Australian Government
Attorney-General's Department

Civil Law and Justice Legislation Amendment Bill 2017

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

The Attorney-General's Department thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission on the Civil Law and Justice Legislation Amendment Bill 2017. The Department welcomes the submissions made to the Committee.

This submission is provided in response to the submissions received by the Committee. Each submission will be addressed separately.

Issues raised by the Australian Human Rights Commission

The submission from the Australian Human Rights Commission (AHRC) (submission 1) makes a number of recommendations in relation to proposed amendments to the *Family Law Act 1975*, the *Marriage Act 1961* and the *Sex Discrimination Act 1984*.

The Department notes the support of the AHRC for a number of the proposed amendments. This submission will address AHRC's recommendations for changes to the Bill, particularly in relation to international parental child abduction (IPCA), arrest powers and use of force, and the capacity to understand the nature and effect of a marriage ceremony.

International parental child abduction

The Family Law Act currently contains provisions making it an offence to take or send a child overseas in certain circumstances. The Bill includes new provisions that would make it an offence to retain a child outside Australia in certain circumstances. These provisions were recommended by the Family Law Council (FLC) in its March 2011 letter of advice on IPCA.

The AHRC has recommended that:

- advice be sought from the Australian Government Solicitor or other appropriate body about the extent to which the exceptions and defences recommended by the FLC are already available under the *Criminal Code 1995* or otherwise, and
- consideration be given to including explicit exceptions and defences to the current and proposed offences.

In relation to whether legal advice should be sought, the Department considers that it is clear that the Criminal Code defences would apply to the IPCA offences.

In relation to explicit provision for defences and exceptions, this issue was considered in the development of these provisions. However, the Government decided not to explicitly include the defences suggested by the AHRC, for the reasons outlined below.

Family Law Council recommendations

The FLC has written three letters of advice on the subject of IPCA offences, dated 14 March 2011, 5 August 2011, and 6 June 2012.[1]

[1] These letters of advice may be found at https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/Lettersofadvice.aspx.

In its letter of advice dated 14 March 2011, the FLC recommended a number of defences be available for offences related to IPCA. The FLC noted that the existing offence provisions in the Family Law Act are already, and any new provisions would be, subject to the defence provisions of the Criminal Code, namely:

- duress (section 10.2 of the Criminal Code)
- sudden or extraordinary emergency (section 10.3 of the Criminal Code)
- self-defence (section 10.4 of the Criminal Code)
- lawful authority (section 10.5 of the Criminal Code), and
- mistake of fact (section 9.1 of the Criminal Code).

Section 2.2 of the Criminal Code applies Chapter 2 of the Criminal Code (which includes those defences) to all offences committed after 15 December 2001. As a result, both the existing and proposed IPCA offences are subject to these defences. It would be unnecessarily duplicative and contrary to Commonwealth drafting practice to reproduce these defences in the Family Law Act.

The *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers* suggests that, where possible, duplication of Criminal Code defences should be avoided.

In addition to the general defences available under the Criminal Code referred to above, the FLC recommended the inclusion of the following defences:

- fleeing from family violence
- protecting the child from danger of imminent harm
- consent, and
- reasonable excuse.

In its letter, the FLC noted that two of the defences, fleeing from family violence, and protecting the child from danger of imminent harm, arguably fall within the existing defence of self-defence provided by the Criminal Code, but suggested that the specific inclusion of the defences would avoid any doubt as to their availability.

These defences were revisited by the FLC in their letter of 6 June 2012. In this context, the FLC was responding to proposed amendments which included defences of 'fleeing from family violence' and 'protecting the child from imminent harm', but did not provide defences for consent and reasonable excuse. The FLC recommended that the general defence provisions of the Criminal Code apply, and that two new defences of 'fleeing from family violence' and 'protecting the child from imminent harm' be included.

After consideration of the advice from the FLC, the Government decided not to include any of the four suggested defences in the final Bill, for the reasons outlined below.

Fleeing from family violence

When this defence was first proposed, the definition of family violence in the Family Law Act was:

> ***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 reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

> Note: a person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

Under this definition, 'fleeing from family violence' would be covered by self-defence, provided the defendant considered it necessary to 'defend himself or herself or another person' and that fleeing was a reasonable response to the circumstances as the defendant perceived them, as this would meet the requirements of self-defence under subsection 10.4(2) of the Criminal Code. Accordingly, fleeing family violence was not included as a defence.

Since 2012, amendments made to the Family Law Act have broadened the definition of family violence, as follows:

> ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

Examples of conduct which could constitute family violence are now provided, and include:

- repeated derogatory taunts
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had, and
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support.

