

Submission  
No 2

**INQUIRY INTO IMPACT OF THE *FAMILY LAW*  
*AMENDMENT (SHARED PARENTAL RESPONSIBILITY)*  
*ACT 2006 (CTH)***

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**Date Received:** 16/10/2006

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Chairperson: Professor Patrick Parkinson

Members: Ms Nicky Davies  
Mr Kym Duggan  
Federal Magistrate Mead  
The Hon Susan Morgan  
Mr Clive Price  
Ms Susan Purdon  
Justice Garry Watts

## Family Law Council

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16 OCT 2006

LAW & JUSTICE

06/3732

13 October 2006

The Hon Christine Robertson MLC  
Committee Chair  
Standing Committee on Law and Justice  
NSW Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Ms Robertson

**Inquiry into the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)**

Thank you for inviting the Family Law Council to make a submission in relation to the above Inquiry.

On 16 November 2004, Council forwarded a letter of advice to the Attorney-General regarding Division 11 of Part VII of the *Family Law Act 1975*. Council made five recommendations in that letter of advice, and those recommendations have now been substantially implemented. As the letter of advice is particularly relevant to your Inquiry, I have attached a copy for your information.

On 28 February 2006 the Council received the following terms of reference on the coordination of the family law system and State and Territory systems:

The Family Law Council should consider recommendation 13 of the Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 in relation to adult victims of family violence. The Government notes that the Family Law Council has already made recommendations on the protection of children in the September 2002 report, Family Law and Child Protection.

The Family Law Council should identify strategies for improving the coordination of the State and Territory systems, including specific projects which may assist the Government achieve the objectives. The Family Law Council should only

consider State and Territory laws to the extent that they intersect with the family law system.

In accordance with recommendation 13, consider measures that the Commonwealth may initiate on its own or with the cooperation of State and Territory Governments to:

- improve effective protection of persons who are or may be victims of family violence
- examine the effectiveness of legal and law enforcement mechanisms and their costs
- consider the degree to which Commonwealth, State and Territory agencies, individually or in cooperation, are able to deliver just and cost-effective outcomes
- assess the effectiveness of initiatives in public education prevention and rehabilitation, and
- examine the alleged incidence of false allegations of family violence.

The Government notes that, as part of the Family Law Violence Strategy, independent short-term research will be commissioned about how the courts currently deal with allegations of violence that arise in family law proceedings.

Council is currently preparing a report addressing the terms of reference. It is anticipated that the report will be submitted to the Attorney-General in the course of 2007.

Addressing the issues of violence and abuse when relationships break down is a pressing social issue and requires a commitment from governments at both State and Federal levels. I hope that the Letter of Advice will be of assistance to your committee and that in due course both your report and our own response to the Attorney-General's reference on family violence, will lead to improvements in co-operation between state and federal service systems working to protect family members from abuse.

Yours sincerely



Professor Patrick Parkinson  
Chairperson



Chairperson: Professor Patrick Parkinson

Members: Ms Josephine Akee  
Ms Nicky Davies  
Mr Kym Duggan  
Ms Christine Mead FM  
Justice Susan Morgan  
Mr Clive Price  
Ms Susan Purdon  
Mr Garry Watts

## Family Law Council

16 November 2004

The Hon Philip Ruddock MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

### **Family Law Council: Review of Division 11 – Family Violence**

#### **INTRODUCTION**

1. Division 11 of Part VII of the *Family Law Act 1975* (the Act) came into force in its current form in 1995<sup>1</sup> and was intended to reflect decisions taken by the Standing Committee of Attorneys-General in February 1993 and July 1994 following consideration of recommendations by the National Committee on Violence Against Women and Children in 1991.
2. In February 1998, at the instruction of the Office of the Status of Women in the Department of Prime Minister and Cabinet, Kearney McKenzie and Associates reviewed the operation of Division 11 (the Kearney McKenzie Report).<sup>2</sup> The Report concluded that Division 11 was not working in practice as intended.
3. In spite of the serious concerns raised by the Kearney McKenzie Report, the Report does not appear to have assumed the profile it deserved and no action has been taken in response. For this reason, Council decided to undertake a review of Division 11 as part of its continuing investigation of the way in which the Act responds to issues of violence. Council has been considerably assisted by the Kearney Mackenzie report and the recommendations it contains but has formed an independent view of some of the matters raised in the report.

