

A Review of the Domestic Violence Act 1995 and Related Legislation

A DISCUSSION DOCUMENT



MINISTRY OF
JUSTICE
Tābū o te Ture

A Review of the Domestic Violence Act 1995 and Related Legislation

A Discussion Document

Prepared by:



New Zealand Government

December 2007

ISBN 978-0-478-29045-4

Table of Contents

	Page No.
<u>Overview</u>	4
Purpose of this review	4
Background to the review	5
Preventing domestic violence	6
The review of the Domestic Violence Act 1995 and related legislation	6
Previous reviews of the Domestic Violence Act 1995	7
Scope of the review	8
Matters excluded from the current review	8
Consultation – how to have your say	9
Official Information Act and Privacy Act requirements	9
<u>Part One – the Domestic Violence Act 1995</u>	10
Background to the Domestic Violence Act 1995	10
Main features of the Domestic Violence Act 1995	10
Changing responses to domestic violence under the Domestic Violence Act 1995 and the Crimes Act 1961	12
The issues we are consulting on	13
Issues relating to the Domestic Violence Act 1995	15
• Protection orders	15
• Enforcing protection orders	26
• Links between the Family Court and the District Court	32
• Children	38
• Programmes	45

Part Two – Interface between the Domestic Violence Act 1995, the Care of Children Act 2004 and the Family Proceedings Act 1980 56

Interface with the Care of Children Act 2004 56

- the definition of violence
- no consent orders made unless the Court has obtained a specialist report
- including relocation as a matter to be considered in determining what serves the child’s welfare and best interests
- no unsupervised contact until the Court has considered a report from a psychologist
- the age of a minor

Interface with the Family Proceedings Act 1980 61

- directions to mediation

Part Three – A list of questions 64

References 69

Appendix one – Immigration Act 1987 and domestic violence 71

THE REVIEW OF THE DOMESTIC VIOLENCE ACT 1995 AND RELATED LEGISLATION

OVERVIEW

Purpose of this review

The Domestic Violence Act 1995 (the Act) enables victims of domestic violence to obtain greater legal protection from the perpetrators of that violence. It helps to prevent and reduce domestic violence. Any person who is in a “domestic relationship” including, for example, married, de facto, civil union, gay and lesbian couples, children, family/whānau, and flatmates can seek a protection order if they are enduring physical, sexual or psychological abuse from a person in that relationship. The protection order imposes no-violence and non-contact conditions on the abusive partner. If these are breached then the partner has committed an offence and may be arrested.

The Ministry of Justice administers the Act. It advises the Government about any amendments that may be required to keep the legislation working well. Since enactment, the Ministry of Justice has kept a record of concerns raised by stakeholders about the operation of the Act and its provisions. However, while some concerns have been raised, there is a generally held consensus that the objectives and general framework of the Act are sound.

The Care of Children Act 2004 (also administered by the Ministry of Justice) promotes children’s welfare and best interests; facilitates their development by helping to ensure that appropriate arrangements are in place for their guardianship and care; and recognises certain rights of children. It interfaces with the Domestic Violence Act at several points. Particularly relevant to this review is section 5(e) of the Care of Children Act, which provides that the child’s safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whānau, hapū, or iwi, or by other persons).

The Family Proceedings Act 1980 deals with paternity, separation, maintenance, dissolution of marriages (divorce), voiding marriages, and counselling referrals both before and during proceedings. As it is about court procedures it does not impact on the policy of domestic violence per se, but rather it influences the operation of the Family Court.

Another important piece of legislation that also interfaces with the domestic violence legislation is the Immigration Act 1987, administered by the Department of Labour. This Act sets out the framework for determining who may enter and remain in New Zealand on a temporary or permanent basis, and the rights of New Zealand citizens to be in New Zealand. Some immigration policies use the same definition of domestic violence as in the Domestic Violence Act. These policies are concerned with the provision of work permits or permanent residence for some victims of domestic violence, and also with the criteria for determining who can sponsor a partner. Appendix One provides a brief overview of the

Immigration Act, and current policy initiatives that interface between the Immigration Act and the Domestic Violence Act.

The purpose of this review of the Domestic Violence Act and those aspects of the Care of Children Act and the Family Proceedings Act that relate to domestic violence is to make our current domestic violence legislative regime more effective by:

- Identifying the provisions of the Domestic Violence Act 1995 that could be strengthened in order to more closely achieve its objects
- Identifying the provisions in the Care of Children Act 2004 and the Family Proceedings Act 1980 relating to domestic violence that could be strengthened in order to more closely achieve the objects of the Domestic Violence Act
- Developing, in light of public consultation, policy proposals for amendment of the Domestic Violence Act 1995, the Care of Children Act 2004 and the Family Proceedings Act 1980 for government consideration.

Background to the review

Domestic violence is defined in the Act to include physical abuse, sexual abuse and psychological abuse.¹ It makes it clear that a person psychologically abuses a child if that person causes the child to witness any of the above abuse. Domestic violence also includes minor or trivial acts where they form part of a pattern of abuse.

Domestic violence impacts on families from all cultures, backgrounds and circumstances. It is a problem that affects thousands of New Zealanders, whether they have direct experience of violence within their family or not. Although it is difficult to measure, the social and economic cost of domestic violence is significant.

New Zealand has a comprehensive set of laws designed to protect women, children and men from violence in the home, yet we continue to have high rates of domestic violence. For example, in the calendar year 2006, NZ Police recorded 38,369 family violence related incidents, and 32,675 family violence related offences, making up a total of 71,044 family violence related occurrences.

In 2005, 29 of the 61 murders were recorded as domestic violence related, while in 2006 16 of the 49 murders were recorded accordingly².

While no part of society is immune from domestic violence, we know that women and children are far more likely to be victims than men. For example, the Ministry of Justice's Family Court Statistics 2005 report highlighted that 92 per cent of the applicants for protection orders were female (p.40). While the 2001 National Survey of Crime Victims reported that more than one in four women can expect to experience violence from an intimate partner in her lifetime (p.139).

¹ Domestic violence is a term defined in section 3 of the Domestic Violence Act 1995. In this document the terms domestic violence and family violence are used interchangeably to refer to behaviour that would fall within the scope of section 3.

² Research & Evaluation Unit, Ministry of Justice.

Many children are also affected by domestic violence. In 2005, there were 7,924 children involved in the 4,545 applications for protection orders. Women's Refuge provided services and programmes to 12,161 children in the year 2005/06. Most of these children will have witnessed violence, and some will have been subjected to violence directly.

These statistics do not show the whole picture of domestic violence in New Zealand. Domestic violence is an under-reported crime. Only a small percentage of victims come to the notice of the justice system. It occurs in private, and within close interpersonal relationships.

Preventing domestic violence

Reducing and preventing domestic / family violence is a priority for New Zealand. Over the years since the Act was passed, a range of initiatives have been launched by government and non-government agencies to assist in reducing violence in all its forms, and violence within families in particular. Recent key initiatives include the following.

Te Rito

In 2002, the Ministry of Social Development published *Te Rito: New Zealand Family Violence Prevention Strategy*. The strategy included objectives, and areas for action, for working toward the vision of families/whānau living free from violence.

Taskforce for Action on Violence within Families

This taskforce was established in June 2005 to advise the newly formed Family Violence Ministerial Team on how to make improvements to the way family violence is addressed, and how to eliminate family violence in New Zealand. The taskforce builds on the action areas outlined in *Te Rito*, and aims to strengthen the response to violence within families. The taskforce provides a forum for the government and non-government sectors, the judiciary, the Children's Commissioner and the Families Commission to set the strategic direction for family violence prevention in New Zealand.

The taskforce's work programme can be viewed on <http://www.msd.govt.nz/work-areas/families-whanau/action-family-violence/index.html>

The review of the Domestic Violence Act 1995 and related legislation

This discussion document is part of the continuing focus on reducing family violence in New Zealand.

The Act is the core legislation in relation to family violence. Improving its operation is essential to the wider work programme. The Act creates a framework for providing legal protection to victims of domestic violence to assist in preventing further violence. It places importance on the value of education in

preventing violence by requiring respondents³ to protection orders to attend free programmes, and providing for applicants⁴ and children to do so as well.

The Care of Children Act 2004 is wider in its scope and purpose. It provides a framework for resolving ongoing care arrangements for children within families, especially when the relationship between the parents breaks down. However, some of its provisions interface with those of the Domestic Violence Act when the child may be at risk of violence. We need to ensure that, in regard to those aspects, the relationship between the two Acts is consistent with, and reinforces, the objectives of the Domestic Violence Act.

Previous reviews of the Domestic Violence Act 1995

Since the enactment of the Domestic Violence Act in 1996 several justice sector agencies have investigated how the new Act was working in practice. This work includes the following reports:

- The Domestic Violence Legislation and Child Access in New Zealand⁵
- The Domestic Violence Act 1995 Process Evaluation⁶
- Women living without violence – An evaluation of programmes for adult protected persons under the Domestic Violence Act 1995⁷
- Evaluation of programmes for children under the Domestic Violence Act 1995⁸
- Evaluation of programmes for Maori adult protected persons under the Domestic Violence Act 1995⁹
- The Domestic Violence Act 1995 42 Day ‘Rules’ and the Children, Young Persons and their Families Act 1989 60 Day ‘Rule’¹⁰
- Evaluation of community based stopping violence prevention programmes¹¹
- The University of Waikato’s report entitled *Living at the Cutting Edge: Women’s Experiences of Protection Orders*¹²

Some of these reports are available on the Ministry of Justice website. Of these reports, the research that comprehensively examined the entire process of implementing all aspects of the Act was the Ministry of Justice’s process evaluation (2000). The process evaluation concluded that the new legislation was an improvement on the previous law, especially in its focus on programmes

³ “Respondent” means the person against whom an application has been made for an order under the Domestic Violence Act; and includes a person (other than an associated respondent) against whom an order is made under this Act. (Section 2, Domestic Violence Act 1995)

⁴ “Applicant” means (a) a person who applies for an order under the Domestic Violence Act on his or her own behalf; (b) the person on whose behalf an application for an order is made pursuant to section 9, or section 11, or section 12 or section 73 of the Domestic Violence Act 1995 (Section 2, Domestic Violence Act 1995).

⁵ Chetwin, A; Knaggs, T, & Young P.T.W.A; (1999).

⁶ Barwick, H; Gray A; & Macky R; (2000).

⁷ Maxwell, G; Anderson, T; & Olsen, T; (2001).

⁸ Cargo, T, & Cram, F; (2002).

⁹ Cram, F., et al; (2002).

¹⁰ Barwick H; & Gray A; (2002).

¹¹ McMaster K, Maxwell G, & Anderson T; (2000).

¹² Robertson, N; et al. (2007).

designed to change respondents' behaviour and its emphasis on the safety of protected persons. The key message from the evaluation was that the Act is sound in achieving its objectives. Nothing in the research suggested a need for a major overhaul.

The evaluation found that the broadened definitions of both a 'domestic relationship' and 'domestic violence' were useful. It noted that many of the respondents and adult protected persons interviewed who had attended programmes were very positive about the experience. The speed with which a protection order could be put in place and the simplified application process both received positive comment in the evaluation feedback.

The process evaluation suggested several areas where the operation of the Act could be enhanced. These issues were mostly operational in nature or related to implementation processes rather than to the legislative provisions themselves.

In summary, the process evaluation and the above work confirms that the main principles and approach of the Act are sound. The latest report released in August 2007 – *Living at the Cutting Edge: Women's Experiences of Protection Orders* also endorsed this view.

Scope of the review

As noted above, this is not a 'first principles review'. Most stakeholders support the current objectives and framework of the Act. A fundamental review is not warranted. Indeed, many of the features of our Act have been, or are being, picked up in legislative reforms overseas.

The review focuses on matters that will improve the current law in achieving its objective of reducing and preventing violence in domestic relationships and by the means specified in the object section (s5) of the Act.¹³ We are seeking to strengthen the Act and related legislation to ensure an optimal response to domestic violence.

Please note that this discussion document indicates the Government's preferred preliminary proposals at this stage. These proposals may change as a result of consultation via this discussion document.

Matters excluded from the current review

Some issues and proposals raised by stakeholders in preliminary consultation were inconsistent with the general policy underpinning the Domestic Violence Act and its objects, or with general legal principles. As a result those proposals are not included in the discussion document.

Other issues, that are not subjects of the Act or related legislation, are also beyond the scope of the review and excluded from the discussion document. These include: eligibility for legal aid, the administration and operation of the Family Court, and funding for the organisations that provide programmes or other services.

¹³ This section is discussed in Part One: Main features of the Domestic Violence Act.

More technical and legal drafting matters that will assist in clarifying the current policy behind the Act have also been omitted from this document, but these aspects of the legislation will be addressed at the time of legislative drafting.

Consultation – how to have your say

Your feedback on this discussion document will help to shape any proposals to change the Act. If the Government decides to make changes to the law, you will also have a chance to make your views known to a Parliamentary Select Committee, which must consider any changes before legislation is passed.

You may send a written submission to:

Domestic Violence Act Review
Ministry of Justice
PO Box 180
WELLINGTON

Or send an electronic submission to: dvareview@justice.govt.nz

By 28 January 2008

Official Information Act and Privacy Act requirements

The contents of any submissions will be subject to the provisions of the Official Information Act 1982 and the Privacy Act 1993. If the Ministry receives a request for information contained in a submission, it will be required to consider release of that submission, in whole or in part, in accordance with the terms of those Acts.

In providing your submission, please advise if you have any objections to the release of any information contained in your submission, and if you do object, the parts of your submission you would wish withheld along with the grounds for withholding under these Acts. Your views will be taken into account in making any decision whether to withhold or release the information requested.

The discussion document can also be viewed and downloaded from the Ministry of Justice website www.justice.govt.nz.

A REVIEW OF THE DOMESTIC VIOLENCE ACT 1995 AND RELATED LEGISLATION

PART ONE – THE DOMESTIC VIOLENCE ACT 1995

Background to the Domestic Violence Act

The Domestic Violence Act 1995 replaced the Domestic Protection Act 1982. During the 1980s there was an increasing awareness of both the social and economic cost of domestic violence. The dynamics of violence within domestic relationships were being investigated and there was a developing understanding of the various forms that abuse can take. As well, the role that effective legislation can play in providing protection was recognised.

By the early 1990s, increasing public and political concern about domestic violence triggered a review of the Domestic Protection Act. This led to a call for reform and a more comprehensive approach to protecting victims. The result was the Domestic Violence Act 1995. When it came into force in 1996 it was considered ground-breaking, both in New Zealand and overseas, because of its emphasis on the safety of victims, and its focus on re-education for perpetrators and support for victims of domestic violence.

Main features of the Domestic Violence Act

The object of the Act is to reduce and prevent domestic violence by recognising that domestic violence in all its forms is unacceptable behaviour, and by providing victims of domestic violence with effective legal protection¹⁴. The Act also outlines how the object is to be achieved¹⁵, namely by:

- Empowering the Family Court to make orders to protect victims
- Ensuring access to the Family Court is as speedy, inexpensive and simple as is consistent with justice
- Providing programmes for respondents and applicants and their children
- Providing more effective sanctions and enforcement in the event that a protection order is breached.

The Act introduced:

- An expanded definition of domestic relationships to include wider family members and same sex couples
- One protection order with standard non-violence and non-contact provisions, with scope for special conditions to be added as necessary, e.g. a condition relating to the manner in which arrangements for access to a child are implemented
- Protection orders that applied whether parties were living together or separately, and that did not automatically come to an end if the parties reconciled

¹⁴ Section 5(1) Object, Domestic Violence Act 1995.

