THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/DHvk:1562772

11 July 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: wkaylerthomson@fortefamilylawyers.com.au

Dear Mr ~~Smithers~~ Jonathan,

Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Thank you for the opportunity to contribute to the Law Council's submission on the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 ("Bill"). The submission of the Law Society of NSW has been informed by its Indigenous Issues Committee, which has a particular focus on the needs of Indigenous families in crisis and the flow-on effects on the rates of removal of Indigenous children.

We support the aim of the legislation, to ensure that appropriate protections for victims of family violence are in place during cross-examination in all family law proceedings. However, we have some concerns about the Bill, underpinned by the complex dynamics of family violence in the Indigenous context.

In its Issues Paper, the ALRC stated that a better understanding of family violence dynamics in Indigenous families is needed in order to ensure meaningful access to the family law system for Indigenous families.[1]

The Law Society agrees with this view. We attach our 2016 submission to the Inquiry into Domestic Violence and Gender Inequality and reiterate the views expressed in that submission. In our view, any response to the issue of managing the litigation of matters where family violence is alleged must be designed in consultation with Indigenous organisations to ensure that the interests of Indigenous litigants are protected, or in the least, that any new legislation does not have any unintended consequences that affect the interests of Indigenous litigants, and the children involved. For example, we understand that a majority of the Indigenous matters in the family law system involve family violence, but the parties may be a grandmother and the mother of a child in question. We are particularly concerned about any exacerbation of the rates of Indigenous children in out of home care.

It is not clear whether consultation was specifically sought and carried out with Indigenous communities and Indigenous service providers in relation to this Bill. Given the historically low levels of engagement with the family law system that Indigenous families have, we suggest that proactive engagement should have been sought. If the Bill passes, we submit

[1] ALRC Issues Paper, [63]-[64]

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that further consultation with Indigenous communities and Indigenous service providers should be carried out in respect of the consequences of the passage of this Bill, both in respect of education, and to determine if any adverse unintended consequences require further legislative attention.

While we acknowledge that the Bill differs somewhat from the exposure draft of the Bill, in some key respects the Bill and its exposure draft are substantially similar. We share the views expressed by the Law Council in its response to the exposure draft of the Bill in respect of this Bill. In particular, we are concerned that proposals to preclude or constrain cross-examination may affect:

- the interests and rights of all litigants;
- the ability of the court to properly determine issues, including identifying and addressing the issues that arise from family violence;
- the efficient delivery of justice, and access to justice in the complex matters that involve family violence.

We note that in its submission in respect of the exposure draft of the Bill, the Law Council further considered that:

- the existing legislative structure provides sufficient power to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to properly protect the rights and interests of both victims and perpetrators;
- the Family Court of Australia and Federal Circuit of Australia have published the "Family Violence Best Practice Principles" which set out how the existing legislative structure will be used by those courts, in particular in relation to vulnerable witnesses;
- legislative amendment to Division 12A of the Family Law Act 1975 (Family Law Act) could ensure the availability of those powers in all proceedings (rather than just parenting proceedings) where determined to be necessary and appropriate;
- further, and targeted, education of judicial officers and the legal profession will serve to ensure appropriate levels of awareness of the powers and practices available to appropriately protect the interests of litigants; and
- for those small number of cases where no other alternative to direct cross-examination is suitable, the Family Law Act could be amended to allow a judge to request a legal aid commission to provide representation for the unrepresented, alleged perpetrator (and the victim if they are unrepresented). The Law Council suggests that the proper administration of justice requires that such a lawyer be engaged for the whole trial, not just the cross examination. If legal aid commissions effectively become a measure of last resort in this context, they should be provided with additional Commonwealth funding to effectively perform the role.

The Law Society agrees with these views and emphasise the following matters.

1. Meaningful access to legal assistance

We note media reporting of the Attorney-General's position that no extra legal aid funding will be available as a result of the passage of the Bill.[2] It further appears that there will be no consideration of whether the legal aid grant guidelines should be reconsidered in light of the proposed legislation.[3]

Even if the Bill does not pass (but particularly so if it does), proper resourcing of legal assistance is a crucial issue for all litigants, whether for the alleged perpetrator or alleged

[2] N Berkovic, "Legal shield offered to victims of violence," *The Australian,* 28 June 2018, 2
[3] Ibid.

victim (regardless of the gender of the alleged victim/perpetrator). In our view, the issue the Bill seeks to ameliorate may in fact be significantly addressed by improving availability of legal assistance. We note the recent report on direct cross-examination conducted by the Australian Institute of Family Studies (AIFS) which found, perhaps self-evidently, that:

> The majority of both self-represented fathers and mothers conducted direct cross-examination. While fathers were more likely than mothers to be self-represented, interestingly, self-represented mothers were more likely than self-represented fathers to conduct direct cross-examination in the in-scope sample (83% vs 69%).
>
> The analysis also examined when a parent was self-represented and whether direct cross-examination was influenced by the other parent's legal representation and/or by the existence of allegations or substantiated family violence.
>
> - When a father was self-represented, the likelihood that he would directly cross-examine the mother was associated with the mother having legal representation (being more likely to take place in these cases) and, to a lesser extent, with the involvement of ICLs in the relevant cases.
> - Fathers were more likely to conduct direct cross-examination where the allegations of family violence involved children as victims.[4]

