Unacceptable risk cases and the intersection of family and criminal law

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Introduction

This paper was first written for the NSW Regional Bar Conference and aimed at an audience of legal practitioners primarily working in family and criminal law. It discusses the unique features of "unacceptable risk cases" which involve serious allegations of risk of abuse, family violence or other harm concerning children and their parents. These include, for example, cases where a parent has been accused of sexual abuse of their child or of serious physical assaults of the other parent.

Part 1 of the paper aims to provide an understanding of the key principles relevant to family law parenting proceedings both generally but also specifically where there are allegations raising the prospect of risk to children.

Part 2 contains a practical discussion of some of the specific forensic and evidentiary considerations arising in unacceptable risk cases with a particular focus where there are concurrent family and criminal proceedings.

Part 1: Family Law Parenting Cases

The following is a summary of some of the key provisions relevant to decision-making by courts which make family law parenting decisions. It is necessarily incomplete but aims to give a general understanding of the usual legislative decision-making pathway and the specific way in allegations of abuse and family violence and dealt with. It is worth noting that the Federal Government has introduced a Bill to Parliament incorporating some significant amendments to the *Family Law Act 1975* (Cth) ("FLA") which, if ultimately enacted, will affect what is set out below.

Legislative Decision-making Pathway

All disputes between parents as to the appropriate parenting decisions to be made and living arrangements for children are determined pursuant to the FLA. Jurisdiction for deciding parenting disputes is primarily vested in the new Federal Circuit & Family Court of Australia (for ease referred to as "Family Court"), although can be exercised to a limited extent in the Local Family Court of NSW ("Local Court").

Parenting cases are largely governed by Part 7 of the FLA and follow a legislative decision-making pathway that involves consideration of objects and principles, presumptions and specific factors in that Part in order to arrive at parenting orders which the Family Court considers, in the exercise of its discretion, are in the best interests of the child.

The objects of Part 7 FLA are to ensure that the best interests of the child are met by specified means which include "*protecting children from physical or psychological harm from being subjected to or exposed to, abuse, neglect or family violence*"[1].

The Family Court must make such parenting order as it thinks proper[2], subject to s61DA regarding parental responsibility[3].

There is a legislative presumption in s61DA FLA that parents having equal shared parental responsibility is in the best interests of a child[4]. Importantly, this presumption can be rebutted where there is evidence showing such an order is not in the best interests of a child or where there are reasonable grounds to believe that a parent of a child has engaged in "*abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family*" or "*family violence*"[5].

When deciding whether or not to make a particular parenting order, s60CA FLA mandates that the paramount consideration for the Family Court is the best interests of the child.

The best interests of a child is to be determined by analysis of the primary and additional considerations set out in s60CC FLA.
The primary considerations[6] are:

(a) "*The benefit to the child in having a meaningful relationship with both of the child's parents*"; and

(b) "*The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence*".

Of these primary considerations, the Family Court is required to give greater weight to (b)[7].

Section 60CC(3) FLA contains a number of relevant additional considerations including any views expressed by the child, the nature of the relationship between the child and each parent, the past involvement of each parent with the child, the likely effect of any changes, the capacity of each parent to provide for the intellectual and emotional needs of the child, any family violence involving the child or a member of the child's family.

Section 60CG FLA requires the Family Court when making orders to ensure that the orders are consistent with any family violence order and does not expose a person to an "*unacceptable*

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[1] Section 60B(1)(b) *Family Law Act 1975* (Cth).
[2] Section 65D *Family Law Act 1975* (Cth).
[3] Section 65D *Family Law Act 1975* (Cth) is also subject to the Family Court being required to consider any parenting plan that the parties have entered into with respect to the child pursuant to s65DAB *Family Law Act 1975*.
[4] It is noted that this section, which is presently under consideration for amendment by the Federal Attorney General, is about decision-making responsibility, not living arrangements.
[5] Section 61DA(2)(b) *Family Law Act 1975* (Cth).
[6] Section 60CC(2) *Family Law Act 1975* (Cth).
[7] Section 60CC(2A) *Family Law Act 1975* (Cth).

risk of family violence" to the extent it is possible consistent with the child's best interests being the paramount consideration.

"Abuse" of a child is defined in s4 FLA as meaning one or more of the following:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

Family violence is defined in s4AB FLA as "*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful*". Examples of behaviour that can constitute family violence are specifically included in this section as follows:

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Standard of Proof

Family law proceedings are civil not criminal proceedings so section 140 *Evidence Act 1995* (Cth) ("EA") applies in parenting matters. This section provides:

> *(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
>
> *(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
>
> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject-matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged.*

The way in which the standard of proof is applied in unacceptable risk cases is discussed further below.

Unacceptable Risk Cases

Throughout the many legislative sections that must be traversed in determining the best interests of child in parenting proceedings, there is only one mention in the FLA of the words "unacceptable risk" (in s60CG FLA).

Those words came to have great significance after the 1988 High Court case of *M v M* (1998) HCA 68 ("M & M"). That case involved allegations that a father had sexually abused his daughter. The trial judge held that he could not make a finding that the father had done so, but he had a "*lingering doubt*" and so ordered that the child have no further contact with her father. The Full Family Court upheld the trial judge's decision. The High Court also dismissed the appeal but in doing so stated "*the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an* ***unacceptable risk of sexual abuse***"[8].

Since that time, the test in M & M has come to be applied not just to allegations of sexual abuse but any case in which there are allegations that a child is exposed to risk of physical or psychological or other harm[9]. Thus, over the years an "unacceptable risk" case has come to be a colloquial term used to refer to parenting disputes in which serious allegations are made of a risk of abuse, family violence or other harm to a child in the care of (usually[10]) one of their parents.

[8] *M & M* (1998) HCA 68 at par 25 (emphasis added).
[9] *A & A* [1998] FamCA 24.
[10] For the purpose of this paper, I will refer only to parents but it is important to know that the principles are the same whoever the child's carer is, provided that these issues are being decided in a court exercising jurisdiction pursuant to the FLA.

Unacceptable risk cases often include allegations of child abuse (sexual or physical) or exposure to family violence between parents. In addition, there are cases in which the child is alleged to have been psychologically abused (i.e. where child has become aligned with one parent and/or estranged from another parent) or are at risk of harm arising from parental substance abuse or mental illness or neglect. Often multiple risks are raised in any one case.

Although M & M remained authoritative, it was a concise decision and successive judgments of the Full Family Court demonstrated sometimes inconsistent approaches towards unacceptable risk cases. In 2022, an appeal was listed before a five-judge bench in *Isles & Nelissen* [2022] FedCFamC1A 97 ("Isles & Nelissen") which produced a clear and authoritative judgment of the effect of the decision in M & M and how unacceptable risk cases are to be determined. Special leave to appeal to the High Family Court was sought but refused.

Since Isles & Nelissen, it is now clear:

1. The Family Court distinguishes proof of alleged historical conduct from the risk that there may be conduct of that nature in the future.

   In Isles & Nelissen it was explained: "*…the High Court of Australia… emphasised the distinction between two very different things: on the one hand, proving alleged sexual abuse according to the civil standard of proof and, on the other, establishing risk of the feared sexual abuse occurring in the future: (M & M (1988) 166 CLR 69)*"[11].

2. The Family Court cannot make a positive finding that an allegation of serious historical conduct is true unless satisfied to the requisite standard of proof in s140 EA.