¹⁵ Section 5(2) Object, Domestic Violence Act 1995.

- Protection orders that could be obtained against a respondent's associates as well as against the respondent
- A definition of violence that included psychological abuse
- Mandatory programmes for respondents, with voluntary programmes available for victims including children
- Provisions that respondents must surrender their firearms licence and any weapons in their possession
- The ability for protected persons to have their personal information removed from public registers.

A focus on children

The new legislation was drafted during a period of increasing public and political concern about domestic violence. High profile incidents focused the public's mind on the seriousness of domestic violence. One such incident was the Bristol case in Wanganui, in which a man who had been granted custody of his three children killed the children and then himself. The Davison Report of Inquiry into the case recognised that a close link existed between spousal abuse and child abuse¹⁶. The report recommended that, where there have been allegations of violence from a parent (either against the children or the other parent), there should be a presumption that any access arrangements with the children should be supervised until it is considered safe for access to be unsupervised. As a result, an amendment to the Guardianship Act 1968 (the predecessor to the Care of Children Act 2004) was inserted in the Domestic Violence Bill to give effect to this recommendation.

The Act takes a cautious approach in relation to children. A protection order automatically applies to any child living with the applicant. All standard conditions of protection orders apply to the children – including the non-contact conditions. The non-contact conditions can only be suspended if the applicant agrees, or if there is a Court order allowing the respondent to have access to the children.

The Act recognises the harm done to children from witnessing family violence. Under section 3(3) of the Act, allowing a child to witness an act of domestic violence is in itself an act of violence against that child. A child who has witnessed domestic violence can therefore apply for a protection order purely on that basis¹⁷.

The Act also provides access to fully funded programmes for children who are covered by a protection order, whether they have been the direct recipient of the violence or not.

Approach on gender and types of relationships

The Act makes no distinction between the gender of applicants or respondents. The new Act removed any presumptions based on gender that existed in the previous legislation and also recognised that domestic violence is not confined to traditional marriage-like relationships. The Act gives priority to the safety of

¹⁶ Davison, Sir Ronald; 1994, *Report of Inquiry into Family Court Proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol*.

¹⁷ Applications by minors for orders under the Act must be made by a representative of the child. Domestic Violence Act 1995, Section 9 Applications by minors.

victims, whoever they may be. It also includes safeguards to minimise, as far as possible, the impact on the rights of respondents.

The issues raised in this document are almost invariably in response to the violence between intimate partners. However, it is important not to lose sight of the fact that the Act does provide protection in other domestic situations. It could be used in situations of elder abuse, abuse of persons with disabilities, or situations that lead to dowry abuse or to prevent “honour killing”.

Protection orders

The legislation set up a regime allowing Judges to make protection orders¹⁸ which prohibit violence *and* enable victims to terminate contact with the perpetrator if they wish. In this way one flexible order provides for the range of situations that were previously covered by either a non violence order or non molestation order under the 1982 Act.

Breach of protection order

A breach of a protection order is a criminal offence punishable by up to six months imprisonment or up to two years imprisonment where the defendant has been convicted twice of the same offence in the previous three years.¹⁹ The penalties were strengthened in the 1995 legislation to ensure that breaches of orders were not minimised. The lack of criminal consequences for breaching some of the orders under the 1982 Act may have minimised the seriousness of breaches and may have influenced perceptions of the level of threat to protected persons.

Changing responses to domestic violence under the Domestic Violence Act 1995 and the Crimes Act 1961

From 1987, when the Police introduced a pro-arrest policy in relation to family violence, convictions for the Crimes Act offence of ‘Male Assaults Female’ started to grow at a much faster rate than convictions for other serious assaults²⁰. In 1995, convictions in this category were almost twice those of other categories of serious assault. However, from the mid 1990s the number of ‘Male Assaults Female’ convictions started to fall sharply, even though other serious assault convictions increased.

It has been suggested that the introduction of the Domestic Violence Act in 1996 – and the re-statement of the Police pro-arrest policy at the same time – might have had an impact on the underlying incidence of domestic violence, or alternatively, this decrease in convictions could have been due to a change in victims’ behaviour by going to the Family Court to obtain a protection order rather than involving the Police.²¹

¹⁸ The Act also enables a number of other orders to be made such as occupation and tenancy orders.

¹⁹ Section 49, Offence to contravene protection order, Domestic Violence Act 1995.

²⁰ Bartlett, E; 2005.

²¹ *ibid.*

Recent data shows that this trend has reversed – in the period 2002 to 2004 there was an increase in the number of offences in the ‘Male Assaults Female’ and ‘common assault–domestic’ category, and a decrease in the number of people applying for protection orders. It is not clear what has caused this downward trend in protection order applications. However, as protection orders are permanent some downward trend to a more stable level was anticipated. Nevertheless, the number of recorded offences as well as applications for, or breaches of, protection orders must be seen in a broader context. The numbers alone do not represent the whole picture.

The extent to which victims are willing to report domestic violence²², and the response of police to such complaints will affect the number of domestic violence incidents that are recorded. The success of initiatives to raise awareness and to reduce domestic violence may also influence the number of offences that are reported. Victims may be more willing to report incidents of domestic violence due to a lower public tolerance for domestic violence. Also, it is apparent that more family violence incidents are being recorded by police and reported as such, rather than being reported under other categories. Therefore the number of recorded offences may rise at a time when the underlying incidence of domestic violence may be stable.

The number of recorded breaches of protection orders may similarly be affected. It is possible, for instance, that the police may lay charges for offences such as ‘Male Assaults Female’, rather than for a breach of a protection order, and that this may mask the level of breaches of protection orders in recorded statistics.

There is a need for both a civil and criminal response to domestic violence. It is important that domestic violence is recognised as criminal behaviour and treated as such, but it is also important that there is a civil mechanism individuals can use as a means to control and prevent abusive behaviour. Further, not all domestic violence constitutes a criminal offence (e.g. psychological abuse) so the civil system provides a remedy for those circumstances. Individuals should be able to choose one or the other option, or both, according to their particular needs and circumstances.²³

The issues we are consulting on

The issues contained in this discussion document are the more significant matters that were raised with us by stakeholders and are within the scope of this review. We are now seeking wider feedback on these matters before developing policy options for Government to consider.

Where it has been useful and relevant we have referred to the law in some other similar countries – mainly Australian states. For some issues though, such information has either not been available or was not relevant because of the different approach taken in New Zealand. We have found the February 2006 Victorian Law Reform Commission report on its review of family violence laws useful because this is a recent in-depth review of family violence laws in a place

²² NZ National Survey of Crime Victims 1996 and 2001 showed that many domestic violence incidents are not reported to the Police.

²³ Victims of domestic violence can choose whether to involve the Police – however, whether the alleged offender is charged is a matter for the Police.

similar to New Zealand. Where we think it is helpful, we have referred to the Victorian Law Reform Commission's report, although it should be noted that the scope of its review was much wider than this review of the Act.

The questions for consultation follow the discussion of each of the issues in the document. Issues are grouped under topic headings. While we are particularly interested in your response to these questions, please provide any other feedback you have, related to each topic.

ISSUES RELATING TO THE DOMESTIC VIOLENCE ACT 1995

1.1. PROTECTION ORDERS

The first set of issues we raise relate to the issuing and discharging of protection orders.

Part 2 of the Act provides for the process of applying for a protection order, their scope, conditions, programmes, duration, variation and discharge of orders, and the enforcement of protection orders.

In brief, the Act provides that persons in domestic or close personal relationships may apply for a protection order from the Family Court if they have been subjected to domestic violence. Applications can also be made on behalf of persons in certain circumstances (for example, for minors and persons who lack capacity).

The applications can be filed 'on notice' or 'without notice' to the other person (the respondent). If filed without notice a temporary order will be granted if the Court is satisfied that there is a risk of harm, or undue hardship is likely to result if it is not granted (section 13 refers). Otherwise the application will be directed to proceed on notice. Once the temporary order has been granted it will be served on the respondent. The respondent can then notify the Court if they wish to be heard on whether a final protection order should be made. If the respondent takes no steps, the temporary order will automatically become final after three months. Where the respondent takes steps to challenge the application a hearing should take place within 42 days of the respondent notifying the Court.

Experience demonstrates that the majority of protection orders are applied for without notice to the respondent (4034 or about 89% in 2005).

The protection order, whether it is temporary or final, prohibits all forms of domestic violence and imposes non-contact conditions. The non-contact conditions, however, can be suspended or revived if the protected person consents. This means that the protected person is in control of the situation. Standard conditions relate to weapons – it is a standard condition of a protection order that a respondent cannot possess or have under his or her control any weapon. If the protection order is a temporary order, as is often the case, the respondent's firearms licence will be suspended until the order becomes final, and the respondent must surrender any weapon or licence to the Police within 24 hours.

Once an order becomes final it is permanent. Section 47, however, provides the process for a protection order to be discharged. A protection order can be discharged on the application of the applicant or the respondent, and if the Court considers it is fit to do so.

Under this heading we raise four issues. They are:

- Should police be able to issue short-term protection orders when called to a domestic violence incident?

- Should the Court give reasons when declining an application for a temporary protection order?
- Should a 'without notice' hearing be provided for an applicant if an application for a temporary protection order has been declined?
- Should the provisions of the Act be more explicit in providing that the Judge can discharge a protection order only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or child of the applicant's family?

1.1.1 Should police be able to issue short-term protection orders when called to a domestic violence incident?

When a victim of family violence contacts the Police, research²⁴ has found it is usually an act of desperation, and invariably it means the victim has unsuccessfully tried every other solution to stop the violence. It has been suggested that allowing police to issue short-term protection orders when called to a domestic violence incident would be a useful addition to current measures, especially in circumstances where no offence has been committed and the offender cannot be arrested. Currently, orders are made by a Family Court Judge on application by or on behalf of the victim.

Section 12 of the Act enables any adult person, which could include the police, to apply for a protection order on behalf of a person if that person is unable, whether by reason of physical incapacity or fear of harm or other sufficient cause to make the application personally. However, in practice police have not made applications on behalf of persons in these situations.

Allowing police the discretion to issue short-term protection orders (say up to a maximum of 72 hours) would be a significant departure from current practice.

Under general criminal law provisions, police officers can arrest someone without a warrant where they have good cause to suspect the person has committed an imprisonable offence, such as the offence of 'Male Assaults Female'. If the alleged offender is not subsequently remanded in custody, bail conditions that are similar in nature to a protection order, such as non-association conditions can be imposed by the Court. However, failure to comply with a condition of bail (other than the condition that the bailee attends his or her next court appearance) is not an offence.

The advocates of short term orders being issued by police argue that there is a gap in the powers that are currently available. Where there is insufficient evidence of the commission of a criminal offence to justify an arrest, police cannot arrest the person even if they think the situation is volatile or dangerous. Police are therefore powerless to do anything other than recommend that the victim seek an order from the Court (which entails some delay) or seek help from a voluntary agency such as Women's Refuge. However, other commentators believe that if police used their current powers more effectively and consistently there wouldn't be any shortfalls in enforcement.

²⁴ Patton, S; (2003).

Overseas experience: Australia

Both Western Australia and Tasmania have recently introduced police-issued protection orders, to complement Court-issued orders. The New South Wales Law Commission has recommended that the New South Wales Police should have the power to make an order that lasts up to 48 hours where an authorised justice cannot be contacted.²⁵ Victoria is also about to trial police issuing interim on-the-spot safety notices to protect victims of domestic violence after-hours²⁶.

Under the Western Australian legislation, police can issue an order for either 24 or 72 hours. The 24-hour order can be issued with or without the victim's consent, while the 72-hour order must have the victim's consent. These orders were introduced because concerns had been raised about the effectiveness of the restraining orders as a method of ensuring individual safety²⁷. The orders enable police to take action where there is insufficient evidence for an arrest on criminal grounds but where they were concerned that there was likely to be further violence.

Immediately after the police order is served the police officer must ensure Police Operations Centre or the closest 24 hour station is advised of the order, and request that the address of the protected person be flagged.

Generally the police orders are issued if the respondent is present at the scene, though they can be issued if the respondent has left the scene but the officer has a reasonable prospect of locating them within the allocated service time – two hours for a 24 hour order, 24 hours for a 72 hour order. Police may, without a warrant, also require a person to remain in a place designated by the police officer while the order is made. If the person does not remain, or the police officer reasonably believes the person will not remain in the place, police may arrest and detain the person in custody for up to two hours.

These powers are further endorsed by a provision that requires police officers when investigating a domestic violence incident to apply for a restraining order, or issue a restraining order, or provide a written record of the reasons why they did not take either of these actions.

Police-issued orders were introduced in Western Australia in 2004. Before this legislation was introduced, police in Western Australia were able to apply for a protection order on the behalf of the victim over the telephone, email or by a similar method if the time or location of the incident or the urgency of the order could not be met by the usual process of the victim applying for an order. However, in practice this process was cumbersome and was not used.

Since 2004 police orders have been widely used, anecdotal evidence suggests that approximately 13,000 orders have been issued since they were introduced to December 2006. Most were for 24 hours. The use of police-issued orders in Western Australia is being evaluated. The results of the evaluation may be available in December. Western Australia's population is 2,010,000; spread over a large geographical area.

²⁵ New South Wales Law Reform Commission, (2003), Recommendation 23.

²⁶ Media release from the Office of the Premier, July 19, 2007.

²⁷ Western Australia Auditor General, (2002).

The Family Violence Act 2004 empowered Tasmanian police officers to make orders of up to 12 months duration (a shorter date may be specified) where the violence is between intimate partners. The consent of the victim is not required. If the police officer (of the rank of sergeant or above, or authorised by the Commissioner of the Police) reasonably suspects that a person has committed family violence, the officer may arrest that person without a warrant, and detain or take into custody for a period reasonably required to make and serve a Police Family Violence Order, or make an application for a Family Violence Order.

Latest data indicates that approximately 70 Family Violence Orders are issued by the Courts, and a further 130 Family Violence Orders are issued by police every month. Tasmania's population is 480,000. A review of the new provisions is due by March 2008.

The large number of orders issued in both Western Australia and Tasmania compared to New Zealand (4,545 in 2005) suggests that the impact of empowering police to issue orders is likely to increase the number of protection orders issued in total²⁸. In both of these Australian States the Police were provided with extra resources to deal with the increased workloads and to ensure police officers were adequately trained.

The major advantages of enabling police the discretion to issue a short-term order are:

- They provide a further tool for police to keep victims safe, especially in situations where no offence has been committed and the offender cannot be arrested
- They provide an opportunity for police to provide short-term legal protection for victims during a period when they may be endeavouring to make safe choices about their own safety and that of their children
- The victim and any children do not have to leave their home in order to be safe
- They provide a further mechanism for addressing elder abuse or abuse of disabled people
- Police supporting the non violent partner gives a strong message to the offender and any children that violence is not acceptable
- There is less opportunity for offenders to destroy family property or inflict further violence on the victim and any children
- Issuing orders without victim consent may be seen as protecting victims from retaliation from the offender as the order has been issued by police not the victim
- Police who are present at the scene may have more accurate information about the situation than a Judge several days or weeks later relying on secondary information from the police, victim, victim advisors, etc
- Victims can receive free legal protection after hours or over a weekend until they are able to apply for a protection order from the Court
- It reduces the possibility of the police (or the courts) not being able to locate the perpetrator in order to serve the order at a later time.

