REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO IMPACT OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) ACT 2006 (COMMONWEALTH)

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At Sydney on Tuesday 31 October 2006

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. D. Clarke
The Hon. G. J. Donnelly
The Hon. A. R. Fazio
Ms L. Rhiannon

CHAIR: Good morning and welcome. Thank you for attending this inquiry. This is the first and only public hearing of the Standing Committee on Law and Justice into the impact of the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act 2006. The inquiry has been established to inquire into and report on the impact of recent amendments to the Commonwealth Family Law Act on women and children in New South Wales and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.

The time frame for the report is short, as the Committee is required to table its report in Parliament on 1 December this year. Accordingly, the Committee is using this public hearing to receive evidence from witnesses with professional knowledge of the legal implications of the amendments. Given the inquiry's tight time frame, it will not be possible to hear in person from the many people and organisations that have made submissions. However, those submissions will be given full consideration by the Committee.

Before we commence I would like to make some comments about certain aspects of the hearing. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing the broadcast of the proceedings are available from the table by the door. In accordance with Legislative Council guidelines for the broadcast of proceedings, a member of the Committee and witnesses may be filmed or recorded but people in the public gallery should not be the primary focus of any filming or photographs.

In reporting the proceedings of this Committee, members of the media must take responsibility for what they publish or for what interpretation they place on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. Under the standing orders of the Legislative Council, any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of the Committee or by any other person.

The Committee prefers to conduct its hearings in public. However, it may decide to hear certain evidence in private if there is a need to do so. If such a case arises I will ask the public and the media to leave the room for a short period. I welcome witnesses from the Attorney General's Department and from the New South Wales Legal Aid Commission.

JUDITH ANNE WALKER, Director, Family Law, Legal Aid Commission, 323 Castlereagh Street, Sydney, sworn, and

LAURA KATHLEEN WELLS, Director, Criminal Law Review Division, Attorney General's Department, Level 22, Goodsell Building, Chifley Square, Phillip Street, Sydney, and

NICOLE MARIE LAWLESS, Solicitor and Senior Policy Officer, Criminal Law Review Division, Attorney General's Department, Level 20, Goodsell Building, Chifley Square, Phillip Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms WALKER: I am appearing as a representative of an organisation.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms WALKER: Yes, I am.

CHAIR: Ms Wells, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms WELLS: As a representative of an organisation.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms WELLS: Yes.

CHAIR: Ms Lawless, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms LAWLESS: As a representative of an organisation.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms LAWLESS: Yes.

CHAIR: Would any of the witnesses like to make an opening statement?

Ms WALKER: I might make a concluding statement after I have seen where your questions lead, otherwise it might be repetitive.

CHAIR: Thank you.

Ms WELLS: Likewise.

CHAIR: As a result of amendments to the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act what changes to the Family Law Act 1975 are the most significant to New South Wales?

Ms WALKER: That is an extraordinarily broad question. It is difficult to separate out what might be relevant to New South Wales compared to the other States. I am sure you would be aware that there is an enormous history relating to family law reform. Since major amendments in 1995 two things have been sought to be achieved in reforms: first, to move as many matters as possible out of the litigation stream; and, second, to make both parents responsible, to the extent appropriate in the circumstances, for the care of their children. As I said, those broad aims were reflected in the first amendments that were made in 1995.

So far as the Legal Aid Commission is concerned, in general terms it is supportive of those very broad goals. However, aspects of particular changes and how they might be implemented or planned might raise other issues. The broad aims of having appropriate matters not caught up in the litigation stream, and having people participate more in decision making and being responsible for their children obviously are quite worthy goals. However the implementation of some of those goals might have consequences that could be of some concern. Some of the difficulties relating to the reforms have been trying to balance or select on the one hand matters that will be appropriate to be dealt with outside the litigation stream, in particular by mediation, and those matters that raise much more complex issues and that will really need some determination by a court.

Because the legislature has been very concerned with the format and not wanting people to slip through and go into the litigation stream, there is a bit of tension through the whole Act in trying to work out which matters will be appropriate for non-litigation and which matters really need the decision making of a court. That is a problem. Unfortunately, allegations of domestic violence and what will happen to them have assumed a strategic role, for example, determining the best interests of a child. That really shows in a number of sections of the Act. That issue comes up later, but we have two primary considerations: the importance of a meaningful relationship on the one hand and the need to protect a child from abuse and violence on other hand.

You might have a presumption of equal shared parental responsibility. That becomes a relevant consideration as one of the exceptions. There is a possibility that people will need to access the legal system without the need for requiring a certificate when that will be introduced in July next year. Domestic violence and allegations of abuse are significant. In a number of key provisions in the Act domestic violence or allegations of abuse become significant. Stemming from that there may well be a perceived need by people for forensic purposes, if they are likely to go to court in domestic violence matters, not to settle without omissions, as has commonly been the case, but to have defended hearings in those matters.

So there is some argument that there may now be an increased likelihood of defended apprehended violence orders [AVOs] than may have previously been the case because of the importance of those sections in trying to achieve the results that I mentioned. One impact on New South Wales might be that what the Commonwealth has decided to do impacts on a State jurisdiction. That is one possible consequence. There are a lot of other consequences but that issue is one of some concern. I doubt whether it has been thought through, certainly by the Commonwealth initially. What the Commonwealth and the States are doing in relation to domestic violence is almost parallel.

The States are increasingly concerned about protecting victims of violence and they view all allegations with great concern. You would be aware from State instrumentalities such as the police and the Department of Community Services that domestic violence issues are manifest in many families, to the detriment of the women and children involved in them. Quite a lot of the reasoning behind family law reforms by some groups has been on an assumption that there are a lot of false allegations. So you see the Act trying to struggle with that.

One of the first things that the Commonwealth has done is to refer domestic violence to the Australian Institute of Family Studies to try to get more than anecdotal evidence about it, which should have occurred before the legislation rather than afterwards. It is quite clear that there have been groups that really believe there are a lot of false allegations made and other groups say that domestic violence is a burning, serious issue.

New South Wales is one of a number of States that has been reforming its domestic violence legislation to reflect this. That is where there have been somewhat different approaches. Then, almost ironically, in some of these provisions, particularly the ones I mentioned, domestic violence becomes quite strategic and important to people and there is this impetus to make sure that proceedings are defended in a way that they may not have been before because of the impact that they will have in the family law context.

Having said that, a number of sections of the Act, in looking at shared parental responsibility, especially the provisions about parenting plans—really important provisions—could well have the result that if women do not get appropriate legal advice, they may well be in a situation where they have a parenting plan or possibly even a court order that forces them to discuss and have consultations

with the other parent about many aspects of a child's life, those long-term issues such as education, residence, religion. That is fine in a co-operative, good relationship or even a parallel relationship that does not have conflict, but if you have a relationship of intimidation and conflict, that consultation could be very difficult for someone to really maintain. That would be a particular concern for us and I will say a little bit more parenting plans if you like now or later, whatever you prefer.

CHAIR: I will just ask another question from this large list and then we will move on to another person. Has the legislation been in place long enough to adequately assess its impact? If not, how long do you think we will have to wait?

Ms WALKER: I can answer no to that for two basic reasons. One reason is that the significance of many of the sections will be determined or will be clarified by decisions made in the Full Court. There are a number of appeals currently pending. We hope to get the results of those cases very shortly, but that will be the beginning of the court's attempt to clarify some of the provisions. Simply looking at the meaning of the legislation you need more time because that is what happened with the 1995 reforms. You need more time to see how the appeal court will deal with quite complex legislation that may well have unintended consequences. That is the first reason.

The second reason is because we only have four family relationships centres now. I must correct the State submission. I only came back from overseas and other places this week. It is not compulsory in the legislation for people to go to family relationships centres. I will say more about that later, but it is not compulsory. It will be compulsory for people to get certificates of a genuine attempt at mediation unless certain exceptions apply and again domestic violence is one of those exceptions, getting back to what I said about the strategy in the section, but the influence of family relationship centres potentially is very important. However, we have four. There are another seven for which tenders closed on 30 October, so I would expect that the Government anticipates they will be in operation 1 July next year, which is when the first of the certificate provisions will cut in. Simply in terms of numerical, quantitative matters, four family relationships for centres for the whole of New South Wales with another seven, and the certification provisions of the Act not cutting in until July 2007, it is quite easy for me to say it is too early.

CHAIR: What happened the last time they brought in an Act. Was it reviewed too early?

Ms WALKER: The other major reforms to the Family Law Act were in 1995. They had a similar purpose to the present ones but that legislation was framed in more general terms. The expectation was that that would lead to parents participating more and having responsibilities and duties towards their children and a change in the way time was spent. The language was actually changed. "Custody" was changed to "residence" and "access" was changed to "contact". The change to language was to get away from the idea of a parent having proprietorial rights in relation to a child.

The objects of the Act were changed to try to foster this idea of shared responsibility for children but this was all subject to the best interests of children being the paramount consideration. There was a real issue about how the objects and the best interests principle would work in practice. The Full Court of the Family Court addressed this some time after that legislation in the case of B and B. The result of this was that it was interpreted very much in terms of the way things had been going and it was, in part, because of this that in this legislation some of those things were put much more specifically than before and what was in those objects is also now repeated in the section that deals with how a court determines the best interests of children.

There is an attempt to be more prescriptive so the court does not interpret in that way. Nevertheless there is still a lot of complexity in the legislation, so we still see the same process happening where the courts on appeal will interpret what the provisions of this legislation mean. The first of these three appeals will be coming up very shortly. They are bound to be followed by more. That is the first tranche of appeals. Often what the legislation will actually mean in practice, in part will be determined by the view that the appeal court takes or even the High Court, if it goes to the High Court. Some time after any major change to legislation there is a change for the appeal courts to have a look at it and clarify issues. That is on the legislative side.

On the other side, family relationships centres are not referred to in the legislation but once their number is increased in New South Wales across the new areas where they are planned, there may

be further things that become clearer. For those reasons we have just put the toe in the water as far as family relationship centres are concerned and the legislation has not had a chance to be considered by the appeal courts.

CHAIR: Where there are no family relationship centres in country New South Wales, what happens to those people?

Ms WALKER: We have a family relationship centre in Lismore at present but there will be soon in a number of country centres following on the current tenders because the Government wants to have them in Wagga Wagga, Dubbo, Newcastle, Nowra, so they will be established in a number of country centres.

CHAIR: I am from the New England north-west area? You just skipped that area totally.

Ms WALKER: Sorry. What happens in country centres is a matter of concern. The family relationship centres are saying that they will have outreach services from these centres.

The Hon. DAVID CLARKE: Ms Walker, I think you made a comment that it has been said that there are lots of false allegations being made in AVO proceedings?

Ms WALKER: No, I did not say that.

The Hon. DAVID CLARKE: No, you said it has been said.

Ms WALKER: Yes.

The Hon. DAVID CLARKE: Do you agree with that statement?

Ms WALKER: No, I do not agree with that statement, but this is in fact what the Australian Institute of Family Studies will be looking at. It will be looking at court files and looking at results orders and such like. No, I do not say that at all. That has become a real political football. In fact, groups saying that have been quite strong and the legislation came out in the exposure draft in 2005 and went before the Legal and Constitutional Affairs Committee in the Commonwealth Parliament and that committee made further amendments, including putting in a provision about costs orders for false allegations because they thought that the drafting did not reflect some of those concerns that had been raised by the House Committee in the first place.

The Hon. DAVID CLARKE: So when fathers groups say that there are a lot of false allegations being made in AVO proceedings you do not agree with those fathers groups at all?

Ms WALKER: I do not want to be put in a simplistic position because I am not saying there will never be a false allegation being made but what I am saying is from my long experience in family law, I would not say such a thing as there are a lot a false allegations. What I should perhaps have said, maybe as an opening statement, is that as director of family law for the commission, I am also responsible for our care and protection work as well as family law, and for our alternate dispute resolution program so, I am really very well aware in my own practice, especially care and protection, that the prevalence of domestic violence in many of those families is quite horrific.

The Hon. DAVID CLARKE: So just to get this clear: are you saying that fathers groups are wrong when they say that there are a lot of false allegations?

Ms WALKER: Yes.

The Hon. DAVID CLARKE: They are getting it wrong, are they?

Ms WALKER: Yes.

The Hon. DAVID CLARKE: And when they say that the scales have tilted heavily against them as fathers in proceedings, do you think they have got that wrong too?

Ms WALKER: The whole idea of family law is that decisions should be made in the best interests of particular children in particular families, so I do not like to look at those labels for that reason. I have had a long history as a child representative and I have been responsible for the management of the Independent Children's Lawyer Program for the commission and I have appeared in many matters where my submission has been that a child should actually reside with the father, usually because of some psychological or mental health problem or otherwise of the mother. So I have taken a position based on the evidence of that family and what is best for that child, regardless of gender, and that is the strong view that I take.

The Hon. DAVID CLARKE: So you do not accept that claim by fathers groups that the scales have unreasonably tilted against them. You believe that is very unfair?

Ms WALKER: No. I have just come back from the12th National Family Law Conference in Perth. Dr Joan Kelly, who is an international authority on the impact on children of divorce and separation, gave an excellent paper, entitled "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research, which touches on these issues. I am sure it will be quite easy for you to get a copy. I recommend it to the committee. Dr Kelly says that in the past, before certain social changes, women were primary carers of children and that was assumed to be the case and very often orders were made that were one size fits all, such as every second weekend and half of the school holidays, that stereotype.

For some time a lot of orders were made reflecting that sort of thing but increasingly, as family responsibilities have become more complex, gender roles have changed, there has been recognition that a lot of fathers can see more of their kids than the traditional approach which may have reflected a different type of society, that may reflect social change and when you are making orders about kids seeing fathers, you need to look at those kids, the relationship they have with their parents and the good relationship they have with their fathers; why not see a lot of their fathers? At other times the father has not been available or there has been a lot of conflict involved and that would not be the sort of thing you would recommend.

Generally, I think people now are more open to move away from what might have been a traditional sort of approach, so whether you want to see those fathers' comments in terms of that. But I really recommend that you look at this short article by Dr Kelly on the impact of divorce. She actually charts the changeover time in views about how children spend the time with their parents over time. I really recommend that as the approach.

The Hon. DAVID CLARKE: We will have a look at that. In the Federal and New South Wales legislation when we are talking about this concept of someone having fear for their safety, it talks about "reasonable fear" for their safety. In the Federal legislation, in the Family Law Act, there is a definition of what is reasonable, but my understanding is there is no definition of what is reasonable in the State legislation. Is that the situation?

Ms WALKER: Yes, but I think my friends might want to talk about the State legislation. That is their particular area of expertise. What I can say about the family legislation is that that objective test was introduced after the exposure draft in 2005. Again, when it went back to the constitutional committee, the committee took the view that they wanted to increase that threshold to make it harder for allegations to be made. So that was quite deliberate in raising the bar and putting in that objective test.

The Hon. DAVID CLARKE: But you would agree to have a definition of what is reasonable would certainly be of assistance to the courts? That is why we have definition sections in legislation—to assist. A definition of what is reasonable would certainly be something of assistance in these sorts of matters, would it not?

Ms WALKER: I do not think the court found a problem with the previous definition, which was a more subjective one. The previous definition would have meant you looked at that person's perception rather than the man on the omnibus's perception of that person's circumstances. So that is a simplistic distinction between the two.

The Hon. DAVID CLARKE: You are saying that they should look at perception rather than reality?

Ms WALKER: What is reality for that person.

The Hon. DAVID CLARKE: The perception of what is reality for that person may not be the reality which may impact on the defendant, that is what I am saying.

Ms WALKER: We are talking about Family Court proceedings, which are not criminal proceedings. But what is very important in domestic violence—and I am sure you would be aware, especially in some communities that have different histories of the role of women and what is appropriate, is a concern may be that what a woman says is a current incident may seem a relatively low-key thing. But if you are looking at a context of many years of really intimidating behaviour and assault, it is reasonable to look at that woman's experience of domestic violence in terms of how she interprets it now. It is very hard to look simply at some third person and say, "How would you be in that woman's situation?" when you may not have lived in the context of that relationship over five or six years.

That is why it is not as simple as that, and remember, it is not a criminal jurisdiction. It is not a jurisdiction that is in most senses about making findings because it is a jurisdiction that is meant to be focused on the best interests of children.

CHAIR: Mr Clarke, perhaps if Ms Wells and Ms Lawless could answer your question further as well.

The Hon. DAVID CLARKE: I will come back to that. Are you actually saying that we should be relying upon the perception of a person making the allegation rather than on the reality? Are you seriously putting that as a proposition?

Ms WALKER: I am just talking about subjective and objective. The Family Court had dealt with a subjective test previously and had not had a lot of difficulty dealing with that. It is not as if the Family Court itself made any submission for that definition of family violence to be changed. Certainly, the Commonwealth Attorney General's Department in giving instructions to the Parliamentary Counsel to draft it did not make that recommendation for change either, having heard the submissions. The recommendation for change came before the Legal Constitutional Affairs Committee after it looked at the exposure draft. What I am saying is that the court or the Attorney General did not find any great difficulties about the way the other definition was interpreted.

The Hon. DAVID CLARKE: What I am putting to you is that the Federal Act has a definition of what is reasonable. That is why we have definitions in these Acts, to make it easier for there to be some borders. But there is no definition in the State law. Do you think that that could be the reason why some people claim that there are many, many allegations of domestic violence—false allegations—that are upheld because there is no definition in the State law to guide magistrates in State courts?

Ms WALKER: Yes, but magistrates in State courts really do not do a lot of family law.

The Hon. DAVID CLARKE: I am talking about apprehended violence orders [AVOs]: they do with AVOs.

Ms WALKER: Yes, but we are talking about a definition that has been put in the Family Law Act.

The Hon. DAVID CLARKE: I am talking about a definition to be put into the Crimes Act to state what is reasonable.

Ms WALKER: I will let my colleagues here from the Criminal Law Division answer questions about criminal law. I am answering in terms of the impact of the family law amendments.

Ms LAWLESS: I can answer that. You are right, there is not a definition of " reasonable" or "reasonableness" in the State legislation. However, there are plenty of things under criminal law, and, granted, certain aspects of AVOs are not, but it is contained within the Crimes Act. But there are many, many aspects of definitions that are not actually defined within the Act. There is plenty of case law and plenty of expertise within various jurisdictions of courts as to the meaning of certain definitions. It is certainly not the case that all things must be defined for there to be a general consensus as to how that is to be applied. This concept of whether something is reasonable or not is, to my understanding, quite a well-known concept, certainly in terms of AVOs and in terms of other variants of criminal law.

The Hon. DAVID CLARKE: Except that the Federal authorities clearly felt that there was a need to have a definition of "reasonable". And while you are saying in the State legislation they rely upon case law, you do not believe that there is any case at all to specify what "reasonable fear for safety" is; you think it just should be left to the case law and we should not give some assistance to magistrates in this very difficult area by having a definition of what "reasonable" is. Is that what you are putting?

Ms LAWLESS: Firstly, you commented that Commonwealth agencies felt the need for that. As Ms Walker has already alluded to, my understanding is that the Family Court did not actually ask for it, did not require it, and, as Ms Walker has also alluded to, nor did the Commonwealth Attorney General when sending drafting instructions. So I am not precisely certain as to who it was that felt it was required, but certainly that was not across-the-board.

The Hon. DAVID CLARKE: But you agree it is there?

Ms LAWLESS: I agree it is there, absolutely. But if there was some dissent as to whether or not it was required I do not think you can say across-the-board. But it was something that was definitely required.

The Hon. DAVID CLARKE: But the dissent was in the minority. The majority view was that it should be incorporated.

Ms LAWLESS: I cannot comment on that. I do not know who it was that had the final say.

The Hon. DAVID CLARKE: But you know it went into the Act?

Ms LAWLESS: Absolutely, I concede that. In terms of State legislation, again, I do not think whether something is reasonable or not is a matter for a magistrate or a judge to determine on the basis of that particular case in front of him. Again, the vast majority of law comes about initially as a result of case law. Certainly, when things become legislated there is a danger of overlegislating to the point where it might be too confined when there are particular instances in front of a magistrate and they may not have the discretion to move outside something that is legislated.

The Hon. DAVID CLARKE: You are actually putting a proposition that within this very controversial area, this very, very important area, we do not need a definition of what is reasonable, we can rely upon the case law? You do not believe that having a definition there is going to be of assistance to magistrates in deciding these very important cases and affecting people's rights?

Ms LAWLESS: With respect to State AVOs?

The Hon. DAVID CLARKE: Yes.

Ms LAWLESS: I do not profess to be an expert in terms of the history of AVOs, but to my understanding they work reasonably well. Magistrates are experts, generally, and have quite a lot of expertise in granting and making orders for AVOs. If the Judicial Commission or others were to form a view that that was needed and that they needed guidance, certainly that is something that could be considered, but I am unaware of any submission from those particular parties requesting guidance.

The Hon. DAVID CLARKE: You say that the law works reasonably well in this area, are you not aware of a lot of criticism in the community from all sectors that this use of AVOs has got out

of hand? You say it is working reasonably well; are you aware of that criticism that has come from many sectors saying that AVOs are being abused in this State?

Ms LAWLESS: I am aware that certain sectors take that view. I am also aware of certain sectors that feel they function reasonably well. Obviously, there are always going to be two sides to just about any coin.

The Hon. DAVID CLARKE: Do you have any objective evidence to support your contention that it is working reasonably well?

Ms LAWLESS: I do, and I could probably find something in a moment. Basically, from what I understand, women who have orders granted at their behest that are in need of protection find that they do actually work effectively. So certainly, from that perspective, in terms of protecting women and children from further violence, they do actually have that outcome.

The Hon. DAVID CLARKE: If you could, in the meantime, look for that evidence?

CHAIR: It is possible for them to take it on notice.

Ms LAWLESS: I will have to do that.

The Hon. DAVID CLARKE: With regard to legal aid in AVO matters, is legal aid available for complainants?

Ms LAWLESS: That may be something I have to defer to Ms Walker, if she is able to answer that.

Ms WALKER: Yes. How the commission particularly assists is having a Domestic Violence Court Assistance Program throughout the State so that women who come to court—or men, because there are men who are complainants as well—have support when they appear at court. Most of the matters, in fact, are run by police prosecutors.

The Hon. DAVID CLARKE: So there is legal aid for complainants?

