STANDING COMMITTEE ON LEGISLATION

PARENTAL SUPPORT AND RESPONSIBILITY BILL 2005

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 8 MARCH 2006

SESSION FOUR

Members
Hon Graham Giffard (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Ken Baston
Hon Peter Collier
Hon Sally Talbot

Hearing commenced at 1.03 pm

BRAJCICH, MS TONIA
Manager, Law and Advocacy Unit, Aboriginal Legal Service of Western Australia, examined:

ALLEN, MS LORRAINE
Manager, Family Law Unit, Aboriginal Legal Service of Western Australia, examined:

CHAIR: On behalf of the committee, I welcome you to the meeting. Thank you for attending to assist the committee with its inquiries. I will quickly address a few formalities before our discussions commence. You will have signed a document titled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

CHAIR: Today's discussions are public and are being recorded. A copy of the transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask the committee to consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue. Do you have an opening statement that you would like to make to the committee?

Ms Brajcich: Yes, we do. Thank you for inviting us to come and give evidence before the committee. I will give a run-down about how we have gotten to where we are. The Aboriginal Legal Service is a community-based organisation that has been around for about 30 years. It operates through 18 offices across the state, and it comprises criminal law, civil law and family law. The executive committee comprises 16 people, who are elected by the people in the regions, including the east and west Kimberley and the Pilbara, Murchison, Gascoyne and southern and eastern regions. Our involvement with the bill began with a discussion paper about which we made a submission in February 2004. We also made submissions regarding the bill itself in January.

The ALS agrees with the government's position insofar as it is a priority that children be raised well. It is a priority also those children should not truant, commit crime or engage in antisocial behaviour. Most families want that but some families need help to achieve it. The ALS disagrees with the government that this bill is an appropriate mechanism to achieve that so far as Aboriginal and Torres Strait Islander people living in Western Australia are concerned. Much of what we will say will apply equally to other families. Obviously the ALS is looking at the proposed legislation only from the indigenous perspective. The background upon which we are relying is that previously the government's involvement with family life was well-intentioned. However, the outcome of those good intentions was the stolen generations, the effects of which continue to be felt today. The results of those intentions render Aboriginal and TI families less likely to comply with the proposed bill. That is one of our concerns and it is why we do not think the legislation would work. We consider also that it would be a bitter irony if children who were parented under those previous arrangements and who carried out what they had learnt on their own families were then penalised under fresh legislation.

We consider that the way of dealing with the problem needs to be much more constructive than the provisions contained in the bill. Research, evaluation and a social impact statement is needed before the bill is implemented. The type of scheme proposed in this legislation has been tried previously in England and also in Orange in New South Wales, with no conspicuous success. Certainly it did not apply to Aboriginal or TI people in England and I understand that it was unsuccessful in Orange. In contrast, we present Aboriginal sentencing courts as an alternative approach. That is a better model and it has been piloted successfully in a number of jurisdictions in Australia. The executive committee of the Aboriginal Legal Service, which has been elected by the people to speak on their behalf on law and justice issues, tells us that it would work in Western Australia. This is where we are coming from.

The key to Aboriginal sentencing and courts is consultation with local communities; that is, the Koori court model, which is based on consultation with the communities. We have seen how the Nunga courts operate, and we can answer some questions about that. I have personally seen the operation of the Koori courts, and can provide the committee with some detail about that. I have not personally seen the operation of the Nunga courts, but the ALS has, and I have some information on that. The ALS believes that that process could be successfully adapted in an education context; for example, the school panels process. Social factors impact on people's ability to raise children well. More services are needed that are tailored to the needs of people and that exist where the people reside. The benefit of our approach is that it is successful and avoids the disadvantage of people not being compliant. Also, it does not tell people what to do. Further, it has been researched and piloted and evaluated specifically for Aboriginal and TI people. It works on the existing strengths of families and communities. If an Aboriginal sentencing court process were used for adults and children, it would provide a positive role model for children who are under 10 years of age and who are therefore not legally responsible. The importance of role models has been recognised through family law, which Lorraine will talk about, and also through the work done by Professor Fiona Stanley and the Telethon Institute for Child Health Research. One of the factors she points to for creating a resilient child is having a positive role model. That is an aspect of the pathways for resilience. This is a much better way of tackling the problem that we agree is an issue. We are very strongly against the bill as a mechanism and consider that the alternative we have suggested is a much better way of dealing with the problem. We know that Mr McGinty is behind the concept of Aboriginal sentencing courts, and we support him in that.

Ms Allen: The family law unit of the Aboriginal Legal Service, which has been in operation for a long time, sees a great deal of the community on a family law level. That involves also a large criminal context. Another arm of that is the care and protection aspect of family law. The ALS is in a position to provide a well-rounded background to how Aboriginal families operate in Western Australia. The ALS has a great deal of contact with extended families all over the state. We can provide a lot of anecdotal evidence to the committee today. Committee members will appreciate that that evidence is not catalogued in either an expert report or reports by a commissioner or inquiry; it is evidence which the ALS has gathered on the ground and which consists of oral evidence and evidence that has been taken to court. It must be measured against that background and it is against that background also that we find that the bill will be inoperable because there will be a great deal of non-compliance of the proposed legislation by Aboriginal families. The measures that have been proposed cannot support the fabric of the family remaining together. It is my view that it will lead to a greater apportionment of blame and that families will try to move children among various families so that the families are not penalised for the actions of their children. That is it in a nutshell.

