

PARENTING

Family Violence - changes to the *Family Law Act*

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The *Family Law Amendment (Family Violence & Other Measures) Act 2018* ("Family Violence Act") commenced operation on 1 September 2018. Its changes will impact on the law, practice and procedures in family law matters, not only where there are family violence orders.

Although the Bill received considerable attention when it was introduced to Parliament on 6 December 2017, less attention was paid to it when it finally passed both Houses on 22 August 2018. It received Royal Assent on 31 August 2018. The focus of attention of Australia at that time was on the federal parliamentary Liberal Party leadership spill. Family lawyers were (and still are) concerned about the Bill introduced to Parliament on 23 August 2018 for the proposed merger of the Family Court and the Federal Circuit Court, and their incorporation into the Federal Court, with the Full Court of the Federal Court to hear family law appeals. This article outlines the important changes made by the Family Violence Act, rather than speculate about future legislative changes.

Overview of changes

The Family Violence Act deserves to be given close consideration by family lawyers, as it has brought about major changes to the *Family Law Act 1975* (FLA). In summary, these are:

1. Courts can be given by regulation the same family law parenting jurisdiction as exercised by the State and Territory courts of summary jurisdiction. This change is particularly directed at courts exercising welfare jurisdiction in relation to children - such as children's courts - which are not always courts of summary jurisdiction.
2. The monetary limit on the jurisdiction of courts of summary jurisdiction to hear contested family law property matters without the parties' consent can be increased by regulation.
3. Courts may give short-form reasons for decisions relating to interim parenting orders.
4. Family law courts have explicit and broader power to dismiss unmeritorious applications.
5. Judges have the discretion to dispense with the requirement to explain an order or injunction to a child where the order or injunction provides for a child to spend time with a person and the child is protected by family violence order, if it is in the best interests of the child not to have the explanation.
6. The 21-day time limit on the revival, variation or suspension of family law orders by State and Territory courts in family violence order proceedings has been removed.
7. A redundant provision that allows a Family Law Court to make an order relieving a party to a marriage from an obligation to perform marital services or render conjugal rights was repealed (s 114(2)).

It was proposed that a breach of a family law injunction for personal protection become a criminal offence, but the introduction of this change was deferred by Parliament.

Jurisdiction of State and Territory courts to hear property matters

Prior to the commencement of the Family Violence Act, courts of summary jurisdiction could hear property settlement matters without the consent of both parties, if the total value of the property did not exceed \$20,000. This monetary limit still applies (s 46A(1)), but the regulations of each court of summary jurisdiction can prescribe a higher amount.

The Family Law Council supported an increase in the monetary limit "as a way of supporting clients of these courts to achieve some measure of economic independence without having to initiate proceedings in the family courts". (Family Law Council: *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, p.145). The upper property limit in the FLA of \$20,000 has not been updated since 1988. The Family Law Council said that this sum was equivalent to approximately \$43,800 in 2016.

The Family Violence Act allows for relevant State and Territory courts, such as children's courts, to exercise the same family law jurisdiction as courts of summary jurisdiction when dealing with parenting matters under Pt VII FLA. According to the Revised Explanatory Memorandum this allows parties to resolve related matters together in State and Territory courts, reducing the need to commence proceedings in a second court and can reduce time, cost, pressure and risk for vulnerable families and children. State and Territory courts are not intended to become the primary fora for resolving family law disputes, but have been given additional tools to resolve matters involving family violence holistically.

The Family Law Section of the Law Council of Australia (FLS) supported an increase in the jurisdiction of State and Territory courts in family law property matters to promote opportunities for resolution of multiple aspects of a case in the one court. It proposed that a limit of \$100,000 be set by the FLA, rather than regulations, to enable proper consideration of any proposals to increase the amount (Submission to the Attorney-General's Department on the Exposure Draft, pp 5-6).

Summary Decrees

A new provision, s 45A FLA, has replaced the previous s 118 FLA in relation to the summary dismissal of unmeritorious applications. According to the Revised Explanatory Memorandum, the aims of the new provision are:

- "To clarify and modernise the powers of the court"; and
- To allow a court "to prevent the use of its court room as a tool for perpetrators of family violence to perpetuate violence".

Section 118, which has been repealed and incorporated into s 45A(4), provided:

"The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:

- (a) Dismiss the proceedings; and
- (b) Make such order as to costs as the court considers just."

Section 118 was supported, in relation to the Family Court, by Pt 10.3 *Family Law Rules 2004*.

The new s 45A(1) and (2) allow the court to make a summary decree in favour of one party, in relation to the whole or part of a proceeding, if satisfied that a party has no reasonable prospect of successfully:

- prosecuting the proceedings or part of the proceedings, or
- defending the proceedings or part of the proceedings.

In determining whether a defence or proceeding has no reasonable prospect of success, proceedings need not be hopeless or bound to fail (s 45A(3)).

A court can, as under the previous s 118, "dismiss all or part of proceedings at any stage if it is frivolous, vexatious or an abuse of process" (s 45A(4)).