Ms WALKER: Yes, but most of the matters are, in fact, run by police prosecutors. I think possibly, at least in the metropolitan area, 70 per cent are now run by police prosecutors. Our role has particularly been to fund the Domestic Violence Court Assistance Program, because you will appreciate how incredibly busy the police prosecutor is on the day, coming to court, so the person needs to be able to see one of the court assistance workers. That has been our particular role.

The Hon. DAVID CLARKE: In a way, a police prosecutor running a case for a complainant is, in fact, a form of legal aid?

Ms WALKER: A form of State aid. It is certainly funded by the State, yes.

The Hon. DAVID CLARKE: What about legal aid for defendants? What legal aid is there for defendants in AVO matters?

Ms WALKER: Legal aid is available for defendants when there is a risk that they could have some serious consequence of the proceedings. It will depend on the history of that particular person and the likely consequence. There is a possibility of legal aid for defendants, but on conditions.

The Hon. DAVID CLARKE: Why should there not be legal aid equally available to both sides?

Ms WALKER: Maybe if we had the funding that is something that we would consider further.

The Hon. DAVID CLARKE: So you are saying maybe it is valid to have that but it is a case of insufficient funding that does not allow a similar level of legal aid being given to defendants in AVO matters?

Ms WALKER: I am not from our criminal law division, and that certainly is an area within the jurisdiction of the criminal law decision. But, certainly, the decisions the Legal Aid Commission makes about the extent of its assistance have to take into account the amount of funding that we have. Certainly, people who have been subject to domestic violence are very vulnerable people who obviously would have some considerable need, and there may be circumstances where respondents also need assistance, that is right.

The Hon. DAVID CLARKE: Do you accept that it is equally valid for defendants in these matters to be entitled to legal aid as it is for complainants, or do you not accept that?

Ms WALKER: I cannot see it as black and white in those terms. Number one, in all cases we have a means test—that is the first thing. So people would have to come within the means test. Secondly, it would be relevant to us to look at the seriousness of the consequences.

The Hon. DAVID CLARKE: We will come back to that issue.

The Hon. AMANDA FAZIO: In the New South Wales Government's submission concern was raised about the potential for imbalance in the counselling process in the family relationship centres. Can you go into a bit more detail about the implications of the failure to identify a family where violence issues impact on the family dispute resolution process?

Ms WALKER: Yes. That certainly was central in my jurisdiction and I am very happy to speak about it. The Legal Aid Commission has had what is a compulsory alternate dispute resolution [ADR] program in family law matters for over 10 years now. It is a very large program for which I am responsible. Last year we conducted well over 2,000 alternative dispute resolution conferences in family law matters so this is not at all new to us. We have exceptions, and we are funded by the Commonwealth Government in our family law matters. Our Commonwealth guidelines set out the exceptions, the sorts of matters that are not appropriate for dispute resolution, and family violence, allegations of disputes, those sorts of things are exceptions with which we now have some expertise dealing with.

What is unique in the way we deal with our ADR is that we provide a grant of legal aid for a party appearing or a party being involved with an alternate dispute resolution conference. If someone qualifies for a grant of legal aid they can have a lawyer there. So it is a lawyer-assisted conferencing program for both men and women equally. So in fact you could have a man and woman there, both with a grant of legal aid to have a lawyer assist them at that conference. We think that is very important because we think having a lawyer there helps address those sort of power imbalance issues. We actually fund the person to spend a number of hours with their lawyer beforehand getting instructions, explaining the procedure, and we also fund the time spent afterwards perhaps drafting consent orders.

This to me is one of the real issues about the amendments and one of my sort of watch this space things that relates to women and children in an important way because unfortunately the history of the family law changes back to the Pathways report in 2000 operated under the assumption that participation by lawyers almost contaminated what happened in proceedings so there was very definitely quite a strong anti-lawyer basis to this approach and an ideological approach to exclude lawyers. But our experience at legal aid is that the behaviour of the lawyers depends very much on the context in which they are operating. We have very high settlement rates in our alternate dispute resolution conferences with lawyer participation. Lawyers in that context understand that their job is to try to obtain a settlement that is in the interests of their clients and explain to the clients where it is going, what the alternative might be if they went to court, with a possibility of actually getting an order.

The family relationship centres program does not involve lawyers in that alternate dispute resolution, for the reason that lawyers are seen to perhaps undermine it. That is something that I can quite clearly say I reject; I have no qualifications whatsoever about saying that, simply because of my

observance and our own statistics of the history of ADR, which is lawyer assisted. So what I think should be the case is that you can look at alternate dispute resolution on a continuum and where in fact you have the more difficult, more conflicted matters I think it is important there to consider lawyer assisted mediation such as is offered by the Legal Aid Commission. But I think at present, because of the history, it is almost either/or because there is a belief that lawyers will make things more adversarial, lawyers will contaminate your attempt to do these things. So the experience of the commission is simply that it is not so. As I said, we have very high settlement rates with lawyers there, and it helps to address the power imbalance issues.

Of course, we have other ways of dealing with that as well because we have shuttle conferences. You can have the parties with their lawyer in this room, the others in a different room, the chairperson going room to room. We have them by telephone and we ask people what they may be comfortable with. I just think that that is a model that has not been well considered in the reforms because of that ideology about the role of lawyers. I am a little concerned with family relationship centres that there is a lot of pressure on the four in New South Wales now to get results because the Commonwealth Attorney General is anxious, understandably, to say that it is working well. So they want to get settlements, they want to do it, they want to move on—that is understandable. Anyone who gets Commonwealth funds wants to tick all the boxes of KPIs. We have to do exactly the same thing.

But I have a concern that perhaps they want to keep people in that system and there may well be some reluctance to say, "These people we have identified, they may still perhaps have ADR but maybe a lawyer-assisted ADR would suit those people." They are initial things. The other thing I might like to say about ADR is if ADR is set up to address the concerns of a client to protect them from that intimidation, having someone with a history of intimidation across the room from you in an ADR session can be incredibly intimidating. That person might just give you a look and it can bring back the whole history of pretty bad domestic violence to you. Having said that, being cross-examined in court by that person or that person's lawyer is not a very pleasant experience either, and that is the alternative to alternate dispute resolution. So do not throw the baby out with the bath water. It is a pretty complex issue. Certainly, there are matters that should never go near ADR, matters that can have safeguards such as I have mentioned, particularly lawyer-assisted mediation and other sort of mediation which you carefully screen and make sure those other contexts are not there could be handled without the presence of a lawyer.

The Hon. AMANDA FAZIO: Another concern expressed in the New South Wales Government's submission was the effectiveness in the implementation of screening tools used to identify family violence at these family relationship centres. Can you elaborate on that?

Ms WALKER: I have seen the screening tools. The consultants were the Catholic University in Canberra and the document is very thick. I know there has been training; I cannot say the extent of that training. I cannot say whether that is balanced by other considerations that might happen at a particular time. I cannot say perhaps what monitoring there may be and what other pressures there may be. Certainly, a screening tool was developed. I did notice that when I looked through that screening tool hundreds of questions that were deemed to bring out some of these sorts of issues. What was often recommended was a referral to DOCS or a referral to the police. If you are again talking about the impact of all of this on State authorities, I expect that the Department of Community Services will have a lot more referrals following from this legislation, as I expect will the police and maybe other New South Wales impacts on other agencies that I will mention.

As you will note, the Department of Community Services is a very overwhelmed organisation, unfortunately, so referring someone to the Department of Community Services is great but you cannot be sure necessarily of quick action if it does not come into one of the priority cases. So maybe the person again should be referred for legal assistance and get restraining orders or a number of other sorts of orders, AVOs or whatever. So again I am a bit concerned that the screening might work but then what happens with the referral? How appropriate is the referral following the identification? Are you just referring people from counselling or do you identify that they may need an urgent legal remedy? So it is what follows from the screening that we have to look at, as well as the operation of the screening.

The Hon. AMANDA FAZIO: My final question relates to the amendments allowing direct evidence to be taken from children by judicial officers without anyone else being there. Can you explain a little about that, and also explain under what circumstances an independent children's lawyer is appointed?

Ms WALKER: Yes, I can explain all of those things. If you are familiar enough with this legislation to know about division 12A, which are the modified procedures for child-related matters, the less adversarial procedures—division 12A is the amended procedures for courts dealing with child-related proceedings and they provide for less adversarial trials. Those procedures were piloted under a program called the Children's Cases Program, and I was on the national subcommittee developing those guidelines when they were piloted in the Sydney and Parramatta registries of the Family Court, and the issue of judges interviewing children came up at that time. With a lot of history of representing children, I felt a number of concerns about that on the basis that I would be particularly concerned if a judge interviewed children and heard evidence about a matter—effectively something a child said—that was not made available to the parties in the matter. I think that that will cause considerable natural justice issues.

Those concerns have been strongly expressed to the court. The court is in the process of developing guidelines about judges interviewing children. Certainly, a judge will be incredibly unlikely to interview a child alone. That certainly will not be recommended in the guidelines for the simple reasons of self protection because some of these children can be really damaged. You imagine if all the simple matters have been taken out of the Family Court because of alternate dispute resolution and certificates, the matters left in the Family Court litigation stream are going through the most complex, difficult matters where there will be quite a history perhaps of mental illness, substance abuse or very serious allegations. They are the sorts of matters that the court will be left to deal with. So for self-protective purposes a judge will not be in a room alone with children. Inevitably there will be a Family Court consultant present and also a taping of the proceedings—usually a videotaping.

The issue is what the parties know about what was said because that is the natural justice issue. Again at the Family Law Conference last week the Chief Justice Family Court from New Zealand, Justice Bouchier, spoke about the practice in New Zealand of judges interviewing children, and Justice Stevenson from the Parramatta registry of the Family Court spoke about all the dangers of judges interviewing children. So the court is very much aware of those sorts of difficulties and is likely to produce guidelines saying under these circumstances commensurate with these safeguards, et cetera, that is what you can expect, because people in the profession have a very cautious approach to it. In terms of independent children's lawyers, the circumstances in which they are appointed are set out in the case called *re K*, which to the best of my recollection is the 1993 case or thereabouts. That case lists about eight circumstances where it is appropriate for the court to appoint what used to be a child representative, now an independent children's lawyer.

Allegations of domestic violence, abuse, high conflict, cultural issues, unrepresented litigants—they are some of the criteria for appointment of an independent children's lawyer. Having said that, those positions are funded by the Legal Aid Commission when they are appointed. Each year we fund over 1,000 independent children's lawyers. About half of them we are able to do in-house but because of conflict of interest where we have had some contact with the parent, those are given to private practitioners. So they can be extremely expensive matters to run for the commission because of the nature of the matters and the complexity and the possible length of trials and the need to have expert evidence, particularly from child and family psychiatrists. Children's lawyers work with behavioural scientists because they are just lawyers and there is a boundary between our expertise and the behavioural scientists. Those reports are very, very expensive.

Ms LEE RHIANNON: In one of the submissions we have received it was raised that protective parents are sometimes penalised when they report abuse or try to escape a violent and abusive relationship. I am interested in your comments about the child protection guidelines. Do you think they need to be improved?

Ms WALKER: Do you mean guidelines?

Ms LEE RHIANNON: I understand that it involved the Federal Family Court. I am learning about this.

Ms WALKER: That is no problem.

Ms LEE RHIANNON: I understand that child protection guidelines are in place. Perhaps the point they are trying to make in the submission is that those guidelines are totally inadequate and must be spelt out. They are arguing that if a protective parent is concerned about how the child is treated when with the access parent the protective parent feels constrained about reporting things because that parent is concerned that he or she will lose status as the parent who looks after the child. They also have particular concerns about the protection of the child and how that plays out.

Ms WALKER: I think I understand where that submission may be coming from. New section 60CC of the Family Law Act sets out the best interests of the child and all the things that the Family Court must look at because, when making orders, that is the paramount consideration. Included in a couple of pages of factors—how you balance them all, I do not know—is an injunction to be co-operative as a parent. That is on the one hand, but obviously there are the same issues about protecting children. So, hypothetically, a parent might feel, "If I'm making allegations and causing conflict I don't seem to have been a co-operative parent so how is the court going to balance all this out?" That may be where the submission is coming from. I am not certain.

There are provisions in the Act. For example section 60K says that when there are allegations of domestic violence or sexual abuse the court must deal with those allegations expeditiously and gather evidence. In fact, the court can order reports from prescribed State authorities, as set out in section 69ZW. It sets out a new provision for the court to be able to get that evidence. I guess it comes back to why it is so important for people to get legal advice. In particular circumstances you could advise a person, "Based on what you are telling me, this is the way you should go rather than that way." If people do not get legal advice they might be concerned that the emphasis will be on co-operative parents. So if parents make complaints, if they are difficult or they do not encourage contact that may be to their disadvantage. If there were no issues of domestic violence or abuse of children and people were not trying to be co-operative about contact, that would be to someone's disadvantage because the whole idea is trying to make parents responsible for their kids and ensuring that children have meaningful relationships with both parents. That is in the objects of the Act, and it is now in that section.

But the Act is always trying to say that it is subject to allegations of domestic violence. As I said at the beginning, that is where we get back to those sorts of issues. That is why this legislation is very complex. There are so many things that potentially could go in different ways, depending on the evidence in a particular matter. So something that concerns me is that it is said in the context of the legislation that family disputes and relationship issues should be dealt with by counsellors, but at the same time many legal issues can arise from such complex legislation. It is really important that people have the opportunity to get legal advice about those things.

Ms LEE RHIANNON: It appears that there are cases from time to time when protective parents are penalised in terms of caring for their children if they try to escape a violent relationship, for example.

Ms WALKER: I find it hard to make a generalisation like that. My mind is going back to the many, many difficult cases that I have been involved with as a child representative. There have been issues. As I said, in some more complex cases there are emotional and mental health problems. Someone's perception and what impacts on their actions can be quite complex in terms of what is going on in their minds. It is very hard. But the bottom line is that if your behaviour is impacting negatively on your child that is a consequence.

Ms LEE RHIANNON: You spoke earlier about changing social attitudes to raising children. Are you aware of any data about changes with respect to children and parental access? I am interested in data over the decades.

Ms WALKER: I brought the report of the recent family law conference because Dr Kelly's work is very important in getting around some of the simplification and putting the focus back on individual groups of kids and families. The article by Dr Kelly is excellent because it looks at those very issues.

The Hon. GREG DONNELLY: Turning to the family relationship centres, their role, as we can best understand, will evolve and develop. Ms Walker, in answering a question earlier from the Hon. Amanda Fazio you said that you saw a continuum operating. I think at one end—if I may put it that way—you had the family relationship centres and at the other you had the ADR operating. Did I misunderstand you?

Ms WALKER: No. The word "mediation" is used in so many different ways, in so many contexts and has so many labels that it becomes tricky. The basic role of the family relationship centres will be to do an intake with people to see whether they can have mediation at the centre. If they think they need further counselling—for example, men might need to go to men's counselling, people may need special contact programs and so on—they will be referred to other agencies that do those sorts of things. The mediation that is done at those centres is not lawyer assisted; people do not have lawyers there. The sort of mediation that we do in the Legal Aid Commission—if people are eligible for a grant of legal aid—is lawyer assisted. I was saying earlier that I think it could be important for family relationship centres to identify during intake matters that might be more suited to lawyer-assisted mediation because of the issues raised in terms of power imbalance. But I think, historically, these things are operating a little in parallel because of the history of believing that lawyers will contaminate things. That belief is pretty ingrained in some areas even if our experience and our statistics—which are objective—indicate that that is not the case.

The Hon. GREG DONNELLY: You referred to ADR—

Ms WALKER: That is alternative dispute resolution. That is my shorthand.

The Hon. GREG DONNELLY: I think you said that family relationship centres are not specifically provided for in the Commonwealth legislation. That leads me to my next question. Picking up the point you made—which I think is very valid—to the extent that this compulsory mediation draws in the disputed parties, are you aware that there will be a process whereby they will discern quite quickly that there is a set of relationships that has broken down so fundamentally that the process of mediation will struggle, and therefore perhaps they might be channelled off to the more legalistic approach? But then you have other relationships that have not broken down irrevocably and the process of mediation may well have some value in trying to bring the parties together.

Ms WALKER: I think in a majority of family disputes mediation will assist settlement. It is the minority that will have complex issues that will need a litigation solution. Beneath those, there are some that probably can deal with the disputes if they have lawyer-assisted mediation and then there is the group that can probably do it with a counsellor without that help. That is what I think.

The Hon. GREG DONNELLY: Related to this point, you mentioned in an answer to a question from the Hon. David Clarke the 1995-96 changes. I think you said that those changes endeavoured to move away from strict legalism and litigation and gave some focus to parents jointly accepting responsibility for their children. In your judgment, why is there a perception that those reforms did not work? If the 1995 reforms were designed to pick up and tackle those key themes, we fast-forward a decade and we have the Commonwealth introducing new legislation—

Ms WALKER: It is much more prescriptive.

The Hon. GREG DONNELLY: Indeed. You have said that. Do you have a view about why the 1995 reforms did not get a result that was believed to be adequate, at least from the Commonwealth's point of view?

Ms WALKER: There are a number of reasons—because the court interpreted that it still had broad discretion and may have gone on a bit as before. On the other hand, certain groups probably had expectations—some of which may not have been realistic. I think also that child support is an underlying issue in terms of the changes. People certainly calculate the number of days because it impacts on child support payments. If you look at the initial terms of reference, they refer to child support as well. So you had the inquiry into child support running parallel to this. I think you cannot exclude from consideration the fact that a group of people were getting pretty upset about paying child

support and feeling that they were not seeing their kids, et cetera. You have a lot of political factors converging at the same time.

The Hon. GREG DONNELLY: Returning to the family relationship centres, in answer to a question from the Hon. Amanda Fazio you said that there were matters that you did not believe would need to go—or, in fact, should go—through the ADR process. In your mind, some matters did not have to go through that process. Can you help us understand what some of those examples would be? In your view, do the FRCs help to move those issues along?

Ms WALKER: The sorts of ones that are not suitable for a mediation-style process are cases where there are allegations of domestic or sexual abuse that simply have to be determined by a court and raise the prospect of considerable risk to children. Those matters are not suitable for that sort of process. There are also matters where there is extreme urgency, matters where there is substance abuse or mental illness, and matters where a person has some sort of mental incapacity—perhaps developmental delay, for example. It would be hard to deal with those sorts of matters in a mediation process. I think some of the organisations running family relationship centres are probably more confident than others in terms of where they might draw the line in dealing with those sorts of issues.

Some organisations have a long history of involvement with family disputes and might think they have the competency to go further than others. There is always a possible risk that you may have gone too far and the other party should have been referred for legal advice because of the complexities of the legislation. I am concerned that perhaps there could be greater acknowledgement that lawyer-assisted mediation can take some matter further or that a person should be referred to legal advice and then come back. I think there is a concern that if you refer a person out of the system for legal advice they may not come back. I have heard that concern expressed. I cannot say it is a general concern, but I have heard it expressed. People say, "We can handle it, we can handle it; we do not want to send people out to those nasty lawyers because they may not come back."

The Hon. GREG DONNELLY: On the issue of family relationship centres, it has not been suggested that we should throw the baby out with the bathwater. We are in the very early stages in terms of evaluating the effectiveness of the centres.

Ms WALKER: Absolutely. I hope I made that very clear. My view is that the majority of family law disputes will be resolved with some form of mediation—whether it is lawyer assisted or by a mediator. I think the idea of giving people some place else to go other than a court is an excellent idea.

The Hon. GREG DONNELLY: You said that the FRCs are not compulsory.

Ms WALKER: No. There is nothing in the legislation that makes FRCs compulsory. What there is in the legislation is a three-stage process. Currently, parties are compelled to comply with pre-action procedures. They should make a reasonable attempt to negotiate. That is the current stage.

Coming on 1 July 2007 is the first stage of the certificate process. Generally, new matters will have to get a certificate. A lot of this is still being worked out because they are such major changes—which organisations can give certificates? It may well be, for example, that Legal Aid Commission, because we work under contractual arrangements with the Commonwealth Government, it scrutinises what we do and our results. Our mediation program may be able to issue certificates as well. Certainly, the family relationship centres will be able to issue certificates. Beyond that, the Commonwealth is looking at accreditation for dispute resolution providers to make sure they reach appropriate standards.

Those certificates that could be issued from 1 July are all sorts of certificates, someone made a genuine effort to settle, someone did not make a genuine effort to settle; the matter is not suitable for the reasons I said or someone has an incapacity to participate. So, that issue of certificates is another reason that things are a bit premature now. We will not see the results of those certificates until later because that will only come in on 1 July next year. The Government will have more of the mediation set up in the community, another seven of the family relationship centres, plus our own program plus private lawyers and other organisations run mediation programs as well. There is interest in a whole

lot of alternative dispute resolution now. Arbitration is being looked at again—lots of different forms of attempting to resolve matters.

Collaborative law is something also that is being seriously considered, where people go to a lawyer with a contract that if they cannot reach agreement with those lawyers they have to start afresh with new people. So, everyone's interest is in a settlement. So, collaborative law is also very important at present.

The Hon. GREG DONNELLY: In the Government's submission there is at least implicit concern that there was not more consultation with the New South Wales Government over the introduction of the Commonwealth legislation.

Ms WALKER: Yes.

The Hon. GREG DONNELLY: The reality is the Commonwealth legislation is now in operation. Picking up the point you made there, which I thought was a good one, about the interface between the States and the Commonwealth, is there now dialogue between the New South Wales and Commonwealth governments over clarifying the role of some of the State services and State bodies?

Ms WALKER: I can only talk about the Legal Aid Commission. I can only say from the Legal Aid Commission and the family law context, there were, as you can see, a lot of reports and exposure drafts to the New South Wales Legal Aid Commission or national legal aid that we belong to. We were able to comment on drafts and if you look at the report of the legal and constitutional affairs, in some places it will comment on the submissions made by Legal Aid. Some things they accepted, some things they did not. But that is not the sort of consultation you mean.

The Hon. GREG DONNELLY: The example you gave about issuing the certificates, for example, you indicated the FRCs could issue certificates but it was unclear?

Ms WALKER: Yes, and we have certainly been consulted on that now. The Legal Aid Commission is consulting with the relevant people and the Commonwealth Attorney-General and negotiating about that whole issue of the accreditation of our mediators under the provisions of the Family Law Act and also whether or not our organisation will be able to issue certificates. That particular issue is under discussion as we speak right now.

The Hon. GREG DONNELLY: It surprised me, the reflection earlier that we do not have some good detailed information about domestic violence in Australia. I was shocked to hear that.

Ms WALKER: Yes, we do not.