<sup>1</sup> *Family Law Reform Act 1995*

<sup>2</sup> Kearney McKenzie & Associates Pty Ltd *Review of Division 11: Review of the operation of Division 11 of the Family Law Reform Act to resolve inconsistencies between State family violence orders and contact orders made under family law* (February 1998).

4. Following a summary of the advice, this letter outlines the purposes of Division 11. It then considers whether these purposes are being achieved. The clarity of the language used in the Division is assessed against the stated purposes of the Division. The language, particularly the use of definitions, is found to be unnecessarily complex and confusing in several respects. Finally, various proposals to remedy these deficiencies are examined.

#### SUMMARY OF ADVICE

5. This Letter of Advice sets out the results of Council's review of Division 11 and responds to the otherwise neglected proposals for reform set out in the Kearney McKenzie Report. The Report provided Council with an insightful analysis of what is a very important scheme in the Family Law Act designed to make two otherwise separate systems work together.

6. Council has carefully considered the arguments for and against the changes recommended in the Report. In some cases Council has not been convinced that on balance the merits are sufficient to justify change. However in many instances Council has come to the view that the arguments in favour of reform clearly outweigh those against it.

7. Accordingly Council recommends that the Family Law Act be amended as follows:

(i) redraft Division 11 into clear, concise language that can be readily understood by the people who must use and implement it

(ii) redraft s 68P to provide a new definition of *contact order*

(iii) repeal s 68Q(c) and amend s 68T along the lines set out below in order to provide a clearer and more succinct statement of the principles to be applied by State and Territory courts when exercising their powers under s 68T

(iv) amend s 68T so that there shall be no power for a court of a State or Territory to *make* a contact order as part of family violence proceedings, and

(v) retain the currently specified period of 21 days with respect to the operation of an order in relation to contact made under s 68T(5).

#### THE PURPOSES OF DIVISION 11

8. The purposes of Division 11 are set out in s 68Q of the Family Law Act as follows:

The purposes of this Division are:

(a) to resolve inconsistencies between Division 11 contact orders and family violence orders; and

(b) to ensure that Division 11 contact orders do not expose people to family violence; and

(c) to respect the right of a child to have contact, on a regular basis, with both the child's parents where:

(i) contact is diminished by the making or variation of a family violence order; and

(ii) it is in the best interests of the child to have contact with both parents on a regular basis.

9. Family violence orders are defined in s 60D of the Act as orders, including interim orders, "made under a prescribed law of a State or Territory to protect a person from family violence". Family violence, in turn, is defined in s 60D as follows:

*family violence* means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

#### **Is Division 11 achieving its purpose?**

10. The first purpose of Division 11 is to deal with cases in which there is an actual or potential conflict between a *contact order* made under the Act and a *family violence order* made under State or Territory domestic violence legislation. The conflict arises from the fact that the contact order may authorise something that is, or may be, specifically forbidden by the family violence order. For instance, a contact order may provide for a father to collect children for contact from their mother's home, the same home he is prohibited, by the family violence order, from approaching.

11. Section 68S of the Act provides that where a contact order is inconsistent with a family violence order, the contact order prevails and the family violence order is invalid to the extent of the inconsistency. Complementary legislation has been passed in most States and Territories.<sup>3</sup> For this reason, there is a real risk that contact orders could expose victims of violence to further violence.

12. Research suggests that contact handovers, in particular, are often a flashpoint for violence and abusive behaviour, and that the early post-separation period is one in which there is a heightened risk of violence between former partners.<sup>4</sup>

13. Division 11 attempts to prevent inconsistencies between contact orders and family violence orders in two ways. Firstly, where a court exercising jurisdiction under the Family Law Act makes a contact order that is inconsistent with a pre-existing family violence order, s 68R places obligations on the Court making the contact order to explain to the parties affected, the effect and consequences of the contact order, and to provide a detailed explanation of how the ordered contact is to take place.

