NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Family and Whānau Violence Legislation Bill

24/05/2017

FAMILY AND WHĀNAU VIOLENCE LEGISLATION BILL

Executive summary

1 The New Zealand Law Society welcomes the opportunity to comment on the Family and Whānau Violence Legislation Bill.

2 The Law Society supports the Bill's objective of amending the criminal and civil law to provide a more complete and fit-for-purpose legislative response to family violence. The Law Society recommends some changes to the Bill to improve its clarity, workability and consistency with related statutes such as the Care of Children Act 2004 (COCA).

3 The Law Society has also identified some gaps in the existing legislative framework and recommends these are addressed in the Bill to improve the protections available to victims of family violence. These relate to:

A clearer definition of "family violence"

- The new definition of "family violence" should be clarified and simplified, including:
    - the concept of 'coercive control', which as currently worded is likely to invite unhelpful legal arguments: paragraphs 19 – 23; and
    - the definition of "intimidation or harassment" (as part of the definition of "psychological abuse") is unnecessarily complex: paragraphs 26 – 28.
- The definition of "family violence" in the Australian legislation provides a useful model that should be considered: paragraphs 20 – 23.

Protective measures for children in family violence cases in the Family Court

- The Bill should provide for the appointment of a lawyer for the child and enable the Family Court to obtain relevant reports, so that the views of child victims of family violence can be provided to and considered by the court: paragraphs 12, 31 – 34, 69;
- The court should be able to interview child applicants for protection orders, and obtain relevant reports: paragraphs 31, 33;
- In applications for protection orders against children, the child respondent should be entitled to be represented by a lawyer appointed by the court, and the court should be able to obtain the relevant reports: paragraph 36; and
- Where a protection order is made against a child, the court should be able to refer the matter to the Ministry for Vulnerable Children, Oranga Tamariki: paragraph 37.

Protective measures for people lacking capacity

- A protection order for a person lacking capacity will be of no practical value unless it can be enforced; the Bill should therefore enable the Family Court to appoint a person/agency to provide oversight and act on behalf of the person if the order is breached: paragraph 41.

Third party applications for protection orders

- Enabling third parties to apply for permanent protection orders without the victim's consent carries risks and may have little or no protective value (for instance, if the victim ignores the order or is unable or unwilling to report breaches). Enabling the court to appoint counsel to assist – to provide information and legal advice to the victim, ascertain their views, and represent their interests in the proceedings – would overcome these problems: paragraphs 43 – 51.

Protection orders: delay in filing notices of defence

- There is a shortcoming in the existing legislative framework for protection orders, relating to delays that can significantly prejudice applicants for protection orders, which should be addressed via an amendment to the Family Court Rules 2002: paragraphs 59 – 62.

New Part 2A: non-violence programmes and services

- Assessors' decisions in relation to appropriate non-violence programmes for respondents should be required to be supported by reasons, so that the court is able to make an informed decision; and victims should be consulted as part of the assessment process and their views taken into account: paragraphs 81 – 82.

Property orders

- The Bill makes helpful changes to facilitate the use of property orders to assist victims of family violence; one further change is recommended, to enable victims subject to psychological or financial abuse (in the absence of physical or sexual abuse) to obtain property orders: paragraph 103 – 109.

Child victims' evidence

- Amending the Evidence Regulations 2007 to ensure evidential video interviews of children and transcripts are available to the court in family violence proceedings (as they are currently in proceedings under other statutes) would benefit child victims of family violence in respect of giving evidence: paragraphs 139 – 144.

Information sharing

- The Law Society agrees that effective information sharing is crucial to addressing the serious issue of family violence. There will be significant overlap between the family violence information sharing scheme and the vulnerable children information sharing scheme in the Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill currently before the House, and between the agencies delivering services under the two schemes. If different approaches are taken, that will exacerbate the difficulties and confusion for agencies and families. The Law Society considers the approach taken in this Bill (subject to some amendments) is preferable to the information sharing provisions proposed in the Oranga Tamariki Bill and that those provisions should be aligned with this Bill: paragraphs 118 – 121.

Sentencing principles

- The Sentencing Act 2002 should be amended to include a principle that victim safety, including the safety of any child, is a mandatory and primary consideration when the court is determining the appropriate sentence in family violence cases: paragraphs 146 – 147.

Legal aid

- Eligibility for legal aid is not addressed in the Bill, but is nonetheless a significant barrier for many victims of family violence (and children) seeking protection orders. The Law Society is aware of cases where victims of family violence have been refused legal aid, placing those applicants under undue pressure. The Law Society considers that legal aid should be available to all applicants (and respondents) under the Domestic Violence Act: paragraphs 149 – 150.

Non-lawyers able to "make and prosecute" applications in court

- The Bill appears to intend that employees of "approved organisations" will be authorised to "make and prosecute" applications for orders. This falls within the "reserved areas" of work for lawyers as defined in section 6 of the Lawyers and Conveyancers Act 2006; the restrictions on non-lawyers undertaking work related to court proceedings is intended to protect consumers of legal services and reflects the ethical and professional obligations lawyers owe to their clients and as officers of the court. Any provision of services by non-lawyers in this area would be unregulated and by individuals who do not owe duties to the court. Careful consideration should be given to such an extension to the regulatory

parameters set in the Lawyers and Conveyancers Act. If an exception to that regulatory scheme is intended, it should be expressly stated in the Bill: paragraphs 54 – 57.

Part 1 Amendments to Domestic Violence Act

Clause 4 Name of principal Act changed

4 Clause 4 changes the name of the Act from the Domestic Violence Act 1995 to the Family and Whānau Violence Act 1995. The Law Society agrees with changing the term "domestic violence" to "family violence". However, the use of the word "whānau" in the title suggests there is a distinct Māori component to family violence, notwithstanding that family violence is prevalent in the whole of society, regardless of ethnicity. The term "family violence" not "family and whānau violence" is used throughout the Bill and it is questionable what benefit including the word "whānau" in the title adds. The name of the Act should be amended to the Family Violence Act.

Recommendation

5 That the name of the Act be amended to the Family Violence Act.

Clause 7 New sections 1A and 1B inserted (Purpose, Principles)

6 Clause 7 inserts twelve purposes into the Act. New principles 1B(c) and (d) could be amended to become one principle in respect of children that reads:

> *"decision makers should, whenever appropriate, recognise that children are particularly vulnerable to family violence, including seeing or hearing violence against others, and are at particular risk of lasting harm to their current and future wellbeing:"*

7 The Law Society suggests that new principle 1B(f) be amended by deleting the word "some" and replacing it with the word "appropriate". This would more accurately reflect that there will be cases (such as where a perpetrator has, for example, significant mental health issues) where it might not be appropriate for that person to engage with services to assist them to stop their family violence.

8 The Law Society agrees with new principle 1B(g) – that victims of family violence should have access to services to help secure their safety from family violence – but notes the lack of services and programmes in some regions for victims of family violence, which include children.

