

**DECISION MAKING IN FAMILY VIOLENCE  
INTERVENTION ORDER MATTERS:  
PRESCRIPTIVE REQUIREMENTS AND LIMITATIONS**

Further information on each of the requirements or limitations is provided in narrative form after the table and can be reached by clicking on the [items in the left column](#). See p2 for background.

<b>Subject</b>	<b>Nature of requirement or limitation</b>	<b>Section</b>
<b>CHILDREN</b>		
<b>Protection from family violence</b>	Must enquire whether any family law or child protection orders	s89
	Must decide if child contact will be safe and if not safe, order no contact	ss91, 93
	Must use powers under s68R of <i>Family Law Act</i> to modify inconsistent order	s90
	If no family law orders and contact safe, must include specific conditions re agreements and negotiations about children's arrangements	s92
	If making final order or varying or revoking an existing order, court must separately consider children's need for protection	ss77, 102-104
	If order made is inconsistent with child protection order, registrar must notify DHS	s174
<b>Orders against children</b>	Need grounds for final consent/unopposed order	s78
	Final orders for no longer than 12 months	s98
	Limits on power to impose exclusion condition	s83(3)
<b>Protecting children in court</b>	Alternative arrangements for evidence generally required	s69
	Child cannot give evidence without leave, unless applicant or respondent	s67
	Certain children cannot be present in court without court order	s150
	Legal representation of children - limited	s62
<b>CONDITIONS ON ORDERS</b>		
<b>Police applications without AFM consent</b>	Limits conditions that can be included on final orders, variations & revocations without AFM consent	ss75, 110
<b>Exclusion conditions</b>	Must consider imposing	s82
	Additional limitations and requirements when considering exclusion of children	ss83-84
	Must ask excluded respondent for address	s85
<b>Firearms and weapons</b>	Must inquire whether respondent has firearms authority or weapons exemption or approval	s94
<b>EVIDENCE</b>		
<b>Cross-examination of protected witnesses</b>	Generally prohibited by unrepresented respondents. Court must inform respondent and give opportunity to obtain representation	s70
	If respondent not represented, court must order VLA to offer representation and may need to warn respondent about effect of refusing assistance	s71
	Representation must also be ordered for unrepresented applicants	s72
<b>PROCEDURAL ISSUES</b>		
<b>Explanation of Orders</b>	Registrar must explain interim order	s57
	Court must explain final order	s96
<b>Final order contest at mention date</b>	Court cannot hear contest regarding final order at mention date unless criteria met	s61

## BACKGROUND

The *Family Violence Protection Act 2008* adopts most of the recommendations of the Victorian Law Reform Commission's (VLRC) Review of Family Violence Laws Report (2006). In that report, the VLRC noted a 'significant variation in the attitudes and approaches' of judicial officers to family violence matters. The Commission attributed this in part to the lack of guidance on matters that should be taken into account when deciding intervention order applications under the *Crimes (Family Violence) Act 1987*.

The *Family Violence Protection Act 2008* therefore contains a number of prescriptive requirements for judicial officers to follow in making decisions in family violence matters, as well as a small number of limitations on conditions that can be placed on orders. This document provides a guide to those prescriptive requirements and limitations.

In relation to decision-making *requirements* – this document deals only with the requirements on the court to consider a *specific* matter, whether or not this is requested by a party. It does *not* address the legislative provisions that prescribe a range of matters that the court must consider in reaching a certain decision, i.e. the criteria for determining conditions of orders (s80), duration of final orders (s97), variation and revocation applications (s100).

## CHILDREN

### 1. Protection from family violence

- a. If a court decides to make a family violence intervention order and the protected person or the respondent is a parent of a child, the court *must*:
  - Enquire whether there are any *Family Law Act* or child protection orders regarding the child - s89
  - Decide whether it will jeopardise the safety of the protected person or child for the child to live with, spend time with or communicate with the respondent - s91
  - If such contact will jeopardise safety, include a condition prohibiting contact – s93.
- b. ***If there are Family Law Act orders***, the court *must*, to the extent of its powers under s68R of the *Family Law Act*, modify the *Family Law Act* order so that it is consistent with the family violence intervention order - s90.
- c. ***If there are no Family Law Act orders*** and the court decides the protected person or child's safety will not be jeopardised by child having contact with respondent, court *must* include, in the family violence intervention order, the following conditions:
  - That arrangements about contact and handover must be in writing or another form stated in the condition. Arrangements about contact can only be in another form if there are *exceptional circumstances* - s92(1)(a), (2)
  - Regarding the way arrangements about contact and handover are to be negotiated to maximise safety of the protected person - s92(1)(b), (3).

- d. **When making a final order only** the court *must* consider if there are any children who are family members of the affected family member (AFM) or respondent who have been subjected to family violence by the respondent. If this is likely to occur again, the court may include the child on the AFM's order (if the need for protection is substantially the same) or otherwise make a separate final order - s77.
- e. **Before varying or revoking a family violence intervention order**, the court *must* consider whether there has been any change in the protection needs of others protected by the family violence intervention order, whether there are other people who have become family members of the respondent or protected person *and* whether there any *Family Law Act* orders in place - ss102-104.
- Court may refuse to vary or revoke the family violence intervention order or may vary it in a different way to that sought if that is necessary to ensure the safety of the other person protected
  - If the original order includes a child, and the child has a continuing need for protection, which is not substantially the same as the other protected person, the court may make a new family violence intervention order for the child and vary the other protected person's order as it sees fit
  - If a child has become a family member since the original order was made, the child has been subjected to family violence and is likely again to be subjected to family violence, the court may, if the child's need for protection is substantially the same as the protected person, vary the order or otherwise make a separate family violence intervention order for the child.
- f. If court makes a family violence intervention order that may be inconsistent with an existing child protection order, the registrar *must* give notice to Department of Human Services - s174.

