NEW SOUTH WALES
BAR ASSOCIATION

OPENING STATEMENT TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

Inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill

1 August 2018, Melbourne

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The New South Wales Bar Association is pleased to assist the Committee with its inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018. This inquiry is extremely important and comes at a critical time for Australia's family law system.

By way of background, the Association is a voluntary professional association. Our members include more than 2,300 barristers who practice in NSW, in addition to judges, academics and retired practitioners. The Association is committed to promoting the administration of justice and can speak with experience to the challenges facing clients and barristers in accessing the family law system and the Courts in registries within NSW.

I serve as the Chair of the Association's Family Law Committee and have worked as a family law practitioner for 24 years.

The state of family law in this country is of critical concern. In the course of law reform, we must not forget that family law is about people, especially children, who deserve to be treated with dignity by experienced judges.

Family violence is completely unacceptable. There is consensus amongst all stakeholders, and those who have appeared before the committee to give evidence today, that victims of family violence and children must be afforded the best protections the system can offer. Where we differ is how the system can best realise that mandate.

Any ban on cross-examination must balance the need to protect family violence victims from being re-traumatised during their court hearings, with the need for procedural fairness for parties. Further, care must be taken to avoid unintended adverse consequences for family violence victims. The Association does not believe that the Bill in its present form achieves the right balance and may result in unintended consequences.

The Association has four primary concerns about the Bill, which are outlined in our submission:

1. First, unintended consequences may arise from a mandatory ban where parties are unable to cross-examine because they are unable or unwilling to obtain private representation, and are unable to access legal aid.

   Failure to allow a party to properly cross-examine deprives a court of the ability to properly protect family violence victims and renders any judgment made unreliable and subject to appeal. This risk is particularly concerning in matters that involve allegations of family violence, where a Court must be in a position to properly determine whether violence has occurred and how the victim and children are to be protected. Further, prolonging court processes and the appeals processes may result in children and alleged victims being exposed to alleged perpetrators to greater periods of time, may exacerbate trauma or may result in inappropriate custody or financial outcomes that are not in the best interests of children or victims.

   Another unintended consequence is the greater significance that will attend proceedings for family violence order proceedings in state-based courts. This may well result in increased cross-examination of victims in those proceedings and greater contests about whether such orders ought be made – where presently they are often made on a mutual basis and/or by agreement without exposing victims to the delay and cross-examination involved in contested proceedings.

2. Second, the Bill's implementation may be significantly impacted by the Attorney-General's proposed structural reform of the federal courts and family law system.

3. Third, the Bill should not be passed until after such time as it can be considered as part of the ongoing inquiry by the Australian Law Reform Commission into Australia's family law system; and

4. Fourth, the Bill may produce the unintended consequence of shifting the impact upon victims of family violence and the associated resource burden to state-based court systems.

To address these concerns, the Association has made four recommendations:

1. That the Bill be amended to operate when the Court determines in its discretion it is appropriate, and not as a mandatory ban;

2. That the Bill not be passed, or alternatively that its commencement be delayed until:

    i. The Australian Law Reform Commission has completed its review of the family law system – which is a whole of system review; and

    ii. Appropriate discussions have occurred and funding agreements have been secured between the Australian Government and Legal Aid to ensure adequate funding is available;

3. A properly-resourced, specialist family law court must be preserved in the future of Australia's family law system to provide the specialist legal training, expertise and discretion required to appropriately hear and determine these issues, while providing targeted, appropriate protections for victims of family violence during the court hearing; and

4. The Federal Government provide greater funding and resource support to the family courts and Legal Aid.

Family law in Australia has been adversely affected by a chronic lack of resources in both the Federal Circuit Court and the Family Court of Australia in the NSW registries, resulting from an absence of commitment by successive Governments to the proper funding of the system. An increasing migration appeal caseload continues to contribute to waiting times for family matters in the Federal Circuit Court.

The Association has consistently argued that the future of Australia's family law system must feature a properly resourced, specialist family court. The Association maintains that this is a critical protection for victims and children to properly determine issues including whether violence has occurred and the consequences of that violence for parenting and financial determinations.

The Association believes the Bill would be unnecessary in a properly resourced specialist court staffed by judicial officers experienced and trained in dealing with domestic violence issues.

The Association has this week called for a national conversation about the benefits of preserving a specialist family court in Australia. The Association believes that a specialist family court should not

be disassembled without informed consideration of alternative options and accordingly we have proposed an alternate proposal for reform.

Now is not the time or place for that conversation. However, we raise this issue to emphasise that the Bill must not be considered in isolation from the context in which this inquiry and parliamentary debate about this Bill occurs.

I would be pleased to answer any questions the Committee have.