While it is appropriate that this conduct be included within the definition of family violence, allowing them as a defence against the various IPCA offences would make the offences very difficult to prosecute, and would provide a defence with a much broader operation than the existing concept of self-defence.

Protecting the child from danger of imminent harm

The defence of protecting the child from danger of imminent harm is duplicative of the defence of self-defence. It is difficult to identify a scenario in which conduct to protect a child from danger of imminent harm would not be conduct necessary "to defend… another person", which is one of the situations in which self-defence can be invoked. Including 'protecting the child from danger of imminent harm' as a defence could lead to a court attempting to distinguish the two defences, with unpredictable consequences, such as limiting the scope of self-defence, or broadening the new defence beyond its intended scope.

Accordingly, protecting the child from danger of imminent harm was not included as a defence, to prevent the duplication of the existing defence of self-defence in the Criminal Code.

Consent

The AHRC has recommended that the consent of the other persons with parental responsibility for the child, or the other parties to the proceedings should be included as a defence to the current and proposed

offences. Similarly, the FLC proposed that written consent should be a defence. This has not been included as a defence, as a lack of written consent to the retention is instead provided as an element of the offence.[2]

The practical effect of making a lack of consent an element of the offence (rather than making the presence of consent a defence) is that the prosecutor is required to prove beyond reasonable doubt that consent did not exist. The defendant is not required to discharge an evidential burden to prove, on the balance of probability, that consent existed.

Reasonable excuse

The FLC also proposed a defence of reasonable excuse. Examples given by the FLC of scenarios where reasonable excuse may apply include airline strikes, bad weather or ill health.

A defence of 'reasonable excuse' would be broad and uncertain. Chapter 4.33 of the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers* discusses the defence of reasonable excuse and suggests that the defence should not be applied to an offence as it is too expansive and unclear as to what is needed to satisfy the defence.

No defence is needed in the scenarios identified by the FLC. In each case the retention would have been beyond the control of the person, and therefore the fault element of the offence would not be satisfied. As the person would not have formed the necessary intention to commit the offence, they would not have committed the offence. In their letter of advice dated 6 June 2012, the FLC accepted this reasoning. Reasonable excuse has therefore not been included as a defence.

Arrest powers and use of force

The Family Law Act currently provides that a person who is authorised by the court to arrest another person has powers related to the use of reasonable force in making the arrest, and powers of entry and search for the purposes of arresting persons. These existing provisions apply to any person authorised by the Family Law Act, or by a warrant issued under a provision of the Family Law Act, to arrest another person.

The current arrest powers in the Family Law Act are subject to fewer limits than the arrest provisions available to the other federal courts, and are broader than the arrest powers available to police officers in the *Crimes Act 1914*. These powers lack the limits and safeguards suggested in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* The proposed amendments would address a number of these issues.

The AHRC has recommended that consideration be given to:

a) clarifying the training and accountability measures that are in place in relation to the use of force
b) whether the categories of persons authorised to make arrests can be drafted more narrowly
c) clarify that arrests may only be made when it is reasonably necessary in specified circumstances, and
d) whether it is appropriate for the use of lethal force to be permitted.

Training and accountability

In practice, the Department expects that only officers who already have arrest powers under other Acts would be authorised as an arrester, and that when a person is authorised under proposed

[2] See paragraphs 65YA(c) and 65ZAA(c).

paragraph 122A(1)(h), that person would be an officer of the Australian Border Force (ABF). These officers would receive training appropriate to the exercise of those powers. For example, powers of arrest are already covered in a number of ABF operational training courses, with training comprising face-to-face learning with legal officers on the parameters surrounding the use of the power, discussions with experienced ABF officers who have used these powers, and practical scenarios to assess an officer's understanding of the use of the power in an operational ABF context.

Narrowing of categories of persons authorised to make arrests

The proposed new sections 122A and 122AA of the Family Law Act would, as well as modernising the arrest powers, narrow the classes of people who would be authorised to use reasonable force and the powers of entry and search for the purposes of arresting a person. The categories of people who would be so authorised are listed in proposed subsection 122A(1). Relevantly, new paragraphs 122A(1)(h) and (i) provide the ABF Commissioner and APS employees in the Department of Immigration and Border Protection (DIBP) (respectively), if authorised by the court to arrest another person, with powers related to the use of reasonable force for the purposes of arresting persons.

This is not a change in policy position in relation to DIBP officers. Under the existing legislation, when authorised to make an arrest by the Family Law Act, a DIBP officer may exercise the existing powers relating to use of force and entry and search. APS employees of DIBP also have other arrest powers under other legislation.

