Chapter 2

Issues raised

2.1 The bill contains 10 schedules, which this chapter will discuss in turn. This will be done by first setting out the purpose and nature of the proposed provisions contained in each schedule, before outlining the support or concerns raised about these amendments in submissions received by the committee, where comment was actually received.

2.2 Submissions focussed on proposed changes to five acts, namely the:

- *Bankruptcy Act 1966* (Bankruptcy Act);
- *Family Law Act 1975* (FLA);
- *International Arbitration Act 1974* (IAA);
- *Marriage Act 1961*; and the
- *Sex Discrimination Act 1984* (SDA).

2.3 While the committee did not receive evidence in relation to all Commonwealth Acts that would be amended by the bill, for completeness, the committee has considered these proposed amendments.

Schedule 1–proposed amendments to the *Acts Interpretation Act 1901*

2.4 Schedule 1 of the bill would amend the AIA 'to clarify the validity of Ministerial acts and the operation of provisions about the management of compilations prepared for the Federal Register of Legislation'.[1]

2.5 The Explanatory Memorandum states that this provision would reinstate a section of the AIA repealed inadvertently by a drafting error in the *Acts and Instruments (Framework Reform) Act 2014*. This would:

> ...reinstate a provision that clarifies that a Minister's exercise of power is not invalid merely because that power, duty or function is conferred on another Minister. For example, the performance of a duty by a Minister under the belief that that duty lies with him or her will not automatically be an invalid exercise of power if in fact a change in the Administrative Arrangement Orders placed responsibility for that duty on another Minister. This provision would not, however, validate the acts of Ministers purporting to exercise power which is conferred on another Minister in all circumstances. Further, it would not authorise or allow Ministers to perform functions or duties or exercise powers that do not fall within their areas of responsibility. This provision is intended to operate in accordance with the convention of collective responsibility, which is part of the Cabinet system of Government.[2]

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1 *Explanatory Memorandum*, p. 2.

2 *Explanatory Memorandum*, p. 17.

2.6 No submitters commented on the proposed amendments contained in schedule 1 of the bill.

Schedule 2–proposed amendments to the *Archives Act 1983*

2.7 The Explanatory Memorandum outlines the amendments the bill would make to the *Archives Act 1983* (Archives Act), which would:

> ….provide the National Archives of Australia with some tools to appropriately manage high volume applicants requesting access to records and make other minor technical amendments, including repealing outdated provisions that do not reflect the Archives current services or technology advances.[3]

2.8 More specifically, the bill would enact provisions:

- extending the timeframe within which the Archives is required to respond to access requests from 90 calendar days to 90 business days
- providing the Director-General of the Archives with the ability to extend the timeframe for processing an access request by mutual agreement with the applicant
- giving the Director-General of the Archives the power to extend the timeframe for processing an access request where that request exceeds a specified number of items, and
- extending the timeframe for internal review by the Archives of access decisions from 14 calendar days to 30 business days.[4]

2.9 No concerns were raised about these proposed provisions by submitters.

Schedule 3–proposed amendments to the *Bankruptcy Act 1966*

2.10 Schedule 3 of the bill would make an amendment to the Bankruptcy Act that would 'clarify that the Family Court of Australia has bankruptcy jurisdiction when a trustee applies to have a financial agreement set aside under the Family Law Act'.[5]

2.11 Although several submissions expressed no substantive concerns about schedule 3 of the bill, some submitters raised concerns on certain aspects of the amendments.[6]

2.12 The Hon Chief Justice Diana Bryant AO QC of the Family Court of Australia (Family Court) stated that she had been generally supportive of the bill's proposed

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3 *Explanatory Memorandum*, p. 2.

4 *Explanatory Memorandum*, p. 5.

5 *Explanatory Memorandum*, p. 2.

6 The Hon Chief Justice Diana Bryant, *Submission 2*, p. 1; Law Council of Australia, *Submission 3*¸ p. 6.

amendments to the Bankruptcy Act. However, she submitted that she had altered her position on proposed changes to section 65L, as contained in items 19–20 of the bill.[7]

2.13 The Explanatory Memorandum states that section 65L(1):

> …empowers the court to make orders requiring a family consultant to supervise, or assist with, compliance of a parenting order.
>
> Item 20 would insert a new subsection 65L(3) to provide that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are 'exceptional circumstances' which warrant the order.

2.14 Chief Justice Bryant explained her change of perspective as being a result of:

> The lack of appropriate resourcing to the family courts over the past two years in particular has caused me to think about how the courts can better deal with cases without the appointment of more Judges. One of the matters I have been considering is an effort to reduce the number of parenting order contravention applications being heard by Judges. One method of achieving this may be to introduce a kind of triage system, whereby such applications are resolved by a team comprised of a Family Consultant acting under s 65L (as it currently stands) and a Registrar exercising delegated powers.[8]

2.15 The committee believes that the Chief Justice's proposal for a new triage system should be given appropriate consideration by the government.

