



NEW ZEALAND
LAW SOCIETY

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Domestic Violence – Victims’ Protection Bill

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1. The New Zealand Law Society welcomes the opportunity to comment on the Domestic Violence – Victims’ Protection Bill (the Bill). The Law Society supports the underlying intention of this Bill. The Bill aims to enhance the legal protections for victims of domestic violence, and to enhance the role of the workplace in addressing the effects of domestic violence and supporting its victims.
2. However, while the intention of the Bill is commended, as currently formulated these legislative proposals appear likely to give rise to unintended adverse consequences and may not achieve the objectives for which they are designed. There are also some areas where the Bill could be improved by providing greater certainty for employers and workers.

Definition of ‘domestic violence document’

3. Clause 4 of the Bill proposes to amend section 2 of the Domestic Violence Act 1995 (DVA) to add a definition of ‘domestic violence document’. Clause 5 confirms that the production of a domestic violence document defines whether a person is a victim of domestic violence for the purposes of enactments other than the DVA. It is therefore a critical definition for the workability of the Bill’s objectives.
4. The Law Society supports the approach taken of including a wide range of documentary proof to establish domestic violence. This recognises that court proceedings take time, and that victims of domestic violence need assistance before as well as after court orders are made. It also recognises that the majority of domestic violence is not reported to the police,¹ and the importance of not imposing pre-conditions such as formal complaints before a victim can seek assistance in the workplace.
5. Consistent with that approach, the Law Society considers that the definition would better achieve its purpose with the following changes:
 - a. clarifying that a Police Safety Order is included in the definition of a ‘domestic violence document’;
 - b. broadening the scope of the confirmation that a medical practitioner can provide. At present proposed subsection (g) requires a medical practitioner to report that a person “has injuries or a condition consistent with having suffered domestic violence”. This is an unnecessarily high threshold, as not all victims of domestic violence will present with injuries or any diagnosable medical condition (noting that domestic violence is defined widely). (The Law Society notes also that it would also be more consistent with the current sick leave procedure in employment law to refer to a certificate rather than a report from a medical practitioner);
 - c. including in the definition reports or certificates from other health practitioners, such as psychologists who may be providing counselling services; and

¹ Only an estimated 24% of domestic violence incidents are reported to the police: 2014 New Zealand Crime and Safety survey, Te Rangahau o Aotearoa Mō Te Taihara Me Te Haumarutanga, Main Findings, Ministry of Justice, Wellington, 2015 at page 107. It is therefore of primary importance to keep the definition of ‘domestic violence document’ as wide as possible to ensure that victims are not excluded from the assistance which the Bill aims to provide.

- d. including within the definition a report from a lawyer instructed on a matter, confirming that they have accepted instructions from the person who alleges he or she has been the victim of domestic violence (in some circumstances a lawyer may be one of the earliest professionals engaged in the process of responding to domestic violence).
6. Subsections (e) and (f) refer to orders and findings made by a “court” in relation to domestic violence. In the DVA a court is defined as “the Family Court or the District Court” or any judge of such a court. This would exclude other courts in New Zealand, in particular the High Court, as well as overseas courts, for example in Australia. While the exclusion of overseas courts may well be appropriate, the Law Society recommends reviewing the definition to confirm that there is no need to include other courts in New Zealand.
7. Subsection (h) includes as a domestic violence document “a report from a domestic violence support organisation relating to a person who has suffered domestic violence”. The Law Society supports the objective of not being overly prescriptive in this description, but there is no definition of a “domestic violence support organisation”, and no specificity as to what that agency must include in its report for that report to be sufficient as a “domestic violence document”. Given the importance of this document, and the absence of any process for an employer to challenge the sufficiency of the report, consideration should be given to prescribing minimum criteria which the agency and the report need to meet.

Extended concept of ‘victim of domestic violence’

8. The definition of ‘victim of domestic violence’ includes both a person who has actually suffered domestic violence (the primary victim) and one who is providing “care or support” to such a person. Although the primary victim must be within the immediate family or household of the supporter, this is still potentially a large class: a number of people (such as flatmates, perhaps within a single workplace) may be providing care or support to a single individual. Each such carer or support person qualifies for the entitlements provided for in the Bill, such as domestic violence leave of up to ten days annually, regardless of the amount of care or support provided. No distinction is drawn between primary victims and their support persons.
9. The extended definition may well be appropriate but:
 - a. the Law Society recommends that the Committee review the definition (as it relates to carers and support persons) to confirm it will operate as intended; and
 - b. the definition may have implications in terms of privacy, consent and self-determination (in particular for the primary victim), issues discussed below.