The Hon. GREG DONNELLY: One hears it anecdotally a fair bit. In the State Government's submission, the second or third paragraph on page 6 talks about the evidence and says that 60 per cent of couples cite family violence as a contributing factor in the breakdown of marriage and 30 per cent describe it as a major reason. Where did those numbers come from? They are not footnoted. What is the source of that information?

Ms WALKER: I am sorry, I was overseas. I did not have a role in this.

The Hon. GREG DONNELLY: They are quite stark and shocking figures. I am wondering where they might come from.

Ms LAWLESS: That might have to be a question we take on notice.

The Hon. GREG DONNELLY: That would be good. I move to the issue of presumption of shared parenting. Page 10 of the submission deals with the issue. I read through it carefully and it goes over to page 11. The second paragraph says:

> There is a risk that this presumption may put the rights of parents (to equal or substantial time) ahead of the child's best interests.

This is obviously suggesting that the new regime potentially creates a conflict between the child's best interests and the rights of the parent. Could you elaborate on that explanation, how you come to that conclusion?

Ms WALKER: I can say something about that but I cannot comment because I was away at the time this was written. I did indicate before that I wanted to say something about parenting plans. There is a little error here that refers to registered parenting plans. Parenting plans are not registered any more and they are not really enforceable either but they have consequences. You could have Family Court orders made, for example, after a hearing that went for five days with an independent children's lawyer, child and family psychiatrists giving evidence, and that creates the ability for a subsequent parenting plan to trump that order. Again, this is a matter of a submission because those of us in family law have great concerns that there could be some duress or intimidation or any other sort of influence exerted on someone after such a long hearing of evidence and, of course, public resources being used.

So, the legislation was modified to say that in exceptional circumstances a court could make in its orders an order that this order could not be overturned by a subsequent parenting plan. The legislation says in exceptional circumstances and indicates the two exceptional circumstances that could be. We have not had time—and this is another relevant thing—to see how the court will approach that, because I think courts will be very conscious that they do not want to be seen to be going against the intent of the legislation. Courts will certainly have that in their minds, that they will not want to be seen to be lightly overturning the intentions, which is to try to emphasise parenting plans as being flexible. You have orders. How do you vary them? You come back to court. Kids grow up and go to school and orders that might suit preschool kids are not going to suit schoolkids, or people might relocate or any of those things.

So the flexibility is important but there is a lot of stress in mediation to have a parenting plan as a result, and that is why I am concerned about the lack of legal advice. Although the parenting plans might not be enforceable, people do not necessarily know that. Also, if the matter comes back to court subsequently, the court could take into account the content of a parenting plan and say you agreed with this and that. So, the parenting plans are a two-edged sword.

The Hon. GREG DONNELLY: In the FRC mediation that is not explained to people?

Ms WALKER: No, I did not say that. I hope it is explained to people but I really think that there could be more certainty, that people do understand some legal consequences. That is all. Maybe it is happening; maybe it is not.

The Hon. GREG DONNELLY: That would be almost procedural, putting that down as what should be put to the people when they are going through the process.

Ms WALKER: It could be being dealt with. The commission has met with all the operators, the family relationship centres, we have pamphlets about vital services which we have taken to all the family relationship centres. It is important for co-operation to take place and for people to be aware of our services as well. I am simply saying that, particularly as you said, with the presumption of shared parental responsibility, if people are hearing this from people who are not legally trained, they can interpret that as meaning that the Act sets it out in concrete that it will be 50:50. You hear all the horror stories, but it is such early days. A woman with a three-week old baby thinks she has to give overnight contact. What advice is the person getting? My answer is I do not really know but if the person saw a lawyer they would be advised that the legislation does not require that at all. Shared parental responsibility is subject to issues of family violence and DV and can be rebutted by the best interests of the child, but those complexities cannot be explained to people in a simple way because they are quite complex.

The Hon. GREG DONNELLY: The issue in question No. 4 of the questions we submitted to you, the length of time to be able to make some judgment about the impact, can you express your view about how much time would need to expire to make this preliminary judgment about how it is going?

Ms WALKER: Certainly. It would have to be at least six months after 1 July next year to see how the family relationship centres are going, how the certificate procedure is going and what decisions the court has been making in the meantime. So, you would be looking, at the earliest, at the end of 2007, after all those sorts of events.

The Hon. DAVID CLARKE: Ms Lawless, you are aware, are you not, of widespread criticism in New South Wales that allegations of domestic violence and abuse are not properly investigated? Are you aware of those allegations?

Ms LAWLESS: I am aware that some aspects of the community do not believe that, yes.

The Hon. DAVID CLARKE: Do you believe that is a valid criticism?

Ms LAWLESS: I would need to look into that further, but I would say that perhaps that does occur in some situations. I do not think that is a statement you could say generally occurs.

The Hon. DAVID CLARKE: You are in a position as policy officer of the Criminal Law Review Division. You do not have a view on whether a night of that is valid criticism? You do not have a view one way or the other that allegations of domestic violence and abuse are not being properly investigated?

Ms LAWLESS: No, I agree that they are generally being properly investigated. There may be instances, just like any situation, where perhaps they are not or are not investigated as thoroughly as they could be. But I would say generally, as a whole, yes they are.

The Hon. DAVID CLARKE: So, on the whole, you are happy with that situation? You reject the widespread complaints from many community groups that there has been a breakdown in the proper investigation of domestic violence and abuse?

Ms LAWLESS: A breakdown in investigation?

The Hon. DAVID CLARKE: Yes, in the proper investigation.

Ms LAWLESS: Again, I think primarily those investigations fall to the New South Wales police and as a general statement I think they do a good job. Again, there will be times when perhaps investigations are not conducted as thoroughly as they should be but as a general rule I think they do their utmost. Clearly, there are always going to be potential problems with funding and resources, and so on. But in an historical analysis things have come a long way from the 1970s, not in investigation but in awareness of domestic violence, and quite a lot has been done to try to pre-empt domestic violence before it occurs and then also once it does occur to investigate it properly.

The Hon. DAVID CLARKE: But more resources being made available would mean these allegations could be more properly investigated?

Ms LAWLESS: Of course, as with any criminal offence.

The Hon. AMANDA FAZIO: Earlier you raised an issue where you thought there might be resource impacts for services provided by the New South Wales Government as a result of the Family Law Amendment (Shared Parental Responsibility) Act. Can you tell us what action you think should be done in relation to these particular resource concerns and also what the New South Wales Government should be doing to address some of the other concerns you have raised about imbalance of power, representation of children, and those sorts of things?

Ms WALKER: That was something I wanted to touch on in my closing submission. One thing, perhaps, is what you have now is the family courts rather than the Family Court. Increasingly, family law disputes are being dealt with in the Federal Magistrates Court. It is very likely, as we work towards a unified registry, which is being planned right now, that most matters will be heard in the Federal Magistrate's Court and only the more complex will go the Family Court. So it might end up that 75 per cent of the work is done in the Federal Magistrate's Court and 25 per cent will be done in the Family Court. I am only saying that because people keep referring to the "Family Court", whereas

things there are changing quite drastically. There has been an exponential growth in the Federal Magistrate's Court over the years since that court was established. But still, what is happening now is that matters listed before a Federal magistrate may not be heard for seven to ten months, dependant on particular registries.

There is a feeling that because there is a Federal Magistrate's Court, State magistrates do not need to deal so much with family law matters. That has a particular impact in regional areas. For example, we have a New South Wales case where one of our solicitors wanted a recovery order in Bega, but the State magistrate thought he did not have the resources or time to deal on the day with the matter. I feel State magistrates have thought that family law was not a priority for them, and people in regional locations not near a Federal Magistrate's Court or a Family Court, or not near a regular circuit, are really suffering as a result. I am not sure of your area, but I note that down on the South Coast that is a serious problem for people trying to get access to the court. They have to go to the Australian Capital Territory. Even if they go to Wollongong, services there have been reduced and they may have to come to Sydney. That is a quite serious concern. This woman's former partner had not returned a child, and the State magistrate was not able to deal with that as an urgent matter.

If we are looking at impacts on women and children, we have to look at the capacity of magistrates in State courts in some regional areas to deal with these matters—at least the urgent ones—so that families are not faced with hours of travel and additional expense. Also on legal aid solicitors do not want to be travelling three or four hours each way to come up from Nowra to Sydney and back. That is a real access to justice issue that the Committee needs to give consideration.

One of the other issues is that a lot of people see forensic advantage in having defended AVO matters, and that also has a resource impact. I do not think the appointment of independent children's lawyers is an issue. On the whole, I am satisfied that they are appointed in cases where they should be appointed. We are involved in the training program for that. That is not a matter of concern. As I have said, there are over a thousand appointments, and the commission is very co-operative with that program. Are there any other matters you want me to deal with?

The Hon. AMANDA FAZIO: Because we are running out of time for this session, I wonder whether you might submit your final statement in writing.

Ms WALKER: Yes, we can do that.

CHAIR: I thank you for coming. Obviously, we probably would need two days to hear what you have to say. We have a major problem with time lines for the Committee's report on this inquiry, and therefore we would request that you supply information and responses within a week of receiving the questions on notice from the secretariat. The other matter is that we did not get to deal with some of the questions on notice that we sent to you, and we would be very grateful if we could add those questions to our questions on notice. I thank you for providing all that excellent information and for coming along today.

(The witnesses withdrew)

CHAIR: Thank you for attending today. I welcome you to the first hearing of the Standing Committee on Law and Justice inquiry into the impact of the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act 2006. The inquiry has been established to inquire into and report on the impact of recent amendments to the Commonwealth Family Law Act on women and children in New South Wales and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.

The time frame for the report is short, as the Committee is required to table its report in Parliament on 1 December this year. Accordingly, the Committee is using this public hearing to receive evidence from witnesses with professional knowledge of the legal implications of the amendments. Given the tight time frame for the inquiry, it will not be possible to hear in person from the many people and organisations that have made submissions. However, those submissions will be given full consideration by the Committee.

There are some general comments I would make about aspects of the hearing. One is about broadcasting guidelines, relating to witnesses and Committee members being the focus of photography, and not persons who have attended to listen to the proceedings. Messages and documents are to be tendered through the Committee secretariat. Mobile phones, even if in silent mode, must be turned off because they interfere with the recording equipment.

ALISON GITA AGGARWAL, Director, Combined Community Legal Centres Group, 3B 491 Elizabeth Street, Surry Hills,

SARA ANNE BLAZEY Solicitor, Combined Community Legal Centres Group, 3B 491 Elizabeth Street, Surry Hills, and

RACHAEL ANNE MARTIN, Solicitor, Wirringa Baiya Aboriginal Women's Legal Centre, PO Box 785, Marrickville, affirmed and examined:

CHAIR: Ms Martin, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms MARTIN: I am appearing as a representative of my employer, that is, Wirringa Baiya Aboriginal Women's Legal Centre.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms MARTIN: I am.

CHAIR: Ms Blazey, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms BLAZEY: I am a representative of the Combined Community Legal Centres Group New South Wales.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms BLAZEY: Yes.

CHAIR: Ms Aggarwal, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Ms AGGARWAL: I am appearing as Director of Combined Community Legal Centres Group.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms AGGARWAL: I am.

CHAIR: Should you consider at any stage that certain evidence you might wish to give or documents that you might wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Would any of the witnesses like to make an opening statement?

Ms AGGARWAL: Thank you for the opportunity to address this Committee. The Combined Community Legal Centres Group is the peak body for community legal centres in New South Wales. We have 38 members around New South Wales all of which provide legal advice in various capacities to marginalised and disadvantaged communities. In particular, we provide a range of legal services including referral, information and advice, as well as doing law reform and community legal education. Community legal centres have a long history of working in the area of family law. For example, in 1992, 30 per cent of the 100,000 support and advice matters that we worked for were in the area of family law.

In relation to our indigenous clients, the major area of law in which they seek assistance is in the area of family law, which represents approximately 30 per cent of the inquiries. This long history of working in the area of family law informs the submission that we have already provided to you and further informs the information that we bring to you today. We really rely on our clients' experiences. We draw upon our clients' experiences, the trends and the patterns that are emerging in the cases that

come before community legal centres and we present that information to you today. I will now hand over to my colleagues Ms Blazey and Ms Martin to go into the details of some of the questions that you have raised in regard to our submission, and to answer any other questions that you might have.

Ms BLAZEY: I am happy to answer any questions.

CHAIR: As a result of amendments to the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act 2006, what changes to the Family Law Act 1975 are the most significant to New South Wales?

Ms BLAZEY: The impacts will be in two areas. The first will be in those areas of law that cross over. One of the problems that those of us who work in family law and relationship breakdown obviously constantly deal with is the different jurisdictions. In a relationship breakdown you have the Family Law Act, which is a Federal matter, child support, which is a Federal matter, and property in marriage breakdown, which is a Federal matter. On the other hand you have de facto property, which is a State matter and, significant to this inquiry, child protection and family violence, which are State matters in that they are dealt with by the Department of Community Services [DOCS] and through apprehended violence orders [AVOs]. The impact will particularly be around AVOs.

One of the things we dealt with in our submission was looking at the role of DOCS and how it interacts with family law matters. It is my view that the way things have been dealt with in the past will not occur any more because of the legislative changes around family violence and the legal requirements. A number of State-based and State-funded organisations will be impacted by the changes. The one that comes to mind mostly is the Women's Domestic Violence Court Assistance Scheme, which supports women who are going to court for AVOs. Traditionally, they have never particularly got involved in issues around family law; they would have just referred women to private solicitors, to community legal centres, or to legal aid for advice. That is becoming increasingly difficult because the family law changes are already impacting on what is happening in court around AVOs.

Another way is around the confusion that will be caused by parenting plans and the impact that those have on orders. I can give an immediate example of that. I have already done some training around the new changes. A number of people have come from children's services and they are very much dependent on their policies and protocols, and how they deal with parents who are separated when they come to collect children. We will see a push towards more matters being settled by parenting plans. At the moment there has been no corresponding change in those protocols around State-based services. That is just for openers.

CHAIR: Do you think the legislation has been around long enough to adequately assess its impact? If not, when do you as group think that the impacts will be fully known?

Ms BLAZEY: The clear answer to that—

CHAIR: Are many of the concerns supposition at the moment?

Ms BLAZEY: No, they are not. I can tell you what is happening from the clients who are contacting us. The impact is not only being seen now; it has been coming all year since the publicity started to come out around these changes. At the Elizabeth Evatt Legal Centre where I work, which is based in the Blue Mountains, we run a telephone advice service. Even before the changes were implemented we were taking calls from people who were saying, "We have separated and I have heard that it is now 50:50; that the children have to be shared 50:50." Obviously we would then explain, first, that the law had not at that point changed and, second, that that was not the change in the law.

We are already beginning to see issues of safety being demoted. We summarised our three main areas of concern around the changes and one is community misapprehension. Certainly it is a big issue around the assumption that we now have fifty-fifty care. The provisions that are in the changes that qualify that around family violence, around reasonable practicality of arrangements, are just not out there in the community.

The Hon. DAVID CLARKE: Ms Aggarwal, are you aware of widespread complaints in the community that there is insufficient investigation of allegations of domestic violence and abuse?

Ms AGGARWAL: If it is okay I would like to hand that over to Sara Blazey to answer.

Ms BLAZEY: Is that in relation to family law issues?

The Hon. DAVID CLARKE: Matters of domestic violence?

Ms BLAZEY: That there is insufficient investigation of that?

The Hon. DAVID CLARKE: Yes. We read from time to time allegations that a child had suffered further injury because there was insufficient investigation.

Ms BLAZEY: There is a very big problem in the crossover between child protection and family law when the allegations of abuse are against one parent. Certainly the practice—and this will be reported by pretty much anyone who has any involvement in giving advice around these issues—is what tends to happen is where there are concerns about a child, a report is made to DOCS. The response of DOCS will often be to go to the parent that the allegation is not made against and say, "You need to take action. You need to go to the Family Court and either revoke orders or get orders that protect the child" and then on that basis no further action is taken by DOCS.

The difficulty is that it is one of those areas where there just is not clear enough co-operation. The parent may well take action under the family law scheme, frequently will be unrepresented. There are many reasons why legal aid may not be available and there is not sufficient communication. I am aware of cases where the response may have come from the Family Court, "If you were so concerned about this, what action did you take?" "Well, I reported it to DOCS". "What action did DOCS take?" "Well, they have now closed their file." That does not mean there was a belief that there was no substance to those allegations. It is, okay, there is now another jurisdiction looking after it. That is a problem that comes up time and time again around family law issues.

The Hon. DAVID CLARKE: Getting back to my question, do you believe that the system is being operated effectively and properly?

Ms BLAZEY: Around domestic violence?

The Hon. DAVID CLARKE: In regard to investigating these allegations of domestic violence and abuse, yes?

Ms BLAZEY: That is a very huge question. If you are talking about police action around apprehended violence orders, the way allegations are treated—

The Hon. DAVID CLARKE: Investigation of allegations by DOCS, for instance? Let us be a bit specific.

Ms BLAZEY: I have answered that. Where it relates to family law, there are big concerns. The response is that this should be dealt with in another jurisdiction, which is the family law jurisdiction. That is the concern.

The Hon. DAVID CLARKE: In regard to domestic AVOs, there needs to be a reasonable fear for one's safety, you would be aware of that?

Ms BLAZEY: Yes.

The Hon. DAVID CLARKE: In the Federal legislation what is reasonable is defined in the Act but in the State legislation it is not; it is just left up to case law. Do you believe that the failure of the legislation to define what is reasonable is a defect in the system?

Ms BLAZEY: In terms of apprehended violence orders?

The Hon. DAVID CLARKE: Yes?

Ms BLAZEY: Probably in New South Wales this issue around reasonable grounds is less of a problem because the State-based legislation does have the two requirements, which is there has to be an actual fear and there has to be a reasonable fear.

The Hon. DAVID CLARKE: I am talking about reasonable fear.

Ms BLAZEY: Yes I know. It is a relatively well-understood legal concept. It is the difference between subjective and objective. I do not think it particularly needs to be spelt out. I think most lawyers and people involved in the scheme completely understand the legal requirements.

The Hon. DAVID CLARKE: So you do not believe the fact that the Federal authorities specified it in Federal legislation makes it easier to understand. The fact that it is not done in State legislation makes it more difficult for magistrates to enforce the law in the State sphere?

Ms BLAZEY: To enforce which law?

The Hon. DAVID CLARKE: To ascertain whether to grant an AVO or not?

Ms BLAZEY: That it makes it more difficult?

The Hon. DAVID CLARKE: It leads to further difficulties in applying the law?

Ms BLAZEY: Are you asking me do I think there should simply be a subjective test for AVOs?

The Hon. DAVID CLARKE: No, I am saying: Do you believe there should be a definition of what reasonable is?

Ms BLAZEY: I think I have answered that. I think my answer to that was that it is an understood legal concept.

The Hon. DAVID CLARKE: And you do not believe that we get into any difficulties in the courts because it is not specified in the legislation?

Ms BLAZEY: Perhaps if you could just clarify why you are asking me questions around this when this is actually an inquiry that is dealing with the Federal legislation.

The Hon. DAVID CLARKE: I am talking about the State legislation.

Ms BLAZEY: I understand you are talking about the State legislation. I am not quite sure where that fits into the terms of reference.

The Hon. DAVID CLARKE: Well, because the number of AVOs that comes through will impact on the Federal legislation because, depending on the particular circumstances, the fact that there is an AVO may very well result in a particular order being given by the Federal Court that it otherwise may not have given?

Ms BLAZEY: That is not true. That is not correct.

The Hon. DAVID CLARKE: You do not believe that AVOs given in the State sphere impact on orders made in the Federal Court? You do not believe they impact at all?

Ms BLAZEY: Are you asking me do I think that parents go to the State court to get an AVO to influence Family Court proceedings?

The Hon. DAVID CLARKE: No, you put a question to me about what relevance my first question to you was and I said the relevance was that an AVO made in a State court may impact on what happens in a Federal court.

Ms BLAZEY: It is one of the matters taken into account when parenting orders are considered. It is in the list of criteria to establish what is in the best interests of the children. One of the matters is whether or not a family violence order has been made, but one of the other considerations in that list refers the court to family violence generally and whether or not an order has been made. It is one of a list of 14 or 15 matters which are taken into account by the Family Court in deciding what parenting order to be made. I do not think there is any evidence to suggest that the making of an AVO has any more influence than any of the other matters that are listed there.

The Hon. DAVID CLARKE: Would that not affect whether there are more shared parenting orders made?

Ms BLAZEY: It is not so much the orders, no. There are many cases that go to the Family Court for parenting orders where orders have not been made. Clearly the critical issue is whether there is family violence. It is one of the things that have to be taken into account. It is one of the relevant matters whether the presumption of an equal share responsibility order is made and it then flows through from that whether the other matters are considered. It is family violence that is the issue rather than an apprehended violence order having been made.

The Hon. DAVID CLARKE: Just going to the question of legal aid available to assist people in AVO cases, I suppose people come to your office frequently involved in these proceedings. I understand that legal aid is available to complainants but there is no legal aid available to defendants. Are you aware of that situation?

Ms BLAZEY: Yes. Most AVOs are actually brought by the police, the overwhelming majority these days. I appear at court in support of the court assistance scheme in our local area to undertake the private matters, but that is correct.

The Hon. DAVID CLARKE: So in a way, that is right, the fact that police are prosecuting is, in fact, legal assistance to the complainants. Are you concerned that there is no legal aid provided to defendants in these proceedings?

Ms BLAZEY: I am concerned—what I think is really important is that any party to any proceedings should certainly have the benefit of legal advice. It leads to much better outcomes.

The Hon. DAVID CLARKE: So you think this is a defect in the present system.

Ms BLAZEY: No.

The Hon. DAVID CLARKE: Because we might well be having a situation where defendants are not able to properly prepare their case because they do not have the technical knowledge or the funds available to pursue evidence?

Ms BLAZEY: Can I just say that I think what is most important—clearly it is a policy issue and it is a funding issue about the decisions that are taken about what Legal Aid decides to fund. There are many cases where there are policy decisions not to fund. Defendant AVOs is one of those. There are actually not that many cases that go all the way through to a defended hearing. What is true is that when both parties have had good legal advice and are able to make informed decisions around AVOs, it is a better outcome for everyone.

The Hon. DAVID CLARKE: So we are not getting the best outcomes that we could when we have a situation that defendants have no access to legal aid in these proceedings?

Ms BLAZEY: No, that is not what I said.

