Response from the Transparency Project to consultation on:

**Draft Amendments to Family Procedure Rules New draft Part 3A of the Family Procedure Rules 2010.(Children and Vulnerable Persons: Participation in proceedings and giving evidence)**

The Transparency Project is a registered charity (No. 1161471) which has as its objects:

1. To advance the education of the public in the subject of family law and its administration, including the family justice system in England and Wales and the work of the family courts, in particular but not exclusively through the provision of balanced, accurate and accessible information about the work of family courts and the facilitating of public discussions and debates which encompass a range of viewpoints.
2. To promote the sound administration and development of the law in England and Wales, in particular, family law, by encouraging and contributing to the transparency of processes in the family justice system, contributing to public legal education concerning family law and matters of family justice, enhancing access to justice in matters of family law and by such other means as the trustees may determine.

Our aim is therefore to make family proceedings clearer to members of the public, those directly affected and more widely. Court rules and practice directions, in general, should be expressed in accessible language. We note that these rules relate to children and adults whose capacity to understand the complexities of the law may be impaired, and therefore these rules should be expressed in as straightforward a way as possible. Although current members of the Transparency Project are lawyers, we regret that we did not find the draft rules easy to follow ourselves, and therefore doubt that they fulfil that requirement.

In this context, we are responding to Questions 1, 3 and 6 only.

*1.*

*There is a need to reflect Article 12 UNCRC and the right of a child to express a view if he or she wishes and is old enough (and see ZH (Tanzania) v SSHD [2011] UKSC 4). The Committee recollects there is provision in children proceedings for the court to consider the attendance of the child under rule 12.14 FPR 2010.*

*(a) Does rule 3A.1 identify with sufficient clarity and robustness, the circumstances when the court should be considering ensuring that children are able to participate appropriately in the proceedings in the light of Article 12 UNCRC?*

*(b) Draft rule 3A.1 refers to ‘where proceedings involve a child’. Is the use of the word involve sufficiently clear about which children are covered by the rule?*

*(c) Draft rule 3A.2 (1) provides that the court must consider whether a child should participate in the proceedings by reason of meeting one of the conditions in paragraph (2). Do you consider that these conditions are appropriate? If not please give reasons.*

Response:

1. No. Rule 3A.1 refers to a child who is ‘involved’. Art 12 refers to ‘matters affecting the child’. It would therefore be clearer and more robust to replicate the wording in Art 12.
2. No, ‘affected’ would be a better term, as we state above.
3. Yes. The conditions include children who are affected by the proceedings, whether or not they are party.

3.

*The Committee has considered how best to establish when this rule applies. In particular the current rule sets out that the court has discretion to make directions where a vulnerable witness/party’s participation in proceedings is ‘likely to be diminished’. The Committee has considered further criteria but, on balance, felt that a more high level description was required to make sure that the court has control and can make decisions on eligibility without being restricted by any specific criteria. The committee would welcome your comments, in particular how we can make sure the measures are not used unnecessarily tying up resources and causing delay.*

*(a)Do you agree with the use of the phrase “is likely to be diminished” to define the persons other than children to whom the rules apply and who may be eligible for assistance (see the following rules 3A.1 (1) (b) and (c), 3A.4 (1), 3A.5 (1), 3A. 9 (1) (a) and (b)?*

*(b) Do you think that the proposed rule, which is intentionally drafted at a high level, provides sufficient clarity for judges, practitioners, parties and court staff to be clear about the specific circumstances in which it should be applied?*

Response:

1. No, we do not think the phrase ‘participation is likely to be diminished’ is clear in this context, either to professionals or to the public. We think that the original terms considered in the consultation, of vulnerable and intimidated witnesses, are clearer. This would be consistent with the terminology in criminal justice of ‘vulnerable or intimidated witness’.
2. No. The CPS definition is better:

A vulnerable witness:

* Anyone under 17, or
* A victim of a sexual offence, or
* A person whose evidence or ability to give evidence is likely to be diminished by reason of mental disorder, significant impairment of intelligence or social functioning or physical disability or disorder.

An intimidated witness:

* A victim of a sexual offence, or
* An elderly or frail victim,
* A repeat victim, or
* A victim of a racially-motivated crime, or
* A person whose quality of evidence is diminished by reasons of fear of distress in connection with testifying in the proceedings.

Reference should also be made to the definitions of domestic violence, controlling behaviour and coercive behaviour in Practice Direction 12 J para 3.

*Q6. Do you have any other comments on the draft rule?*

Yes.

1. In the absence of a draft Practice Direction, it is not evident how consistency will be achieved in reaching the appropriate balance between the role of the Cafcass officer in conveying the child’s wishes and feelings to the court, ascertained through direct social work, and the role of the judge in interpreting the child’s views in a meeting.
2. Rules 3A.3 refers to a young person meeting ‘the judge’, but only a small minority of separating parents are dealt with by a judge. Most parents either make their own arrangements, go to mediators, or are seen by magistrates or magistrates’ legal advisers. How is Art 12 to be addressed in these circumstances? Do these draft rules apply to magistrates and FHDRAs?
3. Will the Practice Direction be clear that what the child tells the judge cannot be used in evidence and therefore cannot influence the judge’s decision? Will the PD clarify how this will be explained to young people (and their parents)?

We believe that all the points made above need be addressed if these new rules are to be understood and applied by professionals and parties.

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On behalf of The Transparency Project

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