Consultations with stakeholders confirmed the importance of retaining the ability for officers of the ABF (which forms part of the DIBP) to be authorised to use force and exercise powers of entry and search under the proposed new sections 122A and 122AA. Maintaining these powers with ABF officers would be of particular utility in preventing international parental child abduction. The current formulation, which refers to "an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*", would include ABF officers.

While ABF officers are only a subset of the APS employees of the DIBP, the department intends to liaise with the courts to discuss administrative options (such as design of the template of an arrest warrant) that could be utilised to ensure that the only ABF officers will be authorised.

Circumstances of arrest

The AHRC has recommended amending proposed subsection 122A(2) of the Family Law Act to provide specific circumstances in which the arrest powers may be used. The Department does not agree with this recommendation. The framework attached to the power of arrest, found in proposed new section 122A, includes limits on entering premises, use of force and how the arrest must take place. Further narrowing of the circumstances in which an arrest may take place, such as requiring proof that the arrest would prevent the imminent unlawful removal of a child from Australia, may lead to the provisions being too limited to operate effectively and lead to unpredictable consequences.

Use of lethal force by APS employees

The AHRC has raised concerns in relation to APS employees within DIBP exercising powers of arrest, and in particular, the possible use of lethal force in the course of an arrest.

It is important to note that use of force that risks death or grievous bodily harm is expressly proscribed by the proposed amendments, except in circumstances where the arrester reasonably believes that doing that thing

is necessary to protect life or prevent serious injury to a person (including the arrester). Further, the use of force is required to be necessary and reasonable under proposed subsection 122A(2).These dual requirements mean that the use of such force is only permitted in circumstances where it is highly likely that the defence of self-defence under section 10.4 of the Criminal Code would be available.

Similar provisions exist in other Commonwealth Acts that provide arrest powers, including:

- Section 3ZC of the *Crimes Act 1914*
- Section 210A of the *Customs Act 1901*
- Subsection 113A(4) of the *Federal Circuit Court of Australia Act 1999*
- Subsection 55A(4) of the *Federal Court of Australia Act 1976*, and
- Subsection 37(2) of the *Maritime Powers Act 2013*

Given the existing limits, the department's view is that it is unnecessary to place further limits on the use of force.

Capacity to understand the nature and effect of a marriage ceremony

The department is committed to ensuring marriage celebrants are provided with appropriate guidance and tools, to support decision-making and respect decisions made about marriage by persons with disabilities. In 2016, the department prepared a professional development activity that all marriage celebrants were required to undertake, which in part focussed on issues of real consent and capacity to understand the nature and effect of marriage. The department consulted with People with Disability Australia in preparing the activity. The department intends to update the *Guidelines on the Marriage Act 1961 for marriage celebrants* after the amendments to the *Marriage Act 1961* commence.

Issues raised by the Hon Chief Justice Diana Bryant AO QC

The Chief Justice of the Family Court of Australia is generally supportive of the amendments contained in the Bill. However, the Chief Justice has indicated that she no longer supports the proposed amendment to section 65L of the Family Law Act.

Currently, section 65L(1) empowers the court to make orders requiring a family consultant to supervise, or assist with, compliance of a parenting order. The proposed amendment would provide that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are exceptional circumstances. This would ensure that the courts are not unduly burdened with an ongoing and onerous obligation to supervise compliance with court orders.

The Chief Justice, in her submission, proposes introducing a system where parenting order contravention applications are resolved by a team comprised of a Family Consultant acting under section 65L and a Registrar exercising delegated powers, rather than by a Judge. The Chief Justice is also seeking funding for the appointment of more Family Consultants and Registrars.

This change in policy, and funding matters, are matters for the Government.

Issues raised by the Law Council of Australia

The Law Council of Australia (LCA) has made several recommendations in its submission (submission 3) in relation to the Bill, focusing on the proposed amendments relating to bankruptcy, arbitration, and a number of technical matters.

Bankruptcy amendments

Currently, jurisdiction in respect of bankruptcy matters is conferred on the Family Court where the trustee is a party to a property settlement of spousal maintenance proceedings by virtue of section 35 of the *Bankruptcy Act 1966.* The proposed amendment is not intended to change the existing jurisdiction, but would make it clear, on the face of the legislation, that proceedings under sections 90K and 90UM of the Family Law Act are included in the Family Court's bankruptcy jurisdiction where a trustee is the applicant.

In its submission, the LCA recommends that the Bill should also provide a definition which would make it clear that jurisdiction also applies where a person has been discharged from a bankruptcy, but whose estate remains vested in the trustee of their estate. The Department will consider the recommendations of the LCA in relation to the proposed bankruptcy amendments.

