

## Parenting orders - Key Literature

### **Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.**

Chapter 16 of the Report examines ‘the way in which state and territory courts exercise jurisdiction under family violence legislation and the *Family Law Act 1975* (Cth)’. The Commission notes that s 68R is rarely used to revive, vary, discharge or suspend a parenting order because (p.702):

- Judicial officers, lawyers, police and others involved in protection order proceedings may not be sufficiently aware of the existence, or understand the nature, of s 68R.
- Some judicial officers, lawyers and police appear to consider that issues in relation to parenting orders should be a matter for federal family courts;
- Judicial officers may not have the information or evidence necessary to amend a parenting order; and
- Parties to proceedings may not have access to appropriate legal advice and other support before seeking to amend a parenting order.

The Commission concluded that ‘increasing and improving the use of s 68R in state and territory magistrates courts is necessary to fill a gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation. In particular, s 68R is necessary to protect victims of family violence where violence arises or escalates after parenting orders have been made—for example, during handover arrangements. In such cases, if s 68R is not used to amend the parenting order, a victim of violence may need to go to a federal family court to seek an amendment to the parenting order as well as a state or territory magistrates court to seek a protection order’ (p 702).

### **Bryant, Diana, ‘*The Family Courts and Family Violence*’ (Paper presented at the Judicial Conference of Australia Colloquium, Adelaide, 9-11 October 2015).**

The paper focuses on the issue of family violence in parenting proceedings (not in property proceedings). Her Honour notes that the family courts are widely criticised for making orders which are inconsistent with family violence orders (see Victorian Royal Commission into Family Violence, South Australian Social Development Committee) but identifies that these criticisms overlook the complexity of the task posed to the family courts and the reasons why ss 68R and 68T of the *Family Law Act* are drafted the way they are (p.4).

She identifies that under federal legislation, a federal court can make orders for contact with are inconsistent with an existing family violence order and, if they do so, the family violence order is invalid to the extent of its inconsistency (s 68Q). If the parenting order is inconsistent with the family violence order, s 68P imposes a number of obligations as to what must be included in the judgment that accompanies the parenting order. Her Honour notes that, '[w]hile s 68P is relied upon from time to time, family violence orders in the majority of cases that come to the family courts either do not include the children as affected family members or, more frequently, include an exception for any orders made by the family courts' (p.5).

Courts making or varying family violence orders may discharge or suspend existing orders made under the *Family Law Act* (s 68R). In interim family violence proceedings, the court can only vary or suspend, but cannot discharge, an order made under the *Family Law Act* (s 68T). Again, there are considerations that must be taken into account before making this order (s 68R(5)).

The justification for ss 68R and 68T are elaborated upon by Her Honour at p.5:

*'Although the subject of criticism, there are reasons for permitting courts to make inconsistent orders. The clue to this is in s 68R(3), which limits the power of a court making a family violence order to vary, discharge or suspend a family court order unless it has material before it that was not before the court that made that order or injunction. That is perfectly sensible — when a violent incident occurs involving a family which has had parenting orders in place, then the state court making the family violence orders is, of course, going to have information available to it that was not available to the judge when the original order was made.*

*Similarly, when family violence orders are made, often on an interim basis, the family courts subsequently considering making parenting orders may well have evidence that was not before the court making the family violence order. This would often be the case, for example, where there is an order made by consent without an admission of the allegations upon which it is based'.*

**Family Law Council, [Interim Report to the Attorney-General: In response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems \(2015\)](#).**

The Family Law Council report provides an excellent summary of the issues that arise in practice relating to ss 68R and 68T. First, in relation to s 68R, they note that several stakeholders reported that some magistrates rarely apply s 68R in family violence hearings, or are reluctant to make family violence protection orders naming children where there are parenting orders in place. It cites a case study from Legal Aid Western Australia and concerns raised in a Victorian report. Second, in relation to s 68T, the Council also notes that concerns were raised as to the time limits imposed. It notes the report of the Australian and New South Wales Law Reform Commission's consideration of these issues and their recommendations (pp.40-42).

