THE LAW SOCIETY
OF NEW SOUTH WALES

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20 January 2017

Public consultation: Family violence amendments
Family Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: familylawunit@ag.gov.au

Dear Sir/Madam,

Amendments to the *Family Law Act 1975* to respond to family violence

The Law Society of New South Wales appreciates the opportunity to provide comments on proposed amendments to the *Family Law Act 1975* aimed at improving the family law system's response to family violence. The Law Society's Family Law, Criminal Law and Children's Legal Issues Committees have contributed to this submission.

1. Exercise of family law jurisdiction by children's court

The proposed amendment would expressly enable state and territory children's courts to be prescribed as courts of summary jurisdiction. This would implement recommendation 1 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems*.[1]

The Law Society supports the proposed amendment as this has potential benefits for families, including continuity of location where a child protection matter has been finalised and parenting orders are needed. This will also clarify the power of the Children's Court to make orders preventing a child being removed from Australia (PASS alert orders and family law watch list orders) or to another state or territory.

However, the Law Society has concerns about the impact this may have on the current workload and resources of the Children's Court, and notes the need for these courts to be appropriately resourced to undertake family law work. The Law Society also notes that court staff and judicial officers will need to be provided with appropriate training.

In addition, the Law Society suggests that Children's Court orders should be registered in the Family Court or the Federal Circuit Court as a matter of practice.

[1] Family Law Council, *Families with complex needs and the intersection of the family law and child protection system: Interim Report (Terms 1 and 2)* (June 2015) 103-104.

2. Short form judgments

The proposed amendment would enable the court to give reasons in short form for a decision it makes in relation to an interim parenting order. This would implement recommendation 3 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems.*[2]

The Law Society notes that courts may currently give reasons for any decision in short form, as long as the reasons provided for the decision are adequate. The amendment does not purport to give the court additional powers. Rather, it is intended to encourage judicial officers in state and territory courts to consider giving short form judgments, where appropriate.

The Law Society supports the proposed amendment given that its aim is to encourage a more efficient use of court resources and avoid delays in judgments being provided.

3. Property jurisdiction of state and territory courts

The proposed amendment would enable state and territory courts to hear more family law property matters by removing the current $20,000 monetary limit (which has not been updated since 1988) and instead prescribing a higher amount in regulations. This would implement recommendation 15-2 of the Family Law Council in its final report on *Families with complex needs and the intersection of the family law and child protection systems.*[3]

The Law Society supports the proposal and would welcome the opportunity to be involved in further consultation regarding the new monetary limit.

4. Summary dismissal

This amendment would allow the court to make a summary decree in favour of one party, if satisfied that a party has no reasonable prospect of successfully prosecuting or defending the proceedings or part of the proceedings. It would also empower the court to:

- dismiss all or part of the proceedings if they are frivolous, vexatious or an abuse of process
- make costs orders as it sees fit, and
- take such action of its own volition or on the application of a party to the proceedings.

The Law Society supports the proposed amendment. We note that courts already have summary dismissal powers that can be used in appropriate cases. The proposed amendment seeks to clarify that power.

5. Criminalisation of breaches of injunctions

Under the *Family Law Act 1975*, the court can issue injunctions for the personal protection of a person or a child. The proposed amendment would make it a criminal offence to breach a personal protection injunction. This would implement recommendation 17-4 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response.*[4]

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[2] Ibid 104.
[3] Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems: Final Report (Terms 3, 4 and 5)* (June 2016) 146.
[4] Australian Law Reform Commission, *Family Violence – A National Legal Response* (October 2010) 813.

The Law Society notes that this is a complex issue and that practitioners hold differing views. The Law Society's Family Law Committee supports the proposed amendments. However, the Law Society's Criminal Law Committee opposes the creation of a new offence and considers that there are preferable ways of addressing the enforceability issue, including:

- A general referral provision providing that a breach of an injunction may be prosecuted under local state law as if it were a breach of state protective orders relating to family or domestic violence, with a regulation defining the relevant legislative provisions for prosecution in each jurisdiction.

- Empowering state or federal police to initiate civil proceedings for breach of an injunction in the Family Court on behalf of the victim.

- An automatic notification to state police where a Form 4 indicates family violence, to enable appropriate action under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*.

In the event that the proposed new offence provision is introduced, the Criminal Law Committee suggests the following amendments to the draft provision:

- Fault element – A requirement that the defendant knowingly contravened a prohibition or restriction specified in an injunction should be included. This would be consistent with the approach taken in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Section 5.6(2) of the *Criminal Code Act 1995* (Cth) states: "If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element". In this case, the 'physical element that consists of a circumstance or a result' consists of 'conduct which breaches the order' (sub-sections (c) and (d) of draft s 68C and draft s 114AA). Because the offence does not specify a fault element (mens rea), the *Criminal Code* implies recklessness. The offences should be amended to include that the fault element for that physical element is knowledge.

- Service – A requirement of proof of service of the injunction on the respondent, where the respondent was not present in court when the injunction was made, should be included.

- Intoxication – The qualifications on the intoxication defence should be removed. The Criminal Code deals with this issue appropriately.

- Aiding and abetting – Provisions aimed at preventing victims from being charged with aiding and abetting a breach of an injunction (for example, in circumstances where the parties have reconciled and have not varied or sought to discharge the injunction) should be included.