CHAIR: When you propose establishing Aboriginal sentencing courts as a desirable alternative model, are you proposing to import into that model the element of compulsion that exists within the parental responsibility orders?

Ms Brajcich: No. We propose that it be applied in consultation with the community. If the community said it should be made compulsory, that is what should happen. In the Koori courts, and I think also in the majority of the courts in the other jurisdictions that do this, it is not compulsory. The person must have been convicted and have consented to the jurisdiction. Some people choose not to go through the Koori court model, and we asked why. They told us that, firstly, they think it is too hard to have to face and explain their actions to people whom they know and who will severely reproach them about it. Secondly, people do not use the Koori court model if they do not identify with their Aboriginal background; they do not feel that is the appropriate system for them. Of the people who do choose to use it - a majority do - it has been wildly successful. We were told that of the previous 160 cases before the Shepparton court, only 12 offenders reoffended, which is a startling reoffending rate.

CHAIR: What was the time frame for that?

Ms Brajcich: It is between one and two years.

CHAIR: What was the recidivism rate prior to that?

Ms Brajcich: I understand it was similar to ours, which is currently 80 per cent. The situation in Shepparton was not dissimilar to ours.

[1.15 pm]

CHAIR: The element of compulsion that I was referring to is the ultimate compulsion, not whether people voluntarily agree to participate through the Aboriginal sentencing court process. The bill as it stands has an element of ultimate compulsion and sanction. If we were to adopt an Aboriginal sentencing court model, would you retain at the very end this ultimate sanction?

Ms Brajcich: Yes. The Aboriginal sentencing courts are a mainstream criminal law model that have the normal criminal law sanctions. It is not a traditional law thing; it is a mainstream system. Those sanctions apply in the normal way. The magistrate - or in the case of the circle courts in New South Wales, the magistrate plus the elders - decide on the sentence. The normal mainstream sanctions are provided. When we are talking about Aboriginal sentencing courts we are talking in that ordinary criminal law context.

CHAIR: I know that in your earlier submissions - there might be some reference in the January one - you referred to the impact of the New South Wales parenting responsibility laws. Is there anything you want to expand on about what happened with Aboriginal families in Orange and Dubbo under the model?

Ms Brajcich: My understanding is that this was the 2004 research. We contacted them to do the submissions about the discussion paper, so it is just about a couple of years ago now. At the time I rang our equivalent over there and I also spoke to legal aid. I think legal aid was doing most the cases, as opposed to our counterpart. I cannot recall who it was I spoke to. I think it was the principal solicitor. Their experience was that essentially their system was more of a curfew system, as I recall, and the difficulty was that there was a lack of services to back it up. There was the idea of removing children and taking them home, but home was not always an appropriate place for them to be. I think I may have spoken to the police as well, or possibly the solicitor conveyed to police's view to me. There was a difficulty knowing what to do with the kids if they were to be removed from one place with nowhere appropriate to put them. That was the difficulty they were having. The view that was expressed to me very clearly was that it just was not working; it was not a good system. Some people were not using it or were avoiding it by not using it. Some were not exercising their discretion to use it and those who were using it were having difficulty with it.

CHAIR: The issues you identified in your submissions seem to revolve primarily around the question of Aboriginal families and Aboriginal culture and the gap that exists between that and the principles behind the bill. You said earlier that you are coming from the perspective of Aboriginal families. Is there anything in the bill that you would see of any merit that relates to either non-

indigenous families or to indigenous families, not because they are indigenous, but because the concept has merit in itself? Do you understand what I mean?

Ms Brajcich: I think so.

CHAIR: Are your objections essentially that it might be a good model but that it does not apply to indigenous families?

Ms Brajcich: No. Essentially we say it is a bad model.

Ms Allen: There must be a clear understanding that what you are proposing is yet another interference in how a family functions. If you look at the criminal jurisdiction, young offenders may be granted penalties under criminal sanctions and you have to look at the level of compliance. When they are being sanctioned with community-based orders, intensive supervision orders and the like, they are not necessarily compliant. My experience coming from the court is numerous breaches of those orders. Getting young kids to comply with them is becoming very difficult. My experience has also been when kids are offending, especially during school holidays - I am speaking only from an indigenous point of view. During school holidays some of their mates are in detention centres and they say that they do not want a community-based order or an intensive supervision order. Rather, they ask to be put inside because their friends are inside. It is almost like a boarding school or a holiday camp for them. The issue of sanctions is: how seriously are they taking them? I have to say not very.

Ms Brajcich: There are other issues that would apply equally to Aboriginal and non-Aboriginal people in that this is another layer because it does not replace criminal law proceedings, restraining order proceedings, family law proceedings, care and protection proceedings or any other proceedings that the family might be involved with. I appreciate that there is a no-order principle behind this, but to get to a no-order you still have to go through the process. This is another experience for the family to go through that will cause problems for the family and, therefore, to the children. It is yet another layer. We think that there is a better way of dealing with this.

Ms Allen: As mentioned in the submissions, the other issue that comes up for us is: who has legal responsibility for the children? Under the Family Law Act and the Family Court Act, when children are born both parents are given joint parental responsibility. That is a legislative requirement for all families. However, in reality there is a joint sharing arrangement. It is not unusual for Aboriginal children to live with extended relatives, all of whom would have no legal responsibility. A good example is a matter that I have been dealing with at the moment. My client is not related to the child. The child was given to her in a traditional way because she was unable to have children. She has no legal responsibility under the law for that child, yet under the government's model she could not be called to account even though she is the person with prime responsibility for that child.

