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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

FRIDAY, 12 FEBRUARY 2016

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Friday, 12 February 2016

Members in attendance: Senators Bilyk, Jacinta Collins, Ian Macdonald.

Terms of Reference for the Inquiry:

To inquire into and report on:

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.

WITNESSES

BROUGHTON, Ms Felicity, Supervising Magistrate for Family Violence and Family Law, Magistrates Court of Victoria

CANNON, Dr Andrew James, Deputy Chief Magistrate, Magistrates Court of South Australia

HAWKINS, Ms Kate, Supervising Magistrate for Family Violence and Family Law, Magistrates Court of Victoria

STRICKLAND, Justice the Hon. Steven, Justice of the Appeal Division, Family Court of Australia

Committee met at 09:05

Evidence from Ms Broughton, Dr Cannon and Ms Hawkins was taken via videoconference—

Evidence from Justice Strickland was taken via teleconference—

CHAIR (Senator Ian Macdonald): I declare open the public hearing of the Senate Legal and Constitutional Affairs Legislation Committee for its inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. We are today having two separate videoconferences with two individual groups of witnesses and, at the same time, with someone on teleconference. It is rather a new proceeding for the committee in that we are doing so many of these at the same time. Such is technology.

The committee's proceedings today follow the program circulated. These are public proceedings broadcast live in Parliament House and via the web. If anyone wants to give evidence in private, then that should be raised. We can, in certain circumstances, deal with evidence in camera. Witnesses are protected by parliamentary privilege. This is a hearing of the parliament. It is unlawful for anyone to threaten or disadvantage a witness on account of any evidence given to the committee. Any such action is taken as a contempt. It is also a contempt to give false or misleading evidence. The committee prefers evidence to be given in public but, as I said, we can in certain circumstances take evidence in camera. If any witnesses object to answering a question, they should state the grounds on which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed.

I welcome everyone here today. I particularly welcome a representative of the Family Court of Australia via teleconference and representatives of the Magistrates Court of South Australia and the Magistrates Court of Victoria, via videoconference. I very much appreciate you all giving up what I know is valuable time in speaking with the committee today. We have received a submission from the Magistrates Court of South Australia, which we have numbered as submission No. 2. The Senate has resolved that an officer of the Commonwealth or a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only the asking of opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions as to when and how policies were adopted. For our benefit, on this side of the table, senators should remember that when asking questions of judicial officers we do have to bear in mind both the independence of the judiciary and the sub judice convention.

Can I ask if anyone wishes to make an opening statement? I understand that the representative from the Magistrates Court of South Australia does wish to make a statement.

Ms Hawkins: The Magistrates Court of Victoria would like to as well please in due course.

CHAIR: We will come to you in due course. My name is Ian Macdonald. I am a Queensland senator. I am the chairman. With me is Senator Jacinta Collins, who is the deputy chair, a senator from Victoria, and Senator Catryna Bilyk, who is a senator from Tasmania. We will start with Dr Cannon.

Dr Cannon: Thank you for the opportunity to make a submission. By way of background I will mention some credentials, which hopefully qualify me to comment. I have been involved with the AIJA organising national conferences—four or five of them since 1996—involving family violence issues. I wrote an education module for judicial officers many years ago and more recently I wrote a script for a video for our court program. I have given evidence as an expert to the Australian Law Reform Commission Roundtable on this topic. I managed the introduction of our new legislation in 2009 and liaised with the victim support office for women and set up a program where we try to re-educate men. I have sat in specialist family violence lists for nearly 20 years and I am a white ribbon ambassador and have been recently redone in that role.

I will just give some background. South Australia's population was 1.7 million in 2015, so it is a relatively small state. In 2015 we had 4,627 intervention orders, which is what we call them in this state. That is 3,183 issued by the police and 1,444 issued by the courts, so that is 4,627 total. I have made available to the committee a

photograph. I only tender it on the basis that it is treated as confidential. It is a photograph of a woman whose identity I do not know but she is entitled to not have it published in my view.

CHAIR: If I can interrupt you there. The committee have the photograph and we will look at it as you speak about it, but we have decided that we will not actually accept it as part of our records.

Dr Cannon: Thank you, I am grateful for that.

CHAIR: We are a bit reluctant on the basis that we do not know who the woman is and she obviously has not given permission, but please feel free to speak to it. We can see the image you are talking about.

Dr Cannon: Thank you. It makes the point graphically that our bread and butter is the crisis management of family violence issues. This is a woman who was subject to family violence and hospitalised as a result. For example, in December last year we had 465 new intervention order applications and almost all of these were new ones and prior to the involvement of the family law jurisdiction at all.

The process in this state is twofold. If police are called to an incident, they can and routinely do issue an intervention order as well as arresting a man—it is almost always a man—and charging him with assault. That is listed before the court usually within two days, so it is a very quick return to the court. The alternative way that these are issued is that a woman—and it is almost always a woman—goes to the police complaining of violence, controlling behaviour or abusive behaviour and the police then prepare affidavit evidence capturing her version and apply to the court. Again, that gets on within a couple of days. If we issue the intervention order, that is returnable a week later and police give priority to serving it.

The point I am trying to get across to the committee is that the police and the magistrates courts, certainly in South Australia and probably in other states, would be doing the front-line crisis work in this important area. The Family Court and the Federal Circuit Court are involved in the long-term management of what you do between the warring parties and in relation to the issue of access to children. We put these in a special list, and a magistrate doing that list is typically doing 40 or more of these cases in a day. So they do not have a lot of time available to them to delve deeply into the extremely complicated issues which arise once you get down to how you manage the children afterwards.

The reason we were particularly concerned to make a submission to the work of this committee is the statement that there are no resource implications in the proposal that the magistrates courts be given no time limit over their ability to vary, revoke, suspend et cetera orders in place under the Family Law Act. We shall need, if that happens, significant additional resources. The Family Court typically has a three-month delay in its routine work and a lesser but still significant delay in what I think they call the Magellan list. I mean no criticism in that. I am stating fact. If you want to get on in the Family Court—and Justice Strickland will be able to tell us more—you have to go through FDR, family dispute resolution, first. That can take a month, and then you have to get an application and a listing, and that might take eight weeks. So there is your 12 weeks.

As you hear, in our court you can get on in a week. So there is no doubt that, if we have an open-ended time limit on the orders we make varying Family Court orders, very quickly the legal profession and others will use our court as the first place where they can get a variation if they are unhappy or if circumstances change affecting any orders in relation to children. They will do it because we are much quicker and they will do it because they can get the police to do their work for them, so it is much cheaper for them. So there will be a lot of work coming to us. We will need funding for social workers and for psychologists to advise on the best interests of children. Legal aid will require additional funding to fund the men and to fund legal representation for children in our courts, and police will require funding for preparing the applications.

We will need more magistrates. This work represents about 10 per cent of our list at the moment—less than that in numerical terms, but a lot of these are contested, so it is probably about 10 per cent of our work. There is a real potential here that you will double our work, so in our state that means I want another four magistrates, thank you very much, if we get this work.

I think there is a really sensible opportunity to have a court which has invested in it all the relevant jurisdictions. I know Judge Hora from America, who did a report for us, made a recommendation which I think is a really good idea, that you have a court that has jurisdiction under the Family Law Act, in the criminal and intervention order space, which we are operating in, and also in the child protection area. The court would be invested with all those jurisdictions to properly manage children. But, if you are going to do that, you have to do it properly, not by this backdoor amendment which will just cause us trouble without resources, in my submission. I think it is a really good idea but it needs resources. There are a lot of other things that could be done, but I will leave them for now.

That is the basic thrust of my submission: good idea, but please resource us.

CHAIR: Okay. We will come back to you with some more formal questions, but first a preliminary question. You are not suggesting any amendments to the bill but rather that, if the bill goes ahead, it does need a lot more resource for the courts dealing with it. Is that your approach in a nutshell?

Dr Cannon: Either leave in place the 21-day limit, which acts as a choke that stops people coming, for the reasons I articulated, or if you do pass the amendment then you need to give us resources.

CHAIR: Okay, thanks. We will come back to you for more detailed questioning.

Ms Hawkins: We certainly agree with the views of South Australia that there are some resource implications for this amendment but we do strongly support the proposal to amend the 21-day time limit currently imposed by section 68T of the Family Law Act to instead provide that the states' or territories' courts' revival, variation or suspension of a family law order under section 68R ceases to have an effect at the earliest of three options: the time that the states' interim family violence intervention order might stop being in force, a time specified in that interim order or at the time that the order, injunction or arrangement is effected by an order made by the family or Federal Circuit Court.

Like South Australia, we see the crisis point in very serious family violence matters. We have a significant number of matters—I think it is close to 50,000 intervention order applications a year—coming before our courts, and many of these are in extremely-high-risk situations. Twenty-one days is simply not sufficient time for a person affected by family violence to make application to the family law courts and for those courts to list and hear these urgent applications. This is often a time of crisis, high emotion and very real concerns for safety for many children affected by family violence in our community. It is imperative that these safety concerns can be addressed at the very earliest opportunity and not have to wait for months to be dealt with in the Family Court. It is clear that the federal jurisdiction has significant resources—social workers, psychologists and the like—to investigate these matters in the long term, but this amendment deals with the pointy end at the first point of intervention rather than the long-term management of these types of applications.

What happens with the lapsing after a 21-day period where an applicant has not managed to get on in the federal jurisdiction is that there is real confusion and uncertainty about care arrangements for children after the initial 21-day period lapses. This exacerbates safety concerns. Even in the most serious cases, the state or territory court is hamstrung and unable to effectively protect a child at real risk of harm. Often the affected family member is forced to, effectively, breach the family law order by denying visitation so as to act protectively of their children. Understandably, this aggravates an already potentially volatile alleged perpetrator of family violence further.

The proposed amendment would ensure consistency between family violence and family law orders and allow judicial officers to flexibly and efficiently respond to specific dynamic safety concerns of the family—

CHAIR: Sorry, but we are having difficulty hearing with you, and you just cut out completely. We are talking with our communications people here. Could you go back to just before I interrupted you?

Ms Hawkins: It is about the confusion and uncertainty that arises after this 21-day period expires where there might be real safety concerns for the child and the applicant is, effectively, forced to breach the family law order and deny visitation, which has the potential to really aggravate an already volatile alleged perpetrator of family violence.

The proposed amendment would ensure consistency between family violence and family law orders and allow judicial officers to flexibly and efficiently respond to the specific dynamics safety concerns of that family as it exists on the day that they are before the court. The proposed amendment would also implement an important recommendation of the Family Law Council in its recent interim report on families with complex needs. We do understand the concerns raised by the Magistrates Court of South Australia and endorse the consequent need for the timely and efficient exchange of information between the family and the state courts. We also share South Australia's concern for the need for appropriate support concerning resources for state courts exercising federal jurisdiction. However, we consider that these are matters which can be overcome relatively easily and should not impede these important reforms.

I would like to now hand over to Felicity Broughton.

Ms Broughton: I wanted to pick up on a couple of things that Deputy Chief Magistrate Cannon had to say. In Victoria we have done over 50,000 intervention orders in the 2014-15 year and more since. In the five years leading up to that there was a 50 per cent increase. I think what is important to understand—and it will be self-evident, of course—is that the family law system is primarily a private system and the jurisdictions exercised by Victorian and state courts across the country are, effectively, public systems involved in the granting of

intervention orders in family violence matters and dealing with the criminal offences which result from family violence.

We have seen a dramatic increase in the number of offences which have resulted, not only in relation to contraventions of intervention orders, which have nearly tripled in five years, but also in relation to stand-alone offences such as recklessly causing injury, aggravated burglary, criminal damage and those sorts of offences in a family violence context. We have seen a dramatic increase in our child protection systems. Obviously the committee has had reference to the Luke Batty matter. Magistrates are coroners in this state. We deal with those matters if there is a committal proceeding in relation to multiple child family violence victims.

Nearly all the work in relation to family violence is being done in, effectively, a public system by state courts. Not only from the judicial side but also from the case management side, many of the wraparound resources have tried to address this pernicious problem, whether it be men's behaviour change programs, applicant support workers, or other interventions at court to provide some people at court who are at the pointy end for those who come to court as their first port of call, seeking safety. I think one of the strongest messages, certainly from the Victorian court, is: we see a [inaudible] in terms of the way that we manage these places. Concentrating on the safety of the families who [inaudible] our courts, often when they first appear in court are in a crisis situation. [Inaudible] in South Australia [inaudible] cases involving a very recent crisis with an intervention order. Then the flow-on effects in terms of that [inaudible] interaction with the system really drops away. There is no coordination in a wrap-around way that the system can currently support people through that system through the family law [inaudible]. Certainly, a lot of the information that we have had—certainly that our court has—just simply does not become available [inaudible] to the federal system. Those gaps—and, certainly, it is borne out by the experience of this—are causing significant risks [inaudible]. I think an important thing, also, to recognise that is different to South Australia, probably about 10 years ago about 30 per cent of our applications were made by applications [inaudible] who came to court [inaudible] perhaps supported by other outreach [inaudible]. The position now is that nearly 70 per cent of the applications before the Magistrates' Court of Victoria are initiated by the Victorian Police. Often, that intervention by [inaudible].

CHAIR: Sorry. Are initiated by?

Ms Broughton: Victoria Police.

Dr Cannon: Sorry. I did not get that either.

Ms Broughton: [Inaudible].

CHAIR: Sorry. Dr Cannon did not get that either. Can you just go back a fraction? Senator Collins, are you hearing that okay?

Senator JACINTA COLLINS: It is not great, but I—

Dr Cannon: I did not get the 70 per cent bit.

CHAIR: We are struggling here. I am not quite sure what to suggest to do. Perhaps, if you could just go—

Ms Broughton: Can you hear me, Dr Cannon? I don't think he can hear.

Dr Cannon: Yes, I can. But I did not hear the bit about the 70 per cent bit. Your microphone is not very good.

Ms Broughton: The point I was making is: now, nearly 70 per cent of applications for intervention orders in Victoria are made by Victoria Police on behalf of affected families members. That is a dramatic change to the position about 10 years ago. When it was reversed, it was about 30 per cent made by Victoria Police. Often, that is initiated because the police attend an incident at a home. The evidentiary basis upon which intervention orders have been made is changing very significantly. My experience is—and, I think, that of my colleagues—a lot of that information just does not get to the federal system. There is a real disjunct in relation to the level of police attendance, investigation and response. The information sharing about the presence of children and what has gone on certainly is not happening. The landscape in relation to these types of matters and the risks that are involved with them are very significant. In Victoria, if there are family law orders, the court is required under our legislation pursuant to section 90 of our Family Violence Protection Act:

… to the extent of its powers under section 68R of the Family Law Act, revive, vary, discharge or suspend the Family Law Act order to the extent that it is inconsistent with the family violence intervention order.

Clearly, it is a mandatory provision within our legislation. Certainly, as Kate has already indicated, the 21 days has really put many families into a position where there is an inconsistency between a Family Law Act order and a family violence intervention order. The risks that are involved in that are extremely significant, in my view. In summary, we do endorse the recommendations that came out of the interim report and the proposed legislation, but there needs to be a lot more consideration of the resources needed to improve the information flow between

both the federal and the state systems. There needs to be a coordinated response to be able to deal with these matters and a timely way of dealing with Family Law Act orders so that families can in a timely way adjust the orders so that the families are kept safe.

CHAIR: Thank you very much for that. Justice Strickland, did you want to say something as an opening comment?

Justice Strickland: No thank you, Senator.

CHAIR: We just have some questions. Senator Collins, if you identify who it is for it we can go across all of them at the beginning.

Senator JACINTA COLLINS: I want to go back to the point that Your Honours from Victoria raised in relation to making interim family orders—that they also 'revive, vary discharge or suspend' parenting orders from the Family Court. Can you tell me how often that occurs. I think you indicated that it was many cases. I am trying to get some sense of it.

Ms Hawkins: We can certainly provide you with the precise number of orders that we make, but it is really not that often. It would be in the hundreds.

Dr Cannon: If I can comment from South Australia, I think we had less than five across the state, out of 4,600 last year.

Ms Hawkins: I sit quite regularly in the family violence jurisdiction, and I would probably only do it once a fortnight.

Senator JACINTA COLLINS: One concern in relation to the removal of the 21-day limit, quite aside from the resourcing issue that has been raised, was that this issue—as I understand it—was addressed back in 1995 and again in 2006, and that change did not occur. Is the 21-day limit is no longer feasible because there have been growing resource problems that have occurred over that time period? Has it been considered whether an alternative time limit, rather than an open-ended arrangement, could be appropriate?

Ms Broughton: My understanding of the proposed amendment is that if the magistrate determines that a shorter period ought to be put in place that can be achieved.

Senator JACINTA COLLINS: So that would then occur on a case-by-case basis.

Ms Broughton: Ultimately it will be up to the judicial officer to make an appropriate decision as to what the order should be. This provides the outer parameters of the powers of the court to effectively make the order; it does not stop shorter times being ordered.

Senator JACINTA COLLINS: Do you think that is feasible? Do you think the judicial officers will do that?

Ms Hawkins: It gives a judicial officer the flexibility to tailor an order that is appropriate to the circumstances. For example, if you have a women in regional Victoria, her ability to get to a Family Court registry and then have that case listed might take a longer period than someone based in the city. There might be particular cognitive or other impairments that might impact on your decision about those matters. But if access to the federal jurisdiction were relatively quick, this flexibility would allow the judicial officer to say, 'You've got six weeks to get your application in.' If they have not done it, the officer can say, 'That's the end of your opportunity to do so.' It just gives the flexibility, which is really useful.

Justice Strickland: It is paragraph 68T(1)(d) which provides that flexibility that has just been spoken of.

Senator JACINTA COLLINS: Thank you. I am also interested in an update on the information-sharing arrangements. As is indicated in the second reading speech, changes to the 21-day limit is a first step. How far away are we from the resourcing improvements that are necessary given the concerns raised by Dr Cannon in relation to what unfortunately seems to have been used as a resource choke as well?

Ms Broughton: I am not aware that there is any commitment at a federal level to provide any resources to that. I might be wrong, but I am certainly not aware of it.