9 New principle 1B(i) reads:

> *"responses to family violence should be culturally appropriate and, in particular, responses involving Māori should reflect tikanga:"*

10 It is unclear what this new principle means. Responses to family violence could include responses from Police, courts, programme providers, other agencies and professionals. The words "culturally appropriate" might suggest that people of one culture are treated differently than others when a response to family violence is made. People of some cultures may not view their behaviour as family violence. The inclusion of "tikanga" excludes other cultures. New Zealand is a country where all forms of violence are unacceptable regardless of the culture of the family involved.

11 If new principle 1B(i) is intended to mean that parties involved in family violence matters should be treated in a culturally appropriate manner, the principle needs to be redrafted to make that clear. Alternatively, new principle 1B(i) should be amended to read:

> *"responses to family violence should be culturally appropriate"*

12 New principle 1B(j) states that decision makers should consider the views of victims of family violence. As victims of family violence will include children, there needs to be some mechanism for the views of children to be heard. The Law Society suggests amending section 81 of the Act to enable the appointment of a lawyer for the child so that there is some mechanism for the views of a child to be put before the court. In some cases, obtaining the views of a child may require a report from a social worker or psychologist or a cultural report. These reports are available to be obtained under COCA and, in the Law Society's view, should also be available under the family violence legislation. The Law Society suggests a new section 81A be inserted, enabling these reports to be obtained if required. Such an amendment would be consistent with the obligation under Article 12(1) and (2) of the United Nations Convention on the Rights of the Child (UNCROC) and would also recognise the importance of new principles 1B(c) and (d).

13 The Law Society supports the inclusion of new principle 1B(k) but suggests it is amended to read:

> *"decision makers shall collaborate, whenever appropriate, to identify and provide an integrated response to family violence"*

Recommendations

14 That:

(a) new principles 1B(c) and (d) be amended to become one principle as suggested above;

(b) new principle 1B(f) be amended by deleting the word "some" and replacing it with the word "appropriate";

(c) if new principle 1B(i) is intended to mean that parties involved in family violence matters should be treated in a culturally appropriate manner, the principle needs to be redrafted to make that clear. Alternatively, new principle 1B(i) should be amended to read *"responses to family violence should be culturally appropriate"*;

(d) section 81 of the Act be amended to enable the appointment of a lawyer for the child so that the views of the child can be put before the court;

(e) the Act be amended by inserting a new section 81A so that social worker, psychological and cultural reports can be obtained if required; and

(f) new principle 1B(k) be amended to read "*"decision makers shall collaborate, whenever appropriate, to identify and provide an integrated response to family violence"*.

Clause 8 Section 2 amended (Interpretation)

Partner

15 Subsection (3) of the definition of partner in clause 8 includes reference to a biological parent. The biological parent in cases of assisted human reproduction and adoption should be excluded. Subsection (3) should be amended to reflect this.

Recommendation

16 That subsection (3) of the definition of partner be amended to exclude a biological parent in the cases of assisted human reproduction and adoption.

Clause 9 Section 3 replaced (Meaning of domestic violence)

New section 3 Meaning of family violence

17 The Law Society supports the amendment to rename domestic violence as "family violence". New section 3(3) provides that violence against a person includes a pattern of behaviour that is made up of a number of acts. In the Law Society's view, the point that trivial but cumulative acts may amount to abuse is better expressed in new section 3A and should be deleted from new section 3(3).

18 In addition, providing the specific example ("to isolate from family members or friends") may inadvertently narrow the scope of behaviour which might be seen as constituting part of a pattern of behaviour. This section should be capable of the broadest possible interpretation, in keeping with the objects of the Act, and could be redrafted as follows:

> *"Violence against a person includes any act that is physical abuse, sexual abuse or psychological abuse, and that may have 1 or both of the following features ..."*

19 The Law Society agrees with the concept of coercive control being included in the Act. However, the following issues with new section 3(3)(a) and (b) as currently drafted include:

(a) it is unclear whether new section 3(3)(a) and (b) are conjunctive or disjunctive – this requires clarification;

(b) the way the words "coercive" and "controlling" are used implies that either there needs to be an intention established to be coercive or controlling, or the behaviour has had the effect of coercing or controlling the victim. This invites unhelpful legal arguments being raised in defended protection matters and needs clarification; and

(c) the overarching definition of family violence as being acts which involve coercion or control and causes cumulative harm should be placed at the beginning of the definition of family violence, to assist the definition of this important concept.

20 By contrast, in Australia the Family Law Act 1975 was amended in 2011[1] to provide a new definition of family violence. The definition uses coercive control as the defining characteristic of family violence, and then specifies what that violence might include. Section 4AB of that Act (Definition of family violence) states:

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

21 Section 4AB(2) then sets out examples of what behaviour might constitute family violence:

> *(2) Examples of behaviour that may constitute family violence include (but are not limited to):*
>
> *(a) an assault; or*
>
> *(b) a sexual assault or other sexually abusive behaviour; or*

[1] Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Commonwealth).

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

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

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

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

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

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

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

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

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

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

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

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

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

22 The Australian definition describes the behaviour as coercive or controlling without requiring an analysis specifically of whether the behaviour constitutes coercion or control. It is the effect of the behaviour and the additional alternative limb that the behaviour causes the family member to be fearful that provides the defining aspect of the behaviour making it violent. The wording of this definition avoids the risk that the court may inadvertently focus on the intention of the abuser rather than the effect on the victim.

23 Decision makers may become side-tracked by trying to decide if a particular behaviour can be legally defined as being coercive or controlling. The Law Society considers that there is benefit in defining the feature of the behaviour as being part of "coercive control" rather than describing behaviour as coercive or controlling which adds an unhelpful and possibly confusing layer of interpretation to the concept. Consideration should be given to amending new section 3(3)(a) and (b) to more closely reflect the Australian definition of family violence.

Recommendations

24 That:

(a) new section 3(3) be amended as suggested above;
(b) consideration should be given to amending new section 3(3)(a) and (b) to more closely reflect the Australian definition of family violence; or
(c) alternatively, new section 3(3)(a) and (b) should be amended for clarity as suggested above.

New section 3A Abuse for purpose of section 3(2)

25 The Law Society supports the inclusion of the word "abuse", as it is often not well understood that abuse per se constitutes family violence.

New section 3B Psychological abuse for purposes of section 3(2)(c)

26 New section 3B defines psychological abuse and new section 3B(1)(b)(i) – (iii) sets out examples of what behaviour would constitute intimidation or harassment. By including a list of the matters that could constitute psychological abuse there is a risk that, despite the non-exclusive language, abuse may be seen as outside the "list", which itself can quickly become outdated. A common way of continuing to psychologically abuse a former partner is through social media with either public or private messaging and posts, yet this is not mentioned as

psychological abuse specifically. Such behaviour could be captured by the Australian definition which includes "repeated derogatory taunts".[2]

27 While the examples listed include matters already set out in existing protection orders, examples of intimidation and harassment are clumsily expressed and not readily understood by lay people. The term "stalking" is more readily understood than the behaviour described in proposed section 3B(1)(b)(i), which reads:

> *"watching, loitering near, or preventing or hindering access to or from, a person's place of residence, business, or employment, or educational institution, or any other place that the person visits often:"*

28 The words "intimidation" and "harassment" in new section 3B(1)(b) by themselves are sufficiently broad and well understood[3] for the courts to adopt a common sense and flexible approach to behaviour that might fall into those categories. Adding complexity to these definitions may limit rather than extend those categories of family violence. New section 3B(1)(b)(i), (ii) and (iii) should be deleted and 3B(1)(b) amended to read "intimidation or harassment".