Ms Brajcich: In some ways if it does not apply to people, we would applaud that. The difficulty is that where the bill would apply to the parents, all these third parties who have cultural responsibility for the child are silent and are invisible in the proceedings. They have interests, yet they are not heard. That is another difficulty.

CHAIR: What does responsible parenting mean? How would you redefine that?

Ms Allen: There are several definitions. The concern for us is that the Family Law Act and the Family Court Act refer to long-term parental responsibility and then we narrow that down to a residence order, which is the day-to-day welfare and care of the child. For example, as a parent you would have your children in your care. You would be responsible for educating, feeding and clothing them. Ultimately you would have some level of control over their behaviour. You would have you own home sanctions. That is a broad definition of parental responsibility. In the Family Court, that ends at 18. If you go to the bill, that responsibility ends when the child is 15. We can take it even further to the commonwealth legislation - particularly Centrelink benefits - under which

the responsibility applies until a child is 20. If a child wants to live independently - outside the home - and he or she is under the age of 20, that child must have authority from the parent to claim any other benefits. There are so many different definitions of age. Against that background you come back to the reality of a very indignant 12-year-old. How are you going to manage a very indignant 12-year-old who has already committed criminal actions and who says that he or she is going? How does a parent or a responsible person control a 12-year-old? You have to look at it against that background. You might find that unless you are going to get the police to bring the child home, home is not necessarily where the child will stay.

Ms Brajcich: Our definition of responsible parenting, in essence, would not differ from any definition of responsible parenting in that a child is raised to be a happy, healthy, resilient and functioning member of the society. In the different Aboriginal cultures we would be talking about that particular society. We are not arguing that children should be able to behave in an antisocial manner or commit crimes or be truant from school. What we are saying is that they need to not be doing those things and to be brought up in a way so that they are not doing those things. However, this bill is not the way to achieve that result.

CHAIR: Do you think parental competence is a factor in the truanting, offending and antisocial behaviour of young people?

Ms Allen: How do you define parental competence?

CHAIR: Do you have a view of parental competence?

Ms Allen: I cannot answer that. What is a standard in one family may not be a standard in another. The situation in my home may not be the situation in someone else's home. I do not think a competent parent can be defined.

Ms Brajcich: But assuming it can be identified then, yes, it does have a role. It is one of the factors that Professor Fiona Stanley picks up. Positive role modelling and the positive raising of children leads to the sorts of behaviours that we want in our children. The reverse of that results in behaviours that we do not want. As Lorraine said, there are issues with standards for people of different cultures and so on. Certainly when we are talking about competent parenting according to the particular society or community definition, it has to. Research bears that out.

Ms Allen: In a wider context, children who come before the criminal justice system are not all from unhappy families. Some of them come from very happy families and they choose a particular way of life. We cannot necessarily say that broken or unhappy homes breed criminals. That is something we will be looking at.

Ms Brajcich: We would have various examples among our files of kids who basically run amok with their friends. There are peer pressure issues and role modelling issues. They come from good homes.

Hon PETER COLLIER: They come from what you would regard as stable and positive homes.

Ms Brajcich: Some kids do and some kids do not.

Hon PETER COLLIER: What about the group that you were referring to? I am saying that you are not equating a stable and positive home environment necessarily with someone who goes on to lead a stable and positive life.

Ms Brajcich: That is right.

Ms Allen: I will give you a good example. A large group of Aboriginals live in Northam. They have lived there all their lives. They have never lived anywhere else. Their children have been born in Northam. The little ones aged six and onwards wander around Northam as they wish, with their mates, friends and cousins. Perhaps we would not allow our six-year-olds to run around, but these children are born and bred there. They know the area, they know how it works. However,

they are picked up and given move-on orders if they are out at a certain time. They are subject to curfews. There are signs up around the place telling them that they should be at school. Northam is their country and they know it. They feel no fear in moving around the town, yet we might frown on that and say that that is poor parenting. Is it?

CHAIR: I will move on to the question of the fines that are contained in the bill. There have been suggestions from other stakeholders that there will be retribution in families who are the subject of fines, including Aboriginal families. Do you have a view on the likelihood of children being punished if their parents are subjected to court processes as a result of their behaviour?

Ms Brajcich: Our CEO, Dennis Eggington, has referred to exactly that occurring. That is something he has raised in various contexts at various times. The answer is yes.

Ms Allen: Again, if you go back to the criminal law side, if you look at the amount of outstanding fines, especially among indigenous people, you will find that they are quite substantial. It is not unusual for them to come before a court and have fines in excess of $10 000. If a parent is going to have an additional burden because of a child who is out of control, the easiest thing to do is to give that child to someone else or to move him along because he is causing too much trouble and cannot be managed.

[1.29 pm]

Ms Brajcich: By and large the families are poor, and so it is a major stress to have a fine of this size imposed on them. That is where the issue comes from; it is a lot of money for a lot of people.

CHAIR: You also note in your submission that you think that an application for an interim parenting order is insufficient natural justice for a parent. Can you explain what you mean by that?

Ms Brajcich: What we are talking about is the provision that parents receive only notice of the application, not that they receive sufficient time to prepare a response to it. It is all very well to find out about it and turn up, but if you do not have time to respond and defend or oppose the application successfully or deal with it, essentially it is an ex parte hearing; you may as well not be there for all that you can do about it. So what we are saying - this is more a tweaking argument than a principal argument - is that this is more along the lines of people needing not only notice but also time to participate in the proceedings appropriately so that justice occurs, rather than essentially one side being heard and the court going only on that.

