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"Domestic Violence: Implications of the New Legislation."

Judge Marshall Irwin

Chief Magistrate

It is difficult to measure the true extent of domestic violence as research indicates that most incidents are not reported to the police or any other official channel.

However as in New Zealand, Domestic Violence in Australia is a major problem. The Australian Institute of Family Studies research in 2000 indicated that 66 percent of separating couples point to violence as a cause of marital break down, with one in three describing the violence as serious. I am sure that this would be consistent with the experience of the Family Law Court of Australia.

An indication of the extent of domestic and family violence in Queensland is the 39.2 percent increase in applications to the Magistrates Court over the past 5 years. This period involved the amendment of the *Domestic and Family Violence Protection Act1989* in March 2003 to extend the type of relationships for which protection orders can be made to family members, informal careers and dating relationships. In the first full year of operation of amendments there was a 24 percent increase in applications.

Despite a decline of 1.3 percent and 2.3 percent in the in the past 2 years, it is clear that the volume of judicial work in this area has increased significantly.

In this paper because of the terminology adopted by the Federal legislation that I will discuss, protection orders are also referred to as family violence orders.

In the court year ending on 30 June 2006 there were 24,179 applications for protection orders. There were 12,151 temporary protection orders and 16,032 protection orders granted. There were variations of 3,907 of those orders and 285 orders were revoked. The total number of orders made was 32,375.

More that 500 applications were dealt with in each of 18 court centres, with 5 centres dealing with over 1000 applications each. In summary the centres which heard in excess of 1000 applications were:

Southport	2,333
Brisbane	1,636
Beenleigh	1,619
Ipswich	1,108
Townsville	1,077

There were also 258 applications at Coolangatta which is a Southport circuit centre.

Cairns was just below this figure with 967 applications. There was a total of 1234 applications before the Sunshine Coast Courts at Maroochydore (737) Caloundra (296) and Noosa (201).

There can be no doubt that domestic and family violence at this level affects the victims, their children, their family and friends, employers and co-workers. It also has repercussions for the quality of life in a local community. It affects people of all ages, cultures, background and life experiences. There can be far reaching

financial, social, health and psychological consequences. The impact of violence can also have indirect costs, including the cost of the community bringing perpetrators to justice through the criminal court or the cost of medical treatment for injured victims.

And while some courts are busier than others in dealing with matters under the domestic and family violence legislation, it is a jurisdiction that magistrates find emotionally demanding regardless of the number of applications brought and heard before each court.

In Australia, like New Zealand, eliminating family violence is going to take many years. I agree with Judge Boshier that for any real impression to be made on it, the court alone cannot solve the problem. It is so pervasive that a community- wide approach based on integrated strategies is that only way forward. [1]

A long term integrated response to the issue would aim to:

- Promote the safety of persons affected by family violence.
- Increase the accountability of people who engage in family violence.
- Encourage behavioural changes; and
- Increase the protection of children exposed to family violence.

This requires that the making of protection orders is not considered in isolation from rehabilitative outcomes.

This is particularly so, when it is recognised that the making of a protection order is often just the initial step in a long on-going saga played out before the courts. Whilst protection orders may place

[1] Boshier, P (Principal Judge, Family Court of New Zealand), (2006) *Domestic Violence: A Comparative New Zealand Perspective*, p4- Calabro Family Law Residential, 19 August 2006.

restrictions on a respondent's behaviour, they are often breached. In the 2004-2005 court year, the Queensland Magistrate Court dealt with 7889 breaches of protection orders.

Apart from these criminal charges the court deals constantly with charges of common assault, serious assault, stalking, deprivation of liberty, child abuse, wilful damage- all part of the domestic violence overlay that exists between the parties. Regularly, upon the domestic violence alarm being raised, the court may have to deal with applications for Child Assessment Orders and Child Protection Orders or what will now be Parenting Orders containing the new concepts of "living with" "spending time with", "have communication with" and "parental responsibility", in our family jurisdiction. [2]

The simple making of a protection order does not address the key issues as to why respondents have chosen or are likely to continue to choose to use violence and breach orders through being violent, not only in the sense of physical abuse but also in the sense of emotional abuse and controlling behaviour.

