NEW ZEALAND
LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

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Family Violence Law Review
Ministry of Justice
DX SX10088
Wellington

familyviolencelaw@justice.govt.nz

Strengthening New Zealand's legislative response to family violence: a public discussion document

Legislative framework: overview

What changes to legal tools and powers would ensure the law keeps pace with advances in understanding of family violence and how to address it?

Introduction

The Law Society welcomes the review of New Zealand's legislative response to family violence[1] and acknowledges the government's current work programme on family violence. Any initiatives that will reduce the incidence of domestic violence and break the cycle of violence are welcomed.

While the Law Society recognises that changes in the law can actively lead social change, it is considered that the current high rate of domestic violence in New Zealand requires more than an improved legal response. Ultimately it requires a substantial shift away from a culture where domestic violence is tolerated.

This review provides an opportunity for a greater emphasis on engaging with and educating perpetrators of domestic violence to avoid future recurrence of violence. Anecdotally, the experiences of family lawyers show that perpetrators who have not previously engaged in the legal process and/or actively participated in any interventions remain an ongoing risk to victims and children. Barriers to people feeling unable to address domestic violence also include a lack of understanding by the public about what domestic violence is and the types of behaviour it may include, particularly behaviour that constitutes psychological violence.

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1 *Strengthening New Zealand's legislative response to family violence: A public discussion document 2015* (discussion document").

This submission has been prepared by the Law Society's Family Law Section, with assistance from the Criminal Law Committee. The Law Society's key observations and recommendations are summarised below, followed by detailed comments on Chapters 1 – 5 of the discussion document.

Executive summary

The Law Society supports the government's initiative to reduce domestic violence. However, a more comprehensive and interdisciplinary review would be preferable. This would involve a review of the Domestic Violence Act 1995 (DVA) along with related legislation such as the Care of Children Act 2004 (COCA), Children Young Persons and their Families Act 1989 (CYPTF Act), Legal Services Act 2011, Victims' Orders against Violent Offenders Act 2014, Criminal Procedure (Transfer of Information) Regulations 2013 and any other relevant regulations, to ensure consistency.

The discussion document states that the recent family justice reforms, eligibility for legal aid, Solicitor General's Prosecution Guidelines and funding for the organisations that provide programmes and other domestic violence support services are out of scope of the review. The Law Society considers these are essential to any considered review of family violence legislation, and it is unfortunate they have been excluded from the current review. In particular, eligibility for legal aid is outside the scope of the review but is a significant barrier for many victims of domestic violence.

The Law Society considers that overall, the legislation already in place to protect the victims of domestic violence is adequate, although further amendments in some areas are recommended (as outlined below).

In addition, better coordination of services and responses when complaints are laid from Police and other agencies, including enhanced information sharing, would assist victim safety. The Law Society considers that internal departmental policies within the Ministry of Social Development (MSD) and the Police would benefit from analysis so that there is a better response to domestic violence. One example of an improved response could be implementing a policy of mandatory investigation by MSD where there are more than two instances of domestic violence notified to the ministry within six months.

The Law Society also makes the following recommendations:

- The conditions for granting a protection order are sound and in the Law Society's view any further development to sections 13 and 14 of the DVA is better left to the courts on a case-by-case basis (see paragraphs 2.3 to 2.4, below).

- Under section 28B of the DVA, a judge of his or her own volition can make orders about day-to-day care and contact even if the party seeking the protection order has not asked for COCA orders. Consideration could be given to providing the court with a reciprocal ability under COCA to make a temporary protection order on its own motion, in limited circumstances, if there is evidence of significant domestic violence and the order is necessary for the protection of the applicant or children of the applicant (paragraph 2.5).

- An applicant may be significantly prejudiced by the delay caused by the respondent not filing the notice of defence within the time prescribed by rule 41 of the Family Courts Rules 2002 (rules). Consideration should be given to having the matter referred to a judge to make a temporary protection order once the time for filing a notice of defence has expired but pending the allocation of the formal proof hearing (paragraph 2.11).

- The Law Society considers that significant improvements are required to the service of documents in domestic violence proceedings, whether they be without notice or on notice (paragraphs 2.12 to 2.21).

- If a protection order is discharged, it is usually done by the applicant filing an application and affidavit. Consideration should be given to amending the legislation to require the respondent to also file an affidavit setting out what they have done to address their past behaviour. This may mitigate situations where the respondent may be attempting to manipulate the discharge of the order (paragraph 2.25).

- The court should be empowered to make occupation, tenancy and ancillary furniture orders on its own volition as part of the suite of conditions that attach to a protection order (paragraph 2.26).

- The Law Society has no objection to the revision of forms. However, this needs to be done with the utmost care and proper consultation. It is suggested that any revision of forms be done by a committee with representatives from the judiciary and the Law Society's Family Law Section (paragraph 2.32).

- The Law Society believes that the legal aid fixed fee steps for proceedings under the DVA, with the exception of remuneration for actual court time to attend the hearing, accurately reflect the real cost of providing legal advice and representation in domestic violence proceedings. While we note that eligibility for legal aid is outside the scope of the review, it is nonetheless a significant barrier for many victims of domestic violence (and children) to seeking a protection order (paragraph 2.34). The Law

Society considers that legal aid should be available to all applicants (and respondents) under the DVA. Alternatively, the income threshold for legal aid in respect of DVA proceedings should be replaced by the income eligibility of those who are able to access the Family Legal Advice Service (FLAS) for parenting and guardianship disputes under COCA, so that more victims of domestic violence would be eligible to obtain legal advice and representation to apply for a protection order (paragraphs 2.35 to 2.38).

- The Law Society suggests that if a final protection order has been made, a respondent could be required to repay part or all of the legal aid grant, i.e. their own legal aid grant if they have defended the application (if eligible for legal aid), or part or all of the applicant's legal aid grant (paragraph 2.37).

- The Law Society also suggests that consideration is given to extending non-payment of the $50 user charge and the repayment waiver in section 19 of the Legal Services Act 2011 to cover COCA proceedings where there are concurrent DVA proceedings (paragraph 2.39).

- The Law Society does not support a comparable FLAS service for those who require protection orders under the DVA, for the reasons outlined in paragraphs 2.40(c)(i) to (x).

- For the reasons outlined at paragraphs 2.49 to 2.62, the Law Society does not support the proposal for mandatory arrest for all breaches of protection orders.

- The Law Society considers that Police safety orders (PSOs) are a valuable tool for the Police in combating domestic violence. PSOs cannot be made when an arrest is made. The Law Society believes that this limitation should be removed as it could provide additional protection for victims of domestic violence when the perpetrator has been released on Police bail and is awaiting a hearing (paragraph 2.70).

- There is no right of appeal from a PSO. The Law Society believes that this should be remedied and that, in limited circumstances, there should be a mechanism to remove such orders from the record (paragraph 2.71).

- Police should be required to file FVIR reports, including information from the ODARA assessment, within a specified time of attending a domestic violence incident. The reports should not be redacted and should be provided in full (paragraphs 2.73 to 2.74).

- Section 51 of COCA provides that the court must consider protective conditions when making a parenting order in certain cases. Section 51(1)(b) is limited to physical or sexual abuse. The Law Society recommends that section 51(1)(b) is amended to include all forms of domestic violence including psychological violence (paragraph 2.85).

- The Law Society believes that where there are concurrent DVA and COCA proceedings applicants and respondents should be able to be legally represented and legal aid should be available for those eligible. This would require an amendment to section 7A of COCA (paragraph 2.86).

- In the Law Society's view no amendment is required in terms of the paramountcy principle or the principles in COCA (paragraphs 2.88 to 2.91).

- The Law Society does not consider that creation of a standalone family violence offence, or class of family violence offences, as suggested in the discussion document, is necessary (paragraphs 3.2 to 3.5).

- The bail and sentencing provisions already afford adequate scope for judges and the Police to impose appropriate bail conditions on domestic violence offenders. Therefore empowering judges and the Police to place additional conditions on people on bail or remanded in custody for any family violence offence is unnecessary (paragraphs 3.6 to 3.9).

- In response to the proposal that District Court judges should be able to vary protection orders on the basis of information they hear during criminal trials and to vary or suspend parenting orders, the Law Society considers it preferable that the criminal court refers these issues as a matter of urgency to the Family Court. If the proposals regarding the sharing of information between courts at paragraphs 5.13 to 5.21 of this submission are adopted, it would mean that the information criminal judges hear during trials could be made available to the Family Court (paragraphs 3.19 to 3.23).

- Timeliness of resolution of criminal charges is desirable in respect of all offending. Cases involving violence, particularly domestic violence, should receive priority to minimise the stress on all involved.

- The Law Society makes a number of suggestions to enable the courts to respond better to domestic violence (paragraphs 3.26.1 to 3.26.7).

- The Law Society supports the proposal at paragraphs 4.6 to 4.8 of the discussion document to provide access to services and programmes so that victims, perpetrators and families can refer themselves rather than relying on a court process (paragraphs 4.2 to 4.4).

- The Law Society supports the proposal at paragraph 4.11 of the discussion document to set out in the legislation that Police should take at least one of the following steps when responding to a report of domestic violence:
  - file a criminal charge (or issue a warning)
  - issue a Police safety order
  - make a referral to a funded service or to an assessment of risk and need

- The Law Society supports a presumption to disclose information about family violence concerns and believes that privacy restrictions on the disclosure of personal information must not take precedence where there is the potential for violence to affect children.

- The Law Society supports the proposal for enhanced information sharing between agencies (paragraphs 5.2 to 5.12) and the family and criminal courts (paragraphs 5.13 to 5.21). This would help to ensure that the courts have the best information available to them to resolve domestic violence cases effectively, enhance victim safety and ensure consistency across the criminal and family jurisdictions.

<u>Chapter 1 – Understanding family violence</u>

The nature and dynamics of family violence across population groups

What changes could be made to address the barriers faced by each population group?
Does the current legal framework for family violence address the needs of vulnerable population groups, in particular disabled and elderly people? How could it be improved to better meet the needs of these groups?
What changes could be made to better support victims who are migrants, particularly when immigration status is a factor?
What other ideas do you suggest?

Māori and Pacific people

1.1 Statistics show that Māori and Pacific people are over represented in the area of domestic violence both as victims and perpetrators of violence. Statistics also show that the risk of domestic violence will be heightened depending on their socio-economic status and area they live in. It is clear that

there needs to be a paradigm shift when addressing domestic violence within different population groups, particularly for Māori and Pacific people. While this shift must occur at a societal level, it also requires culturally appropriate services with dedicated resources and intervention at the earliest stage possible.

1.2 Māori culture and tikanga is based on the fundamental concept of whanaungatanga.[2] When dealing with both victims and perpetrators of violence any approach taken should be inclusive and empower not only the individual but also the whānau as opposed to separating the individual from the problem. The Māori world view is based on the physical (tinana), spiritual (wairua) and psychological wellbeing (hinengaro) of a person and their whānau.

