



20 January 2017

[Name redacted]
Principal Legal Officer
Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear [Name redacted],

Proposed amendments to the Family Law Act 1975 to respond to family violence

The Australian Human Rights Commission welcomes the opportunity to provide comment on the exposure draft of proposed legislative amendments to the *Family Law Act 1975* (Cth) (Family Law Act).¹

As you may know, in 2015 I conducted a national investigation into how Australian children under 18 years of age are affected by family and domestic violence. The findings and recommendations of this investigation are contained in the *Children's Rights Report 2015*.² I refer you to the information about this report provided by the Australian Human Rights Commission in its submission to the Senate inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.³

In my report, I documented a number of concerns which were raised with me about family and domestic violence in relation to the family court system.⁴ These included the ability of family and domestic violence perpetrators to manipulate court processes as a means of continuing to control and inflict abuse and violence on their ex-partner and children, often for prolonged periods.

Based on this, I support the proposed changes within the exposure draft that aim to increase the capacity of state and territory courts to resolve family law matters in a swift manner; and strengthen the power of the courts to share information and protect victims of family violence.

Throughout my term as National Children's Commissioner, I have received numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision-making, and to provide them with accessible information about processes and outcomes. I have also been alerted to a lack of understanding and inappropriate responses to family and domestic violence by those working in the family law system;⁵ court decisions which do not fully reflect the amendments to the Family Law Act in 2012;⁶ and conflict between the right of parental contact and the rights and best interests of the child and their non-violent parent.⁷

Consequently, I would like to raise a concern about the proposed change to allow courts to dispense with the requirement to explain court orders or injunctions that are inconsistent with an existing family violence order, to the child protected by the family violence order.

I believe that this amendment to the Family Law Act could serve to deprive children and young people of information relevant to their wellbeing, and is at odds with the principles of the child's best interests and the right to active participation, as defined by the United Nations *Convention on the Rights of the Child*.⁸

Current requirements within the Family Law Act under Section 68P

Section 68P(2) of the Family Law Act currently requires children protected by a family violence order to be provided with an explanation of certain court orders or injunctions that are inconsistent with an existing family violence order made by a State or Territory Court.⁹ The orders or injunctions that must be explained to the child are orders or injunctions (usually by the Family Court or the Federal Circuit Court) that require or authorise a person to spend time with a child. For example, if the Family Court makes a parenting order that authorises a person to spend time with a child, but the parenting order is inconsistent with a family violence order made by a State or Territory Court, then an explanation for making the parenting order must be given.

The explanation does not need to be given by the Court itself. The Court may arrange for someone else to give the explanation.¹⁰ The Family Law Act provides that the explanation must be given in language that the child is likely to readily understand and must contain certain information.¹¹ The requirement for an explanation is to ensure that the child properly understands the reasons why the court has made an order that directly affects his or her interests.

In my view, the current provisions are an important requirement and do not impose overly onerous obligations on court officials.

The current wording within the Family Law Act states that this requirement comes into effect if:

- (a) a court:
 - (i) makes a parenting order that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; or
 - (ii) makes a recovery order (as defined in section 67Q) or any other order under this Act that expressly or impliedly requires or authorises a person to spend time with a child; or
 - (iii) grants an injunction under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child; and
- (b) the order made or injunction granted is inconsistent with an existing family violence order.¹²

There is an obvious need for children and young people to be aware of changes to their situation resulting from a court order or injunction that is inconsistent with a family violence order that was made for their own protection.

Section 68P(2)(d) requires that the explanation of the order or injunction must include the following details:

- (i) the purpose of the order or injunction; and

- (ii) the obligations created by the order or injunction, including how the contact that it provides for is to take place; and
- (iii) the consequences that may follow if a person fails to comply with the order or injunction; and
- (iv) the court's reasons for making an order or granting an injunction that is inconsistent with a family violence order; and
- (v) the circumstances in which a person may apply for variation or revocation of the order or injunction.¹³

Given that the implementation or contravention of these orders or injunctions will have a direct impact on the life and wellbeing of the child involved, it is important that they are provided with the details outlined in section 68P(2)(d), particularly details of the opportunities to apply for a variation or revocation of the order or injunction.

