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Continuing Legal Education for Criminal Lawyers

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"INTERVENTION ORDERS/APPREHENDED VIOLENCE ORDERS; THE NECESSITY FOR THE PRACTITIONER TO KEEP THE "BIG PICTURE IN MIND".

The current State and Territory courts, and thus the relevant policing organisations are inundated with applications and enforcement of Intervention orders, be they of the domestic or non-domestic type. Each State refers to them by a different name, although at the end of the day they are all Intervention Orders, or more literally restraining orders.

This paper seeks to get the practitioner to look at the "Big Picture" whether they are dealing with the protected person, the defendant/respondent in the criminal law sphere, or in its impact in the Family Law jurisdiction. The larger repercussions, given how transient the Australian population has become, is the impact of Intervention Orders whether interim or final in one State, when they can be registered interstate and then subject to that State's relevant Act: how far do we need to advise our clients to discharge our duty? I will be considering the relevant South Australian, Victorian and New South Wales legislation for the purpose of this paper.

Intervention Orders/Apprehended Violence Orders.

In South Australia, the relevant act is called the *Intervention Orders (Prevention of Abuse) Act 2009* ("*I/O Act")*

In Victoria, the relevant act is called the *Family Violence Protection Act 2008 ("FVP ACT").*

In New South Wales (NSW) the act is called the *Crimes (Domestic and Personal Violence) Act 2007 ("Crimes Act")* and is aligned with the *Personal Safety Intervention Order Act 2010.* In SA and Victoria their respective Acts deal with both personal safety and safety from domestic violence in the same Act.

<u>The Explanation That Must Be Given By The Judicial Officer Making the Order.</u>

Each of the three State Acts require the Judicial officer to fully explain to the Defendant/Respondent and Protected person the full import of the Intervention Order they are imposing.[1] However, in practice this is only as to the import under that particular States legislation governing the order. The problem arises when an Intervention Order is registered in an interstate jurisdiction that then has that particular IO subject to another State's legislation.

Thus the question arises: Has the Court discharged its duty under the Act to properly explain the effect of the order, the consequences that may flow from a contravention of the order and the rights of the defendant and the protected person in relation to the order, given the order can be registered interstate?[2]

Or do we as practitioners have to give that broad and detailed explanation in satisfaction of our obligations to properly advise our client? I would suggest at the very least, that we do need to provide that advice and, particularly in the scenario where we might advise our client to consent to the order without admission[3]. An Intervention Order once imposed, even by consent, is hard to withdraw[4] Although at first blush the parties may live in different States and therefore an uninformed opinion might mean that it has no true effect on your client by consenting, the practical implications are far greater in light of the transience of the population and that quite often a person spends time with their children pursuant to the Family Law Act 1975 in another State. The effect of this cross registration means that an Intervention Order can follow a party anywhere, but more importantly it is enforceable upon them under an Act they may know nothing about, with provisions vastly different to the State under which the Intervention Order was originally made. Following is some of the most

[1] S.17 I/O Act; s.96 FVP Act; s.76 Crimes Act
[2] S.30I/O Act; s.177-183 FVP Act; s.94-98 Crimes Act. And for the purposes of each of those states legislation they can also be registered in New Zealand.
[3] S.23(3) I/O Act; s.78 FVP Act; s.78 Crimes Act.
[4] Thakur v Police [2016] SASC 75;

important provisions of the three State Acts that at a minimum a practitioner working in the Intervention Order jurisdiction should be aware of: this is merely a guide.

The Very Least a Legal Practitioner should know when instructed in Intervention Order Proceedings or Where Their Client is Subject to Intervention Order Proceedings.

1. **Duration of an Intervention Order.**

1.1. In South Australia Intervention Orders do not have a sunset clause: the court is not allowed to fix a date for the expiry of the Intervention Order or limit its duration[5]. They are valid in perpetuity unless a Defendant after the transmission of at least 12 months can show in effect a significant change[6] and are successful on their variation or revocation application. Experience in the South Australian Courts have shown that the courts are reluctant to entertain such applications with a satisfactory result for the Defendant Applicant.[7]

1.2. In Victoria the Court may specify the period for which the order stays in force.[8] In setting the duration of the Intervention Order is must consider that the safety of the protected person is paramount, the Applicant's assessment of the level and duration of the risk, and if the applicant is not the protected person, then the protected person's assessment of the level and duration of the risk[9]. However, if the respondent is a child the period specified in the Order, must not exceed 12 months[10].

