

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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

August 2018

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# **Recommendations**

## **Recommendation 1**

**2.57 The committee recommends that details regarding the funding of the measures contained in the bill be made public prior to the commencement of debate on the bill in the Senate.**

## **Recommendation 2**

**2.58 The committee recommends that the bill be passed, subject to Recommendation 1.**



# Chapter 1

## Introduction and background

1.1 On 28 June 2018, the Senate referred the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 [Provisions] (the bill) to the Legal and Constitutional Legislation Committee (the committee) for inquiry and report by 13 August 2018.

1.2 The Senate Selection of Bills Committee recommended that the bill be referred for inquiry for a number of reasons, including to:

- ensure the bill is fit for purpose; and
- enable stakeholders to provide advice on potential problems or improvements that could be made to the bill.<sup>1</sup>

1.3 The bill makes a number of amendments to the *Family Law Act 1975* (Cth) (the Act) in order to prohibit direct cross-examination between parties in proceedings where allegations of family violence are raised.

### Background and purpose of the bill

1.4 The bill is primarily concerned with the practice of direct cross-examination in proceedings under the Act where family violence is alleged. According to the Attorney-General's Department's (AGD) submission, direct cross-examination is defined as:

...where a party asks questions of another party or witness directly, rather than having questions asked by a legal representative.<sup>2</sup>

1.5 Concerns have been raised in recent years regarding the potential for victims of family violence to be cross-examined by their alleged abuser. This situation has been widely recognised as causing additional harm for victims of family violence. As the Attorney-General, the Hon. Mr Christian Porter MP, explained:

The direct cross-examination of a victim of family violence by their alleged perpetrator can expose the victim to significant re-traumatisation and affect their ability, importantly, to give clear and cogent evidence. The power dynamics underlying family violence can also make it difficult for victims to effectively cross-examine their alleged perpetrator. Victims of family violence also cite the fear of being cross-examined directly by their alleged perpetrator as a significant factor in deciding to settle a matter, often on terms they consider to be unfavourable. This can place victims and children at increased risk of harm.<sup>3</sup>

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1 Senate Standing Committee for the *Selection of Bills, Report No. 7 of 2018*, 28 June 2018, Appendix 3.

2 Attorney-General's Department, *Submission 16*, p. 2.

3 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

1.6 Direct cross-examination in cases where allegations of family violence exist appears to be a relatively regular occurrence. According to the Attorney-General, that research conducted by the Australian Institute of Family Studies indicated that, between 2015 and 2017, direct cross-examination in final hearings had occurred in 173 matters where allegations of family violence were present and one or more of the parties were self-represented.<sup>4</sup>

1.7 Judicial officers have general but extensive powers in relation to the cross-examination of witnesses under other legislation.<sup>5</sup> Case law has also acknowledged the high level of discretion that can be exercised by judicial officers in managing proceedings containing family violence, including whether and how cross-examination will proceed.<sup>6</sup> However, at present, there is no specific prohibition on one party directly cross-examining another party in cases where family violence allegations have been raised.

1.8 The need for reform in this regard has been recognised in a number a recent reports and inquiries, including:

- The Productivity Commission's 2014 report on its *Access to Justice Arrangements* inquiry, which recommended that amendments be made to the Act to prevent direct cross-examination in cases where family violence has been alleged.<sup>7</sup>
- The Family Law Council's 2016 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, which noted that direct cross-examination can perpetuate the abuse of victims of family violence and lead to incomplete and poor-quality evidence.<sup>8</sup>
- At the October 2016 COAG National Summit on Reducing Violence against Women and their Children, it was agreed that a ban should be placed on the direct cross-examination of victims by their perpetrators in family violence and family law proceedings.<sup>9</sup>

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4 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

5 See, for example, the *Family Law Act 1975* (Cth) (the Act), the *Evidence Act 1995* (Cth) and in state legislation.

6 *Truman & Truman* [2008] FamCAFC 4 (21 January 2008).

7 Productivity Commission, *Access to Justice Arrangements* inquiry report, December 2014, <https://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 7 August 2018).

8 Family Law Council, *Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, June 2016, <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> (Accessed 7 August 2018).

9 Attorney-General's Department, *Submission 16*, p. 2.

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- The House of Representatives Standing Committee on Social Policy and Legal Affairs December 2017 report, *A better family law system to support and protect those affected by family violence*, recommended legislation to prohibit perpetrators of family violence from cross-examining the other party.<sup>10</sup>
  - The 2018 report by the Australian Institute of Family Studies, *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*, which worked with the family law courts to determine the prevalence of direct cross-examination.<sup>11</sup>

1.9 The bill is intended to address the need for reform in this area. In his second reading speech on 28 June 2018, the Attorney General stated that the purpose of the bill is to ensure that victims of family violence have adequate protection during cross-examination in all family law proceedings.<sup>12</sup> The key provisions of the bill are summarised below.

### **Key provisions**

1.10 As outlined in the Explanatory Memorandum, the bill would amend the Act to provide new restrictions on direct cross-examination in situations where family violence allegations exist.<sup>13</sup> The bill would insert new 'Division 4-Cross-examination of parties where allegations of family violence' into Part XI of the Act, and would make the following key amendments:

- the prohibition of personal cross-examination where there is an allegation of family violence between the parties to the proceedings and certain circumstances are satisfied;
- the provision that if personal cross-examination is prohibited, cross-examination must be conducted by a legal representative; and
- the provision that, if there is an allegation of family violence and personal cross-examination is not prohibited, the court must ensure that there are appropriate protections for the party who is the alleged victim of the family violence.

1.11 The bill also includes provision for a review of the bill's operations, to be conducted after the second anniversary of the legislation's commencement.<sup>14</sup>

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10 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*, December 2017.

