

## Submission to the Legal and Constitutional Affairs Legislation Committee



13 July 2018

**Committee Secretary**  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100, Parliament House  
Canberra ACT 2600  
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Dear Committee Secretary,

### **Re: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018**

The Council of Single Mothers and their Children (CSMC), joins the National Council of Single Mothers and their Children (NCSMC) in congratulating the Federal Government in taking progressive steps to protect victims of family violence in matters raised under the Family Law Act. We have seen a sustained interest in improving the operations of courts dealing with Family Law matters over the past year including the current Family Law System Review.

This legislation is particularly vital as it attempts to minimise any re-traumatisation from the experiences of family violence through prohibiting cross-examination in certain circumstances and seeks to ensure *that appropriate protections for victims of family violence are in place during cross-examination in all family law proceedings.*

In the following pages we make comments about the draft Bill based on the Explanatory Memorandum, for the consideration of the Committee.

Along with the NCSMC, CSMC responded to the 2017 consultation on the exposure draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill and we look forward to the enactment of legislation that will ensure that victims of family violence will be protected from having to directly cross-examine or be cross-examined by perpetrators of violence during Family Law proceedings.

Yours sincerely,

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Chief Executive Officer

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## About CSMC

The Council of Single Mothers and their Children is a Victorian non-profit organisation founded in 1969 by single mothers to improve their lives and those of their children. Today, we are a professional service organisation which advocates for the rights and interests of single mother families on a range of issues.

Family violence, Family Law matters and the proceedings in all the courts hearing family law and family violence matters, are critical issues for many of our 2,500 members and the 2400 annual callers to the CSMC Support Line.

## Comments on the proposed legislation

### 1. *Ensuring Court protection for victims of family violence*

The protective intentions are clear throughout the Explanatory Memorandum and we commend the government for this.

Based on the experiences of our members and callers attending various courts in relation to Family Law matters, and our reading of the proposed legislation, we raise the following issues for further consideration:

#### Discretionary clauses and the training of judicial officers

Many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench, or in interactions with lawyers who sometimes advise clients against raising concerns or even, refuse to raise them.

While the training of judicial officers may seem beyond the scope of this committee in relation to this legislation, we nevertheless recommend this be considered for inclusion and/or referred to the Family Law System Review. The behaviours of Judges and other court officials that is based on knowledge about the impacts of family violence, beliefs and personal judgements, is key in legislation such as that proposed, where judicial discretion and a lawyers' interpretation and representation are critical to decisions and fair hearings. Examples of such instances include:

102NA (3) where a judge may make a decision

*'The judge has made a decision that I have to move interstate with my children so their father can have access even though he has admitted violence, so I have no job, or income, and we are living in share housing with no family support. It's inhumane what the judge has done. Me and two toddlers thrown out of home, employment and family support and sent back to my abuser. This judge is ex-commercial law and inexperienced. It's beyond belief that someone like this can make decisions for families! He told me I 'will get used to it'. It will be 6-12 months before we get to the family court.'*

102NB (b) where a lawyer may or may not make an allegation of family violence on behalf of their client.

*'I recall the words of the judge on the first day of our final three day trial saying... "How have we reached a final trial hearing without family violence having been disclosed?" She addressed this statement to the three barristers and lawyers who were part of our court proceedings, and it was clear she could see that processes were not put in place in addressing family violence...I further recall asking my legal representatives at every*

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*opportunity when family violence would be addressed, the response I received was...it takes a trial to disclose the family violence...'*

We note that in the Explanatory Memorandum, General Outline, pt. 9 pg. 2, in response to the stakeholders proposition that the ban on personal cross-examination should apply in all matters where there are allegations of family violence, not just in certain circumstances, it is pointed out that 'measures in the Bill have responded to this feedback by making it compulsory for the court to apply other appropriate protections for victims of family violence when personal cross-examination is not prohibited'. As one of the stakeholders, we appreciate this measure but point out that as in the story immediately above, it was the barristers who acted as gatekeepers to keep allegation of family violence from the court (whilst presumably thinking they were acting in their client's best interests).

Given that the new section 102NA (pt.9, page 9 Exp. Memo.) would require both the alleged perpetrator and the victim to conduct cross-examination through a legal representative, it is even more important that legal representatives understand and observe an obligation to not re-traumatise or provoke either party.

Pt 10, page 9 Exp. Memo., rightly refers to the existing section 101 of the Family Law Act and points out that this requires the court to forbid the asking of offensive questions. Based on our members and callers experiences, the question of what will be an **offensive question** is highly contestable and particularly in the Federal Circuit Court, is frequently interpreted through an adversarial lens that is not informed by familiarity with family violence.