Of interest is that it is discretionary, whether the court in Victoria specifies a period of duration of the Intervention Order[11]. If no time is specified then it operates until it is revoked by the court or set aside on appeal. Division 8 of the Act overseas the process for variation or revocation. An application to vary or revoke may be made by an Application under this division or by the courts own initiative[12]. The courts enquiry goes further than that of the South Australian courts, in that in addition to requiring there to have been a

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[5] S.11 (a) and (b)
[6] S.26(4)(b)
[7] *Groom v Police 2017 {[SASC]21*
[8] S.97
[9] S.97(2)
[10] S.98
[11] S.97(1) and s.99. YY v ZZ & Anor [2103]VSC 743 @[99-114]
[12] S.100 L v L & Anor [2016]VSC182 para[63-83]

change[13]the court considers whether there are any other persons who since the order has been made have become family members of the respondent, whether there are any Family Law Act orders in relation to where and with whom a child of the protected person or respondent lives or the existence of an order for the child to spend time with the respondent[14]. Further in deciding to make the order the court must consider the applicant's reasons for seeking the variation or revocation, the safety of the protected person, the protected person's views of the application, whether or not the protected person is legally represented and if the protected person has a guardian, the guardians views[15]The "group of applicants able to make such an application is extensive[16]The Court may also make an extension of the Intervention Order, again either by way of Application or on its own initiative[17].

1.3. In New South Wales, s.79 of the Act governs the duration of the Intervention Order, and like Victoria the Court may specify a period that the order remains in force for. However, if the Court fails to specify a period, then the order remains in force for 12 months after the date of the order[18]. As such, without a defined duration in the Order, the order automatically is revoked after 12 months: this is a marked difference to both the South Australian and Victorian Acts.

The court must, when considering setting a period of operation of the order, form an opinion as to what period is necessary to ensure the safety and protection of the protected person[19]. However, s.79 is subject to the provisions within the Act for variation or revocation of final apprehended violence orders and interim court orders[20].

S.73 of the Act is very similar to both the South Australian and Victorian Acts threshold requirements for revocation and variation[21], however, as an order

[13] 102(1)(a)
[14] S.102
[15] S.100(2)
[16] Division 8, Subdivision 3, ss 108-111
[17] S.106
[18] S.79(3)
[19] S.79(2)
[20]S.79(4) referring to S.73
s.73(3)[21] Requiring a change of circumstances

can have a limiting time of duration, there is also provision for the court to extend the duration of the order[22], and even in the absence of service on the defendant, but subject to s.73(9). Peculiar to this particular Act is that a variation to the order may also be made on a guilty plea or a finding of guilt in certain offences[23], and extends that jurisdiction to the District Court but subject to s.91[24].

Further there is provision pursuant to s.84 of the Act for an application to be made by the defendant for the annulment of an apprehended violence order made by the Local Court or the Children's Court: this is a provision peculiar to the New South Wales Act[25].

2. **Breaches of An Intervention Order**

Each of the three state acts being considered all deal with breaches of an intervention order but they differ in whether a protected person can aid and abet a breach. I will first consider the provisions of each act that governs breaches and the power of police and the ramifications of a breach even if it is only an alleged breach.

2.1. In South Australia, offences against the Intervention order are dealt with in Division 1. In broad terms s.31 deals with a variety of classification of breaches:

2.1.1. by not attending or completing an ordered Intervention Program, and

2.1.2. any breach of any other condition of the order.

The former is dealt with by way of an expiation fee/fine and the latter by way of any sentencing process up to a maximum term of imprisonment for 2 years. There is no offence of aide, abet counselling or procuring the commission of

[22] S.73(7)
[23] S.76(2)
[24] Part 12 which deals with jurisdiction of courts authorised to make orders and determine applications and confers jurisdiction to the Supreme and District Courts.
[25] For consideration of this provision: Attorney General v Bar-Mordecai [2008]NSWSC 1094 para[15-32]

an offence by a protected person[26], unless the conduct of the contravention constitutes contravention of the order in respect of another protected person.

