

## Memo - by email to

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To: Committee Secretary

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Senate Legal & Constitutional Committee

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CANBERRA

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From M. Leah Billeam

Date 1 August 2011

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Subject : **Submissions**

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**LEGISLATION** : Family Law Legislation Amendment ( Family Violence and Other measures)  
Bill 2011

I refer to this Bill and make the following submission

Victorian State law provides for the protection of an alleged Victim by not permitting the alleged Perpetrator to personally cross examine the Victim in any proceedings for an intervention order ( see **Sections 70, 71 and 72 of the Family Violence Protection Act** – ( copy attached)

The Family Court and the Federal Magistrates' Court have just issued their **Best Practice Principles For Use in Parenting Disputes When Family Violence or Abuse is Alleged** .

In this they have listed matters which the decision makers **MAY** consider ( **pages 7,8, and .9** – copy attached). Only In items **ix** and **xxi** is the question of whether a party alleging family violence can give evidence by video link / electronic means., but this still does not address the question of direct cross examination by a self represented litigant.

I raised this with an FMC Magistrate at a recent seminar. She was of the view that the Federal Courts do not have the resources to put in place what the State has provided for in its legislation but she indicated that her practice would be that she would screen the questions being put by a self represented litigant . On the other hand I have a report of a self represented litigant being able to cross examine the other party to the point that , even though she was personally represented , the case had to be adjourned for her to be psychiatrically assessed as she found the process so traumatic . So there is no guarantee that the Court would take the necessary protective action.

I think that there should be a further provision added to the amending legislation to read along the following lines:

***It could be added to S. 101 of the current legislation and read as follows:***

**S 101 (3)**

***a) The Court of its own motion, may, or, if there in an existing family violence order, shall, unless the other party consents being personally cross examined, direct that the party against whom a family violence order has been made, shall not personally cross examine the other party to that order in any proceedings ..***

***b) The Court in such a case shall ensure procedural fairness is accorded in any manner it thinks reasonable to the party so prohibited***

This proposal would not / should not add to the cost burden of implementation but it would require the Court to be more pro-active in managing proceedings appropriately, and it would match the intent of the State legislation .

If you wish to discuss this further I can be contacted on

Thank you

**M. Leah Billeam**  
*Family Lawyer*

Family Violence Protection Act 2008  
No. 52 of 2008

Part 4—Family Violence Intervention Orders

s. 70

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- (3) If the witness is a child, the court must make a direction under subsection (1) unless it considers it is not appropriate to do so having regard to—
    - (a) the wishes expressed by the witness; and
    - (b) the age and maturity of the witness; and
    - (c) the facilities available for the conduct of the proceeding; and
    - (d) any other matters the court considers relevant.
  - (4) Any place outside the courtroom where a witness is permitted to give evidence under this section is taken to be part of the courtroom while the witness is there for the purpose of giving evidence.
  - (5) The court may, at any time in the course of the proceeding, vary or revoke a direction made under subsection (1) on its own initiative or on the application of a party to the proceeding.

**70 Special rules for cross-examination of protected witnesses**

- (1) The following persons are *protected witnesses* for the purposes of a proceeding under this Act—
  - (a) the affected family member or the protected person;
  - (b) a child;
  - (c) any family member of a party to the proceeding;
  - (d) any person declared under subsection (2) to be a protected witness for the proceeding.
- (2) The court may at any time declare a person to be a protected witness if the court is satisfied the person—

Family Violence Protection Act 2008  
No. 52 of 2008

s. 70

Part 4—Family Violence Intervention Orders

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- (a) has a cognitive impairment; or
  - (b) otherwise needs the protection of the court.
- (3) A protected witness must not be personally cross-examined by the respondent unless—
- (a) the protected witness is an adult; and
  - (b) the protected witness consents to being cross-examined by the respondent or, if the protected witness has a guardian, the protected witness' guardian has consented to the cross-examination; and
  - (c) if the protected witness has a cognitive impairment, the court is satisfied the protected witness understands the nature and consequences of giving consent and would be competent to give evidence; and
  - (d) the court decides that it would not have a harmful impact on the protected witness for the protected witness to be cross-examined by the respondent.
- (4) If a respondent who is prohibited from cross-examining a protected witness under subsection (3) is not legally represented, the court must—
- (a) inform the respondent that the respondent is not permitted personally to cross-examine a protected witness; and
  - (b) ask the respondent whether the respondent has sought to obtain legal representation for the cross-examination of a protected witness; and
  - (c) if satisfied the respondent has not had a reasonable opportunity to obtain legal representation, grant an adjournment on its own initiative or if requested by the respondent.
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## 71 Representation of respondent