14. Secondly, where a court of a State or Territory is dealing with an application for a family violence order, and where that court also has jurisdiction to make orders under Part VII of the Act, the court may, pursuant to s 68T of the Act "*make, revive, vary, discharge or suspend*" a contact order. This means that where a contact order is already in place, the State or Territory court can modify or revoke that order to give effect to the family violence order, or it can deal with the issue of contact afresh at the same time as making the family violence order.

<sup>3</sup> s 3 *Domestic Violence Act 1994* (SA); s 106B *Justices Act 1959* (TAS); s 8A *Domestic Violence Act 1986* (ACT); s 20AF *Domestic Violence Act* (NT); s 562FA *Crimes Act 1900* (NSW); s 46C *Domestic Violence (Family Protection) Act 1989* (QLD); s 5 *Restraining Orders Act 1997* (WA), s 176 *Family Court Act 1997* (WA)

<sup>4</sup> Rendell K, Rathus Z and Lynch A *An unacceptable risk: A report on child contact arrangements where there is violence in the family* (Women's Legal Service, QLD, November 2000): 29, 32, 37. Hester M & Radford L (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark* (The Policy Press, Great Britain)

15. The Kearney McKenzie Report looked at these provisions in depth and concluded that they were not working in practice as intended. In summary, the findings were as follows:

- A. **Section 68R is rarely used:** the provision directed to courts making contact orders under the Family Law Act - is rarely used. It is only relevant where such a court knowingly makes contact orders that are inconsistent with a family violence order. Often, the court making the contact order will not know about the pre-existing family violence order, especially where consent orders are proposed and the parties do not disclose the existence of the pre-existing family violence order.
- B. **Section 68R may not apply:** More commonly, s 68R may not apply because a family violence order has been drafted so as to permit the exercise of court ordered contact so there is, in fact, no inconsistency. For example, it is common in family violence orders for prohibitions on approaching or contacting the person protected by the order to be qualified by words such as "*except for the purpose of any orders in relation to contact made under the Family Law Act*".
- C. **Section 68R not used due to lack of information:** Even where there is a pre-existing family violence order and the court exercising family law jurisdiction knows about it, the court may be prepared to make orders inconsistent with the provisions of a family violence order because of lack of information about the nature of the violence which led to the making of the family violence order. The mere existence of the family violence order will not generally be treated as evidence of violence, especially as family violence orders are often made by consent "without admissions" by the person against whom the order is made. The mere existence of an order tells a Court nothing about the nature or severity of the violence. The issue may be fully explored at a final hearing but during an interim hearing, conducted on the affidavits alone, this is rare. Consequently, orders may be made for contact notwithstanding the family violence order.<sup>5</sup>
- D. **Section 68T is rarely used:** The provision which allows State and Territory courts to 'make, revive, vary, discharge or suspend' a contact order is rarely used by State and Territory courts, even though it is well supported in principle. The reasons for this include:
- a. applicants for family violence orders often do not already have contact orders in place
  - b. lack of awareness of the existence of the contact order by the State or Territory court making the family violence order
  - c. limited awareness and lack of understanding of the provisions of s 68T by individuals, lawyers and magistrates
  - d. reluctance on the part of lawyers to apply for orders under s 68T
  - e. reluctance on the part of the Police, who are often the applicants for family violence orders, to become involved in family law issues, and
  - f. reluctance on the part of Magistrates to become involved in family law issues and to take responsibility for changing orders made by a superior specialist court.

### Council's view of Division 11 - complex and confusing

16. In Council's view the primary benefit to be derived from Division 11 is the empowering of courts of summary jurisdiction to suspend or vary existing contact orders at the same time

<sup>5</sup> See also John Dewar and Stephen Parker (1999) 'Parenthood, planning and partnership: The impact of the new Part VII of the Family Law Act 1975' in *Family Law Research Unit Working Paper No 3, Faculty of Law, Griffith University, Queensland*: pp (chapter 4).

as making family violence orders. Such power is critical to the safety of women and children where a contact order would expose them to violence or the risk of violence.