2.16 The Attorney-General's Department (AGD) responded to the Chief Justice's submission by stating that 'this change in policy and funding matters, are matters for Government'.[9]

2.17 The Law Council of Australia (Law Council) noted that the proposed amendments 'do not provide jurisdiction to the Family Court in bankruptcy in circumstances where a person has been discharged from bankruptcy, albeit that their estate remains vested in the trustee in bankruptcy'.[10] Considering this, the Law Council recommended that the following definition be added to the proposed amendment to the FLA:

> ***Bankrupt*** *and* ***bankrupt party to a marriage*** *means a person who is bankrupt and includes, for the avoidance of doubt, a person who has been discharged from bankruptcy but whose estate remains vested in the trustee of their estate.*[11]

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7 *Submission 2*, p. 1.

8 *Submission 2*, p. 1.

9 *Submission 5*, p. 8.

10 *Submission 3*¸ p. 6.

11 *Submission 3*¸ p. 6. Note that the bill's proposed amendments to the FLA are discussed below.

2.18 Regarding this proposed amendment to the bill, the AGD stated that it would 'consider the recommendations of the LCA in relation to the proposed bankruptcy amendments'.[12]

Schedule 4–proposed amendments to the *Domicile Act 1982*

2.19 Schedule 4 of the bill would amend the Act so that it applies to territories currently specified in the Domicile Regulations 1982.[13] The Domicile Act abolished 'the rule of law whereby a married woman has at all times the domicile of her husband, and to make certain other reforms to the law relating to domicile', for the laws of the Commonwealth, as well as the laws of Territories (including common law).[14]

2.20 More specifically, schedule 4 of the bill would:

> …repeal subsection 3(6) of the *Domicile Act 1982* and substitute a new subsection that extends the operation of the Act to the Australian Capital Territory, Norfolk Island, the Jervis Bay Territory, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and any external Territory declared by the regulations to be a Territory to which the Act extends.[15]

2.21 The Explanatory Memorandum clearly states that this proposed change would not affect the application of the *Domicile Act 1982*. Rather, it would simplify its application and interpretation, by moving provisions covering Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands from the relevant regulations into the Act itself.[16]

2.22 The committee received no evidence on this proposed change in submissions.

Schedule 5–proposed amendments to the *Evidence Act 1995*

2.23 Schedule 5 of the bill would amend the current 'presumption about when postal articles sent by prepaid post are received' contained in the Evidence Act, 'to accord with changes to Australia Post delivery times'.[17]

2.24 Specifically, this would amend subsection 160(1) 'to provide that a postal article is presumed to be received on the seventh working day after having been posted', rather than four days, as currently stipulated.[18] This amendment is intended to

12 *Submission 5*, p. 8.

13 *Explanatory Memorandum*, p. 2.

14 *Domicile Act 1982*, section 3(1).

15 *Explanatory Memorandum*, p. 32.

16 *Explanatory Memorandum*, p. 32.

17 *Explanatory Memorandum*, p. 4.

18 *Explanatory Memorandum*, p. 33.

align with 'current Australia Post service timeframes based on the maximum time a letter would take to be delivered on the regular service tier'.[19]

2.25 No submitters commented on these proposed amendments.

Schedule 6–proposed amendments to the *Family Law Act 1975*

2.26 The Explanatory Memorandum states that the bill would make a number of amendments to the FLA to:

- strengthen Australia's response to international parental child abduction;
- clarify the range of persons who may perform the powers of the Registry Managers in the Family Court of Australia or any other court;
- improve the consistency of financial and other provisions for de facto and married couples;
- assist the operation of the family law courts, and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.[20]

2.27 The Attorney-General drew out the purpose and substance of these changes to the FLA in his Second Reading Speech introducing the bill to the Senate:

> Minor and technical amendments contained in the Bill would improve the operation of the Family Law Act by clarifying existing laws, simplifying processes, and remedying inconsistencies. The Bill would make amendments to provide the same rights to de facto and married couples, when instituting maintenance or property proceedings. The Bill would also amend the Family Law Act to clarify that admissibility provisions in the Evidence Act relating to evidence obtained in an improper or illegal manner apply to evidence of disclosures of child abuse in communications between family consultants and family law litigants.[21]

2.28 The Attorney-General also commented on how the bill's provisions would improve the operation of the Family Court in several ways:

> The Bill would amend the Family Law Act procedure for appointing members of the Family Court of Australia Rules Advisory Committee, to be consistent with the process for appointment of a similar committee advising the Chief Judge of the Federal Circuit Court of Australia. Other amendments to the Family Law Act would clarify the range of persons who may perform the powers of the Registry Managers in the Family Court of Australia and any other court. The Bankruptcy Act would also be amended to clarify that the Family Court of Australia has bankruptcy jurisdiction

19 *Explanatory Memorandum*, p. 33.

20 *Explanatory Memorandum*, p. 4.

21 *Senate Hansard*, 22 March 2017, p. 1859.

