



FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO
CHIEF JUSTICE

Commonwealth Law Courts
305 William Street
Melbourne VIC 3000
Mail: GPO Box 9991
Melbourne VIC 3001

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Inquiry into the Public Interest Disclosure Bill 2013

Dear Committee Secretary

It has come to my attention that the Public Interest Disclosure Bill 2013 (“the Bill”) has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 25 June 2013. I understand that the Committee has called for submissions, which are due by 26 April 2013. This letter constitutes my submission on the Bill.

I make this submission in my capacity as Chief Justice of the Family Court of Australia and the views expressed herein do not purport to represent those of other Family Court judges or of the Court as a whole.

At the outset, I wish to confirm that the Department of Prime Minister and Cabinet, through the aegis of the Attorney-General’s Department, has consulted with me on earlier drafts of the Bill. Many of my concerns have been addressed through various iterations and I appreciate my views being taken into account. However, two matters remain outstanding and it is to those that this submission is addressed.

The first of these is my strong view that the Bill should be expressed as being subject to section 121 of the *Family Law Act 1975* (Cth) ("the Act") and to any suppression or non-publication order made by judicial officers exercising jurisdiction under the Act.

Section 121, in broad terms, makes it an offence for a person to publish an account of proceedings conducted under the Act which identifies a party to those proceedings, a person related or concerned with those proceedings and witnesses in those proceedings. It is a serious offence and is punishable by imprisonment for a period not exceeding one year. Section 121 is designed to avoid sensational or prurient reporting of sensitive, intensely personal affairs, and particularly those involving disputation around children.

The Bill seeks to accommodate section 121 and suppression and non-publication orders, which judges of the Family Court are also empowered to make, through the definition of "designated publication restriction" in clause 40. It includes section 121 of the Act and suppression and non-publication orders as defined in the *Judiciary Act 1903* (Cth). That, in turn, engages the requirements of a 'public interest disclosure' in clause 26. Pursuant to clause 26, in order to constitute an internal disclosure, an external disclosure or an emergency disclosure, and thereby attract the protection of the Bill, the disclosures must not be contrary to a designated publication restriction.

This, I recognise, goes a considerable way to avoiding the potential for conflict between the Bill, section 121 and the terms of any suppression or non-publication order.

I nevertheless remain concerned that inconsistencies may arise. For example, a 'legal practitioner disclosure' as a category of public interest disclosure is not subject to the requirement that it not be contrary to a designated publication restriction. Therefore, provided that the other qualifying criteria are met, a disclosure to a legal practitioner that may constitute a breach of section 121 or of a suppression or non-publication order may nevertheless attract protection under the Bill.

Similarly, on my reading of the Bill, clause 51 authorises the principal officer to remove any material from a report into an investigation that, inter alia, results in the copy being a document exempt from the *Freedom of Information Act 1982* (Cth), or resulting in the document being required to have a security classification or containing intelligence information. The principal officer does not have the discretion to remove material that may constitute a breach of section 121 or of the terms of a suppression or non-publication order.

In my view, the objective of section 121 and of any suppression or non-publication order, namely protecting the privacy of people involved in family law proceedings may be compromised by the Bill as currently drafted. In the interests of preserving the laudable intent of section 121, suppression and non-publication orders, and also in the interests of certainty, I therefore urge the Committee to recommend to government that the Bill be

redrafted so that is expressed as subject to that section and to any suppression or non-publication order made by judicial officers exercising jurisdiction under the Act.

There is only one other matter to which I wish to avert and that concerns 'individuals taken to be public officials' under clause 70.

Sub-clause 69, correctly in my view, explicitly states that a judicial officer or a member of a Royal Commission is not a public official for the purpose of the Act. However, clause 70 permits an authorised officer of an agency to determine that the Act has effect in relation to disclosure of information held by a person who was not a public official at the time the information was obtained, as if that person was a public official at the time the information was obtained. Arguably at least, it would be possible to effectively deem a judicial officer to be a public official and, insofar as a person taken to be a public official can be distinguished from a public official per se, the exclusion in sub-clause section 69(4) would be rendered nugatory.

In the same way that sub-clause 69(4) states that it is included "to avoid doubt", I suggest that clause 70 also excludes judicial officers from the category of people who can taken to be public officials, to put that matter beyond doubt also. One way that this could be achieved is through an amendment to sub-clause 69(4) so that it reads "To avoid doubt, a judicial officer, or a member of a Royal Commission, is not a public official **and cannot be taken to be a public official** for the purposes of this Act." I recognise however that drafting is a matter for government, assuming of course that the Committee wishes to pursue this issue.

I happy to discuss any matters arising from my submission

Yours sincerely

Diana Bryant AO
Chief Justice