- (1) If the respondent does not obtain legal representation for the cross-examination of a protected witness after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer the respondent legal representation for that purpose.
- (2) Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must offer to provide legal representation in accordance with subsection (1).

### Note

See section 8 of the **Legal Aid Act 1978** which provides that legal aid may be provided by Victoria Legal Aid by making available its own officers or by arranging for the services of private legal practitioners.

- (3) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the **Legal Aid Act 1978** to the representation of the respondent as if the respondent had been granted legal assistance under that Act.
- (4) If the respondent refuses the legal representation offered under subsection (1), or otherwise refuses to co-operate, the court must warn the respondent that if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application the subject of the proceeding, neither the respondent nor the respondent's witnesses may give evidence about those events.

## 72 Representation of applicant

- (1) This section applies if—
  - (a) a respondent is prohibited from cross-examining a protected witness under section 70; and
  - (b) the respondent is legally represented; and

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- (c) the protected witness—
- (i) is the applicant; and
  - (ii) is not a police officer; and
  - (iii) is not legally represented.
- (2) The court must order Victoria Legal Aid to provide legal representation for the protected witness for purpose of cross-examination by the respondent's legal representative unless the protected witness objects to the provision of the legal representation.
- (3) Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must provide legal representation in accordance with subsection (2).
- (4) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the **Legal Aid Act 1978** to the representation of the protected witness as if the protected witness had been granted legal assistance under that Act.

**73 Expert evidence about family violence**

- (1) The court may admit evidence from an expert witness about the dynamics and characteristics of family violence.
- (2) Without limiting subsection (1), the evidence given by an expert witness may include evidence of—
- (a) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the person committing the family violence; and
  - (b) the psychological effect of violence on persons who are or have been in a relationship or part of a family affected by family violence; and
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meaningful relationship with both of the child's parents. The second primary consideration is the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence. These are the 'twin pillars'<sup>12</sup> of the balancing exercise, which a court will complete. It will be apparent in violence and abuse cases there may be tension between these concepts, the resolution of which can be difficult. However, section 60CC(3)(m) FLA permits the Court to take into account "any other fact or circumstance that the Court thinks is relevant". This ensures that the infinite variety of individual children's circumstances can be addressed.

It is important that people seeking assistance from the courts know **IT IS NOT COMPULSORY** for parties to participate in family dispute resolution processes prior to the commencement of court proceedings, in cases where the Court is satisfied there are reasonable grounds to believe:

- (a) **there has been** family violence or abuse<sup>13</sup>, or
- (b) **THE RE IS A RISK** of family violence or abuse<sup>14</sup>.

Section 60K FLA requires courts to take prompt action in parenting proceedings in which allegations of family violence or abuse are made that may be relevant to the outcome.

The courts have developed procedures in relation to section 60K. Parties are obliged to file a *Notice of Child Abuse or Family Violence* (Form 4). This will trigger administrative processes that will enable the courts to respond quickly to allegations of violence and abuse.

In all cases involving the filing of a *Notice of Child Abuse or Family Violence* the party filing the notice is to be directed expeditiously to the appropriate decision maker - either duty registrar or other judicial officer – for consideration of what steps or type of hearing is necessary for the courts to discharge their obligations pursuant to section 60K of the FLA.

Where a party files a *Notice of Child Abuse or Family Violence* (Form 4), the courts will consider whether an urgent hearing should be held and orders made, for example, to enable evidence to be gathered about the allegations, for the protection of the parties and child. The courts are required to consider whether to require a state or territory welfare agency to prepare a report in respect of the allegations.

