14 August 2001

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Letter of Advice: Violence and Property Proceedings

The purpose of this Letter of Advice is to propose a reform to Part VIII of the *Family Law Act 1975* in order to direct courts exercising jurisdiction under the Act to have regard to the effects of family violence on the contributions of both parties in considering what orders should be made in property proceedings. The proposal reflects Council's concerns about the effect of the decision of the Full Court of the Family Court of Australia in the case of *In the marriage of Kennon* (1997) 22 Fam LR 1.

2. As you know, Council has been examining the general issue of family violence for a considerable period of time. The original scope of the project was to consider the social, legal and historical impact of violence on families and to examine how decisions of the Family Court should take violence in relationships into account. A process of submissions and consultations assisted in refining the terms of the original investigation. In 1996 Council agreed to focus on the impact of violence on decision-making about property and financial matters in family law disputes. Council published a Discussion Paper in 1998 examining the nature of possible financial remedies, as part of a property or spousal maintenance settlement or order. Further background on the genesis of this Letter of Advice is provided below.

3. At its meeting in Parramatta/Sydney on 23 and 24 July, Council had the opportunity to finalise its deliberations on whether the Act should direct courts exercising jurisdiction under the Act to have regard to the effects of family violence on the contributions of both parties in considering what orders should be made in property proceedings, and agreed to provide you with the following advice.

BACKGROUND

4. It is often said that the implementation of the *Family Law Act 1975* ("the Act") marked the end of the concept of "fault" as a relevant factor in family law proceedings. This is usually taken to mean that the former concepts of matrimonial "offence" are now no longer relevant

to the grounds for divorce, and responsibility for the marital break-up is irrelevant in determining the consequences of divorce so far as they concern children or finances.

5. This statement is sometimes taken to have the broader meaning that all questions of conduct or behaviour engaged in by the parties during a marriage are similarly irrelevant in deciding what the consequences of a divorce or separation should be. Yet in the context of proceedings for property adjustment or spousal maintenance, it has long been accepted that behaviour or conduct engaged in during the relationship that has direct financial consequences for the parties can and should be taken into account in assessing the weight to be attached to the s.75(2) factors: *In the Marriage of Ferguson* (1978) 34 FLR 342.

6. Of particular relevance in this context is s.75(2)(o), which refers to "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account". An example of such conduct would be where one party deliberately dissipates the parties' assets. However, the courts have consistently steered clear of attributing any weight to "conduct" or "fault" *as such*, irrespective of its financial consequences.

7. In the case of *In the marriage of Kennon* (1997) 22 Fam LR 1, the Full Court suggested that conduct during the marriage (and specifically domestic violence) may be relevant in determining the parties' contributions to property. In other words, conduct could be relevant in deciding contributions under s.79(4)(a)-(c), apart from any relevance conduct might have under the s.75(2) factors. In doing so, the Full Court was careful to make it clear that it was dealing only with conduct *relevant to contributions*. Consistently with earlier authority, it is still not permissible after *Kennon* to take account of behaviour or conduct *as such*, without identifying its impact either on the contributions issue or on the s.75(2) factors.

8. The Full Court in *Kennon* deliberately eschewed the notion that violence (or other behaviour of the required sort) reduced the contributions of the perpetrator (the concept of "negative contribution"). Instead, the focus was on the contributions of the "victim" - the principle being that the weight attached to those contributions may be increased if they were made more "arduous" as a result of the other's conduct. The Full Court in *Kennon* also made it clear that they did not intend the principle to be confined to domestic violence, but that it included other forms of behaviour or conduct that might have an impact on a party's ability to make contributions. The essential precondition for taking conduct or behaviour of any sort into account under this principle is that it ?had a discernible impact on the contributions of the other party?.

9. Against this background, Council has been considering for some time whether there is a case for any change to the wording of the relevant provisions in Part VIII to take account of these developments. Council issued a Discussion Paper, *Violence and the Family Law Act: Financial Remedies*, in 1998. This paper made a number of suggestions for change to the existing law, including introducing a specific reference to violence in the contribution provisions of s.79(4), in the s.75(2) factors and in s.72 (which sets out the conditions for a spousal maintenance claim). It was also suggested that a separate matrimonial tort be created in the Act, a suggestion that grew in significance following the High Court decision in *Re Wakim*,[1] which marked the demise of cross-vesting. A small number of submissions were received in response to the Discussion Paper. The weight of expert opinion in those responses favoured a change of the sort proposed, although it was clear that there was also considerable opposition to the proposals from some sections or groups in the community.

