



Australian
Human Rights
Commission

Family Law Amendment (Family Violence and Other Measures) Bill 2017

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Family Law Amendment (Family Violence and Other Measures) Bill 2017.
2. While broadly supportive of the intended effects of the Bill, the Commission has concerns about some of the amendments in relation to children's rights. This submission addresses specific issues relating to children's rights only. It does not provide comments on all of the provisions of the Bill.

2 Summary

3. The Commission welcomes the proposal to criminalise breaches of family law injunctions made for personal protection, which will strengthen the powers of courts to protect victims of family violence. The Commission also welcomes the proposal to prescribe relevant state and territory courts so that they can exercise family law parenting jurisdiction. These measures have the potential to reduce time, cost, pressure and risk for vulnerable families and children. However, they may also place greater pressure on state and territory courts, which may be inadequately resourced to expand their roles. It is also likely that judicial officers of these courts will need to acquire a depth of expertise in family law matters, in particular issues relating to children's wellbeing, to ensure that the best interests of the child are met in parenting matters.
4. While broadly supportive of the intended effects of the Bill, the Commission has serious concerns about the proposed change to section 68P of the Family Law Act under this Bill, which allows the 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. The Commission considers that this proposed amendment 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.
5. Research suggests that Australian judges are generally not well-equipped with the skills and the training to undertake direct interactions with children and young people.¹ 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'. The Commission considers 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, appropriate and respectful manner.

3 Recommendations

Recommendation 1: Judicial officers in state and territory courts, including children's courts, prescribed to exercise family law parenting jurisdiction, be provided

with ongoing training and resources on family law matters relating to children including the impacts of family violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters.

Recommendation 2: The proposed amendments to section 68P of the *Family Law Act 1975*, which dispense with the requirements to provide an explanation to children in certain circumstances, not be adopted.

Recommendation 3: Judicial officers and court officials, including Independent Children's Lawyers and family consultants, be provided with training and resources to assist them engage and communicate effectively with children about Family Court matters that concern them.

4 National Children's Commissioner's work on child rights and the family law system

6. Since the beginning of her term in March 2013, the issue of family and domestic violence in the context of the family law system has been raised with the National Children's Commissioner by children, by adults on behalf of children, and by adults reflecting on their childhood experiences. This includes 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.
7. In 2015, the Commissioner conducted a national investigation into how Australian children under 18 years of age are affected by family and domestic violence. This included consideration of children affected by family and domestic violence who are involved with the family law system. The findings and recommendations of this investigation are contained in the *Children's Rights Report 2015*.² The types of concerns raised with her during this examination included: a lack of understanding and inappropriate responses to family and domestic violence by those working in the family law system, court decisions which do not fully reflect the amendments to the Family Law Act in 2012; and conflict between the right of parental contact and the rights and best interests of the child and their non-violent parent.³
8. In January 2017, the Commissioner made a submission to the Australian Government on the exposure draft of proposed legislative amendments to the *Family Law Act 1975* (Cth)(Family Law Act).⁴ This submission focused on proposed amendments to the Family Law Act to remove the requirement to provide an explanation to children in certain circumstances, which is considered in this Senate Committee inquiry.

5 Australian Law Reform Commission review

9. As the Committee will be aware, in September 2017, the former Attorney-General, the Hon George Brandis QC, commissioned the Australian Law

Reform Commission (ALRC) to undertake a comprehensive review of the family law system. The ALRC is due to report to the Attorney-General by 31 March 2019.⁵

10. While there have been a number of inquiries into family violence and family law over the past decade, the Commission considers that this review provides a unique opportunity to address a broad range of concerns about the implementation of children's rights across the whole family law system. The Commission understands that while some of the provisions of this Bill may appear urgent and relatively uncontroversial, there are others which raise more complex issues that may benefit from a consideration by the ALRC. If the Bill is passed into law, given the complexity of the family law system in Australia, there is a risk that some of these amendments will be inconsistent with recommendations from the ALRC review.