In these circumstances it is essential to tackle the causes of domestic and family violence rather than to simply deal with the outcomes. Therefore we must look at ways of intervening to prevent such violence from occurring in the first instance, and to thereby break the cycle of violence.

This leads me back to the concept of taking a long term integrated response to family violence.

To achieve this I have previously proposed the establishment of a specialist domestic and family violence jurisdiction which will adopt what is often described as a "problem solving" or "therapeutic jurisprudential" approach. This could become a "one stop shop" to deal with all the matters arising form of domestic violence and would be able to access intervention programs where the causes of the violent behaviour can be identified and addressed rather than just dealing with the outcome.

[2] Section 64B of the *Family Law Act 1975* (FLA)

This is not a novel concept. A pilot project proposal of such a nature was advanced last year by the Gold Coast Domestic Violence Service. And the concept has been introduced in various forms into some other Australian jurisdictions, including South Australia and, most recently through specific legislation in Victoria.

The Victorian legislation establishes a Family Violence Division of the Magistrates Court to operate at two locations for a 2 year pilot period until 2007. It has jurisdiction in relation to:

- Applications for protection orders;
- Breaches of such orders;
- Bail applications and criminal offences involving domestic and family violence;
- Associated criminal compensation applications;
- Civil damages claims for personal injuries arising from domestic and family violence; and
- Family law issues.

The Courts also have power to order respondents/ defendants to attend counselling to address their violent behaviour. This can involve participation in a program for up to 20-25 weeks.

There is also increased protection for children from family violence by making hearing or witnessing violence together with the likelihood to again hearing or witnessing violence by certain persons a specific ground for an order to be made for a child.

I also note the references by Judge Boshier to establishing dedicated Family Violence Courts in the Wellington and Auckland regions. [3]

Unlike the Queensland Domestic and Family Violence legislation the New Zealand *Domestic Violence Act 1995* has a double

[3] Boshier, P (2006) *Domestic violence: A Comparative New Zealand Perspective* , p 3.

barrelled approach to stopping violence- the short term approach of protection orders and the long term aim of stopping further violent behaviour by requiring all respondents to attend a stopping violence program, unless there is a good reason to excuse them. [4]

The New Zealand legislation also goes further than the Queensland legislation in recognising the impact that violence by other family members can have on a child by the automatic application of a protection order to a child of the applicant. [5]

In addition the three primary New Zealand statutes dealing with family violence are administered by the Family Court. This again enables the adoption of a more integrated approach to this issue than is possible in Queensland and elsewhere in Australia, where under the Federal System, the state or territory Courts are responsible for making family violence orders while Courts having nation family law jurisdiction, are responsible for parenting orders.[6]

Relationship between parenting orders and family violence orders.

As a result of this fragmentation it has been necessary for the *"Family Law Act 1975* (the FLA) to deal with the relationship between orders made under that Act that provide for a child to spend time with a person and family violence orders made under the law of a state or territory to protect a person from family violence.

This has been the subject of Division 11. The *Family Law Amendment (Shared Parental Responsibility) Act 2006 (the SPRA)* has replaced this with a new division 11 which is intended to simplify and improve the operation of the former provisions.

As stated in the new S68N the purpose of the division is to resolve inconsistencies between family violence orders and parenting

[4] Ibid pp 5-6.
[5] Ibid, p16.
[6] Ibid, p5.

orders and to ensure the orders achieve the objects and principles set out in the new S60B, which include:

- Protecting children from physical or psychological harm from being subjected to, or exposed to family violence. [7]

Family violence order yields to a parenting order.

An inconsistency between a family violence order and a parenting order can arise where a court exercising family law jurisdiction makes an order that a child spend time with a person even though an existing state or territory family violence order may prevent this from happening.

Section 68Q clarifies that in these circumstances the terms of the parenting order prevail and the family violence order is invalid to the extent of the inconsistency. The court may make express declarations that make it clear the family law order was meant to override the family violence order (sub-s 68Q(3)).

Section 68P which sets out the obligations of the court exercising family law jurisdiction in these circumstances requires the court making an order or injunction which is inconsistent with an existing family violence order, to explain to the parties affected (or arrange for this to be done by someone else) the effect or consequences of the order or injunction and how it is to be complied with.