A failure to explain these could lead to distress and confusion on the part of the child involved, allow them to be manipulated or provided with misinformation, or place them in a situation where they feel unsafe and unsure of how to seek help or change their circumstances.

Children have a right to have access to information about decisions affecting their lives. For this reason, it is important to maintain the safeguards that require children to be informed about changes to family violence orders made for their protection.

Enabling the court to explain orders in a manner that supports the best interests of the child

The exposure draft proposes an amendment to section 68P(2) to dispense with the requirement to provide an explanation to a child at all, or to dispense with a requirement to explain particular matters, in certain circumstances.¹⁴ The amendments would mean that these explanations need not be given if the court is satisfied that:

- (a) the child is too young to understand the explanation; or
- (b) it is in the child's best interests not to receive the explanation.¹⁵

The public consultation paper accompanying the exposure draft says that the proposed amendments would 'confer discretion on the family law courts to dispense with the requirement [to provide an explanation], or adjust their explanation of an order or injunction to a child, if that is in the best interests of the child'.¹⁶

The consultation paper provides different reasons why an explanation may not need to be provided to younger children and older children.

In the case of younger children, it says that 'young children covered by the order or injunction, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in a detailed explanation'.¹⁷

In the case of older children, it says that the changes would 'enable the court to communicate effectively with a child and in a manner that does not re-traumatise them' and that '[f]or older children, it may not be in their best interest to be exposed to the parental controversy to the extent necessary to fully comply with the requirements'.¹⁸

My concern about this proposed amendment within the exposure draft is twofold:

- First, a broad discretion which permits courts not to provide an explanation when the court considers that the explanation would not be in ‘the child’s best interests’ does not give sufficient weight to the importance of the interests affected or the rights of children to have an active and informed role in decisions affecting their lives.
- Second, a broad discretion denying children access to information based on an assessment that they are ‘too young to understand’ fails to give sufficient weight to the evolving capacity of children and alternative means of providing information (which, I would argue, are already provided for in the requirement that the explanation be provided in language that the child is ‘likely to readily understand’¹⁹).

I expand on each of these issues below.

The right to active participation in legal proceedings

According to the consultation paper, the changes to section 68P stem, in part, from the concern that ‘it may not be in [the child’s] best interest to be exposed to the parental controversy to the extent necessary to fully comply with the requirements’.²⁰

There is a dominant perception amongst family law practitioners that involving children in adversarial proceedings can be harmful for children.²¹ There are understandable concerns about protecting children from the stress of repeated engagement with the legal system and the desire to shield children and young people from familial conflict.²² This protectionist approach seeks to limit children and young people’s interaction with court proceedings.

While it is undoubtedly important to prevent children and young people from being traumatised through their interactions with the court, excluding children and young people from participation in the decision-making process does not protect them from the impact of Family Court proceedings, as they will ultimately be affected by the court’s decisions around living arrangements and contact orders. Children, even very young children, are also generally aware of what is happening in the context of family relationships and are not ‘shielded’ from it, contrary to what adults might think.

The United Nations *Convention on the Rights of the Child* states that children have the right to express their opinion in all matters affecting them and, in particular, in judicial and administrative decision-making processes. Article 12(2) of the *Convention on the Rights of the Child* states that:

the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²³

The Committee on the Rights of the Child has stated in relation to article 12 that:

States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.²⁴

Contemporary legal practices increasingly reflect a child rights based approach that recognises the need to enable children's participation in court proceedings.²⁵ Amendments to the Family Law Act in 2012 included an acknowledgement of Australia's obligations under the United Nations *Convention on the Rights of the Child*. Section 60B(4) of the Family Law Act now provides that an object of Part VII of the Act (in relation to Children, and which contains section 68P) is to give effect to the Convention.