Continuity of legal assistance through the whole trial is key. Legal practitioners are unlikely to be able to serve their clients' best interests if they are asked to conduct cross-examination in a piecemeal fashion, nor is the administration of justice likely to be well served in this scenario. Adequate resourcing of legal assistance includes the timely availability of legally aided assistance, and adequate resourcing of legal assistance for complex matters. In the NSW context, reconsideration of the grant of legal aid guidelines, particularly in the case of Indigenous families, where the guidelines should be broadened in terms of means test and to include various kinship categories. The focus of the legal assistance sector (legal aid, community legal sector and ALS) in respect of Indigenous litigants should shift from advice to representation in litigation processes.

2. Unintended consequences for the legal profession

Further to our concerns in respect of unintended consequences for the interests of litigants, the Law Society makes the following queries in respect of possible unintended consequences for legal practitioners, particularly for duty practitioners, and for the administration of justice:

- We query the process of obtaining and maintaining legal representation for a litigant who is not permitted to conduct direct cross-examination if he or she does not actually want representation. We query the basis of the retainer in these circumstances. Further, will the process of obtaining and maintaining representation for this litigant result in delay in the proceedings that may further put vulnerable parties at risk? What are the consequences in the event a victim makes a complaint against a legal practitioner in these circumstances?

- What are the consequences if a legal aid duty lawyer is assigned to a litigant who is not permitted to conduct direct cross-examination, but where that litigant refuses to take advice and/or gives instructions that are contrary to the administration of justice?
- The Law Society has concerns for the safety of practitioners (who are likely to be duty practitioners) acting for litigants who may be genuinely coercive and controlling where

[4] R Carson, L Qu, J De Maio, D Roopani, *Incidence and context of direct cross-examination involving self-represented litigants*, AIFS, June 2018, at https://aifs.gov.au/publications/direct-cross-examination-family-law-matters

those litigants perceive the duty practitioners to have failed to promote their interests (which may conflict with the administration of justice).

In our view, there should be a risk analysis conducted for the legal practitioners who will be asked to represent litigants who are not permitted to conduct direct cross-examination.

3. Appropriate judicial education

Judicial education on the issue of managing coercive and controlling cross-examination is critical, as well as judicial education in relation to the complex dynamics of family violence in the Indigenous context. Victims should not be exposed to further re-traumatisation; however, it would be counter-productive for victims if judicial officers are not able to properly determine the facts of each particular matter.

Thank you again for the opportunity to comment. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Doug Humphreys OAM
President

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Our ref:FIC:IIC:GUel109927

14 April 2016

Committee Secretary
Senate Finance and Public Administration References Committee
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By email: fpa.sen@aph.gov.au

Dear Committee Secretary,

Domestic violence and gender inequality

I am writing on behalf of the Law Society of New South Wales, and refer to the terms of reference of the Inquiry into domestic violence and gender inequality ("Inquiry"). The comments provided below fall within the scope of terms of reference (a) and (c).

The Law Society generally supports the view expressed in the *National Plan to Reduce Violence Against Women and their Children 2010-2022* ("the *National Plan*") that gender inequalities have a profound effect on violence against women and their children[1]. However, the Law Society also notes that the *National Plan* recognises that:

> [f]amily violence is a broader term that refers to violence between family members, as well as violence between intimate partners. It involves the same sorts of behaviours as described for domestic violence.[2]

and that family violence

> is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur.[3]

The Law Society notes that in the context of Indigenous people, the various drivers of family violence are likely to be complex and intersectional, and gender inequalities may be only one of a number of issues that require attention.

1. The National Plan

The Law Society observes that the *National Plan* is now in the Third Action Plan (2016-2019) – Promising Results phase. 'National Outcome 5 – Justice responses are effective' in the National Plan is of most relevance to the legal profession. The Law Society supports the strategies and key actions set out in National Outcome 5.

[1] The *National Plan to Reduce Violence against Women and their Children 2010-2022*, 15.
[2] Ibid, 2
[3] Ibid.

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The Law Society notes that Strategy 5.2 includes an initiative to implement multi-disciplinary training packages for police, lawyers, judicial officers, counsellors and other professionals working in the family law system. The Law Society supports this initiative and considers that multi-disciplinary training packages for all professionals working in the family law system should educate professionals about the underlying causes of domestic violence, including gender inequality, power imbalances and controlling behaviours.

The Law Society considers that training about the underlying causes of domestic violence is of particular importance for legal practitioners who advise clients about property settlements and parenting arrangements after separation. Training in domestic violence for professionals working in the family law system should be nationally accredited.

The Law Society notes that Strategy 5.3 is about justice systems working better together and with other systems. The Law Society refers to the current Family Law Council reference on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. Families with complex needs include families who have emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. The Family Law Council is to report to the Commonwealth Attorney-General by 30 June 2016. The Law Society suggests that recommendations contained in the final report of the Family Law Council are considered as part of the implementation of Strategy 5.3 of the *National Plan*.

