Submission in Response to the inquiry into and report on how to provide better access for victim-survivors in the family law system to Family Violence Orders (FVO) and the effective enforcement of those orders.

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Thank you for the opportunity to submit to this inquiry.

I am an Associate Professor in the Faculty of Law at the University of Technology Sydney. My work for over 20 years has focused on family law.

I welcome this Inquiry although do wonder about its timing. It appears to have been brought at a time when the family law system is in a period of transition which might impact on the findings of this inquiry.

The changes made to Part VII of the *Family Law Act* 1975 are very recent. This makes it impossible to comment on how the Federal Circuit and Family Court of Australia are currently considering FVOs in parenting proceedings. The court must now consider the history of family violence and any FVO when considering what arrangement would promote the safety of the child, and importantly any person caring for the child.[1] These changes to Part VII make "some positive steps forward", but "until case law is developed their effectiveness at safeguarding children and victim-survivors of family violence is yet to be determined".[2]

Additionally, we do not yet know the impact which the new *Family Law Amendment (Information Sharing) Act 2023* might have on the matters under this inquiry.

As such, I am focusing my submission on the power in s68R of the *Family Law Act* to allow magistrates to alter family law court parenting orders when making or varying FVOs. This is something that I wrote about in 2003,[3] and it has surprised me to find very little has changed (apart from the section number – then called s68T) since then.

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[1] Section 60CC(2A) *Family Law Act 1975* (Cth).
[2] Gabrielle Craig and Amy Power, 'Is It Safe Enough? Changes to the Family Law Act' (2023) 2023(December) *LSJ Online*.
[3] Miranda Kaye, 'Section 68T Family Law Act 1975 Magistrates' Powers to Alter Family Court Contact Orders When Making or Varying ADVOs.' (2003) 15(1) *Judicial Officers Bulletin* 3 (copy attached).

Section 68R Family Law Act

A state or territory court may only revive, vary, discharge or suspend a parenting order to the extent that it relates to a person spending time with a child. In addition, the court may only exercise its power under s 68R when it has material that was not before the court that made the original parenting order.

In 2010, the Australian and NSW Law Reform Commissions[4] reported on how rarely state and territory courts exercise their powers under s68R. During their inquiry they noted that:

> *many stakeholders agreed that a lack of experience and knowledge about s 68R and general family law on the part of magistrates courts, legal practitioners involved in protection order proceedings and police prosecutors contributed to the underuse of s 68R.*[5]

The Commissions found a reluctance on the part of magistrates to amend parenting orders. This is illustrated by the comments of the magistrate in the recent case of *KJ v SH*[6]:

> *You're basically asking me to put on a Family Court jurisdiction hat and revive some orders made on 20 June, suspend other Family Court orders, vary Family Court orders. I'm not going to do that. I'm not a Family Court magistrate. I don't have that legal background. I don't have that legal expertise. I'm magistrate in this court. It's a separate court to the Family Court. Magistrates in the Family Court, they have Family Court background and experience; I don't. I've experience making restraining orders, but this sort of Family Court, you know, order, like I said, in the exceptional circumstances, it is not complicated, yes, we will do it, but I have never done it.*

The Commissions made two recommendations directly relating to s68R[7]. These were:

> **Recommendation 16–1:** Family violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the *Family Law Act 1975* (Cth), reviving, varying, discharging or suspending an inconsistent parenting order. Recommendation
>
> **16–2:** Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.

It is extremely disappointing to note that States and Territories have generally ignored those recommendations made almost 15 years ago.

In relation to Recommendation 16-1: Victoria already had a provision which complied with Recommendation 16-1.[8] The South Australian legislation[9] had a provision stating that the court MAY exercise its power under s68R. This has not been amended after the Commissions' recommendation. My home state of NSW, despite amending the relevant

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[4] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, Australian Law Reform Commission, 2010) 16.
[5] Ibid 16.29.
[6] KJ v SH [2021] WADC 133 [34].
[7] Or its equivalent in WA: section 176 *Family Court Act 1997* (WA).
[8] Section 90 *Family Violence Protection Act 2008* (Vic).
[9] Section 16(1) *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

legislation on many occasions, has not implemented the recommendation. Indeed, to the contrary, a magistrate is asked to 'have regard to any relevant parenting order'[10] when deciding whether or not to make an Apprehended Domestic Violence Order, a provision which could imply the magistrate does not have the power to amend the parenting order.