On the face of these sections the legislation seems straight forward and not too onerous. However, were the gravamen changes is where a Defendant is alleged to have breached an intervention order by an act of violence or a threat of violence. In that scenario section 10A of the *Bail Act* applies and the Defendant becomes a "prescribed applicant" for the purposes of bail. : there is no longer a presumption of bail. They now share the company, when it comes to applications for bail, with offenders charged with serious organised crime offences, manslaughter and blackmail to name a few. In order to be granted bail they must succeed in persuading the bail authority that there exist special reasons to warrant them being released on Bail. What constitutes special reasons has been considered by the Supreme Court.[27], but at the end of the day it is directly linked to the circumstances of the alleged offending[28] in light of the existence of an Intervention Order, although personal circumstances[29], delay in the offender going to trial versus likely totality of penalty can collectively be persuasive to the bail authority.

2.2. In Victoria any contraventions of the Act are dealt with pursuant to Division 10. It specifically deals with contravention of family violence intervention orders[30], contravention of order intending to cause harm or fear for safety[31] and arrest for contravention of family violence intervention order[32]. Like the South Australian act, again the protected person is not guilty as an abettor[33], but unlike the South Australian act it does not contain the exception being where they put another protected person at risk.. This Act allows any act by the protected person that "entices" the defendant to be in breach, to be beyond the tentacles of the criminal law. It goes further in the notations to suggest that if the protected person is dissatisfied with the intervention order, then the

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[26] S.31d(3)
[27] *R v Buhlmann* [2010] SASC 123, *R v Lombardi* (2013) 115 SASR 577, *R v I* [2013] SASC 127, *R v Briggs* (2014) 119 SASR 237, *R v Cecic, Dettman & Niemann* [2014] SASC 132
[28] *R v Lombardi* (2013) 115 SASR 577 at [25]
[29] *R v Buhlmann* [2010] SASC
[30] S.123
[31] S.123A
[32] S.124
[33] S.125

protected person or a police officer can apply pursuant to Division 8 for the order to be varied or revoked.

Division 10 is accompanied by a term of imprisonment not exceeding 2 years as a maximum. Interesting is that some or all of the course of conduct constituting the offence can occur outside Victoria[34],or that the protected person was outside Victoria at the time at which some or all of the conduct constituting an offence occurred[35]: this provision is unique to Victoria.

Victoria is also assisted by Division 11 of the Act, which deals with persistent contravention of notices and orders[36]. If a person so contravenes the Intervention order the associated penalties are increased to 5 years maximum imprisonment. The requirements to satisfy "persistent contravention" in light of practical experience are not that difficult[37].: an offence against either s.37 or 123 of the Act and on at least 2 occasions within 28 days preceding the offence against either s.37 or 123 the accused engaged in conduct constituting an offence against either s.37 or 123 against the same protected person or the same family violence safety notice or intervention order and on each occasion the accused knew or ought to have known that the conduct constituted a contravention of the order. This alleged offending is tried before a jury and ss4-5, whilst including ss3 must be considered; this is a provision not seen in any of the state acts under consideration.

2.3. In New South Wales, contravention of an Intervention Order is governed by s.14 of the Act. A Defendant cannot be in breach of an order unless they have been served with the order or were present in court when the order was made[38]. Breaching, the order gives the police the power to arrest a defendant for the breach and if there was another criminal offence involved, charging them with that offence as well. The *Law Enforcement (Powers and Responsibilities) Act 2002* contains powers of police officers in relation to suspected offences, including a power to arrest a person, without warrant , if

[34] S.123(2A): 123A(3)
[35] 123 (2)(b) : 123A(4)
[36] S.125A; Sanchez v DPP [2013]VSC 707
[37] Director of Public Prosecutions v Ryan [2016] VCC 1466 @para[39]
[38] S.14(2); Brandon Trevor RICH v R [2015] NSWDC 71 @ Para[48]

the police officer suspects on reasonable grounds that a person has or is about to commit an offence.. An attempt to breach an order is deemed to be a breach, even if the breach was not committed[39]. Unless otherwise ordered, a person who is convicted of a knowing breach (or attempted breach) of the order, must be sentenced to a term of imprisonment if the breach consisted of an act of violence against a person[40]. This is not the case however, if the defendant is aged under 18 years[41]. The maximum fine that can be imposed is $5,500 and the maximum period of imprisonment for a breach is 2 years imprisonment.