> when a trustee applies to have a binding financial agreement set aside under the Family Law Act.[22]

Concerns raised about retrospectivity

2.29 In its *Scrutiny Digest*, the Senate's Scrutiny of Bills Committee (Scrutiny Committee) stated it has:

> ...long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).[23]

2.30 The committee outlined its concerns with proposed provisions of the bill to the FLA:

> The committee notes that the explanatory memorandum explains that it is unlikely that parties would suffer any detriment as a result of applying these provisions retrospectively. However, the committee notes it is difficult to quantify any detriment that might be suffered by a party who may have refused an offer to settle on the basis of the law as it currently stands (i.e. believing that the fact of that offer could not be disclosed to the court).[24]

2.31 The Scrutiny Committee 'left to the Senate as a whole the appropriateness of the retrospective application of this measure'.[25]

Concerns raised about international parental child abduction (IPCA)

2.32 The bill contains provisions that would create new offences regarding 'retaining a child outside Australia' in the FLA. These would provide that a person commits an offence where:

- a parenting order to which Subdivision E of Division 6 of Part VII of the Act applies is in force in relation to a child, and
- that child has been taken or sent from Australia to a place outside Australia, by or on behalf of a party to the proceedings in which the parenting order was made:
  - with the consent in writing (authenticated as prescribed) of each person in whose favour the parenting order was made, or
  - in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time, or after, the parenting order was made, and
- the person retains the child outside Australia otherwise than in accordance with the consent or order, and

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22 *Senate Hansard*, 22 March 2017, p. 1859.

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 6.

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 6.

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 6.

- the person was a party to the proceedings in which the parenting order was made, or is retaining the child on behalf of, or at the request of, such a party.[26]

2.33 The Explanatory Memorandum notes that these provisions would remedy a gap in the existing legislation. Moreover, it states that in the previous parliament, amendments closing this gap were considered and endorsed by this committee in its inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill.[27]

2.34 Regarding these proposed amendments, the AHRC stated it 'considers that there are circumstances in which it would be inappropriate to expose parents or others to criminal sanction for taking, sending, or retaining a child outside Australia'.[28] To support this, the AHRC referred to the conclusions the Family Law Council reached in 2011, regarding proposed provisions criminalising the wrongful retention of children abroad should be added to the FLA, such as sections 65YA and 65ZAA of the bill. The AHRC summarised these findings in the following way:

> The Council concluded that there are not principled reasons to treat unlawful retentions differently from unlawful transfers. However, it noted that any criminal provisions should be subject to appropriate defences and exceptions…
>
> For instance, [where] there is evidence that in some cases children are taken, or retained, abroad by parents fleeing domestic violence…[or where] 'practical difficulties associated with travel' may mean that there are cases where a child is retained overseas for longer than permitted, in circumstances which do not warrant criminal sanction…[29]

2.35 Given this, the AHRC recommended that:

> Advice be sought from the Australian Government Solicitor or other appropriate body about the extent to which the exceptions and defences to offences in the *Family Law Act 1975* (Cth) recommended by the Family Law Council are already provided by existing exceptions and defences under the *Criminal Code* or otherwise [and that]
>
> Consideration be given to amending the *Family Law Act 1975* (Cth) to include explicit exceptions and defences to ensure that the existing and proposed offences of unlawful transfer and retention of children abroad will not apply in circumstances of:
>
> - Duress
> - Sudden or extraordinary emergency
> - Self-defence

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26 Item 45 of the bill. See *Explanatory Memorandum*, pp. 49–50.

27 *Explanatory Memorandum*, p. 50. See also this committee's report *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, February 2016, pp. 26–27.

28 *Submission 1*, p. 8.

29 *Submission 1*, p. 8.

- Lawful authority
- Mistake of fact
- Fleeing from violence
- Protecting the child from danger of imminent harm
- Reasonable excuse
- Consent.[30]

2.36 The AGD submitted that the first five of these exceptions and defences already exist in the Criminal Code, for both existing offences in the FLA and proposed offences contained in the bill.[31] In this, it noted that the duplication of Criminal Code defences should be avoided, as recommended by the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers*.[32]

2.37 The AGD also commented on the inclusion of the last four exceptions and defences recommended by the AHRC.[33] In this, it stated that the FLC had noted that two of these potentially fell within existing defence of self-defence, but recommended they be included in the FLA so as to specify their availability as defences (fleeing from violence and protecting the child from imminent harm).[34]

2.38 However, the AGD stated that the government has decided not to include these defences in the final bill. Regarding, 'fleeing from family violence', the AGD noted that a 2012 amendment to the FLA that broadened the definition of 'family violence' to include conduct such as 'repeated derogatory taunts' and financial abuse. The AGD commented that this more broad definition could make some IPCA offences very difficult to prosecute, should 'fleeing from family violence' be inserted into the FLA, as it may 'provide a defence with a much broader operation than the existing concept of self-defence'.[35]

2.39 The committee has, however, formed the view that the bill should be amended to amend the FLA to include a defence of 'fleeing from family violence', to ensure that the existing and proposed offences of unlawful transfer and retention of children abroad do not apply in circumstances of family violence.

2.40 Regarding the proposed inclusion of 'protecting the child from imminent harm', the AGD stated that this would substantially duplicate the defence of self-defence, should it be inserted into the FLA. It commented that:

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30 *Submission 1*, pp. 8–9.

31 Namely: duress; sudden or extraordinary emergency; self-defence; lawful authority; and mistake of fact.

32 *Submission 5*, p. 3.

33 Namely: fleeing from violence; protecting the child from danger of imminent harm; reasonable excuse; and consent.

34 *Submission 5*, p. 3.