6 Better protection to victims of family violence

11. The Commission is broadly supportive of the intended effect of the proposed amendments to the Family Law Amendment (Family Violence and Other Measures) Bill 2017, to provide effective outcomes for vulnerable Australians who are experiencing family violence. According to former Attorney-General, Senator George Brandis QC, the amendments will strengthen the powers of courts to protect victims of family violence, and facilitate the resolution of family law matters by state and territory courts in appropriate cases.⁶
12. In the *Children's Rights Report 2015*, the National Children's Commissioner documented a number of concerns raised with her about family and domestic violence in relation to the family court system.⁷ 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.
13. Based on this, the Commission supports proposed changes 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. In particular, the Commission welcomes the proposed new section 114AA of the Family Law Act which criminalises breaches of family law injunctions made for personal protection.⁸ This relieves the burden on family violence victims of bringing a private application for contravention of the injunction, and breaches will be enforceable by police to improve the safety of protected people under the order, which can include children.
14. The Bill will also allow relevant state and territory courts, including children's courts, to be prescribed so that they can exercise family law parenting jurisdiction. The Commission considers that this measure has the potential to reduce time, cost, pressure and risk for vulnerable families and children.
15. However, the Commission has some concerns that there is potential for these measures to place greater pressure on children's courts and other state and

territory courts, which may be inadequately resourced to expand their roles. In addition, it is likely that judicial officers of state and territory courts will need to acquire a depth of expertise in family law matters, in particular issues relating to children's wellbeing, to ensure that the best interests of children are met in parenting matters. The previous Attorney-General in his First Reading speech on the Bill said that the Australian Government has funded the National Judicial College of Australia to deliver training to state and territory judicial officers about family law parenting and property matters.⁹ While this is welcome, the Commission suggests that judicial officers may need in-depth and ongoing training on a range of issues relating to child wellbeing and family law, including the impacts of family violence and child abuse on children, and applying the best interests of the child principle in parenting matters.

Recommendation 1: Judicial officers in state and territory courts, including children's courts, prescribed to exercise family law parenting jurisdiction, be provided with ongoing training and resources on family law matters relating to children including the impacts of family violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters.

7 Dispensing with the requirement to provide an explanation to children in certain circumstances

16. The National Children's Commissioner has 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.
17. As a result, the Commission is concerned about the proposed change to section 68P of the Family Law Act to allow the 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.¹⁰
18. These concerns were highlighted in a submission by the National Children's Commissioner in January 2017 on the exposure draft of the proposed legislative amendments to the Family Law Act.¹¹ In this submission, the Commissioner raised her concern that amendments which removed the requirement to explain certain court orders 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* (CRC). These concerns remain with the proposed amendments under the Bill currently before this Senate Committee.
19. The Bill proposes to insert new subsections into section 68P of the Family Law Act to create an exception to the requirement to explain an order or an injunction that is inconsistent with an existing family violence order to a child, if

the court is satisfied that it is in the child's best interests not to receive an explanation.¹²

20. The Bill also specifies that the court is not required to include a particular matter otherwise required to be explained if the court is satisfied that it is in the child's best interests for the matter not to be included in the explanation.¹³
21. The Explanatory Memorandum points out that the new subsections in the Bill do not specifically exclude the requirement to explain the court orders or injunctions on the basis of the child being 'too young', as existed in the previous exposure draft of these amendments.¹⁴ It explains that for the Bill, the term 'too young' was considered to be too open to different interpretations. It states that 'under paragraph 60CC(3)(g) the court is able to take into account the age or maturity of a child as one factor in considering the best interests of the child'.¹⁵
22. The Commission welcomes the removal of this exclusion from the Bill. The National Children's Commissioner, in her submission on the exposure draft, raised various concerns with aged-based determinations of children's competency, as they are often overly simplistic and ignore a wide range of factors.¹⁶
23. However, our overarching concern about removing the requirement to explain court orders or injunctions to a child directly affected by these matters remains.
24. Under the current Family Law Act, the orders or injunctions that must be explained to the child are those (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.
25. The explanation does not need to be given by the court itself. The court may arrange for someone else to give the explanation.¹⁷ 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.¹⁸ 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.
26. The Commission considers the current provisions are an important requirement and do not impose overly onerous obligations on court officials.
27. 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. The implementation or contravention of these orders or injunctions will have a direct impact on the life and wellbeing of the child involved. 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.

28. Children have a right to access 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.
29. The proposed amendments permit courts not to provide an explanation when the court considers that the explanation would not be in 'the child's best interests'. In determining what is in the child's best interests for the purposes of these new subsections, the court is required to consider only the matters set out in existing subsection 60CC(2) of the Family Law Act, but not those set out in subsection 60CC(3).¹⁹
30. Subsection 60CC(2) includes two matters: the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from being exposed to family violence.²⁰
31. The additional matters which are contained in 60CC(3) includes a list of considerations, some of which could be relevant to whether it is in a child's best interests to receive an explanation for certain court orders or injunctions. In particular, it includes a consideration of 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.²¹
32. The Commission considers that the proposed amendment 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.
33. There is a dominant perception amongst family law practitioners that involving children in adversarial proceedings can be harmful for children.²² 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.²³ This protectionist approach seeks to limit children and young people's interaction with court proceedings.
34. 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.
35. The CRC 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 CRC 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.²⁴