17. The language of Division 11, however, is a major barrier to the exercise of such power. The language is complex and confusing, even for experienced family lawyers. It is not reasonable to expect magistrates to be able to comprehend and utilise the provisions in their current form, especially during a busy duty list, which is when many family violence orders are made.

### **Simplifying the language of Division 11**

18. If magistrates are to be encouraged to use the provisions of Division 11 the language must be simplified. Council notes and strongly endorses the recommendation of the Kearney McKenzie Report in this regard, namely that "*Division 11 should be redrafted into clear concise language that can be readily understood by the people who must use and implement it.*"<sup>6</sup>

#### **Recommendation 1:**

Division 11 should be redrafted into clear, concise language that can be readily understood by the people who must use and implement it.

### **Simplifying the definitions**

19. Council believes that the key to the complexity of Division 11 lies in the definition section, s 68P. Section 68P has a separate definition for a "*Division 11 contact order*" and a "*s.68R contact order*", yet the latter definition is wholly contained within the former. The distinction is maintained throughout the Division at the expense of clarifying the purpose and intended workings of Division 11.

20. In Council's view there is no need for s 68P to distinguish between the two types of contact order. Council believes that simplifying the definitions will eliminate much of the difficulty in understanding the Division.

#### **Recommendation 2:**

Council recommends that s 68P should be redrafted as follows:

**68P** In this Division, *contact order* means:

- (a) a contact order under this Act; or
- (b) any of the following, to the extent that it requires or authorises (expressly or impliedly) contact between the child and another person or other persons:
  - (i) a recovery order, a specific issues order or any other order (however described) made under this Act;
  - (ii) an injunction granted under section 68B or 114;
  - (iii) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act;
  - (iv) a registered parenting plan within the meaning of subsection 63C(6);
  - (v) a recognizance entered into pursuant to an order under this Act.

<sup>6</sup> Kearney McKenzie, above n 2, 22



21. Both a “s 68R contact order” and a “Division 11 contact order” would then simply be a “contact order” for this purpose and the cumbersome wording in much of the Division would be eliminated. It is envisaged that this would promote a greater use of the provisions by magistrates making family violence orders where there are pre-existing contact orders.

### **What principles apply to contact orders in Division 11?**

22. Another significant source of confusion for magistrates wishing to exercise their powers to make or vary a contact order at the same time as making a family violence order is precisely what principles to apply in making the contact order.

23. The purposes of the Division are specified in s 68Q as set out earlier. Section 68Q(c) provides that one of the purposes is:

to respect the right of a child to have contact, on a regular basis, with both the child's parents where:

- (i) contact is diminished by the making or variation of a family violence order; and
- (ii) it is in the best interests of the child to have contact with both parents on a regular basis.

24. This subsection creates uncertainty. It is not at all clear how the right of a child to contact should be balanced against the other purposes specified in s 68Q, namely, resolving inconsistencies between orders and, in particular, protecting people from violence.

25. Magistrates wishing to use their powers under s 68T to make, revive, vary, discharge or suspend a contact order in the context of family violence proceedings face a bewildering array of statutory provisions that provide criteria for making orders in such cases.

26. For example, the court must have regard to the purpose of the Division and to the best interest of any relevant child: s 68T(2)(b). Section 68T(3), however, provides that certain specified sections of the Act which normally apply to orders about children, do *not* apply to orders for contact made under Division 11. In particular, s 68T(3)(a)(ii) provides that any provision of the Act which would otherwise make the best interests of a child the paramount consideration do not apply.

27. Section 68T(3) specifically excludes the operation of s 68K of Division 10 in the making or varying of contact orders under Division 11. Section 68K provides as follows:

**68K(1) [Considerations for the court]** In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:

- (a) is consistent with any family violence order; and
- (b) does not expose a person to an unacceptable risk of family violence.

**68K(2) [Safeguards]** For the purposes of paragraph (1)(b) the court may include in the order any safeguards it considers necessary for the safety of those affected by the order.