Currency

10. The Bill does not specify how recent the domestic violence document is required to be, or whether there is a point in time beyond which a new document is required for the person to meet the definition of being a victim of domestic violence. This may be something to be addressed in the individual enactments where reliance is placed on the document for specific purposes.

Privacy and suppression implications

11. The Bill is unclear on the level of detail expected to be provided in the reports listed in the definition of ‘domestic violence document’. The use of the term ‘report’ may convey the impression that a reasonably detailed document is required, although that would not seem to be necessary for the purpose of establishing that the person is (or is assessed as likely to be) a victim of domestic violence.

12. Detailed reports raise significant privacy issues for the victim, and for others involved (including the actual or alleged perpetrator). The disclosure of highly sensitive personal information to an employer (and/or the human resources staff of an organisation) may also pose a significant barrier for victims seeking help in the first place.
13. This may be a particular issue where a carer or support person uses a document, possibly without the knowledge or consent of the primary victim who is the subject of the document, to exercise rights conferred on the carer or support person as a victim of domestic violence.
14. The Law Society therefore recommends that consideration be given to clarifying that the report should not disclose any personal information beyond what is necessary to confirm that the person is or is likely to be a victim of domestic violence.
15. Similarly, the Bill is not clear on the interaction between the use and disclosure of 'domestic violence documents' and the potentially conflicting suppression orders and confidentiality requirements in criminal and other court proceedings.

Recommendations

16. The Law Society recommends that clause 4 of the Bill be amended as follows:
 - a. add a new subsection: "a Police Safety Order";
 - b. the references in subsections (e) and (f) to a "court" be reviewed;
 - c. subsection (g) to read: "a certificate from a medical practitioner confirming that they have reason to believe that a person has suffered domestic violence" (or words to similar effect);
 - d. consider extending subsection (g) to other health practitioners;
 - e. add a new subsection: "a report from a lawyer confirming that they have accepted instructions from the person on a matter where the person alleges they have been the victim of domestic violence";
 - f. prescribe minimum standards for an organisation to be classed as a domestic violence support organisation, and amend subsection (h) to specify the minimum requirements for a report from that agency;
 - g. the definition of victim of domestic violence (as it relates to carers and support persons) be reviewed to confirm it will operate as intended, including in terms of the privacy interests of the primary victim;
 - h. clarify:
 - i. that the reports listed in the definition should not disclose any personal information beyond what is necessary to confirm that the person is or is likely to be a victim of domestic violence;
 - ii. the interaction between the use and disclosure of 'domestic violence documents' and suppression orders and confidentiality requirements in criminal and other court proceedings.

Employment Relations Act 2000

17. Clauses 6 and 7 amend the Employment Relations Act 2000 to allow victims of domestic violence to request flexible working arrangements. Proposed Part 6AB allows employees to seek a slightly

wider, although broadly similar, range of flexible working arrangements than can be sought under the current provisions of Part 6AA of the Employment Relations Act.

18. The Law Society notes that the current provisions of Part 6AA do not require an employee to justify or even state a reason why flexible working arrangements have been requested, but rather provide a statutory right to have such a request considered. The Bill puts domestic violence victims in a unique position of having to provide reasons and prove grounds to support their application. This appears to be a backwards step: the original flexible working arrangement provisions were designed to remove such obstacles and distinctions. The Law Society recommends that consideration be given to whether there is a genuine need to create a separate Part to address the needs of victims of domestic violence, or whether they can be accommodated within Part 6AA.
19. The Law Society also notes the following more specific concerns with proposed Part 6AB.

Range of flexible arrangements that can be requested

20. The flexible working arrangements that can be requested are set out in proposed section 69ABA. While these include a limited catch-all in subsection (g), consideration could be given to including arrangements likely to be particularly relevant to domestic violence issues. Similar overseas legislation allows victims of domestic violence to seek “*reasonable accommodation*” at work and defines reasonable accommodation as including adjustment to job structure, transfers, reassignments, changed telephone number, installation of locks, introduction of workplace safety procedures and incident reporting.²
21. Including a non-exclusive specific list along these lines would avoid doubt about the scope of accommodation that can be requested.

Time since previous request

22. Proposed section 69ABB(1)(a) requires 12 months to have passed since a previous request under the section was made. On the face of it this would apply to a previous request made to a previous employer, not just to the current employer. It is assumed that this is intended.