11 Australian Institute of Family Studies, *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*, June 2018, [https://aifs.gov.au/sites/default/files/publication-documents/1806\\_direct\\_cross-examination\\_in\\_family\\_law\\_matters\\_report\\_0.pdf](https://aifs.gov.au/sites/default/files/publication-documents/1806_direct_cross-examination_in_family_law_matters_report_0.pdf) (accessed 19 July 2018).

12 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

13 Explanatory Memorandum, p. 4.

14 Explanatory Memorandum, pp. 2–3.

***Prohibition of personal cross-examination where allegations of family violence have been raised***

1.12 The bill would prohibit personal cross-examination where certain circumstances exist in a case. New section 102NA provides that if, in proceedings under the Act, a party intends to cross-examine another party, an allegation of family violence exists, and certain circumstances are present, mandatory requirements will apply to the cross-examination.<sup>15</sup> The circumstances are:

- one party (the examining party) intends to cross-examine another party (the witness party); and
- there is an allegation of family violence between the examining party and the witness party; and
- any of the following are satisfied:
  - either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;
  - a family violence order (other than an interim order) applies to both parties;
  - an injunction under section 68B or 114 of the Family Law Act for the personal protection of either party is directed against the other party; or
  - the court makes an order that the mandatory requirements apply to the cross-examination.<sup>16</sup>

1.13 If the above circumstances are found to exist, the following mandatory requirements under proposed subsection 102NA(2) would apply to the cross-examination:

- the parties must not personally cross-examine each other; and
- the cross-examination must be conducted by a legal representative acting on behalf of the examining party.<sup>17</sup>

1.14 Proposed subsection 102NB introduces a requirement for the court to ensure there are appropriate protections for the party who is the alleged victim of the family violence in situations where the mandatory requirements do not apply. Subsection 102NB applies where:

- the examining party intends to cross-examine the witness party personally; and
- an allegation of family violence between the examining party and the witness party is present; and

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15 Explanatory Memorandum, p. 9.

16 Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, subsection 102NA(1).

17 Explanatory Memorandum, pp. 8–9.

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- section 102NA does not apply to prevent the examining party cross-examining the witness personally.<sup>18</sup>

1.15 The Explanatory Memorandum states that where the mandatory protections do not apply the court may order a number of protections, including those currently under the Act and in other legislation.<sup>19</sup> Examples of appropriate protections suggested in the Explanatory Memorandum may include video links or screens during cross-examination.<sup>20</sup>

### ***Review of the proposed Division***

1.16 Proposed section 102NC of the bill would provide that a review of the proposed amendments be commenced as soon as possible after the second anniversary of the legislation commencing.<sup>21</sup> The review period may be altered by regulation under proposed subsection 102NC(b).<sup>22</sup>

1.17 According to the Explanatory Memorandum, the purpose of the proposed review would be:

...to ensure that the amendments are operating as intended to reduce potential trauma to victims of family violence, while also maintaining procedural fairness for all parties.<sup>23</sup>

### **Consultation on the bill**

1.18 After noting the recommendations of the Council of Australian Governments (COAG) and other stakeholders, the Attorney-General's Department (AGD) released an Exposure Draft of the bill for public consultation from 17 July 2017 to 25 August 2017.<sup>24</sup> AGD received a number of submissions from organisations, experts, judicial officers and members of the public, which informed the bill's scope and suggested amendments, some of which were later implemented.<sup>25</sup>

### **Conduct of the inquiry**

1.19 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 13 July 2018. The committee also wrote directly to some individuals and organisations inviting them to make submissions.

1.20 The committee received 31 submissions, which are listed at appendix 1 of this report. All submissions are available in full on the committee's website.

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18 Explanatory Memorandum, p. 13.

19 Explanatory Memorandum, p. 13.

20 Explanatory Memorandum, p. 14.

21 Explanatory Memorandum, p. 15.

22 Explanatory Memorandum, p. 15.

23 Explanatory Memorandum, p. 15.

24 Attorney-General's Department, *Submission 16*, p. 4.

25 Attorney-General's Department, *Submission 16*, p. 4.

1.21 The committee held a public hearing on 1 August 2018 in Melbourne.

### **Financial implications**

1.22 The Explanatory Memorandum states:

There are no direct financial implications from implementing the measures in the Bill. The Australian Government is working with National Legal Aid to determine the impacts that are expected to result from the measures in the Bill and ensure that adequate funding is available.<sup>26</sup>

1.23 This issue was raised by a number of submitters who expressed concerns regarding the financial implications of this bill, particularly in relation to National Legal Aid services and the family courts. This issue will be further examined in chapter 2.

### **Compatibility with human rights**

1.24 According to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.<sup>27</sup> These rights and freedoms include:

- eradication of discrimination against women: Articles 2 and 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- the right to a fair hearing: Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR);
- best interests of the child: Article 3(1) of the Convention on the Rights of the Child (CROC); and
- protection of children on dissolution of a marriage, and generally: Articles 23(4) and 24(1) of the ICCPR, and Article 3(2) of the CROC.

### **Structure of this report**

1.25 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, discusses matters raised by submitters about the proposed amendments, and outlines the committee's views.

### **Acknowledgements**

1.26 The committee thanks all organisations and individuals that made submissions to this inquiry, as well as those that gave further evidence at public hearings.

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26 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)

27 Explanatory Memorandum, p. 3.

# Chapter 2

## Key issues

2.1 This chapter outlines the key issues raised in written submissions and in evidence provided at the public hearing on 1 August 2018.