²⁸ Please note, however, that protection orders in Western Australia and Tasmania are time limited, whereas in New Zealand once a protection order is final it is permanent.

However, the proposal does have disadvantages too, for example:

- It is unknown what the longer-term impacts may be. For example, victims may not apply for court protection orders if they could call police and obtain a short term order
- It is unnecessary. If police officers used their current enforcement powers more consistently and effectively any perceived shortfall in enforcement may ease
- Unintended consequences if police place a greater emphasis on issuing orders instead of investigation and arrest
- Victims may be mistakenly issued with an order. In some situations it is difficult to determine who is the victim and who is the perpetrator
- Removing an offender from their home may be seen as encroaching on their rights and liberty
- Police may be seen as less qualified to make a decision about issuing an order than a Judge
- Some commentators may argue that this is a judicial role, and an inappropriate role for police
- The proposal may increase the workload for frontline police officers
- Issuing orders without victim consent may be seen as disempowering victims.

Options

The options are:

1. No change, keep the law as it is. This would mean that police would continue to have the power to arrest offenders and apply to the Court for bail conditions or seek remand in custody. However, in those situations where there is insufficient evidence to arrest an offender, police do not have further options to protect the victim. This may leave the victim and his or her children in a dangerous situation. Breaching bail is not an offence so the consequences are lower than for police or court-issued protection orders.
2. Introduce a new and discretionary police-issued short term order (possibly up to 72 hours), and an associated power to detain a person to facilitate the service of the order. This would mean that immediate action would be possible, reinforcing the seriousness of domestic violence to the perpetrator. Apart from the advantages listed above, it also ensures that the police have greater ownership of the problems surrounding domestic violence, and provides a solution where action is needed, but where there is insufficient evidence to arrest the perpetrator.

Preliminary proposal

Our preliminary proposal is to amend the Act to provide Police with the powers to issue short-term protection orders and to provide associated detention powers so that the orders can be served.

1.1.2 Should the Court be required to give written reasons when an application for a temporary protection order is either declined or put on notice?

Some people think that the Family Court should give written reasons to the applicant when a section 13 application for a temporary protection order is either declined or put on notice.

The current Family Court process for a without notice application is that it is referred to a Judge to be dealt with “on the papers”. Generally the Judge will either make the order or direct it to proceed on notice. Judges have on occasions asked for more information or clarification on issues from the applicant before making an order. However, Judges do not always provide reasons for declining an application for a protection order without notice. Providing reasons would be more consistent with the principle of natural justice. It would also assist applicants in appealing decisions.

On the other hand it could be argued that the proposal will undermine the speed with which orders can be issued, will delay consideration of other applications, and is unnecessary – in most situations the reason for the decline is because there is insufficient evidence.

Further to this issue we also seek your views as to whether or not a Judge rather than putting a without notice application on notice, should instead refer the application back to the applicant and query:

- whether or not the applicant would like the application to proceed on notice, or
- whether a new application should be made with further evidence, or
- whether the applicant wishes not to proceed at all.

Preliminary proposal

Our preliminary proposal is to amend the Act to provide that Judges must give a written reason when they either decline a section 13 application for a temporary protection order, or put it on notice.

1.1.3 When a ‘without notice’ application for a protection order is declined or placed ‘on notice’ should the applicant and his or her lawyer have an opportunity to participate in a hearing in Court?

Section 13 of the Act states that an order can be made on an application without notice if the Court is satisfied that the delay that would be caused by proceeding on notice would, or might, entail a risk of harm or undue hardship to the applicant or a child or both.

Some commentators consider that too many applications without notice are not being approved, and the safety of victims is being put at risk. This proposal would give applicants and their lawyers an opportunity to participate in a hearing, to address any questions which might have led the Judge to decline the application

or put it on notice.

The current Family Court process for dealing with a without notice application is outlined above. Notably it indicates that the Judges can and have sought more information from the applicant or the applicant's lawyer to assist their determination. From June 2004 over 80% of without notice applications have been approved each year. This is a high percentage particularly taking into account that at this stage the respondent may be unaware of the application. We note that Judges must apply the prescribed legal criteria as outlined in the Act. Orders wrongly made may result in engendering further bitterness and distrust in family relationships.

If this proposal was to be implemented, there would be a need for extra judicial sitting time to be available on an urgent basis. Requiring unallocated judicial time to be put aside to provide for these types of hearings will result in further delay in other cases. Moreover, many courts do not have a Judge available on site each day. In small courts, there can be a two week gap, or even longer, between visits from a Family Court Judge. If a hearing was required at one of these Courts prior to an application being placed on notice, this could result in delay in progressing the application further (although the applicant may not necessarily mind that).

We also note that if the above proposals in regard to police-issued orders and the provision of reasons for declining a without notice application proceeded they will, in general, assist to ensure that the rate of successful applications will improve.

Preliminary proposal

In light of the other measures proposed, our preliminary proposal is that we do not amend the Act to allow a hearing when a 'without notice' application for a protection order is declined or placed 'on notice'.

1.1.4 Should the Act make it more explicit that a Judge can only discharge a protection order if he or she is satisfied that the protected person and any child of the protected person will be safe from all forms of the respondent's violence?

Section 47 of the Act provides that the Court may, if it thinks fit, discharge a protection order on the application of the applicant or the respondent.

In civil matters it is generally accepted that litigants have the right to withdraw from litigation without undue interference. However, section 47 modifies that right by requiring the Court to discharge only in situations where it considers it is fit to do so.

Case law indicates that when the Family Court determines whether it "*thinks it is fit*" to discharge a protection order that it should consider whether or not the protection order is still needed.

For example, in *Clarke v Clarke*²⁹ Judge Adams noted that:

“The protection order does not prevent the applicant from permitting the respondent to live with her if she chooses. It provides her with certain rights which, upon the basis of her evidence which she has confirmed, she seems to continue to need. It may be that the time would come when the Court could be convinced even against the longstanding patterns in this case, that a protection order should be discharged. What would need to be demonstrated would be a changed pattern of behaviour between the parties which could give the Court confidence that it will endure.”

Or, as reported in *Hogan v Russell*³⁰ (1997) Judge Boshier noted that:

“If the situation revealed is on its face the classic manifestation of the domestic abuse syndrome in which there are cycles of violence followed by forgiveness and reconciliation, the Court may refuse to discharge the applicant’s order which in itself of course is not, if the applicant does not wish it, a legal impediment to the parties living together. There is also a need to guard against applicants discharging orders because of pressure or threats from respondents.”

Where there are children included under the protection order the Court may appoint counsel to report to the Court as to the safety of the children if the protection order was discharged. In this discussion document’s section on children, we propose that there should be an explicit provision in the Act that provides the Court with the discretion to appoint a lawyer to represent children in protection order proceedings. It is intended that this would apply to the decision as to whether to allow a protection order to be discharged.

Nevertheless, despite the fact that the Court can and does prevent protection orders from being discharged, examples of cases have been cited in the report from Waikato University³¹ that indicates that protection orders have been discharged as a result of pressure being exerted by the respondent or by the victim’s family, and against the interests of the applicant and his or her children.

The same report raised concerns about applicants for protection orders withdrawing an application or agreeing to discharge a protection order when a respondent signs an “undertaking” not to use violence in the future.

From a policy perspective the legal status and the value of undertakings for victims of violence are questionable. This is because they:

- cannot be enforced by police if the violence resumes
- leave the victim of violence without immediate recourse to the legal protections provided by a protection order
- do not involve the threat of a criminal sanction/record if the undertaking is breached
- do not require the perpetrator to attend a violence prevention programme or relinquish their weapons.

On the other hand, undertakings may be seen as a positive way for the parties to resolve matters without the need for Court intervention by seeking a protection

²⁹ *Clarke v Clarke* [1997] NZFLR 201

³⁰ *Hogan v Russell* [1997] 15 FRNZ 688

³¹ Robertson, N; et al. (2007).

order or for ongoing court involvement, such as when there are issues relating to contact with children or the division of relationship property. There also appears to be a perception that discharging a protection order in return for an undertaking by the perpetrator not to commit further violence will reduce the level of conflict between parties to protection order proceedings or other Family Court proceedings. Reduced acrimony between the parties could enable those proceedings to be progressed more quickly and allow the parties to move on with their lives.

Undertakings provide clear benefits for a perpetrator, such as not being subject to criminal sanctions if the order is breached, being able to retain or obtain their firearms and firearms licence, not having to attend a violence prevention programme, and having no conditions that may interfere with the contact or the day-to-day care of their children or the other party.

While a reduction in animosity may be a benefit to both parties, it is difficult to see what other value or benefit an undertaking has for a victim. Given the lack of sanctions for a breach of an undertaking, it is also difficult to see how undertakings provide an incentive to perpetrators not to commit further violence, particularly if there are no other proceedings before the Court.

However, after having made this policy assessment we have no evidence or measure of how undertakings are working in practice let alone whether they are a useful tool or whether they are being applied to the detriment of victims. If you have had positive or negative experiences of the use of undertakings or views on whether undertakings should be used in domestic violence proceedings we would appreciate hearing about them.

Options may be developed subject to further information being referred to us.

Options

The options are (in regard to section 47 of the Act):

1. Keeping the status quo. The Court already has the flexibility to consider whether it thinks it is fit to discharge an order.
2. To amend the Act to make it explicit that the Judge can discharge a protection order (including a temporary order) only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or child of the applicant's family, or both. This approach would link the discharge provisions back into Section 14 – Power to make protection order. However, it does undermine the general principle that litigants can withdraw from using the court system if they wish.
3. To provide criteria that the Court must consider before discharging a protection order. In considering whether to discharge a protection order Judges, in the past, have considered the following matters as relevant:
 - the length of time the order has existed

- the lack of behaviour that warranted the order in the first instance
- the acknowledgement of the respondent of his or her past/present behaviour
- the applicant's/respondent's reaction to the application for discharge
- the severity of the respondent's past/present behaviour
- the programmes undertaken by the respondent/applicant
- current contact and the nature of the contact
- the necessity for contact
- the likelihood of continuing contact
- the future safety of any children.

An additional criterion may also be that the respondent and/or the applicant and any children have completed any court-ordered programmes.

Preliminary proposal

Our preliminary proposal is to amend the Act to make it explicit that the Judge can discharge a protection order (including a temporary order) only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or child of the applicant's family.

QUESTIONS – PROTECTION ORDERS

Police-issued orders

1. Do you think police-issued orders should be introduced or do you believe that current police powers are sufficient for enforcement purposes? Please give reasons for your view.
2. What do you see as the benefits of police-issued orders?
3. What disadvantages would there be in introducing police-issued orders? How could those disadvantages be addressed?
4. Do you have any views on the length of the short-term protection order?
5. What conditions do you think should be attached to police orders?

Application for temporary orders

6. Should the Court be required to give written reasons when a section 13 application for a temporary protection order is either declined or put on notice?
7. Do you think an applicant, who has had his or her application for a temporary protection declined, should be eligible for a hearing to address the issues that led to the decline?
8. Do you think that rather than a without notice application being placed on notice that it should instead be referred to the applicant and the following queries made: whether the applicant wants the application to proceed on notice, or make a new application, or withdraw application completely.

Discharging Orders

9. Do you think the Act should be amended to emphasize that the Judge can discharge a protection order (including a temporary order) only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or child of the applicant's family, or both?
10. Do you believe that over-ruling the applicant's wishes is desirable?
11. Do you think it would be more appropriate for the Act to specify criteria that have to be met before the Court discharges a protection order? What criteria do you think would be appropriate?
12. If the wishes of the applicant to discharge appear to diverge from the interests or safety of the children, how should the Court give children status in the Court?

Undertakings

13. Do you have any experiences or views on the use of undertakings in domestic violence proceedings? Do you believe they are a useful tool for resolving cases or, do you think their use puts victims at risk?

1.2. ENFORCING PROTECTION ORDERS

As noted in the Overview section on page 5 in the calendar year 2006, NZ Police recorded 38,369 family violence related incidents, and 32,675 family violence related offences, making up a total of 71,044 family violence related occurrences. In the same year 21,221 family violence occurrences resulted in an arrest.

Police have committed substantive resources to deal with domestic violence incidents. However, in regard to domestic violence incidents, police generally respond to crisis situations. There is a difference in what is required in such a situation as opposed to what is required in the medium and long term. At the point of crisis, direct and immediate action is required to stop the violence occurring and to prevent its reoccurrence.

If a victim contacts the police, an effective and immediate police response is crucial. Research³² has found that an effective police response can be a factor in the process of leaving a violent relationship.

The Chief District Court Judge's Practice Note "Domestic Violence Prosecutions", 22 December 2004 (in force 1 February 2005) provides timeframes for the management of domestic violence prosecutions in the summary jurisdiction to ensure that domestic violence cases are given priority and finalised without delay. Police efforts at enforcing protection orders, however, could possibly be enhanced by amending the Act in regard to the criteria for arrest for breach of a protection order; and by reframing the offences relating to breach of protection orders.

1.2.1 Should the criteria for arrest for breaching a protection order be retained, amended or repealed?

In order to ensure effective enforcement, the Act (s50(1)) permits arrest without a warrant for suspected breaches of protection orders³³. The arresting officer must have good cause to suspect a breach, and the officer must also consider a number of other criteria laid down in the Act.

Under the Crimes Act 1961, police officers have the power to arrest a person without warrant.³⁴ However, this provision does not include criteria to guide police in the use of the power to arrest. The Domestic Violence Act is unique in including such criteria.

When the Act was being developed there was debate about what should be included in the provision relating to the arrest power for breaches of protection orders. Some people believed that criteria were needed to ensure that the Police would adequately enforce the law; others believed this was not necessary.

³² Patton (2003)

³³ This power does not apply when the breach is failure to attend a programme.

³⁴ Section 315 Arrest without warrant, Crimes Act 1961 allows the Police to arrest without warrant a person who commits an offence punishable by imprisonment or a breach of the peace or where there is good cause to suspect such an offence has been committed.

It was also suggested at the time the legislation was before the Select Committee that the Police Family Violence Pro-arrest Policy³⁵ be incorporated in the legislation. This policy provided that police officers should always arrest an offender who has breached an order unless there were exceptional circumstances. However, the Committee decided not to incorporate the Police Family Violence Pro-arrest Policy in the legislation because it would make the law too inflexible. Instead, the Committee agreed to put criteria in the statute to guide decisions about when an arrest should take place.

At the time it was not considered that the criteria could conflict with the pro-arrest policy. In practice, though, some people now think that the criteria limit the police's ability to arrest offenders because they create stricter tests.

The criteria under section 50 of the Act that a police officer *must* consider when deciding whether to arrest someone without a warrant on suspicion of breach of a protection order are:

- The risk to the safety of any protected person if the arrest is not made
- The seriousness of the alleged breach of the protection order
- The length of time since the alleged breach occurred
- The restraining effect on the person liable to be arrested on other persons or circumstances.

It is suggested that these criteria create confusion for frontline officers. A breach of a protection order is a criminal offence. Yet, these criteria mean that in practice a police officer must take them into account whenever they suspect a breach has occurred and they feel this warrants arresting the offenders. This has led to confusion. For example, some police officers consider that an immediate threat of serious or actual *physical* violence is needed before an arrest can be made. This raises the issue of how the words safety and seriousness should be interpreted.

The Act recognises other forms of violence, such as psychological violence. It also recognises that breaches of orders that do not involve physical violence, can have a serious effect on protected persons. The breach may consist of a seemingly innocent act, for example sending text messages to the protected person, but this act may seriously undermine that person's feelings of safety. In some cases this action can signal that something more serious is imminent. For instance if there had been a history of threats to kill, and the protected person was in hiding, anything that indicated the respondent had located the protected person would be very serious.