Referral to domestic violence support services

23. Proposed section 69ABC(b) requires employers to refer workers making requests under proposed Part 6AB to “*appropriate domestic violence support services*”. An employer who fails to do this is liable for a penalty of up to \$2,000 payable to the worker concerned.
24. It is not clear whether it is intended that the employer is responsible for identifying and assessing the appropriateness of a support service for the worker, and whether they are required to make the referral themselves. As noted above, the worker may not be the subject of domestic violence her- or himself, but rather a person providing care and support. This may affect what support services are appropriate. Nor is it clear whether the worker is obliged to accept and action that referral, or whether or how the employer is expected to monitor or enforce that.
25. Any of those features would constitute a breach of the worker’s privacy and rights to determine their own access to support services of their choosing, and whether they wish to engage with such services at all. It may also engage the rights of the primary victim where the worker is a carer or support person.

² See, for example, legislation from Illinois, USA: Victims’ Economic Security and Safety Act 820 ILCS 180/30(3).

26. As noted above, it is important that the Bill does not impose obligations on victims of domestic violence to participate in processes that they may consider too invasive or too much to cope with at the time, as a pre-condition to being able to access assistance in their workplace. This provision appears to require workers to engage with domestic violence support services (selected by their employer) if they wish to request flexible working arrangements from their employer.
27. It is also important that obligations on employers are clear and practicable. This provision seems likely to cause confusion as to both the obligations of the employer, and how they are to be met without compromising the rights and interests of the worker.

Discrimination: thresholds, response time, grounds for refusal

28. As currently drafted the Bill makes it more difficult for workers citing domestic violence to obtain flexible working arrangements than other workers who invoke the existing Part 6AA provisions. It is not clear whether it was intended to introduce a more restrictive process for victims of domestic violence and, if so, the reasons for that.
29. In addition to the need to provide and prove grounds to support their request, noted above, there are four areas where victims of domestic violence are subject to more onerous requirements:
 - a. Eligibility: under proposed s69ABB(1)(b) a worker making a request citing domestic violence reasons must have been in their job for at least 6 months, and under proposed s69ABB(1)(c) a request cannot be repeated until 12 months have passed. Other workers under Part 6AA have no minimum period of employment before making a request, and no minimum waiting period before making another request.
 - b. Employer response time: under proposed section 69ABC(a) an employer must respond to a domestic violence request within 3 months. Requests from other employees under Part 6AA must be responded to within 1 month. There is no apparent reason for the difference, and in the context of domestic violence, where adjustments to working arrangements may be needed quite urgently, this is a significant disadvantage. There may in fact be good grounds to consider including provision for urgent responses to some requests, such as those that relate to safety or short term requirements for flexible working arrangements because of family disruptions or dislocations.
 - c. Grounds for refusal: under proposed Part 6AB the threshold for an employer refusing a domestic violence request is lower than for other workers making a request under Part 6AA. Proposed Part 6AB introduces the word 'potential' adverse impact as a reason to refuse a request in sections 69ABD(2)(c) (*impact on quality*), 69ABD(2)(d) (*impact on performance*) and 69ABD(2)(e) (*ability to meet customer demands*). The equivalent provisions in Part 6AA require an assessment of actual, rather than potential, impact.

The Law Society notes also that the employer is not required to notify its decision on the request (including the reason and explanation for a refusal) in writing. Decisions by employers on requests under Part 6AA do need to be in writing: current section 69AAE(1). It is not clear why a different approach has been taken for requests under Part 6AB, particularly where the requestor may be experiencing difficulties with concentration and communication due to stress.

- d. Challenges to refusals: proposed section 69ABE only allows a challenge to an employer's refusal to grant a domestic violence request if an employer has not properly responded to a request or has made an incorrect assessment of the threshold requirements under proposed section 69ABD(1). There appears to be no ability to challenge a wrong refusal

under proposed section 69ABD(2) or (3). Similarly, it appears that section 69ABE(6) excludes the personal grievance rights for any decision under section 69ABD(2) and (3).

Recommendation

30. The Law Society recommends that consideration be given to removing Part 2 from the Bill on the basis that flexible working arrangements for victims of domestic violence can be accommodated in the existing provisions of Part 6AA (with or without minor amendments).
31. Alternatively, the Law Society recommends:
 - a. proposed section 69ABA be amended to allow victims of domestic violence to seek “reasonable accommodation” at work, including such matters as adjustment to job structure, transfers, reassignments, changed telephone number, installation of locks, introduction of workplace safety procedures and incident reporting;
 - b. proposed section 69ABC(b) be deleted; and
 - c. the following proposed provisions be deleted and where appropriate replaced with the equivalent provisions applying to requests under Part 6AA: sections 69ABB(1)(b) and (c); 69ABC(a); 69ABC(c) and (d) to add a requirement for writing; 69ABD(2)(c), (d) and (e); 69ABE.
32. Alternatively, and less preferably, the Law Society recommends that the Bill clarify that nothing in proposed Part 6AB limits an employee’s right to apply under Part 6AA, even where the reasons for the request under Part 6AA relate to domestic violence.