10. Council's deliberations were overtaken by events with the release in 1999 of the Government's Discussion Paper, *Property and Family Law: Options for Change*, insofar as it dealt with reform of s.79 of the Act. In its response to that Paper, Council indicated that it considered the issue of violence and conduct in property proceedings to be a complex one and that it would return to the issue after further consideration.

11. Council has now had an opportunity to consider the matter in greater detail. In the course of its work, Council has derived much benefit from the co-opted members of its Violence Sub-Committee, particularly Dr Juliet Behrens, Dr Grania Sheehan, Dr Carole Brown and Dr Sarah Middleton. Dr Middleton generously shared the findings of her doctoral thesis, which investigated the issue of violence in property proceedings from a doctrinal and empirical perspective.

12. The topic has proved to be among the most difficult Council has addressed. Numerous drafts were considered, and on most issues at various times there was considerable difference of opinion among members of the Committee and on the Council itself, and indeed among others with whom the topic has been discussed. The range of issues, and their difficulty, can be readily seen in Dr Middleton's two-volume thesis. Council would expect that legislation on the topic would be the subject of considerable public interest and controversy.

13. In these circumstances, Council considered that it would be most useful to provide you with this Letter of Advice, a short document that attempts to identify the most attractive of the many possible approaches to law reform in this area, and discuss its merits. Accordingly, this report sets out what Council sees as the strongest arguments for legislative change ("The Case for Reform of the Existing Law"); the proposal that seems the most satisfactory of the many that Council considered ("Proposals for amending the Act"); and a discussion of the likely benefits, and difficulties, of the proposals ("Discussion and Recommendations").

THE CASE FOR REFORM OF THE EXISTING LAW

14. Council believes that the most persuasive case for reform falls under three broad heads:

(a) **Uncertainties in the law after Kennon**: Following the decision in Kennon, there are uncertainties in the current law that should be clarified by legislation;

(b) **The relevance of violence in assessing contributions**: The law as set out in Kennon should be changed to allow the court to have regard to family violence in assessing the contribution of the perpetrator of the violence, not only in assessing the contribution of the victim of the violence; and

(c) **Empirical evidence on links between violence and property outcomes**: Research evidence suggests that women who suffer violence during relationships are more likely than other women to be disadvantaged in property settlements. Amendment to the legislation making explicit reference to the relevance of violence in the resolution of financial proceedings may lead to fairer outcomes in such cases. While the results of this study are subject to alternative explanations[2] they are consistent with the common sense proposition

that women who experience violence will often be too afraid to argue for a fair share of the property.

These arguments are made in more detail below.

Uncertainties in the law after Kennon

15. Council believes that aspects of the decision in *Kennon* leave the law in an uncertain state. This is undesirable given that many people, and their advisers, have to rely on this legislation, and judicial interpretation of the legislation, to order their affairs.[3] There is also evidence that a lack of certainty in the law has led to varying interpretations and professional practices,[4] which is itself undesirable in a system that values the principle that like cases should be treated alike.

16. The relevant uncertainties may be summarised as follows:

i. In a key passage in its judgment, the Full Court suggests two ways in which violence may be assessed as relevant to the issue of contributions. First, the Full Court refers to a "course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact on that party's contributions to the marriage" as a factor a judge may take into account in assessing contributions under s.79(4). The Full Court goes on to say that, "put the other way", the operative principle may be expressed as conduct "which has made his or her contributions significantly more arduous than they ought to have been". At first sight, these two limbs appear to be very different from each other. The first implies that, but for the violence, the victim of it would have made more contributions than they in fact did. It appears to imply that the role of the court is to add those missing contributions into the equation and to treat them as if they had been made. The second, on the other hand, does not entail a search for missing contributions, but seeks to add weight to those that were in fact made because of the circumstances surrounding them. Yet, despite this apparent difference, the relevant passage from the Full Court's majority judgment suggests that these two ways of looking at the issue were seen by the Court as interchangeable.

ii. It was noted above that issues of violence and conduct may be relevant to the assessment of the s.75(2) factors in certain circumstances. By this means, they may become relevant to spousal maintenance as well as to property adjustment. In the case of property adjustment specifically, this raises the issue of how violence and conduct factors should be weighed in such cases where (after *Kennon*) they may be relevant to the assessment of contributions *and* to the assessment of the s.75(2) factors. Is there a risk, in such cases, of the violence or conduct being counted twice - once in the weighing of contributions, and once in assessing future needs under s.75(2)? In *Kennon* itself, the majority of the Full Court did not fully address this issue, and stated merely that it preferred to express no final view on the proper role of conduct in the application of the s.75(2) factors.