Ms Allen: Another issue, of course, is whether the person receiving the notification is properly informed in the first place. If you have a child who says, "See, I am going to school today", do we as parents need to take them to their classroom to know they are at school; or can we trust our children to go to school and if our children breach that trust and do not go to school, are we still responsible for that and do we still need to be penalised if we cannot literally take the horse to water?

Ms Brajcich: Another issue with the proceedings is that there are issues in a mainstream court system, which is what the bill contemplates. You are talking about putting Aboriginal people into that system, so you have issues, for example, with them understanding the proceedings and with them being represented. ALS is a legal aid service. Legal aid is the main source of legal help for Aboriginal and TI people. That involves an application process and it involves a shortage of resources, so we may not be able to assist quickly. The person may end up essentially being unrepresented in those hearings, so there are issues involved in relation to the whole procedure of how these people are to do it. There has been no proposal that I am aware of that will give the legal aid services more money to help them help people that go through this procedure; whereas the applicant will generally - certainly in the case of DCD - have the benefit of in-house lawyers. The applicant is fairly high up enough in DCD to say, "I require your services, lawyer, to assist in this application," whereas the respondent is not in the same position. So the process has some issues. They are partly time, money and resource issues and partly because of the procedure being in a

mainstream system for people who speak Aboriginal English or possibly another language other than English.

Hon GIZ WATSON: I do not know whether it was in a submission or in a hearing, but another witness raised the issue of access to legal representation. You have just spoken about it, but what is the likelihood of people who are subject to these kinds of parental responsibility orders actually getting legal representation? As I understand it, the system is already stretched to the limit. I do not know whether you can give me any indication of how many applications already cannot be filled, as it were.

Ms Brajcich: We are funded by the commonwealth government until June 2008. That is basically all the money we are going to get, and it is based on the sort of work that we were doing at the time. So if this bill were to come into operation, it is obviously not something we factored in when the budgets were being negotiated. If we were going to do this sort of work at all - we would need to check our contract and those sorts of things to make sure it is within our terms - we would need to take it from somewhere else. I think the commonwealth Attorney General said that we already run at about a quarter of the cost of legal aid in Western Australia. There is not a lot of fat to trim. It would probably come to the family law unit. Lorraine can talk about the number of staff we have in family law and their ability.

Ms Allen: As I said earlier, we deal with a fairly wide range of issues. We deal with applications to the Family Court of Western Australia and the Family Court of Australia; we deal with care and protection orders when children have been removed from the home of their parents or relatives because there is an issue of risk; and we deal with generally family matters, which can be almost indefinable. The difficulty we have is that at the moment we have two full-time solicitors, but we are looking at that being three. We have an articled clerk who provides assistance and we have the support of court officers who can provide some assistance to us as and when required. It is not unusual for clients to be before the courts and be unrepresented and for the court to make an order that it is going to adjourn the proceedings for an hour or an hour and a half and the court makes an order that a representative of the Aboriginal Legal Service attend. So the court makes those sorts of orders without any consultation with us. As to whether or not we are available is an entirely different matter. So, quite often we then get clients on the doorstep in an absolute panic saying, "I've got a trial that is in the Family Court or in the Children's Court and I need a lawyer straight away, and the court has said you must come down." Often the court even rings the service and says, "You need to have someone down here within half an hour", and it leaves us in a very difficult position. We have to either disobey the court order or leave what we are doing, if we can, to go down. So in this example the likelihood is that some of our clients would get to that notification stage where they are in court, they suddenly realise they need representation, and they just panic.

Ms Brajcich: I will mention two things also. The family law unit services the whole state. Our person in the Broome office happens to be a former family law lawyer who is now doing more crim, so she does some family law; but, in essence, the other officers are crim-orientated. So these two lawyers service all of WA. It would be three lawyers if we were able to fill the third position. Family law, by its nature, as you may already know, tends to be fairly work intensive. Their time is spent doing a lot of affidavit work, writing up documents, spending time in court and so on, so it takes time. You cannot carry the file load in that unit that you can carry in other areas, so there are fewer clients in the unit. This sort of thing, I think, would be quite difficult to do - Lorraine can say. I think the answer is that we would find it very hard to accommodate that sort of increase. We would have to drop something, and there is nothing really that screams out to be dropped, so someone would miss out somewhere.

CHAIR: Can you explain to the committee the concern that you have with parents attending residential counselling courses?

Ms Brajcich: The concern that we have about that is that, under the drafting, the children's interests, not the parents', are of paramount importance. So the parents are essentially being deprived of their liberty and told, "You will go here," without their own interests being taken into account. It is a pretty strong action to take, particularly when, as we say, the result is unlikely to be achieved. It is not justified. There are other ways of achieving that result. To take such a strong stance and deprive parents of their liberty without their interests being taken into account is just not justified in our view.

Ms Allen: In any event, with the counselling that would be offered, would it be appropriate to those particular clients, because Aboriginal people in Western Australia are very varied and their cultural experiences are very varied as well? Would our clients understand what they were doing there? Would they turn up for a second appointment? Would they have the resources to turn up for a second or third appointment? Would they have any money to get there? If it is a Broome matter, would there be a residential counselling course in Broome? How would they get from Meekatharra? How would they get from Albany? How would they get from the suburbs of Perth if they have five children, are on a sole parent pension and their money is stretched to the limit and they have none available?