Also, acts of family violence may seem minor when taken in isolation, but they may form a pattern of abuse. The police need to be able to take appropriate action in these situations. This is reflected by section 3(4)(b) of the Act, which provides that minor or trivial acts can build towards a pattern of abuse. Seemingly minor breaches can signal that serious violence is imminent. Arrests for breaches of protection orders can save lives.

³⁵ Carswell, S; (2006) concludes that the pro-arrest policy is a central tenet in family violence approaches used by police internationally (page 11).

It has been suggested that if the criteria were either removed or modified, the law would reflect these dynamics by allowing police to make arrests in a wider range of domestic violence situations.

Options

The options are:

1. Keep the current criteria.
2. Amend the criteria, for example by clarifying that:
 - a) a protected person's safety is broader than just their physical safety; and
 - b) "seriousness" involves considering the context and history of the case and that it is not limited to physical assault.
3. Repeal the criteria. This would mean that the provision would state that police may arrest without a warrant if they have a good cause to suspect a breach of the protection order. Without any other statutory criteria in place police will determine and administer the policy associated with arresting for breaches of protection orders.
4. Repeal the criteria and amend the section to provide that the police must arrest a person unless there are exceptional circumstances.

Preliminary proposal

Our preliminary proposal is to repeal the criteria, and allow police through their Family Violence Policy to determine and administer the arrest policy in family violence situations.

1.2.2 Should the two-tier penalty system be retained for breach of a protection order?

Under the Act it is an offence to contravene a protection order, fail to comply with any condition of an order, or fail to attend a specified programme. A breach of a protection order is a criminal offence.

The question is whether the current two-tier penalty system for such breaches should be retained. The current law provides:

- Up to six months' imprisonment or a fine of up to \$5,000 for first offences (first tier), and
- Up to two years' prison where a person has been convicted on at least two different occasions of a *qualifying offence* in the last three years (second tier).

A qualifying offence includes any breach of the order *except* a failure to attend a programme. Failing to attend a programme can only attract the first-tier penalty,

and does not count towards the accumulation of breaches required for the second tier.

Since 1999, there have been approximately 1000 convictions per year for breach of protection orders.³⁶ Between 10 and 15 per cent of these convictions result in custodial sentences, averaging between three to four months. These figures include first and second tier offences. It is not possible to know whether most sentences of imprisonment are for three to four months of a possible six months or of a possible two years.

We have received feedback that the current penalty does not reflect the seriousness of the breach, and that it fails to deter people from breaching protection orders. Some people think that the first-tier penalty is too low when a first breach involves serious violence³⁷.

An offender needs to have a prior conviction within the previous three years in order to be eligible for the higher second-tier penalty. This means that Judges are sometimes restricted to the lesser penalty when a higher penalty might be more appropriate given the nature of a particular breach.

It has been suggested that a failure to attend a programme should be a qualifying offence for the higher penalty. Compliance by respondents with directions to attend programmes is low even though programmes are thought to be an important factor in reducing future violence. However, if each failure to attend was a breach, the number of breaches could accumulate, and possibly attract a higher penalty than is warranted.

Increasing the penalty for breaching a protection order would send a signal about the seriousness of breaching an order and it could act as a deterrent. On the other hand the maximum penalty needs to be consistent with similar offences. For instance, the offence of 'male assaults female' carries a maximum two year prison sentence. It may be disproportionate to have a higher maximum penalty for breach of the protection order than the one that applies to the actual assault itself.

Alternatively, removing the lower penalty and making all breaches subject to the higher maximum penalty would signify that any breach is unacceptable. It would also be in line with most other criminal offences, where there is one maximum penalty. Judges would have available the full range of sentencing options up to the maximum penalty, and would be guided by the principles in the Sentencing Act 2002, which include the principle that any penalty must be proportionate to the offence.

Overseas experience: Australia

Tasmania, Victoria and Queensland have a similar two-tier penalty structure. For instance, in Queensland, the penalty for a first or second offence is up to one year imprisonment. A person who has been convicted on two or more occasions

³⁶ Soboleva, N; Kazakova, N; & Chong, J; (2006).

³⁷ We note, however, that the offender is likely to have been charged with a violence offence in such a situation rather than, or in addition to, the breach of a protection order.

in the three years prior to the current offence is liable for a term of up to two years imprisonment.

In contrast, the Australian Capital Territory has created an offence with a single penalty. The penalty is now up to five years' imprisonment or 500 penalty units or both.³⁸ The Australian Capital Territory report on their legislation commented that a tiered approach to the setting of penalties was inappropriate, and that the "Courts should retain the discretion to impose a just and appropriate sentence having regard to the unique circumstances of the case".³⁹

The Victorian Law Reform Commission's review stated that insufficient penalties were given for 'technical breaches'⁴⁰ because Judges did not understand their potential effect on victims, and that sentences were inconsistently and leniently applied. The Commission has recommended that the Victorian Sentencing Advisory Council should review both sentencing practices and penalties for breaches of orders.

Options

The options are:

1. Keeping the current two-tier system:
 - a. with existing penalties;
 - b. with higher maximum first-tier and/or second-tier penalties;
 - c. including failure to attend a programme as a qualifying second-tier offence; (this option would fit with either a and b above or stand independently)
2. Removing the two-tier system and the qualifying period and replacing it with one higher penalty only and with the possibility of a separate offence of failing to attend a programme.

Preliminary proposal

Our preliminary proposal is to:

- (a) remove the two-tier penalty system and replace it with one maximum penalty, and allow the Court to sentence an offender according to the nature and seriousness of the offending; and
- (b) create a separate offence for failing to attend a programme.

³⁸ Penalty units are used in Australia to set the level of the fine.

³⁹ ACT (2003) p40.

⁴⁰ An example given of a 'technical breach' was the case of a woman whose husband sat outside the front of her house in his car and eventually drove off. This action devastated and terrified the woman to the extent she could no longer live in the house.

QUESTIONS – ENFORCING PROTECTION ORDERS

Arrest

14. What is your view on the current criteria in section 50(2) for arrest without a warrant for breach of a protection order – how are the criteria working in practice?
15. Should the statutory criteria for arrest without a warrant for breach of a protection order be kept, or should the criteria be amended or repealed?
16. If you believe the criteria should be amended, what criteria do you believe should be included?
17. Is there any reason why the law should treat arrest without a warrant for breaches of protection orders differently from arrest without a warrant for other offences?

Penalty

18. How should the Court enforce programme attendance?
19. Should the two-tier system, with a lower penalty for first offences, be kept? If so what are your reasons? If not, why not?
20. Should failure to attend a programme be a separate offence? Why?

1.3 LINKS BETWEEN THE FAMILY COURT AND THE DISTRICT COURT

Protection orders are applied for in the Family Court and can be issued by the Family, District and High Court. They are a mechanism for providing the victims with legal protection from abusers, and for both the abuser and victim to access court-funded stopping violence programmes. They are not about investigating or prosecuting criminal offending.

Most criminal cases, including breaches of protection orders and other criminal offending associated with family violence⁴¹, are heard in the criminal jurisdiction of the District Court.

One of the essential differences between the two courts is that they have different standards of proof and involve different state and private agents. In order to be successful in getting a decision in the Family Court the private parties must prove their case on the balance of probabilities.

The criminal standard of proof is beyond reasonable doubt. The higher level of proof is necessary in the criminal court as certainty about a person's guilt is required in order to penalise and/or deny offenders their liberty by imprisoning them.

Other differences are also material; for example, the Family Court files are confidential – the Act prohibits the publication of any report of proceedings under the Act. This feature is unique to the Family Court and is not applicable to the criminal courts. The information that may be transferred from the Family Court to the criminal courts is limited to information about the current status of the civil proceedings and copies of any order made in civil proceedings (Family Court Rule 432).

We examine two issues below relating to current bail and sentencing practices.

1.3.1 Use of Domestic Violence Act affidavits in bail hearings

To obtain a protection order, the applicant must sign a statement setting out why they think they need protection. This is called an affidavit. Although an affidavit is sworn testimony, the information in it may not have been tested in cross examination or rebutted by evidence from the respondent⁴².

In the 1990s, there was a case where a respondent released on bail subsequently killed the protected person. This case prompted calls for Judges determining bail in the District Court to have access to affidavits made in support of protection order applications in the Family Court, so they were more fully informed of the risks. The issue was considered at the time, but no action resulted, even though the idea was thought to have merit. Since that time, the Bail Act 2000 has been passed.

⁴¹ Most particularly the offence of 'Male Assaults Female', Section 194 Crimes Act 1961.

⁴² A piece of sworn testimony is one where the author swears on the bible or a holy book or makes a non-religious affirmation that everything in the document is the truth. The process is witnessed and the witness also signs the document.

Currently, an affidavit used to obtain a protection order cannot be used in any other court proceedings. It has been suggested that affidavits should be made available in bail hearings where the defendant is charged with either a breach of a protection order or with assault against the protected person. In other words, the nature of the charge means that the safety of the protected person is an issue in considering bail. The District Court Judge hearing the bail application would be able to request the affidavit from the Family Court. The applicant's permission would still be required for the affidavit to be used in this way. The proposal raises several issues, for example, that:

- Affidavits fall short of the standard of evidence required in a bail hearing
- Issues of fairness to the defendant are raised because the defendant may not have had an opportunity to respond to the affidavit (for example, if a temporary order had been made without notice)
- Privacy issues are raised if an affidavit is used for a purpose that is different from the purpose that the information was gathered for
- Getting the applicant's consent might prove difficult
- Affidavits would not describe the alleged breach or offence about which separate evidence would still be needed
- The affidavit may raise issues of relevancy if there is a significant time lapse between the affidavit being written for the protection order and the bail hearing
- Sometimes the Court may still want to seek the views of the victim regarding bail.

The Bail Act 2000 permits a Judge to receive any evidence that he or she considers relevant (this could include an affidavit, but at present the Domestic Violence Act prevents this⁴³). The Bail Act also contains specific instruction that the need to protect the victim is the paramount consideration in any bail hearing where there is a charge of breach of a protection order. The affidavit from the protection order process is very likely to contain information that relates to the need to protect the victim.

If permitted under the law, the use of the protection order affidavit at a bail hearing would be an efficient way of getting information and it would mean the applicant avoids the stress of giving evidence at the bail hearing. The Judge has a broad discretion over what evidence is used in the hearing and this may assist in allaying fears about potential unfairness. For instance the Judge has the power to:

- Refuse to admit any evidence (for example, evidence that is more prejudicial than useful can be excluded)
- Admit evidence but give it less weight, or
- Admit the evidence and give the defendant a chance to respond to it.

The normal rules of evidence and the Bail Act appear to contain adequate safeguards. Any privacy concerns for the protected person are covered if that person gives consent for their affidavit to be used in bail proceedings. It may be that some protected persons already assume that their affidavits would be used

⁴³ Section 125 Restriction on publication of reports of proceedings, Domestic Violence Act 1995.

in this way. The consent process should involve information being given to protected persons about the implications of affidavits being later used in this way. Consent given at the time the affidavit is sworn would overcome problems in finding the protected person later, for instance if they had gone into hiding.

Since this idea was first put forward, there has been a further suggestion that it should be narrowed to cover only those cases where the bail hearing relates to the same incident that led to the issuing of the protection order. This would ensure that the information in the affidavit is directly relevant to the bail hearing, rather than indicative of a pattern of domestic violence. It would therefore be less prejudicial to the defendant. On the other hand, it would mean that it may not apply to bail on a case of a breach of the order. Different arrangements for different cases would confuse and risk undermining the law.

Options

The options are:

1. Status quo – that is, leave the law unchanged. This allows for a clear separation between civil and criminal processes. However the District Court Judge may not have all the relevant information when deciding a bail application in cases involving domestic violence.
2. Amend the Act to allow affidavits from protection order hearings to be used in subsequent bail hearings where the defendant is charged with either a breach of a protection order or with assault against the protected person. This provides more information to the Court and potentially increases protection for the protected person. It does not unfairly disadvantage the bail applicant as the Judge has discretion about what evidence is allowed, and what weight it is given.
3. Amend the Act to allow affidavits from protection order hearings to be used in subsequent bail hearings but only where the bail hearing relates to the same incident that led to the protection order being sought or breached. This would provide more information in those cases where the affidavit could be used. However, there would be fewer cases where affidavits could be used, which may limit protection to the victim. In most cases, the bail hearing would take place before the application for the protection order is dealt with, rendering the amendment pointless.

Preliminary proposal

Our preliminary proposal is to amend the Act to allow affidavits from protection order hearings to be used in subsequent bail hearings where the defendant is charged with either a breach of a protection order or with assault against the protected person.

1.3.2 Should sentencing Judges be able to make protection orders in certain criminal cases?

Some people have suggested that when a Judge is sentencing a person for a crime that involves domestic violence (for example, assaulting one's partner, which is a crime under the Crimes Act), the Judge should also be able to make a protection order. This would mean that the defendant would be eligible to attend the mandatory court-funded family violence programmes. At the moment protection orders can be issued in the District Court, however, they can only be processed when the victim has applied for one under the Domestic Violence Act. This proposal would allow Judges, when sentencing an offender, to make an order without an application from the victim.

Many of the conditions that can be made under a protection order can also be made under the criminal law. For example, a person being sentenced for a crime can, depending on the sentence imposed, be prohibited from living at a certain address or from associating with certain people. Supervision and counselling can also be part of a sentence.

However, unlike the Domestic Violence Act, where conditions can last for an indefinite time, the conditions of a criminal sentence are for a set period of time. A second difference is that a protected person has more control over proceedings under the Domestic Violence Act – they can initiate proceedings, whereas a criminal charge is almost always brought by the Police or the Crown. A protected person can also consent to a change in conditions under a protection order – which they cannot do when a person has received a sentence in a criminal court.

While the proposal would save the protected person the stress and cost of having to make a separate application for a protection order, it does raise some legal and operational issues because it would create a new interface between the family and criminal courts. Issues that would need to be considered in the policy development process include:

- Whether the Domestic Violence Act criteria for granting a protection order and standard of proof should also apply in the criminal court. This would add complexities to the sentencing process, because in addition to finding that, for example, psychological violence has occurred, the Court would have to be satisfied that an order was necessary for the protection of the victim
- Determining whether the victim's consent to the order should be required. Consent is implicit under the Domestic Violence Act because applications are usually initiated by the victim, whereas the criminal prosecution is initiated by the State. Ignoring victims' views may have the effect of undermining them even further
- Whether a protection order issued by the criminal courts should be permanent or not
- Examining the links between the two systems to ensure there is appropriate protection for children. For example, consideration should be given to whether the imposition of the order should create an automatic referral to the Family Court for special conditions to be imposed regarding contact with children

- Whether a protection order would be appropriate where the victim is a child of the offender and living with the offender
- Whether other Domestic Violence Act restrictions on publication should be extended to the criminal courts in this situation
- Whether the issuing of the protection order would be seen, at least by defendants, as part of the sentence, or just an enabling provision for Judges to consider in order to protect the victim from further abuse.

At the moment a Judge of a criminal case may encourage the defendant to consent to the victim's application for a protection order when hearing a domestic violence related criminal case. If the victim is in the Court, the application can almost immediately be processed as the summary of facts for the criminal case is sufficient for the application for an order.

It may be to defendants' advantage to consent to a protection order, because it can be seen as them acknowledging that they have a problem, making a good impression on the Judge.