1.3 It is therefore important for Māori and Pacific victims of violence to be able to access services and support that acknowledge and understand their cultural background and worldview and that these services are adequately resourced. Mainstream programmes that incorporate tikanga for Māori offenders show a higher success rate than those programmes that do not.[3]

1.4 Pacific culture is similar to the Māori world view in that "aiga" or family is a fundamental concept within their culture. Notwithstanding this, Pacific woman are often seen in a subordinate role to their male counterparts and are often excluded from decision-making within the home and the wider community. The State of Human Rights Report for Samoa[4] noted that the epidemic rates of violence against woman in Samoa is a form of discrimination that comes about from the systematic undervaluing of woman and their exclusion from the decision-making process, which leaves them feeling more vulnerable and marginalised. It is likely that this is an experience common across other Pasifika countries.

1.5 The Law Society agrees that any service or intervention for Māori or other ethnic population groups must recognise their cultural needs and background. The DVA in its current form is not culturally attuned. The DVA should be amended to reflect the importance of dealing with victims and perpetrators of domestic violence in a culturally appropriate way.

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2 Relationships that provide a sense of family connection; a relationship through shared experiences and working together which provides people with a sense of belonging.

3 Fiona Cram et al, New Zealand Ministry of Justice, Evaluation of programmes for Māori adult protected persons under the Domestic Violence Act 1995, 119.

4 Compiled by the Office of the Ombudsmen of the National Human Rights Institution, Samoa.

1.6 The Law Society notes that reference to Māori domestic violence programmes that were included in the Domestic Violence (Programmes) Regulations 1996 were revoked in 2014. Regulation 27 provided for the inclusion of Māori values and concepts by making sure that any programme designed for Māori, or where a person who attended a programme was primarily Māori, must take into account tikanga Māori, including the following Māori concepts and values:

- mana wahine (prestige attributed to woman)
- mana tane (prestige attributed to men)
- tiaki tamariki (importance of the safeguarding and rearing of children)
- whanaungatanga (family and relationships)
- taha wairua (spiritual dimension of a person)
- taha hinengaro (psychological dimension of a person)
- taha tinana (physical dimension of a healthy person)

1.7 Inclusion of the above concepts and values in regulations governing domestic violence programmes would be a starting point to address the nature and dynamic of family violence from a Māori world view. Values and concepts associated with other cultures could also be included.

1.8 Strengthening the working relationships between government agencies, kaumatua, church leaders and other cultural leaders may assist the government and other agencies in delivering crucial services to hard-to-reach Māori whānau and Pasifika communities.

Ethnic migrant communities

1.9 The Law Society agrees that ethnic migrant communities face additional barriers that may make it more difficult for them to seek help as victims of domestic violence.

1.10 While a special immigration status exists for victims of domestic violence whose partner is a New Zealand citizen or resident holder, not all refugee and migrant women may use it – either because they are unaware of the policy or are not willing to make a statutory declaration that domestic violence has occurred. The issue of domestic violence is therefore more profound for those women who fall outside this immigration status, for example, those who are not eligible as their partner is not a New Zealand resident or citizen.

1.11 The immigration experience itself may create additional stressors for refugee and migrant communities, such as financial problems and unemployment (including the hidden shame of men losing their role as the family's breadwinner), inability to communicate, unfamiliarity with New Zealand culture and systems, and isolation. In addition, women also have more rights and freedom in New Zealand compared to other more patriarchal societies, which will add to the pressures on families. The influence of the host culture on young people in the family can also be a source of family conflict.

1.12 Research shows that women in refugee and migrant communities are more vulnerable to domestic violence from their partners because of their isolation, which may take several forms:[5]

- separation from their families of origin
- if abusive partners keep them housebound and dependent, they can neither participate in their ethnic communities nor find support there
- lack of contacts in the mainstream community
- lack of awareness of mainstream services or lack of trust of New Zealand authorities

1.13 A woman who leaves her husband may face the additional problem of being ostracised and isolated from the community, losing support and her sense of belonging.

1.14 Domestic violence in refugee and migrant communities may be a taboo subject, or it may be justified on grounds of culture or religion so that it is normalised or not acknowledged as domestic violence. It may be seen as a private matter with shame and stigma for the whole family or community attached to it.

1.15 The traditional role of men in ethnic cultures is an important influence on domestic violence in refugee and migrant communities. Research shows that men's domination and adherence to traditional values about women have been shown to be risk factors.[6] Involving men and male community leaders in prevention and intervention efforts is important because men will often listen more readily to other men.

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5 Levine M, and Benkert N (2011) *Case studies of Community Initiatives Addressing Family Violence in Refugee and Migrant Communities: Final Report*, Ministry of Social Development and Ministry of Women's Affairs, Wellington, page 32.

6 B Nam, J Waldvogel, G Stone, M Levine (2011) *Family violence in migrant and refugee families and successful models of prevention and intervention: A summary analysis and annotated biography*, Ministry of Social Development, Wellington, page 9.

1.16 A holistic approach to domestic violence needs to be sensitive to the particular dynamics and context of domestic violence in these communities and deal with the stressors as well as the issue of domestic violence. This will involve empowering communities and individuals through education on what constitutes domestic violence, the relevant New Zealand laws and the impact of domestic violence, particularly on children.

1.17 Providers need to be culturally sensitive including having a sense of the community's level of awareness and understanding of domestic violence; for example, whether it is talked about, hidden or normalised, and how much shame or stigma is attached to the issue. Choosing a neutral location for services, such as a religious venue involving religious leaders, may be seen as less threatening or more comfortable than a mainstream environment. Providers also need to be mindful of the variety of cultures and communities. What works for one community may not work for another.

1.18 There needs to be adequate resourcing to ensure that an appropriate level of support is available across all sectors including referrals to culturally appropriate services, and financial, housing, immigration and legal assistance.

Older people and disabled people

1.19 The discussion document rightly identifies that older people and disabled people who may rely on others for day-to-day care can also be vulnerable to the risk of domestic violence.

1.20 The largest sector in our population over the next two decades will be those over 65. As our population ages the importance of protecting the elderly from neglect, abuse and violence will become an even greater challenge. These people need to have the same quality of care, standards, and appropriate accountability as our vulnerable children and young people do.

1.21 There are significant issues involving the elderly. Those who are experiencing a steady deterioration caused by dementia or Alzheimer's are perhaps the most vulnerable because it is difficult for them to complain or even comprehend that they may be being mistreated.

1.22 Families attempting to cope with elderly members who they may be supporting at home can and do become frustrated and angry at what they experience. These situations are difficult to monitor.

1.23 District health boards have staff in the "service for the elderly" units or their "mental health service for the elderly" who may become aware of such issues. Others who provide elder care also deal with such matters, for example emergency departments deal with the elderly who have "accidents" and may have suspicions about the causes of them. Staff in rest homes or similar facilities such as locked units dealing with dementia and/or Alzheimer's sufferers also provide services. The degree of co-operation on standards, expectations of staff and accountability within this sector is unclear and should be addressed.

Chapter 2 – Victim safety

2.1 The Law Society considers that overall, the legislation already in place to protect the victims of domestic violence is adequate (although further amendments in some areas are recommended, as outlined below). However, better coordination of services and responses when complaints are laid from Police and other agencies would assist victim safety.

2.2 While section 32 of the DVA provides for a mandatory court direction to attend a specified programme (unless the court considers there is good reason not to make such a direction), the respondent may not engage and simply face a criminal penalty for non-engagement. A greater emphasis on engagement with, and education and assistance for, perpetrators of domestic violence as well as for victims, would also help to reduce incidents of domestic violence.

Protection orders

What changes would you suggest to improve access to protection orders? For example:

- *increase funding for applications for protection orders*
- *provide more opportunities for others to apply for protection orders on victims' behalf*

What other ideas do you suggest?

Protection orders under the current law

2.3 The essential conditions for the granting of a protection order are set out in section 14 of the DVA. In the Law Society's view, these conditions are sound. The leading case on the granting of orders is the Court of Appeal decision in *Surrey v Surrey*.[7] *Surrey* clarifies the meaning of "necessary", with the effect that it is easier for the applicant to satisfy this condition. So long as domestic violence is proven and the applicant has reasonable fears for safety, necessity is presumed. Consideration could

[7] *Surrey v Surrey* [2010] 2 NZLR 581; NZFLR 1.

be given to codifying *Surrey* in section 14, however, in the Law Society's view, the courts are implementing *Surrey* satisfactorily and any further development is better left to the courts on a case-by-case basis.

2.4 Likewise, we believe that the grounds for obtaining a protection order on a without notice basis are sound. These are set out in section 13 of the DVA. While criticism is sometimes heard of the number of applications that are put on notice, the vast majority of applications are successful and a temporary protection order is granted. Further, the recent decision of Clifford J in *B v Family Court at Masterton*[8] held that the application in that case should have proceeded without notice and that the "complex dynamics" and the possibility that the respondent was also a victim did not justify proceeding on notice. This suggests that the wording of section 13 should not be tinkered with and that development is better left to the courts as issues arise.

2.5 Under section 28B of the DVA, a judge of his or her own volition can make orders about day-to-day care and contact even if the party seeking the protection order has not asked for COCA orders. Consideration could be given to providing the court with a reciprocal ability under COCA to make a temporary protection order on its own motion, in limited circumstances, if there is evidence of significant domestic violence and the order is necessary for the protection of the applicant or children of the applicant. This could involve an amendment to section 51 of COCA. Care needs to be taken with this in respect of the nature and subject matter of the two statutes – the DVA involving adult relationships and COCA involving parent/child relationships.

On notice applications

2.6 The majority of without notice applications for protection orders are put on notice because:

- there is insufficient evidence set out in the applicant's affidavit; or
- the seriousness of the behaviour alleged is not sufficient to override the right of the respondent to be heard; or
- the delay since the incident occurred may lead to the judge ruling that the necessity threshold is not met.

[8] *B v Family Court at Masterton* [2014] NZHC 3057; [2015] NZFLR 307.

2.7 In practice, there is, and continues to be, a real issue in the delay between when an application is put on notice and that matter proceeding to a hearing. The Law Society believes that in some cases the time delay disadvantages the applicant.

2.8 If an application for a protection order is made on notice, or placed on notice, the respondent has 21 days after they are served with the application to file a notice of defence or a notice of intention to appear.[9]

2.9 Where the order is made on a without notice basis and the respondent wishes to be heard, the court is required by section 76(3) of the DVA to allocate a hearing date as soon as practicable and unless there are special circumstances, no later than 42 days after receipt of the notice from the respondent. It is the experience of many Family Court lawyers that this timeframe is often not met.

2.10 However, where the application is either made or placed on notice, the rules apply. Rule 41 specifies times within which a notice of defence or notice of intention to appear is to be filed and served. If a notice of defence is not served the application will go to a formal proof hearing. Rule 42 then details what occurs if no notice of defence is filed within the prescribed time. The court may, subject to certain sanctions that may be imposed[10] allow the respondent to take part in the proceedings. In that event the hearing may then proceed or be adjourned to a defended hearing date, which is to be as soon as practicable and no later than 42 days after the date of granting the adjournment.[11]

2.11 Where this occurs, an applicant may be significantly prejudiced by the delay caused by the respondent not filing the notice of defence within the time prescribed by rule 41. Consideration should be given to having the matter referred to a judge to make a temporary protection order once the time for filing a notice of defence has expired but pending the allocation of the formal proof hearing.