   By way of example, a positive finding that an accused parent has sexually abused their child or engaged in severe family violence, could result in the relationship between a child and the accused parent being severely curtailed or even terminated by the Family Court. Accordingly, the standard of proof the Family Court is required to apply before making a positive finding is towards the strictest end of the spectrum. In this context the Family Court has held that "*[i]nexact proofs, indefinite testimony, or indirect inferences are insufficient to ground a finding of abuse*"[12].

3. The Family Court is not required to make a finding about alleged historical conduct as determination of that issue is always subservient to the paramount consideration as to what is in the best interests of a child.

   In M & M, the High Court said *"… it is a mistake to think that the Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal*

[11] *Isles & Nelissen* [2022] FedCFamC1A 97 at par 1.
[12] *WK & SR* (1997) 22 Fam LR 592 at par 47.

offence… The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child."[13]

4. Even if no finding can be made about alleged historical conduct, the Family Court must determine whether or not there is an unacceptable risk of harm to the child in the future.

   This is a predictive exercise in which the Family Court evaluates the nature of the alleged risk, the magnitude of the effect of the risk on the child and the likelihood of the risk occurring in the future.

5. When the Family Court evaluates the future risk of harm to a child and whether it meets the threshold of being unacceptable, the standard of proof in the EA does not apply[14].

   Isles & Nelissen gives a useful illustration:
   "*…a mathematical hypothetical will nevertheless illustrate how findings of "unacceptable risk" cannot be measured by the civil standard of proof. Imagine a child will be minded by one of three randomly allocated carers. Assume one of the carers would sexually abuse the child, but the other two would not, meaning the child stands a 33.33 per cent chance of being sexually abused if left in care. No sensible adult would take the risk of leaving the child in care because, even though the prospect of sexual abuse is only possible but not probable, the risk is still too high to tolerate. In other words, it is unacceptable. If parents (and courts) were to instead only react to risks which are probabilities then, in that example, the child would still be left in care unless shown he or she was susceptible to sexual abuse by two of the three carers and the risk was then rated at 66.66 per cent*."[15]

   Thus, a finding that there is a <u>possibility</u> that a child was sexually abused by an accused parent may be enough for the Family Court to decide that there is an unacceptable risk of harm to the child. Conversely, a high probability of a child being slightly harmed, such as by way of the use of physical discipline, is not likely to be unacceptable.

<u>Admissibility of Evidence</u>

It is well known that the rules of evidence don't apply in parenting proceedings but what that really means in practice is not always well understood.

Section 69ZT FLA excludes specific sections of the EA from parenting proceedings[16] unless the Family Court is satisfied the circumstances are <u>exceptional</u> and decides to apply some or all of them to an issue or issues in the proceedings[17].

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[13] *M & M* (1998) HCA 68 at par 20.
[14] *Isles & Nelissen* [2022] FedCFamC1A 97 at par 85.
[15] *Isles & Nelissen* [2022] FedCFamC1A 97 at par 86.
[16] See section 69ZM *Family Law Act 1975* (Cth) for specific details of how parenting proceedings are "child related proceedings".
[17] Section 69ZT(3) *Family Law Act 1975* (Cth). *Maluka & Maluka* [2011] FamCAFC 72 at pars 120-121.

The excluded sections of the EA are:

- *Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;*
- *Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);*
- *Parts 3.2 to 3.8 (which deal with* ***hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character****).*

There is an important coverall section dealing with the effect of having excluded the rules of evidence about admissibility in particular in s69ZT(2) FLA: "*the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying*".

Three things are important to note.

1. Where a complainant parent seeks a positive finding by the Family Court that the accused parent has engaged in criminal conduct at trial, the Family Court can, and often does, apply the excluded sections of the EA at least to that issue[18].
2. Even where the EA is applied by the Family Court when making a finding about whether particular historical conduct occurred, hearsay evidence of relevant representations made by a child will still be admissible[19]. This is necessary because parties are prohibited from having a child under 18 years swear an affidavit or calling them as a witness in family law proceedings so no direct evidence is possible[20].
3. When the Family Court turns its attention from making findings about past conduct to the future evaluative question of whether a child is at unacceptable risk of harm, the admissibility rules of evidence will no longer apply[21]. In this respect, "*[a]ny evidence which is relevant and influential in that predictive enquiry is admissible and should be taken into account…*"[22].

With these things in mind, practitioners for accused and complainant parents alike in unacceptable risk cases should always endeavour to gather and adduce relevant evidence which is to the greatest extent possible admissible pursuant to the rules of evidence in the EA.

This is critical if the Family Court is being asked to make a positive finding about serious historical conduct because there is a real chance at trial the Family Court will apply the excluded rules of the EA. This is highly desirable in any case because each party will ultimately want the Family Court to give weight to their evidence. Most arguments about the

[18] *Amador & Amador* [2009] FamCAFC 196 at par 93.
[19] Section 69ZV *Family Law Act 1975* (Cth).
[20] Section 100B *Family Law Act 1975* (Cth).
[21] *Isles & Nelissen* [2022] FedCFamC1A 97 at par 105.
[22] *Isles & Nelissen* [2022] FedCFamC1A 97 at par 105.

"weight" that should be attributed to evidence are grounded in the principles of reliability and fairness which underpin the EA admissibility rules. Where the probative value of evidence is low, the opposing party may convince the Court to exclude it pursuant to s135 EA.

For this reason, evidence in chief (which in family law is always given in the form of an affidavit) about serious allegations needs to contain detailed particulars about the event and about how the event impacted the child. This is key where there is little corroborating or contemporaneous evidence supporting allegations of abuse or family violence. Consider the weight that might be given to the following evidence in chief:

> "*In 2021, I recall an occasion when the father tried to choke me in front of the child. I thought I was going to die. We were both terrified and we fled the house*".
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> OR
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> "*I recall an occasion when the father was violent to me in 2021. I believe it was winter as it was cold and it was a weekend. In the morning that day, I observed the father to be moody. He didn't speak to me at all for about an hour.*
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> *I recall at one point I walked after him as he was going into the bathroom and asked him if he was okay. He didn't respond and slammed the bathroom door in my face. I was so close I could feel the vibrations as the door hit the doorframe with force. In that moment I felt shocked and scared about what he might do next.*
>
> *The child, who was about 3 at the time, was standing about a metre away from me at the time this occurred. I saw her startle at the sound of the door slamming and saw her look at me with a confused and scared expression on her face.*
>
> *I turned towards the child to reassure her when the father came out of the bathroom. Before I had time to say or do anything he grabbed me with his right hand tight around my throat and pushed me back against wall in the hallway. He was shouting at me but I don't now recall what he was saying. I saw his face was red and enraged and his veins were popping out on his forehead. I could not breathe and struggled to get his hand away from my neck. I recall scratching at his face and arms with my fingernails to try to get him to stop. I thought was going to die.*
>
> *While this was happening, I recall hearing the child crying and screaming "no daddy" and "mummy" repeatedly.*
>
> *After what felt like ages, the father let go of my throat and went to our bedroom. I picked up the child and we both sobbed on the floor of the hallway until I was able to calm us both down.*
>
> *I then took the child and left the home and drove to my mother's house. I did not report the incident to Police because I was scared about having to give evidence against the father*".