In relation to Recommendation 16-2: again, the Victorian FVO application form expressly asks applicants whether they would like the "Family Law Act order about my children be revived, varied or suspended". This explicitly draws the attention of applicants, non-legal advocates, lawyers for applicants, police prosecutors and magistrates to the existence of this power. The NSW, NT, ACT, Queensland, WA and Tasmanian forms are all unclear that a s68R request is allowed or possible. All ask for details of current Family law court orders and proceedings and some list a possible condition of the FVO being that it is subject to parenting orders or FCFCOA court requested counselling or mediation. However, there is no simple box to request a consideration of the use of s68R. Police prosecutors and magistrates are under huge time pressure in these matters. Without a simple box to tick, as is the case for other requested conditions, they are unlikely to consider requesting or making s68R applications.

My recommendation is that the recommendations made by the ALRC/ NSW commissions in 2010 be repeated by this Inquiry.

Do not hesitate to contact me if you have any questions.

Yours faithfully

Associate Professor Miranda Kaye (she/her)

[redacted]

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[10] Section 42 *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

- great proportion of unrepresented litigants in their courts;
- relatively minor nature of many of the cases;
- lack of uniformly high levels of assistance from those representatives, including legal representatives, who appear before them; and
- absence of time to cogitate upon a nice point of law or a sharply contested question of fact.

Pressures of these kinds need compensating benefits — in rostering, shared workload, study leave, relief entitlements and salary.

I honour the modern magistracy. It is the Bench of the Australian judiciary where 90 per cent of the cases are dealt with. Without doubt, the Local Court is the court for ordinary citizens. This is where the rule of law is most visible in our country and, therefore, a place vital in its commitment to freedom. ❑

Endnotes

* Extract from an address at the Annual Conference of the Local Court of New South Wales, Sydney, 29 July 2002.

** Justice of the High Court of Australia.

1 *Ex parte Corbishley; Re Locke* [1967] 2 NSWR 547 at 549.

2 *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 205 CLR 337.

3 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

SECTION 68T FAMILY LAW ACT 1975

Magistrates' powers to alter Family Court contact orders when making or varying ADVOs

Ms Miranda Kaye*

Magistrates are sometimes asked to make Apprehended Domestic Violence Orders (ADVOs) in situations where there are Family Court orders about contact with children. In such cases, magistrates have the power to change Family Court contact orders, so as to keep people safe in situations where the contact order may otherwise place them in danger. Specifically, s 68T of the *Family Law Act* 1975[1] empowers Local Courts to "make, revive, vary, suspend or discharge" a *Family Law Act* contact order when making or varying an ADVO.[2]

How does s 68T work?

Two examples that may lead to the application of s 68T follow —

- *Example 1* A set of parents has a contact order in place. However, the father has been harassing the mother during contact or actually being violent at change-over. The mother now needs an ADVO for her protection and would also like the contact order amended. Perhaps, for example, she would be safer if a third party took the children to the father's house, so she has no dealings with him; or if the hand-over venue was changed to somewhere safer for her? Maybe she would only be safe if contact was stopped altogether?
- *Example 2* The police are applying for an ADVO on behalf of a child to protect the child from physical violence that is being inflicted on him by his father. The parents of the child have separated and this child is also the subject of a contact order between the parents.

In both examples, s 68T gives the magistrate who is making or varying the ADVO the power to vary or discharge the Family Court contact order to ensure the safety and well-being of the parents and child.

In both examples, if the magistrate is making an interim ADVO, then a suspension or variation of the contact order can only have effect for 21 days or, if sooner, until the interim order stops being in force (s 68T(5)(c)). If the magistrate is making a final ADVO, then he or she can use s 68T to ensure that there is no inconsistency between the ADVO and contact order for as long as the contact order is current or until the Family Court makes a new contact order.

