THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC/IIC/PWak:1311740

15 May 2017

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

By email: Natasha.Molt@lawcouncil.asn.au

Dear Mr Smithers,

Parliamentary inquiry into a better family law system to support and protect those affected by family violence

I write on behalf of the Law Society of NSW. Thank you for the opportunity to provide input to the Law Council's submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (the inquiry). This submission includes contributions from the Indigenous Issues and Family Law Committees of the Law Society.

We provide the following comments on the terms of reference of the inquiry.

1. **How the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:**
   (a) **facilitating the early identification of and response to family violence; and**
   (b) **considering the legal and non-legal support services required to support the early identification of and response to family violence**

Resourcing in the Family Court of Australia and Federal Circuit Court of Australia ("Family Law Courts")

The Law Society continues to note its concern about the impact of current delays in family law matters in both courts on the parties, and their families. There continues to be an urgent need for a review of resourcing in relation to family law matters, and an immediate need for additional judicial and other resources.

The Law Society acknowledges that significant funding has recently been made available in the 2017-18 Federal Budget to address domestic and family violence. The Law Society welcomes this funding, however, we note that there continues to be a need for additional judicial resources for Family Law Courts. The platform of supporting the victims of domestic violence seems incongruous with the level of resourcing presently allocated to the Family Law Courts. The Law Society submits that funding in Family Law Courts to facilitate the resolution of matters ought to be central to any policy the government may wish to adopt regarding family violence.

The inadequacy of resourcing of the Family Law Courts results in significant delays in family law matters and consequently fails to ensure the safety of people affected by family violence in the following ways:

1. People affected by family violence are re-exposed to trauma in the course of litigation. The reality for litigants in the Sydney and Parramatta Registries of the Family Law Courts is that it may take up to three years from the time an initiating application is filed until the matter reaches a final hearing before a judge. As a result of the workload of the judiciary, parties may then wait a further lengthy period from the conclusion of the hearing until judgment is delivered and final orders are made.
2. The delay between an initiating application and final orders being made puts people exposed to family violence, including children, at risk of further abuse, including but not limited to where the financial relationship cannot be severed.
3. The delay between an application being made and final orders increases the likelihood that a person who is exposed to family violence may make poor decisions about their matter (including but not limited to parenting matters), as a result of an inability or unwillingness to continue with litigation to obtain more suitable orders.

The Law Society remains concerned that judges in the Family Law Courts are under significant pressure due to increasing workloads and a failure to fill judicial vacancies. Under-resourcing can perpetuate abuse and prevent the Family Law Courts from adequately supporting and protecting those affected by family violence.

Given these significant concerns about the impact of the current level of delays on the parties, and their families, the Law Society encourages the Federal Government to undertake an urgent review of resourcing in relation to family law matters.

<u>Family violence in Aboriginal and Torres Strait Islander communities</u>

In the Law Society's view, the various drivers of family violence in the context of Aboriginal and Torres Strait Islander 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 and Torres Strait Islander women are hospitalised at much higher rates than non-Aboriginal and Torres Strait Islander women as a result of spouse/domestic partner inflicted assaults (38 times); and that Aboriginal and Torres Strait Islander men are also hospitalised at a much higher rate than non-Aboriginal and Torres Strait Islander men as a consequence of spouse/domestic partner inflicted assaults (27 times).[1] These figures are silent on the identity (Aboriginal and Torres Strait Islander status or gender) of the perpetrators.

The Law Society further notes a Parliament of Australia research publication on domestic violence in Australia states that:[2]

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[1] 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), (2006), 54–55, accessed at: http://www.aihw.gov.au/publication-detail/?id=6442467912

[2] 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*, accessed at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust#_Toc401045304

> Aboriginal and Torres Strait Islander 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. Aboriginal and Torres Strait Islander women may be more likely to fight back when confronted with violence than non-Aboriginal and Torres Strait Islander women.[3]

The publication notes further:

> There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in Aboriginal and Torres Strait Islander communities. What data exists suggests that Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander than non-Aboriginal and Torres Strait Islander communities.

