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Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: familylawunit@ag.gov.au

Dear Colleagues,

Public Consultation Re: Family Law Amendment (Family Violence and Other Measures) Bill 2017

The LIV welcomes the Commonwealth Government's commitment to improving the family law system's response to family violence and thanks the Attorney-General for the opportunity to provide feedback in relation to the proposed new measures.

The response of the LIV's Family Law Section (which comprises over 2,700 members practicing primarily in family, and children's law in Victoria) is below. Additional comments have been provided by the LIV's Criminal Law Section in relation to the proposed criminalization of breaches:

General Comments

The LIV agrees that a simplification of Part VII of the Family Law Act ("FLA") (which outlines the legislative pathway the Court must follow to determine the best interests of children in parenting matters) would assist:

a) Parties to better understand how parenting matters are determined under the FLA;

b) Increase the prospects of parties resolving their matter prior to a final hearing and, consequently, alleviate some of the pressure on the family law courts' resources.

Specific response to Exposure Draft and Consultation Paper

1. **Enabling State and Territory Children's courts to be prescribed as courts of summary jurisdiction**

The LIV agrees that amendment should be made to the FLA to clarify that the state and territory children's courts are courts of summary jurisdiction under the FLA. It would reduce confusion within the profession if the Children's Court of Victoria had the same powers to make orders under the FLA as the Magistrates' Court of Victoria.

However, to ensure consistency between the state and Commonwealth jurisdictions, the LIV recommends that guidelines and protocols be developed (following consultation between state and family courts) as to:

a) which matters are suitable to be heard in the state courts;

b) which cases should be transferred to either the Family Court (FCA) or Federal Circuit Court (FCCA);

c) a streamlined process by which matters are transferred to either the FCCA or FCA with provision made to enable the Courts to share information and evidence to reduce the cost of litigation to the parties and minimise delay.

The extent to which this proposed amendment is successful will ultimately depend on the training undertaken by the state and territory judicial officers. The LIV's Family Law Section is concerned about the level of training for family law matters proposed for judicial officers in the consultation paper (1 module of family law training). Family law is complex and its Courts are specialist courts. The LIV considers further training for state and territory judicial officers exercising power under the FLA would:

a) improve the quality of the orders made by state and territory courts under the FLA;

b) reduce the volume of subsequent litigation in the family law courts for orders that are made by state and territory courts which are found not to be in the best interests of children;

c) increase the confidence of litigants in the family law system.

Such training should be coordinated as between the state, territory courts and the Commonwealth federal courts once protocols are established as to the types of matters it is proposed be dealt with by the state and territory courts and to ensure consistency between the approaches to family law matters across all courts exercising jurisdiction under the FLA.

The LIV is also concerned about the proposed timing for the introduction of this amendment in light of the proposal to review Part 7 of the FLA. It may be more efficient and effective if these amendments were made after the Part 7 is simplified.

The LIV's Family Law Section is also concerned about the level of proposed training for judicial officers with respect to family violence (1 module). In Victoria, the Royal Commission into Family Violence recommended the roll out of specialist family violence magistrate's courts noting that the complex dynamics of family violence require the sophisticated understanding that could only be provided in a specialist context.

LIV considers a specialist approach should be adopted for the courts proposing to exercise jurisdiction under the FLA.

2. Proposed changes to the $20,000 monetary limit on property matters

The LIV's Family Law Section agrees that the limit should be increased (noting it has not increased for at least 2 decades) but considers that the limit be capped.

The LIV considers that a maximum limit needs to be clearly specified in the Act (not determined by regulation) to ensure this limit remains clear and consistent and proper consideration of any amendment/s to same in the future can be provided.

3. Proposed Appeal Process

It is not clear from the consultation paper what the processed process is for appeals from the state and territory courts vested with power to make orders under the FLA.

The LIV's Family Law Section considers that all appeals from state and territory courts determining orders made pursuant to FLA should be made to the Family Court of Australia (specialist superior court) and not determined by a superior state court.

4. Criminalisation of a breach of Personal Protection Injunction Order

The LIV supports in principle the proposal to criminalize a breach of a personal protection injunction order (PPIO). The LIV's Criminal Law Section notes that this proposal to criminalize a breach of a PPIO is consistent with provisions regarding criminal breaches in Victoria.

However, concerns are raised by the LIV's Family Law Section in relation to the proposed process by which this may occur. For example:

a) While the proposed amendment would allow a police officer to arrest a respondent for breaching a PPIO, it is not clear whether:

   a. a contravention application would still need to be filed for the breach to have carriage through the family law courts;

   b. that officer would be a state or federal police officer;

   c. the parties to the contravention application commenced by the officer would include both parents or other such persons who may be named in the orders. For example, a PPIO may be included in final orders made in relation to a 2 year old child in 2010 which has legal effect until the child is 18 years old. The parties may after a number of years improve their relationship and wish to commence a care arrangement for the child which is different to the one ordered by the Court. Arguably the party who is named in the PPIO would in breach of the PPIO and the other party could also be prosecuted as they would have assisted to facilitate the breach. Such an outcome is counter-productive to parties moving on with their lives and building a relationship which is amicable and best for the child.

   d. The contravention application proceedings commenced by the officer would be limited to prosecuting the breach or would allow the family law courts to vary the primary care order (as the case in current contravention applications[1]).

      This is concerning as, arguably, it means that the parties could be forced into family law court litigation by the state against their wishes.

      The LIV considers any contravention application proceedings commenced by the officer be limited to just prosecuting the breach and exclude the operation of s70NBA of the FLA.

