



4 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

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Dear Committee members

Inquiry into the Family Law Amendment Bill 2024

Thank you for the opportunity for the **Australian Child Rights Taskforce** ('Taskforce') to make a submission to the Committee's inquiry into the Family Law Amendment Bill 2024 (Cth) ('Bill').

This submission builds on the Taskforce submission to the Attorney General's initial consultation for this Bill, and the submission to the Senate Committee inquiry into the Family Law Amendment Bill 2023 (Cth). In these previous submissions, the Taskforce welcomed the intent of the amendments to give greater priority to children in the family law system, but noted that more was required to prioritise safety, children's rights and a child-centred approach. The Taskforce provided information and specific recommendations to address these suggestions.

Summary

The Taskforce:

1. **welcomes the proposed amendments to the property framework** in the *Family Law Act 1975* (Cth) ('Family Law Act') that expressly recognise the impacts of family violence in property and spousal maintenance proceedings;
 2. **invites the Committee to expressly recognise children's right to an adequate standard of living under Article 27** of the Convention in the factors relevant to assessing the current and future circumstances of parties in property and spousal maintenance proceedings;
 3. **supports the proposed amendments that seek to protect against the harmful disclosure of an individual's private and sensitive records**, as such disclosure may impair the willingness and ability of children who have experienced family violence to access and engage with professional supports, contrary to their right under Article 19 of the Convention;
 4. **is concerned that children under the age of 18 are denied the opportunity to apply for a direction in relation to protected confidences** (sections 102BC and 102BD). The proposed amendments presume alignment between the interests of the child, and the interests of those who are 'capable of representing' the child's interests, which is contrary to recognition of children as victim-survivors of family violence in their own right.
 5. **reiterates that the 'best interests' principle requires consideration of any views expressed by the child when making a Commonwealth Information Order**, particularly if the information requested by a CIO includes disclosures of violence that the child has made.
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About the Taskforce

The Taskforce is a coalition of over 100 organisations, networks and individuals committed to the protection of the rights of children in Australia.¹ This submission has been prepared by the Taskforce's Policy Working Group. While it does not necessarily reflect the detailed views of all organisations, networks and individuals who constitute the broad membership of the Taskforce, this submission is based on previously endorsed collaborative and collective work of the Taskforce over many years. The Taskforce's processes are consultative and draw on the lived experiences of children and young people and those who work with them across a range of sectors and communities.

This submission is built on an understanding of the *UN Convention on the Rights of the Child* ('Convention') and a child rights approach, and on the Taskforce's ongoing knowledge and experience in translating this understanding and approach into policy and practice.

Property provisions

The Taskforce supports the proposed amendments that remove reference to parties having 'control' over children – namely, ss 72(1)(a), 75(2)(c), 79(5)(f), 90SF(1)(b)(i), 90SF(3)(c), 90SM(5)(f) and 90YZD(4)(e)(iii). These amendments eliminate the outdated notion that property norms of 'ownership', 'custody' and 'control' regulate the relationship between parents and their children.² They are consistent with a children's rights approach, reinforcing the 'tenor' of the Family Law Act that 'emphasises any rights that exist sit with the children and any notions of the parental "ownership" of children are discouraged'.³

The Taskforce also welcomes the proposed amendments to the property framework in the *Family Law Act 1975* (Cth) ('Family Law Act') that expressly recognise the impacts of family violence in property and spousal maintenance proceedings. However, the Taskforce draws to the Committee's attention to the proposed new sub-paragraphs 79(5)(f) and 90SM(5)(f), being a factor relevant to assessing the current and future circumstances of the parties in property and spousal maintenance proceedings:

the extent to which either party has the care of a child of the marriage who has not attained the age of 18 years, including the need of either party to provide appropriate housing for such a child;

According to the Explanatory Memorandum to the Bill, this proposed amendment 'implements Article 3(2) of the [Convention] by ensuring that in property proceedings the family law courts can take into account the obligation and duties of parents to provide housing to ensure the wellbeing of dependent children of the relationship'.⁴

¹ See <https://childrightstaskforce.org.au/about-us/>.

² David Archard, 'Do Parents Own their Children?' (1993) 1 *International Journal of Children's Rights* 293; John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161.

³ *Pickle & Sackville* [2017] FCCA 1456, [85].

⁴ Explanatory Memorandum, Family Law Amendment Bill 2024 (Cth), 15 [33].

