

Brief Overview of the *Family Violence Protection Act 2008*

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Table of contents

<i>Scope of document</i>	1
<i>Substantive Law</i>	1
1. Separates family violence and stalking matters	1
2. Preamble and purpose	1
3. Definition of family violence and safety	1
4. People who are covered by the Act	2
5. Family Violence Safety Notices	2
6. Applicants for family violence intervention orders	2
7. Grounds for family violence intervention orders	3
8. Consent Orders	3
9. Duration of family violence intervention orders	3
10. Conditions of Orders	4
11. Variation, revocation & extension	6
12. Vexatious litigants	8
13. Restriction on publication of proceedings	8
14. Children's Court Jurisdiction	8
15. Criminal proceedings	8
<i>Evidence and Procedure</i>	9
16. Proper venue	9
17. Applications to be on oath, affidavit or certified	9
18. Issuing summons or warrant	9
19. Explanation of Orders	9
20. Mention date	10
21. Rehearings	10
22. Legal representation of child affected family members	10
23. Evidence in family violence intervention order proceedings	10
24. Service	11
25. Costs	11
26. Persons under guardianship	12
<i>Transitional arrangements</i>	12

Scope of document

This document is intended to provide a brief overview of the most significant aspects of the *Family Violence Protection Act 2008*. It is not a comprehensive summary of the Act.

Substantive Law

1. Separates family violence and stalking matters
 - *Family Violence Protection Act 2008* repeals the *Crimes (Family Violence) Act 1987* - s212
 - New *Stalking Intervention Orders Act 2008* basically preserves system of stalking intervention orders that existed under s21A of the *Crimes Act 1958* and the *Crimes (Family Violence) Act* except that it aligns firearms and bail provisions and provisions regarding search and seizure of firearms (as well as some terminology) with the *Family Violence Protection Act*. The *Stalking Intervention Orders Act* also contains some minor procedural differences to the previous scheme. The *Stalking Intervention Orders Act* will be repealed when the *Personal Safety Intervention Orders Act 2010* commences.

2. Preamble and purpose
 - Preamble
 - Recognises principles underpinning the Act, including that the justice system should treat the views of victims with respect
 - Recognises features of family violence, including the gendered nature of violence
 - Purpose s1
 - Maximising safety, preventing and reducing family violence, accountability of perpetrators

3. Definition of family violence and safety
 - Broad and detailed definition of family violence - ss5, 6, 7, including:
 - Economic abuse
 - Emotional and psychological abuse
 - 'Safety' means safety from family violence - s4.

4. People who are covered by the Act

- Family members - ss8-10. Broad definition, including:
 - Any person the relevant person regards as 'being like a family member' if it is reasonable to regard them in this way given the circumstances of the relationship – list of considerations
 - Relatives for Aboriginal or Torres Strait Islander people includes a person who is a relative according to tradition or contemporary social practice.
- Associates ss4, 76
 - If a court has made a final family violence intervention order, the court can also make *final* orders against associates of respondent (if they have committed 'family violence') and to protect associates of affected family member (if they have been subjected to 'family violence').

5. Family Violence Safety Notices

- Temporary on-the-spot after hours protection, issued by police, against adult respondents, where there are no other orders in place and they are necessary to ensure safety, preserve property or protect a child - s24
- Can include conditions similar to intervention orders - s29
- Operate as an intervention order application and summons to a first mention date that must be within 72 hours - s31
- In force from when they are served until the court refuses an intervention order at the first mention date or makes an intervention at the first mention date *and* that order is served on the respondent - s30
- Criminal penalty for contravention - s37.

6. Applicants for family violence intervention orders

- The following people can make applications - ss45-46:
 - Police officer
 - AFM or anyone else with AFM's written consent where AFM is an adult
 - If AFM is a child –
 - A parent of the child or anyone else with written consent of parent or with leave – which must be granted if in AFM's best interests
 - *And* aged 14 or older, the AFM with leave of the court – court must not grant leave unless child understands nature and consequences of intervention order

- If AFM has a guardian – the guardian or anyone else with leave of the court – which must be granted if in AFM's best interests.

7. Grounds for family violence intervention orders

- Interim orders s53
 - Necessary, pending a final decision about the application, to ensure safety of affected family member (AFM), preserve property of AFM or protect a child
 - Consent/not opposed
 - Family violence safety notice has been made and there are no circumstances to justify discontinuing protection until final decision.
- Final orders s74
 - Respondent has committed family violence against AFM and is likely to continue to do so or do so again.
- Protection of children ss53(1A), 77
 - Before making an interim or final order, the court must consider whether there are any children in the family that require protection and make appropriate protective orders.

