

1995

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**DOMESTIC VIOLENCE (AMENDMENT) BILL 1995**

**EXPLANATORY MEMORANDUM**

Circulated by authority of

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**DOMESTIC VIOLENCE (AMENDMENT) BILL 1995****OUTLINE**

The purpose of the Bill is to amend the *Domestic Violence Act 1986* to complement recent changes to the *Commonwealth Family Law Act 1975*. The changes to both the Commonwealth and Territory Acts are in accordance with agreement reached by the Standing Committee of Attorneys-General ("SCAG") on how to resolve the difficult problem of potential inconsistencies between Family Court access orders, now known as "contact orders" and protection orders made under State and Territory legislation. The need for legislative reform came about because significant problems have arisen in practice when one parent is forbidden by a protection order made under State/Territory domestic violence legislation to go to, or near the matrimonial home, but an access order made under the Family Law Act states or clearly implies that the parent will, at the matrimonial home, pick-up and return a child before and after access.

The key elements of the SCAG agreement were that the Commonwealth would draft legislation to confer on State and Territory courts the power to vary or revoke a Family Court order in relation to contact in circumstances of domestic violence; that there was recognition of the power of the Family Court to make a declaration setting out the manner in which a family violence order is to operate in the light of a later contact order; and that there needed to be a system of notification by one court to another of any supervening order. The changes also require parties who are before either the Family Court or the State/Territory Courts to inform the Court of relevant protection orders or relevant contact orders so that the Court can take into account such matters when making orders.

**Financial impact**

There is no financial impact from the Bill.

## SUMMARY OF RELEVANT FAMILY LAW REFORMS

The key changes to the law in this area are contained in the Family Law Reform Bill 1994. Divisions 10 and 11 of Part 7 of that Act deal with the relationship between protection orders and Division 11 contact orders. The main provisions are:

### Division 10

*New subsection 68F(2)* - the Family Court must consider any family violence or family violence order involving a child or a member of the child's family, when determining what is in the best interests of the child and the need to protect the child from physical or psychological harm that may be caused by being directly or indirectly exposed to violence. It should be noted that if orders are made by consent, the court may, but is not required, to take into account all the matters in new subsection 68F(2).

*New Section 68J* - parties ( and other persons ) are obliged to inform the Family Court of any relevant family violence order in certain proceedings;

*New Section 68K* - the Family Court in making a contact order must have regard to safeguards to avoid exposure to family violence. The new provision requires the Family Court to ensure that its orders are consistent with any family violence orders, and that the terms of its orders do not expose people to family violence.

### Division 11

*New Section 68P* - contains definitions of a "Division 11 contact order" and a "section 68R contact order".

*New Section 68Q* - sets out the purposes of the Division which are to resolve inconsistencies between contact orders and family violence orders; to ensure that contact orders do not expose people to family violence and to respect the right of a child to have contact with both of the child's parents on a regular basis.

*New Section 68R* - deals with the situation where the Family Court makes a contact order which is inconsistent with a family violence order. Certain obligations are imposed on the court including explaining the purpose of the contact order.

*New Section 68S* - new subsection 68S(1) provides that if a section 68R 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.

New subsection 68S(2) enables parties and others to apply to the court for a declaration which clarifies the relationship between section 68R contact orders and family violence orders. Both the Family Court and courts of summary jurisdiction can make these declarations and the court to which an application is made must hear and determine the application and make such declaration as it considers appropriate. By virtue of new Section 69G, jurisdiction is extended to courts of summary jurisdiction to enable them to make these declarations.

**New Section 68T** - this section gives State and Territory Courts in domestic violence proceedings the power to make, revive, vary, discharge or suspend a Division 11 contact order. The power only arises if the Court is making or varying a protection or interim protection order. It should be noted that if section 68R applied to the making of the contact order, then the State or Territory Court cannot vary the order unless satisfied as to the matters in new subsection 68T(2)(c). New subsection 68T(6) provides that Regulations may require a copy of the court's decision with respect to contact to be registered. Regulations will be made which require the clerk of the Magistrates Court which makes a decision to effect a contact order to register that decision in the nearest Family Court registry.

## DOMESTIC VIOLENCE LAW REFORMS

The amendments to the *Domestic Violence Act 1986* ("the Principal Act") contained in the Bill complement the changes to the *Family Law Act 1975*. The changes are based on model provisions agreed to by SCAG. The main changes are that applicants for protection orders will be required to inform the Magistrates Court of any relevant contact order under the Family Law Act, and that the Magistrates Court, when making or varying a protection or interim order, is required to consider access and any relevant family contact order. The Magistrates Court needs to be aware of relevant contact orders, so that it can properly exercise its power pursuant to proposed new section 68T of the Family Law Act to make, revive, vary, discharge or suspend such orders.

Details of the Bill are as follows.

### CLAUSE NOTES

**Clauses 1 and 2 and 3** are formal. They contain the short title, the commencement date and a short reference to the Act. The commencement of the main provisions of the Bill is tied to the commencement of one of the most relevant changes to the Family Law Act, the provision whereby State/Territory Courts are given the power to make or vary contact orders in domestic violence proceedings, section 68T.

**Clause 4** provides a definition of "relevant family contact order". This definition provides a link to the relevant part of the Family Law Act and describes which contact orders made under that Act are relevant for the changes to the law contained in the Bill.

**Clause 5** provides for the insertion of a new section after section 8 of the Principal Act which deals with the hearing of applications.