28. The Kearney McKenzie report suggests that s 68K should be repeated in Division 11 as it is the section that actually imposes the obligation to achieve consistency with family

violence orders and to avoid exposing people to the risk of family violence.<sup>7</sup> Council does not agree with this recommendation.

29. Section 68K imposes obligations on a court making parenting orders under Division 10 of Part VII of the Act where the best interests of the child are the paramount consideration. Division 11 deals with situations in which contact orders are being considered in circumstances in which family violence orders are in existence or are about to be made. Section 68T makes it clear that, in such situations, while the court must have regard to the best interests of a child, such interests are *not the paramount consideration*. The case for not applying the paramountcy principle in such cases is that a child's best interests must give way to the right of other family members to be protected from violence or the threat of violence.<sup>8</sup>

### **Simplification of the principles of Division 11**

30. Given that the statutory provisions in Division 11 are to be implemented by Magistrates who are, in any case, cautious about exercising their powers under the Division, the case for a clarification and simplification of the applicable principles seems overwhelming.

#### **Recommendation 3:**

Council recommends that the Family Law Act be amended to provide a clearer and more succinct statement of the principles to be applied by State and Territory courts when exercising their powers under s 68T. Council suggests that this can be achieved as follows:

- By repealing s 68Q(c); and
- By amending s 68T to include the following provision as a sub-section:

*In exercising its powers under this section, a court must have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child's right to contact with both parents, provided such contact is not contrary to the best interests of the child.*

31. Attachment A to this Letter of Advice contains a redraft of Division 11, incorporating Council's recommended simplified definition of contact, an amended provision in relation to the purposes of the Division and the suggested amendment to s 68T.

32. Council is of the view that such changes will enhance the clarity, understanding and consequent use of the Division.

### **THE ROLE OF COURTS EXERCISING FAMILY LAW JURISDICTION – A GAP IN PROTECTION**

33. On a practical level, inconsistency between family violence orders and contact orders is most often avoided, not through the operation of Division 11, but through the practice of making any contact ordered under the Family Law Act an exception to prohibitions contained in a family violence order.

<sup>7</sup> Kearney McKenzie, above n 2, 23

<sup>8</sup> See also the analysis of Kirby J in *U v U* (2002) 29 Fam LR 74 in the context of relocation

34. As the Kearney McKenzie Report points out, however, avoiding inconsistency between the two types of orders is not enough.<sup>9</sup> The second purpose of Division 11, as set out in s 68Q, is to ensure that contact orders made under Division 11 do not expose people to family violence. The authors conclude that:

*Division 11 leaves a gaping hole in the protection from family violence it offers women and children. Local courts may quite properly avoid making contact orders in the context of an application for a family violence order; instead, they 'refer the issue' to the Family Court by excepting contact ordered by the Family Court from the prohibitions in the family violence order. ...However, as any subsequent Family Court contact order cannot be inconsistent with a family violence order that includes the exception, the protection offered by Division 11...[does] not apply. This leaves a gap in protection.<sup>10</sup>*

35. Council agrees with this conclusion.

### **Re-invigorating s 68K: Courts to consider risk of family violence**

36. The Kearney McKenzie Report recommended that, in such cases, the court exercising family law jurisdiction should look comprehensively at the issue of violence, whether or not a contact order would be inconsistent with the family violence order:

*When it makes a contact order, including a consent order, involving a woman who has a family violence order that prohibits the respondent from approaching her or her home, the Family Court should satisfy itself that the contact order will not expose her or her children to an unacceptable risk of violence, whether or not the two orders will be inconsistent.<sup>11</sup>*

37. Council supports this recommendation. In Council's view, the court exercising family violence jurisdiction should reasonably assume the court exercising family law jurisdiction will look at the issue in a much wider context than is possible in the context of family violence proceedings where the issues for determination will be fairly narrow.

38. Council notes that a court exercising jurisdiction under the Family Law Act is already required to discharge this function under s 68K in Division 10. It may simply be an issue of s.68K not being well known, and there should be a greater awareness of it.