Ms Hawkins: There is the concurrent project as a result of the COAG move to have a national domestic violence intervention order registration scheme which is coming up against the difficulty of sharing information between the states. But I think it is a potential vehicle to perhaps look at this issue as well so that we can overcome this manual system of having to have a person request of the Family Court a copy of their orders and then have it transmitted back to the state court. It would, in my view, make great sense to have a portal for family law orders that appropriate people could access so that we could get pretty much immediate access to a current family order.

In answer to the question of where that is at, I think the answer can only be, 'Too far away.' I am not sure that there are any moves to actually implement such a scheme at this stage. But Justice Strickland might know better than me.

CHAIR: I will just intervene and ask Justice Strickland whether he agrees that there will be a greater demand for sharing information and what the process would be. Is that possible to do?

Justice Strickland: The short answer is, yes, there is a demand. The obvious problem is our federal system. We have a state system and a federal system and they need to interact. The best way for them to interact is by communication. Senators, you might perhaps ask this question when the Attorney-General's Department appears before you. My understanding is that there have been a number of pilot programs instituted by the Attorney-General's Department around the country on this very issue. That has been ongoing for at least two or three years. There is the involvement of state jurisdictions and the federal jurisdiction in those pilot programs. They are moving apace, although perhaps not—

Dr Cannon: A slow pace, Steve.

Justice Strickland: I do not agree with that, with respect. I am confident that the Attorney-General's Department would be able to provide the answers to the questions both Senator Collins and Senator Macdonald have.

CHAIR: Okay, thank you.

Ms Broughton: I will make one further observation in that regard. Clearly the federal system and family courts do, from time to time, importantly want copies not only of our intervention orders and the applications which formed the basis of them; they want child protection orders which might relate to any proceedings. So there are a number of these cross-jurisdictional matters from state courts, which certainly are very relevant to family law proceedings and which would inform any decision making within those federal courts.

CHAIR: Can I perhaps just ask all of you: with modern communications, is it not relatively easy getting orders scanned through? Or is it actually finding the order in the other jurisdiction, picking it out and getting it to the relevant court? Can I just get a comment from everyone.

Ms Broughton: The technology is just not there.

Dr Cannon: In South Australia we have been trying, but we do not have an effective, efficient information transfer between our court and the family jurisdiction, even though we are about 100 yards or less apart.

But coming back to the point that was made earlier about the committee that is working on coming up with a standard set of orders and data transfer between state jurisdictions, I just want to reinforce the importance of that. We are presently in the position that the railways were in in about 1905, where, in some states, we cannot even call them the same thing—we have intervention orders, there are domestic violence orders, there are restraining orders, there are other things I cannot remember the name of. We all phrase them differently. We all have slightly different procedures. This means the data transfer has to all be done manually, because every order looks different. So if I register a Victorian order in my state, my staff have to rekey it rather than just being able to automate it, and that is between the states.

We have the same disconnect between the state systems and the Family Court. The Family Court, sensibly, has a culture of not releasing information because it is obligated not to, and that culture makes it difficult to arrange for an electronic data transfer. I totally agree with the Victorian submission that that is really what we need to have, so the Family Court knows immediately what we are doing and we know what they are doing.

Ms Broughton: Can I also just raise with you another example—?

CHAIR: Sorry, can I just get a comment from Justice Strickland about that.

Justice Strickland: Well, I am not sure what I am responding to.

CHAIR: Do either the legislation regulations or the court's practice prohibit giving this information to other jurisdictions?

Justice Strickland: No.

CHAIR: I do not know the state courts system, but I would assume that in the Family Court you could almost go in and google the name of a person appearing—a search within your own system, of course—to find the name and then immediately pull up, electronically, any recent orders. First of all, is the Family Court set up for that? And perhaps I might get a comment from the others when you have finished, Dr Strickland.

Justice Strickland: Thank you for elevating my title!

CHAIR: Sorry.

Justice Strickland: That is alright. I am happy to be called 'Doctor'!

CHAIR: Judge! Justice!

Justice Strickland: Yes, we obviously have IT systems which allow us, internally, to access our orders and that can be done very quickly. We are unfortunately, though, losing many of our IT staff because of the Federal Court taking over the back office of our court. We are losing many of our staff, and we are not certain as to what services we will be able to provide either internally or externally once that happens.

CHAIR: What would be wrong with allowing the state jurisdictions to tap into your system to get the same information when they need it instantly?

Justice Strickland: My immediate answer is: there is no reason why that cannot happen. I am struggling to recall, but I do recall that there are systems in place that allow that. For example, we have the facility where Families SA, in South Australia, are able to come to our court and locate orders through our system. So that is a state instrumentality coming to our court and accessing our orders. That has been going on for years. If that needed to be expanded to enable, for example, the magistrates court to do the same thing I cannot see why that could not happen.

Ms Broughton: There is a good report by Professor Chisholm in relation to information-sharing, quite recently, and further information could be provided in relation to some of the limitations on information sharing between the Victorian jurisdiction and the federal jurisdiction, if you would find that useful. I think two reports have been done by Professor Chisholm in relation to information-sharing. The short answer for Victoria, though, is that we have a very antiquated question. If you have someone in the federal system who has the name of John Smith and you do not have a date of birth and you are looking in a child protection system and you do not know if it is the same family because we list our child protection system lists according to the child, if we are talking about intervention orders then in our very modern 1980s Courtlink system we have to search by the name of the respondent—often not even the affected family member—and if you do not have dates of birth and the like it is like a needle in a haystack.

Some of this stuff is incredibly practical. The technology in the courts has not moved on internally, certainly in Victoria. There are severe impediments on a really practical level to tracking down some of this information. Having said that, there are some manual processes that we can engage in—we try to, but that was the point made by South Australia, that it is a highly intensive manual system with our staff.

CHAIR: This committee is actually looking at the federal legislation, and I am getting the impression that no-one has any particular objection to the legislation—in fact, as I hear it, you are all supportive of it. Clearly there is a huge need for resources and complementarity of systems and I am not sure that we are in a position to fix that, but we can make some recommendations. Justice Strickland, you talked about some pilot programs earlier. Is it your belief that that is what those pilot programs are doing?

Justice Strickland: It is not limited to that—that is part of it. They are looking, of course, at the problem of the federal jurisdiction vis-a-vis the state jurisdiction and trying to better interface the two. Part of it is obviously communication and IT.

Senator JACINTA COLLINS: The discussion today has pretty much been dealing with the provisions around 68T. Some of our submissions have indicated the concern that there may indeed be a perverse outcome of some of the amendments around binding financial agreements, whether additional work may indeed be generated around the spouse or maintenance issue and de facto relationships or that particularly on women in domestic violence circumstances the new provisions around the vexatious matters may indeed create complications that have not been contemplated. Have any of your honours considered those points?

Dr Cannon: I think that this will generate some vexatious applications in our court from people who are unhappy with existing access and other arrangements and see us as a cheaper, quicker way of achieving some advantage without necessarily having strong merit in their case.

Senator JACINTA COLLINS: That is particularly issues around 68T but I am wondering about the binding financial agreements amendments and whether any of you have given any thought to those amendments in this bill.

Ms Broughton: I have given some consideration to it, but it is unlikely to have much impact in the magistrates court in the sense that we primarily deal, and primarily in rural areas, with consent/property orders and we have had very little to do with that side of it. Clearly we are very aware of the impact of economic abuse and that secondary abuse that comes through the use of court proceedings to further abuse family members. So, more generally we certainly have experience in relation to that, but certainly as far as finding financial agreements

of concern between the parties, it is unlikely that in terms of the way we exercise our federal jurisdiction under the Family Law Act that is going to have any impact on our daily lists.

Senator JACINTA COLLINS: The second reading speech to the bill suggests that these measures are intended to ensure that prospective current and former parties to a marriage or a de facto relationship can take responsibility for resolving their financial and maintenance matters with certainty without involving a court. I am attempting to understand what the background or what the genesis for these amendments is, where the case for them has been made out. Can any of Your Honours help me there?

Justice Strickland: This is a federal jurisdiction issue. I agree entirely with what has been said about Victoria. I cannot see any example of where this issue would come up in one of the state magistrates courts. But, Senator, I am sorry: the Family Court's position in relation to this part of the bill is that we have not made a submission in relation to it at all, and we are not able to comment on it, because we are the court that will have to interpret these particular amendments if they go through. But, that said, I do not see any harm in perhaps generally answering your question. That mantra, if I can call it that, has been the mantra from day one and was the rationale for introducing the amendments initially. What has led to the need for these amendments is that, unfortunately, the legislation over the years has been interpreted in various decisions and problems have been raised in terms of what the legislation means and how it does in fact impact upon parties who wish to resolve their matters without going to court. As I understand it, that was the catalyst to these particular amendments, because the legislation had become somewhat complicated and subject to various decisions of, for example, our appeal court, which highlighted deficiencies in it.

Senator JACINTA COLLINS: Okay; I think I will raise those issues with other people submitting to us. We are in a situation, unfortunately, in which the Attorney-General's Department has not provided us with a submission, so we have no additional information other than what is in the explanatory memorandum and a very short second reading speech. Hopefully when the department appears before us they can go into more detail about the pilots and indeed about the policy case for these other amendments. I will not press you further on that point.

CHAIR: Unfortunately with these committees we do have very limited time, and we have overextended our time here. I think we have the idea, but just before we conclude, is there any other point that any of the three groups of witnesses might like to make, over and above the very clear submissions that have already been made?

Dr Cannon: Just that we are happy to have the work, but give us the resources; that is all.

CHAIR: Again, we cannot promise that, but we certainly have the comment loud and clear, and we will make sure the government is aware of it.

Dr Cannon: Thank you, and if you do not give us the resources, do not give us the work!

CHAIR: Again, thank you very much to all four. We very much appreciate your time. As I said, I am very conscious of the workload you all have, and allowing us some of your time is very much appreciated. Thanks very much.

KAHLO, Ms Phoebe, Rural, Regional and Remote Lawyer, Women's Legal Service Queensland

LLOYD, Ms Bronwen, Casework Lawyer, Women's Legal Service Queensland

LYNCH, Ms Angela, Community Legal Education and Law Reform Lawyer, Women's Legal Service Queensland

[10:00]

Evidence was taken via teleconference—

CHAIR: Welcome. Thank you very much for joining us. We are, as you know, a parliamentary committee. Parliamentary privilege applies. There are certain rules in relation to these proceedings, which I do not think I need to raise with you at this time. If there is any evidence you want to give in camera you should let us know and we can deal with that. We do have a submission from you, which we have numbered as submission No. 3. Would you like to make an opening statement or amend the written submission you have made?

Ms Lynch: Women's Legal Service Queensland would like to thank the Senate committee for the opportunity to address you on the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015. Women's Legal Service Queensland is a community legal centre that provides Queensland-wide specialist legal information, advice and representation to vulnerable women in matters involving domestic violence, family law and child protection. Ninety per cent of our clients experience domestic violence. Despite these amendments being promoted as protecting victims of violence, our on-the-ground experience tells us that this will not be the case. It is of concern to us that we are now at a legislative stage, and Women's Legal Service Queensland or our national body, Women's Legal Services Australia, has to our knowledge never been directly consulted in the development of these provisions.

In relation to binding financial agreements we do not believe that the proposed amendments have appropriately taken into account the issues for vulnerable people, particularly women, or sufficiently protected their interest. The proposed changes give precedence to commercial contractual principles over the principles of justice and equity and have failed to take into account the dynamics of family violence—in particular, how these agreements are an attractive tool for perpetrators to financially abuse victims because of their lack of court oversight and no need for full and frank disclosure, and they provide a means to manipulate the process to the advantage of the more powerful party, and there are no overarching requirements to comply with justice and equity principles.

Unfortunately, we believe that these provisions require a complete rethink. We believe this is absolutely necessary because of the extent of family violence in the community and, in particular, in families that use the family law system, that protective provisions in the legislation be introduced, including full and frank disclosure, requiring binding financial agreements to be just and equitable, at a minimum retaining the current requirement that solicitors provide advice about the benefits and detriments of entering a binding financial agreement, that the legal advice be provided in writing, that the setting-aside provisions be extended to include more categories to those at least set out in section 79A of the Family Law Act and the equivalent de facto section and that an extra provision is added, importantly, covering family violence. Having undertaken a case review of case law, it is clear that the categories in the current section 79A of the Family Law Act do not cover family violence and that section 79A should be amended to do so. I would now like to refer to a hypothetical case study to illustrate our concerns. I believe that copies of it have been forwarded to you and I ask that it be tended before the committee.

CHAIR: We have those now, thank you.

Senator JACINTA COLLINS: Before you continue, can I ask that we title this very clearly as a 'hypothetical' case study, so that there is no confusion when anyone looks at it.

CHAIR: Yes, fine. That is a good idea, we will do that.

Ms Lynch: I will step you through the case study. It is to illustrate the point, in particular, about how the provisions need to better take into account the dynamics of family violence. Anne was married to Frank for 37 years and lived on a cattle property in rural Queensland. They have four children, who are all now adults and living independently. Frank was psychologically cruel, verbally abusive and financially controlling. He would often threaten her life and throughout the marriage he was also extremely physically violent towards her. On one occasion he broke her arm and it never healed properly. She was scared of him and would always give in to his demands to keep the peace. She had worked on the property all her life, homeschooled and brought up the children, and attended to all home duties.

Ten years before their ultimate separation, Frank arranged for Anne to see a solicitor in town. Frank told her it was to sign a binding financial agreement that he was giving her 25 per cent if they separated, which was more

than she deserved. The solicitor advised against signing it, saying she was entitled to more and because there was no certainty around the total asset pool as financial issues had always been kept from Ann and there was no obligation for full and frank disclosure of assets in binding financial agreements. Anne was frightened of Frank. He had guns and she was worried about making him angry as he had threatened her previously with the use of guns. She knew that if she did not sign it, that it would mean a separation and she would be out on the street with nowhere to go. Despite the lawyer's advice she signed it anyway. She did not feel she had a choice. The lawyer had never asked about the violence.

Eventually Anne separated. She now works as a cleaner and is unable to work full-time because arthritis has set in on her injured arm. Anne received legal advice about the legality of the binding financial agreement. Unfortunately for Anne, the legal advice was that the agreement was probably binding. She had obtained legal advice at the time not to sign and a certificate was attached. It was unlikely that the agreement could be set aside under the current setting aside provisions as she had no dependent children and she had not been threatened or overborne by Frank directly at the time of signing the agreement. Years of conditioning and living with violence had meant that he did not have to engaged in this kind of overt conduct to get his way. Section 90K directs the court to only consider unconscionability in terms of the making of the agreement and not unconscionability more broadly—

CHAIR: Excuse me. The committee would like to ask you questions and you have kindly provided that to us, and we have read it as you have been reading it. Can you just make the point that you want to make in relation to that hypothetical. It is pretty obvious, but you make it.

Ms Lynch: I am glad it is obvious, there is no provision. It has not taken into the account the dynamics of family violence and there is, actually, no setting aside provision that specifically takes into the account the dynamics of domestic violence—really, in the interest of justice and equity, there should be.

CHAIR: In the final paragraph, you are saying that currently section 79A provides that a property settlement can be set aside where there has been a miscarriage for reasons that they mentioned, but your point is that does not include family violence, and you are suggesting that, perhaps, it should.

Ms Lynch: That is right. That is in relation to property settlements. In Section 79A, there is no equivalent setting aside provision under binding financial agreements. So under the current law there is actually no equivalent section 79A. What we are also saying is that section 79A needs amendment. The setting aside provisions in binding financial agreements needs amendment to, at least, incorporate some of the aspects of section 79A but also, importantly, it has to cover family violence as well.

CHAIR: The term—forgive me, it is a long time since I have studied this—'property settlement' does not include the financial orders that are the subject of this amendment.

Ms Lynch: That is right. That is correct.

CHAIR: You are suggesting that a similar section to 79A—amended, as you suggest, in relation to violence—should apply equally to financial arrangements?

Ms Lynch: That is right. We can talk about that case study through the questions that you ask. We were going to make a few points in relation to summary dismissals, and then we can open it up to questions. Is that okay?

CHAIR: That is fine.

Ms Lynch: Women's Legal Service Queensland is supportive of the policy behind this amendment, which is to stop perpetrators of violence using litigation as a way of continuing their abuse of their victims by wearing them down financially and emotionally. However, we have serious concerns that this provision will not achieve its policy objective and will, in fact, lead to injustice and be used against victims of violence. Again, 90 per cent of our clients who are victims of violence and are acting for themselves in court do not have paperwork of a high standard and can present badly because of fear and trauma. We are concerned that perpetrators and their lawyers may misuse the provision to threaten that a victim's case is without merit and, unless she withdraws, costs would be awarded against her. Her claims, on their face, may appear unmeritorious, but with assistance they could be substantially improved.

The suggested provision could actually be a barrier and deter women from raising protective and safety concerns about their children in the court in a similar way that the section 117AB provision—knowingly making false statements and costs, which was introduced in the 2006 amendments—led to the systemic underreporting of family violence and was ultimately removed by the 2012 amendments.

We urge you not to proceed with these provisions and to fully consult with agencies who work with victims on ways to improve the system and to protect victims from systemic abuse. This could also include protective

measures for cross-examination of victims of family violence and family law proceedings. That concludes the opening statement.

CHAIR: Just for clarification: are you urging us not to proceed with the whole bill, or elements of it? I did not quite get that.

Ms Lynch: We are urging you not to proceed in relation to the binding financial agreements provision and also the provisions in relation to summary dismissal. We do support section 68T amendments. What we support, and the issues we have, are more fully outlined in our written submission.

Senator JACINTA COLLINS: Thank you for your very helpful submission, I think it sets out your issues and concerns quite helpfully. Can you elaborate a bit further on your support for the changes to 68T.

Ms Lloyd: Currently, if there is a Family Court parenting order in place that allows, for example, the father to have contact with the children, that order can be temporarily suspended if a protection order is made—an order might be made for the father not to have contact with the children because of a threat of domestic violence. But if a temporary protection order is made suspending the previous parenting plan that only lasts for 21 days at the moment under section 68T, so the amendments would allow that suspension of the previous parenting plan to last a lot longer and without the mother—usually—being in breach of the order. As previous people have said in evidence, it is very, very difficult for a client to get themselves before the Family Court or the Federal Circuit Court to seek that the original parenting order be varied quickly—it can take months and months. In the meantime, she has a couple of choices. She can be in breach of the order by keeping the children away from the father, which exposes her to a potential contravention application and also has serious criminal consequences. Also, if she sends the children to school and there is a current parenting order that is enforced, the father can easily take the children from school, because there are no court orders that stops that from happening.