Overseas experience: Australia

Both Queensland and New South Wales have legislation allowing protection orders to be made by the criminal court at the time of sentencing in relevant cases. The New South Wales legislation requires the criminal courts to make protection orders where a person pleads guilty to, or is found guilty of, a criminal offence that occurs within a domestic relationship. The Court must make an order for the protection of the person against whom the offence was committed, as if an application for a protection order had been made,⁴⁴ unless it is satisfied that an order is not required. The New South Wales legislation specifies the range of offences that can lead to the making of an order.

Queensland's *Domestic and Family Violence Protection Act 1989* gives the criminal court discretion to make a protection order where a person is found guilty of a criminal offence that involves domestic violence⁴⁵. The Court must then be satisfied that a protection order could otherwise be made⁴⁶ (in normal civil proceedings). Therefore:

- The defendant must have committed an act of violence against another person; and
- A domestic relationship exists between the two people; and
- The Court must be satisfied that the person is likely to commit a further act of domestic violence.⁴⁷

The Queensland law does not prescribe specific offences that allow an order to be made. Instead, any offence that involves the elements of domestic violence is sufficient to allow an order to be made.

⁴⁴ Crimes Act 1900 (NSW), section 562BE.

⁴⁵ **Domestic violence** is broadly defined in the legislation to include an act of wilful injury, wilful damage to the other person's property (including a pet), intimidation or harassment of the other person, and indecent behaviour to the other person without consent.

⁴⁶ Refer s16 (3) and s30.

⁴⁷ Refer s20.

Options

The options are:

1. Status quo – that is, no link be established between criminal charges and the making of protection orders. Currently Judges can and do encourage some defendants to consent to a protection order being made at the time of sentencing, so arguably no change is required.
2. Amend the Act to allow the criminal court to make protection orders when an offender is before the sentencing court. This change would mean that the protected person would be saved from the stress and cost of making an application for a protection order, and the defendant would be required to attend stopping violence programmes in the same way as a respondent to a protection order made in the civil system. This measure could increase victim safety.

Preliminary proposal

Our preliminary proposal is to amend the Act to allow the criminal court to issue protection orders when sentencing an offender for a domestic violence related offence.

QUESTIONS – LINKS BETWEEN THE FAMILY AND DISTRICT COURTS

Bail

21. What advantages would there be if affidavits from protection order proceedings were made available to Judges hearing bail applications, where the offence is either a breach of the protection order, or a charge of assault against the protected person? What would the disadvantages be?
22. Have you a view as to how the disadvantages could be addressed?
23. Should affidavits be available only in cases where the bail hearing relates to the same incident that led to the protection order being issued?
24. What other information about the victim's situation should a Judge consider when deciding bail?

Sentencing

25. What advantages would there be if a Judge when sentencing an offender for a crime involving domestic violence was able to make a protection order? What would the disadvantages be?
26. Have you a view as to how the disadvantages could be addressed?
27. Do you think a Judge in the criminal jurisdiction should be able to make a protection order in these circumstances?
28. Do you think the victim's consent should be necessary before an order is made?
29. Does the proposal raise any special concerns for the children of the offender/respondent?

1.4 CHILDREN

Children are often the victims of physical and sexual abuse in the home. Lifetime estimates of child abuse suggest 4–10% of New Zealand children experience physical abuse, and 24% of girls and 11% of boys experience sexual abuse⁴⁸.

Children are also harmed by seeing, hearing, or living with violence in the home. Under section 3(3) of the Act allowing a child to witness domestic violence is in itself an act of violence against that child. A child who has witnessed domestic violence can apply (through a representative) for a protection order on that basis.

The damaging effects on children who have endured and/or observed violence include increased anxiety, fear, depression, aggression, emotional and behavioural problems, and impaired social skills. There are also subtle symptoms associated with witnessing violence that can adversely impact on a child's future relationships, such as seeing violence as an effective means of getting what he or she wants.

In total, there were 7,924 children involved in the 4,545 applications for protection orders in 2005. Women's Refuge provided services and programmes to 12,161 children in the year 2005/06. Most of these children will have witnessed violence and some will have been directly subjected to violence.

The object of the Domestic Violence Act (section 5(1)) is to reduce and prevent violence in domestic relationships by recognising that violence, in all its forms, is unacceptable, and by ensuring effective legal protection for victims. Children who witness violence or are at risk of witnessing violence, or are the subject of violence are included under the term "victims".

When the Domestic Violence Bill was before Parliament in 1995 the Report from the Davison inquiry into the killing of the three Bristol children was released⁴⁹. The result of the inquiry into that case meant that safety of children was a prominent theme of the Act.

The current Act recognises the impact of domestic violence on children in a number of ways. For example:

- Children who witness violence or who are put at real risk of seeing or hearing abuse are deemed victims of domestic violence in their own right
- Children (through a representative) can make their own application for an order
- Children living with an adult protected person are automatically covered by the protection order
- Children's perceptions of the nature and seriousness of the violence must be taken into account when determining whether to grant a protection order
- Where the Court is satisfied there is a risk to the children of the applicant, this factor is sufficient on its own to allow the making of a temporary or a final protection order

⁴⁸ Ferguson, D. & Lynskey, M; (1997); also, Fleming T.; et al. (2007)

⁴⁹ See page 11

- The Court can safeguard the child by making special conditions relating to access arrangements and the circumstances in which contact may take place (e.g. supervised contact)
- The needs and/or best interests of children protected by a protection order are to be considered when determining whether to grant an occupation or tenancy order
- Children who are protected by a protection order are eligible to attend special programmes to help them deal with their experiences.

In addition to these features of the Act, the Care of Children Act also makes it clear that the welfare and best interests of the child must be the first and paramount consideration in *any* proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with a child⁵⁰.

This principle therefore applies when any decisions are being made about contact with the child in domestic violence proceedings, for example, when the Court imposes special conditions that relate to arrangements for access to children under section 27.

The Act currently provides protection for children. Nevertheless addressing the following issues relating to contact, legal representation, and independent cover apart from the primary protected person in unique circumstances, may further enhance the Act's capacity to provide better protection for children.

1.4.1 Should the Court be required to provide parties the opportunity to review contact issues two weeks (say) after a temporary order is made on a without notice application?

Any child who usually lives with an applicant is automatically covered by a protection order. Protection orders contain a standard condition prohibiting contact between the respondent and the people covered by the order. The Care of Children Act recognises the importance of a child to maintain contact with his or her parents provided the child's safety can be assured.

Some respondents have claimed that on the making of a temporary protection order without notice that they are unfairly denied contact with their children – sometimes for lengthy periods until the allegations are determined at a defended hearing. Their concern is that violence has been alleged rather than proven and until such time as matters are finally resolved this represents a significant disruption to the parent/child relationship.

Contact between the children and the alleged perpetrator may occur if the applicant agrees to it or the Court makes an interim order under the Care of Children Act. Contact arrangements may be implemented by way of a special condition of the protection order.

Judges also have recently adopted a practice of giving the parties the opportunity to come to Court approximately two weeks after a temporary order is made, specifically to review arrangements for the care of the children. This approach is

⁵⁰ Care of Children Act Section 4(1)

new and is designed to overcome criticism of the way the legislation impacts on respondents' relationships with their children. However, caution is necessary as this early stage of the proceedings is the most dangerous time for protected persons.

Options

The options are:

1. Status quo. Leave the issue of contact with children to be addressed at the defended hearing stage.
2. Include the recently developed judicial practice in legislation as a compulsory provision or as an enabling provision for the Court to provide an opportunity to the parties to come to Court soon after a temporary order is made to consider contact issues where children are involved. This would provide reassurance to respondents that the matter will be heard, and the timeframe is more consistent with a child's sense of time. However, it does mean that the applicant will have to attend Court a further time. The respondent may still want to defend the order at a later date.

Preliminary proposal

Our preliminary proposal is to amend the Act to reflect the current judicial practice. This would mean that the Court may provide the parties with an opportunity to come to Court soon after a temporary order is made to consider contact issues with the children under the protection order.

1.4.2 Should the criteria for appointing a lawyer for children be widened?

Currently, the Act only provides for a lawyer to be appointed to represent a child where a child makes an application for a protection order through an adult representative. Very few protection orders are applied for on behalf of children. The majority of children who are affected by domestic violence proceedings are affected because one of their parents or caregivers applies for a protection order. The Act does not provide for these children to have lawyers.

The task of a lawyer for a child is to put the wishes and views of the child before the Court, and to tell the Court about any other factors that impact on the child's welfare.

Lawyers must be appointed for children whenever contact issues are being considered under the Care of Children Act unless the appointment would serve no useful purpose. It is common for a lawyer to be appointed where there are concurrent proceedings under the Care of Children Act and the Domestic Violence Act. Just under half of all Domestic Violence Act proceedings also involve contact and residence cases. However, as stated, there is no authority to

appoint a lawyer for children when a case only proceeds under the Domestic Violence Act (unless the child is making the application).

Some people have criticised the inability of the Court to appoint a lawyer to represent children's interests in protection order proceedings (including applications for discharge of an order)⁵¹ initiated by a parent or caregiver. Issues of contact between the children and the respondent can be raised in protection order proceedings, and the Judge has the power to make a contact order as part of the proceedings. In Care of Children Act proceedings it is common practice for a lawyer for the child to provide relevant information so that the Court is better able to make decisions.

Appointing a lawyer for a child for Domestic Violence Act proceedings may mean the process takes longer. There could, however, be processes that minimise the impact of delay on the applicant's safety. For instance, a further hearing to deal with the issues concerning child contact could be held after the protection order had been made.

Options

The options are:

1. Status quo, i.e. only allowing the appointment of lawyers for children who apply for protection orders themselves. However, this means that the children's views may not be represented.
2. A discretion to appoint a lawyer for children in protection order proceedings (but after a temporary order has been issued) where contact issues are being addressed, or in situations where an applicant or a respondent has applied to discharge a protection order (see the discussion on page 21 under the heading of *Protection Orders*). In doing this, the law would be clear and the objects of the Act would be promoted. Such a change would be in line with the Care of Children Act and would be consistent with UNCROC⁵² and children would have their views represented by their lawyer. The Court would have better information on which to make an order. The setting of conditions and contact with both parents could be more easily achieved in appropriate cases.

Preliminary proposal

Our preliminary proposal is to amend the Act to allow the Court discretion to appoint a lawyer for children in protection order proceedings (but after a temporary order has been issued) where contact issues are being addressed, and where an applicant or a respondent has applied to discharge a protection order.

⁵¹ Where an applicant applies to discharge an order there may be a case for further investigation of the interests of any children covered by the order.

⁵² United Nations Convention on the Rights of the Child.

1.4.3 Should children remain covered by a protection order when a protected person dies?

The Act is silent on whether children covered by a protection order remain covered by that order when a protected person dies. In one case where this has happened, the Judge decided that the children did remain covered by the order, but some people think this is such an important issue that the law should be amended to make the matter clear, especially as cases can be overturned on appeal.

A protected person's death will put grieving family members under a lot of stress, and some people think that the legal response should reflect this situation by making it clear that children remain covered by the order. In some cases, the other parent may want immediate custody of the children, while the protected person's family members may oppose this. In cases of conflicting views, the family will need to seek help from the Court. The need to go to Court might be avoided if the law was clear about whether or not the protection order remained in place for the children.

The overriding factor is, of course, what is in the best interests of the children. As with all issues involving children and the Act, there must be an appropriate balance between the safety of children and contact with parents.

Options

The options are:

1. Amend the Act so that the protection order remains in force until the child turns 17, unless the order is discharged (the respondent could apply to have the order discharged, and so could a representative of the child). This provides long-term protection for any child named in the order, and the order can be discharged on application.
2. Amend the Act so that the protection order remains in force for a short period of time, e.g. three or six months. The child named in the order would be covered for a short time after the death of the protected parent in order for the child's situation to be clarified. The parties involved and the Court would need to consider the ongoing needs of the child in regards to the protection of that child. Requirements to take legal steps to continue protection could place grieving families under further stress, especially when making a decision about the order.
3. Amend the Act so that the protection order lapses on the death of the protected person. This may be appropriate in cases where the order is no longer needed and the respondent would not need to take any legal steps to have contact with the child. Conversely, this could put the child protected by the order at risk of violence by the respondent, and the protected person's family would need to take legal steps to have the child protected by a protection order.

Preliminary proposal

Our preliminary proposal is to amend the Act to state that children remain covered by the protection order until the age of 17, unless the order is discharged by the Court.

1.4.4 Should protection orders continue to cover children once they turn 17, if they still live at home with their parent or caregiver who is a protected person?

The Act provides that children who live with a protected person are automatically covered by the order. Under the Act “child” refers to a person who is under the age of 17.

The law is not clear whether the order continues to cover a child once he or she turns 17. Some people think it is possible to argue that the order does continue to apply so long as the young person continues to live with the protected person – while others argue the opposite.

Options

The options are:

1. Status quo. However, this would mean that the law remains unclear.
2. Amend the Act to make it clear that after a young person reaches the age of 17 they remain covered by the protection order while they are still living with the protected person. Under this option, questions arise as to whether:
 - there should be a cut-off point in terms of age, and
 - if the young person moves in and out of home, whether the order should reactivate every time they move back home.

The benefit of this is that a young person would not need to seek an order in their own right if they felt a continued need for protection. However, it may be difficult to establish the need for a new order if no recent incident has occurred and the respondent may feel that the continuation of the order was unjustified and continued to put a barrier between them and the young person.

3. Amend the Act to allow a young person to choose whether or not they wish the order to continue to cover them once they reach the age of 17. The benefit of this is that orders would not be extended where they were not wanted or needed by the young person.
4. Amend the Act to make it clear that a young person who has reached the age of 17 is not covered by a protection order even though they remain living with the protected person. The law would be clear and the young person would know that they needed to seek their own order if they still

felt protection was required. However, if the young person felt they still needed the protection order it might be hard to prove the need for the order if there had been no recent violence.

Preliminary proposal

Our preliminary proposal is to amend the Act to allow a young person to choose whether or not they wish the protection order to continue to cover them once they reach the age of 17.

QUESTIONS – CHILDREN

30. Should the Court be required to provide parties the opportunity to review contact issues after a defined period after a temporary order is made?
31. Do you think it would be helpful to have counsel for the child appointed for any domestic violence cases where children are affected?
32. Should the protection order continue to cover the children when the protected person dies? If so, for how long?
33. Do you know of any cases where the protected person died and contact between the children and the respondent was an issue?
34. Should a child, who is covered by a protection order obtained by their parent or caregiver, continue to be covered by the order when they turn 17 and they remain living with the applicant (parent or caregiver)? Please give reasons for your opinion.
35. If you think a protection order should continue to cover children 17 years and over in the circumstances outlined above, do you think the order should permanently cease to apply to the young person once they move out of home, or should it be reactivated upon their return to their home up to a certain age?
36. When the young person continues to live with the protected person should the protection order cease to cover them at a particular age?

1.5 PROGRAMMES

The object of the Act is to reduce and prevent domestic violence. In order to assist in achieving that aim, section 5(2) (d) of the Act requires respondents and associated respondents to attend programmes. The primary objective of the programmes is stopping or preventing violence. They are an essential element of the Act and key to it succeeding in its aims.

The Act also provides programmes for protected persons⁵³. The goal and structure of the programmes are detailed in the Domestic Violence (Programmes) Regulations 1996.

Programmes for respondents

When a protection order has been made, the Court must direct the respondent to attend a specified programme, unless the Court considers that there is good reason for not making such a direction. A “good reason” may include, for example, that the respondent is in prison or overseas, that the Court is unable to locate the respondent, or the respondent is defending the protection order.