Service of documents

2.12 Since the implementation of the new family justice system, there have been a number of concerns regarding the service of documents and the associated correspondence issued by the various Family

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9 See rule 41(a) of the Family Courts Rules 2002.
10 See rule 42(3)(c) and rule 42(5)(b) of the Family Courts Rules 2002.
11 See rule 314(3)(b) of the Family Courts Rules 2002.

Court registries. The Law Society considers that significant improvements are required to the service of documents in domestic violence proceedings, whether they be without notice or on notice.

2.13 Prior to 31 March 2014, all registries, except Auckland, effected the service of all Family Court documents. In Auckland, the registry relies on counsel to effect service. This exception exists due to a long-term local practice rather than adherence to the rules.

2.14 In April and May 2014, the Law Society wrote to the ministry regarding an apparent operational change in respect of the service of documents in the Family Court, including the service of some protection orders.

2.15 The operational change in effect was that registries were now applying a new interpretation to rule 101, in particular rule 101(1) that "... the registrar must serve, or *cause to be served* ..." so that the registries were returning documents to lawyers for the applicants to arrange service on respondents or were ringing the respondents to collect the service documents, including temporary protection orders, from the registry themselves.

2.16 In its correspondence to the ministry, the Law Society made it clear that it considered that the words "… or cause to be served …" required the registrar to effect personal service by the use of a third party (a process server/bailiff). The risk involved in any other interpretation, such as the method noted above, is that the person may simply refuse to come to the registry to be served. This would obviously be undesirable particularly in respect of the service of protection orders.

2.17 Feedback received from family lawyers around the country in May 2014 was that in most regions, registries were ringing respondents and asking them to attend court to be served. Examples included DVA matters – several of where the respondent was telephoned on a Friday after 5pm and asked to collect from the court a temporary protection order and occupation and ancillary furniture orders.

2.18 Efficiency of service from registries is also an issue. The Auckland registry was sending letters to respondents well before documents were being served. This caused potentially grave situations where people were unaware the other party had knowledge of the proceedings. In several cases last year, it involved confidential addresses for a beaten women and their children being disclosed on the letter to the respondent and where the address of the protected person was directed to be confidential for obvious safety reasons.

2.19 If lawyers instruct the registry in Auckland, service documents should be couriered to their office or the local court. There have been numerous examples where despite clear instructions to courier the documentation, court staff mail it which creates further delays (sometimes up to one week or longer). Many of these examples included protection orders, some of which were made without notice.

2.20 On 8 January 2015, the *Waikato Times* published an article where the ministry confirmed it would halve bailiffs nationally from 93 to 46 and that the "drop in work was due to improvements to day-to-day bailiff operations" and "changes to the Family Court have also reduced bailiff work".[12]

2.21 The Law Society urges the ministry to put in place a process whereby protection orders, whether made without notice or on notice, are served as soon as possible after they are made. It is disappointing that these applications are being filed and orders being granted, sometimes under urgency, for the protection of domestic violence victims and children, yet in some cases the documents are taking a week or longer to be served.

Consequences of an order

Non-contact

2.22 The main consequences of an order are set out in sections 19 and following. Existing legislation does not provide victims with the ability to consent to making contact with the perpetrator unless they resume living together.[13] Section 20(1) provides that the non-contact condition in section 19(1) is to have effect "except where the protected person and the respondent are, with the express consent of the protected person, living in the same dwelling house". There are cases where parties do not resume cohabitation but victims wish to make contact with perpetrators of violence.

2.23 Section 20 of the DVA could be amended to make it clear that while a victim of family violence may have genuinely consented to contact with the respondent to a protection order, a victim can never be taken to have consented to any violence committed in breach of a protection order.[14] This would allow contact that the protected person consented to, but would ensure there was still enforcement action for any violence that occurred during the consensual contact.

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12 http://www.stuff.co.nz/business/better-business/64746709/ministry-confirms-cuts-to-bailiff-numbers

13 See section 19(2) of the Domestic Violence Act 1995.

14 Family Violence – National Legal Response; Final Report volume 1 ALRC Report, 114, October 2010. Recommendation 12-5 at page 25.

2.24 In some situations the abuse can simply restart, allowing the cycle of violence to continue. It is the experience of many family lawyers that where this happens a number of applicants do not understand that there is no need to discharge the protection order for them to continue the relationship. This could be better explained in the ministry's pamphlets on domestic violence and protection orders.

2.25 If a protection order is discharged, it is usually done by the applicant filing an application and affidavit. Consideration should be given to amending the legislation to require the respondent to also file an affidavit setting out what they have done to address their past behaviour, for example, attendance at a domestic violence programme and/or an anger management course. This may mitigate situations where the respondent may be attempting to manipulate the discharge of the order.

Occupation, tenancy and ancillary furniture orders

2.26 In many cases, an application for a protection order is accompanied by an application for an occupation or tenancy order and/or an ancillary furniture order. In the absence of these applications, the court should be empowered to make such orders on its own volition as part of the suite of conditions that attach to a protection order.[15]

Compensation or bonds

2.27 The form of orders that the court can make could be expanded in other ways. For example, breach of the English equivalent of New Zealand's Harassment Act can lead to an award of damages. Consideration should be given to requiring the respondent to pay compensation to the applicant for the abusive behaviour. The applicant (and children) may well be financially stretched and such compensation may be of great assistance. Another option is the payment of a bond for good behaviour but this would not directly assist the victim and children.

Involvement of family/ whanau

2.28 Another possibility is that the protection order be tied in with a family/whānau meeting/hui to try and deal with longer-term problems (analogous to a family group conference). The meeting/hui could be held before the final order is made but involving the wider whānau is more culturally

[15] NLM v SAM [2015] NZHC 935 at [29] where Heath J set aside an occupation order on the grounds that the protection order was sufficient, sed quaere.

appropriate so long as there is no risk of the victim being re-victimised. Consideration should be given to amending the DVA to enable the family group or whānau to be involved if appropriate in the circumstances.

Programmes

2.29 The requirement that the respondent attend a programme is a positive one but is dependent on the nature, availability, frequency and quality of the programme. One important issue is the cultural suitability of the programme. As noted above at paragraph 1.6, the regulations that addressed this were repealed in 2014. Consideration should be given to reenacting the regulations. While the sections on non-violence programmes in the legislation were recently revised, they should be further amended to ensure that programmes are culturally suitable.

2.30 Penalties and consequences for breaching a protection order and failing to attend programmes should also provide for a therapeutic response, to ensure perpetrators get the help they need to make behavioural changes to avoid a recurrence of violence. The offence provision in section 49 of the DVA may not adequately protect victims or ensure future changes are made by the respondent to avoid future violent incidents.

2.31 Victims can attend programmes but do not have to. In some situations, victims re-appear in various different contexts. The effect on children can be disturbing. The victim may well need counselling or education to deal with the impact on children as well as the implications for themselves. Some believe that consideration should be given to making programmes for victims mandatory where the victim does not object and where the court considers that a programme is needed. However, the Law Society believes that even though these programmes would be beneficial for victims, consent must be given to avoid the risk of re-victimisation.

Accessibility of protection orders

Forms

2.32 The Law Society has no objection to the revision of forms as suggested at paragraph 2.11 of the discussion document. However, this needs to be done with the utmost care and proper consultation. Revision of the forms for the purposes of the changes to COCA was a flawed process and must not be repeated. It is suggested that any revision of forms be done by a committee with representatives from the judiciary and the Law Society's Family Law Section.

Funding

Legal aid

2.33 The Law Society agrees with the statement at paragraph 2.12 of the discussion document that most people who apply for legal aid for the purposes of obtaining a protection order will receive support and that applicants do not usually have to repay legal aid. In addition, the $50 user charge where legal aid is granted does not apply to applications for protection orders.

2.34 The Law Society believes that the legal aid fixed fee steps for proceedings under the DVA, with the exception of remuneration for actual court time to attend the hearing, accurately reflect the real cost of providing legal advice and representation in domestic violence proceedings. While it is noted that eligibility for legal aid is outside the scope of the review, it is nonetheless a significant barrier for many victims of domestic violence (and children) to seeking a protection order.

2.35 The government recognises the vulnerability of those who are the subject of applications for compulsory treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 by enabling them to be represented by legal aid providers by virtue of government policy and notwithstanding the provisions of the Legal Services Act 2011. That is quite explicable in the circumstances for that specific group of vulnerable people. By analogy victims of domestic violence are similarly vulnerable.

2.36 Section 10(2) of the Legal Services Act 2011 enables legal aid to be granted in special circumstances where, for example, an applicant's income is over the current income threshold but where the available income is either held by the respondent or needed by the applicant for moving and other expenses arising from the domestic violence. However, the Law Society believes that legal aid should be available to all applicants (and respondents) under the DVA. The Law Society is aware of a number of cases where victims of domestic violence have been refused legal aid placing those applicants under undue pressure. It seems inherently unfair that victims of domestic violence (and their children) should be penalised financially.

2.37 The Law Society suggests that if a final protection order has been made, a respondent could be required to repay part or all of the legal aid grant, i.e. their own legal aid grant if they have defended the application (if eligible for legal aid), or part or all of the applicant's legal aid grant.

2.38 Alternatively, the income threshold for legal aid in respect of DVA proceedings should be replaced by the income eligibility of those who are able to access FLAS for parenting and guardianship disputes under COCA, so that more victims of domestic violence would be eligible to obtain legal advice and representation to apply for a protection order.

2.39 The Law Society also suggest that consideration is given to extending non-payment of the $50 user charge and the repayment waiver in section 19 of the Legal Services Act 2011 to cover COCA proceedings where there are concurrent DVA proceedings. This would reflect that but for the domestic violence, no COCA proceedings would be necessary.

Alternative funding options

2.40 Paragraph 2.13 of the discussion document sets out examples of increased access to funded legal advice, including:

- establishing a dedicated fund;
- community legal advice services such as Community Law Centres; and
- The Family Legal Advice Service (FLAS), which is currently available for parenting and guardianship disputes under COCA.

(a) Establishing a dedicated fund

(i) While there is merit in the idea of establishing a dedicated fund, there is no detail provided, for example, on the amount required for the dedicated fund, the eligibility of applicants (or respondents) to access it, how much money would be available to each applicant (or respondent), and who would administer it.

(ii) The statistics provided at page 5 of the discussion document show that in 2014, the Police responded to 100,000 family violence incidents and in 2013, children were present at over 63% of all family violence incidents attended by Police. Unfortunately, there are no statistics to show how many applications for protection orders were made in corresponding years, how many were granted, and how many of the applicants (or respondents) were legally aided. These statistics are imperative in order to get a realistic idea of how much money would be required to establish such a fund.