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.[4] The Law Society understands that Aboriginal and Torres Strait Islander community members have expressed the view that not only do women and children require support services, but there should also be adequate and culturally competent support services for men. In the experience of the Law Society's members, Aboriginal and Torres Strait Islander 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 on 30 March 2016,[5] and Recommendation 146 made specific mention of the priority that should be given to funding to Aboriginal and Torres Strait Islander community controlled organisations for services for Aboriginal and Torres Strait Islander 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 alleged perpetrators; suitable accommodation for victims and alleged perpetrators; and early intervention and prevention actions in Aboriginal and Torres Strait Islander 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 and Torres Strait Islander 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 and Torres Strait Islander community controlled therapeutic services to properly deliver services to Aboriginal and Torres Strait Islander 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

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[3] 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
[4] ABS, *National Aboriginal and Torres Strait Islander social survey,* (2008), cat. no. 4714.0, accessed at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/
[5] Victorian Government, *Royal Commission into Family Violence*, Summary and Recommendations, (March 2016), accessed at: http://files.rcfv.com.au/Reports/RCFV_Full_Report_Interactive.pdf

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.

Legal assistance funding and cultural competence

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 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."[6]

The Law Society welcomes the recent Federal Government's budget commitment to restore $55.7 million in funding to Community Legal Centres (CLCs) over the next three years. The Federal Government's allocation of $39 million to CLCs and $16.7 million to Aboriginal and Torres Strait Islander Legal Services (ATSILS) adds to the NSW Government's $6 million rescue package for CLCs and reverses the 'funding cliff' facing the sector as a result of cuts due on 1 July 2017. However, we encourage the Federal Government to guarantee annual funding to be provided to the legal assistance sector, in line with the Productivity Commission's report.

The Law Society also considers that successful legal assistance requires lawyers to understand the unique practices, social and cultural needs of their Aboriginal and Torres Strait Islander clients, and to engage with the local Aboriginal and Torres Strait Islander community.

We also note the recent report by the Judicial Council on Cultural Diversity (JCCD), *The Path of Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts,* (the JCCD report). The report found that Aboriginal and Torres Strait Islander people are very likely to be unfamiliar with family law and its processes.[7] There have been relatively few large-scale surveys focusing specifically on the legal needs of Aboriginal and Torres Strait Islander people.[8] It is useful to note that a 2007 review of the family and civil law needs of Aboriginal and Torres Strait Islander people in NSW found that, of the applications for grants of family aid from Legal Aid NSW made by Aboriginal and Torres Strait Islander people, 41% of the applications related to care and protection matters, and only 3.6% of the applications related to family law.[9]

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

[7] Judicial Council on Cultural Diversity, *The Path of Justice: Aboriginal and Torres Strait Islander Women's Experience of the Court*, (2016), accessed at: http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf

[8] Chris Cunneen & Melanie Schwartz, "Civil and family law needs of Aboriginal and Torres Strait Islander people in New South Wales: the priority areas," (2009) 32 *UNSW Law Journal* 725, at 728.

[9] Chris Cunneen & Melanie Schwartz, *The family and civil law needs of Aboriginal people in New South Wales – final report*, University of NSW, (2008), 52, accessed at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/5515/Family-and-Civil-Law-Needs-of-Aboriginal-People-in-New-South-Wales-report.pdf

This is of concern as, in the experience of our members, better outcomes can be achieved for Aboriginal and Torres Strait Islander families if matters that are likely to otherwise turn into care and protection matters (or criminal law matters, or both) are addressed at an early stage and, if appropriate, diverted to the family law jurisdiction.

The Law Society has consistently advocated for better family law pathways for Aboriginal and Torres Strait Islander families. One of the barriers our members have identified is that Aboriginal and Torres Strait Islander people are unlikely to use mainstream services, and are unlikely to use mediation services, noting that mediation services are the usual pathway into the family law system. Given this, we consider that relationships between courts and local service providers (particularly Aboriginal and Torres Strait Islander community service providers such as the Aboriginal Medical Services) are crucial.