8. Consent Orders

- Court can make final order by consent or unopposed whether or not satisfied of grounds and whether respondent admits the conduct alleged or not - s78(1)
- Court cannot make final consent order against a child unless satisfied the grounds are made out - s78(2)
- Court can refuse to make a final consent order if it believes the order poses a risk to the safety of a party or a child - s78(5).

9. Duration of family violence intervention orders

- Interim orders s60
 - Last until final determination, or if a final order requires it, until the final order is served on the respondent
- Final orders ss97-99
 - Duration can be specified. If not specified, they last until further order

- Criteria for determining duration -
 - Court must take into account that the safety of the AFM is paramount as well as the applicant and AFM's assessment of the level and duration of risk from the respondent
 - Court may take into account relevant matters raised by the respondent.
- If respondent is a child, the order cannot be for longer than 12 months unless there are exceptional circumstances.

10. Conditions of Orders

- General ss80-81
 - Safety of AFM and children paramount
 - Can impose any *condition* that appears necessary or desirable
 - List of possible conditions includes:
 - Specific provision about exclusion from 'residence' – see below
 - Conditions about use of personal property – see p5
 - Revocation or suspension of firearms licence or *weapons approval* – see p5.
- Exclusion from residence ss79, 82-85
 - If the court decides to make an intervention order it *must* consider imposing a condition excluding the respondent from the residence shared (or proposed to be shared) with the AFM ('an exclusion condition'). The Act prescribes a non-exhaustive list of criteria – s82(2) - that focus on avoiding disruption to the AFM and children
 - If the court decides an exclusion condition is appropriate against an adult respondent and the protected person does not oppose this, then the court must exclude
 - Where the respondent is a child:
 - Must also consider desirability of respondent being supported/not disrupted
 - Must be satisfied child will have appropriate alternative accommodation, care and supervision. NB also additional considerations where Aboriginal or Torres Strait Islander children
 - Can get a report from Department of Human Services regarding accommodation, care and supervision options before making order

- If excluded, court must notify Department of Human Services
- If a respondent is excluded, the court must ask the respondent for his or her address and advise that police may seek information to locate the respondent
- Where parties are living in rented premises and an exclusion condition is made:
 - On a family violence safety notice or intervention order, the protected person can change the locks - s70A *Residential Tenancies Act*
 - On a final order – the protected person can apply to the Victorian Civil & Administrative Tribunal for termination of the tenancy and a new tenancy to be made - s233A-B *Residential Tenancies Act*.
- Conditions about personal property
 - Can order personal property of protected person or family member to be returned – s86(a)(i)
 - Can order return of *joint* personal property (of protected person and respondent) that will enable protected person's everyday life to continue with as little disruption as practical – s86(a)(ii)
 - Where an exclusion condition is made, can order furniture or appliances that enable the normal running of the home to remain – s86
 - Subject to other courts' orders that have jurisdiction re property and do not affect ownership - ss87-88.
- Conditions about firearms *and weapons* ss94-95, 171
 - Court must enquire whether respondent has firearms authority or weapons exemption or approval
 - If make interim order court can suspend firearms authority or weapons exemption or approval. If make final order court can revoke firearms authority or weapons exemption or approval
 - If court specifically suspends or revokes a firearms authority or weapons exemption or approval, a person cannot appeal under other Acts or seek to be declared a non-prohibited person.
- Children ss53(1A), 77, 89-93
 - Court required to separately consider children and may make orders for children of own motion when the court is making an interim order or a final order – ss 53(1A), 77

- When making any intervention order, the court must enquire whether there are *Family Law Act* or child protection orders - s89
- If there is a *Family Law Act* order and the intervention order and *Family Law Act* order would be inconsistent the court *must*, to the extent of its powers under s68R of the *Family Law Act*, modify the *Family Law Act* order to the extent of the inconsistency - s90
- When making any intervention order, the court must decide if it is safe for the protected person or a child if the child lives with, spends time with or communicates with the respondent - s91
- If the court decides it is not safe, it must include a condition prohibiting such contact - s93
- If there is no *Family Law Act order* and the court decides that the safety of the protected person or child would not be jeopardised by the child living with, spending time with or communicating with the respondent the court must include conditions – s92:
 - That these arrangements about children (as well as changeover arrangements) have to be in writing, unless there are exceptional circumstances (e.g. a party cannot read), or if the respondent, protected person and child live together
 - About how these arrangements can be negotiated (e.g. in writing or through a third party).
- Police applications for final orders s75
 - Where police are seeking a final order, if an adult, competent AFM does not consent to the application, the intervention order can only contain conditions:
 - Prohibiting family violence
 - Prohibiting the respondent from causing another person from engaging in prohibited conduct
 - Suspending or revoking firearms authority or weapons approval or exemption.