### **SHOULD S 68T CONFER A POWER TO MAKE NEW CONTACT ORDERS?**

39. The Kearney McKenzie report proposed that the power under s 68T to *make* contact orders in the context of family violence proceedings should be repealed:

*4.9The magistrate's power to 'make, revive, vary, discharge or suspend' a contact order can be used to resolve an inconsistency between an existing contact order and the family violence order the magistrate is proposing to make. This is necessary to ensure that the family violence order is effective. If there is no contact order there is no inconsistency and there is no need to do anything. Depending on its terms, a family violence order may have the effect of denying contact for a time. If so, the violent parent can apply to the Family Court. It should not be possible for either party to use family violence proceedings to get a contact order. This has happened. In Queensland, for example, there were several cases in the early days of s 68T. In family violence proceedings the focus should be on protecting the woman and her children. Magistrates have the power in any case to make contact orders by*

<sup>9</sup> Kearney McKenzie, above n 2, 16

<sup>10</sup> Ibid, ¶4.4.

<sup>11</sup> Kearney McKenzie, above n 2, ¶4.14

*consent in the exercise of jurisdiction under the Family Law Act. The focus of s 68T should be on resolving inconsistencies between family violence orders and existing contact orders. In cases where there is family violence, making an appropriate contact order is always going to be difficult and magistrates have neither the time or resources to so. The magistrate's power to 'make' a contact order should be repealed.*

40. Council agrees with this proposal. Before coming to a concluded view on the matter Council revisited why s 68T had been drafted to include a power to make such an order. Section 68T was inserted as a result of the July 1994 decision of the Standing Committee of Attorneys-General (SCAG) regarding the treatment of inconsistent family law and domestic violence orders. The relevant SCAG papers were examined. On the material available it appears no explicit consideration was given to the circumstances in which making an access/contact order would be appropriate or desirable. However, while the issue of magistrates making contact orders was not an issue covered in the minutes of discussion, it is clearly in the model provisions drafted at SCAG's request. Council notes that any change to the model provisions may, therefore, need to be placed on the SCAG agenda, or, alternatively, the States and Territories may need to be consulted before any changes were made.

#### **Recommendation 4:**

Section 68T should be amended to provide that a court of a State or Territory that has jurisdiction in relation to matters arising under Part VII (Children) of the Family Law Act, may, subject to s 68T, exercise that jurisdiction in the course of family violence proceedings only by varying, discharging or suspending a contact order. There shall be no power for a court of a State or Territory to *make* a contact order as part of family violence proceedings.

#### **EFFECTIVE PERIOD OF ORDERS MADE DURING INTERIM FAMILY VIOLENCE PROCEEDINGS**

41. Magistrates making interim family violence orders may revive, vary or suspend existing contact orders or make new contact orders. Such orders are effective for up to 21 days and no appeal lies in relation to them: s 68T(5). The benefit of s 68T(5) is primarily seen as being the ability of the court making interim family violence orders to suspend the operation of existing contact orders for a period of three weeks, providing an opportunity for an application to be made to amend the family law orders.

42. The Kearney McKenzie Report recommended that the period of operation of an order made under s 68T(5) should be extended from 21 days to 90 days (requiring an amendment to s 68T(5)(c)(ii)). The report argues that 21 days is insufficient time in which to obtain new orders from a court exercising family law jurisdiction. It notes that in some jurisdictions it can take as long as 60-90 days as a result of delay in court processes.

43. Council does not agree with this recommendation. Council's view is that, in terms of legal process, a 90 day period - which would presumably also be without appeal - cannot be justified. A balance must be achieved between the competing interests of, on the one hand, providing immediate protection from violence which may require existing contact to be suspended, and, on the other hand, ensuring due process in which action must be taken swiftly to change the contact orders (if that is required), rather than allowing up to three months to pass during which no contact would occur and which is not subject to appeal or scrutiny by a court exercising family law jurisdiction.

44. It is true that the delays in many courts exercising jurisdiction under the Act mean that any application for variation or discharge of the contact orders is unlikely to be heard within 21 days, but that period should be long enough for an application for variation or discharge of the contact order to at least be filed.