iii. The scope of conduct covered by the *Kennon* decision is not clear. The majority of the Full Court dealt primarily with violence (and highlighted the lack of definition of the term for the purposes of Part VIII) while making it clear that it did not intend to confine the operation of the principle to forms of violent conduct. Presumably, any conduct occurring during a marriage that has a ?discernible impact? on contributions in the prescribed way (or, according to how the decision is read, in one of the two prescribed ways) will suffice. Beyond that, the majority decision offers no guidance on this important issue. Other sources of uncertainty can

be found in the judgment. For example its reference to "course of conduct" could indicate that the Full Court intended to exclude violence consisting of a single action. Again, there are a number of references to the exceptional or unusual nature of the sort of conduct that should be taken into account, and it is far from clear how or to what extent the relevant conduct must be serious, or exceptional.

The relevance of violence in assessing contributions

17. The decision in *Kennon* specifically rejects the concept of "negative contribution". That is, it rejects the idea that by behaving violently, the perpetrator of the violence reduces the value of his or her contributions. Instead, it focuses on the impact of the violence on the contributions of the victim. In the circumstances referred to in *Kennon*, that person's contributions may be given additional credit if, for example, it can be shown that the violence made it more arduous for the victim to have made those contributions. This approach means that the victim needs to provide evidence to that effect.

18. Council believes, however, that there is merit in the idea that the violent spouse makes a negative contribution which should be taken into account in the overall assessment of contributions. Section 79(4)(c) already refers to contributions to the *welfare* of the family, including contributions made as homemaker or parent. It is consistent with this that actions that are clearly contrary to the welfare of the family should be taken into account to reduce the assessment of the contributions of the person who was responsible for such actions.

19. Such an approach would also be consistent with the assessment of financial contributions. Positive financial contributions, such as earned income or assets contributed by way of gift or inheritance are routinely taken into account. Similarly, wilful destruction of property will be taken into account against the person responsible.[5] Thus if one party inexcusably destroys some of the assets, the court is likely to allocate that loss to the party responsible. This approach is reserved for clear cases. The court does not generally penalise income earners for not making faster progress in their employment, or for investing unwisely.

20. Similarly, it seems to Council to be correct in principle that if a party inexcusably acts contrary to the welfare of the family, by acts of violence, it may be appropriate to take this into account in assessing that party's contributions. In assessing financial contributions in financial matters presently determined by courts exercising jurisdiction under the Act there seems to be a fairly well understood and workable distinction between the sort of reprehensible financial behaviour that is taken into account, and the merely unwise decisions or moderate performance that is not. Consistent with this approach to financial matters, courts assessing the impact of violence on parties' contributions would not seek to assess the quality of behaviour that falls within the ordinary pattern of family life. These are matters of degree, it is true, but ones about which courts can reasonably adjudicate.

21. Council therefore believes that there is a case for expressly requiring the court to take family violence (as defined on page 8) into account in assessing the contributions made by the violent person. If the evidence showed, in addition, that the victim's contributions were rendered greater by the violence, the additional efforts made by the victim would also be taken into account in assessing the victim's contributions, as recognised in *Kennon*.

Empirical evidence on links between violence and property outcomes

22. A recent empirical examination of the post-separation financial living standards of victims of spousal violence, conducted by the Australian Institute of Family Studies and commissioned by the Office of the Status of Women,[6] suggests that victims are more likely than other women to experience considerable financial hardship post-separation and divorce, and that this hardship increases in direct proportion to the severity of the violence experienced.

23. The findings also suggest that spousal violence may play an important role in how property is divided on divorce. The survey (pre-Kennon) showed that women who reported severe spousal violence were three times more likely than women who reported no violence to have received a low share of the matrimonial property on divorce (less than 40 per cent of the property). This particular finding is striking given that almost all of these women had primary responsibility for the care of dependent children post-separation and divorce.