Reasons in short form

The new s 69ZL FLA provides that a court may give reasons in short form for a decision it makes in relation to an interim parenting order. This amendment implements recommendation 3 of the Family Law Council's 2015 *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. The Council identified that a practical barrier to children's courts or courts of summary jurisdiction exercising family law jurisdiction is that writing detailed judgments is not the usual practice of these courts.

The Revised Explanatory Memorandum states:

"Courts are already able to give reasons for any decision in short form, as long as the reasons are adequate. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power."

The FLS generally supported this amendment but was of the view that it was unlikely to have any impact without broader amendments and simplification of the interim parenting decision making process mandated in Part VII FLA.

Explaining orders or injunctions to children

A court exercising FLA jurisdiction is required, to the extent to which the order or injunction provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child, to explain the order or injunction to the person protected by the family violence order (if that person is not the applicant or respondent) (s 68P(2)(c)(iii)). In some circumstances, the person protected by the family violence order may be a child.

New s 68P(2A), (2B) and (2C) FLA create exceptions to the requirement to explain certain decisions of the court to children. The Revised Explanatory Memorandum explains (para 94) the reason for the change:

"In practice, it can be difficult for the court to comply with the requirements of s 68P(2)(c)(iii) and s 68P(2)(d) where the person protected is (or includes) a child. For instance, young children covered by the order or injunction, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in the explanation. For older children it may not be in their best interest, and indeed may be distressing, to be exposed to parental controversy to the extent necessary to comply with the requirements."

Section 68P(2A) specifies that the court is not required to provide the explanation required by s 68P(2)(c)(iii) to a child if the court is satisfied that it is in the child's best interests not to receive an explanation of the order or injunction. The new s 68P(2B) specifies that the court is not required to include a particular matter otherwise required to be explained by s 68P(2)(d) if the court is satisfied that it is in the child's best interests for the matter not to be included in the explanation.

Section 68P(2C) provides that when determining what is in a child's best interests for the purposes of s 68P(2A) and 68P(2B), the court is required to consider the matters in s 60CC(2), but is not required (but may choose) to consider matters listed in s 60CC(3), despite the requirement in s 60CC(1).

Section 68P is intended to strike an appropriate balance between ensuring that judges do not dispense with an explanation lightly, and avoiding an excessive burden on judges to consider an extensive range of matters.

Interaction of family violence orders and FLA parenting orders

Section 68R FLA deals with inconsistency between protection orders made under State and Territory family violence legislation and FLA orders. Section 68R(1)(a) FLA provides that in proceedings to make or vary a family violence order a State or Territory court may revive, vary, discharge or suspend, for example, a parenting order in relation to a person spending time with a child. The Bills Digest (at p 11) explained the purpose of this part of the FLA as:

- to resolve inconsistencies between orders
- to ensure that such orders do not expose people to family violence and
- to achieve the objects and principles in s 60B FLA, which relate to meeting the child's best interests (s 68N).

The operation of the relevant sections (as they were before the Family Violence Act) is explained in the Bills Digest (at p 11-12):

"Section 68R operates differently depending on whether a parenting order is amended by a state or territory court during proceedings for an interim protection order or for a final protection order. When a parenting order is revived, varied or suspended under s 68R in proceedings to make or vary an *interim* protection order, s 68T provides that the variation or suspension of the parenting order only has effect for the period of the interim protection order or 21 days from the date of the order, whichever is earlier. In contrast, the *Family Law Act* does not place a time limit on parenting orders revived, varied, discharged or suspended in proceedings to make or vary a *final* protection order."

The new s 68T(1)(b) and (c) implement recommendation 4 of the Family Law Council's 2015 *Interim Report*. The amendment is also consistent with recommendation 12 made by the Victorian State Coroner in the findings of the inquest into the death of Luke Geoffrey Batty (Revised Explanatory Memorandum p 20).

To avoid inconsistent orders about parent-child contact, this amendment removed the 21 day time limit. Instead, the court's revival, variation or suspension under s 68R ceases to have effect at the earliest of:

- The time the interim family violence order stops being in force (unchanged s 68T(1)(a));
- The time specified in the interim order as the time at which the revival, variation or suspension ceases to have effect (new s 68T(1)(b), and
- The time that the order is affected by an order made by a court, under s 68R or otherwise, after the revival, variation or suspension (new s 68T(1)(c).

This means that any revival, variation or suspension of an order will always cease upon the expiration of the interim protection order, but judicial officers have the flexibility to determine timeframes and

relist matters to manage cases according to particular circumstances. The objective is to provide certainty for victims of family violence.

Conclusion

The Family Violence Act's primary purpose is to allow courts making family violence orders (courts of summary jurisdiction and children's courts) to also exercise FLA jurisdiction, so as to avoid the necessity of the parties also being required to have litigation in a Family Law Court when the FLA issue could have been dealt with by the court making the family violence order.

Whilst most of the changes in the Family Violence Act will only impact on parties where there are family violence orders, there is a wider impact. The power of the Family Law Courts to make a summary decree in favour of one of the parties in relation to part or all of the proceedings has been re-worded and re-located in the FLA. Courts of summary jurisdiction can make regulations to increase the monetary limit of contested property matters from \$20,000. Whether the States and Territories will take advantage of this change and therefore we will see more contested property proceedings heard in courts of summary jurisdiction, is not yet clear.