45. Presumably, the desire to increase the period to 90 days is to avoid a situation in which the residence parent may be found to be in breach of the contact order if contact is withheld while waiting for the application to vary or discharge to be heard. Council argues that such a parent is unlikely to be found to be in breach of a contact order as a result of withholding contact beyond the 21 day period in circumstances where there has been an incident of such seriousness as to justify a Magistrates Court suspending the contact order while making the family violence order and where an application to vary or discharge the contact order has been filed and is awaiting hearing.

**Recommendation 5:**

Council recommends that the period of operation of an order in relation to contact made under s 68T(5) should not be changed from the current period of 21 days.

**A CASE FOR A BROADER REVIEW?**

46. Protection of family members from violence is clearly an important objective of the Act. There is, however, no explicit statement of principle to that effect in s 60B of the Act, which contains a statement of the objects of Part VII and of the principles underlying it. The recent House of Representatives Family and Community Affairs Committee's Report on the Inquiry into Child Custody Arrangements, *Every Picture Tells a Story*, reinforced the importance of such protection being provided within the family law system. Council agrees with the Report's conclusion that there is a need to add a specific reference to a child's right to preservation of their safety to the principles set out in s 60B(2).<sup>12</sup>

47. Council notes the inconsistency between, on the one hand, s 68K in Division 10, which makes the best interests of the child paramount, even in circumstances where a family violence order is in existence, and, on the other hand, Division 11 which provides that the child's best interest is not the paramount consideration in similar circumstances.

48. Council believes that the issue strengthens the case for a reconsideration of the principles applicable throughout Part VII and in particular for giving greater prominence in s 60B to the need to protect family members from violence.

49. Council is engaged in a separate task of considering the role of the paramountcy principle in Part VII, and this issue is perhaps best left until that review is completed.

Yours sincerely



Professor Patrick Parkinson  
Chairperson

<sup>12</sup> House of Representatives Family and Community Affairs Committee, *Every Picture Tells a Story*, Parliament of Australia, December 2003, para. 2.29

**Attachment A****DIVISION 11 – FAMILY VIOLENCE****SECTION 68N WHAT THIS DIVISION DOES**

**68N** This Division deals with the relationship between contact orders and family violence orders.

**SECTION 68P INTERPRETATION**

**68P** In this division:

*Contact order* means:

- (a) a contact order under this Act; or
- (b) any of the following, to the extent that it requires or authorises (expressly or impliedly) contact between the child and another person or other persons:
  - (i) a recovery order, a specific issues order or any other order (however described) made under this Act;
  - (ii) an injunction granted under section 68B or 114;
  - (iii) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act;
  - (iv) a registered parenting plan within the meaning of subsection 63C(6);
  - (v) a recognizance entered into pursuant to an order under this Act.

**SECTION 68Q PURPOSES OF DIVISION**

**68Q** The purposes of this Division are:

- (a) to resolve inconsistencies between contact orders and family violence orders; and
- (b) to ensure that contact orders do not expose people to family violence.

**SECTION 68R PROVISIONS ABOUT MAKING AN ORDER FOR CONTACT WHICH IS INCONSISTENT WITH A FAMILY VIOLENCE ORDER.**

**68R(1)** If a court makes a contact order which is inconsistent with a family violence order, the court must explain, or arrange for someone else to explain, in words likely to be understood, to the applicant, the respondent, the person against whom the family violence order is made and the person protected by the family violence order, the following:

- (a) the purpose of the contact order;
- (b) the obligations that the order creates;
- (c) the consequences that may follow if a person fails to comply with the order;
- (d) the court's reasons for making an order which is inconsistent with a family violence order;
- (e) the circumstances in which a person may apply for the order to be revoked or varied; and
- (f) how the contact provided for in the order is to take place.

**68R(2)** As soon as practicable but not later than 14 days after making the contact order, the court must give a copy of that order to:

- (a) the applicant and the respondent in the contact proceedings;
- (b) the person against whom the family violence order is directed;
- (c) the person protected by the family violence order;
- (d) the Registrar of the Court that made or last varied the family violence order;
- (e) the Commissioner or head of the police force of the State or Territory in which the person protected by the family violence order resides.

