

FAMILY VIOLENCE PROTECTION AMENDMENT ACT 2017 - OVERVIEW

This overview is a guide to commencement of most of the remaining provisions of the *Family Violence Protection Amendment Act 2017* ('the Amending Act'), which commenced on Thursday 29 March 2018.

FOUR KEY CHANGES

Four changes will have the most direct impact on courts.

- The importance of the court explaining the order - The court must now explain the effect of an order, whether it is an interim order or a final order. If the respondent is an adult, then an in-court explanation removes the need for the order to be served. An in-court explanation allows the order to be enforced from the moment it is made.
- 'Lowering the bar' on when a court will make an order to protect a child who is not an applicant - The reforms do this by requiring a court to make an order protecting a child who has been subject to family violence without requiring the court to predict that the child will be subject to family violence again.
- Courts are given more flexible powers to order alternative service where the respondent is an adult, including service by post or service by email.
- Children and cognitively impaired witnesses will be able to give evidence by VARE in proceedings for offences that involve family violence.

See over page for detail on these four changes, along with other changes introduced by the Amending Act.

Explanations of family violence intervention orders

Previously, the Act required a registrar to give the applicant and respondent a written explanation of certain matters when the court made an *interim* order.¹ In contrast, the magistrate was required to explain final orders orally, as well as giving the parties a written explanation.²

The magistrate must now explain the prescribed matters when making both interim and final orders. The amendments also introduce two new matters that the magistrate must explain when making a final order: the interaction between the order and any family law or child protection orders; and, if the court has varied, suspended, revoked or revived a family law order, the purpose, terms and effect of the variation or suspension.³

The amendments introduce separate provisions regarding explanations for child or adult respondents.⁴ These two regimes largely overlap, except for two matters. First, the court must *give* the written explanation to an adult respondent who is present when the court makes the order⁵ but must *serve* the written explanation on a child respondent, even if the child is present in court.⁶ Second, if the adult respondent receives the oral explanation in court, then it is not necessary to serve the order on the respondent. Instead, it is sufficient to *give* a copy of the order to the respondent.⁷

Contravention can now be proved where an adult respondent has received the oral explanation, even if the adult respondent has not been served with a copy of the order. However, child respondents must be served with a copy of the order before the order becomes enforceable.⁸

Transitional provisions

The amendments regarding explanations and service of orders apply both to proceedings commenced after 29 March 2018, and proceedings that have been commenced but not determined before 29 March 2018. The amendments regarding contravention offences do not apply to contraventions that occurred before 29 March 2018.⁹

¹ *Family Violence Protection Act 2008* s.57 (as in force before 29 March 2018).

² *Family Violence Protection Act 2008* s.96 (as in force before 29 March 2018).

³ *Family Violence Protection Act 2008* ss.57, 96 (as amended).

⁴ *Family Violence Protection Act 2008* ss.57, 57A, 96, 96A (as amended).

⁵ *Family Violence Protection Act 2008* ss.57(2A), 96(3) (as amended).

⁶ *Family Violence Protection Act 2008* ss.57A(4), 96A(4) (as amended).

⁷ *Family Violence Protection Act 2008* s.201 (as amended).

⁸ *Family Violence Protection Act 2008* ss.123, 123A (as amended).

⁹ *Family Violence Protection Act 2008* s.229A (as amended).

Orders protecting children

The *Family Violence Protection Act 2008* ('the Act') has always required magistrates to consider whether a child of the affected family member ('a secondary child') was at risk of family violence when deciding applications for intervention orders.¹⁰

Under the amendments, there is now an obligation to make an order to protect a secondary child who has been subjected to family violence unless the court is satisfied that an order is not necessary.¹¹

These new provisions mean that courts apply different tests when determining whether to make an order in relation to an affected family member or a secondary child. The court may make an order to protect an affected family member if satisfied that the respondent has committed family violence against the person and is likely to do so again.

The test for a secondary child is only that the child has been subjected to family violence by the respondent. The court may decline to make an order if satisfied that an order is not necessary to protect the secondary child from family violence. This shifts the burden of proof in relation to predicting future conduct away from the secondary child.

In addition, the court can make an order in relation to a secondary child on its own motion even if the court does not make an order in relation to the affected family member.