Having regard to the first example, it would be difficult for the Family Court to make a positive finding about family violence if that were the only evidence. It would even be

difficult for the Family Court to find that there is an appreciable risk that the mother and child are likely to be exposed to family violence in the future. To do this, the Family Court needs to understand things like the severity of the alleged violent episode which is clearly demonstrated in the second example. Giving a detailed description of not only the incident but also the context allows findings as to whether it was likely a heated argument that became physical or whether it was part of a pattern of controlling and coercive behaviour or whether it was a genuine attempt to kill the mother. The risk of potential harm to the mother and the child is likely to differ depending on which of these findings can be made. The risk of psychological harm to a child of being exposed to heated arguments between their parents might be reduced and thus acceptable if orders are made, for example, for the parents not to come into contact. The risk of psychological harm to a child if their mother was killed by their father is severe and might not be capable of being mitigated and thus unacceptable.

Evidence from witnesses for parents should be adduced in the form of affidavits and similarly give detailed particulars about relevant matters within their direct first-hand knowledge. "Cheersquad" affidavits (or worse, letters) by grandparents, employers or friends which simply extoll a parent's wonderful parenting and perfect relationship with the child can be expected to hold virtually no weight in the Family Court. Considering the above example, however, the complainant's mother could give firsthand evidence in an affidavit of her daughter arriving at her home and what she observed about the mother and child's physical and emotional state at the time lending additional weight and corroboration to the mother's account.

Opinion evidence from non-court appointed purported experts (support workers/ psychologists) should be adduced by way of affidavits provided they conform with the Family Court's rules about adducing expert evidence[23], the rules about admissibility of expert evidence in the EA[24] and relevant caselaw[25]. It is common, even when the admissibility rules of the EA don't apply, for the Family Court to refuse to admit into evidence unsworn "letters" or "reports" containing opinion from such third parties annexed to a parent's affidavit unless the author is available for cross-examination. Seeking to rely upon opinions given by experts are discussed further below.

Part 2: Forensic and Evidentiary Considerations in Unacceptable Risk Cases

This is not intended to be a complete exposition of the forensic issues that might arise in these cases, but rather a discussion of some important things to be aware of when acting for accused and complainant parents alike.

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[23] Part 7 of *Federal Circuit & Family Court of Australia (Family Law) Rules* 2021 (Cth) (hereafter "*FCFCOA (Family Law) Rules* 2021 (Cth)).
[24] Part 3.3 *Evidence Act 1995* (Cth).
[25] I.e. in *TWN & PAQ* [2005] FamCA 677 the Full Family Court found that once the Family Court is satisfied as to relevance, expertise and opinions being the result of application of expertise, then the general rules as to admissibility will be satisfied. That, however, does not prevent the Family Court from considering whether the underlying facts are proven and expert's opinions as they are tested during the trial and determining, by reference to the qualities required by *Makita*, the weight to be given to the evidence.

Communication and Contact between Parents and/or between Parents and Children

There are a significant number of parenting proceedings which are commenced after an accused parent has been charged with criminal offences (accompanied by bail conditions) or after Police have applied for an Apprehended Domestic Violence Order ("ADVO") protecting a complainant parent and/or child. It is very common to see bail conditions or provisional or interim ADVOs which prohibit contact between parents or between an accused and their child. The effect of such prohibitions can be roadblocks to parents communicating about parenting issues and can produce lengthy breaks in contact between an accused and their child. The latter in particular can have significant consequences in parenting proceedings particularly if the child is very young or if there has historically been high conflict between the parents.

It is important at an early stage to ensure that both parents have family law advice. Both parents need to understand the processes for resolving parenting disputes – which usually includes mediation first and if there is no agreement, then court proceedings. For the accused, they will need to give early consideration to what things they may need to do to address any questions of risk in order to be able to resume spending time and communicating with their child as early as possible. For the complainant, they will need to understand their obligations with respect to making decisions about their child and promoting child spending time and communicating with the accused where that can be done safely and the ways in which that can be achieved.

The importance of ADVOs to promote safety is without question. It is also true that, at times, ADVOs are sought for advantage in family law disputes as a way of controlling access to children or property. It is common for an accused parent to allege that a complainant parent does not support the child's relationship with the other parent and that is the reason for the complaints resulting in ADVOs or criminal charges. Thus, practitioners acting for a complainant should be mindful about the potential for any complicity in delay to become relevant at trial.

It is also important to address any legal impediments to contact and communication. Provisional or interim ADVOs (particularly when made *ex-parte*) often exclude all contact between parents or between an accused and their child. The Local Court is required when making an interim ADVO to consider not just the safety of the PINOP but whether contact between the PINOP or Defendant and child is relevant[26]. An application to vary the ADVO can be made to include (in NSW) condition 6 which allows contact only through a solicitor, pursuant to an agreement in writing or an order of the court, or at mediation. This provides all the protections of a no-contact ADVO but allows the accused parent (through their solicitor) to invite the complainant to mediation and to propose even a temporary agreement about communicating and spending time with child. If there are safety concerns for the child and supervised contact is agreed, condition 6 also permits a professional contact service to facilitate

[26] Section 42(2), (3) *Crimes (Domestic and Personal Violence) Act* 2007 (NSW).

contact and communication between the accused and the child pending mediation and/or the court making parenting orders.

Making the decision about whether or not to defend charges or oppose an ADVO

The decision about whether or not an accused should admit or defend concurrent criminal charges and/or oppose the making of an interim or final ADVO should be made with the parenting proceedings directly in mind.

If an ADVO is made (whether interim or final), the Family Court is required to consider any inferences that can be drawn from the order taking into account[27]:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in the proceedings for the order;

(iv) any findings made by the court in, or in the proceedings for, the order; and

(v) any other relevant matter".

There is likely to be a real difference in the inferences drawn by the Family Court if an ADVO is made by consent and without admissions to one where there has been a contested hearing and findings of fact made about allegations of family violence between the parents.

Pleading guilty to criminal charges is likely to result in any agreed facts in the criminal proceeding being accepted as admitted facts by the Family Court in the parenting proceedings[28]. Care should therefore be taken to ensure that any agreed facts are wholly acceptable as any attempt to traverse them later in parenting proceedings could be rejected or result in adverse credit findings. A copy of the agreed facts actually tendered in Court should be retained, as this will not always available from subpoena or the Local Court file.

The Family Court may delay final determination of parenting matters until after the trial of serious criminal charges concerning a child or a complainant parent (although this may conflict with the time standards that the Family Court aims to meet now[29]). There are often good reasons for such delay, including where it is necessary to preserve the accused's right to silence in the criminal proceedings. Delay, however, is a risk in itself and may have an adverse impact upon the accused's prospects of success in parenting proceedings and relationship with the child, particularly if the child is young and they are spending no time or limited supervised time with the accused pending resolution of the criminal charges. Lengthy breaks in contact with a young child may make it harder and longer for an accused parent to re-establish a

[27] Section 60CC(3)(k) *Family Law Act 1975*.
[28] In addition, facts proven after a contested facts hearing by a court exercising criminal jurisdiction could be admitted by the Family Court as proven facts in the parenting proceedings pursuant to s69ZX(3) *Family Law Act 1975*.
[29] See section 5.3 in the FCFCOA *Central Practice Direction – Family Law Case Management*.

relationship with them in the future. For older children, exposure to negative attitudes from a complainant parent may adversely impact their relationship with an accused parent even if it is ultimately found that that they are not a risk. It is important to turn your mind to the balancing of these risks to ensure that parent-child relationships are not being unduly damaged for a perceived forensic advantage.