The Hon. DAVID CLARKE: No, but I am putting that as a proposition.

Ms BLAZEY: No. I think the most critical thing is that people should have access to legal advice. Whether you then go on to say that everyone should get legal aid to defend AVOs is another matter. I think it is much more critical that everyone should have good quality legal advice.

The Hon. DAVID CLARKE: And you agree that at the moment defendants are not in that position in these AVO matters?

Ms BLAZEY: No, you are mixing up the two things. It is a separate issue about whether a decision is taken to fund contested AVOs. What I am saying is that certainly most legal centres will give advice to defendants, as we do to applicants. What I am saying is that that is the most critical.

The Hon. AMANDA FAZIO: I wanted to ask about the shared parenting concept. What is the effect of a legal presumption of shared parental responsibility?

Ms BLAZEY: Can I just clarify that everyone understands the difference between parental responsibility and shared care because they are very different things. We talking here about shared parental responsibility, which is decision making, and not the time that a child is split, because they are two very different things. The concern is that this is going to lead to greater conflict. In some ways bringing in a presumption of making the order is not an enormous change because it was quite frequent that an order was made for joint parental responsibility before these changes came in.

What the difference is, is the requirement now to agree on the major long-term issues. Generally what happened previously was there would be a joint order but the practicality of it was that the parent that the child lived with most of the time would generally make most decisions. There is now a requirement that with all those big issues there has to be agreement. My concern is that again it comes down to the advice that is given, community expectation and understanding. There is little emphasis given to parental responsibility in terms of co-operating, behaving in a civil way to the ex-partner. I am not convinced that the changes that have been brought in will have enough safeguards and encouragement to make this work because if it does not work, the outcome will have greater conflict. If the parents cannot reach agreement over any of these things then it is back to court and possibly more litigation. And the one thing that everyone agrees on is that more litigation is not good for children involved in the situation.

The Hon. AMANDA FAZIO: Apart from that sort of litigation, does the potential exist for parents to act in a vexatious manner just to frustrate the will of the main custodial parent in terms of making these sorts of decisions about the future of the child?

Ms BLAZEY: Absolutely. Certainly, in the past where that situation has arisen then the court will take the hard decision and will say: All right, to stop this coming back to court every six months or every time there is any change, we will now give sole parental responsibility to one parent. One of the unknowns is whether and on what basis they will go down that path because the presumption of the joint order is only rebutted in two situations: one is where there are issues around family violence and abuse, and the other is where it can be shown it is in the best interests of the child.

There is no particular definition around that, so one of the questions I would raise, for example, is if you had a parent where there was substance abuse, if you had a parent where there were mental health problems, or if you had absolute entrenched conflict between parents, is that going to be enough to rebut the presumption? If it is not, and that may well be the case because, as you will know, the Government is pushing everybody down a particular path, I would say in those three situations it is going to be completely horrendous for the children having two parents trying to co-operate on these issues.

The Hon. AMANDA FAZIO: Is it in those sorts of circumstances where it will be best to have an independent children's lawyer appointed to go in and advocate on behalf of the child, or do you think it can be sorted out just with the legal representation of the parents?

Ms BLAZEY: I suspect where a matter was before the court and where the court was considering making a sole parental responsibility order, that is probably one of the situations where an independent lawyer would be appointed.

The Hon. AMANDA FAZIO: Do you have concerns about the amendments allowing direct evidence to be taken from children by judicial officers in the absence of other parties?

Ms BLAZEY: I do not think the amendments have changed that. I am not quite sure where that came from. I would make two points about that: Children are very rarely involved in giving direct evidence. It is probably less likely because of the relaxation of the rules of evidence; it is now much more flexible, and I have to say that certainly one of the positive things about the changes is to take the evidence technicalities out of this. We completely support that. What that means is the court can take hearsay evidence concerning children rather than direct evidence. But the question I would raise around here—and I do not think this was adequately addressed in any of the inquiries or at any time whilst this matter was going through Federal Parliament—is about the voice and the views of the children.

If you look at the research that is carried out about the impact of separation on children, one of the things which always comes over very strongly concerning children is a feeling of being sort of disenfranchised in all this process, and certainly the older children get there is a strong feeling of, "Why isn't the judge asking me what I want?" I think an opportunity to look at that in more detail was missed throughout this whole process.

The Hon. AMANDA FAZIO: What provision has been made for considering cultural sensitivity in the amended Act and what steps have been taken to ensure that the family dispute resolution process is culturally sensitive?

Ms MARTIN: Perhaps I could answer that in terms of cultural sensitivity around Aboriginal culture. The legislation does have an additional consideration for the right to enjoy Aboriginal and Torres Strait Islander culture. The legislation does talk about that. I am not aware of Aboriginal culture awareness training being mandatory for all those who work in mediation, whether it be the intake officer or the actual mediator him or herself, and that is certainly a concern of our centre that it is not mandatory. One of our concerns would be, for example, that a mediator may not understand that extended family is very important to an Aboriginal parent, and that extended family might want to attend mediation or even have an input into that mediation process.

A number of issues have been raised in a paper, which I have a copy of here, written by Dr Sally Hewson called "Primary Dispute Resolution Embracing Diversity". This particular individual did a number of consultations with indigenous communities and a number of issues were raised in that consultation, including the need to involve extended family, understanding the notion of kinship, and the availability of Aboriginal and Torres Strait Islander support people in that process.

The Hon. AMANDA FAZIO: Would you be able to table a copy of that for us?

Ms MARTIN: Yes, I will. Unfortunately, I cannot seem to find a date, but I will table a copy of that for the Committee.

The Hon. AMANDA FAZIO: On page 5 of your submissions you raised concern regarding the way in which cases involving family violence are dealt with at family relationships centres and a lack of legal representation for parties undertaking family dispute resolution. What are the implications of this on the effectiveness of the family dispute resolution process and will it lead to a power imbalance during the resolution process?

Ms BLAZEY: The issue is advice rather than representation, and those are the two things. Representation is taking on a case and following it through courts. It has always been my experience, and again this applies to both parties, what I would describe as top and tailing in terms of legal advice. The best way to sort out any issue around relationship breakdown is first of all to get legal advice about what your position is so you go into any alternative dispute resolution understanding what the parameters are. You then go through the mediation process and, hopefully, reach agreement, and then go back to get legal advice on that outcome. That is what works really well because I think one of the most important things about mediation, which I have to say we completely support in appropriate cases, is that you should always make an informed decision. If you completely take that element out of it then I certainly think it leads to problems. I think in situations where there is a power imbalance between the parties it particularly leads to problems.

We have expressed some concerns about the roll-out of family relationships centres. I think it is still very early days: they have been opened very quickly. The accreditation process, as far as I am

aware, has still not been completed and what is coming out is a very, very different response. We have got four centres in New South Wales in the first roll-out. In some of the centres they are very keen to have a relationship with legal services, particularly community legal centres, the Legal Aid Commission and LawAccess, to ensure that clients get advice. There are some other centres that see that as not being a part of the family dispute resolution process at all.

Ms LEE RHIANNON: I just wanted to continue to ask you about the compulsory mediation, considering there have been some concerns expressed about it. I have heard that concerns of abuse and violence will not be screened out of dispute resolution. For instance, that some women might enter agreements through veiled coercion and intimidation. Some people have spoken about that. I would be interested in your views as to whether you see it playing out like that.

Ms BLAZEY: It is certainly, but that is our biggest concern at the moment around the way that cases are being dealt with by family relationships centres. One of the recommendations that we make at the end of submission is that we would really like to see protocols around domestic violence. The question of family violence and mediation is not a straightforward one in that cases concerning family violence are not automatically being excluded from mediation. There are a number of reasons for that. In some cases that is because we are concerned there is not an appropriate screening process; in other cases some women in that situation would actually positively choose to go through mediation rather than go through a court process, which is the only alternative.

It may be that there are some cases where even though there has been family violence it is still possible to go through an alternative dispute resolution process. One of the big gaps in the setting up of family relationships centres, particularly within New South Wales—I am presuming you are aware that legal aid runs family law conferencing, which is basically mediation with lawyers. That may be a very useful alternative model for cases where there is domestic violence, but as far as I know there is very little linking up between family relationships centres and the Legal Aid Commission about that program, which is a big shame. So there are big gaps, and yes, it is a really big concern.

Ms LEE RHIANNON: Can you explore that a bit more? You mentioned protocols. I imagine you are talking about between the State and Federal bodies. Who are you suggesting should develop these?

Ms BLAZEY: With everyone. If you look at the organisations for which that will be the main concern, the Department of Community Services [DOCS] would certainly be high on that list. There are organisations that are very, very experienced around family violence. The Women's Domestic Violence Court Assistance Scheme would be another. Those are two, obviously, State-funded organisations. There are organisations out there that are very experienced around that and I would like to see those organisations, and particularly DOCS around child abuse allegations, working very closely and on a more formal basis with the family relationships centres. My feeling is it is very ad hoc: that each centre has got certain standards, certain guidelines, but it is go out, go out and do your stuff, really.

Ms LEE RHIANNON: With the family relationships centres is there any other level within the New South Wales Government at which you are suggesting there should be interactions?

Ms BLAZEY: Anyone who can get it sorted, basically. Possibly, coming from the courts, magistrates and judges may well start to get concerned about it. But, certainly, all the players need to get together because, as I have said before, relationship breakdown is such a problematic area anyway because of the crossover between State and Federal: there really is lack of information and understanding when you get that crossover, and the more agencies and government departments that get together to sort this out the better the outcome for clients and children.

The Hon. GREG DONNELLY: It may have been Ms Blazey in an answer to one of the earlier questions, or it might have been in an opening comment, but a statement was made about a concern about the new laws impacting on the AVO regime in New South Wales. Could you elaborate on that point that you were endeavouring to make there?

Ms BLAZEY: Are you referring to a particular question?

The Hon. GREG DONNELLY: It may well have been in the opening statement. It was a general statement that you made. I was wondering what the essence of the point was.

Ms BLAZEY: There have been some legislative changes around the interaction. That would be where the State court has got power to vary a parenting order when you apply for an AVO. So if you are thinking of a situation where a couple have separated and they have got their parenting order, and then there has been some violent incident and a parent has applied to the State court for an AVO, let us say the parenting order says that dad picks the children up from mum's house four o'clock on a Friday, and then there has been a violent incident so mum applies to court for an AVO.

One of the standard orders would be to say that the ex partner should be kept away from the family home. You have a conflict there because the parenting order will override the AVO. One of the very simple powers that the State court has is to vary that parenting order. For example, the most obvious variation would be to say that dad does not pick them up at four o'clock on a Friday from mum's home but that you change the venue from granny's home, McDonald's or the police. As we said in our submission, it is a very useful provision. It is rarely used by magistrates. One of the changes has been to say that before the State court can alter that parenting order it must have new material before it. It sounds a small change and if it is applied properly it should not have a big impact because clearly there has been an incident after that order was made which would constitute new evidence.

I guess our concern is how that provision will be used. As I said, magistrates are reluctant to use that provision, and I think that may make them even more reluctant. The other change, and it is not a legislative change as such, is about the philosophy. It is about the whole philosophy, it is the meaningful relationship versus the safety of the child, and you see that throughout this. It is this balancing exercise which goes throughout these changes. Our concern is, similar to what happened when there were changes to the flight 10 years ago, that the meaningful relationship becomes the all encompassing, absolutely overriding issue. When a magistrate goes to make an AVO the first question is not, "How do I ensure that the children will be safe?" It is, "I am not going to make an order that will in any way affect the father's contact with the children." It is that shift which is our concern.

The Hon. GREG DONNELLY: On the issue of the new family relationship centres that have been established, you made the comment that it appeared that at least some were not interfacing as well as they could be with some of the State-based services. Would you like to elaborate on that and perhaps give specific examples, if you can, where that interfacing is not as good as you think it could be?

Ms BLAZEY: Do you mean in terms of how they are reacting?

The Hon. GREG DONNELLY: Yes.

Ms BLAZEY: I will not name particular family relationship centres but we gave a number of examples in our submission and these are being reported back to various community legal centres. I think in one case the mother explained that there were issues of domestic violence and the comment was made, "That's in the past and what we want to look to now is the future." That is such a basic misunderstanding about—

The Hon. GREG DONNELLY: The nature of domestic violence.

Ms BLAZEY: Yes. I think some of this has just come around with just the rush. These have been opened and rolled out before the accreditation process has been completed, which seems a little strange. I know why but it is problematic.

The Hon. GREG DONNELLY: In terms of the family relationship centre concept, we had evidence earlier this morning from the New South Wales Attorney General's Department which I will share with you because you might care to comment on it. On the extent of domestic violence, in the submission they quoted the following figures, "Evidence shows that family domestic violence is a common cause of marital breakdown ... 60 per cent of couples cite family violence as a contributing factor in the breakdown of marriages and 30 per cent describe it as the major reason why their relationship ended." Would you care to comment on that figure, because getting the extent of domestic

violence seems to be a problematic question? No-one seems to be able to nail down the extent of it. Can you give us any insights?

Ms BLAZEY: To give a specific response, we would have to take that on notice. It depends on what you are looking at—relationship breakdown or within relationships generally. I do not know what the Attorney General's Department is quoting from.

The Hon. GREG DONNELLY: I suppose the point I am getting to is that the family relationship centre concept will draw in relationships that are at different stages of breaking down and perhaps dissolving. Presumably part of the thinking behind the family relationship centre is that through mediation at least there is an ability to reconcile some of those relationships which are breaking down.

Ms BLAZEY: Reconcile as in getting reconciled and getting them back together?

The Hon. GREG DONNELLY: I presume so.

Ms BLAZEY: You need to be very careful around that because those are two very different things.

The Hon. GREG DONNELLY: Can you perhaps just explain that?

Ms BLAZEY: I think the family relationship centres need to be careful about mixing those two. When a relationship ends, often one party wants to end it and the other party wants to continue. Relationship counselling is about looking at the relationship: Is there any prospect of staying together, moving forward together? Mediation is about an acceptance that the relationship is over and it is sorting out all those issues you need to sort out—the children, the house, the contents.

The Hon. GREG DONNELLY: Are you submitting that the family relationship centre model deals with the latter, not the former?

Ms BLAZEY: No they do not. The family relationship centres are very different to any model there has been before. If you look at the main players in this area, even Family Relationships Australia, they have always had different models. They have always had counselling as well as mediation. Family relationship centres are much broader than that and they certainly advertise themselves as "do not necessarily come to us when you are in trouble". It is about parenting. "If you are having difficulties within a relationship about parenting come and see us and talk to us." If you are estranged from grandparents or if your mum and dad are still together. I think this is an issue for the State-based organisations. They certainly advertise that there are all these different things that we can provide but certainly one of the centres that I have the most contact with, what is happening is referral to the State-based organisations and some of those organisations are coming back to the family relationship centres and saying, "We are getting all these referrals from you", because there are large numbers.

The Hon. GREG DONNELLY: Which referrals? Are they domestic violence?

Ms BLAZEY: Domestic violence is one. Financial counselling is another. People with debt problems are being referred to financial counsellors. That is State funded. Women's Health provides all sorts of counselling and support services for women.

The Hon. GREG DONNELLY: Is it necessarily a bad thing that people are being directed to a service which might give some assistance?

Ms BLAZEY: It is a very good thing, but can we have the funding please?

The Hon. GREG DONNELLY: That is a separate point—a major, significant point.

Ms BLAZEY: Yes. Perhaps people need to be clear about the services that are being provided directly by the family relationship centres and the services that they are referring to.

The Hon. DAVID CLARKE: I have a document entitled "Women and Family Law" produced by the Women's Legal Resource Centre, which states, "The New South Wales police have full authority to enforce protection orders made by the Family Court and Federal Magistrates Court but because they are Federal courts sometimes there is some confusion about this which may delay enforcement." That concern has also been expressed on occasions by the Federal Government. Do you agree with that concern expressed by the Women's Legal Resource Centre?

Ms BLAZEY: About the enforcement of orders?

The Hon. DAVID CLARKE: Yes.

Ms BLAZEY: Yes. There is a big difference between orders that are made and orders that are enforced. Sometimes that is because there is a different standard of proof. To get an AVO is on the civil balance of probabilities; enforcement of a breach becomes a criminal matter and is beyond reasonable doubt. Certainly our experience is that there is concern around the enforcement of orders.

The Hon. DAVID CLARKE: So perhaps we need to do something in New South Wales to synchronise so that we do not have this confusion and delay in the enforcement of such orders.

Ms BLAZEY: It certainly bears looking at, the enforcement of orders, absolutely, I would agree with that.

CHAIR: Earlier we heard where the family relationship centres would be located. I am from the New England north west, which has the highest Aboriginal population in the entire State. It sounded to me like there would be a centre at Lismore and Dubbo.

Ms BLAZEY: There is one at Lismore already.

CHAIR: Yes, but I am talking about the huge gap where all the Aboriginal people live. Do you know of any plans at all to help resource Aboriginal people who live there?

Ms MARTIN: In terms of population, are you talking per capita?

CHAIR: No. The majority of Aboriginal persons in New South Wales live in the New England north west, and I am incredibly concerned that Dubbo and Lismore are the centres. Have you heard of any discussion on this issue in relation to resourcing those people?

Ms MARTIN: No, I have not. In terms of Aboriginal population, I do not have anything here.

CHAIR: I am not testing you.

Ms MARTIN: As far as I know, the largest Aboriginal population is in the metropolitan Sydney area. Putting that aside, I am not aware of anything to resource the Aboriginal communities in your particular geographical area, no.

(The witnesses withdrew)

(Luncheon adjournment)

JANET LOUGHMAN, Principal Solicitor, Women's Legal Services New South Wales, PO Box 206 Lidcombe, and

BRIGID O'CONNOR, Solicitor, Women's Legal Services New South Wales, PO Box 206, Lidcombe, affirmed and examined:

CHAIR: Welcome to the first and only public hearing of the Standing Committee on Law and Justice inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006. The inquiry has been established to inquire into and report on the impact of recent amendments to the Commonwealth Family Law Act on women and children in New South Wales and on the operation of court orders that can prevent family violence perpetrators coming into contact with families. The time frame for the report is very short as the Committee is required to table our report in Parliament on 1 December this year. Accordingly, the Committee is using this public hearing to receive evidence from witnesses with professional knowledge of the legal implications of the amendments. Given the tight framework for the inquiry, it will not be possible to hear in person from the many people and organisations who have made submissions. However, those submissions will be given full consideration by the Committee.

I have some general comments that I must make in relation to the hearing. There are broadcasting guidelines that relate to witnesses and Committee members being the focus of media attention. Messages and documents to be tendered to the Committee will be delivered by secretariat staff. The Committee prefers to conduct its hearings in public. However, the Committee may decide to hear certain evidence in private if there is a need to do so. If such a case arises, I will ask the public and media to leave the room for a short period. I ask everyone to turn off their mobile telephones because they interfere with the recording equipment.

I welcome you both to the hearing. Are you each conversant with the terms of reference of this inquiry?

Ms LOUGHMAN: Yes.

Ms O'CONNOR: Yes.

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Would either or both of you like to make a short opening statement?

Ms LOUGHMAN: Yes. I thank the Committee for the invitation to give evidence today to this inquiry and to outline the work that the Women's Legal Services New South Wales does. Women's Legal Services is a statewide community legal centre providing services to the most disadvantaged women in New South Wales. We prioritise services to indigenous women, women in rural areas, women from culturally and linguistically diverse backgrounds and others. We predominantly provide legal advice and representation in family law, domestic violence and sexual assault matters. We operate different programs, including the Women's Legal Resources Centre; the Domestic Violence Advocacy Centre, which provides duty representation for women seeking AVOs in local courts in Western Sydney; and our Indigenous Women's Program, which predominantly has a legal contact advice line answered by an Aboriginal woman and callers are referred to a solicitor for legal advice. We also auspice three services: the Women's Domestic Violence Court Assistance Program Training and Resource Unit and the Family Violence Prevention Legal Services at Walgett, and Bourke and Brewarrina. Our work gives us with the opportunity to hear women's experiences of family law and domestic violence and, we feel, provides a good opportunity to make comment on the impact of the legislation.

CHAIR: Thank you. Has the legislation been in place long enough to assess its impact adequately? If not, when will the impacts be known fully?

Ms LOUGHMAN: There is a yes and a no answer to that question. No, because it will really take a Full Court decision before we get some judicial interpretation, particularly about how the meaningful relationship with both parents and the protection-from-harm provisions will be balanced. Until that happens we are not in a position to see the impact of the legislation. On the other hand, the impact of the legislation was being felt even before it started. There was a lot of build-up to the changes and a lot of uncertainty in the community about what the changes would be. A lot of our work has been trying to clarify that with the community. So even before the legislation was active there was a strong perception in the community that these changes meant a presumption of equal time. So, to that extent, the legislation has been operating in practice for a longer period of time. It has been operating long enough for us to see that it is having an impact. It is affecting the negotiations that parties are engaging in. So the advice to parties negotiating about arrangements for children after separation has changed and people have different expectations going into those negotiations. That is definitely having an impact.

CHAIR: Section 60CC outlines the two primary considerations in determining a child's best interests: having a meaningful relationship with both parents and the need to protect the child from harm. How do these two potentially contradictory considerations interact and what do you perceive as the implications for children?

Ms LOUGHMAN: This is one of the important changes that have been introduced. Real tension exists between these two provisions. To some extent, where there is family violence or child abuse present there is an understanding that these two provisions may cancel each other out. Then the courts or the decision makers will be taken to the other factors in section 60CC. The safety of children should be the highest priority. We saw from the changes in 1995 to the Family Law Act that there was in practice a presumption in favour of contact as a result of the introduction of a child's right to contact with both parents. The research carried out by Rhodes, Graycar and Harrison into the first three years of the operation of that Act showed that in practice there was what was in effect a presumption in favour of contact. Our concern here is that there is going to be a further move towards that happening with less consideration for protecting children from harm. So our concern is that the meaningful relationship with both parents will not be seen as a relationship free from violence or abuse. We would say that protecting children from harm should be the priority rather than having a meaningful relationship with both parents.

The Hon. DAVID CLARKE: Ms Loughman, are you aware of a document "Women and Family Law", which was produced by the Women's Legal Resources Centre, in which it states: "The New South Wales police have full authority to enforce protection orders made by the Family Court and Federal Magistrates Court but because they are Federal Courts sometimes there is some confusion about this, which may delay enforcement"? This concern has been expressed by the Federal Government on a number of occasions. Do you share that concern?

Ms LOUGHMAN: Are you talking about the protective injunctions that can be made under the Family Law Act?

