

The 2023 Intensive Conference

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Conference papers



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Outline of Presentation

- Family Violence Sentencing Reforms
- Section 128 Certificates
- Harman Undertakings
- Tips & Traps: Interim Family Violence Orders
 - Applicants
 - Respondents
- Question Time

BURLEY GRIFFIN
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FV Sentencing Reforms

Background

UG v The Queen [2020] ACTCA 8 (Murrell CJ, Burns and Mossop JJ):

47. We disagree with the contention impliedly advanced by the Crown. Absent any statutory provision to the contrary, in a criminal justice system based on individualised justice, there is no place for a separate sentencing regime that applies to offenders who commit “family violence offences” (or any other general category of offences), whether it be a more lenient or a more severe sentencing regime...

...

51. When sentencing a particular offender for a “family violence offence”, the usual sentencing principles apply. ...

Crimes (Sentencing) Act 2005

34B Sentencing—family violence offences

- (1) In deciding how an offender should be sentenced for a family violence offence, a court must consider the nature of family violence and the context of the offending, including the following:
 - (a) the matters mentioned in the preamble to the *Family Violence Act 2016*;
 - (b) whether the offending occurred at the home of the victim, offender or another person;
 - (c) whether the offending occurred when a child was present;
 - (d) if the offence is a serious family violence offence—whether the offender has 1 or more other convictions for serious family violence offences.
- (2) A court must not reduce the severity of a sentence it would otherwise have imposed because—
 - (a) the offence is a family violence offence; or
 - (b) a family violence order under the *Family Violence Act 2016* or a protection order under the *Domestic Violence and Protection Orders Act 2008* (repealed) is in force against the offender in relation to the family violence offence.
- (3) In this section:

family violence—see the *Family Violence Act 2016*, dictionary.

serious family violence offence means a family violence offence that is punishable by imprisonment for 5 years or more.

Family Violence Legislation Amendment Bill 2022

- Aggravated offence scheme = higher maximum penalties for family violence offences
- Limits on XXN of makers of Victim Impact Statements
- Counselling communications in FV proceedings protected
- Definition of Family Violence amended to include technological abuse

Section 128 Certificates

First, consider:

Is there evidence that **may tend to prove** that your client (s128(1)):

- Has committed an offence against or arising under an Australian law or a law of a foreign country; or
- Is liable to a civil penalty?

Then:

Was an **objection** made to your client giving this evidence?

Is there a **requirement** for your client to give certain evidence?

When should your client to seek a certificate?

What **protection** can it give your client?

Objecting to giving evidence



An objection to give evidence needs be made on the ground that the evidence may tend to prove that your client (Section 128(1)) has committed an offence or is liable to a civil penalty.



*The court must determine whether or not there are **reasonable grounds for the objection** (Section 128(2)).*

Requirement to give evidence

In *Song v Ying [2010] NSWCA 237*, the NSW Court of Appeal held:

- That a witness is compelled to give evidence when they give evidence under a Subpoena.
- When a party to the proceedings is being asked questions by their own legal representative (whether in chief or re-examination) there would “rarely if ever be a question” that the evidence “was given under compulsion” [24], [27].
- A witness who is compelled by a party to give evidence during the proceedings can raise an objection at any stage during their evidence [30].

Requirement to give evidence

Field & Kingston [2018] FamCAFC 145

- Being compelled to give evidence that may tend to prove a witness has committed an offence or render them liable to a civil penalty should be distinguished from would it being **forensically or tactically advantageous** for a witness to give the evidence with the protection of a certificate [24].
- There can be a requirement to give evidence in chief in family law proceedings, however the Court of Appeal concluded [43] *“that the **operation of the Rules (relating to financial disclosure) provide no relevant compulsion** in the sense which would enliven the application of s128 of the Evidence Act.”*

Timing of s128 Certificates

- Retrospective operation of certificates is limited – See s128(6).
- Consider waiting until a certificate has been granted before having an Affidavit signed, filed and served.

Limit on the protection

Although the taking of the privilege against self-incrimination cannot affect credit, depending on the circumstances of a given case, the grant of a certificate under s 128 may affect credibility

See *Spence v The Queen* [2016] VSCA 113 at [82]–[88]

The Courts have exercised the power to send the papers to relevant agency or prosecutor, notwithstanding a certificate being in place.