Studies consistently show that children want to have more of a say in legal decisions affecting them.²⁶ Providing children and young people with the opportunity to make their thoughts and preferences known in court proceedings helps ensure they are satisfied with final decisions around living arrangements and contact with parents²⁷ and contributes to their overall psychological wellbeing.²⁸ Research also indicates that the more heated and contested the matter, the more likely children and young people are to want to have their ideas and opinions heard.²⁹

As well as having their voices heard, children and young people have repeatedly emphasised the importance of being kept informed during court proceedings and being advised of the outcomes as a baseline level of involvement.³⁰

It is my view that the current wording within the exposure draft, couched in terms of the child's best interests, confers a broad discretion to the courts on when to provide information to children that is not sufficiently rights-focused.

Informing a child about a court order or injunction that is inconsistent with a family violence order protecting them, should be the default requirement of the Family Law Act. Any exceptions to this requirement should only be permitted where there is clear evidence, such as a psychological assessment, that it would be detrimental to a child's wellbeing for the explanation to be provided to them.

Determining the capacity of a child to understand

The second problematic aspect of the proposed changes is allowing the requirement to explain orders and injunctions to children to be waived if the court is satisfied that 'the child is too young to understand' the explanation.³¹

The rationale given for this is that 'young children covered by the order or injunction, such as infants and toddlers, are unlikely to grasp the concepts conveyed in the court's explanations'.³²

Without providing guidelines for assessing a child's capacity to understand, my concern is that this provision could be subject to a wide interpretation and not limited solely to infants and toddlers.

Research shows that there is a reluctance among some Australian judges to engage with children.³³ While Family Court judges have the power to undertake interviews with children and young people, this is rarely done in practice in Australia.³⁴ In a study on children's direct participation and the views of Australian judges, many judges expressed concern about lacking the skills and ability to speak directly with children.³⁵

This suggests that Australian judges are generally not well-equipped with the skills and the training to undertake direct interactions with children and young people. This could lead to judges and court officials adopting a default position that avoids providing children with explanations of court orders

and injunctions relevant to their safety and wellbeing because they consider that the children are 'too young to understand'.

Furthermore, aged-based determinations of a child's competency are often overly simplistic and ignore a wide range of other factors. Contextual differentials such as gender, disability, cultural background and socio-economic status, can have a significant impact on the level of competence demonstrated by a child within a court setting.³⁶ There is also a tendency of adults to underestimate a child's ability to understand, and their capacity to formulate views on what is in their interests.³⁷ A child's ability to understanding legal proceedings will be significantly influenced by the efforts made by courts to render the proceedings accessible and understandable to them. The Committee on the Rights of the Child states that legal proceedings should be 'both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information.'³⁸

Rather than inserting broad exemptions that permit children to be denied access to information on the basis of being deemed 'too young', I believe that more training and resources are needed to ensure court officials have the means available to them to engage with children of all ages about difficult subjects, in a safe, effective and respectful manner.

Recommendations

- That the proposed amendments to section 68P listed in item 17 and the proposed note to section 60CC(1) listed in item 14 of the exposure draft not be adopted.
- That resources and training be developed to assist judges and court officials effectively to engage with and communicate with children about family court matters.

Yours sincerely



Megan Mitchell

National Children's Commissioner

T +61 2 9284 9730

F +61 2 9284 9794

E megan.mitchell@humanrights.gov.au

¹ Exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth).

² Australian Human Rights Commission, *Children's Rights Report 2015* (2015). At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015> (viewed 13 January 2017).

³ Australian Human Rights Commission, Submission No 6 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, 23 December 2015. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Family_Law_Bill/Submissions (viewed 13 January 2017).

⁴ Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 144. At <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015> (viewed 13 January 2017).

⁵ Women’s Legal Services NSW, Submission No 33 to Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 16 June 2015, 3–4; Berry Street, Submission No 40 to Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 19 June 2015, 22; Queensland Family and Child Commission, Submission No 16 to Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 3 June 2015, 9.

⁶ Families Australia, Submission No 22 to the Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 15 June 2015, 10.