CSMC noted in our original submission on cross-examination that:

All judicial officers need training in family violence and its impacts ... to realise that:

- this is a recognised social problem with documented impacts on women and children that include murder;
- there are good resources available to improve understanding of these issues; and
- it is part of their duty to be informed about the impacts of partner and family violence to ensure the best interests of the child/ren and the safety of all parties is realised.

We raise these issues of prohibiting cross-examination in every instance of alleged violence and training of the Court officials in part because we know that it is sometimes the least advantaged who are able to pursue an injunction or intervention order against a violent family member. Aboriginal and Torres Strait Islander women, women from newly arrived migrant communities, women who live in rural and remote areas, and women who fear engagement with police and courts for whatever reason, are high amongst these.

### **Recommendation 1**

The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 be amended to prohibit the practice of parties cross examining each other wherever allegation of family violence are made and the law make it clear that if either party believes violence has occurred, this should be made available to the Court at the earliest opportunity.

### **Recommendation 2**

The Legal and Constitutional Affairs Legislation Committee recommend comprehensive training for all judicial officers in respect of issues relating to family and domestic violence, and their impact on Family Law processes (including the capacity of victims to present well), and judgements.

CSMC welcomes initiatives to educate judicial officers on issues relating to family violence including the production of the National Family and Domestic Violence Bench Book. We ask that this committee further underline the importance of these additions to a system that seeks to make the best possible decisions through its recommendation.

## 2. Ensuring procedural fairness and the best interests of the child

We understand the concerns of the government and others who will be voting on the legislation, to ensure procedural fairness and we see this evidenced throughout the draft legislation and particularly in relation to:

- The exclusion of Interim family violence orders on the basis that they may be used to delay or frustrate the trial
- Efforts to ensure all parties are able to afford representation.

CSMC shares the concern for procedural fairness. Whilst we are a member based organisation and clearly advocate for the interests of single mothers, we do this ethically and mindfully. We recognise that it is, both in our experience and in actuarial data, very rarely the mother who is violent and particularly dangerous to the safety and well-being of the children, but it does happen. We would never therefore wish the law to be unfair to either party.

We mention this because sometimes it is the exceptional circumstance that underlines a more general point. We spoke with two children fostered into a member family who believed their mother was trying to kill them and whose father struggled to have the Court (and State Child Protection services) take his allegations seriously. It was the eventual hospitalisation of both children that saw this matter resolved.

The other side of this coin, is the many children and women who have been harmed or killed by their husband or partner, and father, when courts and related services did not, would not, or could not hear them.

So we support efforts to ensure fairness for all parties, with the proviso that any action of the Court, however inadvertently, that reengages, ignores or minimises family violence is no longer possible and that the best interests of the child are always paramount.

We appreciate the strenuous efforts in the proposed legislation to ensure all parties are represented and where they are unwilling to be represented, to enable them to present their case and if necessary, support their case by questions from the court.

### **Recommendation 3**

The Committee recommend specific areas for review of this Division of the legislation. This should include whether the balance of protections and fairness is achieved; whether outcomes for children are improved and whether anything in this Division either encourages or limits litigation abuse.

### 3. Financial impact and efforts to ensure parties are represented.

CSMC is concerned that the Explanatory Memo (pt.13 pg. 3) states that there are deemed 'no direct financial implications from implementing the measures in this Bill.'

We see the following implications:

- The need for comprehensive training of Judges, Lawyers and other court officials in all the Courts hearing Family Law matters and particularly perhaps, the Federal Circuit Court where judges may have come from very different and unrelated areas of law.
- Additional facilities and resources to ensure that every court in Australia hearing a Family Law related matter has the capacity to provide effective protective measures, including and not limited to: increased use of video and audio technology, separate and safe physical spaces for parties to enter and wait, and suitable alternate venues.
- Significant implications for legal aid funding: we note the Australian government is in negotiation with National Legal Aid to determine the impacts and to ensure adequate funding is available. We also note however, that NLA represents only the eight State and Territory Commissions. This means it does not include Aboriginal legal rights services and the Community Legal Services that specialise in family law. We view this as a problem as we know legal aid and community legal services across Australia are stretched in many matters including in respect of family law.

#### **Recommendation 4**

That the legislation acknowledge that there will be financial implications of this Bill and that the Australian government will work with relevant parties including the National Legal Aid, representatives of Aboriginal and Community Legal Services and State and Territory partners, to ensure these are met.