Consider how any evidence and/or judgments from a criminal trial may be used in parenting proceedings. In parenting proceedings, the Family Court has the discretion to:

- receive into evidence the transcript of evidence in another court and draw any conclusions of fact that it thinks proper[30]; and
- adopt any finding, decision or judgment of another court[31].

This can be an advantage or disadvantage depending upon the perspective of your client.

Findings of guilt by a jury and findings on sentencing are almost certain to be adopted by the Family Court. Even if the evidence adduced at a criminal trial is insufficient to satisfy the jury beyond a reasonable doubt that the accused engaged in child abuse or criminal violence towards a complainant parent it could nonetheless be enough to satisfy the Family Court on the balance of probabilities that the accused parent engaged in abuse or family violence as defined in the FLA or poses an unacceptable risk of doing so.

Evidence in parenting proceedings typically covers a much broader timeframe and range of issues than are relevant in criminal proceedings. This means, for any given issue, there is likely to be a significant volume of sworn and unsworn evidence (often containing multiple versions of events) from affidavits, Police records, Police body worn footage, child welfare records, counselling records and expert reports, which can be helpful in cross-examination. Thus, it is possible that adverse outcomes/findings might be made by a criminal court which might not be made in parenting proceedings.

A criminal judge (where there is no jury) might not only find an accused not-guilty but be moved by the evidence to make findings about the complainant's credibility and motive and, in the right case, that they would not be satisfied of the allegations even if the test was on the balance of probabilities. Obtaining a costs order after successfully defending charges in a jury trial could also produce helpful findings by a judge about the strength of the case against the accused and issues of credibility of the complainant.

<u>Obtaining psychological/psychiatric reports in criminal proceedings</u>

Psychological or psychiatric assessments of an accused parent, for the purpose of a fitness plea or for use in sentencing, are compellable in parenting proceedings. There is a strict duty of disclosure in family law and such reports must be provided in a timely manner to the

[30] Section 69ZX(3)(b) *Family Law Act 1975*.
[31] Section 69ZX(3)(a) *Family Law Act 1975*.

complainant parent and the Family Court. A report which highlights significant mental unwellness is undoubtedly relevant to the Family Court when it is making decisions about parenting capacity and risk to the child. Thought should be given to the choice of expert and the instructions with parenting proceedings in mind.

The Local Family Court's power in relation to parenting orders

If there are parenting orders already in place and an application is made for an interim ADVO, the parties must inform the Local Court of the parenting orders[32]. When making or varying an ADVO, if the Local Court has material that was not before the Family Court, the Local Court has power to "*revive, vary, discharge or suspend*" an existing parenting order that has the effect that a child "*spends time with a parent*"[33]. Exercise of this power is often undesirable as the Local Court has none of the court expert services available in the Family Court and increased regional circuits of the Family Court means that the Local Court rarely hears parenting disputes. The more appropriate use of this power in unacceptable risk cases would include the following:

1. Where there is an allegation of child abuse – to suspend existing parenting orders only until the matter can be considered by the Family Court.
2. Where there are allegations of family violence between the parents – to vary the orders to, for example, provide alternative changeover arrangements so that the parents do not have to have face to face contact with each other (such as a supervised changeover service) but there is otherwise no disruption to the accused parent's ability to spend time with the children.

The involvement of children

Particular attention and care needs to be taken about the way in which children can be adversely impacted by criminal investigations and proceedings and how that may impact parenting proceedings.

In cases where investigations and/or charges are laid about child abuse, complainant parents are well advised to be extremely cautious as to how they and others speak with the child about the alleged conduct of the accused parent prior to the child being interviewed by child abuse specialists within the Police or a child welfare agency. It is well known in social science that even young child can give reliable narratives of abuse. There are, however, many ways in which a child's accounts of abuse can become contaminated and may ultimately be viewed as unreliable as a result of the well-meaning but misguided efforts of parents, doctors, psychologists and family members[34]. This can include:

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[32] Section 42(1) *Crimes (Domestic and Personal Violence) Act* 2007 (NSW).
[33] Section 68R(1) *Family Law Act 1975*.
[34] An example of a case which involved such concerns is *Warnett & Amerson (No. 2)* [2020] FamCAFC 260. In that case the trial judge found that the mother had attempted to induce disclosures, the child had likely embellished some of her disclosures to tell her mother what she wanted to hear and that there were inconsistencies and discrepancies

- Complainant parents or family members who act on their suspicion of inappropriate conduct by the accused parent by asking the child leading questions suggestive of abuse having occurred;
- The child being engaged in repeated conversations or discussions to elicit further details about alleged abuse;
- Complainant parents or family members discussing the alleged abuse in the presence or hearing of the child;
- The child being encouraged to repeat allegations of abuse to persons other than investigating child abuse specialists; and
- The child speaking about the abuse with untrained professionals who believe from discussions with the complainant parent that abuse has occurred.

Avoiding such actions means that the resulting evidence of complaint by the child will be superior and more protected from an attack on reliability in whichever jurisdiction it is used.

Research shows that being directly involved in parental conflict and disputes poses a significant risk of psychological harm to children. This risk is ever present in unacceptable risk cases. Practitioners should be mindful of this risk and, where possible, actively seek to minimise the effect on the child of any criminal proceedings.

From the perspective of complainant parents, they should be alive to the following:

- As discussed above, the behaviour of a parent who facilitates a child making a complaint of criminal conduct against an accused parent will often be under scrutiny in a parenting trial. A complainant parent can risk a finding that the child is at an unacceptable risk of psychological harm in their care if, for example, they make repeated attempts to have a child report to Police alleged criminal conduct by the accused parent where the allegations have little foundation.
- The Family Court will almost certainly be highly critical of a child being asked or encouraged to give statements in support of ADVOs against an accused parent.
- Even a child being involved in or overhearing a complainant parent discussing alleged criminal conduct or the existence of criminal proceedings and ADVOs about an accused parent can be viewed negatively.

Forensic decisions made on behalf of an accused parent in criminal proceedings should be considered from the point of view of the potential impact upon the child and what the accused parent is seeking to achieve in the parenting proceedings:

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which diminished the plausibility of the child's accounts but nonetheless found that there was an unacceptable risk of harm by the father. The appeal turned on a failure of the trial judge to give adequate reasons but it was clear that it was in the context of the apparent unreliability of the child's complaints.

- Where the child of an accused person is the complainant in relation to serious criminal charges, the need for cross-examination of the child is likely unavoidable as a finding of guilt could well be determinative of the parenting proceedings. Nonetheless, legal practitioners must be very mindful about managing the obvious risk that a child being cross-examined by an accused parent (even through a legal representative) could cause the child emotional harm, impact their relationship with the accused parent or serve to entrench a child views if they have been exposed to negative attitudes about the accused or have otherwise become aligned with the complainant parent.
- If an accused parent requires a working with children check ("WWCC") for employment or in order to formally participate in child's sporting or extra-curricular activities, the making of an ADVO in which the PINOP is a child can trigger a risk assessment or review of eligibility for a WWCC.
- For the same reasons as above, where a child is included as a PINOP or witness in ADVO proceedings, careful thought should be given as to balancing the risks versus the benefits of defending the application at all. Options to avoid cross-examination might include a pre-trial *voir dire* on the admissibility of the child's statement so that, if the statement is admitted, the accused parent can decide whether or not they will cross-examine the child before the child is subpoenaed and prepared to give evidence. Or an accused parent might prefer to make representations or negotiate different conditions or offer undertakings or consent without admissions prior to the hearing of the ADVO.
- A decision by an accused parent to plead guilty to criminal charges (avoiding the need for the child to give evidence) is likely to be viewed positively by the Family Court. As will an accused parent's willingness to accept they have behaved inappropriately and to focus on engaging with services which minimise the risk of recurrence of criminal behaviour and to gaining an understanding of the risks that behaviour had to the child.

