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# Family Proceedings (Dissolution for Family Violence) Amendment Bill

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*20/10/2023*

## Submission on the Family Proceedings (Dissolution for Family Violence) Amendment Bill

### 1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Family Proceedings (Dissolution for Family Violence) Amendment Bill (**Bill**).
- 1.2 The Law Society commends the aim of the Bill to “reduce the harm that family violence causes in New Zealand”.<sup>1</sup> However, for the reasons set out below, we recommend the Bill does not proceed. Further policy work is first needed to address some of the practical issues and unintended consequences that could arise from the proposed reforms, and to ensure access to justice for the parties to a marriage or civil union.
- 1.3 If, contrary to that position, the Bill is to proceed, this submission (prepared by the Law Society’s Family Law Section) recommends some changes to the Bill and highlights further issues which will need to be addressed.
- 1.4 The Law Society **wishes to be heard** on this submission.

### 2 Intent of the Bill

- 2.1 The Bill’s Explanatory Note states that the Bill intends to *‘reduce the harm that family violence causes in New Zealand by allowing a party to a marriage or civil union to apply for an order dissolving a marriage or civil union if they have been the victim of family violence inflicted by the other party in the relationship.’*
- 2.2 The Law Society is supportive of any measures that reduce the harm caused by family violence. It is the experience of practising family lawyers that the perpetrating of family violence is psychologically complex and does not stop simply because a victim and perpetrator have had their marriage or civil union dissolved. However, in our view the Bill will not achieve its aim of reducing family violence harm. In fact, as currently drafted we are concerned the Bill may be to the detriment of family violence victims, and enable respondents to take advantage of the applicant via other legislative provisions (outlined further below).
- 2.3 By way of example, we consider the Bill would not have changed or improved the scenario referred to by Angie Warren-Clark MP in the first reading debate. In this example, the victim was described as too afraid to apply for a dissolution. When she did apply, the respondent hid from being served with the dissolution papers as a “tactic of abuse”. This Bill will not assist an individual in such a position, nor address or mitigate their fears around applying for dissolution. Tactics by a respondent to avoid service could still occur under the proposed legislation, and would in fact be addressed by directions made as to alternate methods of service, under existing provisions of the law.

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<sup>1</sup> Explanatory Note of the Bill.

### **3 Temporary protection orders as a ground for dissolution**

- 3.1 Section 79 of the Family Violence Act 2018 sets out the requirement for the making of a protection order. Obtaining a protection order is dependent on:
- (a) a finding of fact that the respondent has inflicted, or is inflicting family violence against the applicant, or the child of the applicant's family, or both (section 79(1)(a)); and
  - (b) the applicant satisfying the court that the making of an order is necessary for the protection of the applicant, a child of the applicant's family or both (section 79(1)(b)).
- 3.2 The Bill does not address the issue of whether it is necessary or appropriate to grant a 'fast-tracked' dissolution in situations where the court has only made a temporary protection order, rather than a final protection order.
- 3.3 A temporary protection order is generally made when an application is filed on a without notice basis. In such circumstances, the Court does not hear from the respondent, and the application is accompanied by an affidavit from the applicant only.
- 3.4 A temporary protection order, unless sooner discharged, becomes final three months after the date the order is made,<sup>2</sup> or unless the respondent files a defence.<sup>3</sup> A temporary protection order may be discharged before it becomes final where:
- (a) The respondent files a defence, and ultimately succeeds in having the order discharged at a defended hearing because the court is not satisfied that family violence occurred, or because the order is no longer deemed necessary.
  - (b) Couples reconcile, or resolve their issues by way of an undertaking not to engage in family violence.
  - (c) The applicant has sought a protection order for reasons other than to protect themselves or their children. In the experience of family lawyers, there are parties who file applications for protection orders that clearly do not meet legal thresholds and are motivated by reasons other than to protect themselves or their children. Those applications that succeed without notice and are granted temporary protection orders are often discharged in a defended hearing.
  - (d) Applicants may choose not to give evidence at a defended hearing and discontinue their application.
  - (e) The cost of a defended hearing, particularly for those who are not legally-aided, may lead to a discontinuance of the application.
- 3.5 In such circumstances, granting a fast-tracked dissolution order may be inconsistent with the objective of the Bill to "reduce the harm that family violence causes in New Zealand".<sup>4</sup> If the Bill is to proceed, we recommend amending clause 6 of the Bill to clarify that an application for fast-tracked dissolution can only be made where a final protection order is in place, and a