⁷ Australian Psychological Society, Submission No 38 to the Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 17 June 2015, 11–14; Melbourne Research Alliance to End Violence Against Women and their Children, University of Melbourne, Submission No 18 to Australian Human Rights Commission, *National Children’s Commissioner’s examination into children affected by family and domestic violence*, 9 June 2015, 7–8, 10.

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 3, Article 12.

⁹ The term ‘family violence order’ is defined by s 4 of the Family Court Act to mean ‘an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence’.

¹⁰ *Family Law Act 1975* (Cth) s 68P(2)(c).

¹¹ *Family Law Act 1975* (Cth) s 68P(2)(d).

¹² *Family Law Act 1975* (Cth) s 68P(1).

¹³ *Family Law Act 1975* (Cth) s 68P(2)(d).

¹⁴ Exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), item 17.

¹⁵ Exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), item 17, proposed s 68P(2A) and (2B).

¹⁶ Australian Government, Attorney-General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, December 2016, 6.

¹⁷ Australian Government, Attorney-General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, December 2016, 6.

¹⁸ Australian Government, Attorney-General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, December 2016, 6, 17.

¹⁹ *Family Law Act 1975* (Cth) s 68P(2)(d).

²⁰ Australian Government, Attorney-General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, December 2016, 16.

²¹ Judy Cashmore & Patrick Parkinson, ‘Children’s participation in family law disputes: The views of children, parents, lawyers and counsellors’ (2009) 82 *Family Matters* 15, 15. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 17 January 2017); Michelle Fernando, ‘Children’s direct participation and the views of Australian judges’ (2013) 92 *Family Matters* 40, 41. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 17 January 2017).

²² Judy Cashmore & Patrick Parkinson, ‘Children’s participation in family law disputes: The views of children, parents, lawyers and counsellors’ (2009) 82 *Family Matters* 15, 15. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 17 January 2017); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 5.

²³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 12(2).

²⁴ Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, UN Doc CRC/C/GC/12 (1 July 2009) [33].

²⁵ Judy Cashmore & Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15, 20. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 17 January 2017); Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84 (1997) [16.3] [16.27]. At <http://www.alrc.gov.au/publications/report-84> (viewed 17 January 2017).

²⁶ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40, 42. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 17 January 2017); Rae Kaspiew et al, Attorney General's Department, *Independent Children's Lawyers Study: Final report (2nd ed.)* (2014) 121-123, 132-139. At <https://www.ag.gov.au/Publications/Pages/IndependentChildrensLawyersStudy.aspx> (viewed 17 January 2017); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17-28; Judy Cashmore & Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15, 17-18. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 17 January 2017).

²⁷ ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.

²⁸ J Kelly, 'Legal and educational interventions for families in residence and contact disputes' (2001) 15(2) *Australian Journal of Family Law* 92.

²⁹ Judy Cashmore & Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15, 18. At <https://aifs.gov.au/publications/family-matters/issue-82/children-s-participation-family-law-disputes> (viewed 17 January 2017).

³⁰ Rae Kaspiew et al, Attorney General's Department, *Independent Children's Lawyers Study: Final report (2nd ed.)* (2014) 121-122. At <https://www.ag.gov.au/Publications/Pages/IndependentChildrensLawyersStudy.aspx> (viewed 17 January 2017); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.

³¹ Exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), item 17, proposed s 68P(2A) and (2B).

³² Australian Government, Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper, December 2016, 6.

³³ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 17 January 2017).

³⁴ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40, 41. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 17 January 2017).

³⁵ Michelle Fernando, 'Children's direct participation and the views of Australian judges' (2013) 92 *Family Matters* 40, 45. At <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges> (viewed 17 January 2017).

³⁶ Gerison Lansdown, *The evolving capacities of the child*, (UNICEF Innocenti Research Centre, 2005) 24.

³⁷ ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 12; The Law Society of New South Wales, *Representation Principles for Children's Lawyers* (4th ed) (August 2014) 15. At <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026517.pdf> (viewed 17 January 2017).

³⁸ Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, UN Doc CRC/C/GC/12 (1 July 2009) [34].