(iii) There may be more benefit in considering dispensing with or raising the income threshold of those eligible to access legal aid in domestic violence cases and utilising the legal aid regime already established, rather than creating a separate dedicated fund. The additional funds

required to establish a dedicated fund may well cover the costs of dispensing with or raising the eligibility threshold for legal aid in respect of DVA proceedings.

(b) Community Law Centres

(i) Community Law Centres (CLCs) already provide free legal advice to a substantial number of people with a range of legal problems. Advice on family law matters, including domestic violence issues, make up a substantial part of the service that the CLCs currently provide.

(ii) The Law Society sought statistics from the CLCs in preparing its submission on the Family Court Proceedings Reform Bill in February 2013. The statistics provided for six of the centres showed a significant increase in client numbers over the 2008/2009 to 2011/2012 period ranging from a 47% increase in the Wellington CLC (not including Hutt Valley or Whitireia) to a 174% increase at the Waitakere CLC. This was against the backdrop of many centres having a reduction in their funding and some centres closing. Late in 2012, the then Minister of Justice Judith Collins increased funding for CLCs. However, it is unknown since then whether the client numbers accessing CLCs have continued to increase following the family court reforms, in particular, due to the restriction on legal advice and representation (and the removal of legal aid) in COCA matters, notwithstanding the introduction of FLAS.

(iii) The Law Society also notes that CLCs in some regions have very limited services, for example, some are only open to the public for appointments once a month, or once a fortnight in certain regions. If services provided by CLCs are to increase further to provide greater assistance and services to victims of domestic violence, the funding provided to them will need to increase accordingly. In addition, serious consideration needs to be given to making the CLC service more available particularly in large geographical areas such as Northland, where the level of domestic violence is particularly high.

(c) Family Legal Advice Service

(i) There is an important distinction to be drawn between legal advice and representation provided by legal aid (if the eligibility threshold is met) and the legal services provided under FLAS.

(ii) The legal aid fixed fee schedules for domestic violence proceedings clearly set out guideline hours and associated tasks for each step required for an applicant seeking a protection order on notice or without notice for both a defended and undefended matter and for a respondent in such proceedings. The schedules also include guideline hours and payments for pre-hearing matters, actual attendance at the hearing and additional hours for factors in

a particular case, for example, the other party is self-represented, suffers from an intellectual disability or mental illness or has language or reading difficulties. The current schedule for an undefended application in a DVA proceeding, whether on notice or without notice, provides for a maximum of 15 hours plus an additional two hours for additional factors. A defended matter provides additional time.

(iii) Legal aid providers are able to apply for an amendment to grant, where fixed fees are shown to be inadequate for a particular activity. The amendment must meet specific criteria but would apply, for example, where cases are overly complex and the available hours are simply inadequate to cover the work required.

(iv) In contrast, FLAS solely funds extremely limited out of court COCA advice in respect of parenting and guardianship disputes in two stages. FLAS providers under stage one assist people to navigate the new justice system, which includes explaining to them the various out of court services, such as FDR, preparatory counselling and parenting information programmes and their options about what might happen if matters do not settle. It also covers initial legal advice with their particular matter. Based on legal aid rates and time provided in the fixed fee schedules, stage one represents a maximum of two hours.

(v) If the out of court services do not result in the resolution of the dispute, stage two FLAS provides assistance with the completion of the prescribed COCA forms now required to be used in parenting and guardianship disputes. On the completion of the forms, the FLAS service then ceases. It does not cover further advice or representation in court for these disputes. Based on legal aid rates and time provided in the fixed fee schedules, stage two represents a maximum of two hours. Unlike legal aid, there is no provision for additional time or payment to cover factors such as language or reading difficulties or mental illness or intellectual disability.

(vi) FLAS providers are drawn from the pool of approved legal aid providers. Some legal aid providers are both FLAS and legal aid providers, although some choose only to provide one of the two services. It is therefore possible for an applicant who needs to apply for a parenting or guardianship order following completion (or exemption) of the pre-court processes, to retain the same lawyer due to the fact that FLAS lawyers are required to be approved legal aid providers. However this is not always the case.

(vii) For both without notice and on notice applications for protection orders, the vast majority who do not meet the threshold for legal aid are required to pay for legal advice and

subsequent representation, or to self-represent. As mentioned at paragraph 2.36 of this submission there are limited circumstances where those who are above the income threshold can apply for legal aid due to special circumstances.[16]

(viii) There are regions throughout the country where there is an acute shortage of both legal aid and FLAS providers. This creates additional barriers for domestic violence victims who, in most cases, need immediate assistance, particularly in provincial areas where accessibility to legal advice may be poor or non-existent. While there is a policy in place for both FLAS and legal aid providers to be remunerated for travel to areas outside their local area of travel, there are a number of reasons for the lack of such providers in some areas, including the:

- lack of providers in a particular geographical area generally due to population size or lifestyle choices;
- unavailability of providers in a particular geographical area in terms of workload, existing conflicts of interest, illness, and annual leave/holidays;
- suitability of a particular provider in terms of complexity of the dispute;
- suitability of a particular provider in terms of particular cultural issues (parties may request for example a Māori provider) or language preferences (where the parties both have English as a second language but speak fluent French); or
- low amount of remuneration paid in respect of the tasks to be completed by FLAS providers.

(ix) The Law Society does not believe that the FLAS service in its current form is able to deliver high quality legal advice to those involved in parenting and guardianship disputes. This is due to the inadequate time and remuneration available to FLAS providers to enable them to deliver a level of legal advice and support that should be available to parents or guardians who require this assistance at a particularly stressful time in their lives. Because of the added dynamic of domestic violence to an already stressful and difficult situation, the Law Society does not support a comparable FLAS service for those who require protection orders under the DVA.

(x) It is essential that adequate funding levels are provided to enable a lawyer to continue an ongoing relationship with the client if required. In other words, the funding must be sufficient for the lawyer who offers initial advice to see the case through to a final order. As

16 See section 10(2) of the Legal Services Act 2011.

noted above, this is not always the case under the current FLAS service. In the Law Society's view, continued representation would be an efficient use of limited resources and would also support domestic violence victims at a time of great trauma and stress.

Applications by third parties

2.41 Paragraph 2.15 of the discussion document states that "we could explore empowering Police, or an approved NGO or iwi service provider to apply for a protection order on a victim's behalf". Section 12 of the DVA already enables Police and other persons to make applications on behalf of a victim of domestic violence. In practice, this section is rarely used, mainly because in the past, victims were unco-operative.[17] However, the Law Society supports the retention of the section in the legislation, and where an iwi authority or an NGO applies on behalf of a person for a protection order, it is important that it not be left out-of-pocket financially.

2.42 Whether an application may be made without the victim's consent has serious implications. It is currently possible for a Police safety order (PSO) to be issued without the victim's consent and this was controversial when the legislation was passed. However, such an order can last for no longer than five days and therefore the infringement of the victim's rights is arguably small.

2.43 It is a different situation when considering a permanent protection order. If the victim is happy to receive help in making an application, then there is no problem and the process may actually be much smoother for the victim. However, if the victim is hostile and unwilling to support the application, the outcome may be disempowering of the victim and a denial of their rights and freedoms. The Law Society therefore does not support this approach.

2.44 Paragraph 2.15 of the discussion document goes on to say that the third party application could be with the victim's consent or "where the victim does not object to the application". This reflects the wording used in section 12(3)(b) of the DVA. However, that section has several safeguards such as ascertaining the victim's wishes and making an assessment of the victim's best interests. Given the long-term and wide consequences of a protection order, the victim would have to be fully informed of the procedure and its implications. If after that, the victim does not object, this could then be regarded the equivalent of consent. However, if the victim "does not object" after inadequate explanation and information and an application is made, then the victim is being abused in a

[17] See for example *X v Y* [1997] NZFLR 167.

different kind of way. If section 12 of the DVA is to be amended, it should specify the need for adequate information so the victim is fully informed of the procedure and its implications.

Representatives

2.45 Section 9 of the DVA requires a person under the age of 16 to apply for a protection order through a representative. Greater consistency should be provided between COCA and the DVA when the applicant is a parent aged 16 or over, so that if a protection order is applied for at the same time as a parenting order, a representative would not be required under rules 90 and 90A. There should be closer alignment of these sections to allow applications by persons lacking capacity by virtue of age. Consideration should be given to lowering this threshold especially for a person who is, for example, 15 and has a child. The Law Society also notes the general shortage of litigation guardians available to act for those with disabilities or for those who are minors.

Orders against minors

2.46 Section 10 prevents an order being made against a child under 16. This means that some victims of domestic violence inflicted by minors cannot access the protection order procedure. An example of a real situation is where a 13 year old boy physically attacks his mother on a regular basis but she is unable to apply for a protection order. Consideration should be given as to whether the law should be changed to allow for a parent in these situations to seek protection under the DVA.

2.47 Section 10 also uses the anomalous definition of "… under the age of 17 years, unless the minor is or has been married or in a civil union or de facto relationship." It is unclear why the law treats 16 year olds differently. The United Nations Convention on the Rights of the Child (UNCROC) uses the age of 18 and above and in section 36 of COCA the age of 16 years and above is used for consent and refusal to consent to medical treatment. The Law Society recommends that section 10 be amended to "under 16 years of age". This would allow the reference to marriage, civil union or those in a de facto relationship to be deleted.

Responses to breaches of protection orders

What changes could enhance the effectiveness, use and enforcement of protection orders? For example:

- *require Police to arrest for all breaches of protection orders, where there is sufficient evidence*

What other ideas do you suggest?

Arrest

2.48 The discussion document suggests at paragraph 2.20 that the Police be required to arrest for all breaches of protection orders when there is sufficient evidence to arrest and charge, and that removing Police discretion about whether to arrest when a protection order has been breached could lead to a more consistent response to breaches.

2.49 The removal of Police discretion, although perhaps leading to more consistency, may catch even the most minor, technical and/or inadvertent breaches which may not justify arrest and taking a person into custody.

2.50 Further, as set out in paragraph 2.21 of the document, some complainants may not want the perpetrator arrested and charges laid – they may simply want the perpetrator to desist from the behaviour.

2.51 The discussion document also states at paragraph 2.21 that automatic arrest "could also significantly reduce the use of Police safety orders". This implies that such orders are undesirable, which contradicts the recent evaluation which showed that, in general, they have been well received by Police and the community and have improved the immediate safety of victims and their children.[18] The Law Society believes that mandatory arrest may undermine the objectives of PSOs and be too heavy-handed a reaction when an alternative, workable mechanism is already available.

2.52 The discussion document acknowledges at paragraph 2.21 that the removal of Police discretion would be a departure from longstanding principles of Police independence and may discourage victims from calling the Police if they want domestic violence to stop but do not want the perpetrator arrested. These are legitimate concerns. In the Law Society's view, an additional concern is that the proposal removes the capacity for Police to take into account individual circumstances and is therefore likely to infringe the right to be free from arbitrary arrest and detention guaranteed under section 22 of the Bill of Rights Act 1990 (NZBORA), as discussed below.

Consistency of the proposal with section 22 of NZBORA

2.53 Section 22 of NZBORA provides that:

> Everyone has the right not to be arbitrarily arrested or detained.