Ms Brajcich: To give a particular example about cultural appropriateness, what we are hearing from prisoners is that they just cannot do the sex offender counselling course that currently exists. The way that the course is set up is not appropriate for them; they will not do it. Rather than do this course, because of the way it is set up, they prefer quite often to serve their time than get out on parole. So any counselling or services that are set up, with or without the bill, must be appropriate to the people who will use them, and existing service to a large extent are not appropriate. I quoted the sex offender course as a particular example that we hear about again and again as something that works very ill for our clients.

CHAIR: You state that should the bill become law, the ALS will challenge it. Can you expand on that a little and tell us what you mean by "challenge"?

Ms Brajcich: Basically, this is a decision that would have to be taken by senior management at the time. The options include raising it with the Equal Opportunity Commission and the Human Rights and Equal Opportunity Commission. We have a media capacity; we have a capacity to write letters and submissions, as we have done now. We also have the option, as we have taken, of throwing our resources at some of the move-on laws; that is, cutting something else and throwing our resources at taking each case through to a hearing, if that has been regarded as the greatest need. So, what the organisation does in response to that aspect is something for senior management to decide, bearing in mind the effect it will have on the other services we currently offer. Those are the options we have available. We are not threatening; it is just not the way to do business, frankly. We say that we at ALS feel very strongly that this is deplorable legislation and that other things can be done, should be done and would work much better. If it does come in, we will have to think about how to amend our operations to deal with it. It will be appalling if it comes in. That is the very strong feeling at ALS.

Hon SALLY TALBOT: I take you to the comment you made in your submission about the bill not being a true therapeutic model. Those are your words. Can you elaborate on that statement for us? I am particularly interested in whether you regard the other models that you have referred to, such as the Koori Court and the Murray Court, as therapeutic models. Could you also address what I understand you to mean by the statement, that perhaps the parenting order provisions are in some sense masquerading as therapeutic, whereas they in fact embody the adversarial model that we are all attuned to working with in other systems?

Ms Brajcich: In essence, yes, that is what we say. All the cards under this bill would be held by the department; it has the resources, it has the lawyers and it has the money. It is not obliged to do very much at all, except to say, "This is what we've done and this is what we can do." It is very

different for parents. They have to represent themselves in a mainstream system that does not do business their way. They may or may not have a lawyer. They may or may not have resources to pay a lawyer or get legal aid. If it is a troubled family that has got to this point, they are already dealing with an awful lot of other issues. There is a whole lot else going on, apart from these proceedings, so they are dealing with this on top of everything else, creating extra stress and extra difficulty for the children. So we say that there is an imbalance in the power relationship, which is not a feature of the therapeutic models. Therapeutic models generally - this is my understanding of them anyway - are more collaborative and they focus on identifying what the problem is and how to fix it. This model does not do that. It does not focus on what the problem is or how to fix it. It is basically a big-stick approach. The Koori Court approach, first of all, was devised in consultation with the community to make sure that the system would work. It is a culturally appropriate way of doing business so that everyone understands what is going on and so that the person is heard and participates.

[1.45 pm]

It also brings in services. There is a Koori court officer and also an officer from the Department of Justice, whether it be for the juvenile or the adult person. The officer's job is to make sure that the person is directed to the relevant services that can assist for whatever problem has been identified. In one of the cases I watched, the Department of Justice officer said, "These are the issues. This is who can assist with these issues. I have made an appointment. I will attend with the child." There was that link; it was like an assisted referral. Also in the Koori court were mum and dad and any other supporters. It is set up in a normal courtroom. They do not use the bench. They have a table in front instead, so there is less public gallery room. The kids and adults I saw came in with their families. People were spilling onto the floor and around the place. They were with mum, dad, maybe nanna and cousins. There were various people to support the person. They were all basically barracking for this person to get through it. One man was a very promising footballer and the sports people from the place he learns the football came along and spoke for him. All the supports are there and everyone basically tries to nut out a solution. There are a number of participants at the table. The magistrate or judge is in the middle and on either side is an elder or respected person who are community members and who very often know the offender and can speak directly and offer their support to the offender. The justice officer, who is a Koori person, is on one side. That officer may or not may not know the offender, but probably does, and has worked out all the services that exist. On the other side is the court's own Koori officer. I think that officer normally makes contact with the offender to make all the arrangements. Then there is the lawyer for the offender who is generally an ALS lawyer or sometimes a legal aid lawyer. Then there is the offender, and the support people take up the remaining seats. They have the psychology absolutely right. They said that they experimented with different seating arrangements and they found that this one works.

We saw three cases. They take a long time; they take an hour to an hour and a half each. We were there only for a couple of days. Mum cried in every one of the cases. In two of the cases the offender cried, and this included the 20-year-old footballer who was a hard youth. The third person, who did not cry, engaged with the magistrate and started suggesting his own bail conditions. He said, "When I see these people, I start running into problems, so maybe you can do some bail conditions along these lines." They engaged, participated, talked back and tried to nut out a solution. They said, "This is where I go wrong." Mum and dad said that the kid seemed to be going all right, but then they moved house, he did not have any friends, he got in with a bad crowd and this is what happened. They sort of described the history. Sometimes the elders or respected persons knew the offender's history and could pinpoint what the problem had been: he went off the rails when his dad hanged himself or something like that. In one of the cases we saw, the elder cried because she knew the child and was hoping for him and was very distressed. The psychology of the whole set-up is very powerful.