A protected person is not guilty of an offence of aiding, abetting, counselling or procuring the commission of an offence if there is a breach of the order by the defendant[42]. This provision is more absolute than even the South Australian provision which does have an exception provision: where the aiding, abetting, counselling, procuring has the effect of exposing another protected person under the same order to be exposed to the offending.

It is of note for practitioners to consider s.13 of the Act. S.13 sets out with particularity the offence of "Stalking or intimidation with intent to cause fear of physical or mental harm". If found guilty of this offence a Defendant can face up to a maximum imprisonment of 5 years[43]. The basis of this offence is that the defendants intends to cause fear of physical or mental harm[44], but interestingly the prosecution of these offences are assisted as provision is made that the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm[45]. Again the legislation deals with an attempt to commit this offence as if the offence had in fact been committed[46]. The offence of stalking or intimidation does not have to be as against the protected person: it is enough to satisfy this offence if it is against a person with whom the protected person is in a domestic

[39] S.14(9).
[40] S.14(4)R v Hall: Hall v R [2015] NSWDC 359 (15 October 2015) @ para 16
[41] S.14(5)
[42] S.14(7)
[43] S.13(1)
[44] S.13(2) (3) see Darin Christopher Martin v R [2017] NSWDC 82 paras [87-103]
[45] S.13 (4)
[46] S.13(5)

relationship such that it causes physical or mental harm to the protected person[47]: in effect this is a deeming provision.

3. **Conclusion re Intervention Orders and Their Interaction with the Criminal Law Jurisdiction.**

3.1. It should now be obvious why a proper explanation to the client is important when they are the defendant in an Intervention Order. All 3 Acts considered, allow for the registration interstate of an order and unless the defendant is aware of this import, then a breach interstate can have catastrophic repercussions. Is it enough that you simply warn your client that the order can be registered interstate and if they have any intention of being in that state then they need to consult you as to the law of that state? Although of course, if the order is registered interstate then they can commit an offence in that state even without being in that state. The prime example is the offence pf publication, which is dealt with specifically in each state, via sections 33 in SA, Part 8, sections 166-169C in Victoria[48] and s.45 of the NSW Act. It is important that the legal practitioner fully explains this ban and is clear in their articulation to the client what is considered by the court to amount to "publication".

3.2. Each state Act allows for either a police initiated Intervention Order or a private initiated Intervention Order. I would urge the practitioner if acting for a person seeking an Intervention Order to consider either initiating the application or seek to take over the police initiated order. Both have the same import, but in certain situations, the client, given appropriate resources, can end up with a more acceptable Intervention Order, then if left merely to the police.

Intervention Orders and the Family Law Act 1975

Any legal practitioner working within the Intervention Order jurisdiction also needs to be aware of the interplay of the *Family Law Act 1975* in the criminal jurisdiction. In South Australia, s.16 empowers the Magistrate to vary, revoke or suspend a FLA order and sections 87-93 allow the same in Victoria. NSW judicial officers are not so empowered although they do need to consider any FLA orders in existence pursuant to s.50 and somewhat through s.42.

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[47] S.13(2)

[48] Although ss 169A-169C does allow an exception to that restriction and see s.167

So we can certainly see that in South Australia and Victoria there can be a real impact of the Intervention Order jurisdiction in the family law jurisdiction, not only generally as to property or children's matters but in the State/Territory jurisdiction being able to change Federal jurisdiction orders. What follows is a consideration of the interaction of both and their impact.

1. **Implications for Intervention Orders in Family Law Jurisdictions**

1.1. The phrase Family Violence appears throughout the *Family Law Act 1975* (Cth) (hereinafter referred to as the *FLA*) and is a feature for consideration by the Court in both parenting and property matters.

1.2. The definition of Family Violence in the *FLA* does not differ greatly to that in the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*: it is simply more fulsome.