The Law Society considers that building strong relationships between courts and local Aboriginal and Torres Strait Islander culturally appropriate legal and therapeutic services, will assist with the development of better access to justice strategies at a local level. In this regard, it may be useful to establish court and community Aboriginal and Torres Strait Islander Access Committees at state/territory level. We note also the work carried out by the Aboriginal Family Law Pathways Network to provide education sessions to Aboriginal and Torres Strait Islander communities about family law options at an early intervention stage. We understand that judicial officers from the Federal Circuit Court have worked with solicitors and community service providers to deliver these education sessions to Aboriginal communities.

Community legal education, delivered in partnership with courts, legal services and Aboriginal and Torres Strait Islander controlled and community embedded organisations is also crucial in supporting families accessing the family law system. Appropriately targeted and delivered community legal education sessions on family law legislation and processes can deliver a number of benefits to local communities, including improving safety and access to the courts, improved understanding of the family law system, as well as the opportunity to provide specific legal advice and referral to legal services. Community legal education sessions also have the potential to develop crucial regional service partnerships, particularly through specific Aboriginal and Torres Strait Islander led therapeutic services in those communities.

In general, the Law Society considers that there is great need for adequately funded and 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 and Torres Strait Islander families should ideally take place within a therapeutic jurisprudential framework. From the perspective of effective service delivery to Aboriginal and Torres Strait Islander families in the context of family violence, legal assistance service providers require the support of Aboriginal and Torres Strait Islander community controlled therapeutic services. Aboriginal and Torres Strait Islander community controlled services provide legal assistance providers the same sort of "cultural brokerage" as Aboriginal and Torres Strait Islander court liaison officers[10]. In our view, it is difficult to deliver these services effectively without this support. The support of Aboriginal and Torres Strait Islander community controlled service providers is also invaluable in respect of ensuring the well-being of legal practitioners.

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[10] Above n7, 45

Employment of Aboriginal and Torres Strait Islander Liaison Officers in the Family Law Courts

The Law Society strongly supports the recommendations of the Family Law Council's Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (the Family Law Council Interim Report), regarding the need for Federal Government funding for the employment of Aboriginal and Torres Strait Islander family liaison officers within Aboriginal and Torres Strait Islander-specific legal and support organisations, in order to enhance access to the Family Law Courts for Aboriginal and Torres Strait Islander families who need family law orders.[11] The Family Law Council Interim Report highlighted the importance of locating these support positions within Aboriginal and Torres Strait Islander specific organisations so as to enhance the opportunities for retaining Aboriginal and Torres Strait Islander staff within the family law system and in recognition that people working in these organisations are likely to have connections with relevant local communities.[12]

Early intervention to ensure safety of children and support for families from culturally and linguistically diverse backgrounds

The Law Society recommends that, where there are allegations of or concerns about family violence, there should be mechanisms in place to ensure that children are spoken to by multidisciplinary health and welfare workers, as soon as practicable and away from potential perpetrators. This will allow the welfare workers to determine if the children are experiencing or are at risk of experiencing, family violence, abuse or neglect. This is also an opportunity to develop a holistic response, based on the best interests of the child.

The Law Society also notes that there are significant challenges facing newly arrived migrants to Australia and in particular, young women experiencing family violence. This includes a lack of awareness of available support services, cultural and language barriers, and actual or perceived risks to their immigration status, which may prevent them from seeking help. The Law Society therefore suggests that this group could benefit from adequately funded and culturally appropriate legal and support services, particularly at the intersection of family violence and migration law.

Access to the Family Law Courts during holiday periods

The Law Society also recommends that consideration be given to allowing greater access to the Family Law Courts over the Christmas holiday period, to allow parties to apply for urgent court orders. The holiday period can be a particularly stressful and volatile time for families and therefore access to the Family Law Courts is particularly crucial during this time.

2. **The making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements, which may be put in place as alternative or complementary measures**

The Law Society has recently made a submission to the Attorney-General's Department regarding proposed amendments to the *Family Law Act 1975* (Cth) to respond to family

[11] Family Law Council, *Interim Report: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 1-2)*, (June 2015), 106, accessed at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf
[12] Ibid.

violence. The submission may be of relevance to the present inquiry also and is enclosed, for information.