The test for interim own motion orders is that the child has been subjected to family violence committed by the respondent and an interim order is necessary to protect the child pending a final decision about the application. This is more onerous than the standard test for secondary children (described above) or the test for interim orders in relation to adults, which does not require satisfaction that the affected family member has been subjected to family violence. If a final order or an associated order is made by consent, and the consent does not include a secondary child who the respondent committed family violence against, then the court must not include the secondary child in the adult's order. Instead, the court must make a separate order to protect the secondary child, subject to the exception.¹²

Transitional provisions

The Amendments introduced by Division 1 of Part 2 of the Amending Act apply to proceedings commenced on or after 29 March 2018, and to existing proceedings that have not been determined by 29 March 2018.¹³

¹⁰ See *Family Violence Protection Act 2008* ss.53, 77 (as in force before 29 March 2018).

¹¹ *Family Violence Protection Act 2008* ss.53AA, 77, 77A (as amended).

¹² *Family Violence Protection Act 2008* ss.77, 77A (as amended)

¹³ *Family Violence Protection Act 2008* s.228A (as amended).

Alternative service

A court may make an order for alternative service as a substitute for personal service. A court may only order alternative service if satisfied that it is likely to bring the document to the attention of the person served, will not pose an unacceptable risk to the safety of the affected family member, protected person or any other person and it is appropriate to do so in the circumstances.¹⁴

As part of the amendments to facilitate alternative service, a police officer issuing a family violence safety notice and a court that makes a residence exclusion condition, must advise The respondent must be advised that a police officer may seek information from public sector organisations to facilitate both personal service and alternative service.¹⁵

Orders for alternative service can be made on application or on the court's own motion.¹⁶

Alternative service is not available for:

- (a) A family violence safety notice;
- (b) Any document that, under the Act, must be served on a person who is a child.¹⁷

Transitional provisions

The amendments in relation to alternative service only apply to proceedings for an intervention order commenced, or an appeal filed, on or after 29 March 2018.¹⁸

¹⁴ *Family Violence Protection Act 2008* s.202A(1) (as amended).

¹⁵ *Family Violence Protection Act 2008* ss.33, 85 (as amended).

¹⁶ *Family Violence Protection Act 2008* s.202A (as amended).

¹⁷ *Family Violence Protection Act 2008* s.202 (as amended).

¹⁸ *Family Violence Protection Act 2008* s.231 (as amended).

Availability of VARE for family violence offences

A VARE can now be used “where the conduct constituting the offence consists of family violence within the meaning of the *Family Violence Protection Act 2008*”.

This will require prosecutors and the court to apply the definition of family violence under the Act to criminal proceedings to characterise a defendant’s alleged conduct and determine whether a child or cognitively impaired witness may give evidence by VARE.

Transitional provisions

The expanded availability of VAREs only applies to proceedings commenced after 29 March 2018.¹⁹ Under the *Criminal Procedure Act 2009*, a proceeding commences when the charge-sheet is filed.²⁰

Other miscellaneous changes

Strike out of appeal for failure to appear

The County Court and the Supreme Court now have a power to strike out an appeal where the appellant fails to appear at a mention date or at the time listed for the hearing of the appeal. The appellate court can reinstate an appeal if the failure to appear was not due to fault or neglect on the appellant’s part.²¹

Counselling orders

The CEO of Court Services Victoria is now responsible for approving counselling providers, rather than the Secretary to the Department of Justice and Regulation.²² In addition, court staff who assess a person’s eligibility are renamed “counselling assessors”.²³

Transitional provisions

The new strike-out provisions apply to appeals filed on or after 29 March 2018.²⁴

Any existing counselling approved by the Secretary to the Department of Justice and Regulation is taken to be approved counselling as if it had been approved by the Chief Executive Officer of Court Services Victoria.²⁵

¹⁹ *Criminal Procedure Act 2009* s.449 (as amended).

²⁰ *Criminal Procedure Act 2009* s.5. A proceeding is also commenced when the Director of Public Prosecutions files a direct indictment, or a court exercises the power under s.415 to direct that a person be tried for perjury.

²¹ *Family Violence Protection Act 2008* ss.118A, 118B (as amended).

²² *Family Violence Protection Act 2008* s.133 (as amended).

²³ *Family Violence Protection Act 2008* s.129 (as amended).

²⁴ *Family Violence Protection Act 2008* s.229 (as amended).

²⁵ *Family Violence Protection Act 2008* s.230 (as amended).