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<sup>2</sup> Family Violence Act, s 76.

<sup>3</sup> Family Court Rules 2002, r 315.

<sup>4</sup> Explanatory Note of the Bill.

copy of that final order accompanies the application. Without such an amendment, there is a risk of this Bill being used as a vehicle to obtain a fast-tracked dissolution for reasons which are inconsistent with the objectives of the Bill.

#### **4 Erosion of the ‘no fault’ basis for dissolution**

- 4.1 Prior to the current law, couples could only divorce if one party was guilty of acts such as adultery, desertion, bigamy, drunkenness or attempted murder.<sup>5</sup> The process for obtaining a divorce required the petitioner to prove the respondent was at fault. New Zealand’s divorce laws were subsequently updated with the passing of the Family Proceedings Act 1980 (**FPA**) which introduced a ‘no fault’ basis for divorce (now referred to as ‘dissolution’). Under the FPA, there is only one ground for dissolution: that the marriage or civil union has broken down irreconcilably.<sup>6</sup> In order to establish this ground in law, couples must have been living apart for a period of at least two years immediately prior to the filing of an application for dissolution as evidence of this.<sup>7</sup>
- 4.2 This Bill erodes this ‘no fault’ basis for dissolution by requiring the party applying for dissolution to first obtain a protection order, which in turn requires the applicant to satisfy the Court that the respondent has inflicted, or is inflicting, family violence against the applicant, or a child of the applicant’s family, or both.<sup>8</sup> We acknowledge that it may be appropriate to take such retrograde steps in order to achieve the objective of the Bill to reduce the harm caused by family violence. However, we encourage the select committee to seek advice, and to carefully consider, whether there may be other adverse consequences of providing for a fault-based ground for dissolution.<sup>9</sup>

#### **5 Impact on the parties’ ability to seek legal advice and consider options**

- 5.1 The two-year time frame under the current law between separation and the filing of an application for dissolution gives parties to a marriage or civil union the time to:
- (a) address the emotional issues resulting from a separation (particularly when that relationship has involved family violence);
  - (b) seek legal advice, and consider and decide what their legal options are going forward; and
  - (c) explore out of court settlement.
- 5.2 Bringing the dissolution date forward, as proposed in the Bill, may put pressure on the parties, including victims of family violence, to address these issues urgently, and potentially without the benefit of seeking legal advice. It will reduce the timeframe to address complex legal issues, and remove any opportunity to resolve matters without the need to go to court, pushing parties towards litigation. This may further impact parties when:

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<sup>5</sup> See Matrimonial Proceedings Act 1963, s 21.

<sup>6</sup> Section 39(1) of the FPA.

<sup>7</sup> Section 39(2) of the FPA.

<sup>8</sup> Section 79(a) of the Family Violence Act.

<sup>9</sup> In the time available, we have identified some potential adverse consequences. Careful review is needed to identify any potential consequences not canvassed in this submission.