**68R(3) [Non compliance]** Failure to comply with a requirement of this section does not affect the validity of a contact order made pursuant to this Division.

### **SECTION 68S: CONTACT ORDERS PREVAIL OVER INCONSISTENT FAMILY VIOLENCE ORDERS.**

**68S(1) [Where contact order inconsistent with family violence order]** If a contact order is inconsistent with a family violence order, the contact order prevails and the family violence order is invalid to the extent of the inconsistency.

**68S(2) [Who may apply for court declaration]** Any of the following persons may apply to a court having jurisdiction under this Part for a declaration of the extent to which a contact order is inconsistent with a family violence order:

- (a) the applicant and the respondent in the contact proceedings;
- (b) the person against whom the family violence order is directed;
- (c) the person(s) protected by the family violence order;

**68S(3) [Court to make appropriate declaration]** The court to which an application for a declaration is made must hear and determine the application and make such declaration as it considers appropriate.

### **SECTION 68T VARYING, DISCHARGING OR SUSPENDING A CONTACT ORDER IN FAMILY VIOLENCE PROCEEDINGS.**

**68T(1)** Any State or Territory court which has jurisdiction in relation to matters arising under this Part may exercise that jurisdiction to vary, discharge or suspend a contact order during the course of family violence proceedings.

**68T(2)** The court's power to vary, discharge or suspend a contact order in the family violence proceedings is subject to the following provisions:

- (a) the court must not exercise that power, unless it makes or varies a family violence order or an interim family violence order in those proceedings;
- (b) the court must exercise that power having regard to the purpose of this Division as stated in Section 68Q and to the best interests of any relevant child;
- (c) in the event that the contact order was made at a time when a family violence order was in effect, thus overriding the family violence order to the extent of any inconsistency, the court must not vary, discharge or suspend the contact order unless it is satisfied that it is appropriate to do so:
  - (i) because a person has been exposed or is likely to be exposed to family violence as a result of the operation of the contact order;
  - (ii) having regard to the purposes of this Division; and
  - (iii) having regard to the best interests of any relevant child;

- (d) if the court makes an interim family violence order or an interim order varying a family violence order the court must not discharge a contact order, but may vary or suspend the contact order;
- (e) in exercising its powers under this section, a court must have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child's right to contact with both parents and other people significant to the child's care, welfare and development, provided it is not contrary to the best interests of the child;

**68T(3)** This Part, and the applicable Rules of Court, apply to the variation, discharge or suspension of a contact order in the family violence proceedings subject to the following qualifications:

- (a) the following provisions do not apply:
  - (i) sections 65C, 68K and 69N and subsection 65F(2);
  - (ii) any provisions (for example, section 65E) that would otherwise make the best interests of a child the paramount consideration;
  - (iii) any other prescribed provisions;
- (b) if the court makes an interim family violence order, or an interim order varying a family violence order, then, in addition to the effect of paragraph (a):
  - (i) the court has a discretion whether to apply paragraph 68F(2)(a); and
  - (ii) any other prescribed provisions do not apply;
- (c) the court may dispense with such applicable Rules of Court as it thinks appropriate.

Note: As a result of subparagraph (3)(a)(ii), the best interests of a child are not the paramount consideration. They must, however, still be taken into account as required by subparagraphs (2)(b) and (c).

**68T(4)** The court may vary, discharge or suspend a contact order in the family violence proceedings, on its own initiative or on application by any person.

**68T(5) – [Interim Orders]** If, in the family violence proceedings the court makes an interim family violence order or an interim order varying a family violence order, and the court varies or suspends a contact order, the following provisions apply:

- (a) the variation or suspension of the contact order, as the case may be, does not have effect at a time that is after which ever of the following occurs first:
  - (i) the interim order stops being in force;
  - (ii) the end of the period of 21 days, starting when the interim order was made;
- (b) no appeal lies in relation to the variation or suspension of the contact order.

**68T(6)** The regulations may require a copy of the court's decision to vary, discharge or suspend a contact order to be registered in accordance with the regulations. Failure to comply with such a requirement of the regulations does not affect the validity of the court's decision.