The elders take three steps in the process. The elders do most of the talking. It is a dialogue; it is not speaking through the offender's lawyer. The lawyer does the technical bits such as, "Yes, the person has been convicted or pleads guilty and consents to jurisdiction," and deals with plea and mitigation. After that, the offender speaks for himself often to the elders and respected persons and everyone has a talk around the table. The elders and respected persons will start off essentially by shaming the person: "I knew your grandad. He'd be horrified to see that this is what has happened." The second part tends to be identifying the positives in the offender's life: "Look at all the support people who have come along for you today. Not everyone has that." If the person is good at something, they will talk about that and tell him that this is what he can do: "Look at what you've done. You could have thrown it all away and lost all your chances. This is what is available for you." They hold out that carrot. The third step seems to be to start building the kid up again by saying, "These are the things you can do. Respect yourself. You're good at music. I will come to your first show. You're playing football next Saturday. If you get out of here and don't get sent to prison, I'll come and watch you." They do. They monitor afterwards. It is not just a court experience, because the elders are in the community. If they see the kid breaching a bail condition or something like that, they will say, "Shouldn't you be off home now? Isn't this your condition?" They take an interest. Essentially, the therapeutic approach, as I have seen it happen in the Koori courts, and as I understand it happens in the Nunga courts, the Murri courts, the circle courts and so on, brings together a lot of people to work on solving a problem, temporarily if need be, and come back to court. They just break it into bite-size bits if necessary. They are all focused on doing that all. They all want to do that and try very hard to achieve that, and it really seems to work.

Hon SALLY TALBOT: Could the outcome of one of those processes be the imposition of a parenting order on a parent?

Ms Brajcich: Then it moves the focus away from the child's responsibility for his own behaviour to the parent.

Hon SALLY TALBOT: Strictly speaking, you are talking about offenders. In this bill, the offender is the parent.

Ms Brajcich: Not entirely, because this bill also is supposed to relate to children who have committed crimes. In some cases, it is the children themselves. Earlier we said that some very naughty children come from some very good families, so there are issues there as well. These courts work on the basis of the children accepting responsibility for themselves, and the parents agree that they will do this. Everyone participates and the parents are part of that process. Indeed, the victim can be part of that as well, but not in any of the cases I saw. I was told that occasionally the victim is brought along by the prosecutor. All those people work together. I have not seen this sort of scheme work in that way, so I could not say. The ones that I have seen work run on the basis of the child being responsible, but everyone helps. The parent, elders and respected persons and the courts support. That is what works. That is not to say that something else might not, but it has not come back to the need for research, evaluation and being very careful. That has not happened. With this other version it has.

Ms Allen: I will extend that a bit further. When the Department for Community Development apprehends children in need of care and protection, until very recently it was not as scripted as it is now. The new legislation came into full effect on 1 March. If we take that model in which parents are not offenders, parents are deemed to be respondents to an application because their children are in need of care and protection. What constitutes care and protection can be a variety of things. It can be physical, emotional or sexual abuse. It can be truancy. It can be criminal offending behaviour. In that example, the parents are not charged with a criminal act. They are made to come before the court to explain that the department has a view that their children need to be in care and protection. The whole premise of the department then, if it gets an order for wardship - in most cases, it does - its view is that reunification of the family must occur, unless it is the most dire of

circumstances that cannot allow that to happen. Even with the death of a child - I have been involved with several cases in which a child has died at the hand of the parent - it still does not say no to reunification. It is reunification with appropriate safeguards. It can do that in a variety of ways. The parents can be required to attend particular courses; for example, if there is an issue with drugs and alcohol, it might be a residential drug and alcohol program or regular urinalysis testing so that the department knows that the parent is not using any drugs. It can then require wider involvement with Strong Families. Tonia has given you an example in the criminal jurisdiction. In the family jurisdiction, there will be meetings that include large numbers of family members who can all say that they can help the parents in this way and can put in these sorts of safeguards. At all times, as much as our clients might resist interference from the Department for Community Development, they at least attempt to use a therapeutic model in which the reunification is supposed to be of utmost importance. Down the track, we might find that a child might be out of the home for one, two or five years, but quite often when the child is out of the home, the child is in the home of a relative. The family still has input into how these children are. The parent might not have the care of the child, but a family member will, so they still all work together.

Your model will impose a sanction against the parents, rather than try to come at it from the point of view of how we can help them. They will be penalised because they cannot control their children. Rather than factoring in how they can provide assistance to the child, who obviously needs it, you will straightaway create another layer, as Tonia explained. Various pieces of legislation can all then arrive at what you are saying is the same offence. There can be truancy under the School Education Act or truancy under the Children and Community Services Act. Another parent could bring an action in the Family Court because that parent cannot manage. It might not necessarily be a parent. A family member, be it an aunty, uncle or cousin, or a family friend who has an interest in the child could say that the child is out of control and thinks that he or she can do a better job; therefore, that person makes an application to the Family Court. It is almost like pick a box: which legislation shall we use today? For our clients, that will create an increased level of hostility towards government bodies. I think I am correct in saying that the Department for Community Development would administer this bill should it come into effect, so it will have dual roles. It will be policing, with the opportunity for criminal sanctions, and, at the same time, it will be offering a therapeutic model with Strong Families to keep the family together, but if it does not want to, it can just transfer it across to this legislation and have a fine imposed on the family. I note in your proposals that you say that if they have outstanding fines, they will not lose their driver's licence. They will not lose specific things. They will not be jailed, or can they be jailed? If they go to jail, will they have the opportunity to say, "I'll cut out some fines. Is that worth 14 days? I'm going in anyway"? It will be very confusing for us and the families we will represent, because fines mean a certain thing in the criminal jurisdiction. In this case, you are saying that there will be fines, but no penalty or no way of enforcing them. How will you enforce the fines? It is very difficult for our clients to have myriad legislation that can deal with the same offence.