2.2 The intent of the bill was overwhelmingly supported by inquiry participants.<sup>1</sup> However, a number of concerns were raised in evidence, including:

- access to justice issues, including:
  - ensuring legal representation for all parties affected by the bill; and
  - achieving procedural fairness;
- ensuring adequate funding for the bill's proposed provisions;
- issues relating to the role of legal representatives, including the duration of representation;
- the exclusion of interim family violence orders from the scope of the bill's proposed provisions; and
- the bill's reliance on judicial discretion and whether training will be provided to judicial officers.

2.3 This chapter also sets out the committee's views and recommendations.

### Access to justice issues

2.4 As noted in chapter 1 of this report, the bill proposes that mandatory protections would apply to cross-examinations in certain circumstances, as per proposed section 102NA. Where the mandatory protections would apply, the following requirements must be followed in relation to cross-examination:

- the examining party must not cross-examine the witness party personally; and
- the cross-examination must be conducted by a legal representative acting on behalf of the examining party.<sup>2</sup>

2.5 The proposed requirements would apply in cases where:

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1 See: Rape & Domestic Violence Services Australia, *Submission 7*, p. 2; The Royal Australian & New Zealand College of Psychiatrists, *Submission 8*, p. 2; Australian Women Against Violence Alliance, *Submission 9*, p. 1; Top End Women's Legal Service Inc, *Submission 10*, p. 2; The ACT Bar Association & ACT Law Society, *Submission 15*, p. 1; Liberty Victoria, *Submission 17*, p. 1; Divorce Partners, *Submission 20*, p. 1; Uniting Church in Australia, *Submission 23*, p. 1; Australian Bar Association, *Submission 25*, p. 3; Women's Legal Services Australia, *Submission 22*, p. 3; National Legal Aid, *Submission 29*, p. 4.

2 Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (FL Bill), subsection 102NA(2).

- the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim; and/or
- the examining party is the alleged victim of the family violence and the witness party is the alleged perpetrator.<sup>3</sup>

2.6 A number of submitters argued that the mandatory prohibition on direct cross-examination in certain cases, as set out in the bill, could negatively affect access to justice in several ways. First, some parties who might not qualify for legal aid might nonetheless struggle to afford private legal representation, or may be exposed to financial hardship as a result of engaging such legal representation. Second, parties unable to access legal assistance or engage private legal representation would be unable to conduct cross-examination of the other party, raising questions of procedural fairness. These matters are discussed below in detail.

### ***Ensuring legal representation***

2.7 A common concern across a number of submissions was that the requirement to use a legal representative for cross-examination could result in some individuals 'falling between the cracks' of the proposed new arrangement. In particular, submitters expressed concern that parties who do not qualify for legal assistance, but also cannot afford private legal representation, would be denied the opportunity to cross-examine a witness.<sup>4</sup>

2.8 Rape & Domestic Violence Services Australia (R&DVSA) stated that many parties who had experienced family violence fell into the above category, which R&DVSA described as the 'missing middle'.<sup>5</sup>

2.9 National Legal Aid submitted that, without appropriate funding and resourcing for the proposed measures, the bill's provisions could disempower many self-represented litigants who may be unable to access Legal Aid or afford private representation.<sup>6</sup> Similarly, the Australian Bar Association (ABA) voiced concern that the bill's proposed provisions were based on an expectation that parties would either qualify for Legal Aid or retain private representation, when in fact some parties might be unable to pursue either option. The ABA noted that the existing threshold of Legal Aid in family law proceedings was dependent on certain criteria being satisfied, including a means test, Legal Aid's funding guidelines, and a legal merits test.<sup>7</sup> The ABA stated that the current thresholds 'would prevent many self-represented litigants from accessing representation through a grant of Legal Aid'.<sup>8</sup>

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3 FL Bill, subsection 102NA, Note 1.

4 Rape & Domestic Violence Services Australia, *Submission 7*, p. 3; Australian Bar Association, *Submission 25*, p. 3; National Legal Aid, *Submission 29*, p. 6; The ACT Bar Association & ACT Law Society, *Submission 15*, pp. 4–5.

5 Rape & Domestic Violence Services Australia, *Submission 7*, p. 3.

6 National Legal Aid, *Submission 29*, p. 6.

7 Australian Bar Association, *Submission 25*, p. 3.

8 Australian Bar Association, *Submission 25*, p. 4.

2.10 The ACT Bar Association and ACT Law Society (ACTBA and ACTLS) raised similar concerns regarding parties who may not qualify for Legal Aid, yet may nonetheless be unable to afford private legal representation:

It is noted that the government is in negotiations with National Legal Aid and so the position of funding for these provisions is not yet known. Assuming that legal aid will not be provided for all parties in respect of whom an order under the provisions is made, then the question arises as to how payment will be ensured for those who are not eligible for legal aid. If there is to be a means test applicable to the provision of legal aid for these purposes there will still be a category of people who, although they do not meet the requirements for legal aid on a means test basis, they nonetheless do not have sufficient resources to pay for a lawyer privately.<sup>9</sup>

2.11 R&DVSA observed that the proposed new measures may compel parties who have experienced family violence to engage private legal representation, which could subsequently cause significant financial hardship.<sup>10</sup> R&DVSA noted that this concern was raised by the Victorian Royal Commission into Family Violence during its inquiries.<sup>11</sup> Further, the financial burden of legal representation could force parties to consent to parenting arrangements which may be unsafe or unjust for the victims of family violence and/or their children.<sup>12</sup>

2.12 The Explanatory Memorandum provided details regarding the intended operation of this section and the process envisaged by the bill:

These amendments anticipate a process in which the court, before a final hearing, would make a request or direction that a party engage a lawyer. It is expected that a party would seek private legal representation, where possible. If they cannot obtain private legal representation, they could subsequently seek representation through legal aid. It is intended that these arrangements would be provided for in the court rules and/or practice directions as necessary, to ensure that the courts are able to determine the internal processes and procedures that will best facilitate legal representation and minimise delays for the courts.<sup>13</sup>

2.13 The Attorney-General's Department (AGD) stated that there were ongoing discussions with National Legal Aid in relation to this matter, which would be resolved prior to the consideration of the bill in Parliament.<sup>14</sup>

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9 The ACT Bar Association & ACT Law Society, *Submission 15*, pp. 4–5.