35 *Submission 5*, p. 3.

> It is difficult to identify a scenario in which conduct to protect a child from danger of imminent harm would not be conduct necessary "to defend… another person", which is one of the situations in which self-defence can be invoked. Including 'protecting the child from danger of imminent harm' as a defence could lead to a court attempting to distinguish the two defences, with unpredictable consequences, such as limiting the scope of self-defence, or broadening the new defence beyond its intended scope.[36]

2.41 Regarding the AHRC and FLC's recommendation that 'consent' be included, the AGD commented:

> This has not been included as a defence, as a lack of written consent to the retention is instead provided as an element of the offence [under proposed sections 65YA(c) and 65ZAA(c)]. The practical effect of making a lack of consent an element of the offence (rather than making the presence of consent a defence) is that the prosecutor is required to prove beyond reasonable doubt that consent did not exist. The defendant is not required to discharge an evidential burden to prove, on the balance of probability, that consent existed.[37]

2.42 Regarding 'reasonable excuse', the AGD commented that such a defence would be 'broad and uncertain'. To support this, the AGD outlined the advice given by the *Commonwealth Guide to Framing Offences, Infringement Notices and Enforcement Powers*, which suggests that this defence 'should not be applied to an offence as it is too expansive and unclear as to what is needed to satisfy the defence'.[38]

2.43 The committee has, however, formed the view that the bill should be amended to amend the FLA to include a defence of 'consent' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances where oral, or another form of consent, has been provided in the absence of written consent.

Concerns raised about amendments to arrest powers and the use of force

2.44 In its submission, the AGD provided an overview of the current provisions of the FLA regarding arrest powers and the use of force:

> The Family Law Act currently provides that a person who is authorised by the court to arrest another person has powers related to the use of reasonable force in making the arrest, and powers of entry and search for the purposes of arresting persons. These existing provisions apply to any person authorised by the Family Law Act, or by a warrant issued under a provision of the Family Law Act, to arrest another person.[39]

2.45 Further to this, the AGD noted some of the shortcomings of the current provisions that proposed section 122A of the bill is intended to address:

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36 *Submission 5*, p. 3.

37 *Submission 5*, pp. 3–4.

38 *Submission 5*, p. 4.

39 *Submission 5*, p. 5.

> The current arrest powers in the Family Law Act are subject to fewer limits than the arrest provisions available to the other federal courts, and are broader than the arrest powers available to police officers in the *Crimes Act 1914*. These powers lack the limits and safeguards suggested in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*[40]

2.46 The Scrutiny Committee raised concerns with the proposed amendments that would be made by proposed section 122A(1)(i), which sets out who would be authorised to make an arrest. They noted:

> In addition to persons such as a Marshal, Deputy Marshal, Sheriff or Deputy Sheriff, police officer or the Australian Border Force Commissioner, the bill provides that the power to arrest another person is conferred on 'an APS employee' in the Department of Immigration and Border Protection.[41]

2.47 The Scrutiny Committee noted its general concerns about any proposed 'legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes'.[42] Regarding the bill currently being considered, the Scrutiny Committee requested:

> …the Attorney-General's advice as to the appropriateness of enabling any APS employee within the Department of Immigration and Border Protection to exercise coercive powers and whether the bill can be amended to require a certain level of relevant training be undertaken by those APS employees authorised to exercise these coercive powers.[43]

2.48 The AHRC's submission to this inquiry echoed this concern. Recommendation 3 of the AHRC's submission asks that the Commonwealth consider proposed section 122A of the FLA in the following ways:

- clarifying the training and accountability measures that are in place in relation to the use of force for persons specified in sections 122A(1)(h) and (i);
- drafting the categories of persons authorised to make arrests more narrowly (122A(1)(h) and (i));
- making amendments clarifying that arrests may only be made when it is reasonably necessary in specified circumstances, namely preventing the imminent unlawful removal of a child from Australia (122A(2)); and
- asking whether it is appropriate for the use of lethal force to be permitted for persons specified in sections 122A(1)(h) and (i), except in self-defence in accordance with the ordinary principles of law.[44]

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40 *Submission 5*, p. 5.

41 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 8.

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 8.

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, p. 9.

44 *Submission 1*, p. 13.

2.49 The AGD responded to each of these matters, which will be discussed in turn. Regarding training and accountability, the AGD stated that:

> In practice, the Department expects that only officers who already have arrest powers under other Acts would be authorised as an arrester, and that when a person is authorised under proposed paragraph 122A(1)(h), that person would be an officer of the Australian Border Force (ABF). These officers would receive training appropriate to the exercise of those powers. For example, powers of arrest are already covered in a number of ABF operational training courses, with training comprising face-to-face learning with legal officers on the parameters surrounding the use of the power, discussions with experienced ABF officers who have used these powers, and practical scenarios to assess an officer's understanding of the use of the power in an operational ABF context.[45]

2.50 In its submission, the AGD addressed the AHRC's recommendation concerning the categories of persons authorised to make arrests under the proposed amendments. It first set out the nature of the amendments:

> The proposed new sections 122A and 122AA of the Family Law Act would, as well as modernising the arrest powers, narrow the classes of people who would be authorised to use reasonable force and the powers of entry and search for the purposes of arresting a person. The categories of people who would be so authorised are listed in proposed subsection 122A(1). Relevantly, new paragraphs 122A(1)(h) and (i) provide the ABF Commissioner and APS employees in the Department of Immigration and Border Protection (DIBP) (respectively), if authorised by the court to arrest another person, with powers related to the use of reasonable force for the purposes of arresting persons.[46]

2.51 The AGD commented that this did not represent a change of policy position, but that DIBP officers could exercise existing powers relating to the use of force and entry when authorised by the FLA. Moreover, they also commented that APS employees of the DIBP also had other arrest powers under other legislation.[47]

2.52 The AGD submitted that consultations with stakeholders had confirmed the importance of officers of the Australian Border Force (ABF) (part of the Department of Immigration and Border Protection) retaining the ability to use force and coercive powers of entry under the proposed new sections 122A and 122AA:

> Maintaining these powers with ABF officers would be of particular utility in preventing international parental child abduction. The current formulation, which refers to "an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*", would include ABF officers.

45 *Submission 5*, pp. 5–6.

46 *Submission 5*, p. 5.

47 *Submission 5*, p. 5.

> While ABF officers are only a subset of the APS employees of the DIBP, the department intends to liaise with the courts to discuss administrative options (such as design of the template of an arrest warrant) that could be utilised to ensure that the only ABF officers will be authorised.[48]

2.53 Regarding the potential clarifications of the circumstances of arrests, the AGD disagreed with the AHRC's recommendation for amendments to be made to proposed subsection 122A(2) to provide specific circumstances in which the arrest powers may be used:

> The Department does not agree with this recommendation. The framework attached to the power of arrest, found in proposed new section 122A, includes limits on entering premises, use of force and how the arrest must take place. Further narrowing of the circumstances in which an arrest may take place, such as requiring proof that the arrest would prevent the imminent unlawful removal of a child from Australia, may lead to the provisions being too limited to operate effectively and lead to unpredictable consequences.[49]

2.54 The AGD also set out a response to the AHRC concerns about the use of lethal force by APS employees:

> It is important to note that use of force that risks death or grievous bodily harm is expressly proscribed by the proposed amendments, except in circumstances where the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to a person (including the arrester). Further, the use of force is required to be necessary and reasonable under proposed subsection 122A(2). These dual requirements mean that the use of such force is only permitted in circumstances where it is highly likely that the defence of self-defence under section 10.4 of the Criminal Code would be available.[50]

2.55 The AGD also pointed to a number of other Commonwealth Acts containing similar arrest powers, including the *Crimes Act 1914*, the *Customs Act 1901*, the *Federal Circuit Court of Australia Act 1999*, the *Federal Court of Australia Act 1976*, and the *Maritime Powers Act 2013*.[51]

2.56 Given the existing limits on the use of lethal force, the AGD submitted that 'it is unnecessary to place further limits on the use of force' in the FLA.[52]

2.57 The AGD has acknowledged in evidence that, in practice, it would only be ABF employees who had received training that would be authorised to exercise the arrest powers.[53]

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48 *Submission 5*, p. 5.

49 *Submission 5*, p. 5.

50 *Submission 5*, p. 5.

51 *Submission 5*, p. 6.

52 *Submission 5*, p. 6.

53 *Submission 5*, pp. 5–6.

2.58 The committee will be urging the government to amend the bill to amend the FLA to limit the arrest and use of force powers so that they apply only to employees of the ABF that have received appropriate training.

Other concerns

2.59 The Law Council submitted that the drafting of proposed subparagraph 44(5)(a)(ii) of the FLA could be improved in order to remedy inconsistencies between de facto and married couples in relation to instituting proceedings.[54] The AGD noted this suggestion, commenting that further consideration of whether this is necessary is needed.[55]

2.60 The Committee urges the government to consider whether the drafting of proposed subparagraph 44(5)(a)(ii) of the FLA should be improved.

Schedule 7–proposed amendments to the *International Arbitration Act 1974*

2.61 According to the Explanatory Memorandum, schedule 7 of the bill would make a number of amendments to the IAA to:

- specify expressly the meaning of 'competent court' for the purpose of the [United Nations Commission on International Trade Law (UNCITRAL) Model Law];
- clarify procedural requirements for enforcement of an arbitral award;
- modernise provisions governing arbitrators' powers to award costs in international commercial arbitrations; and
- clarify the application of confidentiality provisions to arbitration subject to the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration.[56]

2.62 The Attorney-General stated in his Second Reading Speech that these provisions reflect:

> …the Government's commitment to maintain its place in the international legal environment by amending the International Arbitration Act to help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive arbitration friendly jurisdiction.[57]

Retrospectivity of provisions

2.63 As noted above, the Scrutiny Committee has longstanding concerns about legislation that introduces retrospective provisions. Given this, the Scrutiny Committee noted that the bill's amendment of the IAA would apply to any arbitral

54 *Submission 3*, p. 7.

55 *Submission 5*, p. 9.

56 *Explanatory Memorandum*, p. 4.