Ms Brajcich: If we go back to the child being responsible for himself, that avoids issues with parents, third parties and so on who have responsibility for the child and picking who should be dealt with under the legislation. This is a generalisation, given the number of Aboriginal and TI cultures in Western Australia. Generally, the kids are raised to be independent and self-sufficient. A lot of Aboriginal and TI kids are setting up families in their mid-teens. The idea of their being responsible for themselves, as occurs in the Aboriginal sentencing courts model, is consistent with that. Again, that is a generalisation. You need to talk to the particular community in which a court is to be set up. However, that is, by and large, correct in a broad sense.

Ms Allen: We are seeing an increased number of younger people in their mid-teens with children with care and protection matters. They have been exposed to drugs and alcohol from a young age. In some cases, they have been taken advantage of and have resulting pregnancies. It is not unusual for us to come across 13 and 14-year-olds who, unfortunately, have started their own families. The

level of responsibility to the parents is somewhat removed under this bill. Under the Family Court Act, a child who becomes a parent then can become a party to these proceedings. They can have their own voice. Ordinarily, they would not be able to until they reached the age of 18. There is a bit of a dichotomy here. In the example of a 13-year-old girl with a child, is the parent then responsible? Can the parent say, "You have to go to school"? Can the parent be challenged if the child does not go to school? They are concrete examples of what we see every day. I cannot see that situation necessarily improving because the issue of drugs in general is a problem.

[2.00 pm]

We are seeing younger and younger children being exposed to more serious drugs. We are seeing drug addiction of a style that is perhaps unprecedented, and with that comes associated criminal behaviour, such as prostitution and burglaries to supplement that use of drugs. I can only give you these concrete examples, because this is untested. However, we can foreshadow problems arising - significant problems - in, first, assisting the clients in the first place, and then if you take the rule that parents are the ones who are brought before a court process, you could have a 13 or 14-year-old girl who says, "Well, make whatever orders you like in relation to my parents, because I can tell you now they will have no effect on me whatsoever." That goes back to this level of independence. When we talk about the level of independence of Aboriginals, it is very common for Aboriginal children to be quite independent at quite a young age. It does not mean that their parents do not have responsibility for them. It is simply a recognition of their growth to independence. It can start quite young. It can start with, as with the example in Northam, six-year-olds running around Northam. Their parents know where they are; they know they are going from one end of town to the other, but they know that they are with their friends and cousins. That level of independence is not ordinarily seen in a non-indigenous family.

Hon SALLY TALBOT: Thank you. That is a very thorough answer. My second question refers to the Children and Community Services Act, to which you have already made reference. You are obviously familiar with the provisions of the new act. You may also know that it has been suggested to us by other stakeholders that the kind of policy that is framed by the bill under consideration today is more appropriately incorporated into the new Children and Community Services Act, particularly in light of the fact that the new act contains different provisions covering parenting. Are you in a position to make any comment on that?

Ms Brajcich: I will go first very briefly. Lorraine is the expert on the act. Just speaking very briefly, it is still DCD, and DCD are the people who took children away until the 1970s - it is not that long ago. It is remembered very strongly. There would be the same issues of compliance, fear and resentment, and all those issues would continue to arise under that system. The only comment that I am going to make about it is that it does not address the problems that we have identified that we think the alternative model we have presented to you does address. It is a different way of doing things. Lorraine is our resident expert on the act.

Ms Allen: That is a bit of a wide call. The practical application of the Children and Community Services Act for us is only going to be procedural, it really is, because as Tonia quite rightly said, it is still the welfare department. The welfare department is this big, bad being that our clients have an absolute horrendous level of hostility towards. It may have been until the 1970s that children were removed pursuant to the stolen generation policies that operated at that time; however, it is still DCD that is coming in and removing children from the care of their parents, families and generally people in the community. It is DCD. They take children out of an environment and they say they are at risk, so they put them into another environment. For our clients that environment has to be seen to be almost perfect, but it is not. There are the abuse-in-care inquiries and these sorts of reports are coming out all the time. There are reports of young, especially Aboriginal, families whose children are in foster care with other Aboriginal people and for whom we do not think the correct checks and balances are taking place. Again, you have heard news reports of

young Aboriginal kids being killed in high-speed car chases when those children were wards of the state and were not at school. The Children and Community Services Act provides that the government and the department cannot be held responsible for actions in court against these children. Again referring to the issue before us, if you remove the children from the environment, can the government guarantee that they will be better off? They cannot. They cannot do that because they are taking them out but they are not providing the level of confidence that our clients need to have to show that the children are being taken out for a short time to help the family get back together or get back on track. There is a natural level of hostility that comes up, because the person who entered into the home to remove the child or children is the person they have to deal with on a daily basis. They have to deal with that person to have regular contact with their child. They have to deal with that person to have courses done. Again it is not unusual for us to be in a position when a child or children are apprehended and our clients say it is too bad, they cannot be bothered. It is not that they do not love their children, but they know their children will find them later on and then they will tell them the truth. It is their truth, it is not the truth that is necessarily agreed to by the department, but it is their truth.

Ms Brajcich: Where that comes from, there is hostility towards the department because of what has happened in the past, but there is also a fatalism because in the past no matter what you did, welfare still got your kids. There is still this "I am not even going to try" attitude that Lorraine is describing. It has to be understood in the context of however hard you try, it is not going to work, and there is that strong belief that that still exists even though the policies changed in the 1970s. DCD, if anything, has been criticised for having a more hands-off attitude than it should, through the Gordon inquiry and so on, but there is still that very strong belief that once welfare is involved, you are a goner and there is nothing you can do. There is that fatalism that goes on; it is not mere hostility and dislike and not wanting to comply. There is also a world of "If I comply, what difference is it going to make; it is just going to tear me apart more."