Article 27 – Children’s right to an adequate standard of living

The Taskforce notes that the proposed amendment also engages children’s right under Article 27 of the Convention to an adequate standard of living. Article 27 imposes a specific responsibility upon parents and carers ‘to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development’, to enable the child to enjoy their right to ‘a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’.

The Australian family courts have described children’s right under Article 27 as ‘a legal and moral right’⁵ which creates a reciprocal obligation that ‘falls upon parents’.⁶ Importantly, Article 27 recognises that implementation of children’s right to an adequate standard of living requires support for parents and carers, through ‘material assistance and support programs, particularly with regard to nutrition, clothing and housing’.

In referring expressly (although non-exhaustively) to ‘housing’, the Taskforce is concerned that the proposed amendments may be unduly narrow, particularly in light of the well-established impacts of domestic and family violence upon children. Domestic and family violence is a leading cause of homelessness for children in Australia.⁷ Children may also directly experience the impacts of financially controlling and/or abusive behaviours by not having their basic living needs met, such as through poor nutrition.⁸

While the proposed amendments recognise that parental separation can accelerate housing instability, particularly in cases involving family violence, the Taskforce invites the Committee to consider whether the proposed new sub-paragraphs 79(5)(f) and 90SM(5)(f) should be further amended to expressly acknowledge, consistently with Article 27 of the Convention, that ‘the conditions of living necessary for the child’s development’ are broader than the child’s housing situation.

⁵ *Whitehouse v Whitehouse* [2015] FCCA 3621, [311].

⁶ *Bradfield v Laurens* [2018] FCCA 1784, [234].

⁷ Kathryn Di Nicola, Dini Liyanarachchi and Jacquelin Plummer, *Out of the shadows: Domestic and family violence: a leading cause of homelessness in Australia* (Mission Australia, 2019); Australian Housing and Urban Research Institute, *Housing, homelessness and domestic and family violence* (2022); Tanya Corrie and Shorna Moore, *Amplify: Turning up the volume on young people and family violence* (Melbourne City Mission, 2021).

⁸ Fiona H McKay and Rebecca Bennett, ‘Examining the Relationship Between Food Insecurity and Family Violence: A Systematic Review’ (2023) *Journal of Family Violence* <<https://doi.org/10.1007/s10896-023-00624-5>>.

Protected confidences

The Taskforce supports the intention of the proposed amendments in Schedule 3 of the Bill, to protect against the harmful disclosure of an individual's private and sensitive records made in the course of professional confidential relationships. Indeed, recent research has highlighted that family court proceedings are often used as a tool for continued abuse by people who use violence,⁹ who may seek the disclosure of private and sensitive records of family violence victim-survivors and their children. Such systems abuse may prevent victim-survivors and their children from accessing professional supports for their family violence response and recovery needs.

However, the Taskforce directs the Committee's attention to section 102BC, which provides for the court to direct that evidence not be adduced in proceedings under the Family Law Act; and section 102BD, which provides for the court to direct that a document not be produced, inspected or copied in proceedings under the Family Law Act, despite a disclosure requirement. Sub-paragraph 102BC(2)(d) and sub-paragraph 102BD(2)(d) provide that the court may give the direction, if the 'protected confider' is a child under 18 years of age, on application by:

- (i) a person who has parental responsibility for the child; or
- (ii) an independent children's lawyer; or
- (iii) a person who has care of the child; or
- (iv) a person who proposes to have parental responsibility for the child.

The Explanatory Memorandum to the Bill explains that the inclusion of the above categories of persons who may make an application 'recognises that there may be a range of persons, such as grandparents, who care for a child on a daily basis, and who are capable of representing the child's interests in relation to the disclosure of their sensitive personal information'.¹⁰

⁹ Rachel Carson et al, *Compliance with and enforcement of family law parenting orders: Final report* (ANROWS, 2022); Heather Douglas, 'Legal systems abuse and coercive control' (2018) 18(1) *Criminology & Criminal Justice* 84; Jane Wangmann, Tracey Booth and Miranda Kaye, *"No Straight Lines": Self-Represented Litigants in Family Law Proceedings involving Allegations about Family Violence* (ANROWS, 2020).

¹⁰ Explanatory Memorandum (n 4) 128 [590].