3. **The effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented, and where there are allegations or findings of family violence**

The Law Society reiterates its recommendations above, regarding the need for greater funding for civil legal assistance services, particularly for Aboriginal and Torres Strait Islander families accessing the Family Law Courts. Navigating through the family law system can be very complicated and therefore it is particularly important for families with complex needs to have access to legal assistance, where there may be a range of other legal issues present, such as debt recovery, property matters and family violence.

We also reiterate our concerns regarding the over-representation of Aboriginal and Torres Strait Islander families in the family law system. This was acknowledged by the Family Law Council in its Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (the Family Law Council Report), which noted the under-utilisation of family law services by Aboriginal and Torres Strait Islander clients and the continuing barriers affecting their access to the family courts.[13]

As highlighted above, submissions to the Family Law Council Report noted that Aboriginal and Torres Strait Islander family law clients are more likely than non-Aboriginal and Torres Strait Islander clients to have complex needs, including family violence and child safety related needs exacerbated by the experience of inter-generational trauma. As such, the lack of access to affordable or legally aided legal assistance services can place a particular burden on clients with complex needs, and place parties at greater risk of family violence.

As such, the Law Society supports the view of the Law Council regarding the need for a greater investment of funding into the legal assistance sector by the Federal Government, to address the structural and systemic underfunding of legal assistance services.[14] As highlighted by the Law Council, the 2014 Productivity Commission report recommended an additional $200 million in legal assistance funding to address these issues, which would result in savings for taxpayers by reducing cost and demand for the courts and other services.[15] The Law Society recommends that any increased funding be directed to improve access and eligibility for legal aid for family law matters, as a critical area of need, particularly for Aboriginal and Torres Strait Islander families.

4. **How the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence**

The Law Society observes that the *National Plan to Reduce Violence Against Women and their Children 2010-2022* (the National Plan) is now in the Third Action Plan (2016-2019) –

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[13] Family Law Council, *Final Report: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 3-5)*, (June 2016), 8, accessed at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF

[14] Law Council of Australia, 'Last-minute cancellation of legal assistance funding cuts a great victory for justice and vulnerable Australians', *Media Release*, (24 April 2017), accessed at: http://www.lawcouncil.asn.au/lawcouncil/images/1720_--_Last-minute_cancellation_of_legal_assistance_funding_cuts_a_great_victory_for_justice_and_vulnerable_Australians.pdf

[15] Ibid.

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.

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 also notes that family report writers and judges dealing with parenting matters need to be sensitive about allegations of family violence, particularly non-physical family violence such as intimidation and control. This type of violence often has significant impacts on the victim and the children. Allegations of family violence may be dismissed in circumstances where it has not been reported prior to separation (which may often be the case for many reasons), but where there is a clear history of anger and behavioural problems from other sources, such as psychologist or counselling records. Although the party making the allegation often has serious concerns for the safety of their children, they may be labelled as a "gate keeper" or a "very controlling parent" by report writers and judges. We note that this is a complex issue and needs to be addressed and dealt with sensitively.

Cultural awareness

We also reiterate our recommendations above, regarding the need for cultural awareness and understanding of the unique practices, social and cultural needs of Aboriginal and Torres Strait Islander clients coming into contact with the family law system, from all legal professionals in the section.

These issues were also acknowledged in the Family Law Council Report, which noted the importance of improving the delivery of family law services in a way that promotes cultural safety for Aboriginal and Torres Strait Islander clients seeking to resolve disputes about the care of children, especially where there are safety concerns for the child.[16] In particular, the Family Law Council received a number of proposed recommendations from stakeholders, to provide culturally appropriate services for Aboriginal and Torres Strait Islander families accessing the family law system, including:[17]

- embedding workers from Aboriginal and Torres Strait Islander services in the Family Law Courts and Family Relationship Centres as family liaison officers to support Aboriginal and Torres Strait Islander clients with complex needs;
- working with Aboriginal and Torres Strait Islander communities and organisations to develop and deliver culturally appropriate post-separation parenting programs and family dispute resolution services;

[16] Family Law Council, *Final Report: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 3-5)*, (June 2016), 147.
[17] Ibid.