The Hon. DAVID CLARKE: I am talking about any orders made in the Family Court or by the Federal Magistrates Court that need to be enforced. I will give you an example to assist you. This is a true case. A non-residential parent has a Federal magistrate's order that states: one, the parents are not to have phone contact between them; and, two, the parents must not in any way interfere with the children's phone contact with the non-residential parent. What happens is that the residential parent terminates the children's phone contact with the other parent, and does this repeatedly. The non-residential parent complains to the police, who say, "Sorry, we don't have any right to do anything in this case; go and see your solicitor."

This person then takes it to the area commander's office and the same thing happens. Eventually he gets a written apology from the area commander's office because they probably acted in good faith but did not know what they were meant to do in this situation. That is the sort of thing I am talking about. That is a specific example of what the Women's Legal Resource Centre would probably be talking about.

Ms LOUGHMAN: If that is what you are talking about there are provisions in the Family Law Act for contravention applications where a Family Court order has been contravened. You can

make an application to the court to have it determined. The changes that have been recently introduced have introduced a clearer process for dealing with contravention and breaches. So, in the scenario you have presented, the remedy is to make an application to the court under the convention or breaching provisions of the Act. Our experience has been that the Family Court is willing to enforce orders requiring contact to be facilitated and a child to have contact but has never been willing to enforce an order requiring and non-resident parent to have contact with their child.

The Hon. DAVID CLARKE: Except in this situation I am talking about the order exists and the police have the power to enforce it. At the end of the day this person was told to go and see your solicitor, we do not have any power. So, the power is already there but the police on this occasion did not understand that they have the power. So, we have this Federal legislation but we have State instrumentalities who are in some confusion as to the power they have to enforce these Federal orders. Do you see that as a problem?

Ms LOUGHMAN: It has not been a problem. I am not aware of that as a problem.

The Hon. DAVID CLARKE: Can you see in that true scenario that I told you about that it is a problem?

Ms LOUGHMAN: Except to the extent that there are mechanisms for dealing with breaches of court orders.

The Hon. DAVID CLARKE: Yes, the first mechanism was to go to the police for them to enforce the order and the police did not do that.

Ms LOUGHMAN: I am not aware of that. I am not aware—

The Hon. DAVID CLARKE: Of the police having the power?

Ms LOUGHMAN: Yes.

The Hon. DAVID CLARKE: This is further demonstration of the confusion, because if I might suggest, you are from the Women's Legal Service and it is something you may be in confusion about. That is exactly what I am saying, there is confusion right down the chain, the police and even in your office?

Ms LOUGHMAN: I think there is a clear process for dealing with contravention of court orders. I think you may be referring to the injunctive power to provide protective orders.

The Hon. DAVID CLARKE: In this case, as I understand it, the police accepted that they had the power to do this, and on the question of whether you are aware or not of this being a problem, are you aware of the document, "Every Picture Tells a Story", a report of the House of Representatives Standing Committee on Family and Community Affairs, a bipartisan report? In that the committee refers specifically to the split of jurisdiction between the States and the Commonwealth over child and family law matters, that is the issue they are referring to, and they say:

> We have taken as a given that the split will continue. We regard the splitting of jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children.

In this case the outcome was that the child was denied access to the child's father. Are you aware of this report?

Ms LOUGHMAN: Yes I am.

The Hon. DAVID CLARKE: Do you recall reading something like that?

Ms LOUGHMAN: No, not in detail. I would need to be refreshed.

The Hon. DAVID CLARKE: Having refreshed your memory on that in this report by this Federal committee, do you see that as a problem? There appears to be a misunderstanding by State instrumentalities as to enforcing orders made under Federal legislation?

Ms LOUGHMAN: I had a recent experience where a recovery order was obtained in a Local Court in remote New South Wales, where the State police acted incredibly quickly and responsibly in enforcing a Federal order. It was an urgent recovery matter. A six-week old baby had been taken from its mother and, of course, and at that very young age she was breast-feeding her child. An application was made to the Local Court for a recovery order. The order was made. The forms were completed and provided through the registrar to the Federal police and back to the local police in that regional community and the police enforced the Family Court order without any difficulty. That is my most recent experience of enforcement of orders and it works very smoothly.

The Hon. DAVID CLARKE: Thank you for that. But you can see, based on what I have suggested and based on the statement contained in the Federal report, there is a problem there? There is a problem of there being a misunderstanding or a failure to understand the powers of State instrumentalities to enforce these orders and to carry them out?

Ms LOUGHMAN: If you are putting to me that that is what the "Every Picture Tells a Story" report says, I do not have it in front of me and I do not see the value in my saying yes or no to that question.

The Hon. DAVID CLARKE: I would like you to assume that what I have told you is correct and I have truthfully repeated to you what the report says, and given the example I told you about, would you not agree there is a problem here?

Ms LOUGHMAN: My experience is that in relation to recovery orders, for example, we have had a very positive experience. If it is in relation to protective injunctions under the Family Law Act in New South Wales, I am not aware of that being used, because we have an AVO system. So, I cannot say any more than that.

The Hon. DAVID CLARKE: Considering you cannot say any more, are you prepared to have another look at it to see whether what is stated in that document might be correct after all?

Ms LOUGHMAN: Of course.

The Hon. AMANDA FAZIO: I have read the submission and some of the questions we sent to you seem to have been covered quite well, but I want to go on to this family dispute resolution section of the questions we sent to you and ask if you can elaborate a bit more on the advantages and disadvantages of the family dispute resolution?

Ms LOUGHMAN: Early dispute resolution is something we would support. The legal system is often unwieldy, and encouraging people to reach their own agreement and sort out their problems early is a positive thing and in appropriate cases we certainly support that. Family dispute resolution is quicker, cheaper and it is people working to reach their own solutions. The compulsory family dispute resolution has its difficulties. Mediation needs to be a voluntary process so the compulsory nature of it takes away from that voluntary process. People need to be making informed decisions about participating in mediation and all the way through the process. I suppose if the family dispute resolution is mandatory there is some obligation to provide the services and we are not necessarily seeing that come through in practice.

The real problem with compulsory family dispute resolution is where family violence is present. It is well acknowledged that mediation is not appropriate where family violence is or has been present. The power imbalance, the risk of having an unfair outcome or a dangerous outcome is there. So, the scenario of the family relationship centre not undertaking risk screening and risk assessment and allowing mediation to go ahead, one of the possible consequences of that may be that with our failure to identify domestic violence the woman may be seen as hostile in the mediation and not making a genuine effort to reach a resolution. So, if a proper screening of domestic violence has not been taken and a proper risk assessment done, that risk is there.

The Hon. AMANDA FAZIO: Do you have any comments on the adequacy of the screening tool that is being used by the family relationship centres?

Ms LOUGHMAN: My understanding is that they are required to screen for the presence of violence and carry out a risk assessment. I am not aware of the details of how they do that, and the accreditation process for accrediting family dispute reservation practitioners is still in the developmental stage, it has not yet been finalised. But whatever the screening process and risk assessment is it will always depend on the quality of its implementation, the quality of the professionals and their expertise and their training and experience in domestic violence. So, the risk assessment tool itself is important and the quality of the practitioners implementing it is important as well. So, we would be keen to see requirements for experience and expertise in implementing these screening tools.

The Hon. AMANDA FAZIO: On page 5 of your submission you talk about some particular problems faced by Aboriginal women and women from culturally and linguistically diverse communities who come into the family dispute resolution system. Can you elaborate on that and also tell us what provision has been made to consider cultural sensitivity in the amended Act, and do you think the family dispute resolution process is culturally sensitive?

Ms LOUGHMAN: I am not aware of the Federal Government's efforts to introduce culturally appropriate services as yet. There are only four Family Relationship Centres in New South Wales—at Lismore, Penrith, Sutherland and Wollongong—so the western part of New South Wales is not serviced and people in those communities either will have to access accredited independent family dispute resolution practitioners in the absence of a Family Relationship Centre, or—

CHAIR: Excuse me for interrupting. What sorts of persons in the community are these independent practitioners?

Ms LOUGHMAN: The requirement for mandatory family dispute resolution is not necessarily from a Family Relationship Centre; it is from accredited family dispute resolution practitioners.

CHAIR: What are they?

Ms LOUGHMAN: They are mediators, or in some cases they are lawyers who have mediation training. They will be accredited under the process being developed by the Federal Attorney General's Department. There is already an existing system of accrediting mediators in the family law system. They are in the process of accrediting mediators under the new legislation. So people will be able to go to accredited family dispute resolution practitioners wherever they are practising. It is just that the Government is putting more resources into the Family Relationship Centre and that is where the Government is expecting people to go to.

For indigenous women to use a service, ideally it needs to be provided by Aboriginal people, but at a minimum there needs to be proper training in the provision of culturally appropriate services. Things like physical spaces, waiting lists, and access to telephones on which people can have private conversations are all impediments to Aboriginal people accessing those services. More time is needed to create the trust that is needed to provide the services, and information needs to be delivered in appropriate ways. So considerable thought and resources need to be given to providing services in a culturally appropriate way.

The Hon. AMANDA FAZIO: Since the introduction of this amendment there seems to have been an incorrect assumption amongst parents that family dispute resolution and equal time arrangements are now required by law for everybody, including those who have a history of domestic violence. Is that your experience? Do you have any other comments to make on it?

Ms LOUGHMAN: Is that one of the numbered questions?

The Hon. AMANDA FAZIO: Yes, No. 11, slightly paraphrased.

Ms LOUGHMAN: There definitely has been a community perception that family dispute resolution is mandatory, and a perception that the changes to the law mean a presumption of equal time.

Ms LEE RHIANNON: I want to ask you how you think the Women's Domestic Violence Court Assistance Scheme is going, how it is coming to grips with the Family Relationship Centres, and whether you have any thoughts or recommendations on how they could complement each other or whether there are any contradictions or any issues that need to be ironed out?

Ms LOUGHMAN: There are likely to be referrals from the Family Relationship Centres to the Women's Domestic Violence Court Assistance Scheme, so that where domestic violence has been properly identified by the Family Relationship Centre their protocols will require the centre to refer people for assistance, so they are likely to be referred to services like ours for legal advice and to the Women's Domestic Violence Court Assistance Scheme for advice and support.

The Women's Domestic Violence Court Assistance Scheme more and more is being called on to provide family law advice to assist women with AVOs, so their work has become more complex. That is a change that has been coming over time, but I think it will increase as a result of the change.

Ms LEE RHIANNON: I am trying to get a sense of the system, because I do not know very much about it. I just wanted to know whether you think it is working well, or whether there are things that the Committee should be recommending—such as whether the protocols need to be improved, or whether protocols need to be put in place, or anything of that nature.

Ms LOUGHMAN: For referrals?

Ms LEE RHIANNON: Yes, and how they work together.

Ms LOUGHMAN: I think it is early days us for us to be seeing how those relationships are working. Our service is receiving calls from women who have been referred from Family Relationship Centres, seeking advice. That is appropriate and welcome. But, in terms of the practice of these services working together, and whether there will be a need to improve referral protocols, I think it is early days.

Ms LEE RHIANNON: Are the referrals being made to your service increasing your workload, and do you envisage a need for more resources?

Ms LOUGHMAN: The changes to the Family Law Act have increased our workload, because it is a whole new and significant law to get on top of, to explain to the community and give advice on. We already have a telephone advice service but the demand far outstrips our capacity to respond. These changes will always impact on that. We never have enough resources to meet demand or do what we are asked to do.

Ms LEE RHIANNON: Have you made any quantitative assessment of how much your workload has increased since the Act has come in?

Ms LOUGHMAN: No.

Ms LEE RHIANNON: It is another job?

Ms LOUGHMAN: It is another job, yes.

The Hon. GREG DONNELLY: Ms Loughman, in your earlier comments you said that the legislation had already started to make an impact, and you made observations about that impact. Could you explain in a little more detail how Women's Legal Services observe the impacts to be playing out over the relatively short period of time that the legislation has been in operation?

Ms LOUGHMAN: I think the case studies in our submission are indicative of our observations of the changes. It seems to be that cases in which shared time is likely to work are cases where there has been a history of very co-operative parenting, where parties are able to communicate

well with each other, and where there is close physical location. It seems to be, from calls coming through our advice line, that that is not necessarily the case; that shared care is being encouraged or likely to be agreed to, even though those conditions do not exist.

The Hon. GREG DONNELLY: I am sorry to interrupt. Are these people, principally women, who are ringing up and saying: This is what is being put to us in mediation and we have reservations about the recommendation?

Ms LOUGHMAN: Yes, or they have been given legal advice that the law has changed and it is more likely that there will be substantial or significant time orders made.

The Hon. GREG DONNELLY: Is that advice they are receiving from the family lawyers?

Ms LOUGHMAN: Yes, from family lawyers, that the law has changed, and if you do not reach an agreement it is likely, if you go to court, that more time is likely to be ordered.

The Hon. GREG DONNELLY: Is that coming out of the referral centres as well, or are the instances that come to mind instances of advice coming from lawyers?

Ms LOUGHMAN: It is from family lawyers.

The Hon. GREG DONNELLY: You commented earlier—as is picked up in your submission—that the legislation has the potential to jeopardise the safety of the child. Specifically, in the second-last paragraph on page 2, under the heading "Terms of Reference 1", you say, "The new family law system may undermine the significance of family violence perpetrated on women and children." Could you explain to us how you come to that conclusion?

Ms LOUGHMAN: It comes from the balancing of tensions between those two competing issues of encouraging a meaningful relationship on the one hand and protecting the child from harm on the other. The experiences of the impact of the last round of changes, the Family Law Reform Act of 1995, on encouraging contact orders, suggest that that may not have been appropriate. For example, there is a study on interim orders providing for contact with a parent where there have been allegations of abuse, and further down the track when the matter goes to hearing and the final decision is made, with the benefit of hindsight it can be seen that an interim order put the child at risk. Our concerns are that, from 10 years ago, when the right of contact was first introduced into the Family Law Act, it introduced, in a practical sense but not in the legal sense, a presumption in favour of contact. Our concern is that the raising of the meaningful relationship provision in section 60CC will heighten that shift.

The Hon. GREG DONNELLY: But it is a balancing act, as you have described it. Most of the witnesses today have talked about the balancing of tensions. That does not necessarily lead to the conclusions that you are submitting. You are saying it "may".

Ms LOUGHMAN: That is right.

The Hon. GREG DONNELLY: Often, one looks back on these things with the advantage of hindsight.

Ms LOUGHMAN: One of the additional provisions that lead us to this conclusion is what has been called the parent friendly provision in 60CC. The court will now consider the extent to which a party has facilitated relationship with the other parent, and there is a case study in our submission of early indications that the courts will look at that as a significant factor. For women who have concerns about harm to their children, there is a terrible tension between raising the allegations and being seen as not facilitating a relationship with the other parent. So that parent friendly provision, we think, will discourage women from coming forward with allegations of abuse, for fear that they will lose their children because they have been seen to be not facilitating a relationship with the other parent.

The Hon. GREG DONNELLY: I am trying to pin this down. If Women's Legal Services is concerned about the regime that has just been put in place—and I gather from your comments that it

might even have concerns about the regime post-1995—in what way would you balance the rights of fathers, mothers and children? In the end it is a balancing act and a difficult one at that.

Ms LOUGHMAN: It is.

The Hon. GREG DONNELLY: How do you pull that off?

Ms LOUGHMAN: Decision making in family law is discretionary and, of course, decision makers bring their values and experiences to the decisions. One thing that would assist would be for the legislation to provide explicitly for "meaningful relationship" to mean a relationship free from violence or abuse. That would clarify that the best interests of the child in having a meaningful relationship with both parents would mean a relationship free from violence or abuse. It has been the experience of decision makers under the Act that the right to contact has overridden the requirement to protect children from harm. That has just been the reality of the decision-making.

The Hon. GREG DONNELLY: Is that reflected in publications and research?

Ms LOUGHMAN: Perhaps we could follow that up.

The Hon. GREG DONNELLY: I would be interested. You are making a pretty significant point and you are asserting that point. If there is any evidence of that it is important to put it on the table.

The Hon. DAVID CLARKE: Getting back to family relationship centres, would it be fair to say that there are two objectives: to try to avoid domestic break ups in the first place and, if they are unavoidable, to try to assist with a smooth process for the break up to occur. Would that in a broad way be the intentions, as you see them, of family relationship centres?

Ms LOUGHMAN: No.

The Hon. DAVID CLARKE: You do not see that at all? You do not think that is what the Federal Government intended these family relationship centres to do?

Ms LOUGHMAN: My understanding of family relationship centres is that they are there to give relationship advice. So yes. If people are seeking assistance with a relationship, whether it is to reconcile or to improve, yes.

The Hon. DAVID CLARKE: The Government said that these centres would assist in trying to avoid a break up, which is a worthy objective, is it not?

Ms LOUGHMAN: If that is what the parties are seeking and they succeed at it, yes.

The Hon. DAVID CLARKE: Is that an approach that Women's Legal Services takes to try to see whether it can resolve the differences rather than just dealing with the result of a break up?

Ms LOUGHMAN: Women contact us for advice at various stages of separation. The vast majority of them seek advice from us when there has been domestic violence and they have made a decision about whether or not the relationship is over. We take the approach that we give information to women, we provide them with what the law says, and it is a matter for them to make a choice about what they are doing. We give them information about services, so if a woman indicated to us that she wanted to make her relationship work and that was the nature of the phone call, we would, of course, refer her to appropriate services.

The Hon. AMANDA FAZIO: We sent you a list of questions. I want to get some comments on question No. 16, which relates to new section 117AB of the Family Law Amendment Act 1975, which states:

> Court costs to be paid in circumstances where a party makes a false allegation in court proceedings related to a parenting order.

Do you have any comments on how that will impact on women in violent relationships? Do you think they will be intimidated by the prospect of unsuccessfully taking court action and then having to pay additional money under the Family Law Act because they have been unsuccessful?

Ms LOUGHMAN: The view that we have taken to this provision "knowingly make a false allegation" is that it is a high bar but, at the same time, it is an additional provision that will discourage, yes.

CHAIR: The Committee is grateful to you for giving evidence today. If we did not have people who were willing to make a commitment to give us information we would never get anything done. You took a few questions on notice, which the secretariat will sort out with you. Because of the Committee's short time frame we are asking you to return them within a week. We also ask you to address any of the questions that we did not get an opportunity to ask you today.

(**The witnesses withdrew**)

CHAIR: This Committee is conducting only one hearing so the information given to it by witnesses is important. At this stage I will not go through all the formal processes. Some broadcasting guidelines are available if required. Messages and documents must be tendered to the Committee through the attendants or the Committee secretariat. The Committee prefers to conduct its hearings in public. However, it might decide to hear certain evidence in private if there is need to do so. If such a case arises I will ask the public and the media to leave the room for a short period.

RODERICK CHARLES BEST, Legal Practitioner and Director, Legal Services, Department of Community Services, 4-6 Cavill Avenue, Ashfield, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Mr BEST: As a representative.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr BEST: Yes, I am.

CHAIR: If you should consider at any stage that any evidence you might wish to give or documents you might wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Would you like to make a short opening statement?

Mr BEST: Yes. I am here as Director, Legal Services, Department of Community Services. Within the Department of Department of Community Services our major interest relates to children, child protection issues, and how domestic violence interacts with them. From the information we have received in the department we know that we are now receiving close to 250,000 reports of children at risk of harm in any 12-month period. Of those, approximately one in four report states that the primary cause for concern relates to domestic violence. That is a very bold statement in that there are other causes relating to other incidences, but it is probably reasonably accurate in recording the rate of domestic violence and its link with child protection.

Almost one-third of the reports come from the police, our major reporter. They have a policy of reporting incidents of domestic violence, so we think that is a reasonably accurate portrayal of the link between domestic violence and child protection. Clearly, in relation to children, domestic violence has considerable importance. They can be subject to violence that might be ongoing between their parents but, in addition to that, there will be a link between violence in the home and outcomes for children. There are research studies relating to everything—from damage to the neural links through to psychological and emotional damage happening to a child arising from domestic violence. So it is a very important factor.

We know from research and work within the department that domestic violence, in particular as it relates to mothers who are the often the subject of physical violence, can have a difficult relationship. The relationship is that the mother is often portrayed as not protecting the child. A violent father, together with a non-protective mother, can result in a child being removed, if a child has been established as being in need of care and protection. That places the mother in a difficult situation in responding to domestic violence and being able to establish what her reaction and response might be when she decides to move.

Referring to some of the questions you have asked, I noticed that one of the questions relates to whether there are any studies that show whether violence increased at the time of separation. Some studies indicate that that might be the case. I will come to those in more detail when I look at the questions. But certainly an English study indicates an increase in that area and there are studies in Australia relating to the greater death of women at the time of separation. I think that is indicative of an increase in violence at a time when the mother is trying to assert or re-establish her independence from a physically violent partner. At that stage some of the physical violence takes on a greater height and there is a greater awareness of it.

So tensions are built within the system. Women in domestic violent situations experience difficulty in maintaining their safety and protection and, at the same time, acting in a way that will be protective and supportive of any children who might be there. We have emergency arrangements and longer-term arrangements within the care and protection system. Referring to the emergency arrangements, one of the factors that we take into account is children concerns and whether alternative action has been taken. That is specified in the care and protection legislation as including applications for apprehended violence orders [AVOs].

The interrelationship, therefore, between domestic violence, AVO family court orders and possible care and protection orders is quite closely intertwined. Therefore a balancing between those respective orders and trying to work your way through the complexity of those arrangements is something that is often necessary in taking appropriate steps for the care and protection of children.

CHAIR: What changes to the Family Law Act 1975 as a result of the amendment are most significant to New South Wales?

Mr BEST: Clearly in terms of the background that I just talked about where there is a change of relationship between the orders made for AVOs under the State law, the care orders and orders relating to family violence being made in the Family Court. There is a slight readjustment in terms of how those orders might be made and that is clearly an important factor. There are changes to the parenting plans and those parenting plans have the possibility of overriding State care orders and again that is a significant element. The presumption in terms of shared parenting rather than necessarily proceeding with the paramount considerations for the child again is a significant difference. Of course, there is the establishment of the family relationships centres, which we would hope would assist in working with families, but we are not quite sure about the impact that they are going to have in terms of the use of other service providers or, in fact, a referral to the services of the department.

The Hon. DAVID CLARKE: In a report "Every picture tell a story"—I think you would be aware of that report?

Mr BEST: Yes, I am indeed.