We support the fact that a later protection order can vary an earlier parenting order—the Family Court Act and Queensland's Domestic and Family Violence Protection Act talk about the circumstances where that should take place—but we do not support the fact that the temporary suspension of the parenting order would only last for 21 days. It should last for as long as the court considers it appropriate or for as long as it takes to get the matter before the Federal Circuit Court for them to revisit the parenting matter.

Senator JACINTA COLLINS: The only other question is what I asked of the previous witnesses too. These other changes that you are opposing do not, as I understand it, relate to the Family Law Council's interim report, so they cannot be characterised as first steps in relation to dealing with family violence matters. Do you have any understanding as to why they have been combined in this bill? Is there a case being put within the community somewhere? What could be the background to these measures?

Ms Lynch: We are actually unsure, I suppose, because we have never really been specifically consulted in relation to their development, so we probably cannot answer. It would seem, from the Law Council of Australia's submission, that there have been ongoing negotiations between the Law Council of Australia and the Attorney-General's Department in relation to some specific case law that has come out of the Family Law Court. We probably could not take it any further than that, because we really have not been involved.

Senator BILYK: Could you clarify one question a bit more for us? You mentioned that you have got concerns with BFAs, and also in your submission you talk about the amendment to section 90GA(2), which is a requirement for legal advice to be watered down. Can you talk to us about your concerns there?

Ms Kahlo: Certainly. Bear with me for one second while I pull that out.

Senator BILYK: The section is about the effect of the agreement on the rights of party receiving the advice and the advantages and disadvantages to that party of making the agreement at the time the advice was provided. The proposed amendment is to change it to 'The effect of the agreement on the rights of that party under this Act'.

Ms Kahlo: At the moment the current provisions are still far away from the requirements that are set out in the four-step process for property settlements dealing with property settlements only. We have serious concerns about watering that down, because we are unsure about the quality of the advice that will be given to clients and what the advice about the effect of the agreement, in terms of what they may be able to receive through other means of property settlement, could be. There are concerns about parties entering into those arrangements without full awareness of what their actual rights may be. The consequences of that are extreme for parties who are vulnerable and who do not have a fair bargaining position.

Ms Lynch: It is a watering down of the current provisions—of a current protection.

Senator BILYK: If I understand correctly what you said, it is the case that people might end up not knowing either the advantages or disadvantages of signing the agreement.

Ms Kahlo: That is right.

CHAIR: Do I understand correctly that the legislation as it is proposed in relation to a BFA being entered into prior to marriage or getting together would be acceptable but you are concerned about the ones that come into effect during the course of cohabitation?

Ms Lynch: No, we are concerned in relation to all of them. We just gave that case example of an existing relationship as it relates to binding financial agreements before marriage, during marriage and after separation.

CHAIR: I can follow your point that, if during marriage, there is violence and intimidation along the lines of your hypothetical case. But if you are going into a relationship and everything is obviously rosy and sweet and full of light, people are then free to make up their own minds—free of any pressure at all or threats of violence—why would that not find favour with your way of thinking?

Ms Lloyd: Basically, the Family Law Act as it stands at the moment has many principles of justice and equity that determine a party's amount of property that they will receive if the relationship breaks down. It is fine for people to contract out of that, as long as the bargaining power is equal. You were referring to a situation where there is no family violence and in that situation—

CHAIR: Hopefully, there is no family violence. If you are being 'violenced' and then still decide that you are going to make this person your partner for life—

Senator BILYK: It does happen, though, Chair, unfortunately.

CHAIR: Governments and legislation cannot protect people from themselves, surely.

Ms Kahlo: I think it is really important to understand that the dynamics of violence are pervasive. When parties are entering into a binding financial agreement pre-empting marriage or before marriage or in a de facto relationship domestic violence can occur. Parties are already in the relationship when they are entering into that. We also know, and it is common knowledge within the community and social science evidence, that separation is one of the most dangerous times for women who have experienced family violence.

CHAIR: I agree with all of that. My question is: if you are entering into a relationship with the person you love and you are going to be with for the rest of your life and you then, with complete openness—which may turn out to be foolish in the end result—and in this case both ways, I would imagine, make these arrangements, you would then be entitled to expect that they would stand, wouldn't you?

Ms Lynch: It is very common for relationships characterised by family violence for the family violence not to necessarily begin until he has control of her. It may not begin until perhaps after the marriage when there is a pregnancy, maybe when they have entered into a binding financial agreement. Perpetrators of violence are extremely manipulative. They absolutely know what they are doing, and it is very, very common for them to start to exhibit their true nature after they have complete control of her and she is in some way stuck in that relationship.

CHAIR: It is not a matter for the states, surely. You are then saying people should not get involved in relationships in ordinary circumstances. It is up to people to make their own decisions—

Ms Lloyd: There are a few different concepts that are involved. One is the bargaining power in the first place if there aren't issues of domestic violence and duress; that is one point. I think the question was about the watering down of the quality of the legal advice. So the other point is that adults who have capacity to make decisions are free to contract out of the safety nets of justice and equity that are in the Family Law Act, but only if they have received full, adequate, very thorough legal advice. Plus, they have not been influenced unduly by issues of domestic violence.

But, basically, the proposed amendments say that a binding financial agreement can still be binding when the quality of the legal advice does not end up being as it should. From our organisation's point of view, we would only support being able to contract out of the Family Law Act if the strictest of requirements were fulfilled. They include not being under duress or having the presence of domestic violence—

CHAIR: I accept that, but I am just a struggling. I would assume that this goes the other way. You are from the Women's Legal Service of Queensland, but I understand there are reverse cases—let's not go into that. But it applies across the board, whether you are male or female. But if you are starting a—

Ms Lynch: It is signing financial agreements that protect the party with the most power. That is what it is there for—

CHAIR: That could well be a very successful lawyer woman who is marrying the gardener, for example.

Senator BILYK: That is right.

CHAIR: But that is not the point of the argument. The issue is that if people are making a rational decision, under no threats of violence or intimidation or anything, that this is the person they want to be with then they know that if the marriage breaks up—and, hopefully, at that stage they would be hoping that it never does!—this is what they are going to get out of it, or this is what their responsibility is going to be. Surely, there is some benefit in having that certainty before you start, so if it does break down you know that in a perfectly rational frame of mind you had made that conscious decision as an ordinary, average, intelligent human being?

Ms Lynch: We agree with that, but in relation to when there is, ultimately, violence in that relationship we believe it is unjust and inequitable. And if there is a serious injustice in relation to the agreement that has ensued there should be a setting-aside clause in those circumstances.

In relation to the case example that we gave you: if, instead of during the marriage, that woman had entered into that binding financial agreement before marriage, then after 37 years of marriage and enduring what she had to we think it is unjust and inequitable that she would have ended up with that amount of property settlement.

CHAIR: Except—not in your example—that if she had made the decision when she was as perfectly intelligent as he was, was as well rounded as he was, 37 years ago, if it were to break down then she knew that she would leave with 25 per cent or whatever it is. She had made that decision, so I am not—

Ms Lynch: The reality is that it acts as an incentive for perpetrators of violence to try to get victims into these binding financial agreements which are unfair and unjust—

CHAIR: I appreciate that in your line of work you do see what I expect is the worst of society. But you are suggesting that people enter into these things thinking, 'Gee, I'll get her'—or him; it might be him—'to sign up at this so down the track I can start belting them around and I know they'll only get 25 per cent, because that is what they've signed up to. So when I start belting them around, as I intend to do in 10 years' time, I know what it's going to be.' There may well be cases like that, but these laws are, I assume, made for everybody and—

Ms Lynch: And that is why: these rules and laws are made for everybody. The issues that we have raised with the proposed amendment do not take away from a party's contractual rights. What they do is provide safer mechanisms that recognise the power imbalance and issues of violence within our community, which are trying to be addressed by the courts and by the legislation. We are saying—and this is crucial to understand—that the current proposals water-down the requirements for legal advice. This means that intelligent people are not able to make a good assessment about their rights and responsibilities and, therefore, make an informed decision about what is best for them.

CHAIR: Well, with anyone who is entering into a significant legal arrangement who does not get their own legal advice, is that then for the state to hold their hand in everything?

Clearly, anyone would get good legal advice. You are suggesting that some of the legal advice is not good. That is a matter for the law societies, not for the state, surely.

Ms Kahlo: There are requirements within these proposals that people who are going to enter into a financial agreement do get legal advice. Everybody must get legal advice. Certainly, the amendments are not trying to take away from that. The issue is about the type of legal advice. It is essential for anybody entering into a contract to make an informed decision that the quality of that advice is sufficient for them to make an informed decision. Currently, the proposals in the amendment will allow for the watering down of that advice and do not provide enough accountability for lawyers. As practitioners we have very clear duties about what we are supposed to be doing, and there is no reason why we should not be providing advice about the advantages and disadvantages of entering into a binding financial agreement. It is our obligation to understand the workings of the legislation and understand the workings of the property settlement four-step program.

CHAIR: Yes, but what you are trying to do is get this legislation to legislate for the quality of advice that lawyers give. As I say, that is more a matter for the law societies or for legal claims against a solicitor for poor advice.

Ms Kahlo: We are not actually asking for much more than what the current situation is at the moment in relation to issues of legal advice. We are simply saying that, when legal advice is provided, the current arrangements remain the same and parties are given advice about the benefits and detriments of entering into that agreement so that they can make a fully informed choice.

CHAIR: So you want to legislate to tick off what the lawyer has to advise on? Is that what you are saying?

Ms Kahlo: That is right, and that is what the current situation is. That is what the current law is.

Ms Lynch: If the setting-aside provisions that deal with justice and equity and also deal with family violence are there, it is really promoting binding financial agreements that comply with that. By having those setting-aside

provisions, there is incentive to not commit family violence and to act in a just and equitable way. That is why we have setting-aside provisions in a number of legislations, because it—

CHAIR: I would be interested to hear what the law councils say about that. Thank you very much. We have run out of time. I very much appreciate you being with us today. I thank you for your submission in writing and also for helping us understand it.

Ms Lynch: Thanks a lot, Senator.

ANDREW, Ms Merrindahl, Program Manager, Australian Women Against Violence Alliance

[10:33]

CHAIR: Welcome, Ms Andrew. These are proceedings of the parliament, so parliamentary privilege applies. If, for any reason, you want to make any part of your submission confidential, you can raise that with the committee and we will deal with that then. Would you like to make an opening statement to elaborate on your submission? We have numbered your submission as No. 10.

Ms Andrew: Yes, I would like to make an opening statement. Thank you for the opportunity to give evidence to the committee this morning. I will tell you about AWAVA to begin. The Australian Women Against Violence Alliance is one of the five national women's alliances funded by the Australian government. Our role is to bring together women's organisations and individuals across Australia to share information and identify issues and solutions in order to respond to, and prevent, violence against women and their children. Our members include organisations from every state and territory in Australia, and represent organisations working on diverse issues, including domestic and family violence, sexual assault, gender and education, and women and disabilities.

I need to stress that I am not a lawyer and I do not work in a front-line legal service dealing directly with family law clients, so I am going to comment at a general level. AWAVA aims to give voice, at the political level, to the knowledge gained on the ground in the services we represent in their intensive work with individuals.

I have read the detailed submission of Women's Legal Services Queensland, whose evidence you just heard, and my concerns about the bill are informed by theirs. The shockingly high rates of violence against women in Australia have recently become more widely known. The most recent ABS Personal Safety Survey in 2012 shows that one in three women have experienced physical violence since the age of 15, while one in five have experienced sexual violence. The perpetrators of violence against women, and violence against men, are overwhelmingly men.

We have also become more aware of the terrible impacts of family violence on children through the work of the Children's Commissioner—whose evidence I understand you will hear later today—and scholars such as Cathy Humphreys. The family law system is one of the major institutions that has to be navigated by many people who are living in violence and are trying to build safer lives for themselves and their children.

Over recent years steps have been taken to give safety a higher priority within family law but the system continues to fall short on that count. The way to make the system safe and trustworthy for victim survivors of domestic and family violence is to incorporate a solid understanding of the dynamics of violence at all steps in the process. The proposed amendments need further work to meet that standard.

I will talk a little bit about binding financial agreements and our position on that, then about summary dismissals and finally about the suspension of parenting orders. We understand the benefit to individuals and to government of people being able to resolve their own disputes without going to court, and we acknowledge that there are some women with assets who may benefit from entering such agreements. However, binding financial agreements do not properly account for issues such as the erosion of self-esteem and the lack of consent that are key to the dynamics of family violence.

While the legislation assumes equal contracting parties, we know that for a very large number of women their choices are interwoven with their need to limit the risk of harm to themselves and their children by appeasing their partner. In these cases, there is a very high risk that women will sign agreements even if their legal advice cautions against it—as we heard in the case study just given. These women understandably see the alternative as worse. For this reason, we agree with Women's Legal Services Queensland that the legislation should adopt a specific setting-aside provision for circumstances where there is family violence. In the absence of such a provision there is a high risk that outcomes will place women in poverty and reward perpetrators of violence.

In relation to summary dismissals, we again acknowledge the benefits of excluding unmeritorious cases from the courts especially in a situation of limited resources. However, an increasing number of people appearing before the family law courts are self-represented, because they lack the financial means to engage a lawyer. This particularly affects women who on average have lower incomes, fewer assets and more dependants. Being self-represented can increase the likelihood of a claim being seen as unmeritorious, especially for victim survivors of domestic and family violence who may be less able to fully identify or disclose their experience of violence compared with a woman who has legal representation. We, therefore, caution against strengthening the capacity for summary dismissals in the absence of extra measures to support victim survivors to obtain the legal assistance they need.

Together with Women's Legal Services Australia and the National Association of Community Legal Centres, AWAVA welcomes the proposal to remove the 21-day time limit for suspension of parenting orders by state and

territory courts making domestic violence intervention orders. This will reduce the risk of contradictory orders applying, which can place women and children at risk of further violence. However, much more far-reaching changes to the family law system are needed to make safety the first priority.

These are some of the changes that AWAVA and its members have been advocating during recent years:

- court based family violence specialists identifying and managing risk at early stages …

… … …

… separate funding for civil and family law matters, in addition to adequate funding for criminal law matters, as recommended by Australia's Productivity Commission …

Remove the presumption of equal shared parental responsibility in family law matters involving children …

… legislative protections to prevent vulnerable witnesses from being directly cross-examined by an alleged perpetrator of violence in … family law matters;

… … …

… ongoing training of judicial officers, legal practitioners, family report writers, court staff and police about the nature and dynamics of domestic and family violence …

… … …

In circumstances of domestic and/or family violence, legal aid should not be withdrawn should a party wish to challenge the findings of a Family Report Writer …

Finally:

That a specialised domestic and family violence funding pathway in Legal Aid Commissions for family law matters be developed … to guide internal decision-making of merit of legal aid applications.

Thank you once again for the opportunity to contribute to the inquiry. I now welcome the chance to answer your questions.

CHAIR: Thanks very much for that.

Senator JACINTA COLLINS: Thank you, and thank you also for your submission addressing the issues that we just canvassed with the previous witnesses. Can I ask you the question I have asked both earlier groups of witnesses today: aside from the issues around the 21-day matter, are you aware of where the policy case has come from in relation to your concerns about binding financial agreements and the other matters in this bill?

Ms Andrew: My basic answer to that is: no, I am not aware, although the explanatory memorandum does explain the complications involved in several subsequent amendments to the legislation and how that complicated the way that binding financial agreements can be treated when people apply to have them set aside or varied. So I can only assume that there is some practical reason for it to be addressed now. But, like Women's Legal Service Queensland, we were not consulted at any earlier stage in the development of the amendments, so I cannot really speak to the detail of where the impetus is coming from.

Senator JACINTA COLLINS: The explanatory memorandum outlined how previous amendments had complicated the interpretation of the provisions around BFAs—is that the case?

Ms Andrew: I believe so. I do not have it before me right now, but I understand that there were several iterations of guidelines about how they should interpreted and that there was some confusion about whether those invalidated the agreements or not, depending on at which point in time the agreement had been entered into.

Senator JACINTA COLLINS: I think Justice Strickland alluded to much the same himself, but I assume in part your concern is that these changes may indeed have perverse outcomes, and there is a concern that consultation on these areas seems to have been relatively limited, if it took place at all.

Ms Andrew: I think so, and I think these issues would have been identified quite early in the process if women's legal services and other advocates in this area had been consulted.

Senator JACINTA COLLINS: As you said, you are the one funded women's organisation focusing on domestic violence issues, and this bill purports to focus specifically in that area, and you were not consulted.

Ms Andrew: That is right.

Senator JACINTA COLLINS: Thank you. That is all I have.

CHAIR: You raised a number of issues about legal aid. That is not specifically the subject of this amendment.

Ms Andrew: That is right. I raised that in the context of the kinds of changes that would be needed to bring a substantive effect to the government's intentions to make family law safer. But I acknowledge it is not covered in the bill that is before us today.

CHAIR: You can never have enough money for legal aid, but there is always a limited source for it. Regrettably, justice in Australia is only for the very, very rich or the very, very poor. But I am not sure that we have the wherewithal to deal with that, and it is a matter for government, not this committee. But we take your point. With the summary dismissals, do you see any merit in that legislation at all? I accept you are not a lawyer.

Ms Andrew: I can see that from the court's point of view it would be useful to have fewer cases to deal with when those cases are not likely to proceed, and that could have flow-on benefits to the meritorious cases of the people who we are concerned with: they may be able to proceed more quickly. But I think the risks are quite high that, given lack of access to representation, there would be many cases in which people's applications would be seen as unmeritorious for reasons other than the substance of the case, especially where family violence may be involved.