It will be essential for the state and territory courts making family violence orders to continue, as they do as present, to include appropriate exceptions to avoid inconsistency with family law orders which are likely to be subsequently made.

Family violence order court has power to vary family law order.

Section 68R deals with the *reverse* situation. Provisions relating to the ability of state or territory Courts hearing family violence

[7] Para 68B (1) (b) of the FLA

applications to revive, vary, discharge or suspend a family law order[8] have existed for some time. However this new section removes the power of the Courts to make a parenting order at the time of making or varying a family violence order and place significant limits on their power to revive, vary, discharge or suspend such orders.

The state and territory Courts only have this power if a family violence order is made or varied and it has before it material which was not before the court which made the family law order (Sub-s 68R(3)).

In addition the court must not vary, discharge or suspend a parenting order, a recovery order or injunction unless it is satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.

Further a state or territory Court can not exercise its power to discharge a family law order when making or varying *interim* family violence orders. And any revival, variation or suspension of such orders in interim proceedings is for a temporary period only. [9] For this purpose I would consider a temporary protection order to be an interim family violence order.

An implication for state and territory Courts is that as a condition of precedent for making such an order it will be necessary to inquire into matters which are beyond the scope of the original application, e.g. it will be necessary, by some means to put evidence before the Courts as to what material was before the Court which made the family law order, to comply with sub-s 68R(3) . Although it will probably be sufficient to refer to events that have occurred following the family making of the earlier order.[10] Such evidence can be expected to be before the court as a basis for making the family violence order.

[8] This section also applies to parenting orders, recovery orders, injunctions and certain undertakings, registered parenting plans and recognisances.
[9] Section 68T of the FLA
[10] Page, S, (2006) *Philips Legacy: Family Law (Shared Parental Responsibility) Act 2006,* 21 June 2006, p 36.

In *The New Family Law Parenting System Handbook.* (The Hand book), despite the limitations referred to, the powers given to the state and territory Courts under these provisions are described as "broad", and it is stated:

> " In many respects in this context, they are freed of the fetters that otherwise circumscribe Part VII jurisdiction given to other courts, the best interests of the child, and wishes of children are, for example, relevant considerations but not determinative of their own. The applicable rules of Court can be dispensed with. All of this is in the relatively narrow parameters of s68R…"[11]

Part VII of the FLA deals with issues in relation to the post separation parenting of children.

As proceedings under the *Domestic and Family Violence Protection Act* to the extent that they concern an order under s68R are arguably proceedings under part VII the less adversarial procedures under the new division 12A of the FLA apply[12]. This also involves a relaxation of the rules of evidence[13].

This should not have any significant implications for the Queensland Magistrates Court because the Court or magistrate in proceedings concerning protection orders and temporary protection orders:

> "May inform itself, himself or herself in such a manner as it or the magistrate thinks fit and is not bound by the rules or practice as to evidence."

Further although I have no current statistics on the making of the exercise of the power to revive, vary, discharge or suspend a family law order, on the basis that I have not done so in three

[11] Family Law Section of the Law Council of Australia (2006) *The New Family Law Parenting System Hand book. (The Handbook)* p 105 para 4.6
[12] Section 68ZM of FLA; see also Page, S at p 36.
[13] Section 68 ZT of the FLA

years as a magistrate, it is unlikely to be a power that will be exercised regularly in Queensland.

Relevance of family violence.

Although the SPRA has introduced a new presumption of equal shared parental responsibility it has not purported to change the paramountcy principle i.e. a child's best interests are paramount in making a parenting order[14] .

Therefore while the first new object inserted in para 60 B(1)(a) recognises the importance to children of having the benefit of their parents having a meaningful involvement in their lives, this is "to the maximum extent consistent with the best interests of the child." And as already observed the second new object reflects the need for children to be protected against the physical and psychological harms involved in being subjected, or exposed to family violence.[15]

Further the presumption of the equal shared parental responsibility is displaced in cases where there is are reasonable grounds to believe that there has been family violence engaged in by a parent or another member of the parent's household, eg. a partner, relative or boarder. As Judge Boshier says in these circumstances the child's perspective is placed above that of the parent[16].