Health and Safety at Work Act 2015

33. Part 3 of the Bill proposes amendments to the Health and Safety at Work Act 2015 (HSWA). While there is benefit in drawing the attention of employers to the particular hazards that arise from domestic violence, the proposed changes appear to be unnecessary and may have a range of unintended consequences.

Part 3 of the Bill is unnecessary and unduly burdensome

34. Clause 10 of the Bill proposes to amend section 16 of the HSWA to include in the definition of ‘hazard’ specific provisions relating to domestic violence. Currently section 37(1) of the HSWA provides that “A PCBU [a ‘person conducting a business or undertaking’] who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.”
35. The law currently provides that an employer must ensure as far as reasonably practicable that the worker (whether a victim of domestic violence or not) is safe when entering and exiting work, and while at work is safe from threats to their health and safety. Such a threat would include threats from a perpetrator of domestic violence. The proposed amendment to section 16 is therefore unnecessary.
36. Clause 11 of the Bill amends section 37 to require every PCBU to have a policy specifically dealing with risks associated with domestic violence. Section 37 does not expressly require policies in relation to any other underlying cause of a hazard. Domestic violence raises complex issues and the most useful workplace response is likely to vary case by case. It is unclear what benefit a generic policy would provide to either employers or workers, and the complexity of the issues means that this obligation is likely to place an undue burden on employers for little benefit.

37. Similarly, clause 12 of the Bill amends Schedule 2, clause 10(1) to require a PCBU to take all reasonable and practicable steps to provide health and safety representatives with training in supporting workers who are victims of domestic violence. Again, no other cause of hazard is identified for compulsory training of this nature, and this would impose a considerable burden.
38. Clause 12 is also of doubtful benefit and may in fact increase the risks of harm. Supporting victims of domestic violence can be complex and it may not be appropriate for a health and safety representative to undertake this task. Further, neither a PCBU nor a representative is equipped to support victims beyond the workplace, although the policy required by clause 11 would appear to direct them to do so. As the Bill is currently drafted, a risk exists that a conscientious PCBU and/or representative could end up providing inappropriate or inadequate support, which could place themselves and the victim at greater risk.

Privacy and consent issues

39. There are also privacy and consent issues in relation to these clauses. Privacy and consent are very important in this context, and they raise sensitive and complex considerations. In some circumstances, any threat to privacy may pose an insurmountable barrier to victims seeking assistance, while for any victim the issues at stake are intensely personal. Issues of consent and a victim's right to self-determine their response to violence are also of obvious importance.
40. The Bill does not deal with how a worker's privacy is to be assured if the employer considers, for example, that a worker ought to be supported by a health and safety representative to mitigate the employer's risks under the HSWA. Similarly, the Bill does not deal with the possibility that a worker may not want particular actions to be taken in relation to a domestic violence situation, but an employer identifies a risk and has a statutory obligation to mitigate it. It is recognised that victims of domestic violence may make decisions that are not logical to those who have not suffered domestic violence themselves. At the same time, employers may reasonably wish to take a conservative approach to mitigating their risks under the HSWA. In addition, people can simply disagree about what is the right thing to be done.
41. It would be an unhelpful result if the Bill caused conflict between the rights and best interests of victims of domestic violence and an employer's reasonable concerns to mitigate liability risks under the HSWA.

Expansion of employer's responsibilities to 'outside the workplace'

42. Clause 11 also proposes that the policy required under new section 37(1A) extend to situations where a person's behaviour is an actual or potential cause of harm outside the workplace.
43. It is not clear how a PCBU could be expected to control hazards or potential harms outside the workplace. As outlined above, there is also the risk that given the complexity of the issues involved in addressing domestic violence, a PCBU's engagement in conduct outside the workplace could actually increase the risk of harm to the victim and to those who intervene.
44. This provision also appears to be contrary to the guiding principle in the HSWA that a person must comply with a duty only to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate (section 30(2)). The reference to "outside the workplace" in clause 11 is therefore either:
 - a. without effect and should be removed, given that PCBUs are likely to attempt to comply with it; or
 - b. a significant expansion of the responsibilities and potential liabilities of PCBUs that would be unworkable in practice, and appears to be contrary to the core principles of the regime.