36. The United Nations 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.²⁵

37. Further, under the CRC, ensuring a child's best interests (article 3) and a child's right to express views and have them taken into account (article 12) are complementary principles. The Committee on the Rights of the Child explains that any 'assessment of a child's best interests must include respect for the child's right to express his or her own views freely and due weight given to said views in all matters affecting the child'.²⁶
38. Contemporary legal practices increasingly reflect a child rights based approach that recognises the need to enable children's participation in court proceedings.²⁷ Amendments to the Family Law Act in 2012 included an acknowledgement of Australia's obligations under the CRC. 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 CRC.
39. Studies consistently show that children want to have more of a say in legal decisions affecting them.²⁸ Providing children and young people with the opportunity to make their thoughts and preferences known in court proceedings helps ensure they understand final decisions around living arrangements and contact with parents²⁹ and contributes to their overall psychological wellbeing.³⁰ 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.³¹
40. 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.³²
41. 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.

Recommendation 2: The proposed amendments to section 68P of the *Family Law Act 1975*, which dispense with the requirements to provide an explanation to children in certain circumstances, not be adopted.

8 Need for training and resources to engage with children

42. 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
43. 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'.
44. 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.'³⁶
45. The Commission considers 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, appropriate and respectful manner.

Recommendation 3: Judicial officers and court officials, including Independent Children's Lawyers and family consultants, be provided with training and resources to assist them engage and communicate effectively with children about Family Court matters that concern them.

¹ 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 16 January 2018).

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 10 January 2018).

³ 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 10 January 2018) 147.

⁴ Megan Mitchell, National Children's Commissioner, Submission to the Commonwealth Attorney-General's Department on proposed amendments to the *Family Law Act 1975* to respond to family violence, 2017. At <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx> (viewed 16 January 2018).

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- ⁵ Attorney-General, 'First comprehensive review of the Family Law Act' (Media Release, 27 September 2017) 1. At https://www.alrc.gov.au/sites/default/files/170927_mr_family_law_review_terms_of_reference.pdf (viewed 16 January 2018).
- ⁶ Commonwealth, Parliamentary Debates, Senate, 6 December 2017, 9911 (George Brandis, Attorney-General).
- ⁷ 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).
- ⁸ Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), sch 1 item 28.
- ⁹ Commonwealth, Parliamentary Debates, Senate, 6 December 2017, 9912 (George Brandis, Attorney-General).
- ¹⁰ Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), sch 1 item 17.
- ¹¹ Megan Mitchell, National Children's Commissioner, Submission to the Commonwealth Attorney-General's Department on proposed amendments to the *Family Law Act 1975* to respond to family violence, 2017. At <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx> (viewed 16 January 2018).
- ¹² Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), sch 1 item 17, s 2A, s 2C.
- ¹³ Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), sch 1 item 17, s 2B.
- ¹⁴ Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), 21 [101].
- ¹⁵ Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), 21 [101].
- ¹⁶ Megan Mitchell, National Children's Commissioner, Submission to the Commonwealth Attorney-General's Department on proposed amendments to the *Family Law Act 1975* to respond to family violence, 2017. At <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx> (viewed 16 January 2018).
- ¹⁷ *Family Law Act 1975* (Cth), s 68P(2)(c).
- ¹⁸ *Family Law Act 1975* (Cth), s 68P(2)(d).
- ¹⁹ Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), 21 [98].
- ²⁰ Explanatory Memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth), 21 [99].
- ²¹ *Family Law Act 1975* (Cth), s 60CC(3)(a).
- 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 16 January 2018); 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 16 January 2018).
- ²³ 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 16 January 2018); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 5.
- ²⁴ *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).
- ²⁵ 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].
- ²⁶ Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC/C/GC/14 (2013) [43].
- ²⁷ 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 16 January 2018); 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 16 January 2018).
- ²⁸ 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->

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²⁹ ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.

³⁰ Joan Kelly, 'Legal and educational interventions for families in residence and contact disputes' (2001) 15(2) *Australian Journal of Family Law* 92.

³¹ 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 16 January 2018).

³² 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 16 January 2018); ACT Children and Young People Commissioner, *Talking with children and young people about participation in family court proceedings* (2013) 17.

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 16 January 2018).

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 16 January 2018).

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 16 January 2018).

³⁶ 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].