1.3. *s.4(1)* of the *FLA,* when considering the meaning of Family Violence directs you to ***s.4AB(1)*** of the Act, which states:

(1) For the purposes of this Act. Family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, , a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

In the absence of uniformity between the various States and Territories as to how they refer to injunctions to stop family violence, the *FLA* refers to such injunctions as *Family Violence Orders* defined in ***s.4(1)*** of the Act as

"*an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence."*

Comment:

Often the first time family violence in a relationship is raised is in the State or Territory Court, as it is often the cause for the breakdown of the relationship, that earlier was merely on rocky ground. In this instance, and usually because of the urgency, the party seeking protection, presents themselves either to a police station or a court seeking urgent protection.

In the absence of FLA orders as to parenting issues or injunctions, then the State or Territory Court is the first to deal with the assertion of family violence, and so is not faced with existing orders under the FLA and thus the possibility of there being inconsistency between the orders contained within the family violence order and existing orders made pursuant to the FLA.

Currently, the State or Territory court, although empowered to change parenting orders where it considers it appropriate for the protection of an applicant or child of the relationship, is not empowered to make a parenting order of its own initiative, if none already exists..49

2. **How do State and Territory Courts exercise jurisdiction under the Family Law Act?**

2.1. Where the matter becomes more complex is where there are existing *FLA* orders as to children of the relationship or at the very least family law proceedings are on foot. The *FLA* addresses this situation where there is inconsistency between family violence orders made under state and territory

[49] The Australian Law Reform Commission in report 114 "Family Violence – A National Legal Response at recommendation 16-3 recommended that *"The Family Law Act 1975 (Cth) should be amended to allow state and territory courts, when making or varying a protection order, to make a parenting order until further order."*

family violence legislation and FLA orders that provide, require or authorise a person to spend time with a child, at Pt VII Division 11 of the FLA (at various sections of the Act between ss.68N-68T):

- **s.68N**[50] of the FLA sets out that the purpose of this division is to resolve inconsistencies between family violence orders and orders under the FLA for a child to spend time with a defendant of a family violence order, whilst seeking to ensure that people are not exposed to family violence and whilst seeking to achieve the objects and principles laid out in s.60B of the FLA.

- s 60B[51] of the FLA deals with what is in the best interests of children where a relationship has broken down and sets out the objects of this part of the Act and the principles underlying it.

- **s.68P**[52] of the FLA sets out the obligations on the Federal Circuit Court or Family Court of Australia when it is making an order or granting an injunction for a child to spend time with the defendant the subject of a family violence order, where the FLA order or injuction will be inconsistent with an existing family violence order.

- s.68P encompasses a parenting order, recovery order, an injunction under s.68B or s.114 order.

2.2. Where such an order is inconsistent with a family violence order it is mandatory for the court[53] to specify in the order or injunction that it is inconsistent with an existing family violence order, give a detailed explanation in the order or injunction of how the contact that it provides for is to take place, explain to the parties and the defendant of the family violence order (if they are not a party) the purpose of the order/injunctions, the obligations created by the order/injunction including how the contact it provides for is to take place, the consequences that may follow if there is a breach of the order/injunction, provide the courts reasons for making an inconsistent

[50] See Annexure 1 for the complete reproduction of s.68N
[51] See Annexure 1 for the complete reproduction of s.60B
[52] See Annexure 1 for the complete reproduction of s.68P
[53] S.68P(2) of the FLA

order/injunction and explain the circumstances in which a person may apply for variation or revocation of the order/injunction.

2.3. Further, in an attempt to ensure all parties, interested persons and the appropriate authorities are aware, a copy of all those matters just enunciated must be provided to each and every one of the identified interest persons or groups within s.68P. This is to ensure that not only are all interested parties aware, but if after the granting of an FLA order, a defendant or a protected person makes an application under that Act to vary or revoke an Intervention Order, then the state or territory court should at the very least have the minimum information it requires to consider such an application.

- **s.68Q**[54] of the FLA invalidates that part of a state or territory family violence order where it is inconsistent with any part of a later order/injunction as listed in s.68P(a), namely is inconsistent with a parenting order, recovery order, s.68B or s.114 injunction, where the order/injunction provides for a child to spend time with a person or authorises that person to spend time with a child and that person is the defendant in the family violence order.[55]

2.4. An application for a declaration that the order/injunction is inconsistent with the family violence may be made to a court under the FLA and can be made by the parties to the order/injunction mentioned in s.68P(1)(a)or the defendant or the protected person in the family violence order where neither of those persons are the parties.[56]