Interim Parenting Orders

Interim parenting hearings involve a truncated process in which the Family Court almost always makes interim parenting orders on the papers. While the Family Court must follow the proper legislative pathway set out above, it is usually unable to make findings of contested fact and interim decisions generally rely on undisputed facts[35]. Simply because findings cannot be made, does not mean they can be ignored where allegations raise concerns about the safety or welfare of a child[36].

In an interim hearing, the Family Court must make an assessment of whether either party's proposed orders would place the child at risk[37] and in doing so is to "*adopt a conservative*

[35] *Goode & Goode* [2006] FamCA 1346.
[36] *SS v AH* [2010] FamCAFC 13 at [100].
[37] *Lim & Zong* [2020] *FamCAFC 20.*

approach or one which is likely to avoid harm to a child"[38]. Thus, evidence adduced at this stage must be particularly focused on the question of risk.

1. Consider the nature of the risk raised on the evidence.

   The risks of child sexual abuse are obvious. If the historical allegations are about family violence, what was the severity of the alleged violence, was it a one-off incident or are there repeated incidents, has the child been previously exposed to family violence?

2. Consider the magnitude of potential impact upon the child.

   One incident of sexual abuse could have life-long consequences for a child. Similarly, being exposed to a single but extremely severe incident of family violence can have significant ongoing psychological impacts on a child. Conversely, isolated incidents of being exposed to parents pushing and shoving and/or engaging in verbal abuse are likely to have emotionally impacted the child but may not outweigh the emotional impact if they were prevented from spending regular time with a parent.

3. Most importantly, consider how the identified risks either have already been or can be mitigated so that they are not unacceptable for the child.

   In the case of child abuse, the only option available might be supervision of the child's time with the accused parent. In the case of allegations of family violence, the existence of an ADVO can (assuming there is no history of breaching such orders) deter future violence and therefore operates to reduce the risk of recurrence. Risk mitigation might also take the form of orders for supervision of time between an accused parent and child, limiting the location and/or duration of time between an accused parent and child, engagement with services (including counselling, behaviour change programs, parenting classes) or having an agent attend changeovers so the parents don't come into contact.

The National Domestic and Family Violence Bench Book[39] is an excellent resource which can be used by practitioners to demonstrate why the behaviour of the accused parent falls (or does not fall) within the definition of family violence and to give real substance to submissions about the nature and magnitude of risk to the child. It is important to link any submissions about what may or may not constitute family violence to the definition of family violence in s4AB FLA.

The Family Court will frequently order a report from a court appointed child expert prior to an interim hearing. Such reports generally provide important information about the child's existing relationships with each parent, any views expressed by the child, the nature and extent of the risks to the child and recommendations about how those risks can be managed.

[38] *Paterson & Hamdy* [2022] FedCFamC1A 118 at 29.
[39] https://dfvbenchbook.aija.org.au.

It is important to be aware that even if a "no contact" ADVO is still in place at the time of an interim hearing, the Family Court still has the power to make parenting orders and those orders will override the ADVO to the extent of any inconsistency[40].

Evidence gathering generally

It is important to always keep the principles relevant to unacceptable risk cases in mind when deciding on an accused parent's and a complainant parent's case strategy as well as when preparing affidavits and gathering evidence from witnesses and other sources:

1. Is the complainant parent seeking a positive finding about the accused parent engaging in historical conduct?
2. Does the accused parent admit the historical allegations but argue there is no future unacceptable risk to the child?
3. Does the accused parent dispute the historical allegations and argue there is no unacceptable risk to the child?

Where the allegations are disputed, the accused parent will likely be gathering evidence to attempt to prove that on the balance of probabilities those allegations are false or that the true events were benign. The complainant parent will likely be gathering evidence trying to corroborate the allegations or demonstrate a tendency of the accused person to behave in that manner.

Where the accused person admits to the historical allegations, both parties' attention should be focused on the question of risk. This might involve obtaining a risk assessment on the accused parent by a forensic psychologist[41]. Each parent will likely adduce evidence which goes to the question as to whether proposed protective mechanisms (such as protective family members or engagement in therapy or services) are actually likely to reduce the risk of harm to the child.

Don't forget that there are a category of cases where the evidence does not demonstrate that a child is at an unacceptable risk of harm from a parent but that orders for the child to live with, spend time or communicate with that parent are not in their best interests[42]. This typically arises where the other parent has always been the primary carer of the child and genuinely holds an unwavering belief that the child is at risk in the other parent's care and the effect of parenting orders facilitating a relationship between the child and the other parent would be to erode the primary parent's capacity to properly care for the child[43].

As the assessment of unacceptable risk involves an evaluation by the Family Court of all relevant evidence (regardless of whether any one fact is proven on the balance of probabilities)

[40] Section 68P and 68Q *Family Law Act 1975*.
[41] Noting that the rules in Part 7 of *FCFCOA (Family Law) Rules 2021* must be followed for any expert evidence in parenting proceedings.
[42] *Russell & Close* [1993] FamCA 62.
[43] See *Keane & Keane* [2021] FamCAFC 1.

it can be helpful to think about evidence gathering as a "triangulation" process. Obtaining evidence from a wide variety of sources (often by way of subpoenaed material) and collating that evidence in a detailed chronology is almost always of enormous assistance in showing the strengths and weaknesses of core allegations and generally in each parent's case.

Independent sources of relevant material

Evidence that is independent of the parties often holds great weight in parenting matters.

Generally speaking, in parenting matters, so long as material held by a third party has "apparent relevance"[44] it can be subpoenaed. Subpoenaed material often contains a treasure-trove of relevant evidence in unacceptable risk cases including:

- Police records;
- School records;
- Counselling records for children and parents (although be mindful particularly about the potential for impacting the therapeutic relationship between a child and their counsellor);
- GP records; and
- Hospital records.

Be mindful that there are strict controls on the number, and timing, of the issuing of subpoenas and consider which subpoenas might be of most benefit at what stage of proceedings[45].

In most parenting cases, as long as material produced under subpoena is actually relevant it is likely to be admitted into evidence at trial. Keep in mind the ability of the Family Court to apply the rules of evidence to a discrete issue in the proceedings, such as findings of fact about whether alleged historical conduct occurred, referred to above. If the rules of evidence are applied, then the records might be argued to be inadmissible if they contain for example opinion evidence[46] or the records don't fall within the business records exception to the hearsay rule[47].

As discussed above, the Local Court file from criminal proceedings can be requested by the Family Court and will often contain relevant evidence[48]. In addition, the brief of evidence prepared by Police[49] regardless of the outcome of the criminal proceedings can give powerful evidence in support of or against findings of abuse or violence in parenting proceedings. Think statements of attending officers who made first-hand observations of the accused and complainant parents and/or child, DVECs given by complainants and photographs of injuries

[44] *Hatton v Commonwealth* [2000] FamCA 892.
[45] Rule 6.27 *FCFCOA (Family Law) Rules* 2021
[46] Part 3.3 *Evidence Act 1995* (Cth).
[47] Section 69 *Evidence Act 1995* (Cth).
[48] A criminal court's file can be obtained by a request by the Family Court Registry Manager pursuant to Rule 6.28 *FCFCOA (Family Law) Rules* 2021 (Cth).
[49] This could be subpoenaed or sought from the accused parent by way of compulsory disclosure.

and the location of the crime. Note that there are strict controls on DVECs and even if it has been served on an accused parent it cannot be tendered in parenting proceedings and will need to be subpoenaed in the Family Court.