10 Rape & Domestic Violence Services Australia, *Submission 7*, p. 3.

11 Rape & Domestic Violence Services Australia, *Submission 7*, p. 3.

12 Rape & Domestic Violence Services Australia, *Submission 7*, p. 3.

13 Explanatory Memorandum, Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Explanatory Memorandum), p. 12.

14 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, xxx, pp. 24–25.

2.14 In response to queries from the committee regarding this issue, AGD advised that the bill's proposed provisions would require that the eligibility criteria for legal assistance change for the purposes of the bill's proposed model.<sup>15</sup> Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, AGD, explained that:

...there is not necessarily a simple cut-off, in terms of Legal Aid saying, 'No, you don't meet our eligibility,' for whatever circumstances. There might be a range of models, including co-contribution, so it will depend on the circumstances for the individual as to whether or not they would receive the full assistance from Legal Aid that would normally be available, whether or not their circumstances are such that they would make a co-contribution and still receive Legal Aid support.<sup>16</sup>

2.15 Mr Gifford further noted that parties who refused legal representation, either by National Legal Aid or privately engaged lawyers, would effectively forfeit their ability to cross-examine a witness if the mandatory protections were found to apply.<sup>17</sup>

### ***Procedural fairness***

2.16 Some submitters raised concerns that parties who were unable to access legal assistance or engage private legal representation could experience procedural unfairness due to their inability to conduct cross-examination of the other party.<sup>18</sup>

2.17 These submitters noted that a party who has experienced family violence, and who wishes to cross-examine their perpetrator, may be prevented from doing so if the party is unable to either access a grant of Legal Aid or obtain private representation. For example, Dr Tracey Booth, Ms Miranda Kaye & Dr Jane Wangmann stated in their submission:

A victim of violence who wishes to carry out her own personal cross-examination should have the option of doing so if she feels able. If such a victim is self-represented, it is likely that she has not satisfied the (very stringent) means test for Legal Aid and she is also unable to pay for legal representation. It would appear unfair for her to be required to pay for legal representation for cross-examination in such circumstances or not have the right to cross-examine her perpetrator. Cross-examination in family law cases can last for many days; lawyers' fees for such cross-examination would be very expensive.<sup>19</sup>

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15 Ms Esther Bogaart, Acting Assistant Secretary, Family Safety Branch, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 27.

16 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 25.

17 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 25.

18 Centre for Excellent in Child and Family Welfare, *Submission 19*, p. 2; Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann, *Submission 2*, pp. 2–3; The ACT Bar Association & ACT Law Society, *Submission 15*, p. 3; Australian Bar Association, *Submission 25*, p. 4.

19 Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann, *Submission 2*, pp. 2–3.

2.18 Submitters from legal associations noted that the inability to conduct cross-examination could shift the responsibility of gathering evidence onto the court and the judicial officer overseeing the case.<sup>20</sup> The ABA submitted that the inability for parties to conduct cross-examination could impact the court's ability to make a sound decision. It stated:

Without cross-examination, a Court is left in the unenviable position of determining a dispute without a proper and fulsome testing of the evidence. In short, where there is a dispute of fact but no cross-examination, the court cannot make a finding one way or the other.<sup>21</sup>

2.19 The ABA further stated that, according to recent case law, judicial officers have limited scope to find evidence that may otherwise be adduced through cross-examination, and – were they to do so – would be compromised in their ability to assess the case.<sup>22</sup>

2.20 The ACTBA and the ACTLS similarly expressed concern that the Explanatory Memorandum suggests that the court would have scope to ask questions of a witness who could not be cross-examined.<sup>23</sup> The ACTBA and the ACTLS stated that this could lead to complaints in relation to the perceived intrusion or intervention of a trial judge during adversarial proceedings.<sup>24</sup>

2.21 In contrast, AGD stated in its submission that the bill ensures procedural fairness for both the victim and the perpetrator of family violence by allowing cross-examination of parties by a legal representative.<sup>25</sup> It further advised:

Where a party refuses to utilise legal representation, the matter will still proceed, with that party foregoing their opportunity to cross-examine the other party. An unrepresented party will still be entitled to present his or her case through his or her own evidence in chief or by directly questioning other witnesses.<sup>26</sup>

2.22 The Explanatory Memorandum addressed this issue in greater detail:

An unrepresented party who is unwilling to obtain the services of a legal practitioner or accept representation from legal aid, would still be entitled to present his or her case through, for example, his or her own evidence in chief or by personally questioning (including cross-examining) other witnesses. Furthermore, in deciding what orders to make for the purpose of resolving the proceedings, the court would, as part of its ordinary judicial

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20 The ACT Bar Association & ACT Law Society, *Submission 15*, p. 3.

21 Australian Bar Association, *Submission 25*, p. 4.

22 Australian Bar Association, *Submission 25*, p. 4.

23 The ACT Bar Association & ACT Law Society, *Submission 15*, p. 3.

24 The ACT Bar Association & ACT Law Society, *Submission 15*, p. 3. Also see: Australian Bar Association, *Submission 25*, p. 4.