57 *Senate Hansard*, 22 March 2017, p. 1858.

proceedings 'whether commenced before or after this item commences', under item 5, commenting that:

> The explanatory memorandum simply restates the provision without providing any explanation. Applying the amendments to proceedings which commenced before the commencement of the amending legislation has a retrospective application.[58]

2.64 The Scrutiny Committee sought the Attorney-General's advice on why these provisions would apply retrospectively.

2.65 This committee is also seeking further clarity from the government on why the proposed amendments to the IAA should apply retrospectively.

2.66 The committee believes that the AGD's consultation process would be enhanced by seeking the advice of the Solicitor-General on the constitutionality of the proposed amendments to the IAA, and suggests that the AGD seek this advice.

Concerns raised about the drafting of and terms used by the bill

2.67 The Law Council broadly supported the intentions of the proposed amendments to the IAA, but raised some concerns about how some provisions had been drafted and some of the terminology used.

Definition of a 'competent court'

2.68 More specifically, the Law Council was supportive of the bill's proposed provision that would recognise the Federal Court and the Supreme Courts of the states and territories as 'competent courts' for the purposes of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), on the condition that this amendment was assessed as constitutionally valid by the Solicitor-General of the Commonwealth.[59] The Law Council commented:

> Subject to advice by the Solicitor-General that such a measure is within power, the changes are welcomed and hopefully prevent any further costly and confusing litigation as to which courts have jurisdiction for these purposes.[60]

2.69 The AGD made no specific response to this recommendation, but noted that it has consulted extensively in developing the amendments to the IAA.[61]

Use of the terms 'settle' and 'fix'

2.70 The Law Council noted that the bill proposes to amend the IAA to remove reference to taxation regarding costs in international arbitration, commenting that:

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58 Senate Scrutiny of Bills Committee, *Scrutiny Digest No 4*, March 2017, pp. 9–10.

59 *Submission 3,* pp. 7–8.

60 *Submission 3,* p. 8.

61 *Submission 5,* p. 8.

> The process of taxation is inherently a judicial process and the amount of costs awarded is often government by the appropriate rules and legislation applicable to each court.[62]

2.71 The Law Council endorsed this proposed amendment. However, it noted that the drafting of the bill may create an unintended distinction between the power of the tribunal to settle costs and the power of the Court to tax costs.

2.72 Because of this, the Law Council recommended the bill replace the words 'settle' and 'taxable' in section 27 of the IAA, with the words 'fix' and 'may be fixed' respectively.[63] This, it stated:

> …would clarify that the powers of the Court and the tribunal (subject, of course, to the agreement of the parties and the arbitral tribunal) are not inherently distinct.[64]

2.73 On this matter, the AGD submitted that it:

> …considers that section 27 as amended by the Bill currently before the Committee uses appropriate language in the necessary level of detail to provide certainty about the breadth of a tribunal's power to make an award of costs in the amounts and to the parties it sees fit. The Bill would modify the existing provision in a manner consistent with contemporary arbitral practice and would be unlikely to be the cause of unwarranted dispute as to the meaning of the term 'settle'. Accordingly, it would not be necessary for further consideration of the LCAs proposal for use of the substitute term 'fix'. It is useful to note that this term is not the only term used in arbitration rules to describe a tribunal's power to determine and award costs, and that there is no uniformity in the terminology of provisions governing these powers in other jurisdictions.[65]

Schedule 8–proposed amendments to the *Legislation Act 2003*

2.74 The Explanatory Memorandum states that the bill would amend the *Legislation Act 2003* to:

> …promote effective practical management of the Federal Register of Legislation by clarifying that retrospective amendments are not required to be incorporated into previous compilations, that an agency is not required to prepare and lodge for registration a compilation of an Act or instrument merely because a provision of the Act or instrument ceases to be in effect, unless the provision is expressly repealed by amending legislation, and when an instrument should be removed from the "In Force" part of the Register.[66]

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62 *Submission 3,* p. 8.

63 *Submission 3,* p. 10.

64 *Submission 3,* p. 10.

65 *Submission 5,* p. 9.

66 *Explanatory Memorandum,* p. 6.

2.75 In this, the new provisions would allow that:

> The Office of Parliamentary Counsel and other agencies preparing compilations of legislation will be able to assess where it is necessary to incorporate retrospective amendments to past compilations, and amending legislation will continue to be available to the public in their most current and correct versions.[67]

2.76 No submitters commented on these proposed amendments.

Schedule 9–proposed amendments to the *Marriage Act 1961*

2.77 The Explanatory Memorandum sets out the bill's proposed amendments to the Marriage Act in schedule 9 of the bill, which are intended to:

- remove outdated concepts and ensure consistency with the Family Law Act in relation to parental consent for the marriage of minors;
- make technical amendments of minor policy significance to improve the operation of the Marriage Act; and
- remedy errors and defects in existing legislation to clarify and streamline relevant provisions to ensure consistency.[68]

Concerns raised

The need to update Guidelines for Marriage Celebrants

2.78 The AHRC supported the amendments to the Marriage Act proposed to be made by the bill. However, it made a recommendation regarding the amendment of section 23B under Item 4 of the bill, should it be passed.