- **s.68R**[57] sets out the power of the state or territory court who are making the family violence order, to revive, discharge or suspend an existing order, injunction or arrangement under the FLA. Such an order can be a parenting order, recovery order, an injuction pursuant to s.68B or s.114 to the extent it expressly or impliedly requires or authorises a person to spend

[54] See Annexure 1 for the complete reproduction of s.68Q
[55] S.68Q9(1) of the FLA
[56] S.68Q(2) FLA
[57] See Annexure 1 for the complete reproduction of s.68R

time with a child[58]. Further it can also revive, vary discharge or suspend an undertaking given to and accepted by a court, a registered parenting plan or a recognisance entered into under an order of the FLA[59]

- The State or Territory court may exercise this power on its own initiative or on application by any person[60].
- However, the State or Territory court cannot use this power unless it[61]:

(a) makes or varies a family violence order in the proceedings (whether interim or not); and

(b) if it proposes to exercise the power with respect to a parenting order, recovery order or s.68B or s.114 injunctions only (i.e. not undertakings, parenting plans or recognisance entered into under an order of the FLA); and

(c) The state or territory court has before it material that was not before the court that made that order or injunction it is about to revive, vary, discharge or suspend.

2.5. What is complicating though is the inclusion of s.68R(4) which states:

> *"The court must not exercise its power under subsection (1) to discharge an order, injunction or arrangement in proceedings to make an interim family violence order or an interim variation of a family violence order"*

This seems to be at odds with ss(3)(a) of that section where it, when discussing the limits on power to be exercised by the state or territory court, specifically refers to the fact that the power can be exercised whether or not it is an interim family violence order it is making or varying. This may well be qualified by s.68T (1) although there is no cross reference to it within this Division of the FLA.

[58] S. 68R(1)FLA
[59] S.68R(1)(d) FLA
[60] S. 68R(2)
[61] S.68R(3)

2.6. The State or Territory court also has other relevant matters it must consider in exercising its power under ss(1), with consideration of the following matters being mandatory:

1. "Have regard to the purposes of this Division,9stated in s.68N)[62]*; and*

2. Have regard to whether contact with both parents is in the best interests of the child concerned[63]*; and*

3. If varying, discharging or suspending an order/injunction mentioned in paragraph (1)(a),(b) or (c) that, when made or granted, was inconsistent with an existing gamily violence order – be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.[64]

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.

2.7. The inclusion of the "Note" in s.68R(5) as engrossed above, is of high interest and particularly in that it excludes direction to the State or Territory judicial officer to s.60CA which quite plainly states that a child's best interest is the paramount consideration in making a parenting order.

Comment

What obviously exists then is inconsistency between the *FLA* where the best interests of the child are paramount when making a parenting order, and a state or territory court that can revive, vary, discharge or suspend a parenting order but where quite clearly the child's best interests are not paramount.

s.68R specifically does not include s.60CA: it directs the State or Territory court to consider in detail what is in the best interests of a child through direction in this Division to s.60B and ss60CB-60CG: such specific exclusion must mean that the child's best interests in for example having a meaningful relationship with both parents is not paramount in this instance.

[62] S.68R(5)(a)
[63] S.68R(5)(b)
[64] S.68R(5)(c)

Of paramount concern in the State and Territory courts when dealing with an application concerning a family violence order, pursuant to s.68R of the FLA is the need to protect a person, including children, from family violence.

s.68S[65] lists what sections of the FLA and Rules do not apply to a court (State or Territory) exercising its power pursuant to s.68R. Most of the exclusions are somewhat pedestrian but s.68S(e) and the notation that follows is of high interest, as to the responsibility placed on the State and Territory courts:

> *"s.68S(1)(e) any provisions (for example, section 60CA) that would otherwise make the best interests of the child the paramount consideration;*
>
> *Note: Even though the best interests of the child are not paramount, they must still be taken into account under paragraph 68R(5)(b)."*

s.68T[66] sets out the special provisions relating to proceedings to make an interim (or interim variation of) a family violence order that apply to the State or Territory courts where it exercises its' power pursuant to s.68R of the FLA. In particular it sets a "sunset clause" for the exercise of that power so that any revival, variation or suspension ceases to have effect at the earlier of the following two events:

> *"(a) The time the interim order stops being in force; and*
>
> *(b) The end of the period of 21 days starting when the interim order was made."*[67]

2.8. Of interest is, there is no right of appeal in relation to the revival, variation or suspension[68], however given the sunset clause, the longest that the "change" will run for is 21 days in any event. Against that fact, the "no appeal" exclusion is probably a pragmatic and sensible inclusion.