29 The ill-treatment of household pets or other animals is included in the definition of psychological abuse (new section 3B(1(d)(i) and (ii)). There is already ample caselaw relating to this issue and the Law Society questions whether new section 3B(1)(d) is necessary. If ill-treatment of pets is to be included, a clearer description such as that contained in section 4AB(2)(f) of the Australian Family Law Act 1975 should be adopted, replacing new section 3B(1)(d)(i) and (ii) with the words "intentionally causing death or injury to an animal".

Recommendations

30 That:

(a) new section 3B(1)(b)(i), (ii) and (iii) be deleted and 3B(1)(b) amended to read "intimidation or harassment"; and

(b) new section 3B(1)(d)(i) and (ii) be deleted and replaced with the words "intentionally causing death or injury to an animal".

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[2] See section 4AB(2)(d) of the Family Law Act 1975.

[3] The same words are used in the Domestic Violence Act 1995: section 3(2)(c)(i) and (ii).

Protection Orders

Clause 14 Sections 9 to 12 replaced (Protection orders – children)

New section 9 Applications by children

31 New section 9 allows a child to apply for a protection order. The Bill should be amended to enable the court to interview the child, as it is permitted to do in COCA proceedings. In addition, to properly serve the needs of child victims, the court should be able to obtain a social worker's report or psychological or other report, in addition to its current power in section 81(1)(b) to appoint a lawyer to represent the child where an application is made on the child's behalf. The power to obtain reports is also noted above in paragraph 12.

Recommendation

32 That new section 9 be amended to enable the court to interview the child and provide for the court to have the power to obtain a social worker's report or psychological or other report.

New section 9A Views of child on whose behalf application made by representative

33 The comments made in paragraph 31 above in relation to new section 9 apply also in relation to new section 9A.

Recommendation

34 That new section 9A be amended to enable the court to interview the child and provide for the court to have the power to obtain a social worker's report or psychological or other report.

New section 10 Applications against children

35 The Law Society supports this amendment, for the reasons outlined in its 2015 submission on the government's discussion document, "Strengthening New Zealand's legislative response to family violence".[4]

[4] NZLS submission 9 October 2015 at [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 [Domestic Violence Act]."
http://www.lawsociety.org.nz/__data/assets/pdf_file/0011/95771/l-MOJ-FV-Review-9-10-15.pdf

36 Where a child is named as a respondent or associated respondent on an application for a protection order, the child should be entitled to be represented by a lawyer appointed by the court. Section 81 of the Act should be amended accordingly.

37 Where a protection order is made against a child, the court should have power to refer the matter to the Ministry for Vulnerable Children, Oranga Tamariki, as care and protection concerns are likely to arise. A violent child has special needs and may be characterised as a victim as well as a perpetrator. In these cases, the court should have power to obtain a social worker's report, or a psychological or other report. The Law Society suggests a new section 81A be inserted providing for the power to obtain such reports.

Recommendations

38 That:

(a) section 81 be amended so that the court can appoint a lawyer for the child where a child is named as a respondent or associated respondent on an application for a protection order;

(b) new section 10 be amended to provide that where a protection order is made against a child, the court must refer the matter to the Ministry for Vulnerable Children, Oranga Tamariki; and

(c) a new section 81A be included so the court has the power to obtain a social worker's report, or a psychological or other report.

New Section 10A Meaning of person lacking capacity

39 The Law Society supports this amendment. Because this section relates to section 11 (a person lacking capacity) rather than new section 10 (applications against children), the Law Society suggests that new section 10A becomes new section 11 and new section 11 be renumbered as new section 11A.

Recommendation

40 That new section 10A becomes new section 11 and new section 11 be renumbered as new section 11A.

New section 11 Applications on behalf of people lacking capacity

41 The Law Society supports this amendment. However, an order granted for a person lacking capacity will be of no practical value unless it can be enforced. The Law Society suggests that new section 11 be amended to give the court power to appoint a person or agency to oversee

the situation and act on behalf of the person if the order is breached. (As noted above at paragraph 40**,** it is suggested that new section 11 be renumbered as new section 11A.)

Recommendations

42 That new section 11 be amended to enable the court to appoint a person or agency to oversee the situation and act on behalf of the person if the order is breached.

New section 12 Applications on behalf of people prevented by physical incapacity, fear of harm, or other sufficient cause from applying personally

43 New section 12 provides for third parties to make an application for a protection order where a person is prevented from doing so personally. The Law Society has previously expressed concern regarding the ability of applications to be made for a protection order by third parties without a victim's consent.[5] There are serious implications if the victim does not consent to the making of an application. 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 limited.

44 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 be much smoother for the victim. However, if the victim is hostile and unwilling to support the application, the outcome may be disempowering for and harmful to the victim. It may also expose the victim to the risk of further violence.

45 There is little protective value in an order that will be ignored by the protected person. The protected person will be the person responsible for notifying the Police if the order is breached. If the protected person is suffering from fear or other disability (for example, anxiety and/or agoraphobia) it is likely that they will fail to complain effectively about any breach and the order will be of no real effect.

46 Even unsuccessful applications are likely to cause discord and disruption in cases where over-protective third parties (such as parents who disapprove of their adult child's partner) mount understandable but misguided applications.

[5] See note 6 above, NZLS submission 9 October 2015, at [2.41] – [2.44].

47 These problems could be overcome if the court was able to obtain independent views of, or on behalf of, the victim, as suggested at paragraph 48 below (new section 12A).

New section 12A Views of person on whose behalf application made under section 12 by representative

48 As currently drafted, new section 12A fails to strike the right balance between a need for applications for protection orders to be made where the victim is under a disability of some kind (including fear), and a concern and respect for the victim and for ensuring that orders, where made, will be effective tools for protection.

49 Before making an order, the court needs to ascertain, as best it can, the victim's views on the application. Issues for the court to consider include:

- whether the application is well-founded;
- what matrix of relationships are represented around the application;
- whether the victim approves of the application;
- whether the victim sufficiently understands the procedure, and the implications of an order; and
- whether an order, if made, will be effective.

50 Given the long-term and wide consequences of a protection order, the victim needs adequate information so that they are fully informed of the procedure and its implications. In the Law Society's view, this should require independent legal advice to be given to the victim by counsel to assist the court. Section 81(1)(a) of the Act currently allows for the appointment of counsel to assist. The Law Society considers that this section should be amended to allow for the appointment of counsel to assist for the specific reason of informing a victim about the procedure and implications of a protection order and to give them independent legal advice where an application for a protection order is made by a third party.