2.79 Section 23B would amend the Marriage Act in accordance with the findings of the Australian Law Reform Commission's report, *Equality, Capacity and Disability in Commonwealth Laws*. The Explanatory Memorandum summarised this recommendation as follows:

> …the Marriage Act should be amended remove the references to a person being mentally incapable of providing consent, to better reflect the National Decision-Making Principles proposed in the report, and to ensure that persons with a disability are not unnecessarily prevented from entering a marriage.[69]

2.80 The Explanatory Memorandum states that accordingly, Item 4 of Schedule 9 would:

> …amend subparagraph 23B(1)(d)(iii) to focus on the requirement for a person to understand the nature and effect of the marriage ceremony in

67 *Explanatory Memorandum*, p. 6.

68 *Explanatory Memorandum*, p. 4.

69 *Explanatory Memorandum*, p. 65.

> order for the marriage to be valid, rather than focus on the persons disability.[70]

2.81 The AHRC commented that this provision, if enacted, would necessitate updates being made to the *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, published by the Australian Government:

> The Commission recommends that when these changes to the Guidelines are made, the Attorney-General's Department include in the Guidelines information for marriage celebrants about how they can best ensure that persons with disabilities are able to make decisions about marriage, including through supported decision making where appropriate, and have those decisions respected.[71]

2.82 In its submission, the AGD confirmed that these guidelines would be appropriately updated, should the bill be passed.[72]

Other concerns

2.83 The committee received broad comments on potential substantial amendments to the Marriage Act from Ms Rona Goold, a marriage celebrant, which were beyond the scope of this bill. Specifically in relation to the bill, she submitted that the bill be amended to ensure independent marriage celebrants do not lose their authorisation for the first non-payment by the charge date of the annual registration, noting that the majority of authorised celebrants were not required to pay such a fee.[73]

2.84 In response, the AGD noted the bill is:

> …intended to clarify the current process; not to significantly change it. Any further change to the policy of the Marriage Act is a matter for the Government.[74]

Schedule 10–proposed amendments to the *Sex Discrimination Act 1984*

2.85 According to the Explanatory Memorandum, the bill would amend the SDA to:

> …repeal section 43 which exempts discrimination against women in connection with employment, engagement or appointment in Australian Defence Force (ADF) positions involving combat duties.[75]

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70 *Explanatory Memorandum*, p. 66. Note that the Explanatory Memorandum notes that the bill is not intended to operate retrospectively, and so the reference to 'mentally incapable' has not been removed in subparagraph 23(1)(d)(iii) as it applies only in respect to marriages solemnised between 20 June 1977 and 7 April 1986.

71 *Submission 1*, p. 14. The guidelines are available at www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Guidelines%20on%20the%20Marriage%20Act%201961%20for%20Marriage%20Celebrants.pdf (accessed 3 May 2017).

72 *Submission 5*, p. 6.

73 *Submission 4*, p. 1 and p. 11.

74 *Submission 5*, p. 9.

75 *Explanatory Memorandum*, p. 4.

2.86 The Attorney-General commented in his Second Reading Speech that:

> Amendments to the Sex Discrimination Act would repeal obsolete provisions. The Bill would repeal the combat duties exemption in section 43 of the Sex Discrimination Act that allows discrimination against women in connection with employment, engagement or appointment in Australia Defence Force positions involving combat duties. The exemption is no longer necessary, as the Australian Government's policy to remove all gender restrictions from Australian Defence Force combat roles was fully implemented on 1 January 2016. Repealing this provision is consistent with Australia's intention to withdraw its related combat duties reservation to the Convention on the Elimination of All Forms of Discrimination Against Women.[76]

2.87 Some submissions received by the committee explicitly supported the repeal of obsolete provisions in section 43 of the SDA.[77] For example, in their support, the AHRC noted:

> The removal of gender restrictions from combat roles is an important step in providing women in the ADF equal opportunity in their work and career progression. Women will be able to compete for all positions on the basis of merit and ability, rather than being excluded from some because of their gender.[78]

Committee view

2.88 The committee has limited its comments to proposed amendments to the Bankruptcy Act, the FLA, the IAA; and the Marriage Act.

2.89 This has been done because five of the schedules of the bill did not receive any comment in submissions, and comments on the SDA were unanimously in favour of the proposed amendments.

Concerns about amendment of the Bankruptcy Act 1966

2.90 The committee received comments on the Bankruptcy Act from two submitters, the Chief Justice of the Family Court and the Law Council.

2.91 Comments made by the Chief Justice of the Family Court go to the funding of Family Consultants and Registrars, as well as the potential introduction of a new system of resolving applications for parenting order contravention.

2.92 The committee acknowledges the Chief Justice's comments and appreciates her general support for the bill. However, the committee considers them as matters of government policy and funding, which are outside the scope of this bill.

2.93 The committee also notes the suggestion made by the Law Council, which advises that a definition of 'bankrupt' and 'bankrupt party to a marriage' should be

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76 *Senate Hansard*, 22 March 2017, p. 1858.

77 See Australian Human Rights Commission, *Submission 1*, p. 16; and Law Council of Australia, *Submission 3*, p. 10.

78 *Submission 1*, p. 16.

incorporated into the provisions of the bill. The committee understands from the AGD that the department is considering this recommendation. The committee believes that there is merit in this advice and urges that the necessary amendments be made.