[18] See paragraph 2.36 of the discussion document.

2.54 The concept of arbitrariness is an important and appropriate yardstick by which to measure legislative powers of arrest.[19] This is particularly so where the proposal is one of mandatory arrest.

2.55 The Court of Appeal in *Neilsen v Attorney-General* is the leading statement on the meaning of arbitrariness:[20]

> Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is *made without reference to an adequate determining principle* or without following proper procedures.

2.56 In the context of domestic violence, the decision of the full High Court in *Attorney-General v Hewitt* is instructive.[21] In *Hewitt*, two police officers arrested the plaintiff when they were called to a domestic violence incident. The officers believed they were obliged to make the arrest because of the Kapiti Abuse Intervention Programme.[22] That programme made it mandatory for officers to arrest a person if there was sufficient evidence to arrest them for a domestic violence offence. The court concluded that:[23]

> a failure to consider the discretion to arrest as a result of blind adherence to policy or a fixed determination to arrest come what may, is not only unlawful but must also be regarded as arbitrary for the purpose of s 22 of the NZBORA.

2.57 Although the policy in *Hewitt* was executive rather than legislative (and consequently the court focused its analysis primarily on the question of the legality of a policy that removed Police discretion) there are lessons to be learnt from the case. In particular, the court observed that factors relevant to an assessment of the arbitrariness of an arrest in the context of domestic violence may include, among other things, the need to remove an assailant from a fraught situation, and the circumstances of the victim and offender. In essence, a circumstantial inquiry is necessary. *Hewitt* has been characterised as an example of a successful challenge to an arrest because of compliance

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19 The Attorney-General has issued three section 7 reports that draw attention to inconsistencies of proposed legislation with section 22 of NZBORA.

20 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [34] (emphasis added).

21 *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC).

22 The same programme set a blanket policy preventing the granting of bail to domestic violence offenders. In *Whithair Attorney-General* [1996] 2 NZLR 45 (HC) the High Court held that blanket policy to be unlawful.

23 *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC) at [55].

with a rigid policy that prevented consideration of whether the intervention of the criminal law is necessary in the particular case.[24]

2.58 In light of the above, arrests (and therefore legislative powers making such arrests mandatory) can be considered to be arbitrary if they:

(a) exhibit elements of inappropriateness;

(b) lack proportionality;

(c) are made without reference to an adequate determining principle; or

(d) are made in compliance with a rigid policy that removes discretion.

2.59 The proposal, if enacted, would require officers to arrest those who breach protection orders, regardless of the circumstances surrounding the particular breach. The circumstances within which protection orders are breached are diverse. Not every breach imposes a risk to public or individual safety. A breach may be trivial or technical. There may be no need to remove the person in breach from a particular situation. Yet the proposal would require an arrest in such circumstances. Such an arrest would meet the criteria for arbitrariness outlined at paragraph 2.58 above.

2.60 The Attorney General's 2010 report under section 7 of NZBORA on the Alcohol Reform Bill reinforces this argument. That bill proposed to introduce a power of arrest in respect of the infringement offence committed by breaching an alcohol ban. The Attorney-General advised that this power of arrest infringed section 22 of NZBORA. One of the reasons for this conclusion was that the proposed power was not necessary to manage high risk situations associated with a breach of an alcohol ban as those situations could be dealt with by the exercise of existing police discretion to arrest.

2.61 The same analysis holds true in respect of mandatory arrest in all breaches of protection orders where there is sufficient evidence to arrest and charge. Mandatory arrest is not necessary to manage high risk situations brought about by a breach of a protection order because in those circumstances police discretion will suffice.

2.62 For the reasons outlined at paragraphs 2.49 to 2.61 above, the Law Society does not support the proposal for mandatory arrest for all breaches of protection orders.

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24 *R v Briggs* [2009] NZCA 244 at [62].

Filing charges

2.63 The discussion document states at paragraph 2.22 that Police are currently looking at how they can improve the prosecution of breaches of protection orders, including the use of video statements recorded at the scene to improve the collection of evidence. There does not seem to be anything inherently objectionable if the attending Police capture incidents on video for the purpose of gathering witness evidence, subject to issues around relevance. The interviewing of suspects at the scene would be subject to existing protections under NZBORA and admissibility requirements under the Evidence Act 2006.

Property orders

What changes would enhance the effectiveness, use and enforcement of property orders? For example:

- *require judges to consider accommodation needs when making protection orders and to make property orders more proactively*
- *simplify enforcement mechanisms.*

What other ideas do you suggest?

Property orders under the current law

2.64 As indicated at paragraph 2.26 of this submission, there are advantages in requiring the court to automatically look at the possibility of granting an occupation or tenancy orders and an ancillary furniture order when considering granting a protection order.

2.65 Under the current law, property orders can only be obtained without notice where there has been physical or sexual violence.[25] The Law Society recommends that section 60(1)(a) be amended to enable without notice applications to be made when there has been any form of domestic violence, including psychological violence.

2.66 Generally, the rules on property orders have not given rise to many problems although there have been issues with the enforcement of some property orders, especially furniture orders. One issue is whether the first of the two alternative tests in section 53(2)(a) – “necessary for the protection of the applicant” – is too narrow. Consideration should be given to amending section 53(2)(a) to read “necessary for the accommodation needs of the applicant or a child of the applicant”. (If section

25 Section 60(1)(a) of the Domestic Violence Act 1995.

53(2)(a) is amended, which relates to occupation orders, section 57(2) relating to tenancy orders, should also be amended.)

Police safety orders

What changes might enhance the effectiveness, use and enforcement of Police safety orders? For example:

- *require Police to refer a perpetrator to services, such as short-term housing*
- *empower Police or a third party to support the victim to apply for a protection order, or apply on behalf of a victim, when a Police safety order is issued (if the victim consents, or does not object)*

What other ideas do you suggest?

Police safety orders under the current law

2.67 PSOs are effective tools for providing "breathing space" or a "cooling down period" between the parties. It needs to be acknowledged that not every incident needs to result in arrest and that often the victim is not seeking a criminal consequence for the perpetrator but simply immediate intervention to stop the behaviour. The Law Society considers that PSOs are a valuable tool for the Police in combating domestic violence

2.68 PSOs dovetail well with the existing domestic violence procedures. When a without notice application for a protection order is made, it assists the court where the applicant can produce a copy of the PSO. Anecdotally, family lawyers find that the court relies on the fact that the Police have seen fit to issue a PSO as an indication that a temporary protection order may be required upon the expiration of the PSO.

Suggested improvements to Police safety orders

2.69 The Law Society considers the name "Police safety orders" is somewhat misleading as it reads as if the orders are protecting the Police. We suggest as an alternative, the orders are called "Personal safety orders" which would more correctly reflect the purpose behind the availability of such orders.

2.70 PSOs cannot be made when an arrest is made. The Law Society believes that this limitation should be removed as it could provide additional protection for victims of domestic violence when the perpetrator has been released on Police bail and is awaiting a hearing.

2.71 We understand from family lawyers that in some cases PSOs have been issued in circumstances where, upon more detailed inquiry, questions have arisen about how bona fide the information was that was available at the time the PSO was made. There is no right of appeal from a PSO and while no criminal conviction results from the issue of such an order, there is likely to be a record on a Police file that an order has been issued. This can have significant consequences for a person at a future time who may have had an order issued on grounds that have later been found to be insufficient. The Law Society believes that this should be remedied and that, in limited circumstances, there should be a mechanism to remove such orders from the record.

2.72 When Police attend a domestic violence incident, a Family Violence Incident Report (FVIR) is completed. The FVIR also contains information from a risk assessment tool known as ODARA[26] that Police use in such cases, which can predict the likelihood that a perpetrator might re-assault in intimate partner relationships. The timeliness, consistency and quality of information provided by Police varies greatly throughout the country.

2.73 Police should be required to file FVIR reports, including information from the ODARA assessment, within a specified time of attending a domestic violence incident. This information should be available at the earliest opportunity following a domestic violence incident whether or not a PSO is issued. The more promptly the information is provided, the sooner victims of domestic violence (and children) are able to obtain protection.

2.74 The reports should not be redacted and should be provided in full. They contain important information (even though technically hearsay) to support a without notice application. At times, the family violence summaries are so heavily redacted that the report is rendered useless. For example, when a person has had multiple police attendances over a long period of time it is impossible to see whether these attendances relate to a particular perpetrator or to another perpetrator.

Opportunity to address the risk of further violence

2.75 The suggestion at paragraph 2.38 of the discussion document that the recipient of a PSO could be provided with somewhere to live seems sensible. If the alleged perpetrator has nowhere else to live, the chance of them continuing to contact the complainant in breach of the PSO seems to remain a significant issue. The Law Society is aware that Aviva in Christchurch undertook a research project

[26] The New Zealand Police implemented the Ontario Domestic Assault Risk Assessment (ODARA) in March 2012.

into the need for short term/emergency housing for men. It was found that men were able to find short term accommodation compared with housing the victims, who would often have the children with them. It may be beneficial for the ministry to consider the outcome of that research project in respect of the suggestion to provide the perpetrator of violence with somewhere to live.

2.76 The discussion document suggests at paragraph 2.39 that a third party or the Police could apply for a protection order after the expiration of a PSO, to ensure the continuity of protection for the victim. This issue is discussed at paragraphs 2.41 to 2.44 of this submission. While it may be appropriate in some circumstances, a protection order should not be applied for if there is no ongoing risk of domestic violence to the victim or the victim does not wish for a protection order to be made.

Keeping children and adult victims safe in parenting arrangements

How should risks to children and to adult victims be reflected in parenting arrangements under the Care of Children Act 2004? How could parenting orders and protection orders be better aligned?

For example:

- *clarify that a child's safety from all forms of violence is to be given greater weight and be a primary consideration*
- *require parenting orders to be consistent with any existing protection order*
- *courts could be given broader discretion to consider risk to the safety of the child and to an adult victim when deciding parenting arrangements*

What other ideas do you suggest?

Family violence and parenting arrangements

2.77 COCA proceedings, which often run concurrently with DVA proceedings, can place adult victims of domestic violence under significant stress. This can include:

- Attending court events or face-to- face negotiations where the perpetrator is present.
- Having to make decisions quickly while under stress, for example, where judges wish to make interim contact arrangements at a directions conference.
- Requiring the victim to permit the perpetrator contact when they are still feeling uncertain about safety issues.

- Requiring the victim to consent to lay supervised contact "providers" because there are few professional supervised contact providers and the alternative would be that the perpetrator would have no contact at all with the children.
- Expecting the victim to engage with the perpetrator over guardianship issues and making arrangements about the children as well as being present at changeover.
- Encouraging the victim to share their contact details and permit changeover to occur from home even if the condition of a protection order is that the perpetrator does not come onto the property.

2.78 The Law Society suggests that it should become standard practice that for procedural court attendances, the parties are not required to attend in person and that the lawyer's attendance is sufficient. We note this is at odds with the current move towards self-representation under COCA but in our view it should be a standard practice where parties are legally represented.