51 Alternatively, the Bill should be amended to include a new section 12A(3) to enable the court to appoint counsel to assist the court by taking reasonable steps to:

(a) inform the victim of the effect and implications of the proceedings;
(b) to ascertain the victim's views; and
(c) to represent the victim's interests in the proceedings.

52 The Law Society recognises there may be a small number of cases where the victim's views cannot be ascertained, including where the victim suffers from a condition, for example severe anxiety (noting that this section does not apply to those whose disability falls under new sections 10A and 11). In the Law Society's view new section 12A(2) should be amended to read:

> *"Unless it is impracticable, P shall be heard in the proceedings…"*

Recommendations

53 That:

(a) section 81(1)(a) be amended to allow for counsel to assist to be appointed for the specific reason of informing a victim of the procedure and implications of a protection order and to give them independent legal advice where an application for a protection order is made by a third party;

(b) alternatively, a new section 12A(3) to be inserted to enable the court to appoint counsel to assist to take reasonable steps to:

  (a) inform the victim of the effect and implications of the proceedings;

  (b) to ascertain the victim's views; and

  (c) to represent the victim's interests in the proceedings.

(c) new section 12A(2) be amended to read "Unless it is impracticable, P shall be heard in the proceedings…"

New section 12C Applications by approved organisation authorised to act as representative

54 New section 12C(1) states that an approved organisation that complies with subsection (2) is authorised to "*make and prosecute*" applications for orders under sections 9 (applications by children), 11 (applications on behalf of people lacking capacity) or 12 (applications on behalf of people prevented by physical incapacity, fear or harm, or another sufficient cause from applying personally). There appears to be no definition of approved organisation other than that it is an organisation that has been approved by the Ministry; accordingly, it is unclear what types of organisations it is envisaged will be providing these services and whether it will be a requirement that those working in the organisation are legally qualified.

55 The wording of new section 12C(1) suggests that a person employed by an approved organisation, who is not a lawyer, is able to act within the "reserved areas" of work for lawyers as defined under section 6 of the Lawyers and Conveyancers Act 2006 (LCA). A

"lawyer" is defined in section 6 of the LCA as a person who holds a current New Zealand practising certificate. Under the LCA it is an offence for any person to provide work within the "reserved areas" for lawyers and to prepare court documents (sections 24 and 26). There is an exception in section 27 which provides that a person may appear as an advocate or represent any person before a court or tribunal if the appearance or representation is allowed or required by any Act or regulation or by the court or tribunal.

56 If an exception to the reserved areas for lawyers (including the offence provisions in sections 24 and 26) is intended, this should be expressly stated in the Bill. Careful consideration, however, should be given to such an extension to the regulatory parameters set in the LCA. The restrictions around the provision of work related to proceedings reflect the consumer protection focus of the LCA. These restrictions also reflect the ethical and professional obligations lawyers owe to legal consumers and as officers of the Court. Any provision of services by non-lawyers in this area would be unregulated and by individuals who do not owe duties to the Court as its officers.

57 If the intention is for employed lawyers in approved organisations to make and prosecute applications, statutory amendment would be required to section 9(1) of the LCA. This is because an 'in-house' lawyer employed by a non-law firm may only provide legal services directly to their employer unless one of the exceptions in section 9(1) of the LCA is engaged. In such a case, care would need to be taken to ensure that appropriate supervision and support was in place for the employed lawyers for the protection of legal consumers on behalf of whom applications were made and the lawyers themselves to ensure they could meet their own regulatory obligations.

Recommendation

58 That the ability of approved organisations under new section 12C(1) to "make and prosecute" applications be reconsidered in relation to the regulatory requirements of the Lawyers and Conveyancers Act 2006. Further to that consideration, if it is decided there is to be an intended exception to the regulatory framework under the Lawyers and Conveyancers Act 2006, that should be expressly provided for in the Bill.

Protection orders: Respondent not filing notice of defence

59 The Law Society has identified a shortcoming in the existing legislative framework for protection orders, relating to delays that can significantly prejudice applicants for protection

orders, and recommends that this be addressed via an amendment to the Family Court Rules 2002.

60 Where an on-notice application for a protection order is filed or a without notice application is placed on notice, rule 41 of the Family Court Rules 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[6] 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[7].

61 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.

62 Rule 41 should be amended so the matter can be 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.

Recommendation

63 That Rule 41 be amended to allow the matter to be referred to a judge to make a temporary protection order once the time for filing a notice of defence has expired.

Clause 19 Sections 19 and 20 replaced

64 Clause 19 replaces sections 19 and 20 of the Act and inserts new sections 20(A) to (C). The Law Society supports the new sections, except insofar as they incorporate examples. New section 20(5) reads:

> *"No consent to contact is valid, unless in writing or in a digital communication (for example, in a text message, email, letter, or standard form)."*

65 The phrase "digital communication" is defined in the Act (see clause 8, amending section 2). The words in brackets are unnecessary and should be deleted.

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[6] See rule 42(3)(c) and rule 42(5)(b) of the Family Court Rules 2002.

[7] See rule 3314(3)(b) of the Family Court Rules 2002.

Recommendation

66 That new section 20(5) be amended to delete the words *"(for example, in a text message, email, letter, or standard form)."*

Clause 27 Section 47 amended (Power to discharge protection order)

67 Clause 27 amends section 47 of the Act in respect of the power to discharge a protection order. In the Law Society's view, the title of this section should be amended to include not only the power to discharge a protection order but the power to vary a protection order. If this recommendation is accepted, new sections 47(1A), 47(1B) and 47(1C) will need to be amended to include the words "or vary" following the word "discharge".

68 The Law Society supports the amendments in new section 47(1(1B): these provide clear guidance to the court on what considerations need to be taken into account, and guidance to perpetrators on what they will need to do in order to have a protection order discharged (or varied, as submitted in paragraph 67 above).

69 The Law Society notes that the reference to a "protected person" in new section 47(1A) may include a child and new section 47(1B)(j) provides that in determining whether to discharge (or vary, as submitted in paragraph 67 above) a protection order, the court must have regard to "any protected person's ascertained views" on the application. As suggested in paragraphs 12 and 36, the Act should be amended to enable the court to appoint a lawyer for the child to ascertain the views of the child if a child is a "protected person". Such an amendment would support the purpose of a child-centred approach to family violence and would also be consistent with Article 12(1) and (2) of UNCROC.

70 For clarity, it would be preferable to amend section 41 by including a new subparagraph (1D) to specifically state that the court can decline an application for variation or discharge if it is not satisfied that any safety issues have been addressed adequately. This would be consistent with the new section 5A of COCA as amended by clause 85.