2.9. Why set a "sunset clause"?

2.9.1. It in effect is a "holding order", to ensure protection whilst allowing time for either the defendant, protected party or other interested person to take an application in the appropriate FLA jurisdiction to

[65] See Annexure 1 for the complete reproduction of s.68S
[66] See Annexure 1 for the complete reproduction of s.68T
[67] S.68T (1) of the FLA
[68] S.68T(2) FLA

get comprehensive orders in place that will then, because of s.68Q invalidate the exercise of the s.68R power, where there is any conflict in the exercise of power by the State or Territory court, or, if in fact such exercise was either too broad or restrictive.

2.9.2. If no application is made to the appropriate FLA jurisdiction then after 21 days the revival, variation or suspension shall cease without any other orders in place.

2.9.3. If the adjournment of the interim family violence order is to a date before the expiration of the 21 day period, then there is nothing in this Division of the FLA that would stop a magistrate from renewing the order. This is particularly of assistance, where the matter in the FLA jurisdiction has not yet reached the date set for the interim hearing: this is not an unlikely occurance, given the time between filing and interim hearing in both the Federal Circuit Court and the Family Court of Australia.

2.9.4. It also means, that any uncertainty a State or Territory judicial officer might experience about exercising their power, in what is most likely to be an unfamiliar jurisdiction is somewhat diluted, knowing that the effect of that exercise of power can only last in the first instance for no greater than 21 days. This is important because quite often the state or territory court is the "first port of call" post the relationship breakdown, coupled with urgency.

2.9.5. The other matter that must be borne in mind, is that not only may the judicial officer be unfamiliar with the FLA jurisdiction and its' application pursuant to the FLA, but also, the legal practitioners appearing on the application, the police prosecutor if it is a police application for a family violence order, or indeed, the applicant or protected person may indeed not have had an opportunity to access any legal advice, or their funding for legal advice may only extend to the family violence order, and not indeed to the other orders capable

of being made pursuant to s.68R of the FLA. Thus the sunset clause may be effective in minimising this deficiency as well.

3. **How often is s.68R used?**

Precise data is not available on this, but what historically is acknowledged through the Kearney McKenzie Report[69], the 2004 Family Law Council Advice[70]and the Australian Law Reform Commission Report 114 "Family Violence – a National Legal Response[71]is that it is rarely used. It was the Commissions view that:

"*The reasons for the underuse of s.68R of the Family Law Act identified by stakeholders in this Inquiry reflect the reasons suggested in previous reports. In summary, the provision is rarely used to revive, vary, discharge or suspend a parenting order because:*

- *Judicial officers, lawyers, police and others involved in protection order proceedings may not be sufficiently aware of the existence, or understand the nature, of s.68R;*
- *Some judicial officers, lawyers and police appear to consider that issues in relation to parenting orders should be a matter for federal family courts;*
- *Judicial officers may not have the information or evidence necessary to amend a parenting order; and*
- *Parties to proceedings may not have access to appropriate legal advice and other support before seeking to amend a parenting order."*72

I would hasten to add, that I believe that from my experience and comments of others within the profession, that s.68R is still rarely, if ever used, in the South Australian state courts and probably still for the reasons expounded by the Commissions above. It is interesting to note that the Chief Justice of SA, in the case of T,T v L,KC[73] adopted dot point 2 in his reasoning. The question has to be, whether this is an area of the law, certainly out of the usual jurisdiction of family law practitioners, that in fact they should be pursuing: particularly in

[69] Kearney McKenzie and Associates report published in 1998
[70] Published by the Family Law Council of Australia in 2004
[71] Published by ALRC on 11 November 2010
[72] Para 16.31 of ALRC report 114 published 11 November 2010
[73] Supra at page 8 [2013]SASC51;(2013)116SASR 78

light of the fact that a private family violence order can be obtained, with the same standing as a police acquired order, and particularly against the delays in matters sometimes being reached in the Federal Circuit Courts and Family Court of Australia coupled with the expensive and prolonged proceedings for contravention proceedings in that jurisdiction.