CHAIR: You say in your submission that often the paperwork of unrepresented litigants is not of high standard and they can present their case because of fear and trauma, and I can well understand that. Do you have—and I'm not asking you to give it—actual evidence of cases where inability to complete the paperwork or present a case is having adverse results? I have not had any experience in the last 20 years with the Family Court, but my general impression is that judges go overboard to make sure that they get to the bottom of cases involving unrepresented litigants—not focusing so much on the process. Is there a lot of anecdotal evidence coming to you that meritorious cases are thrown out because the person is unrepresented and has not been able to do the paperwork or make the right points without assistance or legal advice?

Ms Andrew: I think that question would probably be better directed to a women's legal service specifically, but I can speak more generally about the evidence that we now have about the cognitive, emotional and functional effects of being traumatised and how they permeate every aspect of a person's life, especially in cases where someone is trying to take steps to extricate themselves from a control and abuse situation. It can be very difficult to concentrate, for example. Concentration can be impaired, and the distractions of, for example, homelessness or being unable to secure a safe environment for a person and their children—all of those circumstances—can make it increasingly difficult to prepare high-quality paperwork. I take your point, senator, that judges may be making efforts to counteract the difficulties that people are having as unrepresented litigants, but I think those pervasive impacts of trauma and distress have not yet been understood as quite the serious problems that they are in the way that people need to function when they are engaging with legal systems.

CHAIR: Thank you very much for that. We have no further questions. Thanks for your time in coming along and, principally, for your written submission and your explanations of it today.

Ms Andrew: Thank you for the opportunity.

DOOLAN, Mr Paul, New South Wales Solicitor Representative, Family Law Section, Law Council of Australia

[10:48]

CHAIR: I now welcome Mr Paul Doolan from the Family Law Section of the Law Council of Australia. I remind you that these are proceedings of parliament, so parliamentary privilege applies. It is an offence for anyone to threaten or intimidate you as a result of any evidence that you may give. If there is anything of a confidential nature you want to say, raise that with the committee and we can take in camera evidence, if that is appropriate. You have made a submission, which we have numbered submission No. 11. If you want to make any amendments to it, now is the time to do that. Apart from that, would you like to make an opening statement, and then we can ask some questions?

Mr Doolan: I appear on behalf of the Law Council of Australia today. This statement is primarily addressed to those amendments that deal with financial agreements entered into between parties to a marriage or an intended marriage or between parties to a de facto relationship or an intended de facto relationship. It is important to remember that over 15 years ago, the decision was reached that the introduction into Australian law of what are colloquially referred to as prenuptial agreements or cohabitation agreements would enable parties to an intended marriage or de factor relationship, with the benefit of independent legal advice, to order their own affairs on the breakdown of a relationship and avoid, by and large, the need for those matters to be the subject of a later determination by the court.

At a time when the Family Court and the Federal Circuit Court are struggling mightily to deal with an ever-increasing workload, honourable senators will have heard repeatedly the concerns expressed by the profession and public that there are simply insufficient judicial resources to meet that workload. Any measure such as these that have the effect of helping to reduce the scope of disputes and reduce the workload of the judiciary need to be constantly reviewed and, wherever possible, improved.

The reality is, in the view of the Law Council, that whilst prenuptial agreements and cohabitation agreements—what are known in the legislation as binding financial agreements—have been provided for within the Family Law Act for over a decade a half, their take-up by members of the public has not been as great as it could and perhaps should have been. There are probably many reasons that contribute to that, but one of them is the problems within the legislative framework of the Family Law Act. That, in turn, has led to lawyers—particularly in Sydney, Melbourne and Brisbane—declining to advise clients about them. One of the greatest benefits that the Law Council sees with the proposed amendments is that they may help remove a great deal of uncertainty surrounding financial agreements and hopefully encourage many lawyers to again offer professional services in this area where previously they have steered away from doing so.

CHAIR: I will just mark where you have got to. I do not like interrupt you, but why have lawyers been hesitant to give advice in the area?

Mr Doolan: There are several reasons. The No. 1 reason is that the legislation has been very unclear. That dates back to 2000. There have been a series of landmark cases, some of which have then lead to legislative amendments because of the way the law has worked in an unintended way, which invalidated a number of the agreements. That also led to concern about the difficulties of giving advice to clients. One of those areas is because of the scope of the financial agreement advice that had to be given with so broad that it was almost impossible to define what it was that a lawyer was post to advise upon. It has been a comment by some judges in judgements that in fact with the way the provisions about what legal advice should be provided was worded it was almost impossible to say what should or should not have been said to clients.

That, in turn, leads to a professional negligence issue for lawyers of, 'Why would I potentially open myself up to a very significant law claim in future based upon legislation that is unclear and in circumstances where we do not know what that legislation will be in five, 10 or 20 years time when this marriage might breakdown, or this de facto relationship might breakdown, or as to how the courts might then interpret that legislation in five, 10 or 20 years time?'

Senator JACINTA COLLINS: Did those negligence actions occur?

Mr Doolan: Some have, indeed.

Senator JACINTA COLLINS: Can you give us some sense of the scope?

Mr Doolan: I do not have figures on that, I am sorry. It is probably best to speak to professional indemnity insurers, I would think. I can say that professional indemnity insurers have had a fairly good campaign of trying

to educate lawyers about the dangers of these agreements. That all stems from the legislation and how that legislation has been interpreted.

Senator JACINTA COLLINS: So the genesis of this might have been the professional indemnity insurers' campaign?

Mr Doolan: I would not say that.

CHAIR: Regardless, it is an issue. Do not blame the insurers.

Senator JACINTA COLLINS: I am not blaming anyone.

CHAIR: Was this the Black v Black decision?

Mr Doolan: That was the first of them. Black v Black took—if I can use the expression—a black letter law approach to it. They said that the legislation means what it says, which is that if and only if the following things occur is the agreement binding. At the time, in the original legislation, there was a provision within the Family Law Act that was read by the courts as meaning that unless you actually said the advice that the act said you should have given within the body of the agreement itself and spelt out work perfectly, then the agreement was invalid. That was in circumstances where if you had attached to the back of the agreement a statement of independent legal advice saying exactly the same thing, the agreement would still be invalid; that is because they said the statement was not part of the agreement.

At that point in time, the vast majority of agreements were being drafted in that way. Lawyers were getting statements of independent legal advice in what they thought was in accordance with the legislation. The trial judge in Black v Black agreed that was perfectly acceptable and that it was the way it should be done, and then the full court of the Family Court said, 'No, you can't do it that way. The legislation says the following.' That invalidated the agreement. That then led to the Black v Black amendments that took place in this parliament, which retrospectively cured that particular problem with the legislation.

CHAIR: I used to be a lawyer a 100 years ago. What were the facts in Black v Black where it was determined, I assume, that the advice given was not sufficient?

Mr Doolan: No, that was not the problem. It was a technical issue that within the body of the wording of the agreement it did not repeat with the legislation it said. There was not a clause 43 that said, for example, advice was given on advantages and disadvantages or advice was given on the effect of the agreement on rights. Because those words did not actually appear within the body of the agreement, they said the agreement was invalid. Even though there was a certificate of legal advice that may have said the same thing, they said the certificate is not part of the agreement.

Senator JACINTA COLLINS: That related in part to whether the agreement had been provided to the relevant party.

Mr Doolan: That is a separate issue, as to whether a party receives a copy of the agreement after it is signed. That is a separate issue, I would think.

Senator JACINTA COLLINS: But it is related, I would assume. If the certificate is not provided to the party and the agreement makes no reference to the provision of advice, then it is hard to demonstrate that advice was adequately given.

Mr Doolan: What we have now with the current bill is a situation where there is an exchange of statements of independent legal advice and there must be receipts and acknowledgements so that that problem is, in a factual sense, overcome. One of the problems with these kind of agreements is that it might be signed in the year 2005 and the marriage might breakdown in the year 2030. People start scurrying around: 'Where is the agreement? Where are the statements? Did I get one? Did I not get one?' The idea with that part of the bill is to try to reduce the scope for those kinds of evidentiary dispute over was there an agreement, was it signed and did people get legal advice by ensuring that there are acknowledgements of those matters.

CHAIR: What does the new bill say about that?

Mr Doolan: The new bill attempts to make more clear that the legal advice must be given and it is required that there be a signed statement by a lawyer, it be provided the client and a copy of that must also be given to the other party. There also needs to be acknowledgements of that occurring so that it is clear that, in fact, that has occurred.

CHAIR: There is no requirement for filing it in a Family Court registry so that it is there for posterity?

Mr Doolan: No, there is no filing system for these documents.

CHAIR: I interrupted you in your opening statements. Please go back to that.

Mr Doolan: It is alright. It is like being in court. It is fine.

CHAIR: Unfortunately, the presiding officer is not quite as good as those that you deal with in court!

Mr Doolan: There were two parts of the bill that we wanted to make comment about. The first is just simply the need for clients to have confidence that financial agreements that they strike will be upheld and enforced. Some of the submissions made to this committee by others would suggest that the parliament should give judges an even greater role in scrutinising what might be described as the fairness of the deal struck in the financial agreement. What we say is that that approach ignores the reality of people getting independent legal advice and being advised of their rights under the Family Law Act. The second comment relates to the proposed amendment to section 90K(1)(d)—

CHAIR: Sorry, can you just go back and say that again? Just that last section.

Mr Doolan: The idea in some of the other submissions is that there should be a greater role for judges and scrutiny of the fairness of the deal. We say that ignores the reality of the fact that there is independent legal advice as a requirement of these agreements being made, so it should not be open to the courts to judge the fairness of the agreements. That, in fact, is the approach that the courts are taking at the moment. Parties are free to make a bad bargain if they wish to if they have had independent legal advice. If they go through the process, meet the requirements and get independent legal advice, then that is the whole purpose of this agreement: to allow people, if they wish to, to make a voluntary decision to contract out of their rights.

CHAIR: I am not sure whether you are here when we were talking with the Queensland Women's Legal Service. Were you here then?

Mr Doolan: I was here for part of it.

CHAIR: That was my point to them. They were saying, as I understood them, that some of the legal advice that is given is awful and not up to scratch. My comment to them was that it is a matter for the law societies, not for legislation, to say that lawyers must give good advice and this is how to do it.

Mr Doolan: Although that remedy certainly still remains. What we are seeing in the Family Court is—in fact, sometimes running parallel or in the same hearing—an application to set aside a financial agreement and the court also dealing at the same time with an application about professional negligence.

CHAIR: Okay.

Mr Doolan: So they are dealing with both at once under the—

CHAIR: Is the Family Court able to do that?

Mr Doolan: Under its accrued jurisdiction. There are authorities that can do both.

CHAIR: Okay. That is interesting.

Senator JACINTA COLLINS: Just on that point, Chair: that earlier evidence was not necessarily so much about poor advice but rather unequal power relationships and the impact of duress or not adequate consent and whether those circumstances should be allowed for.

CHAIR: But I was having the discussion about legislating for the quality of legal advice. I do not disagree with you on what you say.

Senator JACINTA COLLINS: The hypothetical case is actually a case of whether we should provide for those circumstances where an unequal bargaining position exists and, despite good advice, that advice is ignored at the time and whether the legislative framework should allow for setting aside such circumstances.

CHAIR: That comes down to: just how much do we, Big Brother in government, tell people how they should act?

Senator JACINTA COLLINS: Yes, it does.

Mr Doolan: That is the question, Senator Collins. There is in fact provision within section 90K that really does deal with those matters, and I direct the committee's attention to it. Section 90K(1)(a) provides that agreements 'obtained by fraud' could be set aside. Section 90K(1)(b) provides that agreements held in equity can be 'void, voidable or unenforceable'. Section 90K(1)(e) refers, in respect of the making of a financial agreement, to 'a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable'. So the legislation already brings in a whole lot of what you might say are almost standard contractual or equitable ideas about unconscionability, about duress, about fraud and about misrepresentation as a basis upon which they could be set aside.

Senator JACINTA COLLINS: Are you aware of any consultation for people dealing specifically with the issues around domestic violence as to whether those provisions have been seen to work adequately?

Mr Doolan: I am not aware of matters relating to consultation; I am sorry, Senator.

Senator JACINTA COLLINS: Thanks.

CHAIR: We keep interrupting you. Go back to where you were.

Mr Doolan: The second comment I want to make relates to the proposed amendment to section 90K(1)(d). By way of background and just to explain where section 90K sits within the legislation: even if a financial agreement meets all of the technical requirements, it is still open to challenge on the basis that it should be set aside on various kinds of equitable or common-law grounds. They are the sorts that I was just walking Senator Collins through.

One of those is what is called the hardship exception, which is in section 90K(1)(d), which is the provision that is the subject of the proposed amendment in the bill. There have been a number of first-instance decisions of judges dealing with this subsection so far. They have given it a very broad interpretation, one which in the view of the Law Council could substantially undermine the enforceability and usefulness of financial agreements. The interpretation so far from some judges has given rise to arguments that, for example, the birth of a child or children of a marriage or relationship which may not have been anticipated at the time the agreement was made would of itself be sufficient to constitute a material change of circumstance that then leaves that party in hardship.

Similarly, there is another broad interpretation that is starting to arise that, if a party to a financial agreement could have done better if they had been able to adduce their claim in the Family Court or the Federal Circuit Court for a property settlement or a spousal maintenance than they would have done under the financial agreement in terms of the contract that they have signed, then, if there are children of the relationship, that of itself may constitute hardship.

The view of the Law Council is that it opens the door to a myriad of applications to set aside these agreements. We say that the amendment proposed to 90K(1)(d) does not in fact go far enough. The Law Council have made a submission that the level of the test should be increased uniformly from being simply a 'material change' to one which requires a 'change of an exceptional nature' test to be applied. This would be similar to the tests that apply under the Child Support (Assessment) Act with binding child support agreements, and it would be similar to the test that is in section 79A of the Family Law Act, which deals with applications to set aside property orders.

The amendment that has been proposed to section 90K(1)(d) effectively leaves the tests of material change the same where the financial agreement has been made prior to the breakdown of the relationship. So the test is unchanged for what we might call prenuptial agreements or cohabitation agreements. The harder test—the one of exceptional change in circumstances—by the amending bill will only apply where people make a financial agreement after the breakdown of the relationship. So they are really just doing a financial settlement. The position of the Law Council is that the higher test—the test of the exceptional change—should apply uniformly.

Senator JACINTA COLLINS: So your submission is 'uniformly' and the submissions of other people with concerns are 'uniformly' but the difference is what the tests should be, uniformly.

Mr Doolan: That is right. As I understand it, the other submissions say there should be no change to the existing provision.

CHAIR: Are you finished with 90K(1)(d)?

Mr Doolan: I have finished my submission completely, Senator.

CHAIR: 90K(1)(d) is referred to in paragraph 25.2 of your submission—or right at the end of Mr Clark's submission. That is correct, isn't it?

Mr Doolan: It is 35.2.

CHAIR: I see in your submission that the Law Council has had a number of consultations with the Attorney-General's Department in relation to the proposed changes. Did they indicate to you why they did not agree with you in relation to 90K(1)(d)?

Mr Doolan: My understanding of the position is that they were concerned that introducing a higher test may leave vulnerable members of the community in a difficult position, and that for that reason—particularly in the case of prenuptial and cohabitation agreements—the existing test of material change should stay in place.

CHAIR: Would you just reiterate what you said about that?

Mr Doolan: Our concern is that the way that expression of 'material change' is being interpreted, at least in the first instance, by some judges is going to lead to potentially substantial attacks on agreements and attempts to set agreements aside on the basis of material change. What constitutes material change may be interpreted so broadly that the worthwhileness of these agreements will be called into question. Lawyers will be saying to clients that

what constitutes a material change in the circumstances is going to be dealt with so broadly that they cannot give their clients any guarantee or credence that their agreement will be able to hold up because of how that expression might be interpreted in the future.

CHAIR: You said that the exceptional circumstances test did apply in some other relevant legislation.

Mr Doolan: Yes, there are two other kind of analogous bits of legislation. One is the Child Support (Assessment) Act, which makes provision for parties to be able to enter into what are called binding child support agreements. Effectively, parties set their own agreement about what level of periodic and nonperiodic child support should be in place. That legislation was amended in relatively recent times—within the last five years or so—to put a test in place to say that there must be an exceptional change in order for that agreement to be set aside.

CHAIR: So there is some certainty from case law on that, I assume.

Mr Doolan: That is right. The other place you see it is in section 79A of the Family Law Act, which is a provision that deals with when a court can set aside a final order for property settlement where there has been a miscarriage of justice, and then there is a series of subsections as to when that should occur. Within that provision there is the use of the expression 'exceptional' rather than 'material' change.

CHAIR: Can these prenuptial agreements be set aside in the event of miscarriage of justice?

Mr Doolan: Not in the broad sense of miscarriage of justice, no.

CHAIR: That is not legislated anywhere?

Mr Doolan: No. There is no broad, overarching justice and equity test against them.

CHAIR: Although that is what I understand the Women's Legal Service Queensland was seeking.

Mr Doolan: As I read in that submission, they wanted effectively for there to be either a judicial imprimatur of the agreement that they be approved at the time people enter into them, or otherwise that when someone goes to enforce them on break down of the marriage that there should be a test applied at that point as to whether they were just and equitable. The difficulty with that is why, then, would we have them in the first place, because that is exactly the same test that a court applies when dealing with a property settlement claim—is it just and equitable to make a property settlement order? It would defeat the whole purpose of having them.

CHAIR: Yes, indeed. Thank you for that.

Senator JACINTA COLLINS: What would be the Law Council's view if there were an attempt to develop a provision around setting aside which captured the circumstances around domestic violence?

Mr Doolan: We would obviously have to see the wording of that. There is no similar wording, for example, within section 79 of the Family Law Act. That is the provision that allows the court to alter interests in property. Neither in section 79 nor in section 75(2), which are the two main things the court looks at, is there any specific provision that directs a court to have regard to family violence as an absolute or expressed factor that should be taken into account in making a property order. So the first point we would make is that to insert it into prenuptial provisions would be a significant legislative departure from the existing rights that relate to just breakdown of the marriage. If there were a case about property settlement and if there were an economic effect of family violence that occurred and a party's contribution were made more arduous by those things that had occurred, certainly they are relevant matters that a court when dealing with a property settlement claim can and often does take into account. So the first point I would make is that you need to first go back to sections 79 and 75(2) to see whether the amendment should be made there first before you look at the prenuptial provision.