It is a breach of the protection order if the respondent does not attend the programme as directed, unless they are excused by the programme provider (generally because of illness or injury). At the end of the programme the programme provider must make a report to the Court on attendance and participation.

When a respondent fails to attend a programme, the programme provider is required to notify the Court of the non-attendance. The registrar is required to bring this notice of non-attendance to a Judge who can summons the respondent before the Court to explain the absence. In practice it would be rare for such a summons not to be granted.

If the respondent appears before the Court on a summons and the direction to attend the programme is confirmed or varied, the Judge must warn the respondent of the consequences of non-attendance. In practice, a new programme date will also be advised to the respondent while they are before the Court so that there is no confusion about when they are required to attend.

If the respondent fails to attend on the summons, or fails to attend the programme again, the Registrar refers the file to Crown Law to commence the prosecution. In the near future criminal prosecutions for this part of the process will be transferred from Crown Law to the Police. One of the drivers behind this transfer is to produce higher attendance at programmes, rather than to prosecute respondents. Nevertheless, police may consider using their own investigative processes in an attempt to engage the respondent with the programme.

⁵³ Protected persons, in relation to protection orders, means
(a) the person for whose protection the order is made
(b) any child of that person’s family
(c) any person for whose benefits the order applies pursuant to a direction made under section 16. (Section 2 Domestic Violence Act 1995.)

Programmes for protected persons

A protected person who wishes to attend a programme is entitled to do so. He or she simply makes a request to a registrar. The programmes for protected persons must promote the protection of these persons from domestic violence.

Support programmes for children who are subject to or witness domestic violence are also available. These programmes must assist the children to deal with the effects of domestic violence.

Domestic violence programmes that come under the Act are termed “mandated programmes”. They must be “approved” by the Ministry of Justice. Programmes can be one-to-one or group-based.

The following issues have been raised regarding the programmes. Paragraphs 1.5.1 to 1.5.4 are about respondents’ access to programmes, 1.5.5 and 1.5.6 are about protected persons’ access to programmes, and 1.5.7 relates to programme providers.

1.5.1 Should respondents of temporary orders have to attend a programme?

As noted above, generally the Judge must direct the respondent to attend a programme when an order is made. The legislation allows the respondent five days to seek a hearing to object to the direction.

Some people think that the requirement to attend a programme should not come into effect until the protection order becomes final. Before that time respondents have not had the opportunity to put their case before the Court. Also, in the shock of dealing with the implications of the order respondents may not turn their minds sufficiently quickly to objecting to the direction. This increases the sense of unfairness for the respondents.

As noted previously, an applicant can apply for a without notice order. In this situation the respondent’s views are not heard, and nor is the applicant’s sworn statement tested (although the Judge must be satisfied that violence has occurred and that the order is necessary to protect the applicant). It is possible that the temporary order might be dismissed when both parties are heard. In these cases, the order to attend a programme was not needed. If the order is made final the direction to attend could then come into force.

On the other hand, where the respondent does not file a notice within the required time period indicating they want to appear and be heard on the making of a final protection order, a requirement to attend a programme could then be imposed.

The question is whether removing the compulsory element of programme attendance at the temporary order stage would place protected persons at increased risk.

Options

The options are:

1. Status quo – that is, all respondents of temporary orders are required to attend a programme unless a Judge considers there is good reason not to.
2. Amend the Act to provide that attendance at a programme is not required if the respondent has filed a notice objecting to attending the programme and extending such time to more than the current 5 days, say to 10 days.
3. Amend the Act to provide that attendance at a programme is not required until either
 - the order has been made final at a defended hearing, or
 - if the respondent does not wish to oppose the order being made, at the expiry of the time period allowed for filing a notice of intention to appear (three months).

This may be regarded as fairer because only those respondents who have had their say in Court or who decline the opportunity to do so, are required to attend a programme. However, it may be seen as weakening the strong approach of the Act which sends a clear signal about the importance of education and zero tolerance of violence.

Preliminary proposal

Our preliminary proposal is to amend the Act so that attendance is not required if the respondent has filed a notice to object to attending the programme, and extending the period for objecting from 5 to say 10 days.

1.5.2 Should respondents be compulsorily summonsed if they fail to attend a programme?

The Act allows the Judge discretion about whether to call a respondent before the Court for not attending a programme. Some people believe that recall to the Court should be compulsory in every case of non attendance. In practice Judges do recall most respondents back to Court when notified of non attendance at a programme.

However, sometimes the respondent has resumed attendance at the programme before the Judge has had a chance to recall the respondent and in these cases recall does not occur. In other cases where recall has been made, the respondent has started attending the programme again and the court appearance is cancelled.

Options

The options are:

1. Status quo – that is, recalling a respondent remains at the discretion of Judges.
2. Amend the Act so that respondents must be recalled to Court if they fail to attend a programme. This would send a strong message to respondents that they must take programme attendance seriously.

(NB in regard to Option 2 that if the preliminary proposal to 1.5.2 was effected then the ten day period for filing an objection would have to be accommodated before respondents were recalled to Court.)

Preliminary proposal

Our preliminary proposal is to amend the Act to make it compulsory for respondents to be recalled to Court if they fail to attend a programme.

1.5.3 Ability of respondents to attend further programmes

While attendance at a programme is mandatory for a respondent there is no provision currently for respondents to attend follow up programmes unless they pay for it themselves. Giving respondents the opportunity to attend further free programmes could be beneficial. We would also be interested in what criteria, if any, could be used to determine eligibility for attendance at further State-funded programmes.

Options

The options are:

1. Status quo – that is, every respondent is required to do one course.
2. Amend the Act to enable the respondent to attend further programmes. If respondents want to change their behaviour, then we should support that desire by ensuring they have the means to do so.

Preliminary Proposal

Our preliminary proposal is to amend the Act to enable the respondent to attend further programmes.

1.5.4 Should a Judge be able to order a respondent to attend a drug and alcohol programme?

There is a well-established link between drug and alcohol problems and violence. At the moment, respondents must be ordered to programmes with the primary

objective of stopping or preventing domestic violence and the programme must aim to change the respondent's behaviour. However, where the respondent has drug and/or alcohol problems this may prevent the respondent from gaining any benefit from the programme.

There is no specific power under the Act to order attendance at a drug and alcohol programme, which might have a different focus than solely stopping domestic violence. A Judge may suggest attendance at a drug and alcohol programme, however, attendance at a programme would be voluntary.

In some cases the Judge may order a respondent to attend a domestic violence programme where the provider is known to have particular skills in drug and alcohol issues. One-on-one programmes can also be ordered if a respondent is not suited to group-based programmes due to their drug and alcohol issues. Further, a Judge may excuse a respondent from attending a stopping violence programme if their drug and alcohol problems mean that their attendance is not appropriate.

The question is whether these avenues are sufficient to address the issue, or whether, because of the link between drug and alcohol abuse and domestic violence, the Act should be amended to create a specific power to order a drug and alcohol assessment with a view to attending a drug and alcohol programme. This would be in addition to the person attending a stopping violence programme.

Places on programmes dealing with drug and alcohol issues are limited and this may impact on the possible effectiveness of any change in approach. Consideration may also need to be given whether to extend such a provision to provide for gambling addictions and possibly mental health treatment as well. Note that any such direction would be informed by an assessment of the individual's need for treatment, their preparedness to be treated, and the availability of treatment services.

Options

The options are:

1. Status quo – that is, only allow the Court to order programmes based on stopping violence.
2. Amend the Act to allow the Judge to direct respondents to attend a drug and alcohol or a gambling addiction programme (or receive mental health treatment if it is needed) in addition to attendance at a stopping violence programme. This would give clear powers to the Judge. Respondents who could benefit from this type of treatment are more likely to receive help.

Preliminary proposal

Our preliminary proposal is to amend the Act to allow the Judge to direct respondents to attend a drug and alcohol or gambling addiction programme or receive mental health treatment in addition to attending a stopping violence programme.

1.5.5 Should protected persons be able to attend more than one programme? Should programmes be available for more than three years after an order is made?

As noted above, programmes for protected persons are voluntary. However, despite their relevance fewer protected persons than anticipated have taken up the opportunity to attend programmes. For approximately every four protection orders made, one protected person attends a programme.

Research by the Ministry of Justice⁵⁴ shows that the reasons for protected persons not going to programmes include:

- Not knowing about programmes
- Practical difficulties getting to programmes
- Not feeling ready to attend – sometimes still in crisis mode
- A lack of available suitable programmes, and
- Individual psychological barriers to attending.

As well as these barriers, there are two barriers in the Act.

Firstly, the law allows protected persons to ask to attend a programme any time during the first three years of a protection order. After three years, programmes are not accessible to protected persons under the Act, although they may attend privately at their own cost.

Secondly, attendance at one programme is funded by the government and sessions are capped (the regulations provide for a group-based programme of between 20-40 hours, or a one-on-one programme of between 9-12 hours).

Some commentators have suggested that programmes for protected persons (including children) should be available for longer than three years, especially as the uptake of programmes by protected persons is low. An applicant may not be ready to attend within the three years because they were dealing with the impact of the violence and other changes in their life, such as separating from the violent partner. Some children may not be ready to attend a programme until they are older. This may be beyond the three year period.

In some cases, an applicant may have completed a programme, but could benefit from another programme or from a specialised programme that later becomes available and is more suited to his or her needs.

⁵⁴ Maxwell, Anderson, Olsen (2001)

In addition, it has been suggested that on the making of an order applicants should be required to attend an initial session for assessment of their need for a programme. While not making attendance at the programme mandatory, this initial assessment could help promote better uptake of programmes by helping applicants understand the value of attendance.

Other commentators have also suggested that we should expand on this idea by providing victims a point of access to a wider range of social and legal services. However, before we develop this proposal we would appreciate a clear view from stakeholders and victims of what social or legal services victims need most at this time that are not already available to them, who would be best placed to provide this service, and how it could be delivered.

Options

The options are:

1. Status quo – that is, keeping programmes voluntary and available for three years at one group-based or one individual programme per person. This could mean that the needs of protected persons are not fully met. It can be argued that these features are a barrier to participation and the aims of the Act are not fully promoted.
2. Requiring an applicant to attend an initial session for an assessment of their need for a programme. This could increase the uptake of programmes by protected persons by making them more aware of the benefits. It is not intended to make programme attendance mandatory for applicants. If failure to attend attracted a penalty such as a fine this may be seen as re-victimising the applicants.
3. Extending the time in which protected persons qualify to attend programmes beyond three years but within the duration of the protection order. Removing the three year cap would open up benefits of programmes to more protected persons and would promote the aims of the Act. Protected persons could then attend a programme when they felt ready.
4. Programmes available indefinitely for protected persons even if the order has been discharged. People who were formerly victims of violence would be able to access programmes if they felt there was a danger they might find themselves in a similar situation again.
5. Increasing the number of programmes that a protected person can attend. This would mean that those who would benefit from more sessions would be able to access them.

Preliminary proposal

Our preliminary proposal is to amend the Act to make programmes available indefinitely for protected persons, or former protected persons if the order has been discharged, and not to limit the number of programmes that a protected person can attend.

1.5.6 Should programmes for children subject to previous protection orders be made more available?

We have raised the issue of whether more programmes should be available for longer periods of time for protected persons. This is also relevant for children who were protected by an order but who are no longer living with the primary caregiver. Under current law children in this situation are not eligible to attend a programme. It is suggested that eligibility to attend a programme be extended to this group.

Sometimes a child may cease to be covered by an order because of a change of residence, for example if they go to live with a relative or come under the care of Child Youth and Family Service. This change should not prevent them accessing a programme, as their need to deal with their experiences is not lessened by the change of residence.

Also, because children are growing and developing, a child might get benefit out of attending a programme some time after they experienced or witnessed violence, either because they are older, or because they are no longer experiencing the events as a crisis situation. They may no longer be covered by the order when they are ready to address the impact of violence.

Options

The options include:

1. Status quo – that is, programmes for children are available only for children who remain living with the protected person.
2. Amend the law to extend the eligibility for programmes for children to all children whose primary caregiver is a protected person, regardless of where the child is living. Extending the eligibility for programmes to children who are likely to have experienced domestic violence will assist them in dealing with its impact and this would remain consistent with the aims of the Act.

Preliminary proposal

Our preliminary proposal is to amend the Act to extend the eligibility for programmes for children to all children until age 17 whose primary caregiver is a protected person, regardless of where the child is living, without any timeframe.

1.5.7 Should programme providers have the ability to contact victims to inform them of the respondent's progress on programmes?

Some commentators consider that accountability to protected persons is an important aspect of therapy for respondents. They suggest that giving the respondent's programme provider the ability to contact the protected person to keep them informed about the respondent's progress in a programme would hold the respondent accountable to the protected person. It is suggested that such contact is vital to provide advocacy and safety checks, and to ensure that the protected person receives an accurate picture of how their (ex) partner is performing in the programme.

However, the protected person may find that being contacted by the programme provider for the respondent is intrusive to their privacy, especially if they are no longer involved with the respondent.

It is not current practice for the Court to give information about victims to providers of respondents' programmes. The Domestic Violence (Programmes) Regulations 1996 allows the Court to authorise or direct "in relation to any other person who is a party to the proceedings or is a protected person under the protection order, the name and contact address of the programme provider to whom the other person has been referred"⁵⁵. This means that the victim, with such information, may be able to contact the programme provider themselves.

If such information was to be passed onto the respondent's programme provider (possibly by the Family Court Co-ordinators) then any release of the protected person's contact details could only occur with the protected person's written consent (obtained at the time the protection order is applied for). It would be critical that this consent is not coerced in any way. Moreover, natural justice would require that the respondent should also know that information about his or her progress is being referred to the protected person.

It is unclear if this initiative would be welcomed by protected persons or by programme providers or respondents.

The proposal also appears to be somewhat contrary to the purpose of the non-contact requirements associated with protection orders. It also may compromise the respondent's commitment to a programme, or further exacerbate any resentment they hold against the applicant of the protection order.

⁵⁵ The Domestic Violence (Programmes) Regulations 1996, section 11(2) (f) (i) & (ii).

In order to clearly deal with releases of contact details within an administrative system, protections would need to be developed so that the victim's contact details are not obtained by the respondent.

Options

The options are:

1. Status quo – that is, the protected person's details are not given to the programme provider for the respondent's programme.
2. Amend the Act to allow programme providers for the respondent to receive the contact details of the protected person, if the protected person wishes to be informed of the respondent's progress. This would allow the programme provider to update the protected person on the respondent's progress. The respondent would also need to be advised that the protected person is being kept informed of his or her progress on the programme.
3. Amend the Act as per Option 2 – but clarify that the information provided to the applicant about the respondent will relate solely to his or her attendance (not progress) on the programme.

Preliminary proposal

In light of the disadvantages discussed above, our preliminary proposal is to not amend the Act.

QUESTIONS – PROGRAMMES

For respondents

37. Do you think attendance at programmes by respondents of temporary orders should be delayed until a final order is made?
38. Should there be compulsory summons to a Family Court of respondents if they fail to attend a programme?
39. Should respondents be eligible for more than one course? If so, what eligibility criteria, if any, do you think should be applied?
40. Should there be a specific power under the Act to direct a respondent to undergo a drug and alcohol assessment and attend a drug and alcohol programme or receive mental health treatment if necessary, in addition to stopping violence programmes?
41. Do you have any suggestions as to how to encourage respondents to attend the programmes?