Further the current best interest provisions are amended to create two tiers of mandatory considerations that the court must take into account in determining what is in the best interests of children under Part VII. The intention in having two separate categories of considerations is to elevate the importance of the primary factors in achieving the revised objects set out in s60B.

The primary considerations mirror the first two objects of s60B to which I have referred.

[14] The handbook p81, para9.3; see section 60CA of the FLA
[15] Section 60B(1)(b) of the FLA
[16] Parar 61DA (2)(b) of the FLA; Boshier P, p15

Therefore the need to protect children from the risk of the physical and psychological harms involved in being subjected to or exposed to family violence has been elevated to a primary factor, along with the right of children to have a meaningful relationship with their parents, in considering the best interests of the children[17].

The handbook states in relation to this:

> "Parents wishing to resist shared parenting after separation have limited scope to do so with any degree of certainty, and that involves evidence of abuse, neglect or family violence. Cases involving such allegations are already very common, and where the allegations are substantiated, the Act probably effects no change in the laws. What is uncertain, however, is whether this elevation of significance of abuse, neglect or family violence to that of a primary consideration will somehow exacerbate or increase such allegations?"[18]

What is clear however, is that for the purpose of this primary consideration the allegations of family violence do not require to be supported by a family violence order that applies to the child or a member of the child's family. This is because this is one of a raft of additional considerations in sub-s 60CC(3).

This consideration is expressed as follows:

> "Any family violence order that applies to the child or a member of the child's family if:
>
> (i) The order is a final order; or
>
> (ii) The making of the order was contested by a person."[19]

[17] The Handbook, p18,para 2.3.1; see sub-s 60CC(2) of the FLA
[18] Ibid, p72 para 4.4.
[19] Para 60 CC (3) (k)of the FLA

This is a modification of its predecessor, para 68F(2)(j). Now a family violence order is only relevant if it is a final order (whether ex-parte, defended or undefended, or it was contested (as an interim order). Thus ex-parte interim and uncontested interim orders are irrelevant. The basis of this was, according to the explanatory memorandum, to address:

" A perception that violence allegations are taken into account without proven foundation in some family law proceedings."[20]

If there was such a perception and it reflects on the basis on which state and territory Courts make family violence orders it is wrong, at least so far as Queensland is concerned. My experience is that even where the court is considering on application on ex-parte proceedings or in those proceedings where the order is consented to without admissions the supporting material is considered to determine whether the basis of making the order has been established. This is reflected in the wording of the orders made by the court which state on their face that the court is so satisfied.

The Handbook addresses the implications of this consideration for the court as follows:

> It is noted, however, that even if the family violence order is not relevant, the underlying family violence is relevant subject to matters of proof. Arguably, the forensic benefit to a case of a family violence order made on a final or contested basis is overstated anyway. Nonetheless, where a forensic advantage is perceived, the complainant will have to see the family violence proceedings through to its conclusions, as the uncontested interim order is of no benefit in the parenting proceedings. It may well be that some defendants will take the view that they suffer little forensic disadvantage by not contesting interim orders. It is in fact the complainant who needs a final order, presumably after evidence has been heard. **There is potential for this paragraph (k) consideration to actually exacerbate family violence litigation in the state courts"**[21]

[20] The Handbook, p72, para 4.6.
[21] Ibid

For completeness I note that another additional consideration which is found in para 60CC(3)(j) which reflects its predecessor, para 68F(2)(i) is evidence of any family violence involving the child or a member of the child's family.

Section 60K obliges the Court to take prompt action in relation to allegations of family violence or a risk of family violence by one of the parties to the proceedings. It requires the issues raised and the allegations to be dealt with as expeditiously as possible.[22]

This section applies to Part VII applications where a document (prescribed under the rules) is filed in the Court making such allegations, a consideration relevant to whether the Court should grant or refuse the application.

The Court is required to make appropriate orders as soon as practicable - if it is appropriate having regard to the circumstances of the case within eight weeks - after the prescribed document of allegation is filed.[23]

The SPRA has inserted a new sub division E into Part VII of the FLA dealing with family dispute resolution and family counselling.