Arbitration amendments

The department has consulted extensively within government and with academic experts, private practitioners and arbitration peak bodies and institutions in developing the amendments to the *International Arbitration Act 1974* (IAA).

The department notes the support of the LCA for all of the proposed amendments to the IAA. However, the LCA submission also makes recommendations in relation to some of the proposed amendments to the IAA. This submission will address the recommendations for alternative drafting made by the LCA—namely that in relation to the power of arbitral tribunals to award costs as set out in section 27 of the IAA, the term 'fix' should be used rather than 'settle'.

The IAA currently provides that an arbitral tribunal has the discretion to determine the amount of costs to be paid in relation to an arbitration, who is to be paid and by whom. The Bill would remove the word 'tax' from paragraph 27(2)(b) and repeal paragraph 27(2)(c) which makes reference to awarding costs to be taxed or settled as between party and party or solicitor and client.

As the LCA recognises, these reforms are intended to make it clear that the discretion of the arbitral tribunal in making an award of costs is not restricted to calculating and awarding costs in a manner similar to a court. The term 'tax' and 'taxing of costs' is recognised as describing the process undertaken by a court in awarding costs. The judicial approach to costs is distinct from that of arbitral tribunals and it is appropriate that the term tax be removed from the provision. The Department understands from the LCA's submission that it supports this proposition.

However, at paragraph 28 of its submission the LCA expresses concern that the amendment may give rise to argument that there is a distinction between a tribunal's power to 'settle' costs and the judicial power to 'tax' costs. The LCA further asserts that the proposed subsection 27(2AA) which would be inserted by the Bill contributes to this confusion.

The Department considers that section 27 as amended by the Bill currently before the Committee uses appropriate language in the necessary level of detail to provide certainty about the breadth of a tribunal's power to make an award of costs in the amounts and to the parties it sees fit. The Bill would modify the existing provision in a manner consistent with contemporary arbitral practice and would be unlikely to be the cause of unwarranted dispute as to the meaning of the term 'settle'. Accordingly, it would not be necessary for further consideration of the LCA's proposal for use of the substitute term 'fix'. It is useful to note that this term is not the only term used in arbitration rules to describe a tribunal's power to determine and award costs, and that there is no uniformity in the terminology of provisions governing these powers in other jurisdictions.

The Department's view is that the Bill in this and other respects increases certainty and efficiency and is not in need of alteration.

Technical amendment to the Family Law Act

The LCA has proposed a slight change in wording to proposed subparagraph 44(5)(a)(ii) of the Family Law Act. Proposed subparagraph 44(5)(ii), would remedy two inconsistencies between de facto and married couples in relation to instituting proceedings. The department notes this suggestion, but will need to give further consideration as to whether this amendment is necessary.

Response to submission from Ms Rona Goold

Ms Goold's submission (submission 4) provides recommendations to address the lack of consistency and parity between the three subdivisions of authorised celebrants.

The department does not support the recommendations proposed in submission 4.

With the exception of recommendations 6 and 7 (discussed below), the submission does not address the specific provisions of the Bill.

Rather, Ms Goold makes recommendations focused on addressing differences in the requirements that apply to the three categories of authorised celebrants under the Marriage Act. Ms Goold also proposes amendments to the Marriage Act that would be substantive and/or of significant policy importance. These amendments would impact a large number of stakeholders, including State and Territory governments. Such changes could not be achieved without significant stakeholder consultation. As such, they are beyond the scope of this Bill, which is omnibus legislation intended to be a vehicle for achieving minor and/or technical amendments only.

In relation to recommendation 6 in submission 4, Ms Goold has proposed that section 39 of the Marriage Act should be amended to enable marriage celebrants to not pay the annual registration charge on one occasion before they are deregistered (however, it appears the reference should be to section 39FB of the Marriage Act). This proposal would be a significant policy change and has implications for the efficient regulation of the Marriage Celebrants Programme. The amendments in the Bill in relation to section 39FB, at items 18-22 of Schedule 9 to the Bill, are intended to clarify the current process; not to significantly change it. Any further change to the policy of the Marriage Act is a matter for the Government.

In relation to recommendation 7 in submission 4, the department notes that the term 'marriage celebrant' in proposed paragraph 115(1)(ab) (at item 37 of Schedule 9 to the Bill) is a defined term in subsection 5(1) of

the Marriage Act. The definition refers to Subdivision C of Division 1 of Part IV. The change proposed in Recommendation 7 is therefore not necessary.