The second point I would make—and again it would depend upon the wording of this—at what level, if I can put it that way, would it become a disqualifying or voiding factor for the prenuptial agreement? That is a difficult question. The definition of 'family violence' in the act at the moment is very broad, and rightly so. It is an issue that has been addressed very well by the parliament in terms of how that is drafted. On the drafting of such a provision would one event 14 years ago where someone had yelled at somebody, which might well at the moment fall within the definition of 'family violence', in itself be a factor that therefore voided the whole agreement?

Senator JACINTA COLLINS: It may also depend on whether that act was around the establishing of an agreement at that point in time or before or after.

Mr Doolan: Yes, and those kinds of provisions can also swing the other way. I have had female clients—and I used to do a lot of prenup agreements; I do not do them at the moment—

Senator JACINTA COLLINS: For the same reasons you mentioned earlier?

Mr Doolan: Yes. That attitude will probably change if these changes come through and I think a lot of lawyers will have that view as well. You often have a female client who on breakdown of the marriage has a prenuptial agreement in place and it was for their benefit. A lot of very wealthy females in the community are the ones who are instigating these prenuptial agreements. They are not all males who are the instigators in my experience. If you had a section in the legislation that simply said that acts of family violence could void an agreement, you could have a situation where a wife discovers an affair by her husband, words are passed and something is thrown and then technically under the act it is an act of family violence. Would that of itself be sufficient to void a prenuptial agreement done 20 years ago? So very careful drafting would be needed. I am just concerned about—and it is a terrible test to apply—what is enough family violence? It is an awful idea.

Senator JACINTA COLLINS: I suppose the critical difficulty here is on the one hand you indicate that binding financial agreements are one means of reducing the pressure on the overwhelmed Family Law Court system but on the other hand you say to us that we should allow people to make bad deals. The difficulty of course is, if you allow people to make deals, principally the most vulnerable people will be on the bad end of the deals and amongst those are often victims of domestic violence. So the question for us is: how do we build in adequate protections if we are going to allow people to step out of the family law system to ensure that those most vulnerable are protected in that process?

Mr Doolan: That is a very good point you make. What I would say in response to it is there are two provisions in there already that hopefully address that very concern. The first is the requirement of independent legal advice. The second is the provisions of section 90K, which are those provisions dealing with when a party can make an application to set aside an agreement, and they bring in things such as within the making of the agreement duress, unconscionable conduct and fraud. All those kinds of common law and equitable principles that are designed to protect the vulnerable are within the legislation already.

Senator JACINTA COLLINS: Did you get a chance to look at the hypothetical example that we were given by the Queensland legal service?

Mr Doolan: Can I just turn that up for a moment?

CHAIR: I think it was only tabled this morning.

Senator JACINTA COLLINS: Yes, sorry, it was only tabled to us this morning.

Mr Doolan: There was one on page 3 but I have not seen it.

Senator JACINTA COLLINS: No, it was not one of the case examples in the actual submission.

CHAIR: It is supposed to be hypothetical although I assume it is based on a lot of fact.

Senator JACINTA COLLINS: I do not want to put you under pressure now to respond to that but could I perhaps ask you on notice if you could consider that case and provide some feedback to the committee as to whether you would disagree with the advice that they referred to where it would be likely that a woman in these circumstances would have no option under the act for the setting aside provisions.

Mr Doolan: I am happy to do that. What time frame? I am used to asking judges for a time frame.

CHAIR: We are probably a bit harsher than judges.

Mr Doolan: I cannot believe that.

CHAIR: Tuesday?

Mr Doolan: Next week?

CHAIR: Yes.

Mr Doolan: Could I have Thursday please?

CHAIR: We have actually set that day for answers to questions on notice, which this is. We will say Tuesday but if you did not get it in until Thursday we will still use it. It is the wrong thing to ask a lawyer and obviously one who is very professional but do not spend too much time on it. We are just really interested, I think, in provisions in the bill where a lot of the concerns raised in that hypothetical could be otherwise addressed. I think that is what we are sort of looking for, and you seem to have as good a knowledge as anyone on the amendments.

Mr Doolan: I will be happy to answer it.

CHAIR: Where do you practise, by the way?

Mr Doolan: I practise in Sydney.

Senator JACINTA COLLINS: The final issue that I would like to ask Mr Doolan about is some of the evidence before us suggests that the changes around spousal maintenance and de facto relationships and the

changes around being able to deal with vexatious matters may have a perverse outcome in that they may generate more work in the courts.

Mr Doolan: In the summary dismissal provisions, I cannot see that. I would have thought, the way they are framed, they give judges the opportunity to remove cases from the system that should not be there. There is already an ability of the courts to do that but perhaps it is not set out as clearly as in the draft bill. I can only see that as being a good provision. I am sorry I did not understand the first part of the question around maintenance.

Senator JACINTA COLLINS: It was around maintenance and matters dealing with, for instance, seeking repayments if a person has entered into a de facto relationship, proving when a de facto relationship has or has not been established—those types of matters.

Mr Doolan: The question of when a de facto relationship starts or ends is probably the most difficult family law legal question. That fine line between boyfriend/girlfriend or de facto husband and wife and when separation happens is almost impossible to tell but the line has to be drawn somewhere. It is just one of those consequences. I think the bill rightly says that if someone is in a new relationship then why is the former partner paying and they should be entitled from that point to repayment if they have overpaid. Unfortunately it becomes a matter of proof as to when that point starts. I do not see a solution to that no matter how you twist or turn the bill. You could say, for example, you cannot do it until they have been separated for two years but you still have the same problem—when did the separation actually start for that two years to run? I do not think there is an easy solution to that particular issue.

CHAIR: I will go back almost to the last reservation you have in relation to the bill that you raised at 35.3. You submitted that the online and objects sections of the amending legislation should recognise that financial agreements can deal with property acquired after relationships breakdown or after divorce and not just property and financial resources received or acquired prior to that time. Can you briefly elaborate on that?

Mr Doolan: It is a rather technical point but the way the legislation works, it almost assumes that once a relationship ends that people stop acquiring assets or stop earning income. The legislation talks only about giving protection to assets acquired. Financial agreement can say, for example, any assets acquired during the relationship will be protected by this agreement. It does not refer to any assets you might acquire after the relationship breaks down. Unfortunately the case law is littered—not in this particular case of prenups—with people who, for better or for worse, have managed to win the Lotto three days after their marriage breakdown and then the Family Court ends up in a giant fight about who gets those Lotto winnings. The relationship had finished but the courts tend to value assets at the date of trial, not the date of separation. In this day and age, I tell clients that it will be three or four years from the date you see me until the date you get a final trial in the Family Court at the moment. We have this enormous problem, because of the delay, of assets constantly changing over three or four years. That is the kind of example dealing just with the marriage situation.

But there is an argument potentially out there that we think could be run by a smart lawyer—or not even a terribly smart lawyer—that this prenuptial agreement did not give protection to any asset that came into existence after the relationship ended because of the way the legislation is worded. We got the Black decision saying that we take a very strict approach to these laws. They are excluding the jurisdiction of the court. The court's jurisdiction should only be excluded to the extent that the law directs. The law, at the moment, says it only gives protection to assets acquired during the relationship. It says nothing about those after a relationship.

You could run into a situation where someone says, 'I agree the prenuptial agreement is valid and in force and I cannot get any of those assets over there. But for these over here that came into existence after the relationship broke down, I am not covered by the agreement and the Family Law Act gives no protection to them on a strict reading of the legislation.' So what we had suggested was—

CHAIR: Because the agreement did not say it might apply to assets acquired afterwards?

Mr Doolan: It is because the agreement cannot say that. Because of the way that the act is worded, it only refers to assets acquired during the course of the relationship. It says nothing of assets acquired after the breakdown of the relationship and that is the distinction here.

CHAIR: Why would your submission not say: let us put it beyond doubt that the assets must be valued at the time the breakdown occurs, not at the time the matter eventually gets to court four years later?

Mr Doolan: We are perhaps at cross-purposes. What we are saying is that if parties enter into a prenuptial agreement and that agreement says that neither of us shall ever make any claim on the assets of the other party, the way the legislation seems to work is that will give a complete coverage if it is a binding agreement to anything they acquired during the course of their relationship together. But there seems to be very clear technical argument that if someone acquired an asset after the relationship broke down, that agreement could not as a matter of law

give it any protection because, the way the legislation is worded, it only gives protection under a financial agreement to assets acquired prior to the breakdown of the relationship. What we are trying to do is cover off loopholes that are going to come up constantly because people are always looking for ways to get out of prenuptial agreements.

CHAIR: So that would invalidate the prenuptial agreement because it did not allow for—

Mr Doolan: The prenuptial agreement would still be valid and it would still protect those assets that it could cover. What we are saying is the way the act operates—

CHAIR: It could not protect the assets acquired afterwards.

Senator JACINTA COLLINS: So there is a window between when the relationship breaks down and the matter is heard?

Mr Doolan: Potentially, if someone receives an inheritance two years after the relationship breaks down but they have not enforced or finalised the breakdown of the relationship from the financial agreement and someone puts in a claim, they will not be claiming any of the assets that were covered by the prenuptial agreement because they cannot but there is nothing to stop them, under the Family Law Act, from claiming the inheritance received.

CHAIR: What does your proposal and 35.3 suggest?

Mr Doolan: It suggests there should be a recognition that the prenuptial agreements can apply to assets acquired even after the end of the marriage or the breakdown of the de facto relationship, just a simple wording change in that regard.

CHAIR: So that is what your recommendation 35.3 says?

Mr Doolan: Yes. In summary form, yes.

CHAIR: Again, did you get an indication from the attorney's office on why they did not go with that?

Mr Doolan: I do not recall. I would have to check and take that on notice.

CHAIR: I can ask the department later on but it seems eminently sensible to me—but that does not mean much, I might say. Thank you very much, Mr Doolan, and thank you to the Law council.

Proceedings suspended from 11:26 to 11:39

MITCHELL, Ms Megan, National Children's Commissioner, Australia Human Rights Commission

CHAIR: Welcome. Thank you very much for joining us, Ms Mitchell. I will not go through the formalities as you have been to enough Senate committees to know the rules. But if you do require any clarification at any time, please just ask. We do have the commission's submission, which is submission No. 6 in our numbering. If you want to make any amendments you can do that, but otherwise I will just ask you to make an opening statement.

Ms Mitchell: Thank you. As National Children's Commissioner at the Australian Human Rights Commission, my role is to monitor and advocate for the rights and interests of children and the laws, policies and programs that impact them, amongst other things. Since I started in 2013, children, adults on behalf of children, and adults recounting their own experiences as children have consistently raised the issue of family and domestic violence and how it plays out in the Family Court context in particular.

In 2014, I conducted an investigation into self-harm and suicide amongst children and young people. This work revealed a link between exposure to domestic and family violence and intentional self-harm.

Last year I undertook a national examination of the impact of family and domestic violence on the lives of children, and the findings and recommendations of this investigation are contained in my *Children's rights report 2015*, which I have here. It was tabled in parliament on 30 November last year. As part of this work, I sought submissions from a range of experts in the field. They were invited submissions. Close to a third of the submissions highlighted concerns about the Family Court and the family law system more generally and the capacity to protect children from abuse and neglect. Respondents consistently reported a lack of understanding of and inappropriate responses to family and domestic violence by those in the system; conflict between the right of parental contact and the rights of the child, in particular to be safe and have their voices heard; court decisions which do not fully reflect the Family Law Act amendments in 2006 and 2012; and inappropriate use of mediation in some cases.

It became clear during the investigation that, given the increasing complexity of matters before the Family Court, including frequent allegations of family violence and child abuse, the court is not well placed to identify, investigate and respond to such claims and the experiences of children in these situations. In my 2015 report, I made a recommendation about the Magellan program in an effort to equip the courts with more specialist expertise in relation to at-risk children.

In relation to the provisions in the bill under consideration relating specifically to child rights issues, I welcome additional and clarified arrest powers, a stronger approach to child abduction, measures to enable the state and territory courts to suspend or vary existing parenting orders where this is considered to be in the best interests of the child, and even the measures providing more certainty about financial arrangements. These are also relevant, as they may ensure greater stability of access to resources for children as they grow and develop, if they are deemed to be accompanied by adequate safeguards for vulnerable parents.

Having said that, it is important that the measures, especially those relating to child safety, are supported by adequate access to information, forensic expertise and expertise in domestic violence and child psychology, trauma and development. Further, these amendments should not circumvent the need for the Family Court to improve its capacity to respond to complex cases involving family violence and abuse.

I also have one other particular concern about the bill in question. This relates to the proposed measures to remove the requirement for the court to explain to a child orders or injunctions that are inconsistent with an existing family violence order. Children routinely tell me that they feel disempowered and silenced in Family Court proceedings. They also say they are not given information about outcomes or consulted on decisions about them. I am also concerned about the capacity of the Family Court—and in fact other courts—to interpret 'best interests' in ways that are actually in children's best interests. I think the recent review by the Family Law Council, which looked at the impact of the 2012 amendments, demonstrates that, while the changes were made to the act in order to increase the visibility of children, increase their voice in proceedings and keep them safe, in fact practice has hardly changed. So I feel that that provision in particular will provide less transparency in terms of the court's activities and less visibility and agency to children in these situations—who, after all, these decisions are about in many cases. Thank you.

CHAIR: Thanks very much, Commissioner. Thanks very much for your submission and for being with us today.

Senator JACINTA COLLINS: Thank you, Commissioner, for the information in relation to the Magellan program. I think that pretty much sits into the space that Their Honours referred to first up this morning, which is the more general resourcing issues around the courts and their operations, but certainly the point is well made.

I want to go specifically to three areas. The first is the changes around binding financial agreements, where you indicate that some certainty would be helpful if adequate safeguards were provided, and that has been the matter before us this morning. For instance, the Australian Women Against Violence Alliance and the Women's Legal Service Queensland are both raising this issue and concerned that, rather than generating certainty, these changes may in fact have perverse outcomes, particularly for vulnerable women.

They also raised a concern as to whether CEDAW has been considered with respect to these amendments. Could you please take on notice for the Human Rights Commission—I know it might not specifically be you—to look specifically at those submissions as to whether there is a concern in terms of the application of CEDAW.

Ms Mitchell: I certainly will take that on notice, and I am certain that the commission would be happy to do so. I heard you speaking to the previous presenter here about the time frame for that. What are you thinking—

Senator JACINTA COLLINS: The timetable is Tuesday but Thursday at a stretch—I think that would be the best way to describe it.

Ms Mitchell: Okay.

Senator JACINTA COLLINS: But equally, Commissioner, the discussion that I suppose I anticipate that I will be having with the department is also around consultation and what consultation has occurred. There are provisions in this bill which are quite distinct from those provisions dealing with domestic violence that it appears the Law Council has been consulted on—but not perhaps others that should be consulted. A response from the Human Rights Commission on those points would be helpful at least for the committee to generate consultation on those matters. It would be concerning if these additional provisions that were originally designed to deal with creating more certainty around binding financial agreements led to perverse outcomes which created greater problems in relation to domestic violence issues, obviously.

Ms Mitchell: Indeed. I am not the expert in this area, and I will defer to my colleagues at the Human Rights Commission who are.

Senator JACINTA COLLINS: Sure. Thank you. On the requirement to explain, do you understand why that change might be proposed?

Ms Mitchell: It is not clear to me, and I was not consulted about it myself. But to me it is a retrograde step. There is some discussion in the statement of compatibility with human rights that it is sometimes in the best interests of the children not to understand, not to be exposed to, the controversy surrounding the case and that there should be discretion given to the judges to make that call. But, as I said, I am not convinced that there is a demonstrated understanding of what 'best interests' is or of children's rights generally. In my experience, many children are able to comprehend and in fact benefit from comprehending the situation they are in—even quite young children.

Senator JACINTA COLLINS: Presumably the discretion also sits with the judge as to how they describe the circumstances.

Ms Mitchell: Exactly. It is all about skills and the way information is provided to children. In fact, for many children, when they come out of these arrangements they are very unclear about what is happening and why, and nobody has taken the time and effort to explain to them what the situation is.

Senator JACINTA COLLINS: When were these provisions introduced?

Ms Mitchell: In terms of hearing the voice of the child, it was back in the 2005 amendments, but the additional safety amendments around domestic violence and child abuse were introduced in 2012.

Senator JACINTA COLLINS: But, in terms of the provision of information to children, they were measures introduced in 2005, and I have yet to see a case to suggest that they are not or have not been working.

Ms Mitchell: You have yet to see a case where they have not been working?

Senator JACINTA COLLINS: A case that demonstrates that those provisions introduced in 2005 have not been working.

Ms Mitchell: Indeed. It is something that you would probably need to put to the Family Court as to why they feel it necessary to have greater discretion in this area.

Senator JACINTA COLLINS: I am not sure that they have even asked for it, which is something else we will ask the department.

Ms Mitchell: For me, it is silencing children and young people. It goes against the provisions that are in the act around children's rights. I think that in the end it is another area where there will be perverse outcomes potentially.

Senator JACINTA COLLINS: Thank you.

CHAIR: Thanks, Commissioner. I think Senator Collins has covered the issues I wanted to raise with you as well. But can I just take this opportunity to ask a question not—well, vaguely—in relation to this bill. Short of waving a magic wand, is there any long-term way that Australia—indeed the world, I guess—can address this issue of violence against women and children? It seems to me to be foreign to the minds of, I would suggest, 90 per cent of Australians that anyone would ever embark upon consistent violence against women and children, short of—as we were talking of in the break—mental health issues, of course, but that is another issue. Are there any broad thoughts that you as the Children's Commissioner might have about how you would change the world to address what seems to me to be an incredible issue? I cannot believe it is as significant as it is, but clearly the evidence is that the violence is there. Is our education system at fault? Are our values at fault? Do you have a broader view on that, Commissioner?