## 2. Orders against children

- a. Court cannot make a consent or unopposed order against a child unless it is satisfied that the grounds for the order are made out - s78
- b. Court cannot make a final order against a child for longer than 12 months unless there are exceptional circumstances - s98
- c. Cannot exclude a child from the child's residence unless satisfied the child will have appropriate alternative accommodation, care and supervision - s83(3) (and see further criteria that must be considered below).

## 3. Protecting children in court

- a. Court *must* make a direction for **alternative arrangements** for children's evidence, unless not appropriate having regard to witness' wishes, age and maturity, availability of facilities and any other relevant matters. Alternative arrangements include use of closed circuit television, screens and support people but any other alternative arrangements the court considers appropriate can be made - s69

- b. A child, other than an applicant or respondent, *must not* give **evidence** unless the court grants leave - s67. In determining whether leave should be granted, the court *must* have regard to:
- Desirability of protecting child from unnecessary exposure to the court system
  - Harm that could occur to child and family relationships.
- c. A child, other than a respondent, *must not* be **present** in court if the child is an AFM or a family member of the respondent or AFM, unless the court makes an order allowing the child to be present - s150.

Before making such an order, the court *must* consider:

- Desirability of protecting child from unnecessary exposure to court system
  - Harm that could occur to child and family relationships.
- d. A 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. In deciding whether to give leave, court *must* have regard to:
- Desirability of protecting child from unnecessary exposure to court system; and
  - Harm that could occur to child and family relationships.

## CONDITIONS ON ORDERS

### 4. Police applications without AFM consent

Unless AFM is a child, or is cognitively impaired, or the AFM has a guardian and the guardian consents:

- a. Police seeking final orders without the consent of the AFM can only obtain a family violence intervention order with conditions – s75:
- Prohibiting family violence
  - Suspending or revoking weapons approvals/exemptions or firearms authorities
  - Prohibiting the respondent from causing another person to engage in conduct prohibited by the order.
- b. Where police are seeking variations or extensions without AFM consent (whether the original application was a police application or was made by the AFM), orders – s110:
- Can only be varied or extended to include conditions prohibiting family violence, suspending or revoking firearms or weapons permits and causing another person to engage in conduct prohibited by the order
  - Cannot be varied to remove conditions.

## 5. Exclusion conditions

- a. If the court decides to make a family violence intervention order, it *must* consider imposing a condition excluding the respondent from a residence shared (or proposed to be shared) with the AFM ('an exclusion condition'). The Act prescribes a non-exhaustive list of criteria that focus on avoiding disruption to the AFM and children for determining if an exclusion condition is appropriate - s82(2)
- b. If the court decides that an exclusion condition is appropriate against an adult respondent *and* the protected person does not oppose – the court *must* exclude - s82(4)
- c. If the respondent is a child, other factors *must* be considered in addition, and an exclusion condition can only be made if court is satisfied that child will have appropriate alternative accommodation, care and supervision - s83(2)-(3)
- d. If the respondent is an Aboriginal or Torres Strait Islander child, other criteria *must* be considered in determining if the child will have appropriate alternative accommodation, care and supervision - s83(4)
- e. If child respondent is excluded, the court *must* notify the Department of Human Services –s83(5)
- f. If exclusion condition is made, the court *must* ask for the respondent's address and advise that the police may seek information to locate the respondent - s85.

## 6. Firearms and weapons

- a. If the court intends to make a family violence intervention order (whether interim or final), the court *must* inquire whether the respondent has firearms authority or weapons exemption or approval – s94
- b. Court then has discretion to suspend such authority etc if making an interim order and to cancel or revoke a firearms authority or weapons exemption or approval if making a final order – s95.

## EVIDENCE

### 7. Cross-examination of protected witnesses

- a. 'Protected witnesses' *must not* be personally cross-examined by the respondent - s70(3) - unless:
  - The protected witness is an adult, the protected witness consents *and* the court decides it would not be harmful to the protected witness
  - If protected witness is cognitively impaired, the court is satisfied that he or she understands the effect of consent and would be competent to give evidence.

Protected witnesses are - s70(1)-(2):

- The AFM or protected person
  - Any child
  - Any family member of a party
  - Any person declared to be a protected witness.
- b. If a respondent is unrepresented, the court *must* -s70(4):
- Inform the respondent that he or she cannot personally cross-examine a protected witness
  - Ask whether the respondent has sought legal representation for the cross-examination
  - If satisfied that the respondent has not had a reasonable opportunity to obtain legal representation, adjourn the matter.
- c. If the respondent does not get legal representation after a reasonable opportunity, the court *must* order Victoria Legal Aid to offer legal 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
- d. If the respondent refuses representation or does not co-operate, the court *must* warn the respondent that if he or she is not represented and cannot cross-examine the protected person about events, the respondent and his or her witnesses may not give evidence about those events - s71.
- e. If the *applicant* is a protected witness and not a police officer and the respondent is legally represented, the court *must* order Victoria Legal Aid to provide legal representation for the applicant - s72.

## **PROCEDURAL ISSUES**

### **8. Explanation of Orders**

- a. Interim order – the registrar *must* give written explanation to the respondent and the AFM of matters in s57. If the party is before the court, this *must* be accompanied by a clear oral explanation by the registrar.
- b. Final order – if the respondent or the AFM are before the court, the judicial officer *must* give a clear oral explanation of matters in s96 as well as a written notice containing the same information.

### **9. Final order contest at mention date**

The court cannot hear contest about final order on a mention date unless parties have had opportunity for advice, they consent *and* it is fair and just - s61.