24. It seems very likely that there is a causal link between the violence and the poorer settlement outcomes for these women. A number of alternative explanations for this finding, which suggest that these women were in some way deserving of a low share of the matrimonial property, were not supported by the data.[7] The evidence suggests that that these women are likely to be intimidated and so unwilling to assert their claims as strongly as they would if there had been no violence. If this is so, they are doubly disadvantaged: by the violence itself, and by its financial consequences. This would be unfair to them (and to any children in their care), and frustrate the intended operation of the Act. They would be receiving less than they should receive under the provisions of the law. The perpetrator would be receiving a corresponding benefit to which he was not entitled.

25. Council accepts, of course, that amending the legislation will not provide a simple solution. If the victims of violence were afraid to press their claims, they may continue to be afraid to do so even if the law were amended to make their legal entitlements clearer, or greater. However, Council considers that the amendments considered below may have a measure of success. Firstly, by stating the law in a clear and unequivocal way, the legislature would reinforce the unacceptability of violence within families. This would be consistent with the approach of the *Family Law Reform Act 1995* relating to children. A more explicit law should help produce fairer property outcomes in at least some cases where there has been violence. Council accepts that legislation establishes an important context for the outcome of negotiated settlements and well as adjudicated ones. Ultimately, because family violence may produce negative financial outcomes for the perpetrator, the legislation may play a part in helping to reduce family violence.

PROPOSALS FOR AMENDING THE ACT

26. Council proposes that the following amendments be made to Part VIII:

i. There should be an amendment to s79 to include a new subsection (s79(4A)) which directs the court to have regard to the effects of family violence on the contributions of both parties.

27. A proposed definition of "family violence" for these purposes is considered below.

28. Council notes that, in its letter of 30 January 2001 to the Attorney-General?s Department regarding proposed amendments to ss75 and 79 of the Act, Council recommended the

inclusion of a new s79(4A). Council suggests that its proposed s79(4A) could be amended as follows, to take into account family violence:

In considering the contributions in subsection (4), the court must:

(a) not assume that the contributions referred to in paragraph (a) are inherently more, or less, valuable than the contributions referred to in paragraphs (b) and (c); and

(b) have regard to the effects of any family violence on the contributions of the parties.

29. This formulation is intended to reflect the case for reform set out above. In particular it would require the court to take family violence into account as a negative contribution by the perpetrator, apart from any effect it may have in enhancing the assessment of the contributions of the victim.

ii. There should be an amendment to s 75(2) to add the following new paragraph to the list of matters to be considered:

"the extent to which the financial circumstances of either party have been affected by family violence perpetrated by a party to the marriage."

30. Council's view is that such a paragraph should be included because, if violence has identifiable financial consequences, then it should be specified as a relevant consideration rather than simply left as part of a general consideration of financial circumstances under the general wording of the section. Council recognises that the effects of violence might well be relevant under other paragraphs of s 75(2), but considers that the proposed amendment would make it clear that family violence can be relevant to the adjustive stage as well as the contribution stage of property proceedings.

31. As to the drafting, if s.79 is redrafted so as to incorporate its own list of the current s.75(2) factors, as recommended by Council in its letter of 30 January 2001 to the Attorney-General?s Department, then Council believes that this new paragraph should be included in the new s.79.

iii. The definition of family violence in Part VII FLA (s60D(1)) should be adopted for Part VIII.

32. Subsection 60D(1) provides:

"***family violence*** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety;"

33. Council considers that there is merit in having a consistent definition of violence in the Act. There is no apparent reason why the fear-based definition of violence used in Part VII of the Act in determining what is in the best interests of the child should not also be used in Part VIII in connection with property proceedings.

34. Council considers that this definition of violence is sufficiently broad to take into account multiple sources of abuse, and cases in which there has been a history of violence and control, as it is fear-based. It is capable of including a single act of physical violence, and would encompass a fear for present or future personal well being or safety. This definition is not confined to physical abuse, but would be wide enough to include constantly demeaning treatment of one spouse by the other (which may also include some acts of violence) that causes serious psychological injury. The reference to fear for "personal well-being" would be wide enough to include such abuse.

35. Council's view is that a definition of this kind, which is based on the consequences of violence - namely fear - would address any concerns that legislative reform will "open the floodgates" in this area. This view is based on the research by Sheehan and Smyth[8] which indicates that the proportion of divorced women and men who report having experienced this fear-based violence is significantly lower than the proportion of women and men who report the occurrence, attempt or threat of physical or sexual violence.

DISCUSSION AND RECOMMENDATIONS

36. We have set out above the case for reform and the legislative proposals that appear most appropriate to carry out such reform. There are however some difficulties and counter-arguments.