2.79 Better use could be made of AVL facilities so that victims of domestic violence can attend court without being physically in the presence of the perpetrator. There could also be better resourcing at court, for example, the provision of more private meeting rooms and wider availability of court security particularly in provincial courts.

2.80 It is interesting to note that the expectations of parents following domestic violence depart markedly from expectations of parents' interactions with Child Youth and Family (CYF) caregivers. When a child is in the custody of the chief executive, primacy is placed on keeping the child's placement stable and secure: contact between children, their parents and the caregivers can be limited and caregivers' contact details are kept confidential. However, the same security is not afforded to a parent who applies for a protection order to keep themselves and a child (or children) safe, potentially before CYF become involved with the child's welfare.

2.81 Even in high conflict situations a parent can be encouraged and/or ordered to share the care of the children with the perpetrator because the violence has not been directed towards the children and the perpetrator has a good parental relationship with the children. However, this places the victim under ongoing stress and in some cases, repeated exposure to coercive behaviour and control. It can also result in the children's care being compromised by virtue of the adult conflict.

2.82 Examples of such behaviour include:

- the children being returned late to inconvenience the other parent
- lack of co-operative parenting particularly if it enables the victim to socialise, gain employment or pursue a new relationship, or even to pursue what they think is beneficial for the children, for example, refusal to agree to extra-curricular activities because some of the events will fall within "their time"
- inability to agree to basic guardianship matters resulting in ongoing disputes
- abusive text messages, emails or phone calls
- the children being subjected to negative comments about the other parent or being questioned (for example, about what the other parent has been doing and who the parent socialises with)
- intimidating behaviour at changeover
- refusal to consent to the other parent relocating to another area where there is better support available or less likelihood of them having ongoing contact with the perpetrator

2.83 A child with a CYF caregiver is more likely to be protected from these types of behaviours than a child with a parent who has been a victim of domestic violence.

2.84 The case study on page 28 of the discussion document is a familiar scenario to many family lawyers. It also illustrates why the Law Society expressed concern[27] regarding the restrictions on legal representation before section 7A of COCA was enacted.[28]

2.85 Section 51 of COCA provides that the court must consider protective conditions when making a parenting order in certain cases. Section 51(1)(b) is limited to physical or sexual abuse. The Law Society recommends that section 51(1)(b) is amended to include all forms of domestic violence including psychological violence.

2.86 While the presence of domestic violence is a reason to exempt a person from attending mandatory Family Dispute Resolution (FDR) its existence is not automatically accepted as a factor that would entitle them to legal representation in subsequent or concurrent COCA proceedings when a matter is filed on notice, unless it is directed by a judge that the application be heard by the court in

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27 See paragraphs 180 to 185 of the Law Society's submission on the Family Court Proceedings Reform Bill, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0010/61597/Family-Court-Proceedings-Reform-Bill-13-2-13.pdf.

28 Noting that section 7A(6) of COCA permits legal representation at a settlement conference if directed by a judge but the basis is that representation is likely to facilitate settlement of the issues in dispute.

conjunction with an application that is filed under any other Act.[29] This results in a person being exempted from FDR due to safety concerns but still having to engage with a perpetrator of violence during on notice COCA proceedings. While this is not the case in respect of without notice applications, the Law Society believes that where there are concurrent DVA and COCA proceedings applicants and respondents should be able to be legally represented and legal aid should be available for those eligible. This would require an amendment to section 7A of COCA.

2.87 The discussion document at paragraph 2.52 suggests amending the law to clarify that a child's safety from all forms of violence is to be "given greater weight and be a primary consideration" and that it could become a component of the paramountcy principle (so that when the court is considering the child's welfare, it must consider whether the child is safe from violence, ahead of all other considerations).

2.88 With respect, this is already included in COCA. Section 5(a) states that a child's safety *must* be protected, and in particular, a child *must* be protected from all forms of violence as defined in the DVA. In addition, the 2014 amendments to COCA also inserted section 5A which states that the court must have regard to:

- whether a protection order is still in force;
- the circumstances in which the protection order was made; and
- any written reasons given by the judge who made the protection order.

These considerations also apply when a final protection order is, or at any time has been, in force against one or more parties to the application. They must be taken into account by the court in applications for a guardianship order, a direction in relation to a guardianship dispute, or a parenting order or variation of a parenting order.

2.89 In the Law Society's view no amendment is required in terms of the paramountcy principle or the principles in COCA.

2.90 The discussion document at paragraph 2.53 suggests amending the legislation to require that parenting orders are to be consistent with any existing protection order. If section 51(1)(b) is amended to include all forms of domestic violence including psychological violence, as suggested at paragraph 2.85 of this submission no further amendment is required. (See also paragraph 5.18).

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29 See section 7A(4)(b)(ii) of the Care of Children Act 2004.

2.91 The former section 61 of COCA, repealed in the 2014 amendments, set out a number of matters that the court must, so far as practicable, have regard to when making a decision as to whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised contact) with the child. Even though section 61 has been repealed, they are still matters that the court has regard to when assessing risk, together with case law based on the former section 61.

Chapter 3 – Prosecuting family violence perpetrators

Prosecuting family violence under the criminal law

What changes, if any, could be made to the criminal law to better respond to family violence, including the cumulative harm caused by patterns of family violence? For example:

- *create a standalone family violence offence or class of family violence offences*
- *create a new offence of psychological violence, coercive control or repeat family violence offending*
- *make repeated and serious family violence offending an aggravating factor at sentencing.*

What other ideas do you suggest?

Framework for family violence offences

3.1 Paragraphs 3.9 to 3.15 of the discussion document suggest creating a range of criminal law offences to improve the way in which the dynamics of family violence are viewed in the criminal jurisdiction.

3.2 The Law Society does not consider a standalone family violence offence, or class of family violence offences, as suggested to be necessary. There are already offences for breaching protection orders and, more generally, in relation to threatening and using violence. While the issue of an offence occurring in a family or domestic environment is not expressly referred to in the Sentencing Act 2002, issues such as breach of trust and vulnerability are recognised[30] and would therefore necessitate the court taking family dynamics into account.

3.3 A suggested new offence of "coercive control" has points both in its favour and against. The central enquiry would be the threshold at which disagreements or pressure properly become the domain of the criminal law. Disagreement, estrangement and unhappiness are, unfortunately, part and parcel of human relationships. They can arise from complex causes involving both parties to a relationship

[30] See sections 9(1)(f) and 9(1)(g) of the Sentencing Act 2002.

and would need to be at a high level in order to justify the intrusion of the criminal law into the home.

3.4 The suggested new offence of repeat family violence would similarly be caught by the current criminal law and repeated criminal offending of any type and/or pattern is already an aggravating factor considered at sentencing.[31]

3.5 As noted above, for these reasons the Law Society does not believe it is necessary to create the proposed offences.

Victim safety in criminal proceedings

What changes would ensure victim safety is considered in bail decisions and sentencing decisions? For example:

- *require judges to make victim safety the paramount consideration in bail decisions in all family violence offences or for specific charges such as male assaults female*
- *empower judges to place additional conditions on people on bail or remanded in custody for any family violence offence*
- *improvements to Police bail*

What other ideas do you suggest?

Bail and sentencing decisions

3.6 Bail conditions are currently governed by section 30 of the Bail Act 2000. A judge and the Police can impose conditions that are reasonably necessary to ensure the defendant:

- appears in court on the date to which the defendant has been remanded; and
- does not interfere with any witness or any evidence against the defendant; and
- does not commit any offence while on bail.

3.7 Victim safety is already the paramount consideration for bail decisions in respect of breaches of protection orders. Section 8(5) of the Bail Act provides:

> In deciding, in relation to a defendant charged with an offence against section 49 of the Domestic Violence Act 1995, whether or not to grant bail to the

31 See section 9(1)(j) of the Sentencing Act 2002.

defendant or allow the defendant to go at large, *the court's paramount consideration is the need to protect the victim* of the alleged offence. [Emphasis added]

3.8 In respect of "Police bail" the relevant sections of the Bail Act are set out below.

Section 21(3) provides:

> In determining whether it is prudent to grant police bail to a defendant charged with an offence against section 49 of the Domestic Violence Act 1995, the Police employee *must make the need to protect the victim of the alleged offence the paramount consideration*. [Emphasis added]

Section 22(1) provides:

> In addition to the condition or conditions imposed under section 21B, a police employee who grants police bail to a defendant charged with a domestic violence offence may impose as a condition of the bail any condition that he or she considers reasonably necessary to protect –
>
> (a) the victim of the alleged offence; and
>
> (b) any particular person residing with the victim.

Section 23(1) provides:

> If a person is arrested under section 50 of the Domestic Violence Act 1995 and charged with an offence against section 49 of that Act, the person must not be released on bail by a Police employee under section 21 during the 24 hours immediately following the arrest.

3.9 These provisions already afford adequate scope for judges and the Police to impose appropriate bail conditions on domestic violence offenders. Therefore empowering judges and the Police to place additional conditions on people on bail or remanded in custody for any family violence offence is unnecessary.

3.10 The problem with extending these provisions to include male assaults female offences, as suggested at paragraph 3.21 of the discussion document in relation to court bail, is that not all male assaults female charges arise in a domestic violence context.

3.11 Victim safety should be the paramount consideration for all violent offences (including psychological violence not just physical), for both court and Police bail. While this is not expressly specified in some sections of the Bail Act, it is certainly taken into account by the court when considering whether there is just cause for continued detention under section 8 of the Act. Relevant factors include the nature of the offence for which the defendant is charged, previous conduct, behaviour and conviction history, and previous history of offending while on bail.

3.12 In addition, sections 10 and 12 of the Bail Act place the onus of satisfying the judge that bail should be granted on the bail applicant, when the applicant has convictions for serious violent offending.

3.13 There are no similar provisions in the Bail Act to guide the Police in deciding whether it is prudent to grant bail under section 21 (other than in relation to protection orders). Whilst it is unlikely that Police would grant bail if there was concern for the victim's safety, a provision similar to that in section 8(5) could be included.

3.14 One situation where the safety of the victim is not paramount is in the case of 17 year old defendants. Under section 15 of the Bail Act, the defendant's age is, in effect, the paramount concern. This is consistent with New Zealand's obligations under UNCROC. Section 15 was amended in September 2013 as a result of the "Christie's Law campaign" and the Law Society does not consider that it requires further amendment.

3.15 Sections 123A to 123G of the Sentencing Act 2002 allows the District Court, of its own volition, to make a protection order. However there is currently no provision for the criminal court to refer the matter to the Family Court for any corresponding contact issues with the children to be addressed. Leaving a person against whom a protection order has been made without any immediate legal help or any obvious ability to arrange contact with their children can mean that they are at greater risk of breaching a protection order simply to see their children when there appears to be no other way for this to be achieved.

3.16 Victims should be properly informed of breaches and receive proper notification of bail decisions. This would ensure victims can be properly supported to feel safe and take further safety measures if required.

