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Family Violence Risk Assessment and Management Framework
Ministry of Justice
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Family Violence Risk Assessment and Management – consultation

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on *A common approach to understanding Family Violence Risk Assessment and Management – a discussion document for consultation* (consultation paper), as part of the development of the draft Risk Assessment and Management Framework. The purpose of the framework is to establish a common understanding of family violence and its dynamics, as well as a consistent and coordinated approach across agencies and services undertaking the core activities of screening, risk assessment and risk management.

The Law Society agrees that family violence is a major problem and a more consistent and connected approach is a necessary part of seeking to lessen the frequency and severity of such violence. The Law Society's Family Law Section and Criminal Law Committee have reviewed the consultation paper, and comments are provided below.

The role of lawyers generally in relation to family violence risks

The consultation paper emphasises the need to establish an educated workforce of practitioners from a variety of agencies dealing with family violence victims and perpetrators. Family lawyers frequently deal with victims and/or perpetrators of family violence (and their children) in relation to court proceedings and other legal processes.¹ Contact with a lawyer is one of the 'doors' through which victims and perpetrators of family violence will enter the justice system.

The current position

Family lawyers have exposure to, and will often recognise, indicators of family violence and child abuse. As part of their role, lawyers act for victims and perpetrators of family violence, including as Family Dispute Resolution (FDR) providers, as youth advocates and as lawyer for the child, and are already 'screening' (in an informal, unstructured and untrained way) for family violence.

¹ Consultation paper, pp 16 – 17.

In addition, when a lawyer is advising clients on the legal options available to them, the lawyer's own judgment about risks and risk management will often be reflected in the advice given, for example during discussions about practical protection measures that can be taken.

However, advice given will not always be accepted. Lawyers also are obliged generally to act on their clients' instructions, and to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.² This is subject to exceptions, notably the professional regulatory obligation to disclose confidential information under rule 8.2 of the schedule to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Rule 8.2 requires disclosure where:

- (a) The information relates to the anticipated or proposed commission of a crime that is punishable by imprisonment for 3 years or more; or
- (b) The lawyer reasonably believes that disclosure is necessary to prevent a serious risk to the health and safety of any person.

Rule 8.3 states that such a disclosure must only be to an appropriate person and only to the extent necessary for the required purpose. This rule would require a lawyer who has a reasonable belief that family violence is occurring to report if someone's health or safety was at risk.

However, lawyers are not necessarily trained as experts in family violence issues, and it would be unreasonable to expect them to detect signs that a trained expert in such issues might be aware of. The Conduct and Client Care Rules relate to lawyers, and refer to the reasonable belief of the lawyer concerned, which is not that of someone trained in the area.

The proposed framework

It is not clear from the consultation paper to what extent lawyers would be expected to be involved in screening for family violence, risk assessment and risk management. The role lawyers would be expected to play needs to be made clearer.

The paper appears to contemplate that lawyers would be involved in *screening* for family violence, with risk assessments and management being referred to appropriately trained and resourced agencies such as Child, Youth and Family, Police and Corrections. The paper sets out at page 34 the agencies and services that would conduct family violence risk assessments, and the list does not include lawyers. There are however contradictory statements elsewhere – for example, the “justice and statutory services” listed at pages 16-17 *include* lawyers and these services “will most likely screen or do an initial risk assessment ...”. Similarly, the paper at page 23 discusses how those justice and statutory services should approach risk assessment. The Law Society considers that the role of lawyers should be limited to *screening* (supported by appropriate education and training) and *referral* where necessary to a specialist family violence agency.

If it is proposed that lawyers are to have a formal role in screening for family violence, a system of education and ongoing training – aligned to the training given to others working in the sector – will need to be introduced, to teach them how to screen for family violence when dealing with clients and their families/whanau.

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Schedule, rule 8.

The role of FDR providers in relation to family violence risks

As noted above, the consultation paper at page 34 lists the agencies and services expected to conduct family violence risk assessments, “when appropriately trained”. The list includes Family Dispute Resolution (FDR) providers.

Under current regulations, the qualification and competency requirements for appointment as an FDR provider provide (among other things) that the person must be able to:³

- (i) assess parties to mediation, and their circumstances and history, for factors (in particular, in relation to possible domestic violence) indicating risks that may arise during, or in the context of, mediation sessions; and
- (ii) manage any risks likely to arise.

There is however no uniform training currently provided to FDR providers on family violence risk screening and assessment. The Law Society agrees that “appropriate training” in FDR risk screening and assessment will be needed if the Framework is introduced, to ensure consistency of approach by FDR providers, safety for victims and a clear referral pathway. Funding may also need to be increased to cover the additional work involved for providers.

The Law Society also notes that, unless the family violence concerns surface in the private one-on-one session, the FDR provider may have both parties present so that managing a risk assessment under those circumstances would require considerable care.

Criminal law context and issues

The consultation paper would benefit from greater recognition that family violence is likely to have criminal consequences. In particular:

- The paper provides no information or guidance about the point at which service providers carrying out risk screening should move from allegations or suspicions of family violence to seeking behaviour change and accountability,⁴ and does not address the fact that the alleged perpetrator’s fair trial rights might then be engaged.
- Referrals to the Police are recommended where there are imminent safety concerns or where a crime has been or is likely to be committed.⁵ However, it is unclear if the “crime” is a reference to the family violence in question or another crime, and there is no guidance on what may constitute a “crime”.

It is also important to note that maintaining the primacy of the protection of victims may be inconsistent with the requirements that apply to certain statutory roles and processes. The preparation of a bail report pursuant to the Bail Act 2000 is an example. Persons preparing bail reports, and judges considering bail, are required to balance a number of factors. The obligation to exercise that statutory discretion after taking into account all the matters stated in the legislation to be relevant cannot be overridden by administrative practices. However, if there were a concern that

³ Family Dispute Resolution Regulations 2013, reg 7(k).

⁴ See: the collective action to be taken during the screening and identification of family violence (consultation paper, p21), risk assessment/collective action (p24), risk management/perpetrator behaviour change and accountability (p27); working with perpetrators (p37); risk management in practice (pp39-40); and effective information sharing/perpetrator behaviour change and accountability (p43).

⁵ At pages 24 and 40.

an applicant for bail may commit offences of family violence if released pending trial, the approach outlined in the consultation paper would appear to require that a recommendation be made against the grant of bail, and that judges should refuse bail where there is a risk of family violence. This goes considerably further than do the provisions of sections 8(1), 8(4) and 8(5) of the Bail Act 2000. Further, an administrative policy which puts primacy on preventing possible family violence may effectively undercut the primacy given by section 8(5) to cases where a protection order has been made.

There would be similar concerns about pre-sentencing reports and recommendations for parole.

The problem may be compounded where the reports do not contain accurate or sufficient detail of the alleged family violence events. The Law Society's Criminal Law Committee is aware of an example of a bail report that listed numerous events as "family violence" and bail was refused. It was later discovered these events were things such as a neighbour calling noise control or the defendant himself calling the Police. The report omitted this detail and it took some time and effort to unearth it.

Conclusion

If the Ministry would like to discuss these comments, please do not hesitate to contact the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully

A handwritten signature in black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President