Recommendations

71 That:

(a) the title of section 47 be amended to include not only the power to discharge a protection order but the power to vary a protection order;

(b) if recommendation (a) is accepted, that new sections 47(1A), 47(1B) and 47(1C) be amended to include the words "or vary" following the word "discharge";

(c) the Act be amended to enable the court to appoint a lawyer for the child to ascertain the views of the child if a child is a "protected person"; and

(d) a new section 47(1D) be included to specifically state that the court can decline an application for variation or discharge if it is not satisfied that any safety issues have been addressed adequately.

Clause 28 Section 48 replaced (Variation or discharge on behalf of protected person)

72 New section 48 deals with the variation or discharge of a protection order on behalf of a protected person. As noted above, a protected person may include a child. New section 48 should be amended to make it clear that the views of a child who is a protected person under a protection order should be heard where a variation or discharge of a protection order is sought.

Recommendation

73 That new section 48 be amended to allow for the views of a child who is a protected person under a protection order to be heard where a variation or discharge of a protection order is sought.

Clause 31 Part 2A replaced (Programmes and prescribed services)

New section 51A Interpretation: prescribed non-standard service, prescribed service, prescribed standard service

74 These terms do not yet have definitions as Parts 1 and 2 in Schedule 2 providing for their description have not been made available. The Law Society assumes these terms are programmes and prescribed services either for victims or for perpetrators and victims of family violence.

New section 51C Assessor or service provider to notify safety concerns

75 New section 51C(2) sets out the definition of "concerns about the safety of a protected person". The Law Society considers that it may be more helpful to relocate this definition to new section 51A (the interpretation section for this Part of the Act).

76 New section 51C(3) requires an assessor or service provider to notify the registrar of the court and Police of any concerns about the safety of a protected person arising during or after the assessment, or during or after the delivery of a programme or prescribed service to the respondent. If there is a perceived risk to any child, the chief executive of the Ministry for Vulnerable Children, Oranga Tamariki must also be notified. To make it clear that each of the

three persons/agencies referred to in new section 51C(3)(a), (b) and (c) must be notified, subparagraphs (a) and (b) should be linked with the word "and".

77 New section 51C(1)(a) to (c) uses the term "concerns about the safety of a protected person" yet new section 51C(3)(c) uses the term "perceived risk". Because the term "concerns about the safety of a protected person" is defined in section 51C(2) it would be preferable to use the same term in new section 51C(3)(c) to avoid differences in interpretation. For clarity, it is suggested new section 51C(2) is amended to read:

> *"… (to the safety of the protected person, including any child the protected person has in their care)"*

78 The Law Society supports the mandatory notification of concerns about the safety of a protected person. However, under new section 51U, the registrar of the court is required to take mandatory steps in response to a notification, but no such directions are provided to the Police or Oranga Tamariki. The notification of concern about safety is not of itself a protective step for victims of family violence unless there is some resulting protective action mandated. For this reason, two new sections should be included in this Part of the Act that set out what action must be taken by the Police and Oranga Tamariki if a notification of a concern is made under new section 51C(3).

Recommendations

79 That:

(a) the definition of "concerns about the safety of a protected person" be relocated to new section 51A;
(b) the subparagraphs in new section 51C(3)(a) and (b) be linked with the word "and";
(c) new section 51C(2) is amended to read "… (to the safety of the protected person, including any child the protected person has in their care)"; and
(d) two new sections be included in this Part of the Act that set out what action must be taken by the Police and Oranga Tamariki if a notification of a concern is made under new section 51C(3).

New section 51D Safety programmes for protected persons

80 New section 51D(2) provides that the judge or registrar must inform the protected person about the availability of a safety programme if the person is not legally represented and no request for a programme is made. The Law Society supports this amendment, which is a

positive step to ensure that wherever possible there is greater access to, and uptake of, safety programmes.

New sections 51I-51Q Non-violence programmes and prescribed services

New section 51I

81 New section 51I provides for an assessor to meet with the respondent if the court has made a direction under new section 51E for the respondent to attend a non-violence programme or to engage with a prescribed standard service. The assessor is to determine whether there is an appropriate non-violence programme for the respondent to attend or if there are other appropriate prescribed services the respondent can engage with which may benefit the respondent. Under new section 51I(2) the assessor can determine not to undertake or complete an assessment or make a determination and further to delay the respondent's attendance at a programme or engagement with a prescribed service under new section 51I(7). The assessor must notify the registrar of their decision (see new sections 51I(3) and (7)). There is no requirement for the assessor to give reasons for their determinations. In order to make an informed decision, it will be important for the judge to understand the reasons for the assessor's decision. The same issue arises under new sections 51J, 51L, 51M, 51N, 51O, 51P and 51S. These sections should be amended to provide that any determination made by an assessor must include reasons for the decisions.

82 The Law Society considers that as part of the assessment process, victims should be consulted and their views incorporated in the decision-making process. This is consistent with victim-centric practice and the appropriate sections should be amended accordingly.

Recommendations

83 That new sections 51I(3) and (7), and new sections 51J, 51L, 51M, 51N, 51O, 51P and 51S, be amended to require the assessor to give reasons for their determinations, and for victims to be consulted and their views incorporated in the decision-making process.

New section 51Q Report and notice of completion and outcome of programme or service

84 New section 51Q requires the service provider to provide a notice of completion and outcome of a non-violence programme or engagement with a prescribed service, once the respondent has completed the programme or service, to the registrar. The report must also advise of any concerns that the service provider has about the safety of any protected person.

85 The Law Society considers it is essential that a report provided under new section 51Q(1)(a) and (b) is also made available to any lawyer acting for a child protected by the protection

order, or any lawyer appointed under section 81 of the Act. New section 51Q(2) should be amended to include a new subparagraph (c) to require the registrar to provide the report to a lawyer for child or a lawyer appointed under section 81.

86 Consideration needs to be given to whether, under the principles of natural justice, the respondent also receives the same information. If there are concerns about the respondent failing to meet the objectives of a programme or service or safety concerns, it is likely that new section 51U(2) would be triggered, requiring a summons to be issued under section 82 to call the respondent before the court, and the information will need to be provided to the respondent in this context.

Recommendations

87 That:

(a) new section 51Q(2) be amended by inserting a new subparagraph (c) to require the registrar to provide the report to a lawyer for child or a lawyer appointed under section 81; and

(b) consideration be given to whether new section 51Q(2) should be amended to provide the respondent with a copy of the report.

New section 51R Information being admitted as evidence or used without court's authorisation

88 New section 51R provides that confidential information disclosed to a service provider or assessor for the purposes of undertaking an assessment or providing a programme or prescribed service cannot be admitted as evidence in any court. However, the information can be disclosed for all or any of the purposes listed in new section 51R(3)(a) to (f). There may be instances where it is necessary for an agency to provide reasons based on the information disclosed to them for decisions it has made about the provision of programmes or services. The Law Society has suggested at paragraphs 81 – 82 that assessors and service providers need to provide reasons in their reports and determinations to inform the judge when making decisions. If these reasons are incorporated into "notifications" there is no reason for new section 51R(3) to be amended. However if the Bill is not amended as suggested, new section 51R(3) should be amended to require assessors and service providers to provide reasons for their decisions.