The Hon. DAVID CLARKE: It states that in many jurisdictions the numbers of child abuse incidents reported to the authorities are far greater than their capacity to handle. That is certainly the case in New South Wales, is it not?

Mr BEST: The number of reports that are coming in?

The Hon. DAVID CLARKE: Yes?

Mr BEST: Are something in the order of 250,000.

The Hon. DAVID CLARKE: Yes.

Mr BEST: That is far greater than any agency would be able to cope with.

The Hon. DAVID CLARKE: That is right, so you have a problem with funding. That would be obvious, would it not?

Mr BEST: No. You have a large number of reports coming in and, as with any system, you have to have a system in place which assesses those reports and work out which of those the State should be intervening with and those which it should not.

The Hon. DAVID CLARKE: So you are saying that you do have the capacity to handle all of these complaints coming in and that you have been handling them quite satisfactorily?

Mr BEST: Clearly there are Ombudsman's reports, which indicate that there are areas for improvement by the Department of Community Services.

The Hon. DAVID CLARKE: And do you agree with the Ombudsman that there is room for improvement?

Mr BEST: I certainly agree with the Ombudsman that there are areas for improvement

CHAIR: We are not in estimates now, David. We are trying to get information about this question.

The Hon. DAVID CLARKE: So am I.

CHAIR: No, you are not.

The Hon. DAVID CLARKE: Yes, I am. Is it true that the primary or major risk to children is not domestic violence from the father but from a subsequent male who is in a relationship with the mother? Is that an observation that you believe is correct?

Mr BEST: The families with which DOCS works are very complex families, by and large, and the violence is there and arising from the mother's partner. I do not know of any statistics in terms of the work from the department breaking that up between birth fathers and subsequent partners.

The Hon. DAVID CLARKE: So you have no information at all that can tell you whether that is true or not, that a major risk to children comes from a male other than the father?

Mr BEST: I certainly do not have any information. I can make inquiries as to whether the department holds any information.

The Hon. DAVID CLARKE: I understand there have been various reports that have pointed this out but you are not aware of any of these reports?

Mr BEST: I am not aware of those reports in terms of the work of the department.

The Hon. DAVID CLARKE: Can you make inquiries?

Mr BEST: Yes, I can certainly make inquiries.

The Hon. DAVID CLARKE: Do you have any instinct that that could be the case or would you prefer not to say?

Mr BEST: I do have an instinct that that might be the case because a large number of people that we work with in fact are not married, so I am trying to break that down—

The Hon. DAVID CLARKE: I am not talking about people who are married. I am talking about a male other than the father.

Mr BEST: That is right and the majority of our families are blended families and we are dealing with whoever the partner is at the time, not necessarily the birth father.

The Hon. DAVID CLARKE: So the information that comes in to you as the director, you have no indication one way or the other as to whether it is the fathers who are responsible for this violence or another male who is in a relationship with the mother?

Mr BEST: I have never had the need to look at that.

The Hon. DAVID CLARKE: Do you not think it would be important, if nothing else, to put in a better light fathers who might be subject to a very wrong perception out there that they are responsible for a lot of this violence when in fact they are not?

Mr BEST: No, my concern is always going to be that of the child, and I would always be looking to see the individual who is looking at causing the risk of harm to the child. I am not interested in putting labels on that.

The Hon. DAVID CLARKE: But it would be important information that could assist you in doing your job better if you had that information, would it not?

Mr BEST: I am not sure that it would make much difference in terms of the orders for the particular child.

The Hon. DAVID CLARKE: That information is really of no relevance or concern to you at all?

Mr BEST: Not in terms of the individual care application for children, no.

The Hon. DAVID CLARKE: What do you say about the number of complaints that are made about insufficient investigation of violence and abuse of children by DOCS in New South Wales?

Mr BEST: In what way?

The Hon. DAVID CLARKE: Are you suggesting that you are not aware of any allegations being made?

Mr BEST: Of course not.

The Hon. DAVID CLARKE: You are aware or you are not aware?

Mr BEST: I am aware.

The Hon. DAVID CLARKE: I am asking what your reaction is to that. Do you believe that that criticism is justified?

Mr BEST: There is always the possibility for an improved response to domestic violence and an assessment of whether the particular children are in need of care and protection.

The Hon. DAVID CLARKE: So the highest you are prepared to put it is that there is always a possibility. You are not prepared to accept that there is a problem of many of these complaints being properly investigated?

Mr BEST: Clearly there is a situation where the department needs to improve its response to the number of reports coming in of violence involving children.

The Hon. AMANDA FAZIO: We have heard from other witnesses that they do not think that this Federal legislation has been in long enough to adequately assess its impact. Do you concur with that view?

Mr BEST: Yes. Most matters in the Family Court are taking somewhere between 15 to 18 months to conclude, so I would have thought that to actually see what is coming out from the Family Court orders you would be looking at something like two years before that occurred. The number of family relationships centres that have rolled out at this stage is still quite small so, again, we have not really seen the impacts of that across a range of communities in New South Wales.

CHAIR: So about mid 2008, do you think?

Mr BEST: Somewhere round about there, I would think, we would start to see some of the consequences.

The Hon. AMANDA FAZIO: Section 60CC of the Federal Act outlines the two primary considerations in determining the child's best interests, that is having a meaningful relationship with both parents and the need to protect the child from harm. How do these two potentially contradictory considerations interact and what do you see are the implications for children?

Mr BEST: Clearly they interact in terms of the fact that they are there in the legislation and you have to try to balance them. The difficulty is—and it is a difficulty we currently face where we take proceedings in the Family Court rather than in the Children's Court. The difference in the legislation is that in the Children's Court it refers to the one paramount consideration, that is, the child. In the Family Court, even without these amendments you already had a situation where certain principles were being placed which sit alongside that of the paramount consideration, and trying to get

that balance without skewing what the paramount consideration might be is always going to be very difficult.

To give you the example, which is that of contact with the child, to what extent are you going that have the requirement for shared parental responsibility? If you have established thresholds, no matter how high they might be, in relation to the safety of the child or the violence which is already there, you are actually balancing all the factors that might be needed to be balanced and giving them the due weight in terms of establishing what the paramount consideration might be, that is, the welfare of the child. My concern is that by placing this emphasis upon shared parental responsibility, you have actually moved away from trying to give a due balance to all of the relevant factors that might be there for the welfare of the child.

The Hon. AMANDA FAZIO: Do you think that the presumption of shared parental responsibility will potentially result in greater contact time for perpetrators of family violence?

Mr BEST: I think it will because, as I said from my opening remarks, I think that most mothers are in a difficult situation and trying to already balance their protecting of themselves, taking appropriate steps and yet at the same time being seen to be protective of the child. If, therefore, you are going to have difficulties in terms of mothers wanting to come forward to prove the violence, if you are going to impose burdens upon them such as possible costs orders, if they fail to appropriately establish their case, I think you are going to find that fewer people putting forward that information before the court and therefore the court is not going to be able to weigh that up. I think they are going to therefore come back and rely upon a presumption for shared parenting, which will result in increased contact.

The Hon. AMANDA FAZIO: On page 11 of the New South Wales Government's submission concern is raised regarding amendments allowing direct evidence to be taken from children by judicial officers in the absence of other parties. Can you provide further evidence about these concerns and let us know what training is provided to the judicial officers and whether you think it is sufficient?

Mr BEST: I am not aware of the training situation in terms of the Family Court, so I cannot comment on that. In terms of judicial officers seeing children in chambers, it has some difficulties in terms of what evidence is therefore admissible, the role and the degree of information which the independent legal representative for the child might have access to. It has difficulty also in terms of confidentiality and the situation of places the child in and whether that child will make more or fewer comments to a judicial officer in chambers than the child might make otherwise.

We did have a situation in the Children's Court some little while ago where there was a practice of some judicial officers have seen children in chambers in the course of care proceedings. The last of those that went on appeal to the Supreme Court was a matter of Talbot's case. There the Supreme Court was critical of the practice of Children's Court magistrates seeing children in chambers on the basis of the manner in which impaired procedural fairness and the difficulties that it gave to the other parties to be aware of what was being said and what was not being said and the context in which it was being said. The experience in the Children's Court, at any rate, has been that a system of interviewing children in chambers has been subject to criticism and is not a practice that was subsequently followed. It is therefore interesting that it has now been picked up in the Family Court.

The Hon. AMANDA FAZIO: Apart from situations of violence or abuse, what sort of factors could be raised by a parent seeking to rebut the presumption of shared parental responsibility?

Mr BEST: There are a range of circumstances set out in the Act, but I assume that you do not want me to go through those?

The Hon. AMANDA FAZIO: No.

Mr BEST: I am not sure that there are a whole lot more. I think they are reasonably comprehensive in what they are saying. I think that it will make people look to see whether, in fact, they should be going down the family violence route in terms of their arguments.

The Hon. AMANDA FAZIO: What provision has been made for considering cultural sensitivity in the amended Act and what steps have been taken to ensure that the family disputes resolution process is culturally sensitive?

Mr BEST: Clearly, the amendments include within them and the Act includes within it provisions already for cultural sensitivity. At the present time I do not have sufficient experience of a range of different peoples coming before the court under this. I am not sure how it is going to work in practice. Certainly, the department has been involved with the Family Court in a number of cases, particularly under a project called the Magellan project. There is only a small number of cases there at the present time and I really do not have a sense of how that is going to interact in relation to cultural sensitivity issues.

The Hon. AMANDA FAZIO: In your opening statement you talked about family violence and you said that you were aware of studies that talked about where the violence increased around the time of a marriage or relationship breakdown. Can you give us some more information on that or refer us to those studies?

Mr BEST: I have brought along a list of references from some articles, which I would be happy to tender in relation to those. Just briefly, there is an English study between England and Denmark, which looked at some increase around about the time of separation. There is an Australian Institute of Criminology study, which talks about the murder of women, and a study between 1988 and 1999 found that approximately 40 per cent of murders of women happened around about the time of separation. I have given those references and I have also pulled out some of the studies in relation to false accusations.

Just in quick summary of those: There is a United States study of some 9,000 situations, which gave a very small percentage of false accusations, and that is mirrored in two Australian studies, one by Hulme and one which was associated with the Magellan project in the Family Court. Against those there is a Canadian study, which shows quite a significantly high percentage of false allegations in dispute, and while there is a commentary on that in the Australian study by Professor Thea Brown, I am not quite sure in my own mind how you reconcile those various studies. But, certainly, the US and Australia would indicate quite a small percentage of false allegations and the Canadian study quite a high.

Ms LEE RHIANNON: Did the Commonwealth Government consult with DOCS prior to the introduction of this legislation?

Mr BEST: No, there was no detailed consultation.

Ms LEE RHIANNON: Did they actually tell you it was coming up?

Mr BEST: We were aware that it was coming through, in the press and the like.

Ms LEE RHIANNON: Moving on from once it is adopted, has there been any consultation in any form in terms of its implementation? Could you explain how that has worked?

Mr BEST: No, there have been no discussions as to the operations between the department and the family relationship centres.

Ms LEE RHIANNON: What role does DOCS play in assisting victims of family violence to amend an existing parenting order?

Mr BEST: It depends on whether or not DOCS decides to intervene in the matter and what supports the department might want to give. All of those would be in relationship to the extent to which we considered the child was at risk of harm and whether or not we thought there was a carer who was there to minimise the harm. If we thought that that was not the case, DOCS would have a right to intervene in Family Court proceedings and would be able to put its case. In most situations what we would normally expect is for the legal representative for the child to subpoena the DOCS files, which would contain all of the reports and the background information and we would be discussing the matter with that legal representative so that that legal representative would be

advancing information on behalf of the department—not on behalf of, but would access that information.

Ms LEE RHIANNON: Will DOCS involvement be used to satisfy the reasonableness test in relation to proving family violence?

Mr BEST: It has not been so far, but one of the concerns we might have is the extent to which we might become involved in the future.

Ms LEE RHIANNON: Can you elaborate on that? When you say you are concerned about your involvement in the future—

Mr BEST: Because we have a large database, one of the concerns is that not only will we be receiving subpoenas to access that information but we will be actually asked to give evidence in terms of what that information might mean, how we might assess it, whether in fact we have properly intervened or whether we should have made a different decision. So the concern is that we are going to have our caseworkers being asked to come along and give evidence on those matters where they previously would not be in those proceedings at all.

Ms LEE RHIANNON: Which was my next question, about the workload. It sounds like that is what you are alluding to there, that there could be a considerable increase in the workload for your people?

Mr BEST: Yes. It was one of the concerns that we had as a department with the Magellan project, and which is why New South Wales was slow in rolling out the project here and why, as happened in Queensland as well, we have only rolled it out into certain of the Family Court registries. We have been very conscious of trying to monitor the workload implications to make sure that we are actually making a valuable contribution and not just spending resources without any proper gain. And that is what we would like to be doing with this as well. We think that we have actually worked very well and very closely with the Family Court in terms of the Magellan project, and that appears to be working satisfactorily and we are keeping a close eye in terms of workload implications. The way the court has been structuring our involvement has meant that the workload implications have been kept to a minimum.

Ms LEE RHIANNON: New section 117AB of the Family Law Amendment Act now requires court costs to be paid in circumstances where a party makes a false allegation in court proceedings related to a parenting order. How do you expect this will impact on women in violent relationships?

Mr BEST: We think it will be one of the factors which will stop women from coming forward with information because, as with most situations occurring in the home, it can be difficult to prove, and prove for a whole range of reasons: not just because there may not be other witnesses available, but also because most people will take deliberate steps to avoid harm occurring, and if you have taken those steps then it is difficult to prove the environment in which that has been necessary. So we think that if you put all of those things together and then you have got a costs order, which in a Family Court proceeding could be quite expensive, then that is likely to act as a deterrent.

Ms LEE RHIANNON: In that the word will get around that people could cop these extra costs and the lawyers would be advising them of such?

Mr BEST: That is right. They are likely to be advised by their lawyers that unless you are very clear about this and you have firm evidence then you should not run the risk.

The Hon. DAVID CLARKE: Just to clarify something beyond any doubt, the position is that you keep no records on what percentage of cases of abuse of children in domestic situations is caused by a male person other than the natural father?

Mr BEST: What I said was that information was not available to me but I would take that on notice and would get back to you about that.

The Hon. DAVID CLARKE: Will you also take on notice this question: Can you advise us what percentage of cases have been handled by your office of proven domestic violence of a child by a male other than the natural father, say for the period of the past three years?

CHAIR: That is well outside our terms of reference.

The Hon. DAVID CLARKE: It will become apparent from questions that I ask other witnesses, so I do consider it relevant.

Mr BEST: I am happy to take that on notice.

The Hon. AMANDA FAZIO: Can we also have then women who are not the natural mothers?

The Hon. DAVID CLARKE: Yes, that is a very worthy suggestion.

The Hon. AMANDA FAZIO: We do not want to appear biased, do we?

The Hon. DAVID CLARKE: Indeed, you are quite right, and I think that is a worthy suggestion by the Hon. Amanda Fazio.

The Hon. AMANDA FAZIO: I just wanted to ask you one last question, and it relates to court orders. In the list of questions we sent you it is No. 16. Can you please describe to the Committee the purpose and operation of Division 11, which relates to the interaction of family violence orders and parenting orders? Do you have any concerns about the operation of Division 11?

Mr BEST: The difficulty that we have with this situation is that what we are now going to be confronted with are orders in the Family Court that will take priority over the State orders, where those orders have a different set of priorities, and those priorities are set out in the Family Law Act and they are not reflected in the State legislation. In addition, what we have within the Care and Protection Act is section 47, which is an equivalent provision to an AVO in that it permits the restriction of parenting acts. When we relate that back to the Family Law Act, that becomes a child welfare law, so that an order under section 47 of the care Act will take priority over Family Court orders. If they did not go via the Children's Court but they went by way of an AVO, the AVO will, in fact, be subordinate to the Family Court order. So we are starting to get the difficulty that we have between Federal and State legislation.

Whereas the Family Court has its priorities in terms of the legislation, the State court can only look at an AVO following that where there is fresh evidence. So whereas the State court could actually look at a broader range of matters and not take in certain priorities, it cannot apply those unless there is fresh evidence coming in that was not considered by the Family Court. So you can start to see that there is not only a conflict between the Federal and the State, and depending upon where you go, how that will apply, but different judicial officers will take into account different circumstances and be required to look at different things, depending upon which order the application is brought and to which court the application is brought. That all strikes me as being quite a complex and messy situation, and it would be good if we could try and resolve that.

The Hon. AMANDA FAZIO: Do you think that that would lead to more cases where there is some form of domestic violence against a child with those cases being referred to the Children's Court rather than just the ordinary court to get a run-of-the mill AVO?

Mr BEST: There could well be greater pressure upon DOCS to be initiating applications in the Children's Court.

The Hon. AMANDA FAZIO: We also had a couple of sub-questions under No. 16. Did you have any comments to make on those?

Mr BEST: I really do not have any information in relation to subsection (a) in terms of 68R. I think I have dealt with subsection (b), and probably (c) as well.

CHAIR: One of our previous witnesses mentioned that they were waiting for determinations from two court cases at the moment. Do you know about those?

Mr BEST: Yes, I am aware that there are some decisions being handed down.

CHAIR: I do not want minute detail about those cases but what sorts of issues would you as an organisation be looking for in those cases?

Mr BEST: We would be trying to look to see what emphasis the judiciary are placing upon the different parts of the legislation. We would be looking to see how the interaction between paramount consideration for the child might interact with some of the other principles. We would be looking to see how those principles are being applied. We are not involved in any of those—the cases that I am thinking of, at any rate—but we would certainly be looking at the general approach the judiciary are likely to adopt to the application of principles.

CHAIR: As far as you know is this is the first judicial testing of the legislation?

Mr BEST: There has been at least one Federal Magistrates Court matter that I am aware of. Mr Justice Rose has brought down a decision in relation to joint parenting as well. So I think there are some already reported.

The Hon. DAVID CLARKE: Regarding the report on the inquiry into child custody arrangements in the event of family separation, "Every Picture Tells a Story", I may have misunderstood you but did you say that DOCS was not consulted by this?

Mr BEST: No, I did not say that. I was talking about the current amendments.

The Hon. DAVID CLARKE: Were you consulted in regard to them?

Mr BEST: Yes.

(The witness withdrew)

(Short adjournment)

GLENN ROBERT THOMPSON, Solicitor, Member, Family Issues Committee, New South Wales Law Society, 170 Phillip Street, Sydney,

JOHN RICHARD LONGWORTH, Solicitor, Member, Family Issues Committee, New South Wales Law Society, 170 Phillip Street, Sydney, sworn and examined, and

OLIVIA JEAN CONOLLY, Solicitor, Member, Family Issues Committee, New South Wales Law Society, 170 Phillip Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Mr THOMPSON: A representative of an organisation.

Mr LONGWORTH: A representative of an organisation.

Ms CONOLLY: A representative of an organisation.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr THOMPSON: Yes, I am.

Mr LONGWORTH: I am.

Ms CONOLLY: Yes.

CHAIR: If you 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, please indicate that fact and the Committee will consider your request. Would either or all of you like to make a short opening statement?

Mr THOMPSON: Not on my part. Our submission is there and I am happy to go to questions.

CHAIR: What changes to the Family Law Act 1975 as a result of the amendment do you think are most significant to New South Wales?

Mr THOMPSON: The most significant to New South Wales—in reality we say it is most significant to all States—is the presumption that has been introduced for equal shared parental responsibility and the flow-on effect from that presumption, if it applies, for the court then to consider whether or not it is appropriate for equal time or whether or not it is appropriate for substantial and significant time. And they are clearly defined and set out in the paper. That is what I see as the most significant change in the culture of that.

Mr LONGWORTH: We could wax lyrical for many hours over the changes to the Act. I think it is 183 pages long. Many will be significant as we look back in time. It is very hard today to say what will be the most significant. As Mr Thompson said, the shared parenting presumption is quite significant, as are also the changes to division 12A of the Family Law Act. By that I mean how we run litigation involving children on a less adversarial basis. We have a history to show that that is a significant and beneficial change through pilot projects run in the Family Court. We would predict that that will in itself be quite significant in the future. There are a myriad of other ones which we could identify but we are happy to answer questions as to any in particular.

CHAIR: That leads into the next question. Has the legislation been in place long enough to adequately assess its impact? If not, when do you think the impacts will be fully known?

Mr THOMPSON: We do not believe it has been in place long enough and it is very difficult to predict when it will be. However, the best estimate that we can come up with is one to two years. Certainly, we need the appellate decisions on the current parts of the legislation in force but also when

the July 2007 amendments come into force or into play then there will need to be a time lag from that to get, firstly, your first instance decisions and then any appropriate appellate authority on the interpretation and effect. That is why we hesitate a bit between one to two years.

CHAIR: That would be fairly consistent with the persons we have heard today.

Mr LONGWORTH: Can I add to that?

CHAIR: Yes.

Mr LONGWORTH: There are two types of changes I think we will see. One is the practical on-the-ground change and the other is the cultural shift. The latter, the shift in society as to how people approach these issues, is clearly an aim to change. Whether it changes because of legislation or changes because society moves is a question but that timeframe could be the piece of string. The practical changes are what I think we are talking about in terms of maybe one to two years or maybe a bit longer, almost certainly not less.

CHAIR: What sort of societal shift would you be expecting?

Mr LONGWORTH: We are clearly looking at an aim from government of not wanting to spend a lot of time and energy in courtrooms—an aim we support. It would be fair to say that we rarely receive clients in our officers wanting to go to court. So if there is a mind set that says there are better ways to do things and that is an accepted and publicly focused shift, then that is a change that will hopefully come about. That is different from some of the aims that might be outlined in the presumption of shared parenting. That sort of cultural shift would be different from a practical shift.

The Hon. DAVID CLARKE: Mr Thompson, do you see the Act as a worthy piece of legislation?

Mr THOMPSON: I have difficulty in defining "worthy". It is certainly a piece of legislation that has been enacted to lead to a certain path that society may be heading towards. So from that point of view, if I can use the word loosely, then yes. However, from the point of view of whether I think these amendments are put together in a logical fashion, no, I do not.

The Hon. DAVID CLARKE: Did the Law Society have an input into, or make any submissions in regard to, this legislation?

Mr THOMPSON: Yes.

The Hon. DAVID CLARKE: I have a document entitled "Women and Family Law" produced by the Women's Legal Resources Centre, in which it says, "The New South Wales police have full authority to enforce protection orders made by the Family Court and Federal Magistrate's Court but because they are Federal courts sometimes there is some confusion about this, which may delay enforcement." Does the Law Society confirm that to be the case?