Recommendation 1

2.94 The committee recommends that the bill be amended to reflect the recommendation of the Law Council in relation to the proposed bankruptcy amendments.

***Concerns about amendment of the* Family Law Act 1975**

2.95 The committee notes that the AHRC supported a number of the proposed amendments made by the bill to the FLA, as well as making a number of recommendations concerning particular provisions. These recommendations particularly addressed proposed provisions to IPCA, and provisions outlining arrest powers and use of force under the FLA.

2.96 Regarding the new IPCA offences introduced by the bill, the AHRC recommended that some potential exceptions and defences should be included in its provisions, following the March 2011 recommendations made by the Family Law Council to the Commonwealth.

2.97 The committee understands from the submission made by the AGD that all these exceptions and defences were given due consideration in the development and drafting of this bill. Compelling reasons for not including these exceptions and defences were given, including avoiding unnecessary duplication of the FLA with the Criminal Code, in accordance with Commonwealth drafting guidelines.

2.98 Regarding the AHRC's concerns about the training and accountability measures in place in relation to the use of force, the department submitted that these provisions would only apply to 'officers who already have arrest powers under other Acts would be authorised as arrester, …[namely] an officer of the [ABF]', and that these officers would have appropriate training.

2.99 On the AHRC's recommendation that the categories of persons authorised to make arrests be drafted more narrowly, the AGD stated that the amendments made by the bill did not represent a new policy position, but that Department of Immigration and Border Protection officers could exercise existing powers when authorised by the FLA. They also noted these officers also had arrest powers under other legislation.

2.100 The AHRC also raised a potential need for clarification that arrests may only be made when it is reasonably necessary in specified circumstances, namely preventing the imminent unlawful removal of a child from Australia. The AGD disagreed with this recommendation, as it could make the provisions too narrow to operate effectively, which could lead to unpredictable outcomes.

2.101 Finally, the committee notes that the AHRC queried the use of lethal force by APS employees, except when used in self-defence in accordance with the ordinary principles of law. To this, the AGD advised that there were already existing limits on the use of lethal force, and similar powers under other Acts, which made it unnecessary for additional limits to be included in the FLA.

2.102 In summary, considering the issues raised by the AHRC about the arrest powers and use of force provisions amended by the bill, the committee is satisfied that the AGD has adequately addressed the concerns they have raised.

Recommendation 2

2.103 The committee recommends that the bill be amended to amend the *Family Law Act 1975* to include a defence of 'fleeing from family violence' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances of family violence.

Recommendation 3

2.104 The committee recommends that the bill be amended to amend the *Family Law Act 1975* to include a defence of 'consent' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances where written consent has not been given, but where there is oral consent or another form of consent.

Recommendation 4

2.105 The committee recommends that the bill be amended to amend the *Family Law Act 1975* to limit arrest powers and use of force so that they apply only to employees of the Australian Border Force that have received appropriate training.

***Concerns about amendment of the* International Arbitration Act 1974**

2.106 The committee notes that the Law Council broadly supported the bill's proposed amendment of the IAA, but raised two concerns.

2.107 First, the Law Council advised that the Commonwealth should seek advice from the Solicitor-General regarding the constitutional validity of considering the Federal Court and the Supreme Courts of the states and territories as 'competent courts' for the purposes of the UNCITRAL Model Law.

2.108 The AGD did not address this point specifically. However, it did state it had 'consulted extensively within government and with academic experts, private practitioners and arbitration peak bodies and institutions in developing the amendments to the [IAA]'.[79]

2.109 The committee considers that the AGD should clarify whether the Solicitor-General has been consulted on these amendments. If this has not been done, the committee considers that the AGD should seek the Solicitor-General's advice.

2.110 Further to this, the Law Council recommended the bill replace the words 'settle' and 'taxable' in section 27 of the IAA, with the words 'fix' and 'may be fixed' respectively.[80]

79 *Submission 5*, p. 8.

80 *Submission 3*, p. 10.

2.111 In this, the committee is satisfied by the response from the AGD, which argued that the bill uses appropriate language consistent with arbitration rules, noting that there is no uniformity in the terminology of provisions governing these powers in other jurisdictions.

2.112 The committee urges the government to provide additional clarity in the Explanatory Memorandum to the bill around the matter of why the proposed amendments to the IAA should apply retrospectively.

Concerns about amendment of the Marriage Act 1961

2.113 The AHRC highlighted that any amendments made by the bill to the Marriage Act should be reflected in updates to the *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, published by the Australian Government.

2.114 The committee notes that the AGD has undertaken to do this, should the bill be passed.

Conclusion

2.115 The committee notes that almost all of the concerns raised by the Law Council of Australia and by the Australian Human Rights Commission have been addressed in a further submission from the AGD—with the possible exception of the Law Council of Australia recommendation mentioned in paragraph 2.16 which the committee believes has merit.

2.116 The committee is satisfied that the amendments contained in the bill would improve the operation and clarity of civil justice legislation administered by the Attorney-General.

Recommendation 5

2.117 Subject to the previous recommendations the committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald
Chair