Recommendation

89 If the Bill is not amended as suggested (paragraphs 81 – 82) to require assessors and services providers to provide reasons for their determinations, that new section 51R(3) be amended in this respect.

New section 51S Powers if matters brought to attention of Judge

90 New section 51S(2) and (3) sets out the powers available to a judge if a registrar brings a matter to the judge's attention under new section 51S(1). It is unclear what other "order or direction" is available to the judge apart from the powers specified in new section 51S(3). This needs clarification.

91 In addition, new section 51S(2) provides that the judge can make an order or direction under the various subsections listed. Only new sections 51E and 51L deal with orders or directions that a judge can make. New sections 51J, 51P and 51Q deal with tasks that assessors and/or registrars must undertake. New section 51S(2) should be amended to delete reference to sections 51J, 51P and 51Q.

Recommendations

92 That:

(a) new section 51S(2) should be amended to delete reference to sections 51J, 51P and 51Q; and;

(b) new section 51S(2) be clarified in terms of what other order or direction is available to a judge.

New section 51W Respondent called before court

93 New section 51W provides for the respondent to be called before the court for non-compliance with a direction. New section 51W(1)(a) allows the court to admonish the respondent for non-compliance of a direction. This remedy does not feature in any other orders or directions available to the court currently under the Domestic Violence Act or the Bill. The Law Society questions whether admonishment is an effective consequence of non-compliance with a court order, in the absence of further consequences for non-compliance. The Law Society suggests that new section 51W(1)(a) should be deleted.

94 The Law Society welcomes the inclusion of new section 51W(1)(d) that allows the court to make, vary or discharge terms or conditions of an interim or final parenting order under

COCA. This will ensure consistency in proceedings that fall under both Acts (COCA and the Family Violence legislation when enacted).

95 It is unclear what other "order or direction" is available to the court under new section 51W(1)(e). This needs clarification.

Recommendations

96 That:

(a) new section 51W(1)(a) be deleted; and
(b) new section 51W(1)(e) be amended to clarify what other order or direction is available to the court to make.

New section 51X Offence to fail to comply with directions

97 New section 51X provides for penalties if a respondent fails to comply with a direction made under new sections 51E or 51L. It is unclear why directions made under new section 51S are not included. The Law Society suggests new section 51X is amended to include reference to directions made under new section 51S.

Recommendation

98 That new section 51X be amended to include reference to directions made under new section 51S.

Clause 32 Section 52 replaced – Application for occupation order

99 Clause 32 replaces section 52 in respect of an application for an occupation order. The phrase "the period of existence of the family relationship in respect of which the protection order is sought or was made" in new section 52(2)(a) is unclear. The Law Society suggests that new section 52(2) would be more easily understood if broken into two subsections, for example:

> *(2) An occupation order grants the applicant the right to live in a dwellinghouse that, at the time the order is made, is owned by either party to the proceedings, or in which either party to the proceedings has a legal interest (for example, a tenancy).*
>
> *(3) Notwithstanding subsection (2), an occupation order shall not be made unless the dwellinghouse was owned by either party to the proceedings, or either party to the proceedings had a legal interest (for example, a tenancy), at a time when the family relationship that gave rise to the protection order existed.*

Recommendation

100 That new section 52(2)(a) and (b) be deleted and redrafted (as suggested in paragraph 99).

Clause 35 Section 56 amended – Application for tenancy order

101 Clause 35 amends section 56 which deals with applications for a tenancy order. New section 56(1A)(a) and (b) uses the same wording as in new section 52(2)(a) and(b). The Law Society recommends that new section 56(1A)(a) and (b) be redrafted as suggested in paragraph 99.

Recommendation

102 That new section 56(1A)(a) and (b) be deleted and redrafted (as suggested in paragraph 99).

Orders relating to property (Domestic Violence Act, Part 3) – Applications without notice

103 The Bill makes a number of changes intended to facilitate the use of property orders to assist victims of family violence. One further change is recommended, as discussed below, that would improve the effectiveness of property orders for victims subject to psychological or financial abuse (in the absence of physical or sexual abuse).

Section 60 (Applications without notice for occupation order and tenancy order) and section 70 (Applications without notice for ancillary furniture order and furniture order)

104 Sections 60 and 70 of the Act allow an application to be made for an occupation order, a tenancy order or a furniture order on a without notice basis, only where the applicant or a child of the applicant's family has been physically or sexually abused. Victims of psychological or financial abuse (absent physical or sexual abuse) must apply for such orders on notice. In practice this means weeks, more likely months, of delay before the matter is heard.

105 Where a family relationship breaks down because of violence, a violent party will often wield abusive power over property. The risks of psychological abuse (including social and educational disruption for children), and associated economic abuse, are high. Some cases of psychological abuse are more pernicious in fact and effect than lesser forms of physical abuse (such as pushing and shoving).

106 In the Law Society's view, the current law does not adequately address the situation where perpetrators of psychological abuse expel their victim(s) from a home they control by refusing to leave. This can occur even where the victim has joint ownership of the property. If the abuse is not physical or sexual, the victim has no choice but to depart. In many cases, this impacts adversely on child victims.

107 The Regulatory Impact Statement[8] (RIS) accompanying the review of the family violence legislation found that "property orders are not being used to their full advantage to reduce homelessness and disruption for victims of family violence".[9] The RIS recommended that the Bill "provide that the grounds for a without notice occupation and tenancy application include psychological violence as well as physical and sexual abuse".[10]

108 The Law Society agrees with that recommendation in the RIS. Sections 60(1)(a) and 70(1)(a) should be repealed, or alternatively amended by deleting the words "physically or sexually abused" and replacing them with "is using or has used family violence against". Such an amendment is justified by the recognition that family violence, in all its forms, is unacceptable (see new principle in section 1A(1)(a)) and that the Bill aims to provide better protection for victims of family violence and to deal more effectively with perpetrators.

109 Amending sections 60 and 70 is unlikely to lead to a flood of applications because the court will only make orders in meritorious cases, having weighed all the competing factors. There are cases each year where, if there had been power to apply, a victim who has suffered psychological abuse would properly have been granted a property order (occupation, tenancy, ancillary furniture or furniture) if the jurisdiction existed.

Recommendations

110 That sections 60(1)(a) and 70(1)(a) of the Domestic Violence Act:

(a) be repealed; or alternatively

(b) be amended by deleting the words "physically or sexually abused" and replacing those words with "is using or has used family violence against".

Clause 50 Sections 96 and 97 replaced

New section 96B Ways requests may be made and documents may be made available

111 New section 96B specifies ways in which requests may be made and sent and copies, evidence, or information be made available. In the Law Society's view, it is not appropriate to include section 97 documentation in this provision. Section 97 should deal only with original

[8] Regulatory Impact Statement, Review of family violence legislation, 3 August 2016.

[9] Regulatory Impact Statement at paragraph 58.