Recognising children and their distinct rights

The Taskforce is concerned that the proposed amendments overlook children’s evolving capacities for decision-making about their best interests (Article 5 of the Convention), and reinforce assumptions about children’s lack of capacity, vulnerability and dependence on adults.¹¹

This concern is magnified in circumstances of family violence, where children are often treated as ‘secondary’ victims, or extensions of their protective parent or carer.¹² However, as children and young people have explained, ‘parents or guardians assumed to be “safe” are not always experienced this way. A child might not have a safe parent or guardian’.¹³

Sections 102BC and 102BD presume alignment between the interests of the child, and the interests of those who are ‘capable of representing the child’s interests’ in relation to disclosure of a protected confidence. These provisions provide no scope for children under the age of 18 themselves to apply for a direction. This approach to protected confidences in the Family Law Act is arguably inconsistent with the current Australian government policy emphasis upon recognising and respecting children as victim-survivors of family violence in their own right.¹⁴

A children’s rights approach requires that children be recognised as having rights, interests and views that are *distinct* from those of their parents and caregivers, and respected as ‘active participant[s] in the promotion, protection and monitoring’ of their rights.¹⁵

The Taskforce invites the Committee to consider amending sub-sections 102BC(2) and 102BD(2), to provide that the court can grant leave for a child under the age of 18 to apply for a direction in relation to adducing evidence (s 102BC) or a direction in relation to complying with a disclosure requirement (s 102BD), if the court considers it to be in the child’s best interests.

This approach would address the Taskforce’s concerns outlined above, and would also be consistent with the ‘best interests’ requirement in sub-section 102BE(3): namely, that if a court is making a direction under section 102BC or 102BD, then the court must regard the child’s best interests as the paramount consideration.

¹¹ See Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022).

¹² Georgina Dimopoulos et al, *Children’s Voices for Change: A Rights-based Approach to Understanding and Implementing Effective Supports for Children and Pre-adolescents as Victim-survivors of Family Violence* (Southern Cross University, 2024).

¹³ Georgina Dimopoulos et al, ‘Children’s voices for change: Co-researching with children and young people as family violence experts by experience’ (2024) 31(3) *Childhood* 369.

¹⁴ Department of Social Services, *National Plan to End Violence against Women and Children 2022 – 2032* (Commonwealth of Australia, 2022).

¹⁵ United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [14].

Commonwealth Information Orders

The Taskforce welcomes the intent of Schedule 3 of the Bill to promote safer outcomes for children and families, including through proposed amendments to Commonwealth Information Orders ('CIOs'). A CIO is a type of location order under the Family Law Act.¹⁶ In deciding whether to make a location order in relation to a child, a court must regard the best interests of the child as the paramount consideration.¹⁷

In previous submissions, the Taskforce has observed that the best interests considerations in the Family Law Act do not meet the requirements of the best interests principle in Article 3 of the Convention.¹⁸ While the second 'general consideration' that must be taken into account when determining a child's best interests is 'any views expressed by the child',¹⁹ in practice, children are afforded limited opportunities to express their views and to be heard.²⁰

If, as the Explanatory Memorandum to the Bill notes, the breadth of information that can be requested under a CIO is 'inherently limited' by the requirement for the court to ensure that the child's best interests are the paramount consideration when making a CIO,²¹ then the best interests assessment must include consideration of any views expressed by the child.²²

The Taskforce reiterates previous concerns that it is impossible to genuinely assess children's best interests – including their developmental, psychological, emotional, safety and wellbeing needs – without their meaningful, safe participation in the decision-making process.²³ This is particularly relevant if the information requested by a CIO includes disclosures of violence that the child has made.

¹⁶ *Family Law Act 1975* (Cth) s 67J(2).

¹⁷ *Ibid* s 67L.

¹⁸ Australian Child Rights Taskforce, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Family Law Amendment Bill 2023 (Cth) (June 2023).

¹⁹ *Family Law Act 1975* (Cth) s 60CC(2)(b).

²⁰ See Georgina Dimopoulos and Michelle Fernando, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Family Law Amendment Bill 2023 (Cth) (June 2023).

²¹ Explanatory Memorandum (n 4) 120 [531].

²² United Nations Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14 (29 May 2013).

²³ Youth Law Australia, Submission to Consultation on Exposure Draft – Family Law Amendment Bill 2023 (Cth) (February 2023).

Need for continuing reform

The Taskforce looks forward to continuing to contribute to an ongoing conversation about strengthening the recognition of the distinct interests and rights of children under the Family Law Act.

Thank you for considering this submission, which can be made public. The Taskforce would welcome the opportunity to appear at a public hearing of the Committee to discuss this submission.

Yours sincerely

On behalf of the Australian Child Rights Taskforce

The Australian Child Rights Taskforce Policy Working Group

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