FAMILY COURT OF AUSTRALIA

PUBLIC CONSULTATION: PROPOSED AMENDMENTS TO THE *FAMILY LAW ACT 1975* TO RESPOND TO FAMILY VIOLENCE

SUBMISSION BY THE HONOURABLE DIANA BRYANT AO CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA

13 JANUARY 2017

INTRODUCTION

1. I make this submission in my capacity as Chief Justice of the Family Court of Australia ('Family Court') and the views expressed herein, which have been developed in consultation with Justice Strickland, the Judge responsible for advising me on matters of law reform, do not purport to represent those of other Family Court Judges or of the Court as a whole.

2. I welcome the opportunity to comment upon the proposed amendments to the *Family Law Act 1975* (Cth) ('the Act') as presented in the Exposure Draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 ('the Exposure Draft') and the Consultation Paper relating thereto.

3. I note that many of the proposed amendments have been the subject of discussions between the Family Court and the Attorney-General's Department over the course of recent years. Accordingly, I will not comment on every proposed amendment.

POWERS OF ARREST

4. Before commencing my comments on the Exposure Draft and Consultation Paper, I would like to identify what I consider to be an oversight in the draft amendments.

5. The Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which lapsed at dissolution on 9 May 2016 and is now tagged with the status of 'Not Proceeding', included amendments to the powers of arrest contained in the Act. In particular, ss 122AA and 122A were to be amended in order 'to bring them in line with the similar powers of the Federal Court and the Federal Circuit Court to provide for when force may be used by an arrester when exercising his or her powers of arrest' as well as to 'limit, in line with similar powers in the *Crimes Act 1914*, an arrester's power to enter and search premises and stop and detain conveyances … for the purposes of making an arrest'.[1]

6. While the changes to ss 122AA and 122A as set out in the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 do not specifically address the issue of family violence, modernisation of these provisions is entirely appropriate in the context of strengthening the powers of the courts to protect victims of family violence. I would argue that these amendments should be included in the Family Law Amendment (Family Violence and Other Measures) Bill 2017 when it is introduced into Parliament.

ITEMS 6 AND 7

7. These items pertain to short form reasons for decisions relating to interim parenting orders.

[1] Explanatory Memorandum to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (Cth) at [39].

8. The Consultation Paper acknowledges that state children's or magistrates courts do not provide written reasons in all matters (at paragraph 22, quoting the Family Law Council's interim report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*). The purported reason, then, for the proposed amendment providing for short form reasons in an interim parenting matter is 'to encourage judicial officers in state and territory courts to consider giving short form judgments, where appropriate' (at paragraph 23 of the Consultation Paper). However, this gives the impression that state courts, when exercising federal family law jurisdiction in interim parenting matters, are *encouraged* to give reasons rather than being *required* to give reasons.

9. Adequate reasons are essential for a variety of reasons, including the right to know why a decision was made, procedural fairness, any basis for further proceedings and whether or not there are grounds for an appeal. If no reasons are provided, then almost certainly the matter will go on appeal and, given the increased number of courts that will be determining interim parenting matters, that will create a significant workload for the Family Court. This is particularly so because an appeal from a court of summary jurisdiction is a hearing de novo.

10. Axiomatically, reasons must be given for all interim parenting decisions, and that should be made clear in the legislation. Of course though, short form reasons should be permitted as long as it is understood that they still need to be adequate reasons. Otherwise, again, the prospect of an increased number of appeals looms large.

11. The Full Court of the Family Court set out in *Goode & Goode* (2006) FLC 93-286 the reasoning pathway that courts must follow in making interim parenting determinations, and *Goode & Goode* remains good law.

ITEMS 10 AND 11

12. These items concern the removal of the $20,000 cap on the value of the property that can be dealt with by a court of summary jurisdiction and the substitution thereof with an 'amount prescribed by the regulations'.

13. I do not dispute the desirability of seeking to better enable courts of summary jurisdiction to deal contemporaneously with minor property law matters and matters involving family violence. I also acknowledge that this proposed amendment would implement recommendation 15-2 of the Family Law Council's final report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* and partially implement recommendation 131 of the Victorian Royal Commission into Family Violence.

14. However, despite my in-principle support for this measure, I would like to express my concern about leaving the amount to be prescribed by the Regulations.

15. As for the question of what the cap should be, I have discussed this matter with the Family Court Policy Committee, the joint Family Court–Federal Circuit Court ('FCC') Family Violence Committee, Chief Judge Pascoe of the FCC and the Family Law Section of the Law Council of Australia. From these discussions I can relay that the Family Court, the FCC and the Section consider that a $100,000 limit would be appropriate. Further, we are also ad idem that the limit ultimately decided upon by Government should be stipulated in the Act and not in the Regulations. Clearly, if the limit is contained in the Regulations then it can be changed far more readily than if it is contained in the Act, but the issue is of such importance that any change should only be made by amendment to the Act. Further, I note that the cap has always been stipulated in the Act and there appears to be no reason why that should be changed.

ITEMS 12 AND 13

16. We are pleased to see these proposed amendments to the powers of the Family Court in relation to the making of summary decrees, bringing those powers into line with those of the Federal Court of Australia and the FCC.

17. I note, however, that a consequential amendment has been overlooked, being the repeal of s 118 as a result of sub-s 45A(4).

ITEMS 18, 19 AND 20

18. These items concern the removal of the 21 day time limit on state or territory courts' power to vary, discharge or suspend an order.

19. I note that these proposed amendments are not new and I acknowledge that public support for the previous iteration thereof was provided on behalf of the Family Court in February 2016 when Justice Strickland appeared before the Senate Legal and Constitutional Affairs Committee inquiring into the Bill that subsequently lapsed.

20. More recently, however, concerns have been expressed by the joint Family Court–FCC Family Violence Committee that the elimination of any imperative for a court to deal with an order of this kind will have significant ramifications as an access to justice issue. Specifically, it has been argued that those affected by such an order will not be able to argue urgency to obtain an interim hearing before the Family Court or the FCC and that, as a result, (particularly in the FCC) there may be long periods when a child does not see a parent. The view expressed by the Committee is that an eight week period should be substituted for the 21 days currently stipulated.

ITEMS 21 AND 24

21. These items are consequential upon the introduction of the new s 45A and again highlight the omission of repealing s 118.

ITEM 25

22. The Family Court has long advocated for the repeal of sub-s 114(2) and welcomes this amendment without qualification.

GENERAL

23. I would like to express my concern about the adequacy of the training in family law that will be provided to state and territory judicial officers. The Consultation Paper indicates (at page 5) that there will be one training module provided covering family law. This belies the complexity of family law decision-making in the realms of both parenting (including on an interim basis) and property and I strongly query its sufficiency to prepare the relevant judicial officers for decision-making in this area of law.