[10] Regulatory Impact Statement at paragraph 58(b).

certified documentation. New section 96B should be amended by removing the reference to section 97.

Recommendation

112 That new section 96B be amended by removing reference to section 97.

Police safety orders (Part 6A)

Clause 58 Section 124E amended (Effect of Police safety order)

113 New section 124E replaces sections 124E(1) and (2) of the Act. New section 124E(2)(b) includes examples of contact. As noted at paragraphs 64 – 65, the inclusion of these examples is unnecessary as "contact" is defined in section 2. New section 124E(2)(b) should be amended to delete the words in the first set of brackets following the word "risk".

Recommendation

114 That new section 124E(2)(b) should be amended to delete the words in the first set of brackets following the word "risk".

Ability to remove Police Safety Orders from the record

115 The Law Society understands from family lawyers that in some cases Police safety orders (PSOs) have been issued in circumstances where, upon more detailed inquiry, questions have arisen about the bona fides of the information 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 this should be remedied and that, in limited circumstances, there should be a mechanism to remove such orders from the record.

Recommendation

116 That the Act be amended to include a new provision for a mechanism to remove references to PSOs from the record, in limited circumstances, where the PSO has been issued on grounds that have later been found to be insufficient.

Information sharing provisions: New Part 6B inserted (clause 69)

117 117 Clause 69 introduces a new Part 6B (sections 124T to 124Y) in relation to information requests, use, and disclosure, and service delivery codes of practice.

General comments on information sharing

118 The Law Society agrees that effective information sharing is crucial to addressing the serious issue of family violence.

119 The existing legislative framework generally allows information sharing to occur. For instance, the Privacy Act principles allow for use and disclosure of personal information outside the purpose for which that information was collected, if an agency reasonably believes this is necessary for the purposes of maintaining the law (including preventing offences such as domestic violence) and protecting safety. The Privacy Act also creates practical mechanisms (such as approved information sharing agreements) that allow information to be shared in a proportionate, transparent and accountable way. However, some agencies are highly risk averse when it comes to information sharing. It is common to find that the risk aversion is based on a misinterpretation of the Privacy Act, but it is unhelpful nevertheless, particularly in an environment such as family violence where speedy action can be critical to safety.

120 Creating information sharing provisions in this Bill is therefore a useful step to ensuring that people are more confident about what they can share. The Law Society's comments on the new Part 6B provisions introduced by clause 69 are set out below.

121 Subject to some amendments (discussed below), the Law Society considers the approach taken in this Bill is preferable to the information sharing regime proposed in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill[11] that is currently before the House. There will be significant overlap between the family violence information sharing scheme and the vulnerable children information sharing scheme in the CYPF (Oranga Tamariki) Legislation Bill, and between the agencies delivering services under the two schemes. If different approaches are taken, that will exacerbate the difficulties and confusion for agencies and families. The Law Society has recommended to the Social Services select committee that the information-sharing framework in the CYPF (Oranga Tamariki) Legislation Bill should be aligned with the provisions in the Family Violence Bill.[12]

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[11] The CYPF (Oranga Tamariki) Legislation Bill inserts a new information-sharing framework into the CYPF Act, to "facilitate the timely and consistent exchange of personal information about individual vulnerable children and young persons to promote their safety and well-being".

[12] NZLS submission dated 3 March 2017 on the CYPF (Oranga Tamariki) Legislation Bill, at [228] – [229], [246]. http://www.lawsociety.org.nz/__data/assets/pdf_file/0019/109108/CYPF-Oranga-Tamariki-Legislation-Bill-3-3-17.pdf

Family and Whānau Violence Legislation Bill information sharing – specific comments

Ensure that release is voluntary not mandatory (new section 124V)

122 Information sharing under new sections 124T – 124Y is voluntary, not mandatory. The Law Society agrees with this approach.[13]

123 However, section 124V(5) states that holder agencies and practitioners "*must* have regard to the principle that [h]elping to ensure that a victim is protected from family violence should usually take precedence over both (a) any applicable confidentiality of the information; and (b) [principle 11 of the Privacy Act] (emphasis added).

124 This is confusing. The mandatory requirement to *consider* the stated principle means that agencies may read the section as effectively *requiring* them to breach confidentiality. This could have unintended consequences for relationships of trust and confidence.

125 First, health practitioners (all of whom are "social services practitioners" under the Bill) are subject to ethical obligations of confidentiality that carefully control what information can be released and to whom. Information sharing is possible and often necessary (for example, notifications to Oranga Tamariki), but must be proportionate, limited and effective to meet professional standards. The Bill should be read in line with those usual obligations, rather than cutting across them. The wording of section 124V(5) is unhelpful in this respect.

126 Secondly, teachers (who are also "social services practitioners") and NGOs that work in the family violence area (who are "family violence agencies") will commonly receive information in confidence from people seeking support. It is important not to create a principle or rule that will impede people's ability to seek help. Releasing information that is received in confidence may involve a fine judgment call as it can result in a loss of trust that means people will be less likely to approach that agency, or similar agencies, for help in future. The "principle" in section 124V(5) does not help the agency to make that call.

127 The Law Society therefore recommends deleting section 124V(5) . The other subsections already provide a strong signal that appropriate information sharing is permissible, and provide an adequate framework within which agencies can exercise judgment.[14] Section

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[13] See note 12, NZLS submission at [242]: There are potentially significant risks associated with mandatory information sharing, including social stigma, the harm that may arise from false accusations, and the risk some families may be less inclined to engage with social services and other supports due to concerns about how their personal information will be used.

[14] Section 124V(1) enables information requests; section 124V(3) confirms that the agency has latitude to use the information; and section 124V(4) sets out the ability to disclose information, whether in

124V(5) at best adds nothing to the clear message sent by those other clauses and at worst may create confusion and disruption.

Recommendation

128 That section 124V(5) is deleted.

A duty to consider disclosing is unnecessary (section 124W)

129 The Law Society also recommends deleting section 124W. A mandatory requirement to consider disclosing in response to a request adds nothing to the earlier sections. It is uncertain what the effect of that duty is, or what the consequence of a breach would be.

Recommendation

130 That section 124W is deleted.

Immunity from liability (section 124X)

131 The Law Society acknowledges the sentiment behind section 124X, which is to ensure that agencies are not risk averse when disclosing information to address issues relating to family violence. Fear of liability is one factor that tends to increase risk aversion. However, it is undesirable to cut off avenues for review or complaint altogether. It is possible that an agency may release information in good faith, but in a way that exceeds what is permitted under section 124V. As it stands, it is unclear how or whether an affected individual could challenge such a disclosure. Inaccurate interpretations of the legislation could therefore go uncorrected.

132 The Law Society submits that it would be better to delete this section and preserve the ability to complain to the Privacy Commissioner. Where agencies have collected, used or disclosed information in accordance with section 124V there will be no liability in any case. This is because the section is generally in line with the Privacy Act; and to the extent that it is arguable that there is a discrepancy, the provisions of the Bill will prevail over the Privacy Act (see section 7 of the Privacy Act). Allowing complaints therefore does not in fact create an additional risk of liability for agencies. There is also a benefit to keeping the door to complaints open: if the Privacy Commissioner receives complaints, his opinions will be of value for agencies in refining their practices and increasing certainty about what they can share.