Ms Mitchell: Thank you for the question, Senator. I think it is a really important one, and I think it is probably one of the most important ones facing our nation. It affects everything from, as you say, the mental health of people and children and their capacity to grow and develop in healthy ways to our productivity down the line, so it is a really important issue. I have thought a lot about how we are in this situation, but we clearly are in a situation where violence and family violence in particular are prevalent. The work that I did last year revealed some pretty astonishing numbers of children that are exposed to violence. There are some estimates that around a quarter of children are exposed to violence in the home. There is actually limited information in that area, but there are some studies that point to around that. That is a broad definition of violence, of course, but it does include physical and sexual abuse as well. But not only are children witnesses or bystanders to this but they are also direct victims. They get in the middle of this. It is one of the main drivers of why we have over 50,000 children in care in this country—a very, very high number. So we really do need to do something about it.

In terms of what we can do, I think it needs a range of measures, from that basic values question that you talked about. I would very much support the education of children in primary school settings upwards about respectful relationships, healthy relationships, what a good relationship looks like and what a good relationship does not look like. I think that is a pretty important prevention and early intervention mechanism.

I also think we need to be having that conversation with the community as well—what is not on. I think we are having that conversation at the moment. It presents a great opportunity for us to be honest about this issue. I also think we need to be training up first-to-know respondents, like teachers, doctors and all of those kinds of people, who will be able to—even during pregnancy, when we know it is a high risk time—ask the right questions and support people who may be subject to the early signs of domestic violence, or even the later signs of family violence in their lives. That is an early intervention measure as well.

Also, we need to be looking at what works in terms of intervention. The problem for children is: what happens to them is that they are kind of incidental to what happens to the parent trying to escape domestic violence. Mostly, all they get is a safe haven in a refuge. They never get the therapeutic support that they need—or not consistently; there are some examples of it—to recover, to become resilient and become healthy citizens, and to repair their relationships with their fathers and mothers, which really needs to occur because they still love their fathers and their mothers, regardless of what they have done. So there needs to be that investment in understanding what works in that space—and there is not very much at the moment.

CHAIR: I was more or less getting to what we do to stop the parents—or one party to the marriage or relationship—participating in violence to the other partner or to the children. If you get the solution to that, the—

Ms Mitchell: This legislation, and many other changes to legislation, is trying to do things around the margins here.

CHAIR: But for violent people, threatening them with going to jail is not going to make much difference. I am just wondering: it is probably an insoluble question that I put—

Ms Mitchell: Until we get a generation of children growing up where they think it is not on. That is why I am talking about investing in children.

CHAIR: So you are talking about children in their capacity as future adults?

Ms Mitchell: Absolutely. Dare I say, if we had a charter of rights in this country, I think people could focus on that issue in a much more comprehensive and strategic way, because this is a rights issue—to grow up healthy and safe. For me, it is a really fundamental one. So I try to have those conversations wherever I go in the early childhood sector and in the schools sector.

CHAIR: Do think that is happening in our schools, or wherever else? I guess it would have to be done at school, wouldn't it? That is the only—

Ms Mitchell: At school, yes. And in other settings as well—it is the sporting field and everywhere where children are. It is, I think, happening. It is bubbling away in a grassroots way. Also, COAG has recently agreed to look at education within the school setting.

CHAIR: So part of the national curriculum would be teaching respect for—

Ms Mitchell: There are lots of opportunities within the current school curriculum.

CHAIR: Is there?

Ms Mitchell: Yes—to do with communication, relationships, negotiation—all of those things—and respectful relationships. Help seeking is the other part of this issue—that is, we do not let things get out of control and escalate in a family setting; we seek help.

CHAIR: As I say, it is not directly germane to the bill, but it certainly is in the broader sense. Is Australia worse than other countries with domestic violence?

Ms Mitchell: That is difficult to answer. However, our numbers of children in care are relatively high. That, I think, is an indicator that we are not building safe, great families.

CHAIR: Do we have statistics on in-care children in Western countries?

Ms Mitchell: There are some—yes. These comparisons are difficult. What does the legislation look like? What is our threshold for removal of children into systems? They will all be different. However, at a broad level—

CHAIR: But, per capita, are we much worse than, say, Britain or Germany, or the United Kingdom?

Ms Mitchell: My understanding is that we are. I would have to confirm that for you. I am happy to do that.

Senator JACINTA COLLINS: I would be interested.

CHAIR: Okay. Although I know it is not directly germane to this, if there was something, it would be useful. I just hope that we are not as bad as other countries. If the answer is, 'Yes, we are,' perhaps I do not want to hear it!

Senator JACINTA COLLINS: No. The difficulty for us, in part, and which might be generating some of this problem, is the federation structure and dealing with children across different state jurisdictions and their child protection systems. But my impression is that we do have a very high—

Ms Mitchell: Rate of children.

Senator JACINTA COLLINS: rate of children in permanent care.

Ms Mitchell: And we know that outcomes for those children are particularly good. The real solution is building safe, great families.

CHAIR: Mind you, I have personal experience with people who should never have been parents, but do we ever get to the stage of *1984*, where Big Brother in government legislates on who can have children and who cannot? I think someone else tried that back in the 1930s.

Ms Mitchell: One of the issues in this space is that these behaviours tend to replicate themselves through generations.

CHAIR: Yes. It becomes the norm.

Ms Mitchell: So breaking the cycle for those kids who have experienced it in the care system should be an absolute focus and priority for us. At the moment there is a thing called the National Framework for Protecting Australia's Children, where all the states and territories and the Commonwealth collaborate to improve the consistency and quality of care and protection but also the broader child awareness in the community. There is an opportunity there to focus at this stage of the framework on children who are transitioning to adulthood. This provides another opportunity to help break the cycle of domestic violence, having children too early—those sorts of issues. At the moment, basically you turn 18 and you are on the streets. Really, we cannot afford to do that if we do not want to replicate those sorts of behaviours, attitudes and values through generations.

CHAIR: Thanks very much for that. As I say, we have digressed slightly, but we look forward to seeing you at some future hearings, as I am sure we will.

Ms Mitchell: Thank you.

ADSETT, Mr David, Deputy Director, Commonwealth Director of Public Prosecutions

CONNELLY, Mr Shane, Assistant Commissioner and National Manager, Crime Operations, Australian Federal Police

OSBORNE, Commander Paul, Manager, Crime Operations, Australian Federal Police

[12:01]

CHAIR: We might start with Mr Adsett and the Federal Police can join in as they arrive. Mr Adsett, I know you have appeared at Senate committees before, so I will not go through all the formal advice, but you are aware of this being a proceeding of parliament and that parliamentary privilege applies. We will not ask you for opinions on policy directly but on different issues relating to it. We have received a submission from the CDPP, for which we thank you and those responsible. We have numbered it as submission No. 17. Would you like to make an opening statement?

Mr Adsett: Yes, I would—thank you. The bill that this committee is examining contains two criminal offences. The general principles of criminal responsibility in chapter 2 of the Commonwealth Criminal Code apply to the Family Law Act—section 7A. The two new offences are capable of being broken into their constituent physical elements, and the physical elements are capable of being characterised as either conduct or circumstance. Each of the physical elements has a corresponding fault element which is clearly discernible. The physical elements have a number of clearly stated alternative options that cover a variety of factual circumstances that may arise in this crime type. I have alluded to this in the submission.

Where a child is taken by a party to the proceedings and retained by that party overseas, this section would apply, but it would similarly apply where the child was taken by a party to the proceedings but retained overseas by another person. It would also apply if the child was taken out of Australia by another person on behalf of a party to the proceedings and retained either by a party or another person overseas. So we can see that there are multiple different circumstances which the proposed offences would apply to, and that is helpful from a prosecution point of view because, as we all know, factual circumstances can potentially vary tremendously in this area.

Similarly, different forms of order requiring the child to be brought back to Australia are covered by the section. For example, there a consent in writing, authenticated as prescribed in the Family Law Act, of each person in whose favour a parenting order was made is a requirement for liability or, alternatively, an order of a court made under part 7 of the Family Law Act. Again, a variety of circumstances are covered; and it is pleasing to see that approach, which retains the flexibility of the provision.

Similarly, the terms used in the offence-creating sections are defined, and that is also a helpful aspect. For example, the term 'parenting order', to which this subdivision applies' is defined in existing section 65X of the Family Law Act.

Lastly, in looking at the legislation—and again this is covered to some extent in the written submission—the type of geographical jurisdiction that is applicable to each of the new offences is clearly stated in proposed section 65ZE. This makes it clear that the offence applies extra-territorially although it is implicit that a large portion, if not all, of the conduct required by the offence provision would occur overseas. It is noted that the application of extended geographical jurisdiction category D is confined to the new offences. There are existing offences in sections 65Y and 65Z of the Family Law Act. These relate to abduction of children from Australia. Again, it is implicit that those offences would operate extra-territorially. But the introduction specifically of a description of the precise geographical jurisdiction that applies to the new offences means that there is now a contrast. The new offences clearly state which geographical jurisdiction applies whereas the existing offences already in the Family Law Act—in sections 65Y and 65Z—do not have an explicit description of the geographical jurisdiction that applies.

This contrast may be unhelpful because the silence of the legislature in specifying the geographical jurisdiction applicable to the existing offence might be seen as an indication of parliamentary intent. Why did the parliament introduce specific geographical jurisdiction in relation to the new offences but leave the existing offences without an explicit statement of the geographical jurisdiction that was applicable? Again, and I can see this happening in a court context, if the existing offences are used—and they are from time to time used in prosecutions—there is an argument that parliament's silence on this meant that there must be some intention to restrict the geographical application of the existing offences. So I think it would be helpful if consideration could be given to clarifying that the extended geographical jurisdiction applies not only to the new offences but to the two existing principal offences in this part of the Family Law Act—that is, sections 65Y and 65Z.

In conclusion, the legislation importantly fills a gap in the Australian law relating to wrongful retention of children overseas and, as the draft explanatory memorandum says, that has an important deterrent aspect. Again, to be an effective deterrent, it is important that the offences be from time to time prosecuted, and from our examination of them they certainly appear to be capable of prosecution.

CHAIR: Mr Adsett, practically, what will these new offences do to your workload—I will ask the Australian Federal Police later—in terms of charging a person with this offence and recovering the child from another jurisdiction? Is that practically doable given your resources?

Mr Adsett: I would say that it is doable. We will inevitably have referrals under the new section. I am using the prosecutions under the existing section as a guide. They are investigated and we have had referrals in relation to those—that is sections 65Z and 65Y. We had one prosecution under 65Z that was completed in 2014 and another under 65Y that was completed in 2015. So we do do work in relation to the existing sections, and we anticipate doing work in relation to the new ones when referrals are received from the Australian Federal Police. Given the number, I do not think it will have significant resource implications, but with new legislation there are inevitably some further prosecutions that are done. But I do not anticipate a flood of cases.

Senator JACINTA COLLINS: I am concerned process-wise about why your concerns in relation to the extended geographical jurisdiction—the clarification around the principal provisions—were not dealt with ahead of you raising them now. Was there not consultation between the Attorney-General's office and you in framing these amendments?

Mr Adsett: I am unable to answer whether there was consultation. My impression is that there was not, and perhaps there should have been, but it is something that was only noted recently in relation to this. In fact, in preparation for this appearance I noted it because thought was given to how the amendment would operate, if enacted, in a practical way, and it was only then that I noticed that the existing offences were potentially not covered. Up until now everyone has been focusing on the amending act, how it looks and how its offences look, not so much how it impacts on existing offences. I think it has been overlooked. I apologise that it has not been noted earlier. The consultation, if it did occur, would have been focusing on the amending act rather than the existing provisions.

Senator JACINTA COLLINS: My sense of these provisions is that they are relatively non-controversial. I do not think we have had evidence from any of the other submitters addressing them. However, we have had concerns about limited consultation in other respects as well, which is why I asked that question. I am also curious, as to the changes in relation to the new offences of retaining a child overseas, to understand how often this sort of situation arises.

Mr Adsett: I think the Australian Federal Police might be in a better position to know how often it occurs in a practical sense. We do get referrals from the Australian Federal Police in relation to the existing child abduction provisions. I have mentioned that we have done prosecutions in recent years under that provision, so it is used. In terms of how often it occurs, there might be occasions where it occurs and we do not get a referral. It might be that that is because the disobedience to the court's orders and processes can be dealt with in a non-criminal context in the court itself, and there might be bigger picture issues for the court to be dealing with in relation to the children in the family. So there might be a number of different ways these matters can go, but, in terms of the prevalence of it, we have not had very many referrals at all.

Senator JACINTA COLLINS: Sure. We will come to that with the AFP. Thank you. The final question I have relates to the requirement for the Attorney to sign off in relation to non-citizens. Will that slow down the process, or can you see that working effectively?

Mr Adsett: I think it will inevitably slow down the process, but that is a very important part of it to ensure that the right considerations are taken into account in prosecuting a foreign alleged offender.

Senator JACINTA COLLINS: It ensures that the Attorney is satisfied that any jurisdictional or other issues have been addressed.

Mr Adsett: There might be international considerations that we are not aware of that need to be taken into account at a government level, and I see that that is something that also impacts there.

Senator JACINTA COLLINS: Thank you.

CHAIR: Thanks very much, Mr Adsett. You might just hang around in case something comes up.

Mr Adsett: Certainly.

CHAIR: I again welcome officers from the Australian Federal Police. Do you want to make any form of opening statement at all about this particular bill and the issue generally?

Mr Connelly: Yes, thanks. Firstly, we would like to thank the committee for inviting us to attend. This is a particular part of the law where we have an involvement, albeit it is not often heard of and it is a difficult area of law. So we thank the committee and we thank, more broadly, this endeavour to amend the legislation.

Firstly, there are two main issues relevant to the AFP, the first one being the extension of the arrest powers and the second being the two new offences. I will turn firstly to the arrest powers. The AFP is supportive of amendments in relation to arrest powers, and it is division 11 on page 34. The amendments are in line with current powers under the Crimes Act 1914 and are generally consistent with the recent amendments to related legislation, such as the Federal Courts Legislation Amendment Act, which amends the Federal Circuit Court of Australia Act 1999 and the Federal Court of Australia Act 1976. Arrest powers will extend, in limited circumstances, to marshals, sheriffs and ABF employees, which could allow the AFP to focus on high-level responses at airports but is mostly applicable in places where the AFP does not have a presence. For example, in small seaports where yachts are departing and a child may be taken on board, or in the case of cruise ships—we have an increased amount of cruise ship business in this country now—where the AFP does not have a standing presence, this will assist in relation to ensuring that children are not taken offshore in contravention of orders. So we welcome that. In the airports where we have a presence, we would imagine that the matters are dealt with by the AFP in consultation with ABF in most circumstances.

The AFP is also supportive of the introduction of the two new offences relating to international parental child abduction. We have some statistics for you, Senator Collins, which may assist you with your previous question. Currently, it is only an offence to unlawfully take a child offshore, and the AFP has been unable to provide assistance in situations where a child has been lawfully taken offshore but then unlawfully retained, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained. The introduction of the location order is viewed as a valuable tool to assist in the location of children offshore. The AFP also supports the expansion of location order provisions. The location orders will be a valuable tool to assist in the location of children offshore in the case of child abductions. Unfortunately, these provisions will not necessarily aid in practical retrieval of children, as the AFP will still need to rely on cooperation and assistance from local jurisdictions, which may be challenging, particularly when dealing with non-convention countries.

Chair, you raised the issue of cost. It is anticipated that this will bring an additional workload to the AFP and, given international jurisdictions, that is a costly exercise. Possibly the greater problem for us is the diversion of limited resources to this function. But, in saying that, we still see this as a very vital function that the AFP performs, and we understand and respect the decisions of the court and our role in that function.

Whilst we see this overall package as a good one, we recognise the difficulty in terms of applying Australian laws in some foreign countries where jurisdiction is an issue—particularly, it is probably worth at this time to note, in countries where there are current war situations, where the AFP has very limited ability to assist or exercise their jurisdiction in any case. So war-torn countries are problematic and I think there are a few cases that you would realise are relevant to that comment. That is the AFP's position. We are happy to take any questions that you would like to provide.

CHAIR: Thanks very much, Assistant Commissioner.

Senator JACINTA COLLINS: Given my earlier statement about the submission that we received, there is one example that poses difficulties with these provisions. I am not sure that not proceeding with provisions such as these is the appropriate response, but there are cases where you have, for example, a woman seeking to protect her child from a family violence circumstance, with delays in the Family Court, who has found the option to flee, essentially, outside of our own jurisdiction as the solution. I am not sure there really is an easy answer in those sorts of cases, but I am curious about how often similar cases have been dealt with by Federal Police.

Mr Connelly: I will start the answer and then I will move to my colleague, Commander Osborne, in relation to that. The whole issue of domestic violence is really relevant to this. We recognise that there have been some endeavours in this space and this legislation to acknowledge the difficulties in family violence. We understand there were 16 submissions made to the committee and one submission raised the issue of police procedures in domestic violence cases, which are largely state based issues, particularly the requirement for police to report the matters to family and child services that they attended a domestic violence situation. There is state legislation where children can be removed in certain circumstances, as you are aware. I understand that submission focused on section 68T, which provided the 21-day time limit. This bill, as I understand it, will enable state or territory courts making an interim family violence protection order to suspend or vary existing parenting orders until either a time specified by the court or another order is made. So I think that working with the state or territory courts in relation to suspension of orders is critical.

My background was in community policing as Deputy Chief Police Officer in the ACT, so I am well aware of the issues around family violence and court. It is about how we find the synchronicity between these orders and the state and territory orders in relation to the safety and welfare of children. Senator, you are quite right: it is a perplexing issue. With the current and absolutely necessary focus on family violence matters, it is one that needs to be examined closely by all people involved in the process—that being the courts, the police, the welfare agencies and the people involved in it themselves.

Senator JACINTA COLLINS: There are cases similar to the one that I mentioned, where a woman feels that her only option is to flee the country to protect a child. I am curious as to how often you would encounter that sort of example.

Mr Connelly: We have certainly had cases where it has been claimed—there are always two sides of the story—to be their only option. We can try to obtain those stats if that is helpful to the committee.

Senator JACINTA COLLINS: What I am curious about is whether any thought has been given to safeguards to those types of circumstances in relation to this extension of the jurisdiction.