Section 60K requires these obligations to be discharged as soon as practicable and within eight weeks if appropriate.

## **BEST PRACTICE PRINCIPLES**

### **A. Checklist of legislative requirements to follow in ALL parenting cases in which issues of family violence or child abuse are raised.**

**In every case, the decision maker MUST:**

- i. Where an exemption has been granted from attendance at family dispute resolution, because of issues of family violence and abuse having been raised, consider whether to order the parties to attend at family dispute resolution nonetheless.

[Section 60I(10)]<sup>15</sup>

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<sup>12</sup> *McCoy & Wessex* (2007) 38 Fam LR 513.

<sup>13</sup> Section 4 of the FLA defines abuse in relation to a child as: "(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person".

<sup>14</sup> For example, a person is exempted from participation in pre-filing family dispute resolution upon production of a current family violence order (s60I(9)(b)) FLA.

<sup>15</sup> Unless stated differently, all sections are from the Family Law Act 1975 (Cth).

- ii. Where section 60K(1) applies:
- consider what orders (interim or procedural) need to be made to obtain evidence about the allegations
  - consider whether to make an order directed to a state welfare authority, pursuant to section 69ZW of the FLA, to require from the authority production of a report or records in respect of notifications of child abuse consider whether to make an injunction for the personal protection of a child or any person with whom the child is involved
  - consider any other order which can appropriately be made, and
  - deal with the allegations as expeditiously as possible.
- [Sections 60B(1), 60K, 69ZN, 69ZW]
- iii. Consider whether the urgency of the situation dictates that a parenting order should be made, notwithstanding the parties have not attended family counselling.
- [Section 65F(2)]
- iv. Where a state or territory family violence order is in force, ensure any order it makes, subject to the consideration of the best interests of the child, is consistent with the family violence order and does not expose any person to an unacceptable risk of family violence.
- [Section 60CG]
- v. If making a parenting order or injunction which is inconsistent with an existing family violence order, the Court must specify in the order that this is the case and explain to the parties affected why the order was made and the interaction between the order and the family violence order.
- [Section 68P]

Matters that decision makers **MAY** consider in cases involving family violence and abuse:

- i. Whether a family dispute resolution practitioner has granted a certificate to a party and the type of certificate granted.
- [Section 60I(8)]
- ii. Whether an exception should be granted to the requirement to attend family dispute resolution prior to the issue of proceedings because of abuse or family violence.
- [Section 60I(9)(b)]
- iii. Where an exception is granted under section 60I(9)(b), whether there would be a RISK of family violence or abuse of a child if there is a delay in applying for any relevant order.
- [Section 60J(2)]
- iv. Whether to direct a party or the parties to file an affidavit or updating affidavit that addresses this issue.
- [Section 60K(1), Rule 2.04, Part 15.2 FLR<sup>16</sup>, r10.01 FMCR<sup>17</sup>]
- v. Whether the matter should be allocated a date in the duty list, and if so, with what degree of urgency.
- [Rules 2.04C FLR, 12.04 FLR, r15.09 FMCR]
- vi. Whether a state or territory family violence order is in force that applies to the child or a member of the child's family and the terms of that order. The Court may include in any order it makes safeguards for the safety of any person affected by the order.

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<sup>16</sup> The letters 'FLR' refer to the *Family Law Rules 2004* (as amended) being the applicable rules for the Family Court.

<sup>17</sup> The letters 'FMCR' refer to the *Federal Magistrates Court Rules 2000* (as amended) being the applicable rules for the Federal Magistrates Court.