25 Attorney-General's Department, *Submission 16*, p. 8.

26 Attorney-General's Department, *Submission 16*, p. 8.

function, be required to form its own view based on the totality of the evidence before it. In particular, the court would not be required to accept as true the evidence provided by the party who was unable to be cross-examined because of the operation of the Bill. A party unable, for this reason, to be cross-examined may be unconvincing (to the court) for other reasons or his or her evidence in chief might have been contradicted by other evidence adduced by the unrepresented party in the proceedings. There would also be some scope for the court itself to ask questions of a witness who was unable to be cross-examined. For these reasons, an unrepresented party who is unwilling to retain legal representation would still be able to present their case and receive a fair hearing.<sup>27</sup>

### **Adequate funding for National Legal Aid and courts to implement bill's measures**

2.23 A number of submitters raised concerns regarding the funding arrangements to support the bill's proposed model.<sup>28</sup> These submitters noted that the bill requires a party to seek private legal representation or a grant under Legal Aid in order to cross-examine a witness if the mandatory protections are found to apply. This may significantly increase demand for Legal Aid representation, in addition to other legal services such as Community Legal Centres and Aboriginal legal rights services.<sup>29</sup>

2.24 Some submitters argued that National Legal Aid and other community legal services operate on tight budgets and may not be able to absorb the cost of the bill's proposed model.<sup>30</sup> R&DVSA stated in its submission:

The Bill envisages that legal aid commissions will provide assistance where parties are prohibited from personal cross-examination but cannot afford to access private representation.

However, R&DVSA [is] concerned that legal aid commissions are not equipped to respond to even the current level of demand for legal assistance in relation to family violence.<sup>31</sup>

2.25 Several witnesses recommended that the Australian Government establish a separate funding stream for the bill's measures.<sup>32</sup> National Legal Aid, for example,

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27 Explanatory Memorandum, p. 6.

28 National Legal Aid, *Submission 29*, p. 6; Uniting Church in Australia Synod of Victoria and Tasmania, *Submission 23*, p. 2; Rape & Domestic Violence Services Australia, *Submission 7*, p. 2; Australian Women Against Violence Alliance, *Submission 9*, p. 1; The ACT Bar Association & ACT Law Society, *Submission 15*, p. 4; Women's Legal Services Australia, *Submission 22*, pp. 4-6; Australian Bar Association, *Submission 25*, pp. 3-4; Law Council of Australia, *Submission 26*, pp. 9-10.

29 Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann, *Submission 2*, p. 2; Council of Single Mothers and their Children, *Submission 6*, p. 4.

30 Women's Legal Services Australia, *Submission 22*, pp. 4-5; Law Council of Australia, *Submission 26*, p. 10; Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, 1 August 2018, p. 3;

31 Rape & Domestic Violence Services Australia, *Submission 7*, p. 4.

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recommended the creation of a dedicated Commonwealth Family Law and Family Violence Fund, which would support the bill's measures and assist in funding legal assistance centres.<sup>33</sup>

2.26 R&DVSA also supported the creation of a separate funding stream for the measures contained in the bill:

R&DVSA believes that additional, dedicated funding to legal aid commissions is vital to ensure that legal assistance is accessible to all parties who are prohibited from personal cross-examination, especially women who have experienced family violence. Moreover, a dedicated funding stream will ensure this initiative does not detract from other vital services provided by legal aid commissions to people who have experienced sexual, family or domestic violence.<sup>34</sup>

2.27 Women's Legal Services Australia also stated in its submission that without a separate funding stream for the bill's measures, Legal Aid Commissioners, Community Legal Centres and other specialised legal services would be unable to cope with the demand to provide lawyers to conduct cross-examination without redirecting resources from other areas of need.<sup>35</sup>

2.28 Other submitters put the view that the bill's provisions may create an added burden on court resources and cause delays in proceedings. The Law Council of Australia (the Law Council) noted that trials would likely be delayed due to the bill's proposed requirement that parties seek legal representation in certain circumstances:

The Law Council struggles to see how the family courts can oversee parties acquiring legal representation without, at least, one more extra procedural for each case before trial, adding to the costs of any represented litigant and delays. It is foreseeable that the Bill will have the consequence of trials being adjourned or trial listings being vacated so that legal representation can be obtained. The new provisions may also give parties the opportunity to delay for strategic reasons.<sup>36</sup>

2.29 The Law Council further observed that the bill did not provide additional funding for the family courts to enable them to implement the bill.<sup>37</sup> The Council of Single Mothers and their Children (CSMC) also highlighted this issue, stating that the courts would require additional resources to implement the protections proposed by

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32 Women's Legal Services Australia, *Submission 22*, p. 5. Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, 1 August 2018, p. 3; Ms Nicky Davies, Director, Family Law and Civil Justice Services, Legal Aid Queensland, *Committee Hansard*, 1 August 2018, p. 5

33 National Legal Aid, *Submission 29*, p. 7.

34 Rape & Domestic Violence Services Australia, *Submission 7*, p. 4.

35 Women's Legal Services Australia, *Submission 22*, p. 5.

36 Law Council of Australia, *Submission 26*, p. 10.

37 Law Council of Australia, *Submission 26*, pp. 6 and 10–11.

the bill, including increased use of video and audio technology, separate safe spaces for parties to enter and wait in the courts, and alternate venues.<sup>38</sup>

2.30 The Law Council also stated that the bill was likely to prompt parties who have experienced family violence, who may previously have avoided court action for fear of direct cross-examination, to proceed with their cases. This could subsequently cause further delays to court listings and add to the workload of the family courts.<sup>39</sup>

2.31 As noted in chapter 1, the Explanatory Memorandum stated that there are no direct financial implications from implementing the measures contained in the bill. It further explained that the Australian Government:

...is working with National Legal Aid to determine the impacts that are expected to result from the measures in the Bill and ensure that adequate funding is available.<sup>40</sup>

2.32 In its submission, AGD provided further details regarding the consultation process with National Legal Aid:

In March 2018, the department formed a Steering Committee with representatives from National Legal Aid and the family law courts, to ensure the necessary processes and procedures to successfully implement the measures are developed prior to their commencement. This work includes determining the processes and procedures that will best facilitate legal representation when the ban is in place. National Legal Aid is best placed to work with the department on the reforms because, unlike other legal assistance providers, legal aid commissions have national coverage and currently provide legal representation services in all family law court registries.<sup>41</sup>

2.33 It was further noted that the department, in its consultations with National Legal Aid, was also considering 'issues such as contributions from those that can afford to pay and ensuring that the measure cannot be exploited'.<sup>42</sup>

2.34 AGD further advised the committee that the department was close to finalising funding arrangements with National Legal Aid and that details may be available prior to debate on the legislation in the Parliament.<sup>43</sup>

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38 Council of Single Mothers and their Children, *Submission 6*, p.5. Also see: Law Council of Australia, *Submission 26*, p. 11.

39 Law Council of Australia, *Submission 26*, p. 10.

40 Explanatory Memorandum, p. 3.

41 Attorney-General's Department, *Submission 16*, p. 7.

42 Attorney-General's Department, *Submission 16*, p. 7.

43 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 30.

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### ***Broader issues of legal assistance funding and law reform***

2.35 The committee heard evidence from a number of submitters who stated that wider reform should be undertaken in relation to legal assistance funding and the family law system more broadly.<sup>44</sup>

2.36 This matter is beyond the scope of the committee's examination of the bill. The committee notes, however, that this issue may be considered by the review of the family law system currently being undertaken by the Australian Law Reform Commission (ALRC).<sup>45</sup>

### **Legal representation restricted to cross-examination**

2.37 Proposed subsection 102NA(2)(b) stipulates that, where certain circumstances exist in a case, any cross-examination must be conducted by a legal practitioner acting on behalf of the examining party. This requirement would be applied to both parties involved in cross-examination. According to the Explanatory Memorandum, this would ensure that 'neither party would be disadvantaged and both parties would be provided with reasonable opportunity to present their case'.<sup>46</sup>

2.38 Submitters from lawyers' and barristers' groups noted that the requirement appears to only mandate a lawyer for the cross-examination portion of the case, which may result in the legal representative being unable to fully understand the case and cross-examine a witness effectively.<sup>47</sup>

2.39 The ABA, for example, pointed to a number of difficulties in the proposal of a legal representative being present only for a portion of the final hearing:

The limited nature of such instructions on a brief to appear:

- a. introduces a process where the legal representative for one party will parachute in and then swiftly out of a hearing (for the sole purpose of cross-examining the other party and perhaps only on the topic of family violence);
- b. discourages the legal representative from developing and implementing an overall case plan in preparation for the final hearing;

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44 Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann, Submission 2, p. 2; Council of Single Mothers and their Children, *Submission 6*, p. 5; Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association, *Committee Hansard*, 1 August 2018, pp. 17–18.

45 On 9 May 2017, the Australian Government announced its intention to direct the Australian Law Reform Commission to conduct a review of the family law system. The terms of reference are available at the following website: <https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>.

46 Explanatory Memorandum, p. 12.

47 ACT Bar Association and ACT Law Society, *Submission 15*, pp. 2–3; Women's Legal Services Australia, *Submission 22*, pp. 5–6; Law Council of Australia, *Submission 26*, p. 6; National Legal Aid, *Submission 29*, p. 6; Australian Bar Association, *Submission 25*, p. 5.

c. excludes the legal representative's involvement in preliminary issues at final hearing, for example objections to evidence (which in some cases, will obviate the need for cross-examination on particular topics);

d. inhibits the legal representatives' understanding of, and ability to adapt to, the issues arising during the earlier stages of the hearing (for example, concessions made by a witness, the oral evidence given by a family report writer, an expert valuer or their own client under cross-examination);

e. prevents the legal representative from making submissions, arising from the cross-examination undertaken; and

f. nonetheless, requires the legal representative to read and consider all of the evidence to be relied upon at the final hearing.<sup>48</sup>

2.40 The ABA further expressed concern that the proposed model would constitute a breach to its Constituent Bodies' Rules. It also questioned whether a barrister's professional indemnity insurance would be available for such a limited period of representation.<sup>49</sup>

2.41 National Legal Aid also expressed concern at the requirement for legal representation to be required only for cross-examination. It submitted:

The role of cross-examination is to test the evidence presented to the court to enable the judicial officer to make the appropriate decision in the circumstances of the particular proceedings before the court. Cross-examination also puts the cross-examiner's case to the witness party. This requires an understanding of each party's case. The cross-examiner has the opportunity to read filed materials, to hear the evidence of the other party, and in the cross-examination to test the evidence by asking questions, including questions which flow from the responses received, with full knowledge of the circumstances of the case. In the family law context, the decisions to be made by the court relate to the safety and well-being of the children and the parties, the right of the child/ren to have a relationship with both parents, and the division of property and associated financial arrangements which may affect the party's livelihood.<sup>50</sup>

2.42 National Legal Aid recommended that the parties subject to the mandatory protections be provided with full representation throughout the duration of the trial, rather than representation limited to cross-examination.<sup>51</sup>

2.43 Conversely, AGD's submission stated:

Generally, it is expected that legal representation provided through legal aid commissions will apply to the final hearing, where cross-examination is most likely to take place. This is envisaged to include the necessary preparatory work for that hearing, including opportunities for settlement

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48 Australian Bar Association, *Submission 25*, p. 5.