Mr Connelly: I think we can go back to the core. If you accept that there are protections for the children and the woman involved under state law, perhaps they have not exercised their rights in relation to those protections. In bringing a child back in those circumstances and exercising this law, I think that the court would duly consider, if an offence was committed under the new law, whether there is the necessary mens rea as to the reasons why the offender did what they did, and that lies with the court. But ultimately we need to bring the matter back to the court so that the court can rightly make those decisions on the basis of the evidence. I believe in that case the evidence experienced by the state police in terms of the history of family violence, domestic violence service agencies and the evidence of the offender themselves in terms of their family violence circumstance would be taken into account by the court—and should be.

Senator JACINTA COLLINS: Would there be a timeliness requirement? For instance, a child returned to the country and put back into the care of the perpetrator: what is there to ensure that that circumstance does not prevail or indeed, ideally, does not occur?

Mr Connelly: The state agencies all have their DOCS areas in relation to the protection of children, and that is paramount in relation to ensuring that the child is not exposed to violence or a victim of violence themselves.

Senator JACINTA COLLINS: It is all back to those original resourcing issues.

Mr Connelly: Absolutely. And it is a circular argument, I know, but those facilities are there, and I would say, having experienced the changes in the treatment of family law, over my last 32 years of policing, that they are improving every day. And really the state and territory police forces are focusing on it greatly. In the ACT there are very particular laws in terms of family violence and pro-arrest processes in relation to family violence offenders. So, it is probably not the way it was when I first started as a young constable, but it still has a way to go.

CHAIR: I do not really have any questions for you at present, but does the Federal Police have special units to deal with children/domestic violence areas? Or is it just something that all police officers—I appreciate that they are all trained in it, but some would specialise in it; is that the case?

Mr Connelly: In relation to our community policing here in the ACT and in the external territories that we police we absolutely have a specialist team, both in what is an area specifically about child sex offences or violence effected against children. We also run nationally a child protection operations team, which is very much focused on online abuse of children or physical abuse of children, both within Australia and offshore, and there have been quite a number of notorious cases in relation to abuse of children. The team undertakes specific training, and we work in cooperation with the state and territory police in all but one state with a joint team arrangement called the jacket team. We have our detective working with each state and territory child protection team around child abuse. It is a close operational nexus, because in the current world we see online predatorial behaviour, so we have good grooming offences in relation to people who seek to groom children and commit acts of sexual assault and violence against children. Quite often they are one and the same. It is not discrete. We are talking about violence in its extreme, in our view.

We also work with our international partners, particularly in the region around travelling sex offenders and their behaviours. When we see physical contact offences against an Australian child we have a team specifically set up to try to identify the location of the child, using whatever technologies we can. We work very closely with every state police and territory police service in the town to try to take that victim away from that situation and prosecute the offender. So, the virtual or online criminal behaviour and the physical behaviour are brought together with these teams, and they are especially trained in that.

It may interest you that we also deal with another area where the law was recently changed—arranged marriages. We have children being subject to forced marriage arrangements, and we work specifically to prevent that activity and prosecute the activity. But, more importantly, we work to provide the child support, because quite often they will need time out from the family situation when we have intervened. We work to ensure that the child is looked after, and we work closely with state and territory DOCS type of workers to provide that. That is a very interesting level of crime that seems to be increasing, not decreasing, so referrals seem to be going up in that space. It is a bit of an unknown crime in Australia but a crime all the same.

CHAIR: Are your officers—I feel for them if this is the case, but I cannot see any other way—as a norm expected to have some understanding of the Family Law Act?

Mr Connelly: Absolutely. Right from the word go, Commonwealth acts are a critical element of federal policing activity, obviously the core ones being the Crimes Act and the Criminal Code. But we execute Family Court orders quite regularly. I think you have some statistics there, Paul. Would you like to provide those to the senator?

Cmdr Osborne: The AFP receives on average about 400 recovery orders each year from the Family Court of Australia. On average there are about 142 of the new Hague Convention applications which are recorded essentially with the Attorney-General's Department. Of those about 70, roughly half, relate to children being taken out of the country. It is important to note, though, that that is the number of applications, and obviously each application will have certain individual circumstances where it may be that there is more than one child involved in that actual case.

CHAIR: And does that often require your officers to travel overseas and physically extradite children?

Mr Connelly: That is where these new laws may well assist us. Quite often the case is that they are taken out of the country, the current situation, lawfully before an order is in place, and then an order is in place but it cannot be effected. I think this new law is a critical way of dealing with this. We have an extensive liaison network around the world, and we use them in the first instance to assist us in these cases.

CHAIR: That is other police forces, or child protection forces?

Mr Connelly: Yes, although we have police officers located in I think 32 countries, so we use them in the first instance just to try to keep our travel budget in a situation that is reasonable and is defendable in the Senate estimates process. But all in all these are costly exercises, and there have been controversial cases over the years. When we are involved it is costly and it is, as I said earlier, quite a diversion of resources, but a necessary one all the same.

CHAIR: So, amendments to this act do make it easier to facilitate that happening?

Mr Connelly: They do. But in saying that, as I said right at the very start, in non-convention countries, exercising an extraterritorial jurisdiction is always very hard, particularly if you have a person with dual nationality. If they go to a non-convention country they are a citizen of that country. David is probably better placed to speak to that than me, but that can form issues for us. And we have mutual assistance requests with police forces all around the world, and of course we have the INTERPOL network as well.

Cmdr Osborne: I might also add that we monitor all of our family law alerts on a 24/7 basis from our operations coordination centre here in Canberra, and we have had considerable success on occasion whereby an alert has been activated and a child has actually departed Australia and is in the airspace, and on a number of occasions, because of the responsiveness of that capability, we have been able to alert forward to the next point of landing of an aircraft and with an order in place been able to recover a child, take them into custody and then have them returned to the jurisdiction.

Mr Connelly: That is quite correct. In fact, because we have the presence of the airports we have had aircraft diverted and land in Perth. The child is offloaded and we have the police there. So, they have not actually made it. We have a little bit of a window of about nine hours when they are flying over Australia that helps us a little bit. But it is that timeliness; it is having access to the orders, as Paul says, and being able to do these things in real time. Once they are out of the country, whilst extraterritorial legislation is always good, it becomes more difficult.

Senator JACINTA COLLINS: And the irony of that I suppose is the concerns we have heard today about the data issues between the federal and state courts.

Mr Connelly: Yes.

Senator JACINTA COLLINS: So, we can do this internationally, but we cannot sort out our domestic situation.

Mr Connelly: The joys of our Federation, I am afraid.

CHAIR: Apart from the territories where you have a community policing role, do you ever get involved, for any reason, in domestic cases involving the Family Law Act? If so, for what reason?

Cmdr Osborne: Predominantly, that is handled by the state and territory police forces because of the jurisdictional issues. We do, obviously, assist in the execution of Family Court orders in the states and territories, primarily through our crime operations response portfolio, which is positioned around the country. We also have at our disposal a network of officers in all of the jurisdictions who are our family investigation liaison officers and are specifically trained to deal with families in response to crimes. We can call upon them as a resource in those circumstances as well.

Mr Connelly: One thing I would like to raise with the committee is the importance of this legislation. It is a two-way street. The committee will probably recall a very controversial case a few years ago where we were removing children to another country that was a party to the convention. That got a lot of press. Dealing with taking children away from one family member is at the extreme end of difficult. It is more difficult when it becomes a media circus. More importantly, these laws will not work if we do not honour our end of the bargain.

CHAIR: Yes.

Mr Adsett: There are provisions that prevent media from covering those issues which identify a child and the proceedings in the Family Court. In the case that I think Assistant Commissioner Connelly is referring to, there was a successful prosecution in relation to those media outlets referred to us by the Australian Federal Police. *The Courier Mail* was fined for four instances of breaching that provision in the Family Law Act and fined a maximum penalty in relation to those breaches.

CHAIR: Which provision was it, exactly?

Mr Adsett: I think it is section 120 of the Family Law Act.

CHAIR: But what did it relate to?

Mr Adsett: It prevents the media from identifying a child who is the subject of a Family Court proceeding.

CHAIR: We have nothing further. Thank you very much for your attendance today and for helping the committee. Thank you, in the case of the DPP, for your submission. Thank you, all of you, for your presence and explanation.

MANNING, Mr Greg, Acting Deputy Secretary, Attorney-General's Department

QUAYLE, Ms Bridget Leanne, Senior Legal Officer, Attorney-General's Department

STILL, Mr Stephen, Principal Legal Officer, Family Law Policy and Legislation Section, Attorney-General's Department

[12:38]

CHAIR: Welcome, Ms Quayle and gentlemen. We appreciate your coming along. I will not go through the rigmarole. You have all appeared at so many Senate committees that you could probably repeat the opening warnings in your sleep. If you do require any assistance at any time, just let the secretariat know. Do you want to make an opening statement? There is no submission from the department, which, I suspect, Senator Collins may make reference to.

Mr Manning: We do not have an opening statement.

CHAIR: I assume someone in your organisation has had a look at most of the submissions that have come in?

Mr Manning: Yes.

CHAIR: We had a hypothetical case submitted to us by the Women's Legal Service in Queensland, which Mr Doolan from the Law Council has taken away to give us a legal opinion on, even though it is a hypothetical case. It is a hypothetical example which is I suspect in the extreme, but no doubt it has happened. I wonder if it might be useful, on notice, to give you a copy of that statement. Could someone in your organisation relatively quickly—like, by next Tuesday or Thursday—say, 'That is not relevant,' 'This is relevant,' 'This is captured by XYZ,' or, 'That is a valid point but it is simply beyond the policy of the government'? Do you think you might be able to do that if we give you a copy of it?

Mr Manning: I do not think we will be able to provide legal advice in the same way as the Family Law Section might but we can certainly address how the regime and the safeguards in the regime may apply to that factual situation.

CHAIR: I am more interested in the department looking at this and saying, 'That is simply not correct. If you look at section X, that would not occur,' or, 'From the government's point of view that is unreasonable.' I do not want you to spend too much time on it.

Mr Manning: We are happy to consider it from that perspective.

CHAIR: Similarly, you would have had a look at the Law Council's submission. They made the point, which I was pleased to hear, that they had been consulted and they had been in long discussions with the department. I always think both the department and the process benefit if they are involved. They were basically happy with it, but they had three issues where they said the act did not go far enough and could have easily been addressed. Do you have their submission in front of you?

Mr Manning: Yes. Paragraphs 35.1 to 35.3.

CHAIR: Certainly what they were saying in paragraphs 35.2 and 35.3 seemed to make sense to me. We did cover the other one too. Specifically, are you able to comment now or on notice on those, which appear to me, having heard one side of the story, to be reasonably responsible comments?

Mr Manning: Yes, Mr Still can provide some answers now. If you want further information, we are happy to take the question on notice.

Mr Still: In relation to the question of the set aside test in 90K(1)(d), we consulted by an exposure draft on the financial agreement amendments between April and June last year and the draft that we consulted on at the time had the exceptional circumstances test apply irrespective of when the marriage breakdown happened. We received a range of submissions on that. Obviously the Family Law Section was supportive. Other submitters indicated that they thought that, particularly in relation to BFAs entered into before a relationship breakdown, that test was probably too strict and might cause hardship to children. So considering those submissions the view was come to that there was valid concern about the welfare of children because BFAs can be entered into at the very outset of a relationship—and that might be 20 years before the breakdown of the marriage or the de facto relationship and all sorts of things could happen, particularly many children could be born, for example, that were not contemplated by the agreement. Bearing that in mind, we thought that the compromise that is struck appropriately protects the interests of children in particular, but, once a relationship breakdown has happened, the parties have all the information available to them that they need to appropriately take into account all of the needs of children, and so that is why that provision has ended up in that form. In essence it is in response to submissions we received.

CHAIR: I do not want to in any way verbal him—anyway, I am not capable—but, as I understood it, part of the argument was that leaving it as material change meant that it would be interpreted so widely as to be perhaps no brake or no condition at all. Therefore, as I think I recall, that would perhaps discourage lawyers from getting involved in it, for fear of not being able to cover the range and then 20 years later being sued for wrongful advice.

Mr Still: I am not sure I can comment on that so much, except to say that it is the current test in the act and there is some case law on what it means. For example, I know that case law indicates that the material change of circumstances cannot be a change of circumstances that you contemplated when you went into the binding financial agreement, so those things definitely would not be relevant.

CHAIR: They also made the point that the exceptional circumstances test actually applies in section 79A of the Family Law Act and 136(2) of the Child Support Act, and there was some suggestion that it should at least be uniform.

Mr Still: I think the important thing to note about section 79A is that it relates to property orders that are made after a relationship has broken down. The application of the exceptional circumstances test after a relationship breakdown, in relation to financial agreements, is not inconsistent with the approach in section 79A. The property provisions in section 79 do not apply prior to a relationship breakdown.

CHAIR: Thank you for that. I will ask you to have a look at the *Hansard* record—which may not be out by Tuesday. I am not sure whether you were listening to Mr Doolan's evidence somewhere else?

Mr Manning: I was not personally, but some of our officers were. But we will probably still need to get the *Hansard*—

CHAIR: I am not sure when the *Hansard* will be out, of course.

Mr Manning: We are happy to take it on notice and address it, although, as Mr Still has pointed out, essentially the aim is to have a balance whereby the higher test is for those agreements where all of the relevant circumstances are known, whereas in those other ones it is thought more appropriate to have a slightly different test.

CHAIR: I am quite sure that some of the witnesses who have already appeared would err on your side, but I thought Mr Doolan's arguments were persuasive. It gets to very technical aspects of law, which I am certainly not capable of doing. Similarly, is it easier to make a comment on 35(3)?

Mr Still: I think so. In relation to that, the family law section did put the submission to us about the changes they suggested. And we decided not to do that because the language of referring to property of the parties at, or before, divorce is consistent with the substantive provisions of the act. For example, if you look at section 90B(2)(a) you will see very similar language about the property that is in the scope for financial agreements. Given that an objects provision clearly is meant to describe the substantive provisions, we thought it was appropriate that it be maintained consistently.

CHAIR: Again, my understanding may not be correct, but put simply I understood that point to be that, with a financial agreement, you could only exclude dealing with property until the time that the marriage broke down. But then, whilst that could be excluded in some circumstances, the prenuptial agreement was not able to be written to incorporate assets acquired post separation.

Mr Still: It is an interesting point. The act also provides, in addition to dealing with those species of property, that agreements can deal with other matters that are 'incidental or ancillary' to those mentioned in that provision—'and other matters'. I think it is probably technically possible.

Mr Manning: We will take it on notice and provide a few paragraphs in response to that.

CHAIR: Yes. Could you have a look at the arguments? Depending on which side you are on in a property or financial settlement after break-up, certain people would agree and certain people would disagree, as it suits their own circumstances. But I thought the arguments were reasonably sound, so if you would not mind having a look at it?

Mr Manning: Certainly.

CHAIR: Again, I do not want a 20-page opinion on it.

Mr Manning: No. We will just set out simply the compromise and the reasons for what is there, for the committee's benefit.

CHAIR: Okay.

Senator JACINTA COLLINS: Mr Manning, did you say that the binding financial arrangements provisions were part of an exposure draft that has previously been circulated?

Mr Manning: I did not. Mr Still might have.

Mr Still: I did, yes.

Senator JACINTA COLLINS: Mr Still did. When did that process occur?

Mr Still: I believe it was between 19 April last year and 1 June. I can give you the exact dates, if you want.

Senator JACINTA COLLINS: I am more interested in who was engaged in that process.

Mr Still: Sorry—just to correct that, it was 30 April and 19 June. It was a public consultation. So we put it out publicly and people who were interested provided us with submissions. We received seven submissions.

Senator JACINTA COLLINS: Could you tell me who they were from?

Mr Still: The ones I have are the Family Law Section of the Law Council of Australia, the Law Institute of Victoria, the Law Society of New South Wales and a number of people in their individual capacities—some family law practitioners and some family law academics.

Mr Manning: We could take it on notice and give you those details.

Senator JACINTA COLLINS: I am mostly asking because people are raising concerns around some of the perverse consequences that might occur, particularly for vulnerable women experiencing domestic violence. They do not seem to have been captured. Whether it is an issue with the consultation process itself, or whether those bodies are mindful of exposure drafts in this situation, I do not know. So I am curious as to whether the people who did submit captured that perspective or not.

Mr Manning: Certainly the fact that submissions were received from the Family Law Section of the Law Council of Australia, the Law Institute of Victoria and its equivalent body in New South Wales would indicate to me that it was getting to the practitioners, who are aware of it. But, as I said, we can give you the identities of the other submitters if that would assist. We will provide a full answer to your question.

Senator JACINTA COLLINS: Well, no. I suppose my concern in part in today's hearing is processes I have come to expect in other portfolios, and I think I have canvassed this with A-G's in the past. From the committee's point of view, we were asked at the very end of last session as a matter of—I don't think 'urgency' is quite the right word—

CHAIR: Preference.

Senator JACINTA COLLINS: preference to report back by 24 February. We have obviously had access to the second reading speech, the explanatory memorandum and the human rights statement, but the amount of detail in that was relatively limited. For instance, Mr Still's statement just now that there was an exposure draft of these provisions is new to the committee. That type of information is usually helpful for us as we digest concerns raised by other submitters, which is why it is my preference that the department provide us with more wholesome background to why the minister is seeking to proceed in this way. It is easier for us to be able to digest those things rather than to try to glean it from you at this stage.

The second preference to that if something is particularly urgent is that the department comes forward with an opening statement addressing the concerns that have been raised during the course of the hearing. And it seems as if you were not prepared to do that at our opening. We have limited time; we have got another 35 minutes for me to go through each matter and ask 'why?' or 'how?' or 'when?', but it is usually easier if the department is a bit more prepared, especially when we have a limited time frame.

Mr Manning: I note all those comments. I do not think it is a matter of not being prepared, but rather wanting to respond to the questions that the committee has and leaving maximum time for that. It was our intention, noting your comment that you thought we made the wrong decision in that case.

CHAIR: Can I offer a slightly divergent view, but not entirely. I appreciate that you all have very important things to do in your day jobs. But sometimes a comment on some of the submissions where—it would be helpful to us if there are instances where the submissions are clearly wrong, and in many instances your department is better resourced to understand everything than some of the very often volunteer submitters. Perhaps they do when they get home from work or something, so they may have missed a point. It is sometimes useful if you do not enter into the debate as such. That is perhaps more for us, but then if you can say, 'Sorry, I hear what they say, but if they look at section 23(4) that is just clearly wrong. It is not a—

Mr Manning: I note that, and if it assists the committee I will make sure that message is understood across the department, not just in this area.