Recommendation

45. The Law Society recommends that Part 3 of the Bill be removed as being unnecessary, and likely to give rise to adverse consequences.
46. If the provisions are retained, the Law Society recommends that:
 - a. Proposed section 37(1A)(b) be amended to delete the words “or outside the workplace”. (Alternatively, and less preferably, to replace the words “outside the workplace” with “in immediate proximity to the workplace.”)
 - b. Further provisions be included to address the worker’s rights of privacy and consent.

Holidays Act 2003

47. Part 4 of the Bill proposes changes to the Holidays Act 2003 to provide for an entitlement to 10 days per annum of ‘domestic violence leave’ on production of a ‘domestic violence document’. The issue of currency of the document, discussed above, may be significant in this context.
48. As noted above, this entitlement extends not only to the victim of domestic violence, but also (by virtue of the definitions in the Domestic Violence Act) to any person who provides care or support to a victim in their immediate family or household.
49. There are a number of issues where potential refinements would be beneficial.
50. First, the proposal differs from the current provisions for 5 days’ annual sick leave in an important respect: a worker taking sick leave is required to prove (on request) sickness or injury on each occasion that sick leave is taken. In contrast, for domestic violence leave, once the ‘domestic violence document’ is produced the worker is entitled to 10 days’ leave of their choosing, with no requirement to show that a particular day’s leave is related to the impact of domestic violence. It is not clear whether this is an unintended result of the drafting of the provisions, but it could be remedied by aligning the provisions more closely with the requirements for sick leave.
51. Secondly, while a minor matter, it would be advisable to ensure that this form of leave is not referred to as ‘domestic violence leave’ as privacy and stigma concerns may create a barrier to people who should be accessing it.
52. Thirdly, it is noted that the proposal is potentially onerous on employers, as 10 days’ loss of productivity may be a significant cost, depending on the size of the business and the profile of the staff employed. The Law Society has no view on the decision to allocate the full costs of these provisions on employers. However, this does raise a practical concern that the cost may incentivise employment practices designed to reduce potential exposure. While the proposed new discrimination ground will provide a remedy for discrimination where an employee chooses to bring a claim, unfortunately these amendments are unlikely to be effective in preventing more subtle or systemic changes in practice.
53. Finally, the Bill as drafted leaves a number of areas of undesirable uncertainty for employers and payroll providers in the implementation of the proposed leave provisions, as follows.
 - a. Section 14 of the Holidays Act defines “gross earnings” to include all payments an employer is required to pay to an employee under the employee’s employment agreement (including payment for annual holidays, public holidays, alternative holidays, sick leave and bereavement leave). The Bill is silent on whether gross earnings include domestic violence leave payments. Whether included or not, it is important that the provisions are clear: if it is going to be treated wholly in the same way as sick leave, then it could simply be included in

section 14(a)(iii). If it is to be excluded, then it could be included under section 14(c)(v). Or either of these provisions could be included in the list in proposed at section 72C(6).

- b. Other points that need to be clarified for the implementation of domestic violence leave (DVL) are:
- i. whether an employer can advance DVL similar to sick leave (s 66(3));
 - ii. whether an employer may allow an employee to take annual holidays if DVL is exhausted (s 39);
 - iii. how and when an employer must allow an employee to take DVL when they are about to take or are taking annual holidays (sections 36-38);
 - iv. ensuring employees remain entitled to payment for a public holiday despite also being entitled to take DVL (section 40);
 - v. requiring employers to keep accurate records of DVL taken (section 81);
 - vi. whether an employee who provides a medical certificate as proof required for DVL can be required to take sick leave instead of DVL; and
 - vii. whether DVL will form part of the definition of “minimum entitlements” for the purposes of section 4B of the Employment Relations Act 2000 and enforcement mechanisms.


Recommendations

54. The Law Society recommends that:

- a. consideration be given to adding provision for a worker to demonstrate (if requested) that a particular day's leave is related to the impact of domestic violence;
- b. consideration be given to renaming 'domestic violence leave' to 'special leave' or similar;
- c. consideration be given to means of reducing the incentive on employers to reduce exposure to the potential costs of domestic violence leave;
- d. amendments to Part 4 of the Bill be made to clarify the matters listed in paragraph 53 above.

Conclusion

The Law Society would welcome an opportunity to be heard in support of its submission.



Kathryn Beck
President
1 May 2017