The Criminal Law Committee also suggests that recommendation 17-3 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response* should be implemented. Recommendation 17-3 provides: "The *Family Law Act 1975* (Cth) should be amended to provide separate provisions for injunctions for personal protection" which are finite and can contain similar conditions as per state apprehended domestic violence orders. Recommendation 17.4 should not be implemented on its own, as the thrust of the Australian Law Reform Commission's recommendations around injunctions and family violence is that they should align as far as possible with state legislation.

The Law Society notes that there is a potential for double jeopardy in situations where, in addition to the injunction made under the *Family Law Act 1975*, an apprehended domestic violence order (provisional, interim or final) is also in place.

Section 114AB of the *Family Law Act 1975* prevents a person from applying for an injunction in respect of a matter for which a state or territory protection order has been sought or obtained (unless the protection order has lapsed, been discontinued or dismissed, or the orders are no longer in force). However, this prohibition does not extend to matters not dealt with in the protection order, and only applies where the state or territory procedure has been used first. There is no corresponding prohibition on a person who has sought or obtained an injunction under the *Family Law Act 1975* from seeking a protection order under NSW legislation. Generally, it would not be appropriate for concurrent proceedings to occur where the parties and conduct involved are the same.

The Law Society notes that state and territory police will need to be provided with suitable training on their powers and duties regarding these injunctions.

6. Dispensing with explanations regarding orders or injunctions to children

The proposed amendment would allow more flexibility about the manner in which judges must explain orders and injunctions to a child, and would confer discretion to dispense with the requirement if the child is too young to understand the explanation or it is in the best interest of the child to do so.

The Law Society agrees with the concern raised by the National Children's Commissioner during the Senate Legal and Constitutional Affairs Committee inquiry on the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015, that this could lead children to feel as though they do not have a voice in proceedings which affect their lives.[5] The UN Committee on the Rights of the Child has stated in its 'General Comment on the right of the child to have his or her best interests taken as a primary consideration', that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention",[6] including the right to participation under Article 12 of the *Convention on the Rights of the Child*.[7]

The Law Society believes that the basis for dispensing with the requirement should be whether it is in the child's best interests, rather than whether the child is "too young to understand". We consider that the best interests of the child allows for a more flexible approach, and, if a court is required to consider the matters listed in s 60CC(2) and (3) of the *Family Law Act 1975*, the court's attention would be turned to the child's maturity and level of understanding and any other characteristics of the child that the court thinks are relevant.[8] We therefore consider it desirable to require the court to consider the matters listed in s 60CC(2) and (3) to inform itself of the child's best interests, including in particular the views of the child.[9] We support the need for courts to be flexible in how they provide the explanations to children.

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[5] The Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (2016) para 2.52.

[6] Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) para 4.

[7] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[8] See *Family Law Act 1975*, s 60CC(3)(a) and (g).

[9] See ibid, s 60CC(3)(a).

7. Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order

Currently, if a state or territory court, in hearing interim domestic violence order proceedings, orders that a family law order be varied, revived or suspended, then the variation, revival or suspension only has effect for 21 days. The proposed amendment would enable a state or territory court's variation, revival or suspension of a family law order to continue to have effect until:

- the time specified by the court in that order (e.g. tied to the making of a final family violence order)
- a further order is made, or
- the interim domestic violence order ceases to be in force.

This would implement recommendation 4 of the Family Law Council in its interim report on *Families with complex needs and the intersection of the family law and child protection systems.*[10]

The Law Society notes the views of the Senate Legal and Constitutional Affairs Committee in its inquiry report on the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015:

> The committee believes that the removal of the 21 day expiration period would be beneficial to victims of family violence, because it would help to ensure that they, and/or their children, are not subject to conflicting court orders. The committee is persuaded that consistent court orders are a key element in facilitating protection from violence.
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> The committee is also persuaded that access to timely information in matters involving children and victims of violence is crucial for the court system to be able to respond effectively. On that basis, the committee recommends that the Commonwealth government, in conjunction with states and territories, consider the practicalities of a protocol for information sharing between courts.[11]

The Law Society supports the proposed amendment. We note that a 21 day period would generally not allow a sufficient amount of time for a matter to be heard by the family courts given the current delays experienced by those courts. In addition, we encourage the Department to implement the recommendation of the Senate Legal and Constitutional Affairs Committee regarding the development of an information sharing protocol between the courts.[12]

8. Repeal obligation to perform marital services

Section 114(2) of the *Family Law Act 1975* permits the court to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights. The proposed amendment would repeal this section. This would implement recommendation 17-6 of the Australian Law Reform Commission's final report on *Family Violence – A National Legal Response.*[13]

The Law Society agrees that this provision should be repealed as it is obsolete, unnecessary and inappropriate.

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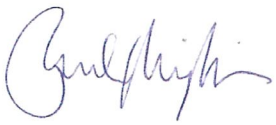
[10] Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems: Interim report* (Terms 1 and 2) (June 2015) 104.
[11] Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (February 2016) para 2.34-2.35.
[12] Ibid para 2.36.
[13] Australian Law Reform Commission, *Family Violence – A National Legal Response* (October 2010) 824.

Please do not hesitate to contact Chelly Milliken, Principal Policy Advisor, on 02 9926 0218 or chelly.milliken@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Pauline Wright
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