- (a) **Dividing relationship property:** once a dissolution order is made, there is a 12-month time limit for filing an application to divide relationship property.<sup>10</sup> In limited circumstances, the court may allow an application to be filed out of time,<sup>11</sup> but this is not guaranteed. Many lawyers therefore advise their clients to resolve their relationship property issues before applying for a dissolution because of the 12-month time limit. Without the opportunity to obtain legal advice, parties seeking a fast-tracked dissolution may be surprised to learn their property claim is statute-barred after the 12-month time limit. In this way, fast-tracking a dissolution may not be in the interests of victims of family violence.
- (b) **The Court makes orders relating to settled property:** upon the dissolution of a marriage or civil union, section 182 of the FPA allows the court to make orders relating to any settled property, such as property settled upon a trust. While there is no statutory timeframe for bringing a section 182 application, lawyers often advise their clients to consider filing this application before or at the same time as applying for a dissolution. The Bill brings the dissolution date forward so as soon as a dissolution order is made the time limit starts to run on property relationship claims. Unrepresented parties will not have the benefit of receiving such advice.

5.3 If the Bill is to proceed, the select committee will need to consider how the process for obtaining a fast-tracked dissolution order can be modified to ensure affected parties have the opportunity to carefully consider the important issues discussed above, and to seek legal advice in relation to those issues.

## 6 Liability to maintain spouse or civil union partner

- 6.1 Section 64 of the FPA provides for maintenance after a marriage or civil union has been dissolved. The section is intended to give effect to the 'clean break principle',<sup>12</sup> and to encourage former spouses and partners to become independent and self-sufficient after their marriage or civil union is dissolved.
- 6.2 It is important to note that the circumstances in which maintenance is available after the dissolution of a marriage or civil union are narrower than when maintenance is claimed while the parties are still married or in a civil union. For example, the grounds in section 63 relating to physical or mental disability,<sup>13</sup> and the inability to obtain work,<sup>14</sup> which apply pre-dissolution, are absent from the section 64 grounds that apply post-dissolution.
- 6.3 In cases of family violence, the applicant will often suffer from physical or mental health issues. If their marriage or civil union is dissolved, those physical or mental health issues are not grounds to seek spousal maintenance (but are grounds if the marriage or civil union is

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<sup>10</sup> See s 24(1)(a) of the Property Relationships Act 1976.

<sup>11</sup> Section 24(2).

<sup>12</sup> On the breakdown of a marriage, the 'clean break' principle provides that matrimonial property should be divided between the parties who should then be free to go their own separate ways without there being continuing competing demands on each other's property (*Z v Z (No 2)* [1997] 2 NZLR 258 at 264).

<sup>13</sup> Section 63(2)(d).

<sup>14</sup> Section 63(2)(e).

not dissolved). This may mean that victims of family violence will have limited scope to apply for spousal maintenance if they have been granted a fast-track dissolution.

- 6.4 In addition, a respondent to a protection order could apply for a fast-track dissolution in order to take advantage of the more limited spousal maintenance grounds that would apply after the marriage or civil union is dissolved. The select committee will need to consider if further amendments to the FPA are needed to address this issue.

## **7 The need for additional resources**

- 7.1 An unintended consequence of this Bill being enacted is that there may be an increase in defended proceedings for fast-tracked dissolutions. While some parties may not oppose the dissolution of their marriage or civil union, they may take umbrage at being labelled a family violence perpetrator, and look to vigorously defend such an accusation.
- 7.2 The enactment of this legislation may also result in increases in:
- (a) Applications for protection orders, which are needed to establish the ground for obtaining a fast-tracked dissolution order; and
  - (b) Applications to discharge protection orders,<sup>15</sup> where respondents believe those orders are being sought for the purpose of obtaining a fast-tracked dissolution order.
- 7.3 If the Bill is enacted, it will be important to ensure the Family Court is adequately resourced to manage this additional workload, and to ensure any proceedings and applications before the Court are progressed in a timely manner.
- 7.4 The Law Society also notes that current delays in the Family Court may result in applicants needing to wait for many months to obtain a fast-tracked dissolution under the Bill. This would be inconsistent with the aim of the Bill to allow applicants to obtain a dissolution order without needing to wait for two years. Further resourcing is therefore needed to address this issue.



David Campbell  
**Vice President**

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<sup>15</sup> Under section 109 of the Family Violence Act.