11. Variation, revocation & extension

- Variation and revocation ss100-105
 - Criteria for deciding revocation or variation include applicant's reasons, safety and views of the protected person - s100
 - Can vary instead of revoke - s100
 - Interim variations can be made - s101

- Additional protection in varying or revoking - ss102-105
 - Requirement to separately consider protection needs of all persons protected by the order
 - Can refuse application or vary it in a different way if this is necessary to ensure the other person's safety
 - Where the other person is a child, or there is a child who has become a family member since the order was made, the court can address the child's needs by variation of the original order or can make a separate order where the child's needs are not substantially the same.
 - Court specifically required to consider whether there are *Family Law Act* orders regarding a child who is protected by the original order or a child who has become a family member since the original order was made.

- Extension ss106 -107
 - Can extend an order if the respondent is likely to commit family violence if the order is not extended, whether or not the respondent has done so while the previous order was in place and whether or not the respondent has complied with the previous order
 - Can make interim extensions for not more than 28 days if the respondent has not yet been served with the extension application.

- Applications to vary, revoke, extend ss108-112, 149
 - Range of people who can apply includes police and guardians even where they were not parties to the original application
 - Respondent needs leave to seek variation or revocation – court must be satisfied there has been a change in circumstances that may justify the variation or revocation
 - Police can seek variation or extension without consent but cannot remove conditions and cannot include conditions other than those they can obtain without the AFM's consent in an original application – see p6
 - Can revoke, vary or extend an order made by any other court, including an order confirmed or varied by the County Court or Supreme Court on appeal (but in this case, there must be new facts and circumstances).

12. Vexatious litigants

- Empowers Magistrates Court (Chief Magistrate or Deputy) to declare a person vexatious if he or she has 'habitually, persistently and without any reasonable ground instituted proceedings against the same person' - ss188, 193
- Applications for declarations can be made by the Attorney-General and/or the person against whom the applications have been made. In the case of the latter person, he or she requires leave to make such an application - s189
- Where a person is declared vexatious he or she needs leave to institute proceedings - s193.

13. Restriction on publication of proceedings

- Significantly proscribes publication that can identify children *and* adult parties – can only publish with court order, if it is in the public interest and just. ss166-169

14. Children's Court Jurisdiction

- Shared jurisdiction with the Magistrates' Court where AFM or respondent is a child but if the respondent is a child, the Children's Court should hear the application, if practical - s146
- Empowered to make orders involving adults where a related matter involving a child is before the court - s147
- When hearing a child protection application, Children's Court can revoke or vary an intervention order to the extent that it would be inconsistent with a proposed child protection order. Parties are to be given notice and the opportunity to be heard before a revocation or variation is made - s173.

15. Criminal proceedings

- Contravention of safety notice or intervention order, ss37, 123
 - 2 years maximum penalty whether first or subsequent offence
- Aid and abet ss125, 222
 - Protected person cannot be charged with aid and abet for encouraging, permitting or authorising respondent to contravene a safety notice or intervention order.
 - This also applies to behaviour prior to the commencement of the *Family Violence Protection Act*, provided the person has not been charged, or if the person has been charged, the charge has not been dealt with.

- New offences of failing to surrender firearm or firearms authority, ammunition or weapon when directed - s158(4).

Evidence and Procedure

16. Proper venue

- Proceeding must be issued at proper venue - ss42, 235, 251, *Magistrates' Court Act* s3(1) and *Children Youth & Families Act* s3(1):
 - For interim orders – any court location
 - For final orders – the venue the court determines most appropriate having regard to factors including safety, preventing disclosure of parties' whereabouts, parties' ability to get to court, availability of support services and case flow.

17. Applications to be on oath, affidavit or certified

- Applications for intervention orders s43
- Phone and fax applications by police s44
- Applications for warrants s51

18. Issuing summons or warrant

- Summons can be issued whenever intervention order application made to court - s49
- Warrant can be issued - s50:
 - Against adult respondents only
 - Where it is necessary to ensure safety of AFM, preserve property of AFM or protect a child or to ensure the respondent attends court.

19. Explanation of Orders

- Interim orders s57 - registrar must give written explanation to respondent and AFM. If the party is before the court, the registrar must also give a clear oral explanation of the order, provided that the magistrate has not already done so. The form of the written explanation is provided in the regulations
- Final orders s96 – If protected person or respondent or both are before the court, the judicial officer must give them a clear oral explanation of order as well as written notice containing the same information.

20. Mention date

- Cannot proceed to contested hearing regarding final order unless parties have had opportunity to get legal advice and representation, they consent, and it is fair and just - s61.

