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

By email only: familylawunit@ag.gov.au

30 January 2017

Dear Attorney-General,

RE: Amendments to the Family Law Act 1975 to respond to family violence

This letter has been prepared by UNICEF Australia on behalf of the Steering Committee of the Australian Child Rights Taskforce (CRTF Steering Committee). The Australian Child Rights Taskforce is Australia's peak child rights network, made up of more than 100 organisations advocating for the protection, promotion and fulfilment of the rights of children in Australia. The Steering Committee is comprised of UNICEF Australia, the National Children's and Youth Law Centre (NCYLC), SNAICC – National Voice for our Children, the Human Rights Law Centre, National Aboriginal and Torres Strait Islander Legal Services (NATSILS), King & Wood Mallesons and James McDougall, consultant.

We welcome the release of the amendments to the *Family Law Act 1975* to respond to family violence, and we are grateful for the opportunity to make a submission on this important topic.

Family violence is a breach of the right of children to be free from violence and, as a signatory to the *Convention on the Rights of the Child* (CRC), the Australian government is required to take all appropriate legislative, administrative, and other measures to protect children from violence. Although we believe there is much more to be done by Federal, State and Territory governments to address family violence in Australia, we believe that these reforms are largely positive.

This brief submission focuses on items 14 and 17 of the Exposure Draft which would allow a court to dispense with an explanation regarding orders or injunctions to children. It will also comment briefly on the proposal to criminalise breaches of personal protection orders and associated funding implications of the reforms.

<u>Dispensing with explanations regarding orders or injunctions to children (Items 14 and 17)</u>

All children have the right to participate in decisions affecting them (article 12 of the CRC). As such, a child should generally be allowed to participate in proceedings, including to receive information on the content of an order where it impacts on who the child will spend time with. The Committee on the Rights of the Child has explained that participation includes "…information-sharing and dialogue between children and adults based on mutual respect…in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes".[1]

[1] Committee on the Rights of the Child, *General Comment No. 12 (2009) The right of the child to be heard*, 1 July 2009, UN Doc. CRC/C/GC/12, [3].

As such, courts must be required to make every effort to communicate with a child in a manner that the child can understand, including, generally, when orders are given. The court should be informed by, and utilise, a multidisciplinary approach and seek to provide an explanation using the service of the most appropriate communicators for an individual child (for example, through an advocate, psychologist or other trained professional). Particular effort should be made to communicate with young children, children with a disability and children from culturally and linguistically diverse communities.

The Steering Committee of the CRTF is therefore concerned that the scope of the amendment as currently drafted might, if applied inappropriately or generally to children under a certain age, operate to exclude children from the important process of understanding the reasoning of the court, even where it is otherwise appropriate and safe for them to be provided with such information. However, we see the benefit of allowing the court to have discretion to dispose of such matters in exceptional cases where it is in the individual child's best interests (not, for expediency, cost or any other matter).

The following are our major concerns with the proposal:

a. That, without a proper understanding of best interests and the skills and resources necessary to communicate effectively with children, the provision could be used to circumvent a requirement to include the child and potentially infringe their right to participate.

b. The proposal to allow a court to dispense with the requirement in the event the child is considered "too young" is problematic in that it could be used to encourage a standard practice of excluding children below a certain age, regardless of their individual maturity, capacity to understand, desire to participate or other circumstances. Rather, if a court is required to consider the maturity of the child and other factors (as outlined below) when determining whether or not it is in the child's best interests to be given an explanation of the orders, the court would have the flexibility sought.

c. Under the proposed s 68P(2)(C) the court would not be obliged to consider the matters listed in s 60CC (How a court determines what is in a child's best interests). Because of this provision, a court would not need to consider important factors which would otherwise inform what is in the best interests of an individual child including, for example, the views of the child (s 60CC(3)(a)) and the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child (s 60CC(3)(g)) and, if the child is an Aboriginal child or a Torres Strait Islander child, the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture) (s 60CC(3)(h)). The court should ideally be required to consider, according to each child, their individual level of maturity, their view, lifestyle, culture and background for example, to determine whether or not providing information to the child is their best interests. Doing so would safeguard against a general approach to providing information about orders to children, but also allow the court to have discretion where to do so is not in the best interests of a child based upon a proper consideration of their individual characteristics.

Recommendation 1:

a) In Item 17 (after subsection 68P(2)) in proposed subsection 68P(2A), delete "(a) the child is too young to understand an explanation of the order or injunction; or" and in proposed subsection 68P(2B) delete "(a) the child is too young to understand the matter; or".

b) Consider introducing a requirement that the court consider important individual characteristics of the child (for example, their level of maturity, view, lifestyle, culture and background), when exercising its discretion under s 68P.

c) Amend Item 14 in line with the amendments to Item 17 outlined above.

d) Ensure the reforms are accompanied by additional measures to ensure that the court properly understands and applies the best interests principle, including additional training and capacity building for judges where needed. The Government should also implement Recommendation 13 of the Family Law Council *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5* that:

1) The Australian Government establish a young person advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.

2) The Australian Government consult with children and young people as key stakeholders in developing guidelines for judges who may choose to meet with children in family law proceedings.

The criminalisation of breaches of personal protection orders

We welcome in broad terms the proposal to criminalise breaches of personal protection orders. We note, however, that these changes will bring with them increased demand on the resources of legal aid, CLCs, courts and police services, amongst others. These reforms must therefore be accompanied with resources to enable effective enforcement of the provisions, as well as quality and timely legal advice for both victims/survivors and persons who are accused of the offence.

Associated funding implications

Finally, we wish to highlight our ongoing concern at the funding cuts to the National Partnership Agreement on Legal Services due to take effect on 1 July this year. Legal services play an essential role to advise and assist all members of the community, including children, who are experiencing family violence. We have serious concerns about the impact that these cuts will have on the provision of timely, accessible and quality legal advice and representation for people experiencing family violence.

Recommendation 2:

a) Assess the resource implications that these changes will have, particularly the demand for legal advice and representation, and ensure appropriate funding for agencies, departments and services affected by the changes.

b) Reverse the planned funding reductions to Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services nationally between 2017-2020.

c) Reinstate and provide additional funding to Family Violence Prevention Legal Services.

d) Commit to a process of constructive dialogue with State and Territory governments, legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services, Family Violence Prevention Legal Services and other relevant stakeholders to ensure the sustainability of funding for the legal assistance sector.

If you have any questions or if we can be of further assistance, please contact [personal details redacted].

Kind regards,

Members of the Steering Committee of the Australian Child Rights Taskforce

James McDougall Consultant