49 Australian Bar Association, *Submission 25*, p. 5.

50 National Legal Aid, *Submission 29*, p. 6.

51 National Legal Aid, *Submission 29*, p. 6.

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through late-stage legally-assisted family dispute resolution, where appropriate.<sup>52</sup>

2.44 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Divison, AGD, further clarified:

...I think people are concerned that we're talking about somebody being nothing more than a mouthpiece. That's certainly not the intention here. They'll come in for the final hearing where the cross-examination is more likely to occur. They'll be involved in the preparatory work for that hearing, so they'll actually look to see whether or not there's alternative ways of resolving the matter rather than actually taking it through to that final hearing. It's not the full extent that a person would have if they were otherwise eligible for legal aid, so they won't be there from the very instigation of the matter and go through to the very finality. It's much more towards the end of that particular hearing, but they will be much more than just a mouthpiece for the purposes of cross-examination.<sup>53</sup>

### **Exclusion of interim family violence orders**

2.45 Some submitters raised concerns regarding the exclusion of interim family violence orders from proposed subsection 102NA(1)(c)(ii). The Top End Women's Legal Service Inc. (WLSNT) submitted that interim family violence orders are commonly used due to the time delay often experienced in the courts in reaching a final hearing.<sup>54</sup> It also noted that if relevant criminal offences are ongoing, a family violence order is 'often adjourned until the criminal charges are finalised'.<sup>55</sup>

2.46 WLSNT further stated:

A person who has experienced family violence should not be subjected to cross-examination by their perpetrator simply because an interim family violence order is in place as the matter awaits hearing. WLSNT believes the distinction to be artificial, contrary to the experiences of victims of family violence, and with capacity to undermine the legislative intention to afford appropriate protections to family violence victims whilst facilitating evidence on crucial matters.<sup>56</sup>

2.47 In recognition of these concerns, the Explanatory Memorandum explained that interim family violence orders:

...have been excluded because they may be made ex parte and/or without a hearing. This leaves open the potential for a party to obtain an interim

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52 Attorney-General's Department, *Submission 16*, p. 7.

53 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 28.

54 Top End Women's Legal Service Inc, *Submission 10*, p. 2.

55 Top End Women's Legal Service Inc, *Submission 10*, p. 2.

56 Top End Women's Legal Service Inc, *Submission 10*, p. 2.

family violence order shortly before or during a family law trial, for the purpose of delaying or frustrating the trial.<sup>57</sup>

2.48 At the hearing, AGD provided further explanation as to why interim family violence orders were excluded from the bill's scope:

Interim family violence orders have been excluded, mainly because they can be made *ex parte* or without a hearing. This leaves open the potential for a party to obtain an interim family violence order just before or during their family law trial, which may delay or frustrate these provisions and the hearing. So it's not that we don't think that interim family violence orders are important, but we think they could be used as a litigation strategy as well to frustrate the matter. Where an interim family violence order applies to both parties, they can still apply to the court for a ban, and the explanatory memorandum is clear that that is one of the things that a court might take into account. So, if that person wishes to enliven these provisions, they can say, 'I have an interim family violence order,' and the court will make a decision based on that.<sup>58</sup>

### **Judicial discretion and training**

2.49 Some submitters highlighted concerns regarding the judicial discretion contained in proposed subsection 102NA(3) to make an order under subparagraph 102NA(1)(c)(iv) to apply the mandatory protections.<sup>59</sup> Women's Legal Services Australia stated that people who have experienced family violence may not report family violence due to fear of further harm and not being believed, feelings of shame and distrust, and cultural and/or language barriers to reporting.<sup>60</sup> This view was shared by CSMC, which submitted that many parties who have experienced family violence are inconsistently treated by judicial officers.<sup>61</sup>

2.50 A number of submitters recommended that training should be provided to judicial officers in relation to matters involving family violence.<sup>62</sup> While the issue of judicial training is beyond the scope of the bill in question, the committee notes that the topic is relevant in regards to how judicial officers will exercise the functions granted under proposed section 102NB. The committee also observes that this issue may be relevant to the review of the family law system being undertaken by the ALRC.

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57 Explanatory Memorandum, p. 10.

58 Ms Esther Bogaart, Acting Assistant Secretary, Family Safety Branch, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 30.

59 Council of Single Mothers and their Children, *Submission 6*, pp. 2–4.

60 Women's Legal Services Australia, *Submission 22*, pp.6–7.

61 Council of Single Mothers and their Children, *Submission 6*, pp. 2-3.

62 Council of Single Mothers and their Children, *Submission 6*, p. 5; Women's Legal Services Australia, *Submission 22*, p. 7.

2.51 Addressing this issue, AGD noted that, as part of the implementation of the proposed measures in the bill, the Australian Government had funded a number of initiatives to support judicial training:

The implementation of these measures requires the expertise of the judiciary and family law professionals, particularly as it relates to understanding family violence. The government has funded the Australasian Institute of Judicial Administration to develop the National domestic and family violence bench book and the National Judicial College of Australia to deliver family law and family violence training to federal, state and territory judges in 2017, 2018 and 2019...<sup>63</sup>

### **Committee view**

2.52 The committee recognises that there exists a significant problem in relation to direct cross-examination of parties in cases where allegations of family violence have been raised. In particular, the committee is alert to the fact that re-traumatisation can occur as a result of a victim being cross-examined by their perpetrator. The committee welcomes the bill's attempt to address this situation and prevent further harm to those experiencing family violence. It also notes that the intent of the bill was widely supported in evidence tendered to the inquiry.

