

3 March 2017

Attorney-General

**Family and Whanau Violence Legislation Bill (PCO19891/1.50) – Consistency with the
New Zealand Bill of Rights Act 1990
Our Ref: ATT395/261**

1. We have considered the Family and Whanau Violence Legislation Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”), scheduled for consideration by the Cabinet Legislation Committee on 9 March 2017. We have considered the **attached** version 1.50 of the Bill. We understand further consideration is being given to some of the proposed amendments and a revised version of the Bill may be issued. We do not expect those amendments, if made, will change this advice.
2. In our opinion the Bill is consistent with the Bill of Rights Act.

Outline of the Bill

3. This omnibus Bill will amend the Domestic Violence Act 1995 (renaming it the Family and Whanau Violence Act 1995 as well as making related amendments to the Bail Act 2000, Care of Children Act 2004, Crimes Act 1961, Criminal Procedure Act 2011, Evidence Act 2006, and Sentencing Act 2002.
4. The broad purpose of the legislation is to ensure the legislative framework underpinning the response to family violence is more complete and fit for purpose, and supports better a co-ordinated and effective response to family violence.
5. The provisions of the extant Act and the Bill which require consideration for their consistency with the Bill of Rights Act are as follows:
 - 5.1 Part 2 which provides for protection orders;
 - 5.2 Part 2A which provides for programmes and prescribed services;
 - 5.3 Part 3 which provides for occupation tenancy and furniture orders;
 - 5.4 Part 6A which provides for the issue of Police Safety Orders.
6. The provisions described above engage a number of the rights guaranteed by the Bill of Rights Act: freedom of association (s 17); freedom of movement and residence (s 18); freedom from unreasonable search and seizure (s 21); right not to be

arbitrarily detained (s 22); rights of persons arrested or detained (s 23); and minimum standards of criminal procedure (s 25).

7. Where the Bill causes any limitation of these rights the limitations will be justified for the purpose of s 5 of the Bill of Rights Act if they are rationally connected to a pressing social objective and cause a minimal impairment to the exercise of the right. In this case the pressing social objective is the protection of vulnerable people from family violence.

Consistency with ss 14, 17 and 18 - Freedom of expression, association, movement and residence

8. The ambit of freedom of association is “broad and encompasses a wide range of associational activities ...”.¹ It has been held to include the right of an individual to associate with any other individual.²
9. Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand (s 18(1) Bill of Rights Act). Liberty of movement and residence is considered a fundamental right in a free and democratic state and includes the right of an individual not to move. The right is closely aligned with the right to freedom of association.
10. The right to freedom of expression has been interpreted in broad terms and protects written or spoken communications.³

Protection orders / Programmes and prescribed services

11. The Bill provides for protection orders and occupation and tenancy orders which will limit the freedom of movement and association of the person identified as the offender by preventing them from going to certain places, which may include the place that was their usual residence, and associating with specified people with whom they have or have had a close personal relationship. They will also be inhibited from communicating with those persons, limiting their right to freedom of expression. In providing for the identified offender to be compelled to attend programmes and receive prescribed services, they may be compelled to go to particular places and associate with people they would otherwise choose not to.
12. The Bill replaces the standard conditions for protection orders (Part 2, ss 19–20C). The standard no-contact condition is intended, in part, to control a respondent’s contact with a protected person. To this end, a respondent and/or associated respondent must not make any contact with a protected person that is not authorised. Authorised contact includes contact that occurs with the express consent of the protected person to the making of that contact. This may extend to, for example, living in the same dwelling house as the protected person, entering in or remaining on land or in a building if the protected person is present, and making contact by telephone, internet, or any other digital communication. Contact by a

¹ *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72].

² *B v JM* [1997] NZFLR 529 (HC) at 532.

³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15]: “This right is as wide as human thought and imagination”.

respondent with a protected person may also be permitted if reasonably necessary in an emergency, or if authorised by the Family Court

13. The proposed amendments in Part 2 align with proposed amendments to Part 2A of the Domestic Violence Act for programmes and prescribed services. On making a protection order, the Act must compel a court to direct a respondent to undertake an assessment for and attend a non-violence programme. A court is also given the discretion to direct a person to undertake an assessment for prescribed services and engage with a prescribed service (s 51E).

Occupation and tenancy orders

14. The Bill proposes amendments to Part 3 of the Act for orders relating to property. A person who applies for a protection order may also apply for an occupation order or a tenancy order (ss 52 and 56 respectively). These orders would grant an applicant the right to live in a dwelling house owned by either party or in which either party has a legal interest, or vest in the applicant the tenancy of the dwelling house whether either party is a sole tenant or a joint tenant with the applicant.