E.g. Centrelink fraud - *Vasilias & Vasilias* [2008] FamCA 34

Harman Undertakings

Harman v Secretary of State for the Home Department [1983] 1 AC 280

- Implied undertaking or obligation to the Court that documents will only be used for the purposes for which they were disclosed and not for collateral purposes unless the court grants leave
- Applies to witness statements, affidavits and documents produced under subpoena
- Exception if the material has been received into evidence
- A breach of the undertaking is contempt

Harman Undertakings

In *Hearne v Street* ([2008](#)) 235 CLR 125; [\[2008\] HCA 36](#), Hayne, Heydon and Crennan JJ described the obligation in these terms:

“[96] Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, **the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.** The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits...”.

Harman Undertakings

Federal Circuit and Family Court of Australia Rules 2021 (Cth) - Rule 6.04

- (1) A person who inspects or copies a document, in relation to a proceeding, under these Rules or an order:
- (a) must use the document for the purpose of the proceeding only; and
 - (b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court’s permission.
- (2) However:
- (a) a solicitor may disclose the contents of the document or give a copy of the document to the solicitor’s client or counsel; and
 - (b) a client may disclose the contents of the document or give a copy of the document to the client’s solicitor or counsel; and
 - (c) this rule does not affect the right of a party to use a document or to disclose its contents if that party has a common interest in the document with the party who has possession or control of the document.

Release from Harman Undertakings

- The obligation may be dispensed with by the court if special circumstances exist
- The relevant considerations are non-exhaustive. However, the contribution that the document might make to achieving justice in the second proceedings has been described as perhaps the most important consideration of them all
- Special circumstances will typically be found where the documents are sought to be used as part of an accused's defence in criminal proceedings

Interim Family Violence Orders



Tips & Traps

21 Interim orders—grounds for making

A court may make an interim order if satisfied that the order is necessary to do either or both of the following until the application for the final order is decided:

- (a) ensure the safety of an affected person from family violence;
- (b) prevent substantial damage to an affected person's property.

Note 1 The court must consider the matters mentioned in s 14 in deciding whether to make the interim order.

Note 2 An *affected person* includes any child who hears, witnesses or is otherwise exposed to family violence committed against another person (see s 8 (1), def *family violence*, par (b) and dict).

14 Matters to be considered—family violence orders

- (1) In deciding whether to make a family violence order, a court must consider the following:
- (a) the objects of this Act in section 6;
 - (b) the affected person's perception of the nature and seriousness of the respondent's alleged conduct;
 - (c) the welfare of any child that is an affected person;
 - (d) the accommodation needs of the affected person and any child of the affected person or respondent;
 - (e) any hardship that may be caused to the respondent or anyone else by the making of the order;
 - (f) any previous family violence or personal violence by the respondent in relation to the affected person or anyone else;
 - (g) any previous family violence order made in relation to the respondent;
 - (h) any previous contravention of a family violence order by the respondent;
 - (i) the need to ensure that property is protected from damage.

Note An *affected person* includes any child who hears, witnesses or is otherwise exposed to family violence committed against another person (see s 8 (1), def *family violence*, par (b) and dict).

Applicant of an IFVO

- Don't wait until a previous FVO lapses - Extending FVOs
- Utilise the annexure to the Application
- Subpoenas
- Order becomes effective once served
- Service
- Aid or abet a breach
- Length of the Order – with special or exceptional circumstances

Applicant of an IFVO

What are the appropriate exceptions?

Don't be seen to frustrate parenting arrangements



If you are asking for exceptions to these prohibitions, please tick any boxes below that you want to apply, or write other exceptions in the spaces provided.

The respondent be prohibited from:	Please ✓ one or both	
	Adult affected person	Child affected person
5. Being closer than a set distance (eg. 100 metres) from the affected person(s) <i>If yes, please say below how far away</i> <input type="text"/> metres	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> EXCEPT in accordance with orders or a parenting plan made under the <i>Family Law Act 1975</i> , when the distance shall be <input type="text"/> metres;		
<input type="checkbox"/> EXCEPT in relation to the respondent's children, when spending time with them in accordance with orders or a parenting plan made under <i>Family Law Act 1975</i> ;		
<input type="checkbox"/> EXCEPT at a counselling/mediation session or restorative justice conference arranged with the consent of the affected person(s);		
<input type="checkbox"/> EXCEPT <input type="text"/>		

Respondent of an IFVO

- Contravention of FVO – criminal offence
- Special Interim Family Violence Orders
- Transcript of oral evidence at ex parte interim hearing
- Amendments - s83

Respondent of an IFVO

Automatic consequences:

- Firearms licenses, employment, Security clearances, WWVP

s68Q – inconsistencies between FVOs and Family Court Orders

s60CC(3)(k)* - existence FV order or findings made can be relevant parenting proceedings

* Subject to changes to best interests factors proposed by the *Family Law Amendment Bill 2023*

Questions?



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