The collation of information from independent sources with the evidence of the parties often helps achieve the triangulation discussed above. Information which might seem damning or exculpatory in isolation can and often does have a very different complexion when viewed in the context of the chronology of events or other events occurring at the time.

Expert evidence

Expert evidence is commonly adduced in parenting proceedings. This will include reports from treating doctors/psychologists/psychiatrists, reports from court appointed child experts, expert reports obtained by the parties jointly and adversarial expert reports (with the Family Court's leave).

Always be mindful that in the Family Court, evidence resulting from an examination of a child which relates to abuse or risk of abuse of the child is inadmissible unless the Court orders otherwise[50]. The only exception is that evidence can be adduced of the first examination conducted for the purpose of deciding whether to bring proceedings or make an allegation that a child has been abused or is at risk of abuse. Therefore, causing a child to attend upon a general practitioner, paediatrician, psychologist or psychiatrist may produce admissible evidence of abuse or risk of abuse, but only from the child's first attendance.

Reports from treating professionals can be obtained by a party independently but the report must strictly relate to their treatment of the parent/child in order to be admitted[51]. It is very common to have treating professionals for a complainant parent or a child to stray into giving opinions about the accused parent, the alleged historical conduct or the risk to the child. Such opinions are often ultimately rejected or given little to no weight by the Family Court.

Often in cases of child abuse parties will jointly obtain a single expert report from a professional with expertise assessing child abuse allegations in family law proceedings. This can be a powerful piece of evidence providing opinions about the veracity of the allegations of child abuse and unacceptable risk. Significant weight can be given to their opinions so both parties should ensure that there is careful attention given to the professional's expertise, the process for assessment (including that all parties and child/ren are interviewed[52]) and what information/documentation is appropriate for the expert to receive[53]. The timing of such a report is important in concurrent proceedings, given the need to preserve the accused parent's right to silence (and noting discussion below about the ability of agencies like NSW Police to obtain copies of such reports for the purpose of investigation/prosecution).

[50] Section 102A *Family Law Act 1975*.
[51] Rule 7.01 *FCFCOA (Family Law) Rules 2021* (Cth).
[52] *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 at par 39.
[53] Following the rules in Part 7 of *FCFCOA (Family Law) Rules 2021* (Cth) should achieve this.

Less commonly in parenting proceedings, a party will attempt to introduce evidence from an adversarial expert witness such a psychiatrist or similar. While an adversarial expert report can be admitted by the Family Court granting leave[54], there is good authority which warns of the "*grave dangers*" in the Family Court relying upon such evidence where that expert has not interviewed all of the parties and child/ren[55].

Sharing of information/documents obtaining through family law proceedings

There are important limits on sharing documents from family law proceedings in criminal proceedings.

There is a general legal principle applying in all Commonwealth jurisdictions, called the Harman Undertaking. The effect of the Harman Undertaking is that a party who receives documents or information received by compulsion of law is prohibited from using those documents for a purpose other than what it was provided until it is read in evidence[56].

The Harman Undertaking has recently been directly incorporated into the FLR[57]. Rule 6.04 FLR prohibits documents filed or disclosed by a parent or produced under subpoena in family law proceedings (including the contents of such documents) being used for any other purpose or being disclosed to any other person without leave of the Family Court[58]. Note that the fact that documents have been read in evidence in the Family Court does not appear in Rule 6.04 to exempt them from the Harman Undertaking.

The effect of rule 6.04 and the circumstances in which the Family Court will grant such leave was discussed in the recent case of *Evert & Pascal* [2022] FedCFamC1F 569. In that case, the Family Court focused on the potential that granting leave would discourage disclosure by parties, their relevance to the criminal proceedings and any prejudice that might be suffered from the party opposing leave. Ultimately, the Court gave leave to all documents sought except for the Notice of Child Abuse, the Child Inclusive Memorandum and Family Assessment Report on the basis that the submissions did not demonstrate they would be relevant to the criminal proceedings.

It's worth remembering that, the Harman Undertaking and Rule 6.04 aside, reports prepared by court appointed child experts in parenting proceedings are almost always the subject of a specific order by the Family Court prohibiting parties from providing it to any other person without leave.

[54] Rule 7.08 *FCFCOA (Family Law) Rules 2021* (Cth).
[55] *Re W & W (Abuse Allegations; Expert Evidence)* [2001] FamCA 216 at par 147.
[56] *Hearne & Street* [2008] HCA 36.
[57] *Evert & Pascal* [2022] FedCFamC1F 569.
[58] Rule 6.04 *FCFCOA (Family Law) Rules 2021* (Cth).

Be aware that in addition to an accused parent being able to apply to the Family Court for permission to use documents or reports from family law proceedings in criminal proceedings, there have been cases in which the NSW Police have successfully applied to not only copy the court file in family law proceedings but also to use an expert report for the purpose of a criminal investigation/prosecution[59].

Final Hearings in parenting proceedings

Some unacceptable risk cases will benefit from an early hearing on the historical allegations and the question of unacceptable risk. In this respect, the Family Court has power to order a discrete hearing where a decision may "*dispose of all or part of a proceeding*"[60]. This can be particularly useful where an accused parent is spending no time with a child due to the serious nature of the allegations.

If the Family Court makes a finding that the historical allegations either did not occur and/or the evidence does not demonstrate an unacceptable risk at a discrete hearing, then the parties might be able to reach agreement about parenting arrangements without the need for a further hearing. Alternatively, after the discrete hearing the accused parent can apply for orders to start spending time with the child and further evidence can be gathered before the Family Court makes a final decision about what long-term parenting arrangements are appropriate for the children.

Section 128 Certificates[61] are commonly given in family law hearings when an accused parent objects to giving sworn evidence admitting to criminal conduct unless they are protected from the risk of prosecution. Its' use in parenting proceedings is arguably consistent with the Family Court's inquiry into the best interests of the child. A s128 Certificate can be given in advance of the evidence in chief being filed by way of affidavit and not just when questions arise in cross-examination[62]. Consequently, it is appropriate to deal with this issue at the compliance and readiness for hearing stage well in advance of the trial. In this way, the s128 Certificate can be issued before the accused parent has to prepare and file their trial affidavit, so that it can properly include all their evidence about the admitted conduct.

Frequently in unacceptable risk cases there will be a "s102NA" issue or order. Where there is an allegation of family violence in family law proceedings and:

- A current final ADVO between parents; or
- A previous conviction of a parent with an offence involving violence or a threat of violence to the other parent; or
- An injunction pursuant to the FLA; then

[59] *Sahad & Savva* [2016] FamCAFC 65.
[60] Rule 10.10 *FCFCOA (Family Law) Rules 2021* (Cth).
[61] Section 128 *Evidence Act 1995* (Cth).
[62] *Ferrall v Byton* [2000] FamCA 1442 at pars 89-90.

pursuant to s102NA FLA, both parents are prohibited from personally cross-examining the other parent[63].