3.17 The Department of Corrections is responsible for the conditions on which people are held in custody. Corrections do not allow visits or phone calls from victims or witnesses while a person is awaiting trial. The Law Society does not consider there is a need for further controls in this area. A defendant in custody is already restricted in terms of liberty. Corrections have significant powers to regulate the contact the defendant has with the outside world. Although it is possible for a defendant to call an approved number and the recipient pass the phone to someone else (such as a complainant), calls are recorded by Corrections and offence provisions such as perverting the course of justice can be utilised.

3.18 We note that paragraph 3.23 of the discussion document recognises that the ideas proposed would require judges to have access to adequate information to make informed decisions about victim safety. If the suggestions included in paragraphs 5.13 to 5.21 of this submission were adopted, there would be no need to amend the bail and sentencing legislation as proposed in the discussion document.

Judicial powers in criminal proceedings

What powers should criminal court judges have to vary or suspend orders usually made by the Family Court, or to make orders at different stages in proceedings? For example:

- *give judges in criminal proceedings greater powers to vary protection orders on the basis of information they hear during trials*
- *empower judges in criminal proceedings to refer the question of varying a protection or parenting order directly to the Family Court.*

What other ideas do you suggest?

Protection orders

3.19 The Law Society understands the reasoning for the suggestion at paragraph 3.25 of the discussion document that District Court judges should be able to vary protection orders on the basis of information they hear during criminal trials. However, in practice orders are varied by the same court in which the order has been made.

3.20 In the Law Society's view it is preferable that the criminal court refer the issue of varying protection orders as a matter of urgency to the Family Court. If the proposals regarding the sharing of information between courts at paragraphs 5.13 to 5.21 of this submission are adopted, it would

mean that the information criminal judges hear during trials could be made available to the Family Court in respect of varying a protection order issued by it.

3.21 It would also be beneficial if judges' sentencing notes on family violence matters were recorded and made available to the Family Court. Many of these decisions are currently given orally, compared with a Family Court matter where brief minutes are issued after each appearance. A judge's sentencing notes would assist the Family Court to understand what has happened during a criminal court process, particularly if the notes include comments, for example, about the credibility of the victim's or defendant's evidence.

Parenting orders

3.22 The idea raised at paragraph 3.25 of the discussion document that judges in criminal cases be empowered to vary or suspend parenting orders is contrary to the specialist jurisdiction of the Family Court to make and vary orders in respect of children. The proposal is not supported by the Law Society for the following reasons:

- There may already be active proceedings before the Family Court.
- The children's views are not available to the criminal court judge whereas in the Family Court a child must have a reasonable opportunity to express a view[32] and the Family Court must take into account any views the child expresses.[33]
- The Family Court file may contain information relevant to the children's welfare and best interests that the criminal court judge will not have access to. The child's welfare and best interests are paramount.[34] Therefore varying, revoking or suspending contact may not be in the best interests of the children, even if to do so may be in the best interests of the adult victim.
- The victim's views on amending the parenting order might not be obtained.
- It is unclear what would happen in terms of other guardians' rights to be heard if orders are varied by a criminal court judge particularly if there are no live Family Court proceedings.

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32 See section 6(1) of the Care of Children Act 2004.
33 See section 6(2) of the Care of Children Act 2004.
34 See section 4 of the Care of Children Act 2004.

- It could create difficulties given the restrictions on further proceedings where leave is required in certain cases to commence substantially similar proceedings less than two years after a final direction or order is given in previous proceedings.[35]
- Not all criminal court judges are familiar with Family Court legislation.
- Settled matters might be resurrected with the victim then becoming entrenched in new litigation with the offender.

3.23 In the Law Society's view it is preferable that the criminal court refer the issue of varying or suspending parenting orders as a matter of urgency to the Family Court. The Law Society suggests that these cases are categorised as complex cases requiring a greater degree of judicial oversight as provided for in rule 416T. A Family Court judge can then assume management of the file and ensure that further directions are made as necessary. This might include making an order for supervised contact under section 59 of COCA or setting the matter down for an urgent short cause hearing.

Consistent and timely family violence criminal cases

What changes would you suggest to court processes and structure to enable criminal courts to respond better to family violence?

3.24 Timeliness of resolution of criminal charges is desirable in respect of all offending. Cases involving violence, particularly domestic violence, should receive priority to minimise the stress on all involved. The Law Society welcomes the current work being undertaken to test additional ways to remove potential delays in domestic violence criminal cases.

3.25 One way in which court processes are responding better to domestic violence is the existing provision in section 195 of the Evidence Act 2006 to prevent persons against whom there is a final protection order being able to cross-examine a protected person. In those cases counsel to assist is normally appointed to cross-examine the protected person. This process provides for victims to be better protected during the court process where the perpetrator is self-represented.

3.26 The Law Society makes the following suggestions to enable the courts to respond better to domestic violence:

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[35] See section 139A of the Care of Children Act 2004.

3.26.1 Court procedures could be altered to make an automatic provision for a closed court for domestic violence complainants and for victims while they give evidence. This is currently the automatic practice for victims of sexual assault. This should also apply if the victim is reading a victim impact statement. This could also be extended to other witnesses so that at the request of a prosecutor, the defendant or a judge of their own motion, the court could make an order for a closed court when *any witness* gives evidence in a proceeding for a domestic violence matter if the court is satisfied that the nature of the evidence the witness is to give, their personal circumstances, the nature of their relationship to any other person in the proceeding, or for any other reason, the court considers it is in the interests of justice to do so.

3.26.2 Provision could be made for a complainant or victim to have a court-appointed support person if they do not have their own support person, where they are required to give evidence or they wish to be present at court in any capacity at any stage of the proceeding.

3.26.3 There should be a requirement that the prosecutor must meet with a complainant in a domestic violence proceeding prior to a complainant giving evidence. Such a practice would ensure that the prosecutor knows the views of the complainant about all relevant matters prior to leading their evidence. The only exception to this would be where the complainant declines to meet with the prosecutor.

3.26.4 There should be a requirement that the prosecutor must advise the court (by a formal procedure) by the second court appearance if the complainant in the proceeding has ever been the subject of a charge the defendant has previously faced (even if the defendant was acquitted or the charge was resolved without a conviction being entered). If the charge for which the defendant faces is a schedule offence, or an offence of breaching a protection order, the court must be advised of this at the first appearance.

3.26.5 In terms of bail, a person charged with a domestic violence offence, unless they are eligible for bail as of right, should only be bailed by a District Court Judge or a High Court Judge, even if such bail is granted on the papers.

3.26.6 It would be beneficial to have a dedicated, qualified and experienced family advisor for victims in domestic violence criminal proceedings. Many victim advisors who currently liaise with victims do not necessarily have the adequate time or skill-set to properly support and advise victims throughout all parts of the proceedings.

3.26.7 When a criminal charge relating to domestic violence is set down for a hearing, it is essential that prosecutors ensure they speak with the victims throughout the remand time to ensure they are aware of the victim's perspective, which could change markedly over the course of the remand period.

Chapter 4 – An additional pathway to safety

What are your views on an additional pathway for families who seek help to stop violence escalating? Is such a pathway necessary or appropriate?

What are your views on the range and type of services that might be appropriate in the circumstances?

Access to services

4.1 The discussion document at paragraphs 4.3 and 4.4 notes that many people do not report domestic violence to Police, seek a protection order or wish to engage with the justice system. They often just want the violence to end and many will require assistance to achieve that. In addition, many people in this situation may not have the financial means to seek access to services including non-violence programmes.

4.2 Paragraphs 4.6 to 4.8 of the discussion document suggest providing access to services and programmes so that victims, perpetrators and families can refer themselves rather than relying on a court process. The Law Society supports this proposal. If people are actively seeking help then support and help should be provided. For some families experiencing domestic violence, access to other services may be required, such as housing, financial assistance, budgeting, counselling and assistance with drug and alcohol dependency. There is no "one size fits all" solution and any service should take into account the population group of that particular person including their ethnicity, socio-economic status, gender and the geographical area in which they live.

4.3 One option would be to provide a "triage" service that identifies the needs of each family, who could then be referred to the most appropriate service(s). This would ensure the most efficient use of limited resources. Taking the time to refer families to the most appropriate service at the earliest stage would ensure they receive the right support and do not disengage at a later stage. This approach would align with the current approach taken by the various local Children's Teams established under the vulnerable children legislation.

4.4 Many people face financial barriers and other constraints such as childcare and travel to attend programmes and services, particularly in remote rural areas. Consideration should be given to providing services that are able to be transported to certain areas and the delivery of programmes via a "wananga" style on a marae over a weekend or a number of weekends as opposed to two hours over a 12 to 16 week period.

4.5 It is important to ensure that victims in particular are referred to an appropriate service that empowers, educates and supports the victim and provides them with a culturally appropriate environment and facilitator.

Police action

What are your views on clarifying in law that Police take at least one of the following steps when responding to family violence reports:

- *file a criminal charge (or issue a warning)*
- *issue a Police safety order*
- *make a referral to a funded service or services or an assessment?*

What other ideas do you suggest?

4.6 The Law Society supports the proposal at paragraph 4.11 of the discussion document to set out in the legislation that Police should take at least one of the following steps when responding to a report of domestic violence:

- file a criminal charge (or issue a warning)
- issue a Police safety order
- make a referral to a funded service or to an assessment of risk and need

4.7 Expressly including the options in legislation and making them known to the public would provide clarity and would be helpful.

4.8 As noted at paragraph 4.14 of the discussion document, this additional pathway would require significant funding in terms of the resources and services required. However, it would enhance the current system and assist in addressing the underlying issues through intervention at the earliest

stage. It is likely that the long-term benefits of addressing domestic violence at an early stage would outweigh the cost.

4.9 Current Police guidelines may also require amendment to assist Police to make an assessment of the circumstances and level of risk. Police making the initial assessment may require additional training around the most appropriate and available services for that particular family in that particular area to ensure they are referred to a culturally appropriate service that "fits with that particular whanau".

Chapter 5 – Better services for victims, perpetrators and whanau

Sharing information

What changes could enhance information sharing between agencies in family violence cases? For example:

- *creating a presumption of disclosing information where family violence concerns arise*
- *stating that safety concerns 'trump' privacy concerns.*

Information sharing between agencies

5.1 It is crucial that appropriate information is able to be exchanged between agencies dealing with any child who has been subjected to violence, in relation to their safety and welfare. Under the Children's Action Plan, the Chief Executives of the Ministries of Education, Health, Justice, Social Development and the Police are now jointly accountable for working together to develop, deliver and report on a cross-agency plan to protect vulnerable children and improve their wellbeing.[36]

5.2 The ministerial inquiry and subsequent report by Mel Smith, "*Following an inquiry into the serious abuse of a 9 year old girl and other matters relating to the welfare safety and protection of children in New Zealand"* of 31 March 2011 (Smith report) recommended that the interests of children be improved by clear arrangements for the sharing of information among professionals and others. The Law Society agrees with the Smith report that where a child's welfare and safety are at risk, the sharing of information must extend beyond government agencies and cover a wider range of organisations, including NGOs and individuals such as lawyers for children and private sector counsellors.[37] Professionals working with children, such as teachers, social workers, GPs, nurses,

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[36] See http://childrensactionplan.govt.nz/

[37] See paragraph 8.26 and 8.35 of the Smith report.

psychologists, therapists and Police, should be able to share information about children for the purposes of protecting those who may be at risk of harm.