2.53 The committee notes that a critical tension emerged in evidence, which was the balance between procedural fairness and the protection of parties who have experienced family violence. The committee acknowledges the importance of striking a balance between both elements in order to ensure that parties to such proceedings are protected, but also have equal opportunity to present their cases and receive a just outcome. After carefully considering the evidence presented to the committee in relation to these matters, the committee finds that the correct balance has been achieved by the bill.

2.54 Concerns regarding the funding of the bill's proposed measures were a consistent theme throughout evidence provided to the committee. The committee notes that, while the Explanatory Memorandum of the bill does not set out how the measures will be funded, AGD has confirmed that an agreement with National Legal Aid is imminent and expects that details will be publicly available when the bill is debated in Parliament.

2.55 The committee further acknowledges the evidence provided regarding litigants who may not qualify for legal assistance and also cannot afford private legal representation. Evidence gathered by the committee has suggested that this group of people may be significantly impacted by the bill's proposed measures. Again, however, the committee notes the advice provided by AGD that this issue is currently being considered in the department's consultations with National Legal Aid.

2.56 The committee believes there should be a commitment to additional funding for Legal Aid before the bill is put to a vote in the Senate, including the amount,

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63 Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 3 August 2018, p. 24.

timeline for distribution and method of distribution; and in any additional funding for Legal Aid that is announced, the government make clear the eligibility of litigants who do not meet regular eligibility requirements but could not otherwise afford a private lawyer.

**Recommendation 1**

**2.57** The committee recommends that details regarding the funding of the measures contained in the bill be made public prior to the commencement of debate on the bill in the Senate.

**Recommendation 2**

**2.58** The committee recommends that the bill be passed, subject to Recommendation 1.

**Senator the Hon Ian Macdonald**

**Chair**

# Appendix 1

## Submissions

- 1 The Commissioner for Victims' Rights, South Australia
- 2 Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann
- 3 National Council of Single Mothers & their Children
- 4 Queensland Law Society
- 5 Professor Patricia Eastal AM, PhD
- 6 Council of Single Mothers and their Children
- 7 Rape & Domestic Violence Services Australia
- 8 The Royal Australian & New Zealand College of Psychiatrists
- 9 Australian Women Against Violence Alliance
- 10 Top End Women's Legal Service Inc.
- 11 Baptist Care Australia
- 12 New South Wales Bar Association
- 13 Queensland Family & Child Commission
- 14 Domestic Violence Legal Workers' Network (WA)
- 15 The ACT Bar Association and the ACT Law Society
- 16 Attorney-General's Department
- 17 Liberty Victoria
- 18 Initiatives For Women In Need (IWIn)
- 19 Centre for Excellence in Child and Family Welfare Inc.
- 20 Divorce Partners
- 21 Mr Phil Bachmann
  - 21.1 Supplementary to submission 21
- 22 Women's Legal Services Australia
- 23 Uniting Church of Australia Synod of Victoria and Tasmania
- 24 Australian Human Rights Commission
- 25 Australian Bar Association
- 26 Law Council of Australia
  - 26.1 Supplementary to submission 26
- 27 Catholic Women's League Australia Inc.
- 28 The Chief Magistrate of the Local Court of New South Wales

- 29 National Legal Aid
- 30 Bar Association of Queensland
- 31 Adelaide Magistrates Court
- 32 Non-Custodial Parents Party (Equal Parenting)
- 33 Dr David Thorp

## **Additional information, answers to questions on notice and tabled documents**

### **Additional information**

- 1 Correspondence from Dr Stewart Fenwick, Chief Executive Officer and Principal Registrar, Federal Circuit Court of Australia, dated 10 August 2018, in relation to evidence provided at a public hearing on 1 August 2018.

### **Answers to questions on notice**

- 1 New South Wales Bar Association – answer to question on notice taken at the public hearing on 1 August 2018 (received 8 August 2018).
- 2 Rape & Domestic Violence Services Australia - answer to question on notice taken at the public hearing on 1 August 2018 (received 6 August 2018).

### **Tabled documents**

- 1 Council of Single Mothers and Their Children - statement made by a member of CSMC at the public hearing on 1 August 2018.

## **Appendix 2**

### **Public hearings and witnesses**

**Wednesday, 1 August 2018 – Melbourne**

BAILES, Mr Morry, President, Law Council of Australia

BOGAART, Ms Esther, Acting Assistant Secretary, Family Safety Branch, Attorney-General's Department

DAVIDSON, Ms Jenny, Chief Executive Officer, Council of Single Mothers and Their Children

DAVIES, Ms Nicky, Director Family Law and Civil Justice Services, Legal Aid Queensland

De CAMPO, Ms Natalie, Senior Policy Solicitor, Queensland Law Society

DOOLAN, Mr Paul, Deputy Chair, Family Law Section, Law Council of Australia

DUNN, Mr Matt, General Manager, Policy, Public Affairs and Governance, Queensland Law Society

GIFFORD, Mr Cameron, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department

KEARNEY SC, Mr Michael, Chair, Family Law Committee, New South Wales Bar Association

LYNCH, Ms Angela, Chief Executive Officer, Women's Legal Service Queensland

MATTHEWS, Ms Helen, Women's Legal Services Australia

McINTYRE, Ms Kajhal, Legal Researcher and Project Worker, Rape and Domestic Violence Services Australia

PARAMASIVAM, Ms Gayathri, Associate Director Family Law, Victoria Legal Aid

SEBASTIAN, Ms Andi, Policy and Communication Officer, Council of Single Mothers and Their Children

TAYLOR, Mr Ken, President, Queensland Law Society

WILLIS, Ms Karen, Executive Officer, Rape and Domestic Violence Services Australia

WOLKE, Ms Kerry, Assistant Director, Family Safety Branch, Attorney-General's Department