



CDPP

Australia's Federal Prosecution Service



Submission by the Commonwealth Director of Public Prosecutions

Senate Legal and Constitutional Affairs Legislation
Committee Inquiry into the Family Law Amendment Bill
2024

October 2024

Introduction

1. The Office of the Director of Public Prosecutions (Cth) (**CDPP**) welcomes the invitation to provide a submission to assist the inquiry into the Family Law Amendment Bill 2024 (**Bill**).
2. This submission draws on the CDPP's experience in prosecuting various offences under the *Family Law Act 1975* (Cth) (**FLA**).
3. This submission provides observations on the insertion into the FLA by the Bill of new strict liability offences through the new s 10KH (found in Schedule 2 of the Bill). The offences relate to the provision of "*children's contact services*" (**CCS**), which is the facilitation of contact arrangements between children and members of the children's family where those arrangements cannot be safely managed by the family itself. The six proposed offences appear to be designed to penalise persons and companies who provide unaccredited CCS, by targeting either the provider of the actual service or the persons who run the business that provides the service.

Section 10KH - New Offences

4. Section 10KH creates six separate offences:
 - 4.1. s 10KH(1) provides that an individual commits an offence if an individual provides a children's contact service and the individual is not a CCS practitioner;
 - 4.2. s 10KH(2) provides that a body corporate commits an offence if the body corporate provides a children's contact service and the body corporate is not a CCS business;
 - 4.3. s 10KH(3) provides that a person commits an offence if the person is a CCS business, and an individual provides a children's contact service on the person's behalf and the individual is not a CCS practitioner;
 - 4.4. s 10KH(5) provides that an individual commits an offence if the individual controls, directs or organises the provision of children's contact services in the individual's own name or a business name if the individual is not a CCS business;
 - 4.5. s 10KH(6) provides that a person commits an offence if an individual provides a children's contact service on behalf of an entity that is not a legal person, and the entity is not a CCS business and the person is a person who controls, directs or organises the provision of children's contract services on behalf of the entity;
 - 4.6. s 10KH(8) provides that a person commits an offence if an individual provides a children's contact service on behalf of an entity that is not a legal person, and the entity is a CCS business, and the individual is not a CCS practitioner, and the person is a person who controls, directs or organises the provision of children's contact services on behalf of the entity.
5. "*CCS Practitioners*" and "*CCS business*" are defined terms which essentially require accreditation pursuant to ss 10KC and 10KD. "*Children's contact services*" is also a defined term under s 10KB(1).
6. Section 10KH(10) provides that strict liability applies to each of the new offences.

7. The maximum penalties that apply to each offence depend on whether the offender is an **individual** (50 penalty units), or a **body corporate** (250 penalty units).
8. The express reference to different penalties for an individual and a body corporate, in relation to the offences that could be committed by either, provide the contrary intention for the purposes of s 4B(3) *Crimes Act 1914* (Cth) (the **Crimes Act**). This subsection will therefore have no application to the new offence provisions. However, the formula to calculate a pecuniary penalty in s 4B(3) works out to the same amount as the prescribed maximum penalties for the new offences in any event.

Time Limit for Commencement

9. The application of s 15B of the *Crimes Act* means that a prosecution of an **individual** may only be instituted within one year of the offence, but a prosecution of a **body corporate** could be enacted at any time. This is because the maximum penalty for bodies corporate is 250 penalty units, and s 15B(1A) provides that if the maximum penalty is above 150 penalty units, the prosecution can be commenced at any time.
10. This Office was unable to identify a provision under the existing FLA or the Bill that provides a contrary intention to s 15B of the *Crimes Act*.

Strict Liability

11. It is expressly stated in s 10KH(1) that each of the offences are to be strict liability offences.
12. For the offences where the defendant is a person who is not necessarily providing the service themselves, but either has someone provide the service on their behalf or is running a business, ss 10KH(4), (7) and (10) provide that the offences do not apply if the person had considered if the individual or business was accredited and was under a mistaken but reasonable belief about that matter. This is consistent with the general test for mistake of fact (strict liability) under s 9.2 of the *Criminal Code* (Cth) (**Criminal Code**)
13. Section 12.5 of the Criminal Code provides that for a body corporate to rely on s 9.2, the defendant *also* has to establish due diligence. However, the proposed s 10KH(4), (7) and (10), which could apply to bodies corporate, makes no mention of due diligence. This may cause confusion as to what a body corporate must establish to make out the defence of mistake of fact. The explanatory memorandum does not make reference to due diligence.

Conclusions

14. The Explanatory Memorandum is clear that Parliament's intention is to create a strong deterrent against non-compliance through the creation of these strict liability offences. The prosecution will not be required to prove that an individual / body corporate knew that it was providing or intended to provide a CCS without accreditation. Specific defences are available for mistakes of fact, although the requirement of due diligence for a body corporate may require further consideration in the final framing of the offence provisions.

15. The CDPP does not foresee any unintended consequences flowing from the insertion of the s 10KH offences into the FLA, particularly if clarity is provided on the requirements to establish the specific defences available.