- developing and resourcing tailored education programs about family law for Aboriginal and Torres Strait Islander communities to enhance understanding of legal rights and awareness of how the family law system works; and
- ensuring ongoing cultural competency training for family law system professionals, including judicial officers.

The Law Society strongly supports the above recommendations, to improve relationships and pathways between the family law system and Aboriginal and Torres Strait Islander led and controlled services and communities.

Cultural reports in family law matters

The Law Society strongly supports Recommendation 16(2) of the Family Law Council's Report, to amend Part VII of the *Family Law Act 1975* (Cth) to provide for the preparation of Cultural Reports, which may be included in Family Reports for Aboriginal and Torres Strait Islander children where a cultural issue is relevant, and for the Family Report to include a cultural plan which sets out how the child's ongoing connection with kinship networks and country may be maintained.[18]

The Family Law Council Report acknowledges the lack of any legislative requirement to prepare a cultural plan for an Aboriginal and Torres Strait Islander child in family law matters, which would require a clear articulation of how the child's ongoing connection with kinship networks and country will be maintained.[19] The Family Law Council Report notes the range of submissions received from stakeholders, recommending the preparation of culturally secure family assessment reports to assist the courts in decision-making in children's matters.[20] These reports should address issues such as the obligations of family members in growing up children associated with totemic and country connection. Other submissions to the consultation suggested that cultural reports should be prepared in consultation with Elders and Grandmothers as appropriate, and that these should become an integral part of family reports in cases involving an Aboriginal and Torres Strait Islander child.[21]

Specialised Aboriginal and Torres Strait Islander list

The Sydney Registry of the Federal Circuit Court is currently trialling specialised lists for family law matters involving one or more Aboriginal and Torres Strait Islander parties. The trial is being supported by legal assistance and other support services, to assist clients in accessing the Court.

The Law Society strongly supports the aim and purpose of this initiative, to reduce the number of matters in the Children's Court and to reduce the number of Aboriginal and Torres Strait Islander children being placed in out of home care by encouraging families to use the Federal Circuit Court, to make applications to keep children with other family members.

5. The potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described

The Law Society acknowledges that in December 2015, the Council of Australian Governments (COAG) agreed that each State and Territory would introduce model laws to automatically recognise and enforce Domestic Violence Orders across Australia, including New Zealand orders registered in Australia.

[18] Ibid, 150.
[19] Ibid, 148.
[20] Ibid.
[21] Ibid.

The national recognition scheme will improve information sharing between the States and Territories, and better protect the safety of victims if they choose to move interstate. At its April 2015 meeting, COAG agreed that by the end of that year:[22]

- a national family violence order scheme will be agreed whereby family violence orders will be automatically recognised and enforceable in any state or territory of Australia;
- progress will be reported on a national information system that will enable courts and police in different states and territories to share information on active family violence orders, with NSW, Queensland and Tasmania to trial the system;
- COAG will consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and
- COAG will consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse.

In May 2015, Minister for Women Michaelia Cash stated that while the legal framework was on track to be agreed to nationally by December 2015, the system to share information on active family violence orders between jurisdictions would take significantly longer to implement.[23] All states and territories committed to introducing similar legislation by July 2017. NSW was the first state to introduce the legislation in March 2016.[24] Each state and territory other than Western Australia has now introduced corresponding legislation.[25]

The Law Institute of Victoria has reported that the actual development of a national database is likely to take many more years to develop, noting that each state and territory will require significant resourcing to update their own systems and process the backlog of information on to those updated systems and then integrate those systems with a consistent national platform that is yet to be developed.[26]

The Law Society recommends that, as part of the development of the national database, consideration should be given to including orders made by the Family Law Courts in this information sharing platform also. Giving the Family Law Courts access to current family violence orders, and State and Territory Courts access to information on the existence of orders made under the *Family Law Act 1975* (Cth) would significantly improve information sharing and reduce burden on parties navigating the two legal systems. This recommendation is also supported by the Family Law Council, which recommended the development of a national repository of family law, family violence and children's court orders that can be accessed by each relevant court.[27]