[1] s70NBA FLA allows the court to vary a primary order in contravention application proceedings.

e. The officers need would be sufficiently resourced, trained or experienced in legal matters to be able to determine whether or not a breach has occurred. An important distinction between family law court orders and personal protection orders made by a state court (in Victoria, intervention orders) is that they can legally be overturned by the parties entering into a parenting agreement. This is designed to allow parties to change their care arrangement in a cost effective and easy manner without requiring them to return to Court or receive independent legal advice. A party accused of breaching a PPIO could, in theory, produce a paper with a handwritten care agreement signed by both parties which effectively overrides the PPIO. It would be a difficult evidentiary exercise to ascertain whether the other party consented to the parenting plan, was coerced into signing and/or whether the signature was forged.

The LIV notes that the consultation paper did not detail the processes proposed for the prosecution of breaches of PPIO. At present, the Commonwealth family law courts do not have the processes nor the resources to hear such matters or develop processes by which to hear such matters. Without further funding, the family law courts simply lack the necessary resources to handle the contravention applications in a timely manner.

The LIV notes that the Magistrates' Court of Victoria already has experience and processes by which breaches of intervention orders are heard. The LIV queries whether consideration ought to be given to the Magistrates' Court of Victoria having the power to prosecute breaches of PPIO's. This could arguably be achieved by complementary state and federal law reform which expands the definition of intervention orders to include PPIOs made by a family law court. The National Family Violence Order Database would require such a step to achieve its intention. We understand similar steps have already been taken in Tasmania to achieve this.

5. Removal of 21 day time limit on variation of family law orders in interim proceedings

The LIV's Family Law Section supports the removal of the 21 day time limit as it relieves the victim from needing to bring further family court proceedings within 21 days.

However, the LIV considers that another time limit should be introduced to avoid creating a 'status' quo' situation with the family's care arrangement which may have an undesirable effect on the determination of family law matters or promote applications being made for strategic long-term purposes which have little to do with the merits of the Intervention Order process.

At present, the basic fact that one parent may not be able to spend time with a child as a result of an Intervention Order will not necessarily mean that parent will obtain an urgent interim hearing in the family law courts. The application for a review of a suspension of a parenting order could take from 4-8 months to be heard in the family courts. This timeframe alone, putting aside all other considerations, has the potential to detrimentally impact upon a child's attachment, routine and developmental growth.

The longer the delay between a suspension and a review can result in a more entrenched status quo for the child, whether appropriate or otherwise. This time period may, in and of itself, become

a factor for consideration in the family law scenario where the child's best interests (the paramount consideration under the *FLA*) will be considered in a context where the child may not have spent time with a parent for a considerable period of time.

The LIV supports an extension of the 21 day time limit to vary, discharge or suspend a parenting order however suggests that a time limit, potentially of 60 days, be implemented instead.

6. Dismissal of courts to dismiss unmeritorious claims

The LIV has no objections to the proposed amendments regarding the court's power to dismiss unmeritorious claims.

The LIV's Family Law Section considers that the concerns noted in the paper raised by Women's Legal Services Queensland and the Australian Women Against Violence Alliance (that the new provisions could be misused by the more powerful party, and that litigants in person may make mistakes which make their cases appear unmeritorious) may be minimized by ensuring that the family law court is sufficiently resourced to enable its judicial officers to receive further training in the complicated dynamics of family violence.

7. Explaining impact of family law orders to children

The LIV considers that an explanation ought to be given to children only when the Court decides that it is in the best interests of the child to do so. In some cases it may not be in the best interests of a child to be provided with an explanation, for example, where a child lacks the maturity to understand the explanation or if the child may be traumatized or experience psychological harm from hearing an explanation. Judicial discretion should also be utilised to enable the Courts to determine who should provide the explanation to the child. In some cases, the child may have an existing relationship with a professional (e.g. family consultant, Independent Children's Lawyer, counsellor or psychologist) and it may be less traumatic for the child to receive the explanation from a professional with whom they are comfortable rather than a stranger.

The LIV notes that there are current proposals in Victoria to require state and territory judicial officers (and potentially others including the police) to explain or provide written explanations to certain person about family law and child protection implications in the context of intervention order proceedings where there is family violence. The LIV considers that the explanation proposed to be provided in this content be consistent with the proposed explanations given by state or territory courts to limit any confusion of the parties and to promote consistency between the jurisdictions. Inconsistency as between the jurisdictions will only lead to confusion by the parties and increase the risk of contravention of orders.

8. Short form judgments in interim proceedings

The LIV agrees that the FLA be amended to enable and encourage judicial officers to deliver short form judgments in interim proceedings.

The LIV suggests that all courts proposing to exercise jurisdiction under the FLA collaborate to produce a clear template for short form judgements to ensure the reasons supplied by the judicial officer are sufficient to constitute proper reasons and mitigate opportunities for appeals.

The LIV notes that many judgments in the Family Court and Federal Circuit Court are delivered *ex tempore*, particularly at an interim hearing level, which both assists the judicial officers in terms of the time pressures on them and the parties in that they receive the judicial determination in a prompt and efficient fashion. The LIV considers that *ex tempore* judgments are an absolute necessity in the family law courts. The LIV would be concerned were state and territory judicial officers to be required to provide a written judgment in every case, particularly given the family law courts' reliance upon *ex tempore* judgments. Consideration should be given to the promotion of the provision of a verbal judgment and mechanisms for same to be made available in printed form as soon as practicable thereafter.

Further Information or Queries

In Victoria, there are many proposals being considered to implement the recommendations made by the Royal Commission into Family Violence. It is imperative that state and Commonwealth reform be consistent to ensure that the family law system does not inadvertently compromise the safety of families, especially children.

The LIV welcomes the opportunity to provide any further feedback in relation to proposed amendments to the FLA and its proposed integration with Victorian law and practice and invites you to please contact [contact information redacted] if you have any queries or would like any further information.

Sincerely yours,

Belinda Wilson

President, Law Institute of Victoria