



FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO  
CHIEF JUSTICE

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Committee Secretary  
Senate Legal and Constitutional Affairs References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary

**SUBMISSION TO THE INQUIRY INTO THE CURRENT INVESTIGATIVE  
PROCESSES AND POWERS OF THE AUSTRALIAN FEDERAL POLICE IN  
RELATION TO NON-CRIMINAL OFFENCES**

This letter represents my submission to the Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal offences (“the Inquiry”). I make this submission in my capacity as Chief Justice of the Family Court of Australia (“the Court”), following consultation with the Court’s Law Reform Committee. The views expressed in this submission are my own and do not purport to represent those of individual judges or of the Court generally.

This submission has been prepared in response to term of reference (h), “any related matters”, and is confined to discussion of the Australian Federal Police’s (“AFP”) response to referrals made by the Court when a possible breach of a Commonwealth law is suspected. I appreciate this in an inquiry into non-criminal offences but I nevertheless thought is appropriate to bring some issues relating to criminal offences arising in civil proceedings to your attention.

Occasionally in the course of hearing and determining a family law dispute, a judge will form the view that a party or parties to the proceedings may have engaged in conduct that offends a Commonwealth law. In those circumstances, a copy of the reasons for judgment and a sealed

copy of the order, and any other relevant materials, are provided to the AFP with a request that an investigation be undertaken to establish whether there is sufficient evidence to prosecute the alleged breach. Until 2011, referrals were made through the Attorney-General's Department ("AGD"). However, upon AGD having sought legal advice as to privacy implications arising from referrals, the Court was asked to make referrals directly to the AFP. These are usually done through the chambers of the Court's Principal Registrar, although judges may also make referrals directly from their own chambers or through registry managers.

The Acting Principal Registrar has informed me that, over the past five years, the Principal registrar has referred between two and five matters per year to the AFP. These are consistently in the areas of bigamy, breach of section 121 of the *Family Law Act 1975 (Cth)*<sup>1</sup> ("the Act"), and perjury. There have also been instances where a judge has suspected that fraud on federal or state revenue, or a similar offence, has been committed.

The Principal Registrar has been told by the AFP that it utilises a Case Categorisation and Prioritisation Model ("CCPM") to respond to referrals. A copy of the CCPM can be found on the AFP's website at [www.afp.gov.au](http://www.afp.gov.au). I understand that the CCPM is a rating system. The rating given to each referral is arrived at after consideration of the following factors:

- Incident type
- Impact
- Priority
- Client impact and priority
- Importance to the AFP
- Resources
- Budget
- Duration
- Property/fraud value
- Case type

I understand that the rating arrived at following a CCPM assessment is taken into account by the AFP's Operations Monitoring Centre in determining what recommendation to make to the Operations Committee, which is ultimately responsible for deciding whether to undertake a particular matter or not.

I note specifically that in the category 'impact', conduct that impacts upon an individual only is classified as 'low'. The types of offences that arise in family law proceedings, such as bigamy, are of their nature limited in their effect on others, which may militate against a matter being pursued.

Unfortunately our records do not reveal how many referrals have been accepted for investigation and how many have not. I can advise the Committee however that there have

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<sup>1</sup> Section 121 imposes restrictions on the publication of family law proceedings and a breach of section 121 is punishable by a maximum term of 12 months' imprisonment.

been occasions upon which the Court has been informed that the AFP does not have sufficient resources to enable every complaint to be investigated, even where there is a reasonable basis upon which to suspect that a Commonwealth law has been breached. For example, in 2008 a matter involving possible illegal conduct by way of false claims for government grants was referred to AGD and then to the AFP. The AFP responded to AGD that it could not take the case on because the number of offences referred to the AFP often exceeds its investigative capacity. Further, AGD was informed that the AFP is not resourced to investigate every complaint or allegation made, even when there is sufficient information to suggest that a Commonwealth law has been breached. This occurred most recently in February 2014, when the AFP declined to investigate a suspected case of bigamy.

I appreciate that the AFP, like many Commonwealth agencies, is operating in a climate of scarce resources and must exercise fiscal restraint. Nevertheless, I consider that the capacity to investigate suspected illegal activity is fundamental to the proper administration of justice and indeed to the rule of law. There seems to me to be little point in the parliament enacting laws if people who breach those laws are unable to be brought to account. In my view, every referral to the AFP should be investigated.

However, from a family law perspective, if budgetary constraints do not enable every complaint to be pursued, it may be necessary to give consideration to alternatives to investigation by the AFP. As I said earlier in my submission, all suspected breaches of Commonwealth laws that arise in family law proceedings are currently referred to the AFP. I query whether that is necessary in cases where there is little or no need to collect evidence. For example, in the matter of *Hiu & Ling* [2010] FamCA 743, where the applicant sought a decree of nullity on the basis that the respondent was already married at the time the parties wed, the respondent admitted the facts as alleged by the applicant. In that case, the presiding judge referred the matter to the Commonwealth for consideration of whether a prosecution should be mounted. This would be the case whenever admissions are made, and that often occurs in cases involving allegations of perjury. In circumstances such as those, no investigation is required and the involvement of the AFP would be superfluous. Procedurally, I see no reason why a referral for consideration of prosecution could not be made directly to the Commonwealth Director of Public Prosecutions, ideally by way of initial referral to AGD.

Were such a process to be instituted, that would mean that the AFP's involvement in illegal behaviour associated with family law proceedings would largely be confined to possible breaches of section 121 of the Act. In my experience the AFP usually accepts such matters for investigation, although it is rare for a prosecution to be brought. The one example of a successful prosecution for breach of section 121 is that involving *The Courier-Mail*, which published the names and photographs of four sisters at the centre of an international custody dispute. After the then Attorney-General received oral and written representations from me about the importance of mounting a prosecution, AGD referred the matter to the AFP, which accepted it for investigation in May 2012. Proceedings were brought in the District Court of Queensland, whereupon Queensland Newspapers, the publishers of *The Courier-Mail*, pleaded guilty to four counts of breaching section 121 and was fined \$120,000.

I would be interested in the AFP's views about this proposal, which could be pursued in evidence before the Committee if the Committee deemed it appropriate to do so.

Yours faithfully

Diana Bryant AO  
Chief Justice