New S60I provides compulsory attendance at family dispute resolution in a range of circumstances prior to lodging an application with the court. The object is to assist people in resolving family relationship issues out of court and reserve litigation as the last resort.[24]

The difference from the previous position is that these processes are made compulsory before filing rather than afterwards.[25] This is now mandatory, save in the circumstances specially excluded.

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[22] para 60K(2)(c)
[23] Sub-s 60K (2A) of the FLA
[24] Carmody, T (2006), *Explanatory Note, Family Law Amendment (Shared Parental Responsibility) Bill 2005, 27 April 2006, p8.*
[25] The handbook, p41, para 1.6 and 2.1.

The requirement is being implemented in three phases set out in the sub-s.60I(2)-(6) to allow for the roll out of the family relationship centres over the next few years.[26]

However this requirement does not apply if the court is satisfied that there are reasonable grounds to believe that there has been family violence or a risk of family violence by one of the parties in the proceedings.[27]

This exception is intended to protect people who would be at immediate risk of violence if there was a delay in attending court. The standard of proof required is an objective test. This means for example, that it is not sufficient for the Court to be satisfied that a party believes that there would be a risk of family violence if there was a delay in the applying for the order. Rather the Court must be satisfied that there are reasonable grounds for this belief in the particular circumstances of the party on an objective basis.

Although the first phase of the roll out does not conclude until 30 June 2007, and this requirement will not apply to applications made up to and including this date, during this phase the *Family Law Rules 2004* will continue to apply. However the pre-action procedures under these rules do not apply in a parenting case involving allegations of family violence.

The question also arises as to whether this exception to the requirement for compulsory dispute resolution, will exacerbate family violence litigation in the State and Territory Courts.

[26] Carmody,T, p8.
[27] Para60I(9)(b)

Implications of the New Legislation for Domestic Violence

I have already referred to the effect of the new legislation on the state and territory Courts hearing family violence applications to revive, vary, discharge, or suspend family law orders and the implications of relevant provisions on the exercise of this power. For the reasons I have given I do not consider that this will have a significant effect on the state or territory Courts.

There will also be implications for the Courts on the occasions of exercising their family law jurisdiction.

Over the past two years, there has been a significant decrease in the involvement of the Queensland Magistrates Court in the exercise of this jurisdiction with the assistance of the Federal Magistrates Court which has extended monthly family law callovers to Southport, Toowoomba and Maroochydore in addition to their other circuits. This approach is in keeping with the fact that family law is not our core jurisdiction but is that of the Family Court and the Federal Magistracy.

However our Court will still exercise this jurisdiction when required. It is most likely that we will provide this service in some of our more remote locations in urgent matters.

When our Court exercises this jurisdiction it will have to be careful to apply the definition of “family violence” in the FLA. This is different from the definition of “domestic violence” in the *Domestic Violence and Family Violence Act.*

The SPRA has amended the definition to add the concept of” reasonableness” to the existing definition.

The new definition in sub-s 4(1) is as follows:

> “family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of a

person's family that causes that or any other member of that family reasonable fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: a person reasonably fears for, or is reasonably apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her wellbeing."

Therefore the Court will only take into account allegations of violence where the fear or apprehension of violence is reasonable.

Sub-s4(1AB) provides an expansive definition of who is a family member which captures not just persons who are married, de-facto or relatives, but people who ordinarily reside with the person. Sub-s4(1A) defines who is a relative.

Therefore violence is to be assessed from the perspective of the applicant for the family law order or a member of their family, subject to looking at whether it is reasonable for a person in the shoes of the applicant or family member to be fearful or apprehensive for his or her personal wellbeing or safety.[28]

The new definition is based on a concern during the House of Representatives Committee's enquiry which gave impetus to the new legislation, that false allegations could be made.[29]

This definition is in some ways narrower and in other ways wider then the definition of "domestic violence" in s11 of the *Domestic and Family Violence Act:*

[28] Boshier, P p17.
[29] The Handbook, p99 para 3.4

"(1) **"Domestic Violence"** is any of the following acts that a person commits against another person if a domestic relationship exists between the two persons:-

(a) wilful injury;

(b) wilful damage to the other's property;

(c) intimidation or harassment of the other person;

(d) an indecent act to the other without consent;

(e) a threat to commit an act mentioned in paragraphs (a) to (d)

(2) The person committing the domestic violence need not personally commit the act or threaten to commit it."