New subsection 8A(1) specifies that applicants for a protection order shall inform the Court of any relevant family contact order, or pending application for such an order. As the making of an interim order is based upon such an application, this requirement applies also when the court is considering whether to make an interim order under section 14 of the Principal Act.

New subsection 8A(2) provides that a failure to inform the Court does not invalidate a protection order or interim protection order.

*Clause 6* provides for amendments to section 10 of the Principal Act which deals with matters to be taken into account by the Court when determining an application for a protection order.

New subsection 10(1)(ea) provides an additional matter to be taken into account by the Court when considering whether to make a protection order. The new consideration is whether there are any access arrangements between the person seeking the protection order or the person against whom the order is sought and any child of either persons that is relevant to the making of a protection order, and to any relevant family contact order made under the Family Law Act of which the Court is aware.

Because one of the restrictions in a protection order can be to prohibit a parent from being at the home of the protected person, and one of the requirements for access may be for a child to be collected from that home, there is a possibility of conflict between these orders. However, the new Family Law provisions, particularly new Section 68T, together with new subsection 10(1)(ea) will assist the Courts and parties, by seeking to avoid such conflict. Once the Court knows about relevant access arrangements or contact orders, the Court can then take these into consideration when deciding what sort of restrictions should be in a protection order. The Court can also exercise its powers under new Section 68T to make, revive, vary discharge or suspend contact orders. The Court may, for example, vary access arrangements by changing the location from where a child is to be collected so that this does not occur at the home. Despite endeavours by both State/Territory Courts and Family Courts, there may still be situations where there are inconsistencies between a protection order and a Family Law contact order. In this situation, persons may apply to either the Family Court or the State/Territory Court for a declaration of the extent to which a contact order is inconsistent with a protection order, new section 68S of the Family Law Act.

New subsection 10(3) provides that a failure to have regard to the matters in subsection 10(1)(ea) does not invalidate the protection order, or order varying it.

*Clause 7* provides for amendments to section 14 of the Principal Act which covers the making of interim protection orders.

New subsection 14(2A) provides that the Court must have regard to whether there are any access arrangements between the person seeking the order or the person against whom the order is sought and any child of either persons, that is relevant to the making of the order, and to any relevant family contact order made under the Family Law Act of which the Court is aware.

When making an interim order previously, the only requirement in the Act was that the Court be satisfied that it was necessary in order to ensure the safety of

the person seeking protection pending hearing and determining the application. The new requirement will assist the Court to avoid, where possible, making an interim order that is in conflict with access or contact orders. The Magistrates Court will have the same powers to vary etc contact orders that are discussed above in relation to clause 6 except the Magistrates Court cannot discharge a contact order when dealing with an interim protection order.

New subsection 14(2B) provides that failure to regard relevant access or contact orders does not invalidate an interim protection order or variation of it.

*Clause 8* provides for amendments to section 18 of the Principal Act which deals with the variation and revocation of orders. The changes to this section complement section 68T of the Family Law Act

New subsection 18(4) provides that the Court must take into account all the matters in section 10, which includes consideration of relevant access or contact orders, when deciding whether to vary a protection order.

New subsection 18(5) provides that the Court is not to take into account relevant access or contact orders when deciding whether to revoke a protection order.

New subsection 18(6) provides that in deciding whether to vary an interim protection order, the Court must consider the question of access or any relevant contact order and the need to ensure the safety of the aggrieved person, pending the hearing and determination of a full protection order.

New subsection 18(7) provides that in deciding whether to revoke an interim protection order, the Court is to have regard to the need to ensure the safety of the person for whom protection is sought, pending determination of a full order. An interim order normally lasts for a period of no more than 10 days, however there are exceptions if a longer period is required (refer section 17 of the Principal Act).

*Clause 9* repeals section 30A of the Principal Act which dealt with exemption from the secrecy provisions contained in section 30, and provides for the insertion of new provisions.

New subsection 30A(a) provides that a party to domestic violence proceedings does not breach the secrecy provisions by informing a person of the contents of an order.

New subsection 30A(b) provides that a person is not breaching the secrecy provisions by informing the Court of a protection order or interim protection order in relevant Family Court proceedings. This provision complements new Section 68J which requires parties to inform the Court about domestic violence orders.

*Clause 10* sets out when certain of the changes to the law apply.

*Subclause 10(1)* provides that requirement for applicants for protection ( or interim ) orders to inform the Court of any relevant family contact order, or pending application, applies only in relation to applications made after the commencement of the relevant section.

*Subclause 10(2)* provides that the requirement for the Court to take into account relevant access and family contact orders when making or varying protection orders, and not to consider such matters when revoking protection orders, only applies after the commencement of the relevant sections.

*Subclause 10(3)* provides that the relevant considerations for the Court when making, varying or revoking interim orders as set out in clauses 7 and 8 only apply after the commencement of these provisions.

#### **Notes**

The aim of the SCAG Agreement was to clarify the relationship between protection orders made under State/Territory domestic violence legislation and contact orders made under the Family Law Act and to end the difficulty and uncertainty that has existed for parties who have to live with such orders, and police, solicitors and others who work in the area. The footnote has been included with this aim in mind and is an additional tool to assist parties and others by alerting them to the fact that when they are reading the new provisions contained in the Bill, they should also read the corresponding provisions of the Family Law Reform Bill 1994. The footnote gives a brief summary of the main features of the relevant Family Law provisions.