37. It is possible that the changes proposed here will have some undesirable effects. If the amendments have the desired impact, they may lead to an increase in allegations of violence in financial proceedings. That could mean additional material in affidavits and additional cross-examination. They could thereby extend the length of trials to some degree.

38. It may be, too, that such allegations are more likely to be challenged than some other sorts of evidence, so that the increase in cross-examination may be considerable. It is also possible that the allegations and their consequences might make the proceedings more hostile than they might otherwise have been. Again, the addition of allegations of violence on one side might provoke the other side to add other allegations of violence or of different kinds of misconduct coming within the proposed definition. Finally, there may be an effect on settlement rates, but this is very difficult to predict.

39. However, it could be argued that all of these risks are inherent in *Kennon* itself. It would appear, especially from Dr Middleton's study of unreported cases, that the *Kennon* principle has been applied appropriately, and there is no evidence that it has caused major difficulties. In any event, Council believes that if there are risks of the sort identified, they are likely to be outweighed by the benefits of amending the law in the way proposed.

40. It must also be recognised that the courts will no doubt need to work through issues relating to the detailed implementation of the proposed amendments, and their relationship with *Kennon* and with other provisions. However this would appear to be part of the inevitable refinement and development of law over time.

41. The proposed amendments do not address the relationship between property adjustments under s 79 and remedies a party might have for damages under tort law. It seems that since the demise of cross-vesting, such actions are rare, due no doubt to the costs and other disincentives to bringing separate proceedings in a state or territory court. Council's view,

however, is that these issues may be appropriately left to the courts to resolve as and when they arise.

Reform to Part VIII preferable to a new statutory tort

42. In its 1998 Discussion paper, *Violence and the Family Law Act: Financial Remedies*, Council canvassed the option of introducing a new matrimonial tort into the Act, enabling spouses to bring actions in the Family Court for damages for personal injuries suffered during a marriage. One purpose of the proposal was to overcome the technical difficulties associated with the cross-vesting scheme. The demise of cross-vesting, following the High Court's decision in *Re Wakim*, served, if anything, to increase the practical value of this proposal.

43. However, on reflection, Council has formed the view that this option would not have as positive an effect on those most likely to benefit from law reform as would the amendments Council now proposes. For example, it is unlikely that a statutory matrimonial tort would be accessible to a substantial number of victims of violence, particularly those on lower incomes, with disabilities, and those from non-English speaking backgrounds, because any new cause of action is likely to be expensive and complex to pursue.

Recommendations

44. This Letter of Advice has attempted to identify the most satisfactory proposal for reform and the arguments for and against it. In the end, after much consideration and discussion, Council has come to the view that the arguments in favour of reform outweigh those against it. Accordingly Council recommends that the Act be amended as follows:

i. There should be an amendment to s79 to include a new subsection (s79(4A)) which directs the court to have regard to the effects of family violence on the contributions of both parties.

ii. There should be an amendment to s75(2) to add the following new paragraph to the list of matters to be considered:

"the extent to which the financial circumstances of either party have been affected by family violence perpetrated by a party to the marriage."

iii. The definition of family violence in Part VII FLA (s60D(1)) should be adopted for Part VIII.

Yours sincerely

Des Semple

Endnotes

[1] Re Wakim ex parte McNally & anor [1999] HCA 27

[2] The number of women reporting the experience of extreme forms of violence was small and the effects of important variables such as socio-economic status on property division outcomes and post-divorce financial circumstances could not be controlled.

[3] See for example the Family Law Section's submission in response to the 1999 Discussion Paper, Property and Family Law: Options for Change - kindly provided to the Council for the purposes of this project.

[4] Middleton, Sarah, The Relevance of Domestic Violence in Proceedings for Financial Relief Under the Family Law Act 1975 (Cth), submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy, University of Tasmania, December 2000, pp162-166.

[5] See, eg, In the Marriage of Cordell (1977) 3 Fam LR 11,588; FLC 90-322; In the Marriage of Kowaliw (1981) 7 Fam LN 13; FLC 91?092.

[6] Sheehan, G., & Smyth, B. (2000), 'Spousal Violence and post separation financial outcomes', Australian Journal of Family Law, Vol 14. pp. 102-118.

[7] Ibid p. 116

[8] Sheehan, G., & Smyth, B. (2000), 'Spousal Violence and post separation financial outcomes', Australian Journal of Family Law, Vol 14. pp. 102-118.