The limits on freedom of movement, association and expression are justified

15. We consider the limitations the Bill imposes on the identified offender's freedom of association, movement and expression are demonstrably justified. The effective protection of the victims of family violence requires urgent and decisive intervention. The limitations contemplated by these parts of the Bill are significant for the identified offender but constitute the least intrusion that is consistent with the Bill achieving its important aim. The identified offender has the ability to have his or her case put urgently before the Family Court where they can seek variation or discharge of the orders if that is warranted.

Consistency with s 25(c) – Presumption of innocence

16. Section 25(c) of the Bill of Rights Act provides that everyone who is charged with an offence has the right to be presumed innocent until proved guilty according to the law.
17. The Bill proposes amendments to provisions for the offence of breach of a protection order and failure to comply with a direction:
- 17.1 Section 49(2), which is not amended or replaced, makes it an offence punishable by imprisonment for a term not exceeding 3 years to breach a protection order. It is a defence in a prosecution for a respondent to prove that he or she had a reasonable excuse for breaching the protection order (s 49(2)).
- 17.2 Section 51X which is amended makes it an offence to fail to comply with a direction 'without reasonable excuse'.
18. By requiring an accused person to prove a defence to a criminal charge, the right to presumption of innocence affirmed by s 25(c) of the Bill of Rights Act is limited.

However the reverse onus provision can be justified on the basis that⁴ the defence relies on matters that are exclusively within the knowledge of an accused.

Consistency with ss 22 and 23 – liberty of the person and arbitrary detention

19. Sections 22 and 23(2) of the Bill of Rights provide respectively that everyone has the right not to be arbitrarily detained and, where they are detained, to be charged promptly or released.
20. A constable may arrest a person without a warrant if there is good cause suspect contravention of a protection order, or failure to comply with a term or condition of a protection order or related order (s 50). Neither the extant Act nor the Bill provide for the release of the person arrested. A prior provision to that effect was repealed as from 1 January 2001 (former s 51).
21. In failing to provide for the release of the person arrested, there is a risk that a person will not be charged promptly or released, and equally that their continued detention will become arbitrary. The lack of any provision in this regard may be contrasted with the provisions for detention in Part 6A discussed below. Nonetheless, any detention authorised by this enactment must still be consistent with ss 22 and 23 of the Bill of Rights Act. It could not be said that in enacting the power of detention in this form Parliament is authorising an arbitrary detention or the unreasonable delay in the laying of charges.

Consistency with s 21 - right to be secure against unreasonable search or seizure of property

22. Section 21 of the Bill of Rights Act provides that everyone has the right to be secure against unreasonable search or seizure of property.
23. Section 21 of the existing Act is undisturbed by this amendment. It provides it is a condition of every protection order that a respondent must not possess or have under his or her control, any weapon and must not hold a firearms licence. A respondent to a protection order must as soon as practicable and no later than 24 hours after service of the protection order, surrender any weapon and any firearms licence in his or her possession. On the making of a temporary protection order, the firearms licence is deemed to be suspended and if the order is made final, the licence is deemed to be revoked. The Court retains the discretion to modify the standard terms of a protection order.
24. The amended s 124E of Part 6A also imposes similar requirements on a person against whom a safety order is issued (safety orders under Part 6A are addressed below).
25. There is no doubt that in these provisions the Bill will authorise the seizure of property, but the given the increased danger posed by the misuse of firearms in incidents of family violence the seizure of the property is reasonable.

⁴ See *R v Wholesale Travel Group Inc* [1991] 3 SCR 154; *Attorney-General (Hong Kong) v Lee Kwong Kut* [1993] AC 951 (PC) at 969; *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at [41], [84]–[85] and [90]. The point was noted with possible approval but not decided in *R v Hansen* [2007] 3 NZLR 1, at [43], [66] and [227].

Consistency with s 25 – Minimum standards of criminal procedure

26. Section 25 of the Bill of Rights Act provides that everyone who is charged with a criminal offence is entitled to the observance of minimum standards of criminal procedure.
27. An issue is raised as to whether the seizure of any weapons and licences and the suspension and possible revocation of licences amount to a criminal penalty, and require the criminal procedure protections under s 25 of the Bill of Rights Act.⁵ If the orders are civil in nature, no issue arises.
28. It is generally recognised that forfeiture regimes for the seizure or confiscation of property involved in offending are not criminal in nature. In this Bill, the requirements for the surrender of any weapons and licences are not criminal in either form or substance, in that the standard conditions:
- 28.1 do not impact on the criminal record of the person;
 - 28.2 do not involve any penalty other than the loss of the licence or the firearm;
 - 28.3 are aimed at general preventive measures, rather than specific punishment, by reducing family violence for the benefit of public safety; and
 - 28.4 can be modified by the Court to suit the facts of a particular case.
29. We conclude therefore that these orders do not amount to criminal penalties and do not give rise to any apparent inconsistency with the Bill of Rights Act.