21. Rehearings

- Respondents can only apply for a rehearing if they were not personally served with the application and they were not made aware of it under a substituted service order, or if there are exceptional circumstances - s122.

22. Legal representation of child affected family members

- Child who is an AFM but not the applicant may only be legally represented if the court, on its own initiative, considers it appropriate and grants leave – s62(1)
- In deciding whether to grant leave, court must have regard to desirability of protecting children from exposure to the court system and possible harm to family relationships – s62(2).

23. Evidence in family violence intervention order proceedings

- Rules of evidence do not apply other than ones to protect witnesses but court can decide not to admit evidence if satisfied that it is 'just and equitable' to do so OR the probative value is substantially outweighed by the danger that the evidence will be prejudicial, misleading or confusing - s65
- Evidence can be given by affidavit or *sworn statement* - s66
- Evidence by and presence of children
 - Child who is not an applicant or respondent cannot give *evidence* without leave – considering desirability of protecting children from exposure to the court system and possible harm to family relationships - s67
 - Child who is an AFM or a family member of a party should not be present in court unless a court order is made allowing them to be present – considering desirability of protecting children from exposure to the court system and possible harm to family relationships - s150
- Expert evidence about the nature and dynamics of family violence can be admitted - s73
- Alternative arrangements for intervention order proceedings:
 - Can close proceeding if necessary to prevent AFM or witness being caused undue distress and embarrassment - s68

- Other alternative arrangements may be made, including use of closed circuit television, requiring practitioners to be seated, screens and support people. Such arrangements are required where the witness is a child unless this is not appropriate having regard to the wishes, age and maturity of the witness, available facilities or any other relevant matter - s69
- Cross-examination by unrepresented Respondents ss70-72
 - Respondent cannot personally cross-examine 'protected witness'
 - Required to obtain own representation or court must order Legal Aid to offer representation. Legal Aid have the right to assess the respondent and impose conditions on the grant of assistance – a protocol between the court and Legal Aid will clarify that the court cannot order duty lawyers to appear
 - If respondent refuses or does not cooperate with representation, court must warn respondent that the respondent and the respondent's witnesses will not be able to give evidence about issues that the respondent has been unable to cross-examine witness about
 - If protected witness is the applicant and not a police officer, the court must also order Legal Aid to represent the applicant unless the applicant objects.

24. Service

- Documents must be served by - s202:
 - Personal service; or
 - If 'not reasonably practicable' to personally serve, by substituted service
- Certificate of service or non-service must be filed - ss203-204
- Police can apply to Victorian public sector agencies for information to locate the respondent to enable service - s207.

25. Costs

- Parties bear their own costs - s154 - but court may order costs if:
 - Exceptional circumstances; or
 - Application was vexatious, frivolous or in bad faith
 - Mere fact application made and then withdrawn not exceptional, vexatious etc

- If there are grounds for a costs order, the court can adjourn and notify parties that orders will be made at the next date unless contested - s154(5).

26. Persons under guardianship

- Have the right to be separately heard in applications for intervention orders and/or variation, revocation or extension of intervention orders - ss64, 108-112.

Transitional arrangements

- Preserves orders made under the *Crimes (Family Violence Act)*. References to *Crimes (Family Violence Act)* and orders made or registered under the *Crimes (Family Violence Act)* are taken to be references to *Family Violence Protection Act* and orders made or registered under the *Family Violence Protection Act* - ss214-217, 223
- Applications for variation, revocation or extension of orders made under the *Crimes (Family Violence Act)* are to be dealt with under the *Family Violence Protection Act* – s215
- Applications for intervention orders or for variation, revocation or extension of intervention orders made prior to the commencement date but not yet finalised are to be dealt with under the *Family Violence Protection Act* in all situations, *other than* where a hearing has started but not yet concluded - in this case, the *Crimes (Family Violence) Act* applies. Even where an interim order has been made under the *Crimes (Family Violence) Act* but the final hearing has not yet started, the *Family Violence Protection Act* applies – ss218-220
- If appeals have started but not yet been finalised they continue under the *Crimes (Family Violence) Act* – s219(1)(b)
- If proceedings for breach of intervention order have started but not yet been finalised they continue under the *Crimes (Family Violence) Act* – s219(1)(c)
- Family violence committed between persons who would not have been family members under the *Crimes (Family Violence) Act* may be taken into account in an application made between such persons after the *Family Violence Protection Act* commences – s221.
- If an AFM has aided or abetted an offence under the *Crimes (Family Violence) Act* because the AFM encouraged or authorised a breach but the AFM has not been charged with the offence at the date of commencement, the AFM cannot later be charged with this offence. If the AFM has been charged but the charge has not been dealt with, it must be withdrawn – s222.