Mr THOMPSON: Are you talking about compliance with orders for children to spend time or compliance with injunctive-type orders for the protection of a person?

The Hon. DAVID CLARKE: Let us take all orders. Do we see a synchronisation between Federal legislation and the implementation of orders by State instrumentalities?

Mr THOMPSON: By the police in particular?

The Hon. DAVID CLARKE: Yes.

Mr THOMPSON: I would perceive there are difficulties.

The Hon. DAVID CLARKE: Can I give you this example of a case that I am aware of? A non-residential parent has a Federal magistrate's order that states that the parents are not to have phone contact between them but the parents must not in any way interfere with the children's phone contact.

The residential parent terminates the children's phone contact with the father, and this behaviour is repeated. The father then goes to the police but they say they have no power to do anything about it. The matter then goes to the area commander, and he says the same thing. Is this sort of case common to you?

Mr THOMPSON: I would not say it is, but I have heard of it.

The Hon. DAVID CLARKE: It is a very unsatisfactory state of affairs, is it not?

Mr THOMPSON: There are other avenues that the Act directs you to in the compliance regime, which is meant to lead you into resolving the problem for the court to deal with it and, in some senses, appropriately a court then applying the Family Law Act principles and the basic premise that the welfare of the child is paramount. So the Act provides a mechanism for that enforcement. If there is need for urgent enforcement or urgent variation of the orders, there is provision to go back to the Federal magistrate at short notice or to the Family Court if need be.

The Hon. DAVID CLARKE: Do you think the police need further training in their role in supporting court orders emanating from the Act?

Mr THOMPSON: I think so.

Mr LONGWORTH: If I may add to that, I have had a lot of experience in some areas of domestic violence and my understanding and experience is that there has been a substantial shift in the work of police and their training over the 20-odd years that I have practised. There is now a very real focus. Indeed, the reaction we would receive from the New South Wales police has greatly improved from what we experienced a long time ago. That being said, any one of us could pick an anecdote from our particular files where we would say that it is unsatisfactory. Why it was unsatisfactory is another question. But I do not agree with the general statement that there is a problem. I would agree that there is always a way that we can focus on doing things better.

The Hon. DAVID CLARKE: These incidents are all too frequent, though, are they not?

Mr LONGWORTH: Of?

The Hon. DAVID CLARKE: The sort of incident that I have just described.

Mr LONGWORTH: Are you talking about the breach of the order or the involvement of the New South Wales police?

The Hon. DAVID CLARKE: I am talking about the failure of police to follow through and ensure that the order is complied with.

Mr LONGWORTH: Certainly I think that one of the difficulties identified in the question you are asking is that we have the State and the Federal systems—and we will not be changing that very quickly, as I understand it. There are very great difficulties between the Federal regime and State enforcement. If that is a problem, I suppose I would have to agree that it is a problem. But that does not mean it is not capable of being addressed.

The Hon. DAVID CLARKE: So you are saying it is a problem but it is something we should look at to address.

Mr LONGWORTH: I am saying that there are some problems in what you say, yes.

The Hon. DAVID CLARKE: Thank you. Turning briefly to domestic AVOs, would you say that there has been a culture of unfairness to fathers?

Mr LONGWORTH: It is a general question. In what sense?

The Hon. DAVID CLARKE: I am putting it as a general question and seeking a general response. Do you believe that the system has acted unfairly to fathers?

Mr LONGWORTH: When you are talking about violence as opposed to parenting issues, for example, parenting issues have me thinking fathers and mothers whereas violence issues do not necessarily have me thinking in those terms.

The Hon. DAVID CLARKE: I am talking about domestic AVOs involving fathers.

Mr LONGWORTH: No.

The Hon. DAVID CLARKE: You do not think so at all?

Mr LONGWORTH: No, I do not think so.

The Hon. DAVID CLARKE: Turning to the question of legal aid and domestic violence orders, the situation is apparently that legal aid is available to the complainant but not to the defendant. That is the situation as I understand it.

Mr LONGWORTH: I do not know that my experience is current enough to answer that question.

The Hon. DAVID CLARKE: Is there anybody here from the Law Society who would know the situation?

CHAIR: Did we not get some evidence on this already? You know the answer.

Mr LONGWORTH: I think Ms Walker spoke this morning.

The Hon. DAVID CLARKE: I want you to assume that is the case, that legal aid is not available to defendants in these matters. That is a very unfair situation, is it not?

Mr LONGWORTH: In what sense?

The Hon. DAVID CLARKE: In the sense that a complainant can make an allegation and is legally aided, including by way of a police prosecutor, and a defendant is not entitled to any legal aid whatsoever?

Mr LONGWORTH: I suppose that they are questions of policy though, are they not?

The Hon. DAVID CLARKE: But the Law Society does comment on matters of policy.

Mr LONGWORTH: We do. If we make broad assumptions like that I suppose one could make broad mistakes, and that is what I am trying to avoid. I am not trying to avoid the question. But we know statistically that people who are victims of domestic violence are usually in the weaker position. So, if the State saw fit to support those individuals it would be hard to argue with that.

The Hon. DAVID CLARKE: Are you saying it would be hard to argue against the current situation that legal aid is denied to defendants because very often complainants are in a difficult economic situation?

Mr LONGWORTH: It might be more a question of whether legal aid is properly funded or adequately funded to support everybody.

The Hon. DAVID CLARKE: I understand that, and that is a separate question altogether, but as a matter of principle it seems very unjust that defendants in a domestic AVO situation are not entitled to any legal funding, whereas there is funding for complaints.

Mr LONGWORTH: We are talking about the State Act now, we are not talking about the shared parenting legislation. If it were the case, as I recall the way the Act works, that a complaint is brought without reasonable excuse there are cost provisions under the State Act. I might be corrected on that as I have not researched that for today, but that is my understanding of the Act, but as a policy

question I suppose the question must be asked does one look at funding people who are in a power less position?

The Hon. DAVID CLARKE: But who is to say that the defendant is in any more powerful position economically than the complainant?

Mr LONGWORTH: I do not make the policy. I am not agreeing or disagreeing with it, but there is a substantial wealth of study that suggests that is the case.

The Hon. DAVID CLARKE: That those who are the complainants are in a weaker position economically—

Mr LONGWORTH: No, in a power imbalance situation. I am talking more about victims of domestic violence, male or female.

The Hon. DAVID CLARKE: Do you believe this area of legal aid to assist defendants in these matters is something that should be looked at?

Mr LONGWORTH: Yes.

The Hon. DAVID CLARKE: Does the Law Society have a view on this?

Mr THOMPSON: We must preface this by saying that we are part of the committee. The committee has not addressed that question at all, it not having anything in the papers. Having said that, I think it is something that should be looked at and I think it is something that needs to be examined in more detail to see if the consequential flow-on is what you are suggesting by the questions, namely, that there is just a blanket no legal aid on one side and absolute legal aid on the other. Because there are still the tests for legal aid, to my understanding, and there would need to be appropriate testing arrangements set in train to make sure that the Legal Aid Commission was not being abused in that situation by either side.

The Hon. DAVID CLARKE: Except that when there is a police prosecutor acting for the complainant, you cannot get much better legal aid than that, can you, that is 100 per cent legal aid?

Mr THOMPSON: I would not agree with that.

The Hon. DAVID CLARKE: In the sense that there is no expense to the complainant, that is a form of legal aid and there is no comparable legal aid to the defendant?

Mr THOMPSON: There is no doubt that there is no comparable to the defendant in that sense.

The Hon. AMANDA FAZIO: Section 60CC outlines the two primary considerations in determining a child's best interests, that is, having a meaningful relationship with both parents and the need to protect the child from harm. How do these two potentially contradictory considerations interact, and what are the implications for the children involved?

Mr LONGWORTH: Our overall answer to that must be it is very early. This has been a major change on how we focus on the best interest questions. It should be remembered that whatever section 60CC says, section 60CA still says the paramount consideration is the welfare of the child. Section 60CC is now divided into two primary considerations and a bundle of additional considerations. Whether or not there is prioritisation, and there is a debate whether one trumps the other, we do not know because we have not had any guidance on that. In particular, on the question about two considerations it is not necessarily the case that they are contradictory; they could be complementary, and I could draw anecdotes myself where that might be the case. Anything else that I could say would merely be guesswork because it is an interpretation of how that section is going to work, and that is about what the future holds. I hope that is an adequate answer.

The Hon. AMANDA FAZIO: I want to get some comments from you on what is the effect of the legal presumption of shared parental responsibility. I know you dealt with this in your

submission, where you say that that presumption can be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility. The impression we have, and you might have a feeling for this as well, is that most people assume that now there is this legal requirement for shared parental responsibility I do not think enough people know they can get out of that if necessary. What comments to you have to make on that?

Mr THOMPSON: I would agree with that basic premise that many people on the street now think that that presumption remains equal time. That is a problem that some people who may not have legal advice before negotiating arrangements are negotiating from a false premise of what the law may or may not say. As we know, and it is in the paper, that is not what the law says.

CHAIR: We have heard some bits of anecdotal evidence about legal advice, probably more from lone solicitors, but legal advice being given to some women in relation to this that is opposite to what you just said. Can you to tell me the process for the legal people to get this information about this new Act?

Mr THOMPSON: For the profession to be educated, are you saying?

CHAIR: Yes.

Mr THOMPSON: The processes are the family law section of the Law Council of Australia went out and held a number of seminars throughout Australia on the legislation, its meaning and effect, and what it was. There have been articles in the Law Society journal, the *Australian Family Lawyer* and there have been other seminars, and the Young Lawyers have had a seminar on it. So, there has been an adequate number of opportunities for anyone who wants to familiarise themselves with the legislation to do so.

CHAIR: Do you think some of this may be remedied when there have been some more judicial handings down on the issue?

Mr THOMPSON: We certainly hope so. We are all waiting appeal decisions and no doubt articles will be written flowing from those decisions in the Law Society journal, the *Australian Family Lawyer* to set out the way the courts are interpreting the presumption, the rebuttal of the presumption and how it is interpreting the primary considerations as opposed to the additional considerations. As John said, whether the additional considerations are secondary or of equal importance, for example.

The Hon. AMANDA FAZIO: To follow on from that, people who came into a shared parenting agreement without having legal advice would not be aware of the opportunities to rebut that presumption. Have you any idea how many or what proportion of people enter into disagreements without seeking legal advice?

Mr THOMPSON: Firstly, I would have to answer that by saying I do not know if they do not know their position, but some may not. Some may. Certainly, they are people who do not come to lawyers so I do not have any statistics on that all.

Mr LONGWORTH: What you are talking about I think are situations where individuals come before court. I think 5 per cent or 6 per cent of the people who are walking around in separated situations. There is no obligation on people to come to any agreement about anything. People have their own parental responsibility for a child under the Act, without having to move to the next step of shared. It is only when we get the situation where people need an adjudication that the court has to consider shared parental responsibility, and if the court does that without argument that convinces it otherwise then we move to things like significant and substantial time with children. But people in lawyer's office and mediator's office and family relationship centres can use whatever they like without having to use the words we were talking about.

The Hon. AMANDA FAZIO: Will the presumption of shared parental responsibility potentially result in greater contact time for perpetrators of family violence?

Mr THOMPSON: I think the answer to that has to be it could. It may; it may not, because we have to go back to the overriding principle, the paramount principle of child's best interests. That is the factor the court must take into account, and then the primary consideration, the objects of the Act, protection of the child from harm. You can have a situation, and it might be a family violence situation, but the child is still adequately and properly protected from harm. It may mean more contact than previously, it may mean less or it may mean a different structure of contact, but that is where it is still too early to see the effects.

Mr LONGWORTH: Also, we know from the reforms of 1995 that the contact time, as we called it then, increased, even in circumstances of interim applications. There might have been allegations of violence or other concerning conduct. It should be remembered the objects speak of meaningful contact, so we might do it better when we understand what the dynamics of the event were, violence or something else that gives a sense of what we call unacceptable risk. It may be at a time when a child or a parent may be controlled in a way that preserves the relationship but also protects the child.

The Hon. AMANDA FAZIO: I thank you for the comments you may in relation to our terms of reference and also just to tease out a bit more information about one of the comments that you made. You said mothers are receiving less by way of child support as a result of fathers spending greater time with their children and many expenses associated with the raising of children do not greatly reduce when children spend more time with their father. Is that an issue that is being raised with your members by their clients?

Mr THOMPSON: It is certainly an issue that is being raised and it is one that needs to be monitored and addressed, because a partial flow-on effect may be spousal maintenance orders rectifying a child support situation. That submission is really saying that the resident parent still has to maintain the house whether or not the children are there 10 days out of every 14, five days out of every 14 or seven days out of every 14. So they still have the core expenses, and child support naturally reduces and that is where we also have to look at the proposed child support amendments when they come in as to sharing the burden of the cost of the children and how the new system and formula will come into play.

Mr LONGWORTH: I think it would be reasonable for us to say that the changes to this formula clearly have not happened overnight, that a lot of investigation has gone into the needs to be addressed, and more changes are to come in July 2007. We are identifying that on the ground individuals are reporting quite quickly changes in their pockets. That is not saying anything qualitative about that; it is a quantitative statement.

Ms LEE RHIANNON: Thank you very much for coming in. I am wondering what your key thoughts are with regard to the New South Wales Government. This Committee will be looking to come up with some recommendations on how departments and other services will, directly and indirectly, handle the Family Law Amendment Act. I am wondering what your thoughts are on what could be recommended.

Mr LONGWORTH: We struggled with that question because, I suppose, firstly this legislation is so fresh and, secondly, because we are sitting here not necessarily to raise concerns. These are issues we identify because of our experience. There may be things that we say in hindsight are concerns, there may be things we say are great, and there may be things on which we will say we just do not know at this stage. How it will interact with the New South Wales Government has stretched our mind a bit. We identified some issues in the overlap between State and Family Courts exercising Federal jurisdiction. That particularly would be when the one court attempts to deal with the other jurisdiction's orders, section 68Q and such. That may have implications for resourcing of Local Courts, it may have implications for resourcing Family and Federal Magistrates courts. I cannot come up with anything more erudite than that as to how it might affect New South Wales planning.

Ms LEE RHIANNON: Apart from situations of violence or abuse, what sorts of factors could be raised by a parent seeking to rebut the presumption of shared parental responsibility?

Mr THOMPSON: That is where you go back to the overriding principle of the best interests of the child, and you then look at the primary factors, followed by the secondary factors. I commented

earlier about the way the legislation sits; you have to jump between sections that are up to 20 pages apart at times. For example, if you have looked at the primary factors and still have not got to your answer, or you have not found, if you are looking for it, reasons why the presumption should not apply, you then look at the additional factors. So, if you go through the wishes of the child, and violence and harm are still in there, and you go to the additional considerations of section 60CC and identify each of those factors, then you weigh those factors against the best interests of the child because that overrides whether or not the presumption should apply. It will be how the court interprets those considerations.

Mr LONGWORTH: The community has a long tooth in knowledge of this area. Some of the hallmarks that we used to see for what we called joint custody were things like that the parents had high levels of communication and high levels of co-operation. So, whilst there may have been no violence or abuse, you may have a family situation where one of the parents has not been or is not involved. That might be an appropriate situation to rebut the presumption of shared responsibility and either have a sole order, or no order, and leave as it was under the law. Essentially, if it is the case that there are very inadequate levels of co-operation and communication, it could be a welfare factor for the child to have disparate communication at parental level.

Ms LEE RHIANNON: I want to ask you about children being asked to give evidence. Do you have concerns about the amendments allowing direct evidence to be taken from children by judicial officers?

Mr LONGWORTH: The amendments do not actually speak to that. It is not the Act that talks about that; it is in the rules of the court, and they have been there for a few years. Indeed, I think the question might have been about division 12 and how court cases might be run differently. As long as I can remember—and this is older than I am—the Matrimonial Causes Act of 1954 provided for children to be interviewed. We have court cases going back to the mid-60s talking about circumstances where that might occur, how you would do it, and what are the appropriate ways of doing it. It is certainly something in history that has been done quite cautiously, and I cannot say I have ever been involved in a case where it has occurred.

That being said, it is something that, with social theory today, it is being solidly look at, but it does not arise from the Act; in fact, the Act just talks about how one might obtain the views of the child and says it might be through a report, or it might be through an independent children's lawyer or such other way as the court thinks appropriate, subject to the rules. It is the rules that then introduce some of the notions such as a judicial officer interviewing a child. As I understand it, that is done quite scarcely, and with great caution. There is quite a lot of focus at the moment on how the training might be put in place if that is to be a feature of our future landscape.

Ms LEE RHIANNON: You seem to be saying it has been in place for a while and that it has been done responsibly. Is that correct?

Mr LONGWORTH: I am saying that the provision has been there for a long while. Has it been used? My experience and that of my colleagues is that it has been used very rarely.

Ms LEE RHIANNON: So we cannot actually comment on it in a qualitative way?

Mr LONGWORTH: It might be that lawyers are not the best people to comment on that. Those involved in the social interaction with children and the social sciences probably could tell us best how that should be done, if it should be done, and when it should be done.

Ms LEE RHIANNON: Can you comment on the training of judicial officers, and whether you think that is adequate at the moment or could be improved?

Mr LONGWORTH: We are not usually privy to what training our judicial officers get. As I understand it, they certainly have structured committees to look at what they should be doing, and that the training that should be there should be intensive. More than that my qualification does not allow me to speak on.

Mr THOMPSON: Several papers were delivered last week at the National Family Law Conference in Perth by appropriately qualified persons. I should have brought the book. Several of those papers talked about whether the children want to be heard and methods of doing that, rather than the other way round, with we lawyers saying they do, they do not, judges should, judges should not. The impression that I was left with from the Perth conference was one of an overwhelming reluctance on the part of judges and Federal magistrates to be launching into interviewing children. My experience accords with that of John: It is almost unheard of that it happens. It has happened, but it is almost unheard of.

CHAIR: For your information, the secretariat has organised that the Committee obtain the book from the conference.

Mr THOMPSON: There were a number of papers from appropriate experts on that very point.

CHAIR: I have a question in relation to the workload of country solicitors. In country areas, and particularly in smaller towns, who do you think will be picking up the role of mediation?

Mr LONGWORTH: Do you mean actually being a mediator?

CHAIR: Who will deliver the process provided for by this law?

Mr LONGWORTH: I may be misunderstanding the question.

CHAIR: The question is the distribution of the Family Relationship Centres and the distribution of mediators throughout country New South Wales who may be licensed to deliver these services.

Mr LONGWORTH: I think we could comment on a number of things that we would like to see given greater resources, and that would be one of them. I think there are 15 Family Relationship Centres set up now.

CHAIR: Not yet. Four have been set up, and 15 are on the way.

Mr LONGWORTH: I think the second tranche is not yet in place.

CHAIR: It is 15 in Australia, is it?

Mr LONGWORTH: Yes. As to where they are, I cannot tell you specifically. But the general comment—and I would echo the comments we hear from rural members of our committee—is that there are not enough resources, and what resources there are are very thinly spread.

CHAIR: Are they being asked to go further with what they deliver?

Mr LONGWORTH: I think they would say that that is an accurate statement for Family Relationship Centres, for Local Courts, for Legal Aid resources, for all manner of things affecting the rural sector. That is just one of them.

Mr THOMPSON: I think it goes slightly further in that it may mean the tyranny of distance. When you said going further, I would take that to be, yes, they do travel further also to get to the facilities that are there; and, yes, it would be ideal if you could have a Family Relationship Centre in every major city or town in New South Wales. But that is a funding issue, and we know that will not occur.

The Hon. AMANDA FAZIO: How do the amendments of the Act affect the willingness of victims of family violence to obtain an apprehended domestic violence order?

Mr LONGWORTH: It is not my understanding that the Act has affected anyone's willingness to seek a protective order. There are clearly within the Act changes in relation to family violence, but that is in the Federal sphere. It is my perception that the willingness of an individual to

approach a State court for a protective order – and it is only my perception, because again it may prove to be different in history—has not been affected.

The Hon. AMANDA FAZIO: Can you please describe to the Committee the issues regarding the operation of division 11 relating to the interaction between family violence orders and parenting orders? Do you have any other concerns about the operation of division 11?

Mr LONGWORTH: It is a long answer to give in four minutes. Did you get our paper?

The Hon. AMANDA FAZIO: Yes. I just want you to elaborate on that for the benefit of Committee members' deliberations.

Mr LONGWORTH: History will teach us more than I could possibly predict, but we have an interaction between the two jurisdictions, State and Federal, over each other's domain. Whether it occurs or not, I do not know what history or the future will tell us. We know that State courts, under division 11, have the potential to make orders invoking the Federal jurisdiction. I suppose one of the concerns is the way the Act appears to be structured: they would only have to be considering new material. My experience of being in Local Courts, with busy lists and dealing with issues like this, is that the process of dissecting what was before another court on another day may be quite challenging, and then perhaps running yet another hearing on the same issue. I can see that being a challenge for certain magistrates—and I do not mean a challenge to their ability; I mean a challenge to their time and resources.

There is also the consideration that, under section 68S, there seems to be relief from a primary consideration of the welfare of the child for the State court. Equally, for the Federal Court, the onus is that making orders that might overlap a State family violence order has an invalidating effect. But, in order to go through that process again, that will be a resource driven hearing, which has an impact for the judicial officer, for the court system and for the people who have to go through it perhaps twice. Whether that actually occurs is another question, because, with good advice and with good guidance, people may be able to navigate the minefield that they are in without having to run down the paths I am outlining that the Act may provide. We have had the situation that the Family Court has had the power to deal with State violence orders before, and it has often been a bit easier and a bit cheaper to deal with the matter in two courts rather than in the one just because of the processes. But it is there and they do have an overlap. From a technician's perspective I can see issues, but what they mean in the future it is very hard to say.

The Hon. AMANDA FAZIO: If you go to the Children's Court to get an order about domestic violence relating to a child does that order takes precedence over a Family Court order? If you just go through the District Court and get an ordinary AVO the Family Court order takes precedence. Do you think that will lead to people court shopping?

Mr THOMPSON: That type of approach has been available for a long time. The history of that has told us that if the courts think that is occurring they are quick to turn around and say, "This should be somewhere else." So we are hopeful that it will not, but it could. But on John's point with the magistrates, time will tell whether Local Court magistrates decide to launch into varying, complex children's orders made by the Family Court following a hearing, or whether they adopt the approach that your question is leading to, "I will deal with the violence side of the matter and suggest that they go back to the Family Court to deal with any amendment that is necessary in the long term". Bear in mind that they could always do a short-term amendment and then leave the Family Court or the Federal Magistrate's Court to deal with its order knowing that, if there is urgency, parties can get to the courts on an urgent basis.