By virtue of sub-s 11A (1) a spousal relationship, an intimate personal relationship, a family relationship, and informal care relationship are domestic relationships.

The court only has power to make a protection order against a person for the benefit of another person if it is satisfied that the person has committed an act of domestic violence against the other person and a domestic relationship exists between them, and:

"(i) The other person is likely to commit the act of domestic violence again; or

(ii) If the act of domestic violence was a threat - it is likely to carry out the threat."[30]

By virtue of sub-s 20(1) the Court may only include the name of the relative or associate of the aggrieved on a domestic violence order of it is satisfied that the respondent had committed or is likely to commit any of the following acts against the relative or associate:

- Wilful injury;
- Wilful damage to the property of the relative or associate;

[30] Sub-s20(1) of the Domestic and Family Violence Act

- Intimidation or harassment;
- A threat to commit such an act.

The definition of "family violence" is narrower because:

- It is limited to family members and although this term is expansively defined it will not cover the full extent of the domestic relationships within the term "domestic violence."
- It is limited to wilful damage and threats of wilful damage where this creates fear or apprehension about personal well being;
- It is unlikely to cover "harassment" which requires a repeated or persistent form of conduct which is annoying or distressing rather than something which would incite fear.[31]
- It would not extend to an act which was not objectively intimidating but which was done deliberately knowing it would intimidate and intending to achieve that result, if the act did have the effect. This would be sufficient to constitute intimidation for the purposes of the definition of "domestic violence'.[32]

The definition is wider because:

- It is not limited to acts against the person who seeks the family violence order or against a relative or associate of that person. Rather it extends, for example to a child who is exposed to family violence engaged in by others.
- It will apply in the absence of a likelihood that the conduct will be repeated.

The other significant implication for the state and territory Courts will be whether they are likely to experience an increase in family violence litigation as a result of:

[31] *Bottoms v Rogers* [2006] QDC 80, 13 April 2006, per McGill DCJ at [18]
[32] *Dowse v Gorringe* [2004] QDC477, 3 December 2004, per McGill DCJ at [31].

- the displacement of the presumption of equal shared parental responsibility in cases involving family violence;
- the elevation of the significance of family violence to a primary consideration in determining the best interests of the children;
- the fact that an additional consideration in determining the best interests of the children under para 68CC(3)(k) is any family violence order that applies to a child or a member of the child's family, if the order is final or the making of the order was contested;
- the requirement of undertaking family dispute resolution before filing an application, being inapplicable if the Court is satisfied that there are reasonable grounds to believe that there has been family violence or a risk of family violence by one of the parties to the proceedings.

Views have been expressed both ways in discussions which have followed the passage of the new legislation. The jury will remain out until there has been more practical experience with the legislation. Only crystal ball gazing is possible at this stage.

As I have already observed some concerns have been expressed by the Family Law Section of the Law Council of Australia in the Handbook that some of these changes may exacerbate family violence litigation in state and territory Courts.

If this concern becomes reality it will have significant detrimental consequences for the Courts and litigants as a further increase in case loads will inevitably delay the listing and final disposition of matters both in the family violence and other jurisdictions of the Courts. This will justifiably result in calls for additional resources, including the appointment of more magistrates.

However at this point I take a more cautiously optimistic view.

Importantly it is not the existence of a family violence order but the underlying family violence itself which is relevant to the primary consideration of protecting a child from physical or psychological harm from being subjected to, or exposed to family violence. This

is emphasised by the absence of the reference to a family violence order in connection with that consideration. In contrast the additional consideration in paragraph 60CC(3)(k) expressly refers to a family violence order.

Therefore it is evidence of family violence which is important for the purpose of the primary consideration. The existence of a family violence order in itself does not provide that evidence. It tells the Court exercising family law jurisdiction no more than that the Magistrates Court was satisfied of those matters which were a condition precedent to the making of the order.