Where these conditions are not satisfied, the Family Court may nonetheless make an order that personal cross-examination is prohibited of its own motion or on the application of a party.

There is a scheme administered by the legal aid bodies in each state for funding the appointment of legal representation where the prohibition in s102NA FLA applies.

Legal Costs

The above discussion shows the importance of early and realistic disclosure of legal costs when there are concurrent family law and criminal proceedings, particularly for the accused parent. Running and defending criminal charges and/or ADVOs concurrently with parenting proceedings can for some parents be cost prohibitive. A case strategy for both criminal and parenting matters should ideally be developed at the same time, with specific consideration as to where, when and how to dedicate the client's limited resources. Obviously, the exigencies of litigation are unavoidable, and particularly challenging if you are in multiple courts. But, it is important to make this an early strategic focus to avoid the client having to give up for costs reasons.

[63] Section 102NA *Family Law Act 1975* (Cth).

Key Sections of the *Family Law Act 1975* (Cth)

FAMILY LAW ACT 1975 - SECT 4

"abuse" , in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

FAMILY LAW ACT 1975 - SECT 4AB

Definition of family violence etc.

(1) For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

FAMILY LAW ACT 1975 - SECT 60B

Objects of Part and principles underlying it

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

FAMILY LAW ACT 1975 - SECT 60CA

Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

FAMILY LAW ACT 1975 - SECT 60CC

How a court determines what is in a child's best interests

Determining child's best interests

(1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Note: Section 68P also limits the effect of this section on a court making decisions under that section about limiting, or not providing, an explanation to a child of an order or injunction that is inconsistent with a family violence order.

Primary considerations

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

Additional considerations

(3) Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child;

(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j) any family violence involving the child or a member of the child's family;

(k) if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

Consent orders

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

FAMILY LAW ACT 1975 - SECT 61DA

Presumption of equal shared parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or

(b) family violence.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

FAMILY LAW ACT 1975 - SECT 65D

Court's power to make parenting order

(1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

Note: Division 4 of Part XIIIAA (International protection of children) may affect the jurisdiction of a court to make a parenting order.

(2) Without limiting the generality of subsection (1) and subject to section 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

(3) If the application for the parenting order was made as a result of the adjournment under paragraph 70NEB(1)(c) of proceedings under Subdivision E of Division 13A of Part VII:

(a) the court must hear and determine the application as soon as practicable; and

(b) if the court makes a parenting order on the application, the court may, if it thinks it is appropriate to do so, dismiss the proceedings under that Subdivision.

Note 1: The applicant may apply to the Federal Circuit and Family Court of Australia (Division 1) for the application for the parenting order or for the proceedings under Subdivision E of Division 13A of Part VII, or both, to be transferred to the Federal Circuit and Family Court of Australia (Division 2): see section 52 of the *Federal Circuit and Family Court of Australia Act 2021* .

Note 2: The applicant may apply to the Federal Circuit and Family Court of Australia (Division 2) for the application for the parenting order or for the proceedings under Subdivision E of Division 13A of Part VII, or both, to be transferred to the Federal Circuit and Family Court of Australia (Division 1): see section 149 of the *Federal Circuit and Family Court of Australia Act 2021* .

Note 3: Proceedings may also be transferred from the Federal Circuit and Family Court of Australia (Division 2) to the Federal Circuit and Family Court of Australia (Division 1) by order of the Chief Justice: see section 51 of the *Federal Circuit and Family Court of Australia Act 2021* .

FAMILY LAW ACT 1975 - SECT 68P

Obligations of court making an order or granting an injunction under this Act that is inconsistent with an existing family violence order

(1) This section applies if:

(a) a court:

(i) makes a parenting order that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; or

(ii) makes a recovery order (as defined in section 67Q) or any other order under this Act that expressly or impliedly requires or authorises a person to spend time with a child; or

(iii) grants an injunction under section 68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child; and

(b) the order made or injunction granted is inconsistent with an existing family violence order.

(2) The court must, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child:

(a) specify in the order or injunction that it is inconsistent with an existing family violence order; and

(b) give a detailed explanation in the order or injunction of how the contact that it provides for is to take place; and

(c) explain (or arrange for someone else to explain) the order or injunction to:

(i) the applicant and respondent in the proceedings for the order or injunction; and

(ii) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and

(iii) the person protected by the family violence order (if that person is not the applicant or respondent); and

(d) include (or arrange to be included) in the explanation, in language those persons are likely to readily understand:

(i) the purpose of the order or injunction; and

(ii) the obligations created by the order or injunction, including how the contact that it provides for is to take place; and

(iii) the consequences that may follow if a person fails to comply with the order or injunction; and

(iv) the court's reasons for making an order or granting an injunction that is inconsistent with a family violence order; and

(v) the circumstances in which a person may apply for variation or revocation of the order or injunction.

(2A) Subparagraph (2)(c)(iii) does not apply to a child if the court is satisfied that it is in the child's best interests not to receive an explanation of the order or injunction.

(2B) Paragraph (2)(d) does not require inclusion of a matter in an explanation given to a child if the court is satisfied that it is in the child's best interests for the matter not to be included in the explanation.

(2C) In determining whether it is satisfied as described in subsection (2A) or (2B), the court:

(a) must have regard to all or any of the matters set out in subsection 60CC(2); and

(b) despite section 60CC, may have regard to all or any of the matters set out in subsection 60CC(3).

(3) As soon as practicable after making the order or granting the injunction (and no later than 14 days after making or granting it), the court must give a copy to:

(a) the applicant and respondent in the proceedings for the order or injunction; and

(b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); and

(c) the person protected by the family violence order (if that person is not the applicant or respondent); and

(d) the Registrar, Principal Officer or other appropriate officer of the court that last made or varied the family violence order; and

(e) the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides; and

(f) a child welfare officer in relation to the State or Territory in which the person protected by the family violence order resides.

(4) Failure to comply with this section does not affect the validity of the order or injunction.

FAMILY LAW ACT 1975 - SECT 68Q

Relationship of order or injunction made under this Act with existing inconsistent family violence order

(1) To the extent to which:

(a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and

(b) the order or injunction is inconsistent with an existing family violence order;

the family violence order is invalid.

(2) An application for a declaration that the order or injunction is inconsistent with the family violence order may be made, to a court that has jurisdiction under this Part, by:

(a) the applicant or respondent in the proceedings for the order or injunction mentioned in paragraph 68P(1)(a); or

(b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); or

(c) the person protected by the family violence order (if that person is not the applicant or respondent).

(3) The court must hear and determine the application and make such declarations as it considers appropriate.

FAMILY LAW ACT 1975 - SECT 68R

Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act

Power

(1) In proceedings to make or vary a family violence order, a court of a State or Territory that has jurisdiction in relation to this Part may revive, vary, discharge or suspend:

(a) a parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child; or

(b) a recovery order (as defined in section 67Q) or any other order under this Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or

(c) an injunction granted under section 68B or 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or

(d) to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child:

(i) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act; or

(ii) a registered parenting plan within the meaning of subsection 63C(6); or

(iii) a recognisance entered into under an order under this Act.

(2) The court may do so:

(a) on its own initiative; or

(b) on application by any person.

Limits on power

(3) The court must not do so unless:

(a) it also makes or varies a family violence order in the proceedings (whether or not by interim order); and

(b) if the court proposes to revive, vary, discharge or suspend an order or injunction mentioned in paragraph (1)(a), (b) or (c)--the court has before it material that was not before the court that made that order or injunction.