Incidence of contact violence

Section 68T becomes particularly important where there is continuing violence at contact or change-over. Research shows that such violence is, unfortunately, very common.[3] Violence does not always end with the separation of the parents. Indeed, the point of separation and the period immediately afterwards is likely to see an

escalation of violence. Alison Wallace found that 46 per cent of spousal killings by men in New South Wales involved women who had either left, or were in the process of leaving, the relationship.[4] International research has shown that most post-separation violence directed towards mothers is linked in some way to child contact.[5] Indeed, New Zealand homicide statistics demonstrate that the highest risk category for women is during contact change-over.[6]

The prevalence of violence around contact is confirmed by recent research.[7] This research involved interviewing women who have been, or are, the targets of domestic violence and who have negotiated child contact arrangements with their abusive ex-partners. It was found that, of the 34 women who were resident parents facilitating contact visits with the father, only five indicated that they had experienced no violence at contact change-over.[8]

Under-utilisation of s 68T

The principle underlying s 68T is, sensibly, that contact orders should not expose parties to violence. Section 68T is especially important because, if a contact order is inconsistent with an ADVO, the contact order prevails *unless the magistrate exercises his or her power to vary, suspend or discharge it*.[9] It is therefore crucial for magistrates to consider whether a current contact order might undermine an ADVO by placing the applicant or child in an unsafe situation.

Research indicates that few magistrates are using their powers under s 68T.[10] Often this is simply because there is no contact order in place when parties come before the Local Court for protection. In the usual case, a woman would apply for an ADVO *before* any contact order is made by the Family Court. In those cases, the powers of magistrates to vary, suspend or discharge a contact order under s 68T would not apply. Section 68T, however, does give magistrates the power to *make* a contact order in those circumstances. In an appropriate case, the magistrate might make an order for carefully prescribed child contact that did not involve any contact between the parents.

Even when a contact order is already in existence, however, it appears that s 68T is under-utilised. One of the reasons for the low use of s 68T could be that applicants' representatives are not making applications under the section. It is quite possible that many lawyers and police prosecutors are either unaware of s 68T or reluctant to make applications under the provision. The court, however, can exercise its powers under s 68T without an application being made.[11] This is particularly useful if the applicant is self-represented (an increasingly common phenomenon) or it is apparent to the magistrate that the representative is unaware of s 68T.

Another reason why s 68T appears to be under-utilised could be that the drafting of the section is remarkable and unfortunate in its complexity.[12] The legislative aim, however, is simple — to provide magistrates with the power to help keep people safe. Hence, although the court should consider the best interests of the child, the court can, and often should, prioritise the safety of the mother above the best interests of the child if that is necessary in a particular case.[13] The section can be distinguished from the other child provisions in the *Family Law Act* because the best interests of the child are *not* paramount.[14] In any event, it is not always in the child's best interests to have regular contact with both parents. It is also not in the best interests of a child to have its mother be the victim of violence. Sometimes, there are good reasons for a child to have no contact with a parent.[15]

Practice note

If the Local Court does make an order under s 68T, the registrar of the court must then send a sealed copy of the decision to the registrar of the Family Court.[16] An easy way to do this is to use Family Court Form 23A, which can be obtained from the Family Court web site.[17]

Conclusion

The under-utilisation of s 68T is unfortunate and could be risking the safety of women and children. Magistrates should not be tempted to simply refer the parties back to the Family Court. This involves added cost, time and possible exposure of the mother or children to violence in the meantime. The *Family Law Act* was purposely amended to give magistrates the power to make, vary, suspend or discharge Family Court contact orders when making ADVOs. When the safety of applicants who have been granted ADVOs, or their children, needs to be protected, use should be made of those powers. ❑

Endnotes

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1 Introduced in June 1996 by the *Family Law Reform Act* 1995.

2 Referred to as a "family violence order" in the *Family Law Act* 1995.

3 K Rendell, Z Rathus, A Lynch, *An Unacceptable Risk: a report on child contact arrangements where there is violence in the family*, 2000, WLS, Brisbane.

4 A Wallace, *Homicide: The Social Reality*, 1986, NSW Bureau of Crime Statistics and Research, Sydney.

Continued on page 8