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THE INCLUSION OF FAMILY VIOLENCE ORDERS AMONG THE FACTORS TO BE CONSIDERED IN RELATION TO CHILDREN: S 60CC(3)(k)

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Summary

Rather than repealing s 60CC(3)(k), as suggested in my original submission, it might be better to replace it with a provision along these lines:

> (k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.

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Introduction: the problem with paragraph (k)

Section 60CC(3) sets out a list of 'additional considerations' that the courts must consider in determining what parenting orders will be most likely to be in the child's interests. Paragraph (k) includes among those factors *family violence orders*, ie orders made by state and territory magistrates under special domestic violence legislation.

The existing paragraph (k) refers, in substance, to any family violence order that applies to the child or a member of the child's family, if it was a final order (rather than an interim order) or if it was an order made in contested proceedings (rather than by consent). The amending bill would remove the two qualifications, so that the list of considerations would include '*any family violence order that applies to the child or a member of the child's family*'.

There is an underlying problem with paragraph (k) in either form. The list in s 60CC(3) is a list of considerations, or factors, relevant to what is in the child's interests: for example, the child's

views, and each parent's parenting capacity. The court's conclusion about each of these matters represents a *finding*, having reviewed the evidence. But paragraph (k), unlike the other paragraphs, includes something that is, at best, an item of *evidence*, not a consideration or factor. The prior making of a family violence order by a state court might be relevant, but only as evidence, as part of the story. It would make sense for the list to include among the considerations the need to protect the child from violence,[1] but it makes no sense to include family violence orders. It would be equally mistaken, for example, to include hospital records in the s 60CC(3) list of considerations relevant to a child's best interests.

In short, the list in s 60CC(3) should say something about the importance of family violence in determining what is best for children, but should not include things that are merely items of evidence.

The problem of drawing inference from family violence orders

Saying that the court should treat family violence orders as considerations in themselves raises the question how the court is to do so. The obvious way is for the court to infer from the making of the order that there has, in fact, been family violence. But the order itself does not tell the court what was the evidentiary basis for the order. The order may have been made after a full hearing, on the basis of cogent evidence. But it might also have been made by consent and without admissions, or in urgent interim cases in which the court did not even hear both parties. It is a problem, therefore, for paragraph (k) in effect to tell the family law court that it should infer that there has been violence. It seems clear that there are *some* cases in which people agree to such orders, or obtain such orders, without a proper reason:[2] in those cases, if the family law court inferred that there had been violence, it would be doing an injustice.

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1 It does so, notably in paragraph (j); see also s 60B(1)(b), 60CC(2)(b). I will not digress to explore whether these provisions are adequate (The Women's Legal Service QLD, Submission 80, at paragraph 10.2, presents a powerful argument that they are not).

2 I refer, for example, to the Parkinson submission (No 14). I do not say anything about the controversial question *how frequently* this sort of thing happens: it is enough for my argument that it sometimes happens, or even that it could happen.

Why there are problems with the existing (k) and the bill's amended version, and the argument for repealing (k)

The existing law attempts to deal with this problem by excluding from paragraph (k) orders by consent, and uncontested orders.

Although this is understandable, it creates a problem. It suggests that the family law courts should *not* pay attention to consent orders and uncontested orders. The problem is that many of these orders will have been made in circumstances of real violence, and it is wrong, and dangerous, for the law to say, apparently, that they should be disregarded.

Although it is just one paragraph, the issue is important. If the paragraph leads to the court assuming that there is violence when there is not, it will cause injustice (as seems likely under the existing version. And if it leads to the court assuming there is no violence when there is (as seems likely under the amended version), it will also cause injustice.

There are other matters also to be considered.[3] If the Act makes it appear that the family law courts will infer actual violence from the making of these orders, people will presumably be reluctant to consent to orders against them. In practice, many family violence orders are made by consent, and no doubt they provide protection in many cases where it is needed, even if in other cases they are made when they should not have been made. Discouraging people from agreeing to such orders – because they fear it will go against them in the family law courts – seems likely to reduce the number of consent orders, exposing some people to danger, and increasing the already heavy work load of the magistrates courts. This problem would, I think, be exacerbated by the bill's amendment to (k).

For essentially these reasons, in my 2009 Report and in my submission to the Committee I proposed that paragraph (k) be repealed.[4]

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3 I have discussed the issue in detail in a forthcoming article in the *Australian Journal of Family Law*, "The Family Law Violence Amendment of 2011: A progress report, featuring the debate about Family Violence Orders".

4 Professor Parkinson's submission presents a detailed argument to the same effect.

Second thoughts: amending paragraph (k)

Since then, however, I have become concerned that simply repealing the paragraph might give the impression that family violence orders are unimportant, and should be disregarded. That would be unfortunate. If a family violence order has been made, it is important that the family law court should know about it (section 60CF, appropriately, requires parties to inform the court of such orders). It should be treated as something that requires investigation, because it might well be an indicator of violence. What the family law court wants, of course, is evidence about the circumstances in which the order was made, and, most importantly, evidence about whether there really was violence, and if so what was its nature. The law should encourage people to provide that sort of evidence.

I am concerned, therefore, about the perceptions that might be caused by repealing paragraph (k) even though that would be a logical solution to the problem (it was always a mistake to have inserted paragraph (k)). I now propose, instead, that paragraph (k) should be amended to read something like this:

> (k) any relevant inferences that can be drawn from any family violence order that applies, or has applied, to the child or a member of the child's family, taking into account the nature of the order, the circumstances in which it was made, any evidence admitted and any findings made by the court that made the order, and any other relevant matter.

Such an amendment would treat family violence orders as what the ALRC calls a 'flag' - something that should put the family law courts on the alert. It would avoid the dilemma posed in the choice between the existing law and the bill's amended version of paragraph (k), namely that the existing law wrongly suggests that consent and interim orders are *never* occasioned by actual violence, and the proposed amendment wrongly suggests that they *always* are. It would tell the court, and indicate to the public, that the court will look at the relevant inferences that can be drawn from each family violence order, having regard to the circumstances, including the nature of the order. It would thereby indicate to the parties that they should provide evidence to the court that will enable it to do so, rather than giving people the misleading and dangerous impression that the court will draw inferences simply from the making of family violence orders.