(4) The court must not exercise its power under subsection (1) to discharge an order, injunction or arrangement in proceedings to make an interim family violence order or an interim variation of a family violence order.

Relevant considerations

(5) In exercising its power under subsection (1), the court must:

(a) have regard to the purposes of this Division (stated in section 68N); and

(b) have regard to whether spending time with both parents is in the best interests of the child concerned; and

(c) if varying, discharging or suspending an order or injunction mentioned in paragraph (1)(a), (b) or (c) that, when made or granted, was inconsistent with an existing family violence order--be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction.

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.

Registration of revival, variation, discharge or suspension of orders and other arrangements

(6) The regulations may require a copy of the court's decision to revive, vary, discharge or suspend an order, injunction or arrangement to be registered in accordance with the regulations. Failure to comply with the requirement does not affect the validity of the court's decision.

FAMILY LAW ACT 1975 - SECT 69ZT

Rules of evidence not to apply unless court decides

(1) These provisions of the *Evidence Act 1995* do not apply to child-related proceedings:

(a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).

(3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:

(a) the court is satisfied that the circumstances are exceptional; and

(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.

(5) Subsection (1) does not revive the operation of:

(a) a rule of common law; or

(b) a law of a State or a Territory;

that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

FAMILY LAW ACT 1975 - SECT 69ZV

Evidence of children

(1) This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child-related proceedings.

(2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.

(3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).

(4) This section applies despite any other Act or rule of law.

(5) In this section:

"child" means a person under 18.

"representation" includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

FAMILY LAW ACT 1975 - SECT 69ZW

Evidence relating to child abuse or family violence

(1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.

(2) The documents or information specified in the order must be documents recording, or information about, one or more of these:

(a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;

(b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;

(c) any reports commissioned by the agency in the course of investigating a notification.

(3) Nothing in the order is to be taken to require the agency to provide the court with:

(a) documents or information not in the possession or control of the agency; or

(b) documents or information that include the identity of the person who made a notification.

(4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.

(5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

(6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:

(a) the person consents to the disclosure; or

(b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.

(7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:

(a) is notified about the intended disclosure; and

(b) is given an opportunity to respond.

FAMILY LAW ACT 1975 - SECT 69ZX

Court's general duties and powers relating to evidence

(1) In giving effect to the principles in section 69ZN, the court may:

(a) give directions or make orders about the matters in relation to which the parties are to present evidence; and

(b) give directions or make orders about who is to give evidence in relation to each remaining issue; and

(c) give directions or make orders about how particular evidence is to be given; and

(d) if the court considers that expert evidence is required--give directions or make orders about:

(i) the matters in relation to which an expert is to provide evidence; and

(ii) the number of experts who may provide evidence in relation to a matter; and

(iii) how an expert is to provide the expert's evidence; and

(e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.

(2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:

(a) about the use of written submissions; or

(b) about the length of written submissions; or

(c) limiting the time for oral argument; or

(d) limiting the time for the giving of evidence; or

(e) that particular evidence is to be given orally; or

(f) that particular evidence is to be given by affidavit; or

(g) that evidence in relation to a particular matter not be presented by a party; or

(h) that evidence of a particular kind not be presented by a party; or

(i) limiting, or not allowing, cross-examination of a particular witness; or

(j) limiting the number of witnesses who are to give evidence in the proceedings.

(3) The court may, in child-related proceedings:

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

Note: This subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.

(4) In proceedings under this Part in which the court is required to regard the best interests of the child as the paramount consideration:

(a) subsection 126K(1) of the *Evidence Act 1995* does not apply in relation to information that would:

(i) reveal the identity of a journalist's source; or

(ii) enable that identity to be discovered;

if the court considers that it is in the best interests of the child for the information to be disclosed; and

(b) the court must not direct, under a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations, that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.

FAMILY LAW ACT 1975 - SECT 100B

Children swearing affidavits, being called as witnesses or being present in court

(1) A child, other than a child who is or is seeking to become a party to proceedings, must not swear an affidavit for the purposes of proceedings, unless the court makes an order allowing the child to do so.

(2) A child must not be called as a witness in, or be present during, proceedings in the Federal Circuit and Family Court of Australia, or in another court when exercising jurisdiction under this Act, unless the court makes an order allowing the child to be called as a witness or to be present (as the case may be).

(3) In this section:

"child" means a child under 18 years of age.

FAMILY LAW ACT 1975 - SECT 102NA

Mandatory protections for parties in certain cases

(1) If, in proceedings under this Act:

(a) a party (the ***examining party***) intends to cross-examine another party (the ***witness party***); and

(b) there is an allegation of family violence between the examining party and the witness party; and

(c) any of the following are satisfied:

(i) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;

(ii) a family violence order (other than an interim order) applies to both parties;

(iii) an injunction under section 68B or 114 for the personal protection of either party is directed against the other party;

(iv) the court makes an order that the requirements of subsection (2) are to apply to the cross-examination;

then the requirements of subsection (2) apply to the cross-examination.

(2) Both of the following requirements apply to the cross-examination:

(a) the examining party must not cross-examine the witness party personally;

(b) the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party.

Note 1: This section applies both in the case where the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim, and in the case where the examining party is the alleged victim and the witness party is the alleged perpetrator.

Note 2: This section does not limit other laws that apply to protect the witness party (for example, section 101 requires the court to forbid the asking of offensive questions and section 41 of the *Evidence Act 1995* requires the court to disallow certain questions, such as misleading questions).

Note 3: To avoid doubt, a reference to a party in this section includes a reference to a person who is a party because of the operation of a provision of this Act (for example, sections 92 and 92A, which are about intervening parties). This section only applies to an intervening party if the intervening party is involved in the allegation of family violence, whether as the alleged perpetrator or as the alleged victim.

(3) The court may make an order under subparagraph (1)(c)(iv):

(a) on its own initiative; or

(b) on the application of:

(i) the witness party; or

(ii) the examining party; or

(iii) if an independent children's lawyer has been appointed for a child in relation to the proceedings--that lawyer.

CRIMES (DOMESTIC AND PERSONAL VIOLENCE) ACT 2007 - SECT 42

Consideration of contact with children

42 CONSIDERATION OF CONTACT WITH CHILDREN

(1) A person who applies for, or for a variation of, a final apprehended violence order or interim court order must inform the court of--
(a) any relevant parenting order of which the person is aware, or
(b) any pending application for a relevant parenting order of which the person is aware.
The court is required to inform the applicant of the obligation of the applicant under this subsection.
(2) In deciding whether or not to make or vary a final apprehended violence order or interim court order, the court is to consider the safety and protection of the protected person and any child directly or indirectly affected by domestic or personal violence.
(3) Without limiting subsection (2), in deciding whether or not to make or vary a final apprehended violence order or interim court order, the court is to--
(a) consider whether contact between the protected person, or between the defendant, and any child of either of those persons is relevant to the making or variation of the order, and
(b) have regard to any relevant parenting order of which the court has been informed.
(4) A final apprehended violence order or interim court order, or a variation of such an order, is not invalid merely because of a contravention of this section.
(5) In this section,
"relevant parenting order" means a parenting order (within the meaning of Division 5 of Part VII of the *Family Law Act 1975* of the Commonwealth) that relates to contact between the protected person, or between the defendant, and any child of either of those persons.