Part 6A Police Safety Orders

30. Part 6A provides for Police safety orders. A Police safety order under this Part will require the person who is the subject of the order to vacate any place occupied by the person at risk, to surrender any firearms and to refrain from threats against or any other contact with that person (s 124E as amended). An order has the effect of suspending parenting orders (s 124G), will remain in force for the period specified in the order but may not exceed 5 days (s 124K), and may be made without the consent of the person at risk (s 124C). Proceedings may not be brought against the Crown or any constable in respect of anything done or omitted to be done for the purpose of carrying out the requirements of Part 6A, provided that the Crown or the constable acted in good faith and with reasonable care (s 124S).
31. Formal advice was tendered to you on Part 6A when the Domestic Violence Reform Bill was introduced in 2008.⁶ That advice addressed the power of a police officer of or over the rank of sergeant to make an on-the-spot safety order where necessary to ensure the safety of a person in a family relationship (s 124B). Section 124B would be amended under this Bill so that a qualified constable may issue an order against a person if there are reasonable grounds to believe that the order is necessary to help make a person at risk safe from family violence. Further an order would now be available for issue against a child where justified by special circumstances (s 124D).

⁵ See, for example, *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507, [35]ff, and, more broadly, R Clayton & H Tomlinson (eds) *The Law of Human Rights* (2ed: Oxford, 2009)[11.30]ff and [11.358]ff.

⁶ Advice dated 11 November 2008.

32. In the 2010 advice to you we said,:

...the effect of a [Police Safety] order engages numerous rights under the Bill of Rights Act, including the right of expression under s 14 and the right to freedom of movement under s 18. Further, and noting that the safety order is in substance a short-term version of protection orders made by the Family Court under the existing legislation, the new provisions necessarily lack the procedural and institutional safeguards of that Court. It is therefore necessary to consider whether these various limitations are justifiable in terms of s 5 of the Bill of Rights Act.

The explanatory note to the Bill indicates (at 4) that the safety order provisions are intended to provide Police with an alternative where a person is believed to be at risk but where there is not a sufficient basis to arrest and to provide persons at risk with an opportunity to consider their options. There are also indications of practical difficulties faced by people at risk in making use of the existing Family Court regime.

Given those considerations, the threshold of necessity under proposed s 124B(1)(b), the relatively short duration of safety orders and the requirement of seniority of authorised officers, I consider that this provision is, on balance, a justifiable limitation on the rights concerned.

33. We do not consider the proposed amendments change this advice in any way.

34. We have also considered the powers available to the Police and the District Court for a person to be detained when a Police safety order is proposed and the implications for the rights protected by the Bill of Rights Act:

34.1 Section 124I as currently enacted provides for a constable who is proposing to issue a Police safety order to detain a person for a period not exceeding 2 hours for the purposes of issuing and serving the order or obtaining authorisation if necessary.

34.2 A person who fails to comply with an order or a condition of an order may be taken into Police custody (s 124L). The person taken into custody must be brought before a District Court within 24 hours (s 124L(4)). If this does not happen, they must be released or served with a summons for a future appearance date (s 124M).

34.3 If a District Court is satisfied that a person has refused or failed to comply with a Police safety order, the court may reissue the safety order for a further period not exceeding five days or issue a temporary protection order (s124N(2)). In that event, the court is authorised to detain a person in custody for a period not exceeding 2 hours for the purposes of issuing and serving the order (s 124N(6)).

34.4 If a District Court considers it appropriate, the proceedings may also be adjourned to another time to consider whether a temporary protection order should be issued in addition to the safety order.

34.5 The Act does not provide a District Court with any other express power to hold the person in custody. It follows that the person must be released once the proceedings are concluded.

- 35. We consider that these provisions are a proportionate response to pressing social concern about the impact of family violence on vulnerable members of the community and there are adequate provisions to ensure the detention is able to be brought to an end before it becomes arbitrary.
- 36. This advice has been peer reviewed by Senior Crown Counsel Austin Powell.



Debra Harris
Crown Counsel

Noted/



Hon Christopher Finlayson
Attorney-General

4 / 3 /2017