CHAIR: Thank you for your commitment to take the time to help us with our inquiry. It is important to us. The secretariat will send to you a couple of questions that you have agreed to take on notice. The Committee recognises that you have put very good work into your submission but, because of its short time frame, it would appreciate it if you supplied it with answers within a week. The secretariat will also contact you and seek clarification in relation to other issues.

(**The witnesses withdrew**)

CHAIR: This is the first public hearing of the Standing Committee on Law and Justice into the impact of the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act 2006. This inquiry was established to inquire into and report on the impact of recent amendments to the Commonwealth Family Law Act on women and children in New South Wales and the operation of court orders that can prevent family violence perpetrators from coming into contact with their families. The Committee's time frame is very short. Accordingly, for this one hearing day, we sought to obtain evidence from witnesses with professional knowledge of the legal implications of the amendments.

We will also be considering all the information that has been given to us in the multiple submissions we have received from interest groups. We have broadcasting guidelines but I will not repeat them as I have referred to them several times during the day. If witnesses require to hand Committee members documents or messages that should be done through the Committee's secretariat. We like to conduct our hearings in public. However, we can decide to hear certain evidence in private if there is a need to do so. If such a case arises I will ask the public and the media to leave the room for a short period.

DUNCAN GODFREY HOLMES, Solicitor, Slade Manwaring Solicitors, Level 21, St Martin's Tower, 31 Market Street, Sydney, and

NEIL JAMIESON, Solicitor and Director, Champion Legal, PO Box 7, Parramatta, sworn and examined:

CHAIR: Mr Holmes, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Mr HOLMES: I am appearing as an individual.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr HOLMES: Yes, I am.

CHAIR: Mr Jamieson, in what capacity are you appearing before the Committee—as an individual or as a representative of an organisation?

Mr JAMIESON: As an individual.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr JAMIESON: I am.

CHAIR: If you should consider at any stage that certain evidence you might wish to give or documents that you might wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Would you like to make a short opening statement?

Mr JAMIESON: I do not particularly want to make one, no.

CHAIR: As a result of amendments to the Commonwealth Family Law Amendment (Shared Parental Responsibility) Act what changes to the Family Law Act 1975 are the most significant to New South Wales?

Mr JAMIESON: The answer to your question is that we will not know for a period of approximately 18 months. It will take that long for the legislation to work through and for the implications to be understood. I do not think there is anything in the legislation that is New South Wales specific. Perhaps as a general point the only thing I do see is that there may be an increase in the representation of parties in apprehended violence orders [AVOs] before the State courts.

CHAIR: Do you think that is because people need proof of domestic violence in order to participate in the Commonwealth law system? Do you think that is why there will be an increase in the representation of parties before the courts?

Mr JAMIESON: No. It is because the Act itself sets out that the court will take into account the outcome of contested proceedings in apprehended violence orders. So I think in the circumstances, rather than as has been in the past, people have let their clients do those themselves, or perhaps let the matter take its course. I do not think you can do that any more and I think it will mean that far more of them will be contested.

CHAIR: Do you mean "contested" as in somebody has been charged with violence?

Mr JAMIESON: If there is an apprehended violence application before a Local Court, quite often they were settled in the past on a without admission basis, if you like. But because the Act specifically states that the court will take into account those apprehended violence orders that are reached at the end of contested proceedings, I think you will find that more proceedings before the Local Court will now be contested so that both parties will be represented. Because the outcome has significance, parties will want representation to ensure that there is an appropriate outcome.

The Hon. DAVID CLARKE: I have a document entitled, "Women and Family Law" produced by the Women's Legal Resources Centre, which states:

> NSW Police have full authority to enforce protection orders made by the Family Court and Federal Magistrates Court but because they are Federal courts sometimes there is some confusion about this which may delay enforcement.

Have you found that to be a problem?

Mr HOLMES: Not from my perspective, no, not at this stage.

The Hon. DAVID CLARKE: Let me give you a true example. A non-residential parent has a Federal Magistrates Court order that states the parents are not to have phone contact between them and that the parents must not in any way interfere with the children's phone contact. The residential parent then terminates the children's phone contact with the father and repeats this behaviour. The father goes to the police who state that they have no control in this matter and no jurisdiction. The matter then goes to the area commander and the same answer comes back. Finally, there is an admission that the police did have the power and an apology is given. The sort of thing I am talking about is where there is a misunderstanding amongst State instrumentalities, in particular, the police, of their powers to enforce Federal orders.

Mr HOLMES: From my perspective anecdotally the telephone orders are a problem with enforcement. They are a nightmare for anyone to try to enforce, be it a court or a police officer. My experience as a private practitioner advising clients and hearing clients' stories is that it is fair to say that you get a degree of reluctance from the State police to get involved in family law matters, particularly of the type you just cited. Usually the police say, "That is a family law matter, contact your solicitor", and the ball gets bounced back to us.

The Hon. DAVID CLARKE: That is exactly what I am talking about but I am suggesting that the ball should not be bounced back to you. It is a responsibility that the police have. In many instances they are not aware that they have that responsibility.

Mr HOLMES: I might well agree with you but I am commenting on the way it happens in practice. There is a natural reluctance from the State police, invariably in my experience, to get involved in matters of this nature. The police must have their own reasons, be it staffing or whatever, I do not know, and the ball is bounced back. That individual would be told, "Go and see your solicitor."

The Hon. DAVID CLARKE: So that situation needs to be addressed, does it not?

Mr HOLMES: Oh yes, without a doubt.

Mr JAMIESON: I have a bit of difficulty with that issue. I cannot quite see how the police could possibly have any power to enforce anything in that sense. Only a court can enforce its own orders. The police might be able to assist, but when something such as that has occurred, in a sense behind closed doors, the police will never be in a position to get to the bottom of it. Only a court, after evidence has been given by both parties in a contravention application could ever get to the bottom of it, perhaps resolve it, and make some subsequent orders.

The Hon. DAVID CLARKE: I put it to you that it is an area where the police do have powers to act and they are evading their responsibility in doing so in the particular situation that I have given?

Mr JAMIESON: It may be dependent on the area the police are in, but quite often the police have been very helpful to some parties but not necessarily to others and sometimes you wonder whether that is more to do with the parties than the capacities of the police. Some matters are resolvable by just some commonsense and a third party perhaps intervening, in this case the police. Some matters are completely irresolvable by just about anybody and sometimes the police are put into a situation where they are asked to resolve and assist where it is just impossible to do so. In general, my experience is, yes, there are matters that they do not get involved with, but there are a substantial number of matters where they are of great assistance.

The Hon. DAVID CLARKE: I would like to briefly turn to the question of legal aid in domestic AVO situations. Legal aid is available to a complainant but not to a defendant. Do you have a view on that situation?

Mr JAMIESON: Given that the significance of an AVO hearing is greater now because of the amendments to the Act, it is more important that people who are defending an AVO be able to do so, and do so appropriately. I would have to say that anybody appearing before the court needs assistance and if that assistance means a grant of legal aid to get that assistance, then really that is what they should have.

Mr HOLMES: Could I make a little disclosure, that I am a member of the Legal Aid Review Committee, which is an appeals body set up by legislation to determine appeals from parties who do not get a grant of legal aid. I have been on that committee for 10 years or so and it is my experience that generally defendants will not get aid at all. I think from a practical perspective one must look at funding issues. The domestic violence lists at some particular courts are absolutely horrendous in length and perhaps one issue is for a duty solicitor to be appointed for defendants.

At the moment there is an extreme imbalance out there. The AVOs are run by the police and there are hordes of unrepresented defendants out there and the only way to possibly manage that within reasonable financial limits is perhaps a duty solicitor specially set up for that list in those courts.

The Hon. DAVID CLARKE: That is indeed one solution, but setting aside what solutions there are, it is something that needs to be looked at because if it is not, there is a continuing injustice in this whole system of domestic AVOs?

Mr HOLMES: Yes, I would agree with that.

The Hon. AMANDA FAZIO: I wanted to follow up on that. You said that some of the courts have very long list for domestic violence cases. Do you think that the introduction of the Family Law Amendment (Shared Parental Responsibility) Act will actually cause those lists to grow because it is in the family law interests of people to contest AVOs now?

Mr HOLMES: I am reluctant to agree and I really think it is just a little early to find out. We all have these concerns about malevolent litigation using the domestic violence legislation for ulterior purposes. Those concerns, from a realistic point of view, can be levelled at the complainant and the defendant who defends the indefensible. At the moment our only answer to that dilemma is that the truth will be determined by a magistrate, but the legislation is still just so new that we do not know the practical way it is going to be applied, as yet.

Your first question was: What was the most significant amendment in this legislation. It is clearly, in my view, this concept that is coming in of shared parenting and the different interpretations that apply to that. Anecdotally speaking, in terms of new instructions that I am receiving as a private practitioner, I am now noticing that men are wanting more parenting time with their children to the extent of wanting fifty-fifty; this concept of fifty-fifty. We still have not seen the reality check to the legislation; in other words, everyone may want it but is it practical? We do not know yet. It is just early days.

Mr JAMIESON: The only comment I have to make on that is that one of the prime amendments to the Act is the presumption of shared responsibility, which can be rebutted, and one of the ways to rebut that is if there has been family violence. Is that going to lead to more people seeking family violence orders to rebut that presumption? I think the answer is yes. Practically, in the long run, will it mean more matters before the Local Court? I do not know, but I think initially that is going to happen—and I have matters in the office now where that is occurring because the rebuttal of the presumption means that the court does not follow the process of then asking the question of whether there should be shared time and then substantial and significant time. It actually goes off in a different direction and goes back to what the old legislation was, which is simply, what is in the best interests and welfare of the child, without any guiding principles of shared time or substantial and significant time. My answer is I think it will.

The Hon. AMANDA FAZIO: I wanted to raise with you an issue that was in the submission from the Law Society and it relates to the impact that this legislation has on, our terms of reference say women and children but in effect we are looking at custodial parents and children. They have said that it will make it more difficult for custodial parents and children to relocate and it will mean that custodial parents are getting less child support because the non-custodial parent now will have shared responsibility and could have the children three nights a week out of seven and therefore the custodial parent who, in the majority of cases is the mother, will get less child support. In effect, it will have these two negative impacts. The one I am having the most difficulty working my way around is that if the placement of the child is always supposed to be in the best interests of the child, creating economic hardship to the custodial parent would seem to be working against the best interests of the child. Do you have any comments to make on that?

Mr JAMIESON: You have raised three issues. The first is relocation. I do not know the answer to that. One former judge and an academic says these amendments will really have no long-term practical effect whereas others are completely of the opposite view, so we simply do not know what the courts are going to do. Yes, I think relocation will be more difficult. That is a personal view. I cannot really go beyond that.

Secondly, the way the child support legislation is currently constructed, the amount of maintenance that is paid is based on the number of nights. If, in fact, the number of nights is now decreasing that the children are with the resident parent, then yes, it will be a reduction in child support and again I really cannot go beyond that because it simply will. On the question of economic hardship, everybody circumstances are so different that it is really impossible to say, "Yes, it will have this effect", but you have to take it that if somebody is getting less income for a child, clearly their circumstances are going to be somewhat different but then again, balancing that, the costs they are incurring will now be incurred by the other parent because the child will be with them perhaps more, so it might balance out.

Mr HOLMES: Without wishing to sound pedantic—

The Hon. AMANDA FAZIO: That is fine. Correct me, I am not a lawyer.

Mr HOLMES: Could I just mention that the word "custody", with all its emotions, was meant to have been obliterated about 12 years ago and it was obliterated by legislation but it never has been, in people's minds, even to the extent that the Prime Minister uses the word.

The Hon. AMANDA FAZIO: Please correct me then.

Mr HOLMES: But I understand the issues. The general reaction amongst legal practitioners and the advice they are giving clients without a doubt since the changes to the legislation is that one cannot be as confident of successful relocation cases anymore and that, in a way, is part of the message that the Government has intended to be conveyed by this legislation, that the issue is sharing the parenting, sharing the responsibility of bringing up children. In a way—and I have seen the submissions by the Law Society—that impact is what was intended by the Government. In terms of child support, at the end of the day the children have to have their financial needs met and the assessment is just the first step in the process. There are the internal review processes that parents are entitled to use and that does not just look at the number of bed nights and things like that. It does look at who is shouldering the financial responsibilities and where the burden should be shared.

Ms LEE RHIANNON: As legal practitioners could you explain how the advice that you give to your clients who come to you with family matters has changed since this legislation came in?

Mr JAMIESON: I have to be honest with clients and say that at the moment they are in a grey area of the law. It is always the case when legislation is introduced that there is some uncertainty as to what will ultimately happen, however, there are general guiding principles contained within the Act that are still there. It is possible to advise clients that they have to accept that there are some grey areas. For example, the Act talks about significant and substantial contact and then defines that, but we do not know whether that is the only definition that the court will give. It may in fact mean that there is more contact than what the Act sets out for that particular definition. That is my view.

Mr HOLMES: I think my advice to clients has changed as a result of this legislation. My understanding is that we need to be focusing now on greater emphasis on concepts of parental responsibility as opposed to possession of a child, greater concepts of sharing those responsibilities wherever possible. It is a changing social climate and we cannot lock ourselves in the past by saying to a mother, for example, "The children should be with you and can go and visit dad alternate weekends and maybe have tea one night during the week."

That sort of old-form concept of what should happen after a marriage breakdown is gone, as far as I am concerned. People still come in with that sort of a concept and I suggest to them that that is not necessarily the outcome anymore.

Ms LEE RHIANNON: So you do not find it such a grey area, is that what you are saying?

Mr HOLMES: I am trying to look at the intention of the legislation because when the case authorities come down to give us guidance in the next six to 12 months I do not think it is going to be the same as what it was before. To do so would be just ignoring the legislation.

Ms LEE RHIANNON: Can you explain under what circumstances independent lawyers for children are appointed?

Mr HOLMES: Mr Jamieson is one too. We both are. I have been an independent child's lawyer for nine years. The actual criteria, and possibly Ms Walker might have told you this, *Re K* is the guidelines. Potentially, if the court wants to appoint an independent child's lawyer it will be because the guidelines are so wide. They are usually appointed when there is an issue of violence, when there is an issue of power imbalance between the parties, be it financially or some other aspect, and invariably the cases I have been getting lately are one of the parents has a mental illness. I am becoming expert on things like bipolar disorder.

Ms LEE RHIANNON: Do you think the system works well in terms of the children?

Mr JAMIESON: I think it does. It gives children a voice and it gives the judges the assistance of that independent third party who can look at all the issues and, in fact, make sure that there is before the court all the evidence the court is going to need to properly determine the matter. When there are only two parties quite often they cannot tell their lawyers or not bring before the court all the evidence that really should be there, and one of the great benefits of the independent children's lawyer is not only in representing the children's view but making sure the court has enough evidence it needs to make a proper decision.

Ms LEE RHIANNON: Can staff at the new family relationships centres be adequately trained to identify and appropriately screen for family violence issues, given that parties are unable to self-select out of mediation on the basis of family violence?

Mr HOLMES: I think that is a real worry that we have. We do not know the answer to that. We do not know the level of skills that these people are going to have as criteria. The organisations that the Government seems to be choosing for its providers are generally good organisations—I think it is Unifam and people like that—

Mr JAMIESON: Relationships Australia.

Mr HOLMES: Relationships Australia, who have significant qualifications and experience in the field. So, to some extent, I suppose, we are trusting them.

Mr JAMIESON: One of the other difficulties is it is not one organisation that is responsible across-the-board for all of the centres, each centre is tendered for. So at this stage we do not know who is going to get which centres.

Ms LEE RHIANNON: Therefore we do not know or you are already seeing an inconsistency in standards?

Mr JAMIESON: The only centre that I have got any contact with is the Penrith centre, and it has only been open about three or four months, I think.

Ms LEE RHIANNON: So it is too early?

Mr JAMIESON: It is too early to say.

Ms LEE RHIANNON: What effect does the lack of legal representation and legal advice during the family dispute resolution process have on women and children?

Mr JAMIESON: I read that question and it seems to me that in it there is a presumption that you cannot get legal advice, but, in fact, you can. There is nothing to preclude a person from getting legal advice before they go to one of the centres or during the course of the time they are at the centre. They can get whatever advice they want through either a private practitioner or through legal aid.

Mr HOLMES: But I think that question reflects the perception they are trying to convey, that you should not have legal advice, that you are meant to just go straight to the family relationships centre and proceed through that pathway.

Ms LEE RHIANNON: So you think there is an intent in there?

Mr HOLMES: Yes, I do.

The Hon. AMANDA FAZIO: There seems to be all this push from the Federal Government to keep lawyers out of Family Court matters. Why has the legal profession not jumped up and down like they have done to the New South Wales Government for changes to the MAA and workers compensation?

Mr HOLMES: I would like to answer that because I actually do not think there is going to be significantly less work for us. Without wanting to beat our own chests, we do settle a lot of matters. Maybe these matters are going to just settle at the family relationships centre; the tough ones are still going to filter through to us. My colleague and I basically litigate only the hard matters, as do most lawyers, and they are never going to resolve; it does not matter how many family relationships counsellors you have, there is no answer to them other than a judicial determination.

CHAIR: So you already carry a mediation role?

Mr HOLMES: Without a doubt.

Mr JAMIESON: To just take up that point again: years ago the Family Court provided an informal counselling service for parties who had separated prior to coming to court. That was embraced by lawyers. I do not see this as being any different from that, except that it is no longer done within the Family Court but it is done outside the Family Court. I agree with what my friend says: if parties are going to settle they are going to settle, and if they are not that is when they will come to their lawyers. Frankly, most people who go through a relationship breakdown have never done it before—we do have some recidivists, but most do not—and part of the role of lawyers in that circumstance is providing to them ways of resolving their particular problems that they themselves cannot yet see because it is too close and it is too raw.

The Hon. DAVID CLARKE: The Federal parliamentary report, " Every Picture Tells a Story" refers to the split in jurisdiction between the Commonwealth and the States and states that is one of the most pressing matters affecting children in Australia and suggests that it can lead to terrible outcomes for children. Keeping in mind that only 2.6 per cent of children from divorces are in a shared parental situation, and that means there are 97 per cent of other cases where they are not, does it follow that a large portion of this 97 per cent are there because of domestic violence orders? If that is the case, is that not an incredible situation we have?

Mr JAMIESON: I am not sure I have understood the question. Of the 97 per cent of the parties that are sharing the children between them by agreement between them, of the other percentage

that does not mean domestic violence is involved in those cases—I am sorry, I have obviously misunderstood the question.

The Hon. DAVID CLARKE: What I am saying is would you accept that these domestic violence orders are a significant reason for that high proportion?

Mr JAMIESON: No.

The Hon. DAVID CLARKE: You do not accept that?

Mr JAMIESON: I just do not see in matters that I deal with there is a high proportion of domestic violence. It may vary in other practices in other areas. Perhaps I could say that in the matters that I deal with perhaps 10 per cent have some element of domestic violence, the balance do not. I am aware that there are other solicitors in practices where the percentage of parties involved in domestic violence is much higher.

The Hon. DAVID CLARKE: Mr Holmes, have you got a comment on that?

Mr HOLMES: This is where you get trouble with anecdotal responses. I suppose my percentage would be a little higher. Just from my anecdotal experience, I think there is a greater amount of domestic violence in, say, 10 per cent across my caseload. I think 90 per cent of my independent children's lawyers' cases have an element of domestic violence in them without a doubt.

The Hon. DAVID CLARKE: What percentage was that?

Mr HOLMES: Possibly up to 90 per cent. But that is why I am appointed. That is why there is a third lawyer sitting at the bar table, to get to that issue and work it out. But in terms of private clients, I think my experience is that the domestic violence issue is more prevalent than 10 per cent. But that is anecdotal; that is my perspective.

The Hon. DAVID CLARKE: So to take the figures of somewhere between 10 and 90 per cent, if we have a situation where there may be domestic AVOs being given in situations where there appears to be an uneven playing field because defendant fathers cannot get legal aid, is that not going to distort the system? Could that be a major factor for us having such a low percentage of 2.6 per cent where there are these shared parental orders? In other words, the uneven playing field in these domestic AVO proceedings, would that have a flow-on effect to give some explanation for why we are only getting 2.6 per cent of children being in a shared parental situation?

Mr HOLMES: From my perspective I think the real answer is two things: it has not been a shared parental situation because firstly, a reality check on the men's position has shown an inability for them to be in a shared parental situation and, secondly, the traditional advice given by traditional solicitors has been that you are going to lose, so roll over and give up now and do not waste your money on us. And those are the concepts that are being shaken by the new legislation.

Mr JAMIESON: I think one other aspect too is I think it takes an extraordinary couple to be able to go through a divorce and then share their children in some informal way. It is a small minority of people who can put themselves aside for their children's benefit—some do, and that is terrific. But, in the past, it has been a very small percentage that has been able to do that, and I think that is another factor.

The Hon. DAVID CLARKE: And that is a very unfortunate situation for fathers and also for children who need a father.

The Hon. AMANDA FAZIO: And for mothers.

The Hon. DAVID CLARKE: We are talking of the 97 per cent really involving a situation where it is the father who is coming off second best.

Mr JAMIESON: This change in the legislation will probably take up to five years to change community attitudes. If this legislation does change attitudes it will be to increase the role that each

parent has in the child's life after the parents have separated and divorced because we do see situations where it is the father who ends up with the children, not necessarily the mother, so it can be both ways. I think the community attitude will take up to about five years to change, and if it is going to change it will change in the direction of both of them having a greater say.

Mr HOLMES: It is the same problem we had 12 years ago in family law when we abolished the word "custody". The law might have abolished it but the general society did not. And everyone still talks about, "I want custody of my children". Here we are 12 years on and this is the Government's next attempt to have a change and to bring in this issue of sharing the responsibility for your children. That is the message that we are trying to take on board and advise our clients accordingly.

CHAIR: I thank you both for coming along today. We were advised that you people would be very useful to this inquiry and we think you have been. We thank you very much for your thoughts on when this should be reviewed from a State level in the long term. I think definitely it will be one of our major recommendations that a review in such a case come forward in the future.

(The witnesses withdrew)

(The Committee adjourned at 4.45 p.m.)