5.3 The discussion document states at paragraph 5.7 that the Family Violence Death Review Committee has suggested creating a presumption of disclosing information where family violence concerns arise or that safety concerns 'trump' privacy concerns.

5.4 The Law Society supports a presumption to disclose information about family violence concerns and believes that privacy restrictions on the disclosure of personal information must not take precedence where there is the potential for violence to affect a child. While the Privacy Act 1995 protects an individual's privacy, the law should not be used as a barrier to appropriate information sharing between professionals, where there is an issue involving a child's safety and welfare. Agencies and others involved in any process relating to a child's safety and welfare should lawfully be able to share information that impacts on the child's safety and welfare.

5.5 Given that individual organisations may each hold separate pieces of information indicating concerns regarding children and families but are unaware that similar concerns are held by other organisations, any present restrictions regarding the sharing of information must be relaxed to enable appropriate exchanges of information to take place.

5.6 The NSW Children and Young Persons (Care and Protection) Act 1998 (NSW Act) may be of assistance in terms of the provision of information sharing. Section 245(c)(1) of the NSW Act states:

> A prescribed body (the provider) may provide information relating to the safety, welfare or well-being of a particular child or young person or class of children or young persons to another prescribed body (the recipient) if the provider reasonably believes that the provision of the information would assist the recipient:
>
> (a) to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class of children or young persons, or
>
> (b) to manage any risk to the child or young person (or class of children or young persons) that might arise in the recipient's capacity as an employer or designated agency.

5.7 Section 245H(1) of the NSW Act gets around the restrictions of other privacy laws by stating:

> A provision of any other Act or law (whether enacted or made before or after the commencement of this section) that prohibits or restricts the disclosure of information does not operate to prevent the provision of information (or affect a duty to provide information) under this Chapter.

5.8 The NSW Act justifies this approach by stating in the "Principles and Objects" of the Act at section 245A(2):

> … because the safety, welfare and well-being of children and young persons are paramount:
>
> (i) the need to provide services relating to the care and protection of children and young persons, and
>
> (ii) the needs and interests of children and young persons, and of their families, in receiving those services,
>
> take precedence over the protection of confidentiality or of an individual's privacy.

5.9 Similar amendments could be made to COCA, CYPTF Act and the DVA to facilitate appropriate information sharing relating to the safety, welfare and well-being of children.

5.10 It would be appropriate for one minister from the ministries identified above to be empowered to ensure that approved information sharing agreements (AISAs) are put in place and regularly reviewed and evaluated.

5.11 Staff working in the relevant agencies would need to be clear about the ability to share information, including what information should be shared, with which agencies and in what circumstances. AISAs should clearly identify these parameters. In addition, there would need to be clear protocols to ensure compliance with the duty to share information with other authorised parties involved in child safety and welfare. This may require additional training to reduce uncertainty which might lead to critical information not being shared.

5.12 Information would need to be held on a central database so that authorised parties are able to access information promptly where a child is believed to be at risk. There would need to be safeguards in place regarding the input, access, storage, dissemination and destruction of the information and to deal with complaints about unjustified access to information.

Information sharing with and between courts

What changes could enhance information sharing between courts and between courts and other agencies, in family violence cases? For example:

- *require that judges are provided with information held by Police and other justice sector agencies*
- *place a positive duty on parties to inform the criminal court of any related Family Court proceedings or orders*

What other ideas do you suggest?

Information to support judicial consideration of victim safety and information about the history of police involvement

5.13 An article by Chief District Court Judge Jan-Marie Doogue published in *LawTalk*[38] spoke of the increasing complexity of family violence cases, particularly in the Family Court where family violence is often intertwined in proceedings to determine suitable care arrangements for children post separation and in child protection proceedings.

5.14 Judge Doogue noted various challenges the judiciary face in making decisions, for example judges having to make decisions based on limited information about the risk posed by the alleged perpetrator to their family, as important information held by prosecuting and other authorities is currently not made available to judges.

5.15 A pilot project which improves the information on an offender's family violence history provided to judges and registrars for bail decisions began in the Porirua and Christchurch District Courts on 1 September 2015. The information to be provided will include whether the defendant:

- has a history of family violence and whether police have been called to deal with family violence incidents involving the defendant;
- has been served with or breached a Police safety order; and
- is subject to or has breached a protection order.

5.16 This information will enable active steps to be taken to ensure informed decisions are made where there is a history of domestic violence affecting the victims in the case before the court. The Law Society supports the proposal at paragraph 5.14 of the discussion document to place a positive obligation on Police to provide this information.

[38] Family violence a focus for District Court judges, *LawTalk*, Issue 866, 5 June 2015, page 27.

Information about other court proceedings

5.17 The Law Society supports the proposal at paragraph 5.18 of the discussion document for enhanced information sharing between the family and criminal courts. Information should be shared between the two jurisdictions so that all courts are able to access relevant information. For example:

- Family Court judges should be able to access a criminal record as of right when being asked to make a decision about a protection order.
- A judge in the criminal jurisdiction considering an appropriate sentence for an assault on an adult or child should be able to access records of the Family Court dealing with the same people.
- A judge in the criminal jurisdiction asked to make an order under the Harassment Act 1997 should be able to access any records held by the Police involving callouts recorded in their system as incidents of "domestic violence".

5.18 This would help to ensure that the courts have the best information available to them to resolve domestic violence cases effectively, enhance victim safety and ensure consistency across the criminal and family jurisdictions.

5.19 The Law Society notes that there are factors that would need to be balanced in order to ensure people's rights to privacy and natural justice are preserved and to recognise the differences between the two jurisdictions in terms of standards of proof and matters of public record.[39]

5.20 The Law Society does not believe there is a need for integrated courts of the type proposed in paragraph 5.16 of the discussion document, provided proper exchanges of relevant information are available to any court dealing with any question before it involving domestic violence.

5.21 The Law Society supports the proposal in paragraph 5.19 of the discussion document to place a positive duty on parties to inform the criminal court of any related Family Court proceedings or orders that may directly or indirectly affect the perpetrator or victim, including a child. However, this should be in addition to the court system adopting new practices that promote coordination and information sharing in multiple cases involving the same family.

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[39] The factors are discussed in more detail in the NZLS submission on "Stronger Response to Family Violence: improving information sharing between the family and criminal jurisdictions in domestic violence cases", 7.11.14, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/84532/l-MOJ-DVinfo-7-11-14.pdf.

Information from inter-agency family violence meetings

5.22 While it may be the case that there is inconsistency in the approach of the network of agencies that meet regularly throughout the country to discuss and exchange information about family violence cases (as noted at paragraph 5.21 of the discussion document), they should continue to meet and provide, as they now do, useful information to and from the Police and MSD. This role would be further enhanced by a "common risk assessment framework" as proposed in paragraph 5.21 of the discussion document.

Safe and competent workforce

In your view, what impact would setting minimum workforce and service delivery standards have on the quality of services? What challenges do you see in implementing minimum statutory standards? For example:

- *establish minimum standards for workforce competence*
- *require agencies and service providers to put in place policies and systems that support the workforce to practice in a responsive, safe and competent way*

What other ideas do you suggest?

Safe and competent family violence workforce and service delivery

5.23 The Family Violence Death Review Committee define the family violence workforce as:

> "all those working at all parts of the multi-agency family violence system who have the opportunity and responsibility to identify and respond to families experiencing family violence".[40]

5.24 This broad definition illustrates that it is essential that there is active sharing of information between the relevant government agencies and approved NGOs subject to an AISA.

5.25 It is important when dealing with vulnerable children and adults to ensure that information is properly shared. Otherwise there is a serious risk that one agency will not be aware of crucial information held by another agency.

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40 Family Violence Death Review Committee (2014), Fourth Annual Report: January to December 2013, page 13.

5.26 If a mental health service learns from a child that he or she has been sexually abused both the police and CYF should receive this information.[41] The Law Society considers that this information should also be able to be provided to any educational facility involved with that child as well as any counsellor assisting the child to deal with the abuse. In addition, the Accident Compensation Corporation should be informed so that it can deal with that child, from a funding and a service provision perspective.

5.27 The Institute of Judicial Studies will need to ensure that its training is comprehensive and regular to enable judges to gain and retain the skills and knowledge required to operate effectively.

5.28 The Law Society agrees with the statement in paragraph 5.24 of the discussion document that both victims and perpetrators should expect the family violence workforce to be responsive, well-trained and competent. This will require a collaborative approach between the various ministries and agencies not only to ensure that appropriate policies and systems are in place but also that there are clear and comprehensive guidelines to enable appropriate information sharing. Unless all related agencies provide excellent service the children and adult victims of domestic violence will not be well served.

5.29 The Law Society supports the establishment of minimum standards of workplace competence as proposed at paragraph 5.25 of the discussion document. That would ensure staff are capable of using appropriate risk assessment tools as and when required. If there is to be a "minimum standard" applied to the sharing of information in appropriate circumstances, staff working in the agencies will need to be clear about the ability to share information, what information is to be shared and in what circumstances. The Law Society suggests that there should be consequences for staff who do not meet the required performance standards, to ensure that the family violence workforce attains and maintains consistency and credibility.

5.30 Consideration is needed on how minimum standards of competence for the family violence workforce would fit with existing professional standards. A shared minimum standard of competence should apply to those working in the sector, for example, Police, counsellors, ACC staff, district health board staff and others. Where organisations have existing professional standards, these may need to be aligned to achieve consistency.

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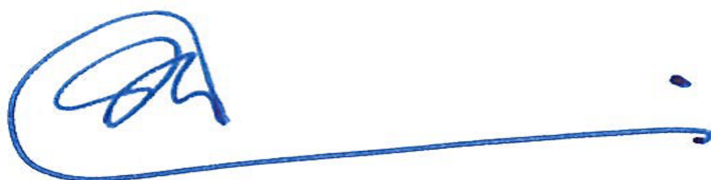
41 Disclosure about ill-treatment or neglect of a child/young person is made to Police or Child, Youth and Family under sections 15 and 16 of the Children, Young Persons, and Their Families Act 1989.

5.31 In the Law Society's view, it is imperative that agencies and service providers must put in place policies and systems that support the workforce to practise in a responsive, safe and competent way. The Law Society agrees with the suggestions at paragraph 5.27 of the discussion document about the content of those policies and systems and that they should be contained in regulations so they can be updated when required.

5.32 While the Law Society acknowledges there will be challenges in setting minimum workforce and service delivery standards, those challenges must be overcome to ensure that all providers have in place policies and systems that support the workforce to practise in a responsive, safe and competent way. If not, there will be a real risk that the system will fail.

If you wish to discuss these comments, please do not hesitate to contact the Law Society's Family Law Section through the Law Society's Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / ph 04 463 2912).

Yours sincerely



Allister Davis
Vice President