8/10

- vii. Whether one or both of the parties should be ordered to attend family counselling or family dispute resolution, or an appropriate course, perpetrator of domestic violence program, or another program or service.  
[Section 13C]w
- viii. If one or more of the parties is directed to attend such a course or program, what orders are necessary to protect the safety of any person subject to such an order?  
[Section 13C(4)]
- ix. Whether any safety plan is in place for court events and whether a safety plan needs to be formulated. In particular, should consideration be given to the party being housed in a secure room during a court event or giving evidence by video link? Should arrangements be made to escort a party to and from court? What security is necessary for any given event?  
[Section 69ZN(5)]
- x. Should a case started in the Federal Magistrates Court be transferred to the Family Court, with or without a request for inclusion in the Magellan List?
- xi. Whether there are unresolved criminal or state welfare proceedings and, if so, whether the family law proceedings should be adjourned until finalisation of those proceedings or whether the person against whom proceedings have been instituted should be invited to apply for a certificate under section 128 of the *Evidence Act 1995* (Cth).
- xii. Whether the address of the party making the allegations should be suppressed.  
[Section 69ZN(5)]
- xiii. Whether any person not currently a party to the proceedings should be joined as a party.  
[Rule 6.02(1) FLR, r11.05 FMCR]
- xiv. Whether the child or children should be independently represented.  
[Section 68L]
- xv. Whether to request a child welfare officer to intervene in the proceedings.  
[Section 91B]
- xvi. Whether it would be appropriate to make either an interim parenting order or a procedural order without notice to the other party and in the absence of a party.  
[Section 69ZN(5); Parts 5.3 and 5.4, FLR, r5.01 FMCR]
- xvii. Whether a family report should be ordered.  
[Section 62G]
- xviii. Whether an expert with expertise and clinical experience in family violence or abuse should be appointed to prepare a report.  
[Section 69ZX(1), Part 15.5 FLR, r15.09 FMCR]
- xix. Whether one or more of the parties should be required to make the child available for either a psychiatric or psychological evaluation.  
[Section 68M(2)]
- xx. Whether subpoenas should be issued to compel the production of documents.  
[Part 15.3 FLR, r15.09 FMCR]
- xxi. Whether the person alleging family violence or abuse should be permitted to give evidence by electronic means from another location.  
[Section 102D(1)]

xxii. Whether to transfer the matter to another court.

[Section 33B, rr11.17, 11.18 FLR, section 39 FMA, r8.02 FMCR]

## **B. Family and other expert reports**

Family and other expert reports can provide the Court with an independent forensic assessment of particular issues. Commonly these include the children's relationships with the parties, the children's views and the parties parenting capacity. It may include the emotional and psychological effects of exposure to family violence, the effect upon a child or partner victim of contact with the perpetrator and whether therapeutic intervention may assist a perpetrator to live without violence. The expert appointed should have specialised knowledge based on his or her training, study or experience. The expert's role is to assist the Court in an impartial way with matters within his or her knowledge and capability.

[Rule 15.59 FLR, Part 15 FMCR]

Reports from experts, counsellors and social workers who have seen either of the parties over a period of time can also provide the Court with a valuable source of information on particular issues.

If the Court makes findings of fact about the allegations of family violence or abuse or the risk of family violence or abuse prior to the report process, the report writer is to be provided with a copy of the findings and the report is to proceed on that basis.

In considering the appointment of an expert witness to prepare a family report or other report, the Court may wish to satisfy itself that the expert witness has appropriate qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or being exposed to the risk of family violence or abuse, on the children and any party to the proceedings.

In the framing of orders for a family report or other expert report, the judicial officer may wish to consider the following matters<sup>18</sup> and, where appropriate, direct the reporter to:

- i. Specifically address the issue of family violence or abuse or the risk of family violence or abuse.
- ii. Assess the harm the children have suffered or are at risk of suffering if the orders sought are or are not made.
- iii. Consider whether or not there would be benefits, and if so, the nature of those benefits, if the child spent time with the person against whom the allegations are made.
- iv. Assess whether the physical and emotional safety of the child and the person alleging the family violence or abuse can be secured before, during and after any contact the child has with the parent or other person against whom the allegations are made.
- v. Ascertain the views of the child or children in light of the allegations of family violence or abuse or the risk of family violence or abuse when it is safe to do so.
- vi. Where family violence or abuse is established, report on:
  - the impact of the family violence or abuse
  - whether the person acknowledges the family violence or abuse has occurred
  - whether the person accepts some or all responsibility for the family violence or abuse
  - whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate
  - whether the person has participated or is participating in any program, course or other activity to address the factors contributing towards his or her violent or abusive behaviour

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<sup>18</sup> Adapted from the "Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence", Prepared by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law, April 2002.