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[22] Council of Australian Governments, *Communique*, (17 April 2015), 1, accessed at: https://www.coag.gov.au/sites/default/files/communique/COAG%20Communique%2017%20April%202015.pdf

[23] Emma Griffiths, 'National domestic violence order scheme may not be completed until end of 2016, Federal Minister Michaelia Cash says', *ABC Online*, (4 May 2015), accessed at: http://www.abc.net.au/news/2015-05-04/national-dvo-scheme-may-not-be-completed-until-end-of-2016/6443070

[24] *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act* (2016) (NSW).

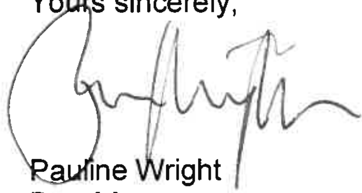
[25] Law Institute of Victoria, *National Recognition of Family Violence Orders*, (9 August 2016), accessed at: https://www.liv.asn.au/staying-informed/young-lawyers-blog/young-lawyers-blog-2016/august-2016/national-recognition-of-family-violence-orders

[26] Law Institute of Victoria, *National Recognition of Family Violence Orders*, (9 August 2016), accessed at: https://www.liv.asn.au/staying-informed/young-lawyers-blog/young-lawyers-blog-2016/august-2016/national-recognition-of-family-violence-orders

[27] Family Law Council, *Final Report: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, (June 2016), 2.

Thank you for considering this submission. I would be grateful if questions could be directed at first instance to Anastasia Krivenkova, Principal Policy Lawyer, on 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:FIC/CLC/CLIC:PWcm1252873

20 January 2017

Public consultation: Family violence amendments
Family Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: familylawunit@ag.gov.au

Dear Sir/Madam,

Amendments to the *Family Law Act 1975* to respond to family violence

The Law Society of New South Wales appreciates the opportunity to provide comments on proposed amendments to the *Family Law Act 1975* aimed at improving the family law system's response to family violence. The Law Society's Family Law, Criminal Law and Children's Legal Issues Committees have contributed to this submission.

1. Exercise of family law jurisdiction by children's court

The proposed amendment would expressly enable state and territory children's courts to be prescribed as courts of summary jurisdiction. This would implement recommendation 1 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems.*[1]

The Law Society supports the proposed amendment as this has potential benefits for families, including continuity of location where a child protection matter has been finalised and parenting orders are needed. This will also clarify the power of the Children's Court to make orders preventing a child being removed from Australia (PASS alert orders and family law watch list orders) or to another state or territory.

However, the Law Society has concerns about the impact this may have on the current workload and resources of the Children's Court, and notes the need for these courts to be appropriately resourced to undertake family law work. The Law Society also notes that court staff and judicial officers will need to be provided with appropriate training.

In addition, the Law Society suggests that Children's Court orders should be registered in the Family Court or the Federal Circuit Court as a matter of practice.

[1] Family Law Council, *Families with complex needs and the intersection of the family law and child protection system: Interim Report (Terms 1 and 2)* (June 2015) 103-104.

2. Short form judgments

The proposed amendment would enable the court to give reasons in short form for a decision it makes in relation to an interim parenting order. This would implement recommendation 3 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems.*[2]

The Law Society notes that courts may currently give reasons for any decision in short form, as long as the reasons provided for the decision are adequate. The amendment does not purport to give the court additional powers. Rather, it is intended to encourage judicial officers in state and territory courts to consider giving short form judgments, where appropriate.

The Law Society supports the proposed amendment given that its aim is to encourage a more efficient use of court resources and avoid delays in judgments being provided.

3. Property jurisdiction of state and territory courts

The proposed amendment would enable state and territory courts to hear more family law property matters by removing the current $20,000 monetary limit (which has not been updated since 1988) and instead prescribing a higher amount in regulations. This would implement recommendation 15-2 of the Family Law Council in its final report on *Families with complex needs and the intersection of the family law and child protection systems.*[3]

The Law Society supports the proposal and would welcome the opportunity to be involved in further consultation regarding the new monetary limit.