CHAIR: Mind you, on your other point, that these hearings are very often for senators to ask questions, we do not want all of the time taken up—

Mr Manning: And that is what I was conscious of—not wanting to come along and be seen to be giving out information which the committee might think is irrelevant.

CHAIR: Because we have sort of mumbled about that with another department that comes before us, but not yours.

Senator JACINTA COLLINS: Now that you have mentioned the discussions which occurred with the Family Law Section of the Law Council of Australia—we had the law council earlier, but not specifically the Family Law Section of it—I may go back and have a look at their submissions on the exposure draft as well. But I am particularly concerned with the limited time we have at the moment to explore the concerns around perverse outcomes that might occur with some of these changes to the binding financial agreements. I am concerned that the provisions do not adequately cater for the power imbalance that may occur, particularly for women experiencing domestic violence. Indeed, the provisions around generating certainty may instead produce more activity in the family court, as people seem to avail themselves of new provisions or provisions that can work in perverse ways to create difficulties for women experiencing domestic violence. For instance, we had the Australian Women Against Violence Alliance, who we fund specifically to provide advice on this, say that they had not been consulted. We had the CDPP saying they were not sure they had been consulted on their suggestion that we amend the bill. Can you respond to those types of concerns about how we are proceeding?

Mr Manning: As Mr Still outlined earlier, it was a situation where the draft was made publicly available and input sought from whoever was interested, rather than going to people specifically. Although I am not sure whether we specifically went to some of those legal interest groups. In relation to the first organisation you mentioned, nothing specific was happening. In relation to the DPP, they are a portfolio agency, so we went to our criminal justice area, who handle consultation. We would have to take it on notice to get details of what consultation there was, but we are in much the same position as the DPP witnesses you had earlier. But there are usual consultation arrangements in place for consulting with them, which were followed in this case as well.

Senator JACINTA COLLINS: Okay. Now on the specific issues. There are concerns about how these provisions fail to accommodate circumstances where there may be a significantly unequal relationship between people party to a binding financial arrangement. There are concerns that we should look at specific setting aside provisions that would deal with issues around domestic violence. I am looking for a response from the department on those matters.

Mr Manning: Certainly there are a number of protections for vulnerable parties under the scheme generally. Clearly there has to be consent and there has to be independent legal advice for each party. There is already a framework for where financial agreements can be set aside, including in circumstances involving fraud, duress, unconscionable conduct or undue influence.

Mr Still: I think the other issues that the submitters raised, with full and frank disclosure, are also covered by another ground of setting aside, which is 90K(1)(a). It talks about the setting aside for nondisclosure of material, which I think covers that ground. As Mr Manning has mentioned, and I think Mr Doolan this morning as well, the provision about setting aside agreements which are voidable or unenforceable imports all of the contractual and equitable doctrine around setting aside agreements, which includes matters such as undue influence or duress. Indeed, I think there may even be some case law in which an FA was set aside on the basis of undue influence, which I can provide if it is helpful.

Senator JACINTA COLLINS: What would be more useful, I think—and the chair raised this—is the hypothetical case example we were given. It was an example which was described as one that would fail the existing provisions. I would be interested in whether that would be your view, or whether you believe that there are existing appropriate provisions that would capture those types of circumstances.

Mr Still: Yes, we will consider that.

Senator JACINTA COLLINS: I am not asking for legal advice per se, but that was the evidence before us. The concern here is that, with a bill that was argued to be dealing with family violence measures, it is weakening the provisions on provision of legal advice and it is making changes to the binding financial arrangements—which may provide legal practitioners with more certainty, but we want to ensure it is not diminishing the rights of vulnerable people who may experience domestic violence.

Mr Manning: It is not weakening the legal advice provisions, in the sense that independent legal advice must still be provided. It is designed to prevent an overly technical approach to enforcement of it. The concerns you are outlining here are quite valid, but there is another concern, which is that, by providing certainty through achieving the policy objectives of this framework, you allow people to remove themselves from those circumstances earlier. The point I am making is that an overly technical approach, which is the problem that has led to these changes,

keeps people in the courts and it keeps people in the family law system for longer, potentially, because there are cases about it. So an approach which more practically achieves the policy aims, whilst still having appropriate safeguards, might in fact assist some people by not allowing those types of cases to be run. I just really want to point that out, because there is no intention in this to somehow undermine the requirements for people to be properly advised and to be able to consent. It is more about trying to get away from the case law, which seemed to put up an overly technical approach that meant that these were not able to be used. The aims of the regime were not being met, because people were reluctant to use them for those reasons and so, in fact, could potentially be kept in that system and unable to resolve these things sooner. I do not want to make too big a point about that; I just think that is a relevant consideration here as well.

Senator JACINTA COLLINS: I think it was put earlier in our evidence in a way that better highlights that contrast, which is that, to alleviate the pressure on our court system, binding financial agreements may not be such a bad thing; however, if they do not have adequate safeguards then the people who bear the burden are the people in a low bargaining position that end up making bad deals.

Mr Manning: Of course, I do not think the government, from a policy position, would disagree with any of it. There is no alleviation of safeguards here just to help out with resourcing issues in the courts; it is not what is being addressed here.

Senator JACINTA COLLINS: Would you provide us with some background on the issues raised around 68P?

Mr Still: The 68P amendment is intended to allow the court not to explain certain matters relating to family violence to children where the court considers either that the child is too young to understand what is being explained to them—an infant, for example; at the moment, they are required to do that even if there is no point to it—or that to do so is not in the child's best interests. I was not present for—

Senator JACINTA COLLINS: Firstly, I am curious as to where the amendment has come from. What is the background?

Mr Still: That is an amendment that was sought by the court.

Senator JACINTA COLLINS: It was sought by the Family Court?

Mr Still: The Family Court, yes.

Senator JACINTA COLLINS: Within what process? When were they asked to suggest this as an amendment?

Mr Manning: The Family Court periodically put forward, if you like, minor amendments that they believe should be made to improve the operation of the act. My recollection was that it was one of those, rather than its coming out of any other formal process.

Senator JACINTA COLLINS: Summary decrees are another example where it has been suggested to us that there may be a perverse outcome and that these provisions could allow a perpetrator of domestic violence, let us say, to use this as another means of making life difficult for a victim.

Mr Still: In a sense, the summary dismissal provisions clarify and make substantially clearer existing powers of the court. I think the first point to make is that those amendments bring together a number of existing powers that are in the act and in the rules and reformulate them in a more modern way that is more consistent with the powers of the other courts and is easier to use. I think the second—

Mr Manning: Could I just interrupt Mr Still's evidence there to just build on that point? Because the Federal Circuit Court of course has jurisdiction in family law and also in other general federal law, it is aware of where there are provisions in other acts operating in other jurisdictions which might be consistent but slightly different. So my understanding is that the request for this amendment came from that court in relation to that and was agreed to by the Family Court as well. I just wanted to provide that background before you go on.

Mr Still: The other point to make is that at present there are a large number of litigants in person in the family law courts generally, and no concern has been raised with us about whether those summary dismissal powers that already exist are being used inappropriately, and I do think that the courts are likely to take summary dismissal very, very seriously because of its access-to-justice implications.

Senator JACINTA COLLINS: Mr Still, this takes me back to my concern at the outset about consultation. It is one thing to consult with the courts and the Law Council and practitioners. But it seems as if there have been people operating on the front line around how these provisions impact on victims of domestic violence that are not part of this equation—or at least that is what the evidence before us this morning indicated to me. Before we finalise our report, it might be more appropriate to allow you time to reflect on the evidence that is in their

submissions and that was before us today and to provide us with a response. I could go to each instance, such as other examples in the areas of spousal maintenance—enabling spousal maintenance to be nil—and the question of whether these provisions have been contemplated in terms of CEDAW. I do not know, and I am interested in your response here, whether a little bit more time for the department would be useful. Given the evidence, I think it is appropriate that the committee have a more comprehensive response on those matters.

Mr Manning: I do not think the department needs any more time to respond to any questions on notice.

Senator JACINTA COLLINS: No, I am not talking about more time there. I am saying: would it be more useful to you to respond to those various issues one by one now, in a prattle of questions over the next 20 minutes, or would it be more fruitful to be able to review the evidence we had this morning and to do so on notice by somewhere between Tuesday and Thursday?

Mr Manning: In terms of the best use of time, if we could deal with any issues now, that would be good, and then we will just respond to those ones which are still outstanding in the committee's mind.

Senator JACINTA COLLINS: Okay. Then the issue about nil maintenance.

Mr Still: What is the concern in relation to that, exactly?

CHAIR: You get into a policy issue here, and perhaps a philosophical discussion. I have the view that you cannot really protect people from themselves and you cannot legislate people's behaviour, their understanding or their ability to make agreements when there are no other pressures around. It is slightly different if it is in a relationship and there is violence and intimidation, but in prenuptial things—and that is, I think, what you are talking about, Senator Collins—

Senator JACINTA COLLINS: Yes.

CHAIR: So we do not want the department to get involved in that. Leave that to the politicians on the philosophical issue. I think, with respect, some of the questions Senator Collins is asking might come into that—not that I am arguing with her.

Senator JACINTA COLLINS: No, because what I am asking about is changes to the existing framework.

CHAIR: Yes—what the department might be able to say. Anyhow, having sought clarification, I will leave it to Senator Collins to give the clarification.

Senator JACINTA COLLINS: All right. I will start with this one: the spousal maintenance provisions, where they are included in BFAs, will be amended under the bill to include that spousal maintenance will cease on the death of a payer, notwithstanding that the BFA continues to operate unless the agreement provides otherwise. Spousal maintenance will cease in the event of a payee marrying or entering into a de facto relationship with someone other than the payer unless the agreement provides otherwise. Overpayments of spousal maintenance after the death of a payer or a new relationship starting will be recovered under the act. There are concerns that those new provisions will create difficulties, particularly for victims of domestic violence or more vulnerable people, where you will end up in the fraught area of when precisely a de facto relationship is entered into or whether repayments will be pursued. I just do not have a sense before us at this stage that these are issues that have been canvassed with anyone other than the courts and the Law Council.

Mr Still: In relation to when a de facto relationship is entered into, de facto relationships are defined in the act but, by their very nature, there may not be a single event that causes a de facto relationship to crystallise. It is a question of fact on the factors set out in the act as to whether you are in one or not, and there is a list of them, such as cohabitation, shared finances, the existence of a sexual relationship and so on. You assess the totality of those factors to determine whether there is a de facto relationship. In the event of a dispute, I would assume that that would have to be litigated if it could not be agreed.

Senator JACINTA COLLINS: Which is the point: that there may well be more litigation about these issues as we change the existing benchmarks for a reason not yet understood. Were these provisions part of the consultation that occurred in the exposure draft?

Mr Still: I believe so, but I might need to confirm that on notice.

Senator JACINTA COLLINS: Okay. As I said, the exposure draft process is completely new to me. I would like to go and look at it and see what was put there and who was consulted in that process. But it appears at this stage that the oversight has been that those dealing at the coalface with women—or people—who are victims of domestic violence do not seem to have had a voice in that process.

Mr Manning: As I said earlier, anyone could have had a voice in it, and what we do not know is who considered it and decided not to put in a submission.

Senator JACINTA COLLINS: Well, at the moment I do not know who made submissions, because I did not know it existed.

Mr Manning: Yes. We have outlined some, and we have to clarify and outline the nature of the others, and we have to clarify the details.

Senator JACINTA COLLINS: Yes.

Mr Manning: But I do not think it is strictly correct to say that they were not consulted or did not have an opportunity to comment, because everyone did. No limitations were put on it.

Senator JACINTA COLLINS: I am not arguing that point. It may depend on how well the process was advertised, but—

Mr Manning: Yes. Likewise, the fact that one organisation was not aware of it does not mean that no-one at the coalface was aware of it, I suppose is the point I am making.

Senator JACINTA COLLINS: No, I understand that. Seven submissions.

Mr Still: In relation to 'nil value', I think that came out of the submissions on the exposure draft. The concern, as I recall it, was that it has always been assumed that you could make that provision in the BFA but it has not been wholly clear on the face of legislation. That provision is intended to clarify that to avoid instances where what people actually agree is overturned. It is probably consistent with the long held principal in family law property disputes of promoting a clean break wherever possible, that if parties agree that their financial relations should cease in some form—if that is what they want to do—then that can be facilitated.

Senator JACINTA COLLINS: I do not know whether you are aware of the discussion we had first up this morning about course resourcing.

Mr Manning: I am not aware of that discussion, but I am very aware of the issue, because I am also responsible for the courts branch within Attorney-General's Department.

Senator JACINTA COLLINS: In terms of the 21-day limitation, we have had some fairly strong evidence of the advantages of that being removed. But by the same token we had the Adelaide court describe it as a choke, which prevents federal matters landing in the state jurisdiction and the significant resourcing concerns that may arise. Has this issue being canvassed with the state courts?

Mr Still: This is an amendment that came out from the Family Law Council's interim report into families with complex needs. The Family Law Council itself consulted with a wide range of bodies, including state courts. In developing the amendment, we consulted with state and territory justice departments, and they then consulted with their courts, I understand. Obviously, they were doing that. I believe that certainly some states, when we consulted them, consulted with their courts and provided feedback.

Senator JACINTA COLLINS: Justice Strickland suggested we ask you to elaborate on the various pilot projects that are occurring to improve information sharing between state courts and the family law court and the Federal Circuit Court.

Mr Still: Information sharing is something that has been a matter of great interest to the government for some time. The department has undertaken quite a significant body of work. I think that one thing that was mentioned this morning was the two reports the department commissioned from Professor Richard Chisholm, into information sharing. I have brought copies with me, if you are interested to see them. We can table them.

Senator JACINTA COLLINS: Sure.

Mr Still: In addition to that, we have done a variety of things. We have undertaken four annual national child protection and family law collaboration meetings with various stakeholders, including Family Law Court officials, child protection officials and officers of various legal aid commissions. Those have frequently canvassed practical mechanisms for sharing information better between the courts. As I mentioned, there are the two reports undertaken by Professor Chisholm. We have taken some action, based on those reports. In particular, we have amended section 121 of the act, which is the prohibition of publication provision, to make it as clear as possible that the federal family law system can share information.

Senator JACINTA COLLINS: When did that amendment occur?

Mr Still: It was in the Civil Law and Justice Legislation Amendment Act 2015.

Mr Manning: It was given assent in August last year, from memory.

Mr Still: Yes. We have now implemented regulations to give effect to the amendment. We have also established a website as an information-sharing platform for stakeholders in the child protection and family law systems. There has been a pilot project in South Australia, which commenced in February 2011, involving

stakeholders from Family Court of Australia, the Federal Magistrates Court, as it was then, the youth court of South Australia and representatives from the Family Court Australia HD, with the South Australian Attorney-General's Department others. It is a long list. A key focus of that pilot project was information-sharing. There has also been a project looking at the outposting of child protection workers from the Victorian Department of Human Services in the Melbourne and Dandenong family law court registries. An evaluation of that was undertaken by the Australian Institute of Family Studies, which found that that outposting role was very valuable in improving information sharing between family law and child protection systems and ensuring that the child is in the appropriate court, given the family circumstances. They made a number of recommendations which are currently being considered.

In addition to that, the Federal Circuit Court of Australia has implemented a new notice of risk process, which is directed at getting information about child protection considerations into the family law matters that they hear. In addition to all of that, the Family Law Council reference, which has been mentioned a number of times, has in its terms of reference that it 'should examine opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.' So there is quite a lot going on.

Senator JACINTA COLLINS: I think the main concern in my mind—there are still some that were raised with us this morning that I will need to look more closely at—relates to whether we should not only be looking at modernising the binding financial agreements element in this bill but also be looking at modernising the safeguards in relation to setting aside in circumstances relevant to vulnerable people, particularly those that might experience domestic violence. This was the challenge that we gave to the law council. It was raised with us that given some of the broad definitions of domestic violence there may be some significant challenges about how you might do that. By the same token, I remain concerned that the current setting-aside provisions relating to things as generally as consent and fraud may not be that accessible or that relevant. When you respond on notice to what we have discussed earlier, if you could keep those issues in mind as well, also given that the law council is going to come back to us on that issue too. Can give me a quick link to the exposure draft consultation process?

CHAIR: The secretariat has found it. It is a good website, but down at the place where it has 'Submissions' it says, 'No submissions are available for this consultation'. I am not sure whether it is appropriate to ask that you put all the submissions are up there—that is for judgement—but even a list of them if there are no privacy issues.

Mr Manning: That is right. We will check it out. Does it assist you to receive the submissions?

Senator JACINTA COLLINS: Yes.

CHAIR: Does it?

Senator JACINTA COLLINS: Yes. The only issue is that if there is a reason why they were not made available on the site there may well be privacy issues as to why.

Mr Manning: That is right. Let us take that on notice and check that.

CHAIR: I suggest that is more of an administrative oversight.

Senator JACINTA COLLINS: If there is any reason that there are administrative or privacy reasons as to why they should not be available publicly, we could at your request receive them in camera, but it would be useful to be able to look at those submissions.

CHAIR: They are not filed away in the deep, dark dungeons by this? Would you still have them?

Mr Manning: Yes.

Senator JACINTA COLLINS: It was only last year. The same year that we received the reference, Chair!

CHAIR: The consultation was June 2015.

Mr Manning: April to June.

CHAIR: Thank you, very much. It is obviously intended to be a step in the right direct. We appreciate your assistance to the committee now and over the next few days in trying to understand it a bit better.

Mr Manning: Just to confirm that we have copies of the report Mr Still referred to in his evidence to provide to the committee.

Senator JACINTA COLLINS: Is it one report or two?

Mr Manning: There are two reports.

CHAIR: We will table that report. There have been some other things tabled, which the committee resolves we will accept. Bear in mind that we are not accepting the photograph that was referred to before. That concludes

today's proceedings. I have mentioned the date for the return for questions on notice. Thank you, very much. Thanks again to Hansard, Broadcasting and, as always, our ever hardworking secretariat.

Committee adjourned at 13:25