THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref:CrimJErg931283

16 February 2015

The Hon Brad Hazzard MP
Attorney General and Minister for Justice
Level 19
52 Martin Place
SYDNEY NSW 2000

Dear Attorney General,

Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014

I am writing on behalf of the Criminal Law and the Juvenile Justice Committees of the Law Society of NSW ("the Committees") in relation to the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* ("the Act"), which received assent on 28 November 2015 and has not yet commenced.

The object of the Act is to enable the use of recorded interviews with complainants in domestic violence proceedings instead of written statements or oral evidence. The Committees understand that the Department of Justice will monitor the operation of the Act for six months following the commencement of the legislation. The Committees write to express its preliminary concerns about aspects of this Act.

1. Committees' concerns

Central to the Committees' concerns is the fact that complainants appear to have no discretion about whether their recorded evidence is used in proceedings. This is particularly troubling given that s 85(1A) (in committal proceedings) and s 189(1A) (in pre-trial procedures in lower courts) provide that a person who made a representation given in evidence in a recorded statement is guilty of an offence if the representation contains any matter that, at the time the representation was made, the person knew to be false, or did not believe to be true, in any material respect. The maximum penalty if dealt with on indictment is 5 years imprisonment.

The Committees understand that recorded statements will be taken at (or shortly after) domestic violence incidents, which is often a highly emotive, and likely fraught, time. While the Committees appreciate the need to deter false claims, the Committees are concerned that s 85(1A) and s 189(1A) may expose genuine complainants to prosecution and to very serious consequences. The Committees are concerned that this may result in some domestic violence victims choosing not to report instances of violence: clearly a counterintuitive outcome.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Further, notwithstanding proposed s 289I dealing with the hearsay and the opinion rule, the Committees are concerned that this Act may bring about inconsistencies in the way evidence in recorded statements is dealt with, *vis a vis* evidence provided in other forms. For example, complainants may have serious injuries which may show in a recorded statement. However, in other contexts, pictures of serious injuries are restricted.

2. Committees' submissions

In respect of the concerns the Committees raised in relation to ss 85(1A) and 189(1A), the Committees acknowledge the proposed s 289G (which provides that the prosecutor must take into account the wishes of the complainant in deciding whether or not to use the recording as evidence in chief). However, in the Committees' view, this does not go far enough. The Committees submit that the Act should be amended in the following ways:

1) A recorded statement should only be led as evidence in chief with the consent of the complainant.
2) Where that consent is not forthcoming, the prosecutor still has the discretion to adduce the recording as evidence in chief, but:
    a) The court must be informed that the complainant does not consent to its use; and
    b) The complainant cannot be prosecuted for the falsity of any statement contained in the recorded statement; and
    c) The complainant must be informed that he/she is not liable for any such prosecution. The Committee's view is that this is necessary so as not to create any incentive for the complainant to persist with a false statement in order to avoid prosecution.

The Committees acknowledge that there is no other area in which a complainant is given as much control over the prosecution case. The Committees acknowledge also that it is already an offence to make a false assertion in a written statement to police.

However, the Committees are of the view that recorded statements are different from written statements as there is no other area in which a complainant is liable to prosecution as a result of the untruthfulness of a statement made by him/her in such difficult circumstances, and with no opportunity to properly reflect on the consequences of making it. Written statements to police are usually taken under circumstances more conducive to reflection, and there is a jurat at the beginning of the statement which reminds the maker of the statement of the consequences of making a false statement. Further, the proposal to use recorded statements in proceedings is a proposal to expand the means by which a prosecution can prove its case. Given this, the Committees submit that requiring a complainant's consent does not equate to a fetter upon existing means of proof. It is only a restriction upon the circumstances in which an additional means of proof is available.

Further, given the potential issues raised with respect to the admissibility of evidence in the form of recorded statements that may not be admissible in other contexts, the Committees submit that it is likely that the Act will require amendment to make clear that that the usual rules of evidence apply to recorded statements.

The Committees also note that policy and legislative changes relating to domestic violence are often based on domestic violence incidents between two adults. This can lead to unintended consequences where Apprehended Domestic Violence Orders ("ADVOs") are taken out by parents or carers against children. Parents often change their mind in relation to taking action against their children, and the recording procedure in the Act could disadvantage children who already face a power imbalance where parents or carers have taken out the ADVO.

Thank you for the opportunity to comment. Questions should be directed to Rachel Geare, policy lawyer for the Committees, at rachel.geare@lawsociety.com.au or 9926 0310.

Yours sincerely,

John F Eades
President