Ms Allen: That is correct. The Child Welfare Act deemed that when a child was made a ward, at the end of the period of wardship the department did not have to go back to court. They would just seek a ministerial extension of the period of wardship and they could provide their reasons, which would not necessarily be provided to the parents. Under the new act they have to go back to court, but the practical effect for our clients is that it does not really matter because it will just be rubberstamped anyway. If I could go back to that fatalistic attitude - which is that they have got my kids, there is nothing I can do - we often have minutes of agreed orders or we have proposals such as: if the welfare has my kids, this is what I have to do to get them back. We try to challenge the department and ask for something so that we can tick a box so that my client can go away and know he has to do A, B, and C in order to get his children back. What often happens is that somewhere in that process something might not be complied with and again the children are not returned. There is the view: get me to the edge and then pull me back again; you are not going to get my children back. The welfare is the government agency and this type of bill will make no difference to how they interact with our clients, or if it was the Department of Justice, because it will be the welfare, the welfare and the welfare. They are not going to engage. It is not a view of whether they engage or not; they are not going to get anywhere. We have situations where children have been taken into care and they ran away and returned to their parents. Welfare came and got them back. They ran away again. Welfare came and got them back. On the third time when the children ran away they disclosed substantial sexual abuse at the hands of the foster carers. In this example my clients took the children and tried to flee the state, at which time they were apprehended, I think in New South Wales. The children were brought back and put into care. This family I am talking about has a long history with the criminal justice system and will have a longer history with their children and their children's children. It is unfortunately generational how this family has operated. What faith, if any, can they have in the welfare? "Welfare took my children because you said they were at risk; whilst they have been away from me they have been severely sexually abused; they have still

participated in criminal behaviour; they have still not gone to school. So you are telling me that I now have to be responsible under this new legislation for ensuring that my children go to school, that they do all of these things and, if not, I can face sanctions. What sanctions, if any, are you going to provide if the children are in foster care and those very same things are happening? Are you going to say, 'We will shift the blame to the children because you are not accepting the blame'?"

Ms Brajcich: One of the advantages of the sentencing court process is that you can divide things into bite-size pieces. In one of the cases I saw there was a kid who could not be told that he needed to do this, this and this and then we would pass sentence. What the court did instead - there were two things he had to do within a week with the assistance of the justice officer. I think he had to attend two different appointments. According to the court judge, that was all he was up to doing, and then it would be reviewed. If he did okay, the matter would be looked at again. It can be broken down into little bits that people can cope with, whereas if there is an overall shopping list of things that people have to do, they are either intimidated out of complying with any of them or they will comply with some and not with others. They would feel resentful and say, "Well, I did some of it." and they do not get any reward for that. Another feature of this model we are suggesting as an alternative is that you can break it up into little bits and make it manageable.

Ms Allen: If it is incorporated slowly into the Children and Community Services Act, section 240 of that act provides for confidentiality about the identity of notifiers in relation to children. For example, if a person makes a complaint about the way a child is managed or the way a child has been treated, that person's identity is now protected. The extreme difficulty with that is that in Aboriginal families it is not unusual for there to be large amounts of family feuding in competing families. It is also not unusual for certain family members to have a falling out, which opens the door for many malicious types of allegations. Under the new act the person making those allegations generally will tell you an allegation is made, we will give you a general picture of what the allegation is, but that is about it. On the strength of that allegation they may remove your child from your care. The issue is that our clients cannot challenge. We do not know who has made the allegation and we do not know the substance of it. We know the general picture but we do not have the substance. Then if it goes to a trial where we want to cross-examine and test the veracity of that allegation, we cannot unless we have sought leave of the court and the court has deemed that witness to be necessary in the public interest. Against that background, our clients are lucky if they are represented, because then we will know what the legal requirements are to try to get a witness before the court. If they are unrepresented, at an interim level, what faith are they going to have in the department, which says that an allegation has been made but that it cannot and will not tell the person exactly what it is or who has made it? We do not object to doctors and professionals making allegations because in most contexts those are reasonable allegations based on evidence before them, but when it comes to non-professionals or other people making those sorts of allegations, it is very concerning for our clients and for us because it is a denial of natural justice. If you have the department under that umbrella using this type of legislation or this type of proposal against our clients, the question would be: what faith and what level of compliance will you have, with our clients thinking that they have a right to be heard? As parents they are suddenly put in a position of being sanctioned, whereas the actual people who were offending might not be.

[2.15 pm]

And then, when it comes to the lack of them being able to challenge allegations made in relation to their children, they will not be provided with information to be able to test it. They will feel very compromised by the nature of the information that is being put to them. The notifications to parents to say that they are required to attend court to explain why their child has not gone to school will cause them to ask whether they will be given the information or whether they will be allowed to speak. Will they hear from the child? Under the Children and Community Services Act the child will no longer be necessarily invited to court unless it is deemed to be in his or her interests. The

children will still have their own lawyers and they will be represented on most occasions but, on many occasions, the parents will not be represented, yet it will be the parents who face sanctions either through a fine or having their children removed from them and never returned. I cannot emphasise enough the problems that we will have, especially under the new Children and Community Services Act.

CHAIR: That concludes the questions we have for you today. Thank you for your evidence and attending today.

Hearing concluded at 2.16 pm