For protected persons

42. Should programmes be available to protected persons for longer than the current three-year period? If so, for how long, for example, for the duration of the order, or for some other length of time?
43. Should protected persons be able to attend more than one programme? If so, in what circumstances or situations would further programmes be helpful?
44. What are your views about applicants being required to attend an initial session for assessment of their need to attend a programme? If you think it is a good idea do you think failure to attend should attract a penalty or would it be better if attendance was voluntary?
45. Do you think the Family Court should provide victims with a point of access to a wider range of social services? If so, what social services do victims need most that are not already available to them? Who would be best placed to provide this service? And how would it be delivered?
46. Can you suggest other ways to encourage more protected persons to attend programmes?
47. Should programmes be extended to children who used to be protected persons?

For programme providers

48. Should the Act allow programme providers of respondent programmes to receive the contact details of the protected person, if the protected person wishes to be informed of the respondent's progress on the programme? If you believe they should – what do you think are the advantages of this proposal?
49. Do you think the information provided should be limited to the respondent's attendance?

PART TWO – INTERFACE BETWEEN THE DOMESTIC VIOLENCE ACT, THE CARE OF CHILDREN ACT 2004 AND THE FAMILY PROCEEDINGS ACT 1980

2.1 INTERFACE WITH THE CARE OF CHILDREN ACT 2004

2.1.1 Should there be similar definitions of ‘violence’ in the Domestic Violence Act 1995 and the Care of Children Act 2004?

Section 58 of the Care of Children Act defines ‘violence’ as *physical or sexual* abuse. The definition of violence is carried over from section 16A of the Guardianship Act 1968. It is a more limited definition of violence than in the Domestic Violence Act, which defines violence as including physical, sexual and psychological abuse. Psychological abuse includes, but is not limited to, intimidation, harassment, controlling behaviour, threats of physical abuse and also includes causing or allowing a child to see or hear the physical, sexual or psychological abuse of a person with whom the child has a domestic relationship or putting the child at real risk of seeing or hearing the abuse occur.⁵⁶

Psychological abuse can be damaging and is an important factor to consider whether a child is at risk. This is recognised in other legislation, such as the Children, Young Persons and Their Families Act 1989, which includes “emotional harm” in its definition of child abuse.

Decisions under the Guardianship Act have indicated that as the purpose of the Domestic Violence Act is to strongly discourage domestic violence and to provide effective protection to victims, emotional or psychological abuse should also be recognised as violence.⁵⁷ Judges have also examined whether a child’s safety should be considered solely in terms of safety from physical and sexual abuse. They have determined that the Guardianship Act, now the Care of Children Act must have intended to protect children from psychological and emotional abuse and that they could not be “safe” if they were being psychologically abused.

Section 61(d) of the Care of Children Act includes emotional harm to the child as one of the factors the Court must take into consideration in determining whether a child will be safe having contact with a violent party. Section 60(6) provides that where the Court is unable to determine whether allegations of physical or sexual abuse are proved, but is satisfied that there is a real risk to the child’s safety it may make any order to protect the safety of the child as it thinks fit. Where there is evidence of psychological abuse, the Court may be able to use this clause to protect the child’s safety. Section 5(e), the only prescriptive principle in the list of factors relevant to determining a child’s welfare and best interests, states that the child’s safety must be protected and in particular the child must be protected from all forms of violence. This is a new provision in the Care of Children Act that was not in the Guardianship Act.

However, determining what constitutes psychological abuse raises complications not present in cases of physical or sexual abuse. For example, the nature of parental control and responsibility for children may make it difficult in some situations to determine whether a parent is abusive or simply exercising

⁵⁶ Domestic Violence Act s. 3(2)(c) Meaning of domestic violence.

⁵⁷ For example, *Felder v Hubbard* (1996) NZFLR 769, Family Court, Judge Ellis

necessary parental control. However, the Courts have been able to deal with this complication in the Domestic Violence and Children, Young Persons and their Families Acts. In addition, there may be some clear-cut cases of psychological abuse that do not raise such complications.

Expanding the definition to include psychological abuse may lead to an increase in allegations and may also be likely to result in more counter-allegations of violence. This would have implications for the Family Courts. Expanding the definition might also lead to an increase in orders for supervised contact or orders of no contact between the violent party and the child. The impact of such orders can be significant, severely limiting or preventing contact between a parent and child.

Preliminary proposal

Our preliminary proposal is to include psychological abuse in the definition of violence in the Care of Children Act 2004.

2.1.2 Should the Care of Children Act 2004 be amended so that, where allegations of domestic violence have been made in proceedings for a parenting order, no orders are made by consent unless the Court has obtained a report from a specialist in domestic violence to evaluate the impact and effects of violence on the child?

Every request for a parenting order by consent made in the Family Court is currently referred to a Judge for consideration. In cases where violence is alleged⁵⁸, regardless of what agreement parents may have reached, the Court has a statutory duty to determine, on the basis of the evidence before it, whether the allegations were proven or not (s60(1)(b) refers).

Where violence is established, i.e. proven, the Court cannot grant day to day care or contact to a violent party unless it is satisfied that the child will be safe: s60(4). In determining whether a child will be safe the Court must consider the factors set out in s60(a)–(i). In making a determination on issues of violence under section 60(1)(b), the Court takes into account the evidence before it.

Where the Court is unable to make a determination that violence has occurred but is satisfied that there is a real risk to the child's safety the Court may make any order that it thinks fit is necessary to protect the safety of the child.

Under section 4 of the Care of Children Act the welfare and best interests of a child must be the first and paramount consideration in any proceedings under the Act. This includes any decisions made by the Judge on application for a consent order. In determining the welfare and best interests of the child a Court must take into account any of the principles in s5 that are relevant. Section 5(e) provides that a child "must" be protected from all forms of violence.

⁵⁸ The allegations of violence referred to in section 60 can be of violence against the child that the proceedings relate to, a child of the family, or the other party to the proceedings (s60(3) refers).

The Court is able to obtain a specialist report under s132 of the Care of Children Act where it considers a report would be helpful for determination of the proceedings in assessing issues of risk and safety of the child and in determining the best interests of the child. The brief for the specialist report writer is determined by the Judge after consultation with the parties and their lawyers. The report writer will in most cases meet with parties and the child.

Preliminary proposal

We do not propose any change to the current situation. The Family Court is already required to determine issues of risk and safety of the child under the Care of Children Act. Where the Court believes it necessary, they can obtain a specialist report. A specific requirement to obtain a specialist report in every case in order to evaluate the impact and effects of violence before a consent order is made is not necessary and should remain a matter of judicial discretion. It is also likely to cause significant time delays in the making of parenting orders (due to the time it takes to obtain a report).

2.1.3 Should the Care of Children Act 2004 be amended so that a party who has used violence against the other party or a child of the other party, shall not be granted unsupervised contact unless the Court has first considered a report from a psychologist who has specialist training in domestic violence?

There have been some concerns voiced that the Family Court does not always call for specialist reports in cases involving domestic violence and that specialised knowledge is required in assessing children exposed to domestic violence, and in understanding their expressed wishes. It has been suggested that unsupervised contact should only be granted once a specialist report has been obtained by the Court. It is suggested that such a report should evaluate the risk to the child, the impact of the prior violence on the child, the implication of the violence on each party's parenting abilities, and the meaning of the child's expressed wishes.

In cases where violence is alleged, the Court has a statutory duty to determine, on the basis of the evidence before it, whether the allegations were proven or not (s60(1)(b) refers).

As detailed above in 2.1.2, where violence is proven, the Court cannot grant day to day care or contact to a violent party unless it is satisfied that the child will be safe. Where the Court is unable to make a determination that violence has occurred, but is satisfied that there is a risk to the child's safety, the Court may make any order that it thinks is necessary to protect the safety of the child.

Under section 4 of the Care of Children Act the welfare and best interests of a child is paramount. This includes any decisions made by the Judges on application for consent orders. In determining the welfare and best interests of the child a Court must take into account any of the principles in s5 that are

relevant. Section 5(e) provides that a child “must” be protected from all forms of violence.

The Care of Children Act enables a Family Court Judge to ask for a specialist report where it considers a report would be helpful in assessing issues of risk and safety of the child and in determining the best interests of the child.

Preliminary proposal

We do not propose any amendment to the Act. The current provisions enable the Family Court to obtain a specialist’s report where the Court believes this may be necessary to assess risks.

2.1.4 Should section 4 of the Care of Children Act 2004 be amended to the effect that, where a party has used violence against the other party or a child of the other party, the Court must, in determining what best serves the child’s welfare and best interests, take into account any wish of the other party to relocate?

It has been suggested that s4 of the Care of Children Act 2004 be amended to make it mandatory that the Court, in determining the child’s welfare and best interests, take into account any wish of the other party to relocate so that s/he is able to recover from the trauma of domestic violence (as defined by section 3(2) of the Domestic Violence Act 1995) and to better provide an environment which will support the recovery of the child. The intent is to make this part of the paramountcy principle in s4.

When an application is made to relocate the Court must take into consideration any argument or evidence put before it. If an applicant wishes to raise the above considerations in relation to domestic violence then they will be considered by the Court. The Court will make a decision in accordance with the welfare and best interests of the child having regard to any of the principles in s5 that are relevant. Section 5(e), which states that the child’s safety must be protected is clearly relevant in this context.

It would not be appropriate to make relocation where there has been domestic violence part of the paramountcy principle itself. This would elevate a specific situation over any other that might be relevant in the determination of the child’s welfare and best interests. The strength of the paramountcy provision is its flexibility, and therefore its ability to respond to the particular circumstances of an individual case. The principles in s5 provide guidance of what might be relevant in any particular situation, but even s5 is not an exhaustive list.

Preliminary proposal

Our preliminary proposal is not to amend the Act. Where issues in relation to domestic violence are raised in a relocation application the Court must already take these into consideration in determining the welfare and best interests of the child.

2.1.5 Should the age of a child in the Domestic Violence Act be the same as the age of the child in the Care of Children Act 2004?

The interpretation section of the Act states that a “child means a person who is under the age of 17 years; but does not include a person who is or has been married or in a civil union or de facto relationship”⁵⁹.

This interpretation of age is consistent with the interpretation of age for a young person⁶⁰ in the Children, Young Persons and Their Families Act 1989, however, the age of a minor under that Act is also being reviewed. This is because “under 17” is inconsistent with the interpretation of the age of a child set out in the United Nations Convention on the Rights of the Child (UNCROC), the Children’s Commissioner Act 2003 and the Care of Children Act 2004.

The UNCROC was concluded in 1989 and was the first international instrument to incorporate the full range of human rights – civil, cultural, economic, political and social rights. States parties to the Convention agreed that each child had the rights conferred by the Convention including a special need for protection.

In ratifying the Convention in 1993, New Zealand undertook to take all appropriate legislative, administrative or other measures for the implementation of the rights under the Convention.

The Children’s Commissioner Act 2003 sets out the age of a child as being under the age of 18 years⁶¹ as does the Care of Children Act 2004, which states that a child means a person under the age of 18 years.⁶² The Care of Children Act 2004 amended the age at which guardianship of a child ends to 18 years, to conform to the age set in UNCROC. Children who have, with consent of their parents, married or entered into a civil union or de facto relationship when aged 16–18 years are also treated as independent adults for the purpose of guardianship matters.

Options

The options include:

⁵⁹ The Domestic Violence Act 1995, Part 1, s2.

⁶⁰ **Young person** means a boy or girl of or over the age of 14 years but under 17 years; but does not include any person who is or has been married [or in a civil union]: Child, Young Persons and Their Families Act 1989, s2.

⁶¹ Children’s Commissioner Act 2003, Part 1, s4(1)

⁶² Care of Children Act 2004, Part 1, s8.

1. Status quo – that is, the definition of “child” remains as someone who is under the age of 17 years. This means that the definition of a child in the Act would be inconsistent with both UNCROC and other related legislation.
2. Amend the interpretation of the age of the child to 18 in the Domestic Violence Act 1995. This means that the interpretation of the age of a child in the Act would be consistent with UNCROC, and related legislation.

Preliminary proposal

Our preliminary proposal is to amend the Act so that the interpretation of the age of the child means a person who is under the age of 18.

(Note that implementing this change would affect preliminary proposal 1.4.4 discussed under the heading *Children*.)

2.2 INTERFACE WITH FAMILY PROCEEDINGS ACT 1980

2.2.1 Should the Family Proceedings Act 1980 be amended to empower Judges considering an application under Care of Children Act 2004 to direct that the parties not be referred to counselling or a mediation conference when a party has used violence against the other party or of a child of the marriage, civil union or de facto relationship?

2.2.2 Should the Family Proceedings Act 1980 be further amended to specifically exclude victims of domestic violence from being required to take part in a mediation conference?

Concerns have been expressed that parties have been referred to counselling and mediation in situations where domestic violence has been alleged. As a result victims have felt that they have been re-victimised.

The Family Proceedings Act encourages parties to use counselling in respect of the marriage, civil union or de facto relationship (section 9(1)) prior to any application to the Court being made. However, when an application for a separation order is made, the Family Court Judge may direct that the matter is not referred to counselling where the Judge is satisfied the respondent has used violence (within the meaning of s3(2) of the Domestic Violence Act 1995) against the applicant or a child of the marriage or civil union (s10(3)).

Section 19A states that joint counselling shall not be required where there has been violence.

These counselling provisions are aimed at trying to get parties to resolve their differences as much as possible without involving the Court. Nevertheless, the Family Proceedings Act provides that no-one can be required to attend counselling at which the other party is present if that party has used domestic

violence (section 19A). Nothing, however, in section 19A prevents the provision of counselling to parties, if the victim agrees to attend.

There is no equivalent provision for mediation. On receipt of an application for a separation or maintenance order, or for contact or day-to-day care of the children, a Family Court Judge may direct that a mediation conference be convened (section 13(1)). The referral to mediation is at the discretion of the Family Court Judge and the matters that the Judge takes into account in reaching that decision are also discretionary. Alleged domestic violence will be taken into consideration by the Judge in deciding whether a mediation conference is appropriate in the circumstances.

Family mediation (i.e. non-judicial mediation) was recently piloted in the Family Court and is included in the Family Court Matters Bill, which has recently been tabled in the House. Family mediation is proposed as an alternative to counselling. The Bill contains provisions that provide that either party to a marriage, civil union or de facto relationship may request or be directed to family mediation in any matter arising in relation to the marriage, civil union, or de facto relationship. The Registrar of the Family Court will also have the power to determine whether the matter should be referred to a mediator or a counsellor, and in regard to specific applications the Judge may also direct a matter to be heard by a mediator (clause 55). Whether domestic violence is alleged will be a factor in whether a referral is made. The mediator also has the power to assess whether mediation is appropriate and if it proceeds, how it proceeds. Lawyers for the parties and child are also able to attend.

Counselling aims to promote reconciliation and/or conciliation between the parties. Where domestic violence is present there are good reasons why this may not be appropriate and the legislative provisions above reflect this. Mediation, however, has a different focus and aims to assist parties make their own arrangements concerning their children. Mediation offers the parties an opportunity to be involved in making decisions about their children's future care rather than having these decided by the Court at a defended hearing. Mediation does not require parties to talk with each other but through the conference's chair, a Family Court Judge. Lawyers for the parties and child are also able to attend. While mediation is not appropriate for every case in which domestic violence is alleged, where it does occur there are sufficient safeguards in the current legislative provisions to deal appropriately with these situations.

Preliminary proposal

In light of the above considerations, our preliminary proposal is to maintain the status quo.