Often the order will not state any more than that the Court is satisfied:

- The person has committed an act of domestic violence against the other person;
- A domestic relationship exists between the 2 persons; and
- The person is likely to commit an act of domestic violence again.

The Court may have come to this conclusion on any of a number of bases which are not disclosed on the face of the order, and which, at least in Queensland may not satisfy the definition of 'family violence' in subsection 4(1) of the FLA.

Further in Queensland the order may have been made by consent without admissions by the respondent.

Accordingly the Court exercising family law jurisdiction is likely to require evidence to be placed before it of what is alleged to constitute the family violence rather than relying on the mere existence of the order.

Further if there is a perception in Courts exercising family law jurisdiction – despite my disagreement with it – that violence allegations are taken into account without proven foundation in

some family law proceedings, the mere existence of the order is unlikely to be given much weight by the Court.

If this is the approach taken to family violence orders by Courts conducting parenting proceedings, litigants may come to the conclusion that there is little forensic benefit in obtaining a family violence order purely to support their case in those proceedings.

I do not consider that the position will be any different in those cases where the aim of the applicant is to obtain a family violence order in order to rely upon the additional consideration in para 60CC(3)(k).

Although some respondents may contest the application either in the hope of delaying the making of a final order or perhaps in the hope of successfully opposing the order, it is debatable whether there will be any more than a negligible increase in the relatively small proportion of persons who would have done this prior to the commencement of the new legislation.

In my view the same matters that I have referred to in relation to the relevance of a family violence order to the primary consideration will also have the effect that respondent will see little forensic benefit in opposing the making of the order.

For the same reasons I do not anticipate a significant increase in family violence applications in order to avoid the family dispute resolution requirement.

In this case there is the additional reason that the requirement does not apply only if the Court is satisfied that there are reasonable grounds to believe that there has been family violence or a risk of family violence by one of the parties to the proceedings.

For a court to be satisfied on reasonable grounds it is again likely to require consideration of the evidence underlying any family violence order that has been obtained rather than simply relying upon the existence of the order.

Conclusion

The new legislation for the purpose of this paper has been the SPRA which recently amended the FLA.

This legislation has implications for state and territory Courts exercising family violence jurisdiction having regard to:

- The provisions governing the relationship between parenting orders and family violence orders;

- The differences in the definition of 'family violence' and it's equivalents between the Federal legislation for the purpose of the exercise of family law jurisdiction and the State and Territory legislation for the purpose of the family violence jurisdiction;

- The displacement of the presumption of equal shared parental responsibility in cases involving family violence;

- The role of family violence and family violence orders in determining the best interests of children;

- The requirement of undertaking family dispute resolution before filing an application, being inapplicable if the court is satisfied that there are reasonable grounds to believe that there has been family violence or a risk of family violence by one of the parties to the proceedings.

Because family violence orders yield to parenting orders state and territory Courts will have to be mindful of continuing to include appropriate exceptions in family violence orders to avoid inconsistency with subsequent parenting orders.

Although the new legislation has clarified the ability of state and territory Courts hearing family violence applications to revive, vary, discharge or suspend a family order, experience suggests that at

least in Queensland this is not a power which will be exercised regularly.

It will be necessary for the state and territory courts to be alert to and apply the definition of "family violence" in the FLA when exercising family law jurisdiction rather than the different definitions which apply to the equivalent terms under state and territory family violence legislation.

Not withstanding concerns that have been expressed that some of the changes brought by the new legislation may exacerbate family violence legislation in state and territory courts with the determinantal consequences associated with the increase of case loads, with the aid of my crystal ball my cautiously optimistic view is that any such increase will be negligible. **However, only time will tell.**

Reference:

Office of Attorney-General of Victoria (2004) *Media release: Domestic violence Courts for Heidelberg, Ballarat.*

http://www.justice.vic.gov.au/CA2569020010922A/page/Courts+and+Tribunals-Magistrates%27+Court+of+Victoria-Family+Violence+Court+Division?OpenDocument&1=0-Courts+and+Tribunals~&2=0-Magistrates%27+Court+of+Victoria~&3=0-Family+Violence+Court+Division~

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