4. Summary dismissal

This amendment would allow the court to make a summary decree in favour of one party, if satisfied that a party has no reasonable prospect of successfully prosecuting or defending the proceedings or part of the proceedings. It would also empower the court to:

- dismiss all or part of the proceedings if they are frivolous, vexatious or an abuse of process
- make costs orders as it sees fit, and
- take such action of its own volition or on the application of a party to the proceedings.

The Law Society supports the proposed amendment. We note that courts already have summary dismissal powers that can be used in appropriate cases. The proposed amendment seeks to clarify that power.

5. Criminalisation of breaches of injunctions

Under the *Family Law Act 1975*, the court can issue injunctions for the personal protection of a person or a child. The proposed amendment would make it a criminal offence to breach a personal protection injunction. This would implement recommendation 17-4 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response.*[4]

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[2] Ibid 104.

[3] Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems: Final Report (Terms 3, 4 and 5)* (June 2016) 146.

[4] Australian Law Reform Commission, *Family Violence – A National Legal Response* (October 2010) 813.

The Law Society notes that this is a complex issue and that practitioners hold differing views. The Law Society's Family Law Committee supports the proposed amendments. However, the Law Society's Criminal Law Committee opposes the creation of a new offence and considers that there are preferable ways of addressing the enforceability issue, including:

- A general referral provision providing that a breach of an injunction may be prosecuted under local state law as if it were a breach of state protective orders relating to family or domestic violence, with a regulation defining the relevant legislative provisions for prosecution in each jurisdiction.

- Empowering state or federal police to initiate civil proceedings for breach of an injunction in the Family Court on behalf of the victim.

- An automatic notification to state police where a Form 4 indicates family violence, to enable appropriate action under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW).*

In the event that the proposed new offence provision is introduced, the Criminal Law Committee suggests the following amendments to the draft provision:

- Fault element – A requirement that the defendant knowingly contravened a prohibition or restriction specified in an injunction should be included. This would be consistent with the approach taken in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Section 5.6(2) of the *Criminal Code Act 1995* (Cth) states: "If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element". In this case, the 'physical element that consists of a circumstance or a result' consists of 'conduct which breaches the order' (sub-sections (c) and (d) of draft s 68C and draft s 114AA). Because the offence does not specify a fault element (mens rea), the *Criminal Code* implies recklessness. The offences should be amended to include that the fault element for that physical element is knowledge.

- Service – A requirement of proof of service of the injunction on the respondent, where the respondent was not present in court when the injunction was made, should be included.

- Intoxication – The qualifications on the intoxication defence should be removed. The Criminal Code deals with this issue appropriately.

- Aiding and abetting – Provisions aimed at preventing victims from being charged with aiding and abetting a breach of an injunction (for example, in circumstances where the parties have reconciled and have not varied or sought to discharge the injunction) should be included.

The Criminal Law Committee also suggests that recommendation 17-3 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response* should be implemented. Recommendation 17-3 provides: "The *Family Law Act 1975* (Cth) should be amended to provide separate provisions for injunctions for personal protection" which are finite and can contain similar conditions as per state apprehended domestic violence orders. Recommendation 17.4 should not be implemented on its own, as the thrust of the Australian Law Reform Commission's recommendations around injunctions and family violence is that they should align as far as possible with state legislation.

The Law Society notes that there is a potential for double jeopardy in situations where, in addition to the injunction made under the *Family Law Act 1975*, an apprehended domestic violence order (provisional, interim or final) is also in place.

Section 114AB of the *Family Law Act 1975* prevents a person from applying for an injunction in respect of a matter for which a state or territory protection order has been sought or obtained (unless the protection order has lapsed, been discontinued or dismissed, or the orders are no longer in force). However, this prohibition does not extend to matters not dealt with in the protection order, and only applies where the state or territory procedure has been used first. There is no corresponding prohibition on a person who has sought or obtained an injunction under the *Family Law Act 1975* from seeking a protection order under NSW legislation. Generally, it would not be appropriate for concurrent proceedings to occur where the parties and conduct involved are the same.