Note: It is possible that as a result of the Select Committee's consideration of the Family Court Matters Bill that the above provisions are amended. The Bill may also be enacted over the next few months.

If submissions to this discussion document suggest that the enacted provisions need to be amended then that can be implemented in the future Domestic Violence Reform Bill.

QUESTIONS – INTERFACE BETWEEN THE DOMESTIC VIOLENCE ACT 1995, THE CARE OF CHILDREN ACT 2004 AND THE FAMILY PROCEEDINGS ACT 1980

Care of Children Act 2004

50. Do you believe it would be appropriate to include a definition of psychological violence in the Care of Children Act 2004 that is consistent with the definition in the Domestic Violence Act 1995?
51. Do you have any comment to make, where allegations of domestic violence have been made in proceedings for a parenting order, on whether there is a need for the Court to obtain a report from a specialist in domestic violence before making the order?
52. Should section 4 of the Care of Children Act make specific reference to relocation as a result of domestic violence?
53. Should a report from a psychologist always be obtained before a party who has used violence against the other party is granted unsupervised contact?
54. Should the age of a child in the Domestic Violence Act be raised to 18 so as to be consistent with the definition in the Care of Children Act and UNCROC?

Family Proceedings Act 1980

55. Do you agree with maintaining the status quo on the provisions relating to mediation and awaiting the outcome of the Family Courts Matters Bill?

PART THREE – A LIST OF THE QUESTIONS

PROTECTION ORDERS

Police-issued orders

1. Do you think police-issued orders should be introduced or do you believe that current police powers are sufficient for enforcement purposes? Please give reasons for your view.
2. What do you see as the benefits of police-issued orders?
3. What disadvantages would there be in introducing police-issued orders? How could those disadvantages be addressed?
4. Do you have any views on the length of the short-term protection order?
5. What conditions do you think should be attached to police orders?

Application for temporary orders

6. Should the Court be required to give written reasons when a section 13 application for a temporary protection order is either declined or put on notice?
7. Do you think an applicant, who has had his or her application for a temporary protection declined, should be eligible for a hearing to address the issues that led to the decline?
8. Do you think that rather than a without notice application being placed on notice that it should instead be referred to the applicant and the following queries made: whether the applicant wants the application to proceed on notice, or make a new application, or withdraw application completely.

Discharging orders

9. Do you think the Act should be amended to emphasize that the Judge can discharge a protection order (including a temporary order) only if he or she is satisfied that the order is no longer necessary for the protection of the applicant, or child of the applicant's family, or both?
10. Do you believe that over-ruling the applicant's wishes is desirable?
11. Do you think it would be more appropriate for the Act to specify criteria that have to be met before the Court discharges a protection order? What criteria do you think would be appropriate?
12. If the wishes of the applicant to discharge appear to diverge from the interests or safety of the children, how should the Court give children status in the Court?

Undertakings

13. Do you have any experiences or views on the use of undertakings in domestic violence proceedings? Do you believe they are a useful tool for resolving cases or, do you think their use puts victims at risk?

ENFORCING PROTECTION ORDERS

Arrest

14. What is your view on the current criteria in section 50(1) for arrest without a warrant for breach of a protection order – how are the criteria working in practice?
15. Should the statutory criteria for arrest without a warrant for breach of a protection order be kept, or should the criteria be amended or repealed?
16. If you believe the criteria should be amended, what criteria do you believe should be included?
17. Is there any reason why the law should treat arrest without a warrant for breaches of protection orders differently from arrest without a warrant for other offences?

Penalty

18. How should the Court enforce programme attendance?
19. Should the two-tier system, with a lower penalty for first offences, be kept? If so, what are your reasons? If not, why not?
20. Should failure to attend a programme be a separate offence? Why?

LINKS BETWEEN THE FAMILY AND DISTRICT COURTS

Bail

21. What advantages would there be if affidavits from protection order proceedings were made available to Judges hearing bail applications, where the offence is either a breach of the protection order, or a charge of assault against the protected person? What would the disadvantages be?
22. Have you a view as to how the disadvantages could be addressed?
23. Should affidavits be available only in cases where the bail hearing relates to the same incident that led to the protection order being issued?
24. What other information about the victim's situation should a Judge consider when deciding bail?

Sentencing

25. What advantages would there be if a Judge when sentencing an offender for a crime involving domestic violence was able to make a protection order? What would the disadvantages be?
26. Have you a view as to how the disadvantages could be addressed?
27. Do you think a Judge should be able to make a protection order in these circumstances?
28. Do you think the victim's consent should be necessary before an order was made?
29. Does the proposal raise any special concerns for the children of the offender/respondent?

CHILDREN

30. Should the Court be required to provide parties the opportunity to review contact issues after a defined period after a temporary order is made?
31. Do you think it would be helpful to have counsel for the child appointed for any domestic violence cases where children are affected?
32. Should the protection order continue to cover the children when the protected person dies? If so, for how long?
33. Do you know of any cases where the protected person died and contact between the children and the respondent was an issue?
34. Should a child, who is covered by a protection order obtained by their parent or caregiver, continue to be covered by the order when they turn 17 and they remain living with the applicant (parent or caregiver)? Please give reasons for your opinion.
35. If you think a protection order should continue to cover children 17 years and over in the circumstances outlined above, do you think the order should permanently cease to apply to the young person once they move out of home, or should it be reactivated upon their return to their home up to a certain age?
36. When the young person continues to live with the protected person should the protection order cease to cover them at a particular age?

PROGRAMMES

For respondents

37. Do you think attendance at programmes by respondents of temporary orders should be delayed until a final order is made?
38. Should there be compulsory summons to a Family Court of respondents if they fail to attend a programme?
39. Should respondents be eligible for more than one course? If so, what eligibility criteria, if any, do you think should be applied?
40. Should there be a specific power under the Act to direct a respondent to undergo a drug and alcohol assessment and attend a drug and alcohol programme or receive mental health treatment if necessary, in addition to stopping violence programmes?
41. Do you have any suggestions as to how to encourage respondents to attend the programmes?

For protected persons

42. Should programmes be available to protected persons for longer than the current three-year period? If so, for how long, for example, for the duration of the order, or for some other length of time?
43. Should protected persons be able to attend more than one programme? If so, in what circumstances or situations would further programmes be helpful?
44. What are your views about applicants being required to attend an initial session for assessment of their need to attend a programme? If you think

- it is a good idea do you think failure to attend should attract a penalty or would it be better if attendance was voluntary?
45. Do you think the Family Court should provide victims with a point of access to a wider range of social services? If so, what social services do victims need most that are not already available to them? Who would be best placed to provide this service? And how would it be delivered?
 46. Can you suggest other ways to encourage more protected persons to attend programmes?
 47. Should programmes be extended to children who used to be protected persons?

For programme providers

48. Should the Act allow programme providers of respondent programmes to receive the contact details of the protected person, if the protected person wishes to be informed of the respondent's progress on the programme? If you believe they should – what do you think are the advantages of this proposal?
49. Do you think the information provided should be limited to the respondent's attendance?

INTERFACE BETWEEN THE DOMESTIC VIOLENCE ACT 1995, THE CARE OF CHILDREN ACT 2004 AND THE FAMILY PROCEEDINGS ACT 1980

Care of Children Act 2004

50. Do you believe it would be appropriate to include a definition of psychological violence in the Care of Children Act 2004 that is consistent with the definition in the Domestic Violence Act 1995?
51. Do you have any comment to make, where allegations of domestic violence have been made in proceedings for a parenting order, on whether there is a need for the Court to obtain a report from a specialist in domestic violence before making the order?
52. Should section 4 of the Care of Children Act make specific reference to relocation as a result of domestic violence?
53. Should a report from a psychologist always be obtained before a party who has used violence against the other party is granted unsupervised contact?
54. Should the age of a child in the Domestic Violence Act be raised to 18 so as to be consistent with the definition in the Care of Children Act and UNCROC?

Family Proceedings Act 1980

55. Do you agree with maintaining the status quo on the provisions relating to mediation and awaiting the outcome of the Family Courts Matters Bill?

You may send a written submission to:

Domestic Violence Act Review
Ministry of Justice
PO Box 180
WELLINGTON

Or send an electronic submission to: dvareview@justice.govt.nz

By 28 January 2008

References

- Australian Capital Territory *Protection Orders Legislation Review Final Report* ACT Department of Justice and Community Safety (December 2003)
- Bartlett, E. *Is Domestic Violence Increasing or Decreasing? Various Trends in Domestic Violence*, Ministry of Justice: Wellington, June 2005 (unpublished).
- Barwick, H; Gray A; and Macky R; *The Domestic Violence Act 1995 Process Evaluation*, Ministry of Justice: Wellington, April 2000
- Barwick H; Gray A; *The Domestic Violence Act 1995 42 Day 'Rules' and the Children, Young Persons and their Families Act 1989 60 Day 'Rule'*, Department for Courts: Wellington, June 2002
- Cargo, T, Cram, F; *Evaluation of programmes for children under the Domestic Violence Act 1995*, Ministry of Justice: Wellington, January 2002
- Carswell, S, *Family violence and the pro-arrest policy: a literature review* Ministry of Justice: Wellington, December 2006
- Chetwin, A; Knaggs, T, and Young P.T.W.A; *The Domestic Violence Legislation and Child Access in New Zealand*, Ministry of Justice: Wellington, May 1999.
- Cram, F., et al; *Evaluation of programmes for Maori adult protected persons under the Domestic Violence Act 1995*, Ministry of Justice: Wellington, August 2002.
- Davison, Sir Ronald; *Report of Inquiry into Family Court Proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol*. Department of Justice: Wellington, 1994.
- Ferguson, DM & Lynskey, MT (1997) Physical punishment/maltreatment during childhood and adjustment in young adulthood. *Children abuse and neglect* 21(7) 617–30;
- Fleming TM, Watson PD, Robinson E, Ameratunga S, Dixon R, Clark T, Grengle S, (2007) *Violence and New Zealand Young People: Finding of Youth2000 – A National Secondary School Youth and Wellbeing Survey*, Auckland, the University of Auckland (2007).
- Robertson N, Busch R, D'Souza R, Sheung FL, Anand R, Balzar R, Simpson A and Paina D; *Living at the Cutting Edge: Women's Experiences of Protection Orders*, A report prepared by the University of Waikato for the Ministry of Women's Affairs, 2007.
- Maxwell, G; Anderson, T; Olsen, T; *Women living without violence – An evaluation of programmes for adult protected persons under the Domestic Violence Act 1995*, Ministry of Justice: Wellington (February 2001).

McMaster K, Maxwell G, and Anderson T: *Evaluation of community based stopping violence prevention programmes*, Institute of Criminology, Victoria University for Department of Corrections, 2000.

New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003).

Patton, S *Pathways: How Women Leave Violent Men* (2003) Women Tasmania, Department of Premier and Cabinet (2003).

Robertson, N; Busch, R; D'Souza, R; Lam Sheung, F; Anand, R; Balzar, R; Simpson, A; Paina, D, *Living at the Cutting Edge: Women's Experiences of Protection Orders* The University of Waikato for the Ministry of Women's Affairs, August 2007.

Soboleva, N; Kazakova, N; & Chong, J; *Conviction and Sentencing of Offenders in New Zealand*, Ministry of Justice: Wellington, 2006

Media release from the Office of the Premier (Victoria, Australia) July 19, 2007

Victoria Law Reform Commission, *Review of Family Violence Laws Report*
[http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Family_violence/\\$file/Final_report.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Family_violence/$file/Final_report.pdf)

Western Australia Auditor General *A Measure of Protection: Management and Effectiveness of Restraining Orders*; (Report No 5, 2002)

APPENDIX ONE

Immigration Act 1987 and domestic violence

The Immigration Act 1987 sets out the framework for determining who may enter and remain in New Zealand on a temporary or permanent basis, and the rights of New Zealand citizens to be in New Zealand. It outlines processes for a range of immigration decision-making, including on visas (offshore) and permits (onshore), refugee status, refugee status cancellation, permit revocation, removal and deportation. The Immigration Act establishes the decision-making powers of the Minister, visa and immigration officers, refugee status officers, relevant appeal bodies, and the courts. The Act also provides for the detection and prosecution of people who have used false or misleading information to get a visa or a permit. Monitoring of migrants', sponsors' and third parties' (employers and education providers) compliance with the Act and conditions of stay is also covered. Specific policies which (amongst other things) relate to the rules and criteria under which eligibility for the issue or grant of visas is determined are set out in the Immigration Operations Manual.

The Department of Labour's Victims of Domestic Violence (VDV) policy enables people temporarily in New Zealand who have been living together in an established relationship with a New Zealand citizen or resident, and who had intended to seek residence in New Zealand on the basis of that marriage or relationship, to apply for a work or residence permit:

- If that marriage or relationship has ended due to domestic violence by the New Zealand citizen or resident, and
- If they returned to their home country, they would be disowned by their family and community as a result of their relationship ending, and have no means of independent support.

The details of the policy, which applies to both women and men, are set out in sections S4.5 (residence permit) and WI5.30 (work permit) of the Operations Manual. The policy was strengthened in April 2007 to include a protection order as evidence of domestic violence for the purposes of the policy.

The following evidence must be provided in support of domestic violence having occurred:

- A final protection order against the New Zealand citizen or resident partner or intended partner under the Domestic Violence Act 1995, *or*
- a relevant New Zealand conviction of the New Zealand citizen or resident partner or intended partner of a domestic violence offence against the principal applicant or a dependent child of the principal applicant; *or*
- a complaint of domestic violence against the principal applicant or a dependent child investigated by the New Zealand Police where the New Zealand Police are satisfied that domestic violence has occurred *and*

(in all cases) referral to the New Zealand Immigration Service by a Child, Youth and Family approved Refugee Organisation.

The definition of 'domestic violence' in the policy is linked to the meaning set out in s.3 of the Domestic Violence Act 1995.

However, recent research has further proposed that:

- The VDV policy include a consideration of the interests of children when determining whether a woman's application for residence and/or a work permit should be granted
- Immigration officers considering applications for residence under the VDV policy be enabled to consider a wider range of evidence in determining whether domestic violence within the meaning of section 3 of the Domestic Violence Act 1995 has occurred, but that the rules be drafted to specifically exclude information from the abuser.

The Department of Labour (DOL) is further reviewing the VDV policy, in consultation with the Ministry of Women's Affairs, to identify if its provisions and operations could be even further improved. This work includes considering the above recommendations.

The VDV policy links to character criteria for sponsors of partners. A perpetrator of domestic violence that has resulted in granting residence to a person under the VDV policy cannot sponsor a subsequent partner for residence or a temporary permit. Additional character criteria for sponsors of partners came into force from 5 November 2007. A person with a conviction for domestic violence or sexual crimes cannot sponsor a partner for residence or support a partner's or an intended partner's temporary entry application, unless they are granted a character waiver. The exclusion from sponsoring in regard to the current and new criteria is set at seven years.

Further, as part of the Immigration Act Review, which was tabled in Parliament in August 2007, Cabinet has agreed that the legislation will provide that sponsors of applicants for residence or a temporary permit have to be acceptable to the Minister of Immigration or an immigration officer. Application of section 3 of the Domestic Violence Act could mean that some sponsors may be deemed as unacceptable for the purposes of an application for residence or for a temporary permit on the basis of partnership. The Immigration Bill is currently before the Transport and Industrial Relations Select Committee.



MINISTRY OF
JUSTICE
Tāhū o te Ture

ISBN 978-0-478-29045-4

[New Zealand Government](#)