2. Family violence in Aboriginal and Torres Strait Islander communities

As noted above, in the Law Society's view, the various drivers of family violence in the context of Indigenous communities are likely to be complex and intersectional, and gender inequalities may be only one of the issues that require attention. We note that there may be other relevant factors including intergenerational trauma; homelessness and inadequate housing leading to overcrowding; unemployment; mental illness and substance abuse that may play a role.

Australian Institute of Health and Welfare figures suggest that Aboriginal women are hospitalised at much higher rates than non-Aboriginal women as a result of spouse/domestic partner inflicted assaults (38 times); and that Aboriginal men are also hospitalised at a much higher rate than non-Aboriginal men as a consequence of spouse/domestic partner inflicted assaults (27 times).[4] These figures are silent on the identity (Aboriginal status or gender) of the perpetrators.

The Law Society further notes a Parliament of Australia research publication on domestic violence in Australia states that:[5]

> Indigenous family violence may differ from the stereotypical image of a passive victim battered behind closed doors. It often takes place in public and can involve a number of people. Indigenous women may be more likely to fight back when confronted with violence than non-Indigenous women.[6]

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[4] F Al-Yaman, M Van Doeland and M Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples,* Australian Institute of Health and Welfare (AIHW), Canberra, 2006, 54–55, <http://www.aihw.gov.au/publication-detail/?id=6442467912>

[5] Janet Phillips, Penny Vandenbroek, "Domestic, family and sexual violence in Australia – an overview of the issues," 14 October 2014, *Parliamentary Library Research Papers 2014-15* < http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust#_Toc401045304>

[6] Ibid, citing H Blagg, 'Restorative justice and Aboriginal family violence: opening a space for healing,' *Restorative justice and family violence,* Cambridge University Press, Cambridge, 2002, 191–205

The publication notes further:

> There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in Indigenous communities. What data exists suggests that Indigenous people suffer violence, including family violence, at significantly higher rates than other Australians. In addition, a high proportion of violent victimisation is not disclosed to police and rates of non-disclosure are higher in Indigenous than non-Indigenous communities. [footnotes not included]

The Law Society notes also that in the National Aboriginal and Torres Strait Islander Survey in 2008, one in four people surveyed reported that family violence was a neighbourhood or community problem.[7] The Law Society understands that Aboriginal community members have expressed the view that not only do women and children require support services, but there should also be adequate support services for men. In the experience of the Law Society's members, Aboriginal victims of violence often seek holistic, family-focused solutions.

In this regard, we note that the Victorian Royal Commission into Family Violence tabled its final report ("Report") on 30 March 2016,[8] and Recommendation 146 made specific mention of the priority that should be given to funding to Aboriginal community controlled organisations for services for Aboriginal women and children; family centred services and programs (and one-door integrated services where family members can obtain a range of supports); culturally appropriate legal services for victims and perpetrators; suitable accommodation for victims and perpetrators; and early intervention and prevention actions in Aboriginal communities, including whole-of community activities and targeted programs.

The Law Society considers that there is a great need for adequately funded culturally appropriate legal services in those critical areas in which family violence intersects with the legal system. This is especially pertinent in care and protection, family law and apprehended domestic violence order proceedings. These services are most effective when funded to provide a holistic service incorporating legal advice and therapeutic support within an early intervention context, and when accompanied by appropriate community legal education initiatives. The delivery of services to Aboriginal families should ideally take place within a therapeutic jurisprudential framework. From the perspective of service delivery, as well as in respect of ensuring the well-being of legal practitioners, legal assistance service providers need the support of Aboriginal community controlled therapeutic services to properly deliver services to Aboriginal families in this context.

It should be noted that in terms of managing conflict, there needs to be a number of different legal assistance providers available in order to deal with both legal and community conflicts of interest. In practice, parties in (violent) conflict with each other cannot be properly served by one organisation, particularly if the various services are located in the same building. There needs to be a number of culturally appropriate litigation services in addition to advice services. In the Law Society's view, this is both an ethical issue and a safety issue.

The Law Society notes that the issue of adequate funding for legal assistance is a pressing and long-standing one. In particular, the adequate funding of civil law legal assistance has been comprehensively considered by the Productivity Commission in its *Inquiry Report on Access to Justice Arrangements*. Recommendation 21.4 of that report notes that the Australian, State and Territory Governments should provide additional funding for civil legal assistance services, and the total annual cost of the requisite services will be around $200

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[7] ABS, *National Aboriginal and Torres Strait Islander social survey, 2008,* cat. no. 4714.0, ABS, Canberra, 2010, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/>

[8] Victorian Government, *Royal Commission into Family Violence*, Summary and Recommendations, March 2016, <http://files.rcfv.com.au/Reports/RCFV_Full_Report_Interactive.pdf>

million. The Productivity Commission also noted in this recommendation that "where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance."[9] We understand that the Government has not formally responded to this Report.

Yours sincerely,

Gary Ulman
President

[9] Australian Government Productivity Commission, *Access to Justice Arrangements – Inquiry Report Overview,* No. 72, September 2014, 68 <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>