The Law Society notes that state and territory police will need to be provided with suitable training on their powers and duties regarding these injunctions.

6. Dispensing with explanations regarding orders or injunctions to children

The proposed amendment would allow more flexibility about the manner in which judges must explain orders and injunctions to a child, and would confer discretion to dispense with the requirement if the child is too young to understand the explanation or it is in the best interest of the child to do so.

The Law Society agrees with the concern raised by the National Children's Commissioner during the Senate Legal and Constitutional Affairs Committee inquiry on the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015, that this could lead children to feel as though they do not have a voice in proceedings which affect their lives.[5] The UN Committee on the Rights of the Child has stated in its 'General Comment on the right of the child to have his or her best interests taken as a primary consideration', that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention",[6] including the right to participation under Article 12 of the *Convention on the Rights of the Child*.[7]

The Law Society believes that the basis for dispensing with the requirement should be whether it is in the child's best interests, rather than whether the child is "too young to understand". We consider that the best interests of the child allows for a more flexible approach, and, if a court is required to consider the matters listed in s 60CC(2) and (3) of the *Family Law Act 1975*, the court's attention would be turned to the child's maturity and level of understanding and any other characteristics of the child that the court thinks are relevant.[8] We therefore consider it desirable to require the court to consider the matters listed in s 60CC(2) and (3) to inform itself of the child's best interests, including in particular the views of the child.[9] We support the need for courts to be flexible in how they provide the explanations to children.

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[5] The Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (2016) para 2.52.
[6] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) para 4.
[7] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[8] See *Family Law Act 1975*, s 60CC(3)(a) and (g).
[9] See ibid, s 60CC(3)(a).

7. Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order

Currently, if a state or territory court, in hearing interim domestic violence order proceedings, orders that a family law order be varied, revived or suspended, then the variation, revival or suspension only has effect for 21 days. The proposed amendment would enable a state or territory court's variation, revival or suspension of a family law order to continue to have effect until:

- the time specified by the court in that order (e.g. tied to the making of a final family violence order)
- a further order is made, or
- the interim domestic violence order ceases to be in force.

This would implement recommendation 4 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems.*[10]

The Law Society notes the views of the Senate Legal and Constitutional Affairs Committee in its inquiry report on the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015:

> The committee believes that the removal of the 21 day expiration period would be beneficial to victims of family violence, because it would help to ensure that they, and/or their children, are not subject to conflicting court orders. The committee is persuaded that consistent court orders are a key element in facilitating protection from violence.
>
> The committee is also persuaded that access to timely information in matters involving children and victims of violence is crucial for the court system to be able to respond effectively. On that basis, the committee recommends that the Commonwealth government, in conjunction with states and territories, consider the practicalities of a protocol for information sharing between courts.[11]

The Law Society supports the proposed amendment. We note that a 21 day period would generally not allow a sufficient amount of time for a matter to be heard by the family courts given the current delays experienced by those courts. In addition, we encourage the Department to implement the recommendation of the Senate Legal and Constitutional Affairs Committee regarding the development of an information sharing protocol between the courts.[12]

8. Repeal obligation to perform marital services

Section 114(2) of the *Family Law Act 1975* permits the court to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights. The proposed amendment would repeal this section. This would implement recommendation 17-6 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response.*[13]

The Law Society agrees that this provision should be repealed as it is obsolete, unnecessary and inappropriate.

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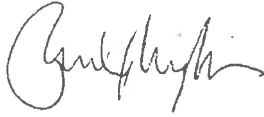
[10] Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems: Interim report* (Terms 1 and 2) (June 2015) 104.
[11] Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (February 2016) para 2.34-2.35.
[12] Ibid para 2.36.
[13] Australian Law Reform Commission, *Family Violence – A National Legal Response* (October 2010) 824.

Please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on 02 9926 0218 or chelly.milliken@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Pauline Wright
President