

# Domestic Violence (Enhancing Safety) Bill

1 December 2008

Attorney-General

Domestic Violence (Enhancing Safety) Bill (PCO 13504/3.0): Consistency with the New Zealand Bill of Rights Act 1990  
Our Ref: ATT395/90

1. I have reviewed this Bill for consistency with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act").
2. In brief, the Bill proposes a number of substantive and procedural changes in respect of protection orders. Substantive changes under the Bill include provision (cl 7) for senior Police officers to make emergency protection orders and also (cl 9) for protection orders to be made by sentencing courts.
3. While issues as to consistency arise under cl 7 of the Bill, as discussed further below, I conclude that these provisions are able to be justified in terms of s 5 of that Act.

## **Issues in respect of Police power under cl 7**

4. Clause 7 provides for the making of protection orders on an emergency basis by a Police officer of the rank of sergeant or higher. An order may only be made (new s 124B(1)(b)) if necessary to ensure the immediate safety of the protected person and after consideration of various relevant factors (s 124B(2)). An order may only be made for up to five days (s 124H(2)) and must be served upon and explained to the person against whom the order is made (s 124G). An order cannot be made against a person aged under 17 (s 124D).

## **Court-directed attendance at addiction assessment and treatment**

5. The effect of an order is (s 124E) to require the person against whom it is made to vacate any place occupied by the protected person, to surrender any firearms in his or her possession, to refrain from abusing, threatening, damaging the property of, harassing or, except in emergency, communicating with the protected person and any children associated with that person. An order also suspends any current parenting order (s 124F).
6. Further, no proceedings may be brought against any Police officer or against the Crown in respect of any action under the proposed powers, unless the action is without good faith and/or reasonable care (s 124K).
7. Two issues arise under the Bill of Rights Act.

## *Substantial effect of and absence of procedural protections from Police orders*

8. First, an order made under cl 7 is of very broad and intrusive effect and limits the rights of the person against whom it is made to expression (s 14 of the Bill of Rights Act) and movement (s 18). Further and more significantly, an order necessarily limits various significant legal rights of the person against whom it is made – notably, in denying that person access to land or buildings that he or she may own or otherwise be entitled to enter or use – by decision of a non-judicial officer and without procedural safeguards either at the time or by way of subsequent review or appeal, and so raises an issue as to compliance with the right to natural justice affirmed by s 27(1). Further, there is also limited immunity for the Crown and Police, under which there is no substantive redress for an order that is made or implemented in an unjustified manner, albeit in good faith and with reasonable care <sup>[1]</sup>.

9. It is therefore necessary to consider whether these various limitations are justifiable in terms of s 5 of the Bill of Rights Act: that is, whether the restriction is rationally connected to an important objective and is proportionate to that objective.

10. It appears clear that the objective is important and rationally connected to the making of an order: the explanatory note to the Bill indicates (at 2) that the Police ("on the spot") order provisions are intended to provide Police with a response 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 <sup>[2]</sup>.

11. The issue is therefore whether the limitations are proportionate. It is relevant to note that:

11.1 An order may be made only if "necessary to ensure ... immediate safety" (s 124B(1)(b)) and after consideration of relevant factors (s 124B(2));

11.2 An order may only be made for up to five days, and the time period is to be fixed after consideration of the s 124B(2) factors (s 124H(2) and (3)). The maximum period of five days is, I note, longer than the three day maximum applicable under what appears to be the only similar comparative provision applicable in Western Australia, but is not, unlike under that legislation, a fixed period <sup>[3]</sup>; and

11.3 The requirement that the issuing officer be of the rank of sergeant or above, although not a substitute for involvement of a judicial officer, does provide a safeguard. I note that while other jurisdictions provide for the making of emergency orders by the relevant court on urgent telephone application by a Police officer <sup>[4]</sup>, that would not provide the "on the spot" response sought by the Bill or provide a distinction between the Police intervention and any subsequent Court application by a protected person.

12. Given the objectives of the proposed provisions, I consider that this provision is, on balance, a justifiable limitation on the rights concerned.

*Orders may not be made against a person under 17*

13. Clause 124D has the effect that an order may not be made against a child, defined (in s 2 of the Domestic Violence Act 1995) as a person under 17, unless married or in a de facto relationship. This provision may appear to raise an issue under the right of non-discrimination on the grounds of age in ss 19(1) of the Bill of Rights Act. Age is defined as "any age commencing with the age of 16 years" by s 21(1)(i) of the Human Rights Act 1993.

14. However, the different treatment reflects the availability of similar, but specifically designed, protective measures for 16-year olds, such as the power of removal of young persons at risk of harming themselves or others or of causing serious damage to property under s 40 of the Children, Young Persons and Their Families Act 1989.

15. Given the availability of these measures, no issue of inconsistency arises.

16. This advice has been reviewed by Victoria Casey, Crown Counsel, in accordance with Crown Law protocol.

Yours sincerely

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Crown Counsel

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Footnotes

1 The application of s 5 entails an assessment of whether the restriction is rationally connected to an important objective and is proportionate to that objective: see, most recently, *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

2 N Robertson et al *Living at the Cutting Edge: Women's Experiences of Protection Orders* (2007).

3 Section 30F, Restraining Orders Act 1997 (WA)

4 See, for example, s 61 Domestic Violence and Protection Orders Act 2001 (ACT).

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