4. **How does the Federal Circuit Court or Family Court of Australia become informed of the family violence order and how then does it deal with it when considering both parenting orders and division of property orders?**

4.1. Division of Property: Where proceedings for property settlement are under consideration, that court must have recourse, when adjudicating what is just and equitable by way of a division of property pursuant to s.79 of the FLA (and it's redirection through the Act), whether a party the subject of the proceedings has been subjected to family violence such that it has impacted on them in the past capacity to contribute financially to the relationship and their future potential to adequately provide for themselves.

4.2. Parenting Orders: The Federal Circuit Court and the Family Court of Australia's approach to family violence is to identify the issues and then determine whether there is an unacceptable risk to that child by exposure to the perpetrator of the family violence. Pursuant to s.60CC(k) (3) of the FLA, when considering making a parenting order, the court must consider the existence of family violence[74] both historically and into the future in establishing what is in the best interests of the child, noting that the best interests of the child is paramount, and " *ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;"*: [75]

5. **How does the family law practitioner utilise the existence of a family violence order?**

S.60CC (3)(k) " if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:

[74] S.60B(1)(b) of the FLA "protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;"
[75] S.60B(1)(a) of the FLA

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;"

Comment

s.60CC(3)(k) is of vital interest to the family law practitioner with respect to parenting issues. However, it must be noted that pursuant to s.91 of the Evidence Act 1995(Cth) an order made by the state or territory court is not proof of the facts alleged in those proceedings. The practical implication being that those alleged facts will need to be re agitated in the FLA proceedings, noting that the standard of proof employed is the civil standard of proof contained in s.140 of the Evidence Act 1995(Cth), as modified by s.69ZT(3) of the FLA..

However, having said that, the fact that a complaint has been laid in the state or territory court, an affidavit filed and quite likely either additional transcript evidence available, used to supplement any deficiencies in the affidavit, or transcript taken of evidence if the family violence order was contested, is information that the family law practitioner should seek to introduce into the parenting proceedings where relevant: a particularly useful tool in establishing prior inconsistent statements.

6. **So where to now?**

As mentioned earlier, if s.68R is to be utilised by the State or Territory courts, then family law practitioners should be seeking to practice in this jurisdiction, both in private and State applications for family violence orders. These practitioners have the:

6.1. knowledge and expertise required in both drafting affidavits and in appreciating the ramifications in the family law jurisdiction;

6.2. often it's the first time the breakdown of the relationship comes before the court;

6.3. ability to elevate both at State and Federal level the need for protection for their client and the child(ren) or other member from family violence.

6.4. ability to provide assistance to the state or territory court in exercising s.68R

6.5. the ability in private applications be able to address more fulsomely the orders necessary to adequately protect the applicant and their family members[76], or in defending family violence applications, ensure that the defendant's position when more fulsome orders as to parenting orders are made are in no way compromised.

Further, I would go so far as to suggest that the following is correct:

- a common belief that the protection offered by family violence orders is more effective at a state level as compared to ones originating at the federal level, both as to response by police officers in the event of a breach and now because of the impact through the amendments to the Bail Act that that a breach affords the protected person;
- the capacity to have State family violence orders issued(even though at first instance on an interim basis), as a matter of urgency is plainly available in the state/territory jurisdiction; and
- the application for a family violence order at the State level is a minimum expense to the applicant if obtained via police and even if done by way of a private application would be at less cost, compared with the expense of filing and drafting supporting documents in the family law jurisdiction, noting that the affidavit filed in that instance could either be the same or a version of the affidavit already filed in the family law jurisdiction, or utilised for filing in the family law jurisdiction into the future.

[76] S.24 Intervention Orders (Prevention of Abuse) Act 2009 (SA)

- A concern that parties to family law proceedings or a disgruntled party after receiving final orders for parenting in the family law jurisdiction might use the State courts and in particular s.68R in an appropriate matter:
    - A way to disarm this process may well be for the State or Territory courts exercising this jurisdiction to have access to the Commonwealth portal so they can independently check the status of the matter and indeed verify if the "new material" that is now before them [77]is in effect new, such that they can revisit the orders made by the family law jurisdiction pursuant to s.68R

[77] S.68R(3)(b) of the FLA