. It will be there. It is in the same part of the Act as talks about what the court should consider and how the court should conduct care matters. The amendments are there to direct, and to give assistance and guidance.

The Hon. HENRY TSANG: In fact, it helps with the education of judicial officers as well?

Mr BEST: What we are hoping is that by taking into account similar fact evidence, we will look at the whole situation for a family and start to shift the focus, which is not there in all cases, but it is certainly in some cases, of just looking at a particular incident and instead putting that child back into the context of the family and saying, "What has been going on in this family's life? How serious has been the harm to other children?" If the harm has been that serious, content clearly alters how you consider the risk to the current child before you. It is a question of weighing up those risks and then trying to look out into the future and say, "Does this child need care and protection?" The way you have done that is, in part, by the risk factors that are demonstrated by what has occurred to other children in that family or the behaviour of those parents or those carers to other children.

The Hon. AMANDA FAZIO: Regardless of the mother in this case choosing to appear for herself in the District Court, is it still the case that the judge did not take into account to facilitate evidence that was presented by the department?

Mr BEST: The judge gives no evidence of having given appropriate weight to similar fact evidence.

The Hon. AMANDA FAZIO: In fact, it was irrelevant that the mother was unrepresented in this case?

Mr BEST: That is right, because as Justice Blanche said, the judge in the District Court was looking to see what the current relationship was between this child and parent and, therefore—and I pointed this out to you to in the transcript, and there are other parts—the judge was clearly saying, "I cannot take this information into account."

The Hon. AMANDA FAZIO: Even though the judge did not take similar fact evidence into account, in his judgment he stated, "I accept that the mother has problems with symptoms of paranoia and conspiracy." He further said, "The evidence is that the child may be at risk in the future. The risk is that the mother's inability to deal with her borderline personality problem may lead to dynamics between herself and the child which could be harmful to her psychological development." I think the "her" in that last bit is the child's psychological development. Despite all of this information in the judgment, and apart from the evidence that was given by DOCS this judge still did not take into account what underpins the legislation at the moment, which is the best interests of the child.

Mr BEST: Yes. And when you read the judgment you will see at the end that His Honour was saying, "I do not think this child was in need of care and protection, but I would like to try to make some formal undertakings." The Counsel for the Director General had to go back and say, "But if you have not found the child in need of care and protection you cannot then go ahead and make court orders saying that the mother has to give undertakings about how she is going to improve her parenting capacity because you have removed the capacity of the court to make any orders about that. The judge was clearly in his mind, and that is the way the judgment reads, saying, "I find there was no need to make any orders about this child, but I would like to make some orders about undertakings that the mother has to do because, clearly, there was concern about her relationship with the child." But we had to say, "But you have no power to do that." The discussion at the end of the judgment is about that.

The Hon. AMANDA FAZIO: It seems to me, from having read the letter from justice Blanche, Chief Judge, of 28 November, the reason we are actually having the inquiry is that there is a misunderstanding of the statement from Chief Judge Blanche that refers to the judgment being made and the capacity of the mother to care for this child at that time. There is a reference in his letter that says that evidence was taken in relation to other children, but that Judge Phelan suggested the evidence relating to previous children was irrelevant.

The Hon. MELINDA PAVEY: He does not say that.

Ms SYLVIA HALE: That is a total misrepresentation.

The Hon. AMANDA FAZIO: That is a direct quote from the letter. So much for your conspiracy theories about misrepresentation.

The Hon. MELINDA PAVEY: What letter? Where does "irrelevant" come out in that letter?

CHAIR: If you would like to identify which letter you are referring to?

The Hon. AMANDA FAZIO: The letter I was referring to, if people bothered to listen properly—

The Hon. MELINDA PAVEY: We were.

The Hon. AMANDA FAZIO: —I said was a letter from Chief Judge Blanche on 28 November 2006.

The Hon. MELINDA PAVEY: Where does it say "irrelevant"?

The Hon. AMANDA FAZIO: If you will be quiet, rude woman, I will tell you.

CHAIR: Please read the letter.

The Hon. AMANDA FAZIO: It says, "I have now had the opportunity of reviewing the judgment of Judge Phelan, and nowhere in the judgment did Judge Phelan suggest that evidence relating to previous children was irrelevant."

Ms SYLVIA HALE: Exactly!

The Hon. AMANDA FAZIO: "Indeed, Judge Phelan noticed action taken in respect of other children who were 13, 11 and 9 at the time of the hearing relating to the particular child, who was then only 2. The focus of the judgment was on the capacity of the mother to care for this child at that time."

Ms SYLVIA HALE: And he goes on to say, "Neither in this judgment nor in any other judgment that I am aware of has it been suggested that history cannot be considered." That is the key sentence.

The Hon. HENRY TSANG: Will you rule that the interjections are disorderly?

CHAIR: Absolutely—your interjection and Ms Hale's interjection.

The Hon. AMANDA FAZIO: Do you believe, or do you think that it is valid to say that the focus of the judgment was on the capacity of the mother to care for this child at that time has been misrepresented by people when they have been framing questions today, and may have been doubting the veracity of the Government's claims that this legislation was needed to allow similar fact evidence to be presented and taken into account by judges considering such cases?

Dr SHEPHERD: It is not for me to comment on the positions that might have been taken by members of the Committee. However, it is clear that the Government's position in relation to similar fact evidence came from a consideration of the sorts of circumstances that we believe in DOCS, and the counsel representing DOCS believes, demonstrated the failure of the courts to take into account adequately similar fact evidence. That sentence, "The focus of the judgment was on the capacity of the mother to care for this child at this time" is exactly the same position as Counsel has taken, and has suggested that the judge was wrong. It is exactly that situation that we are trying to correct so that children who are in front of the court have the best evidence available. It is also important in relation to the next sentence that was raised by Ms Hale where the Chief Judge says, "Neither in this judgment nor in any other judgment that I am aware of has it been suggested that parenting history cannot be considered." The simple fact is that Mr Best has provided you with a substantial document that shows there are many cases in which the parenting history has not been considered and, in some cases, has said to be unable to be considered. I take his words there that he is not aware of—perhaps that is carefully crafted, I do not know- but the simple fact is that there is a substantial number of cases, and the document that has been provided to you will demonstrate that amply.

CHAIR: Time has expired for Government questions.

[*Evidence omitted by resolution of the Committee, 21 December 2006*]

(The witnesses withdrew.)

(The Committee concluded at 4.17 p.m.)