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response to a request or proactively. The ability to develop a code of practice under clause 124Y also assists.

Recommendation

133 That section 124X is deleted.

Codes of Practice (section 124Y)

134 The Law Society agrees that developing a code of practice under section 124Y may well be useful to provide further guidance for agencies operating in this area. However, it submits that the legislation should include a requirement to consult with the Privacy Commissioner, and with the Office of the Children's Commissioner in appropriate cases. A requirement to consult the Privacy Commissioner is a common feature of legislation with privacy implications, including other Bills currently before the House.[15]

135 The Departmental Disclosure Statement records the Ministry of Justice view that a consultation clause is not necessary, because the Cabinet Manual requires consultation with the Privacy Commissioner in any case.[16] However, the same can be said of most if not all the other legislative references to consulting with the Privacy Commissioner. The Law Society submits that there is a positive benefit to including a consultation clause: having a formal requirement to consult (with consequences for failing to do so) will enhance public trust that privacy will be properly considered as part of the process.

Recommendation

136 That the Privacy Commissioner (and the Office of the Children's Commissioner, in appropriate cases) be consulted on any proposed Code of Practice to be issued under section 124Y.

<u>Subpart 2 – Amendments to Care of Children Act 2004</u>

Clause 85 Section 5A replaced (Domestic violence to be taken into account)

137 New section 5A requires the court, on the application for a guardianship and/or parenting order, to take into account any past or present temporary or final protection order, the circumstances in which the order was made, any written reasons given by the judge who made that order, any convictions for breach of a protection order, any conviction for any

[15]See for instance clause 275(4) of the Customs and Excise Bill, which requires consultation with the Privacy Commissioner before implementing an automated electronic system at the border; and new section 109F (clause 6) of the Enhancing Identity Verification and Border Processes Legislation Bill, where consultation is needed before amending the information sharing schedule.

[16]Departmental Disclosure Statement on the Family and Whānau Violence Legislation Bill, 3 March 2017, at p12.

other family violence offence, and all relevant safety concerns that an assessor or service provider has notified. It would be preferable if new section 5A was amended to include an express provision to enable the court to decline an application if it is not satisfied that any safety issues have been adequately addressed. This would be consistent with the suggested amendment to new section 27(1A).

Recommendation

138 That new section 5A be amended to include an express provision to enable the court to decline an application if it is not satisfied that any safety issues have been adequately addressed.

Subpart 5 – Amendments to Evidence Act 2006

Evidence Regulations 2007

Regulation 22

139 The Law Society has identified a gap in the current law which, if rectified, would benefit child victims of family violence in respect of giving evidence.

140 Regulation 22 of the Evidence Regulations 2007 provides for evidential video interviews of children taken by Police upon criminal complaints, to be made available to the Family Court as evidence in proceedings under the Children, Young Persons, and Their Families Act 1989 (CYPTF Act) and COCA. However, those evidential videos are not available to the Family Court as evidence in proceedings under the Domestic Violence Act 1995.

141 Regulation 23 states that the Police must supply a copy of any existing transcript of a video record to the Family Court under regulation 22. Regulation 24 provides that the copying or showing of a transcript is limited to certain purposes. Regulations 23 and 24 are also only available to the Family Court in CYPTF Act and COCA proceedings. They are not available in proceedings under the Domestic Violence Act 1995.

142 Offering evidence by way of video is an important way to get the evidence before the court without the need to further interview a child. This video evidence will qualify as a hearsay statement under section 18 of the Evidence Act 2006.

143 Regulation 22 does not make the evidence necessarily admissible but it makes it available for a judge to assess admissibility. There are sufficient protections which apply to the way the video is released by the Police and handled by the court under regulation 22 to ensure that the child's video statement is protected and cannot be disseminated.

144 There appears to be no rationale why this evidence would be available in CYPTF Act and COCA proceedings but not in family violence proceedings. This Bill provides an opportunity for this gap in the law to be rectified. The Law Society suggests that regulations 22 and 24 of the Evidence Regulations 2007 should be amended to ensure such evidential videos, and any transcripts that are in existence, are available to the court in family violence proceedings.

Recommendation

145 That regulations 22 and 24 of the Evidence Regulations 2007 be amended to ensure such evidential videos and existing transcripts are available to the court in family violence proceedings.

Subpart 6 – Amendments to Sentencing Act 2002

Section 8 Principles of sentencing or otherwise dealing with offenders

146 Section 8 of the Sentencing Act 2002 sets out principles that the court must take into account when imposing a sentence or otherwise dealing with offenders. Clause 127 of the Bill amends section 9 of the Sentencing Act 2002, to add as an aggravating factor at sentencing that the offence was a family violence offence committed on a protected person whilst the offender was subject to a protection order.

147 In the Law Society's view, section 8 of the Sentencing Act 2002 should be amended to include a principle that in family violence cases, victim safety, including the safety of any child, should be a mandatory and primary consideration when the court is determining the appropriate sentence in family violence cases. Such an amendment would be consistent with the requirement for the safety of victims to be considered by judges making bail decisions in family violence proceedings, through the proposed amendments to the Bail Act 2000 in clauses 77 – 81.

Recommendation

148 That section 8 of the Sentencing Act 2002 be amended to include a principle that in family violence cases, victim safety, including the safety of any child, should be a mandatory and primary consideration when the court is determining the appropriate sentence in family violence cases.

Access to justice – legal aid eligibility

149 The Law Society notes that eligibility for legal aid is not addressed in the Bill, but is nonetheless a significant barrier for many victims of family violence (and children) seeking protection orders.

150 The Law Society is aware of cases where victims of family violence have been refused legal aid, placing those applicants under undue pressure. The Law Society considers that legal aid should be available to all applicants (and respondents) under the Domestic Violence Act, for the reasons set out in the Law Society's 2015 submission on the Family Violence Review.[17]

151 Alternatively, the income threshold for legal aid in respect of family violence 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 Care of Children Act (COCA) proceedings, so that more victims of family violence would be eligible to obtain legal advice and representation to apply for a protection order.

152 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 family violence proceedings. This would reflect that but for the family violence, no COCA proceedings would be necessary.

Recommendations

153 That:

(a) legal aid should be available to all applicants (and respondents) under the Act;
(b) alternatively, the income threshold for legal aid in respect of family violence proceedings should be replaced by the income eligibility of those who are able to access the FLAS for parenting and guardianship disputes under COCA proceedings; and
(c) 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 family violence proceedings.

[17] NZLS submission dated 9.10.15 on "Strengthening New Zealand's legislative response to family violence: a public discussion document", at [2.33] – [2.39].

Conclusion

154 The Law Society wishes to be heard.

Kathryn Beck
President
24 May 2017