Family Violence Death Review Committee feedback on the Family Violence Legislation Bill

13 October 2016

1. Introduction

1.1 Background

The Family Violence Death Review Committee (FVDRC) is a statutory committee of the Health Quality & Safety Commission (HQSC) mandated to (1) review and report to the HQSC on family violence deaths, with a view to reducing their number, and to continuous quality improvement through the promotion of on-going quality assurance programmes, and (2) develop strategic plans and methodologies that are designed to reduce family violence morbidity and mortality.

FVDRC members are drawn from a wide range of sectors – primarily justice, health, and academic research (kaupapa Māori and tauiwi) – and all share an expertise in family violence. This submission is based on learnings from the death reviews and the collective professional experience of the FVDRC members.

1.2 FVDRC membership

The FVDRC Chair, Julia Tolmie, is an Associate Professor in Law at the University of Auckland. She has researched and published for more than 20 years on family violence issues as they arise within family law and criminal law in New Zealand and other jurisdictions, particularly Australia and Canada.

FVDRC membership:

- Denise Wilson (Deputy Chair), Professor Māori Health, Auckland University of Technology
- Dawn Elder, Professor of Paediatrics and Child Health, University of Otago, Wellington
- Paul von Dadelszen, retired Family Court Judge
- Pamela Jensen, Barrister & Solicitor, Jensen Law
- Dr Fiona Cram, Director, Katoa Ltd
- Jane Koziol-McLain, Professor of Nursing, Director, Centre for Interdisciplinary Trauma Research, Auckland University of Technology
- David White, Consumer representative
- Dr Jacqueline Short, Consultant Forensic Psychiatrist and Senior Clinical Lecturer University of Otago

2. Family Violence Legislation Bill

The FVDRC supports many of the changes in the Family Violence Legislation Bill (the Bill), including the inclusion of:

- principles to guide the achievement of the purpose of the Family Violence Act
- coercive controlling behavior in the definition of family violence
- codes of practice that will guide service delivery.

However, due to the time constraints for consultation, the FVDRC has focused on providing specific feedback on suggested changes to certain clauses in the Bill.

3. Part 1: Amendments to Domestic Violence Act 1995

CLAUSE 6

Section 1B – Principles

Amend the wording of principle (1)(c) to 'identifying, reducing, and preventing family violence requires responsible people and organisations to work together, and to work effectively to maximise the safety and wellbeing of victims (including children) and stop the abusive behavior of the person using family violence.'

A further two principles should be added –

1. 'The decision-making of victims is respected but the protection and safety of victims takes precedence.'
2. 'In whatever form it takes, family violence is a fundamental violation of human rights.'

The first principle was originally included in *Paper Two: Family violence and civil law*, and supports section 124V.

Practitioners' roles with respect to the safety of victims and responding to people perpetrating violence need to be explicit and visible in the Bill. If they are not, we are unlikely to see the required transformative shifts in practice. The FVDRC is attached to the particular practice principles which address victims' safety (which were clearly expressed in *Paper Two: Family violence and civil law)* and is requesting them to be comprehensively included in the Bill, because the safety of victims is the top priority. Victims' safety will be compromised if we take an individual victim empowerment approach to safety. Intimate partner violence is a liberty crime where the victim's autonomy is under attack and/or seriously compromised by the abusive person's behaviour and the harm that they have suffered. The Bill needs to be clear that victim safety is a collective responsibility and that practitioners unambiguously have a role in maximising the safety of victims.

The Bill is an opportunity to be innovative and enact practice principles that can foster the conceptual shifts and practice changes required to create an integrated safety response system, in which the safety of victims and the rehabilitation and reintegration of people perpetrating violence is a collective responsibility.

CLAUSE 7

Section 2(4)(c)

In answer to the query, the 'biological parent' in the cases of assisted human reproduction should be excluded.

CLAUSE 8

Section 3B(4)

This reads:

> (4) Psychological abuse (for those purposes) may be or include behaviour that does not involve actual or threatened physical or sexual abuse.

It might be useful to include non-exclusive examples.

CLAUSE 13

Section 9

To be consistent with United Nations Convention on the Rights of the Child (UNCROC), the age of 17 years should be changed to 18 years.[1]

Section 12B(1)(a)

Again, to be consistent with UNCROC, the age of 17 years should be changed to 18 years.[2]

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[1] There is reference in a number of sections to 'child' which is defined in s.2 of the current Domestic Violence Act 1955 (the DV Act) as meaning '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 a de facto relationship.' This definition conflicts with Article 1 of the United Nations Convention on the Rights of the Child (UNCROC) that says that for the purposes of the Convention 'a child means every human being below the age of eighteen years …' It may be noted that a 'child' is defined in s.4 of the Evidence Act as meaning "a person under the age of 18 years'. The Bill includes amendments to that legislation.

CLAUSE 14

Granting other people the ability to apply for a protection order on behalf of the victim may result in the person perpetrating violence being mandated to engage with a non violence programme, as well as resulting in access to services for the adult and child victims, without placing the responsibility for driving that process on the victim. However, victims are still left with the responsibility of enacting the protection afforded by the order. They will bear primary responsibility, for example, for notifying the police of breaches of the order.

With respect to an 'incapable person' or 'partly incapable person', who would notify the police of a breach of the protection order, the incapable person' or 'partly incapable person, or a person on their behalf? How will a protection order afford these victims the level of protection needed?

The FVDRC supports the development of a comprehensive approach to safeguarding adults at risk of abuse and neglect. Although adults at risk are particularly vulnerable to family violence, they have additional and different needs and issues that deserve specific attention and tailored responses. People First[3] defines an adult who needs safeguarding against abuse as an adult who has *care and support needs*, **and** is experiencing (or is at risk of) abuse and neglect **and** *as a result of those needs* is unable to protect her/himself against the abuse or neglect (or the risk of it). Many adults who need safeguarding may be abused by family members and/or paid carers and/or other people in their communities. Adults who need safeguarding may also experience additional forms of abuse, including institutional abuse.

Accordingly, it is suggested that there is a need to enact stand-alone vulnerable adult legislation (cf. the Vulnerable Children Act 2014). For example, in the UK the Care Act 2014 governs the social care system for adults in need of care and support and their adult carers.

Section 11(3)

Section 11(3) has been moved (by Sch 2 of this Bill) into the PPPR Act 1988 — as it is about s 10(1)(i) of that 1988 Act — and notably that section covers only proceedings under the principal Act in a/the District Court. Should it cover as well proceedings under the principal Act in a/the Family Court?
The answer to this query is yes.

CLAUSE 18

Section 19(a)

The examples should include reference to social media, such as Facebook and Twitter.

Section 19(c)

There should be specific reference to social media, such as Facebook and Twitter, under 'indirect contact'.

Section 20B(b)

Reference to the word 'custody' should be deleted; it has been superseded by 'day-to-day care' in Care of Children Act 2004 (CoCA) (used earlier in (b)).

CLAUSE 21

Section 27

In answer to the query, it would make sense for ss.27(2) and 27(2A) to come into force on 1 October 2017.

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[2] Further proposed sections where the age of a minor is said to be 17, in conflict with what is in Article 1 of UNCROC. In addition, there are also these: CLAUSE 7 - Section 2(7)(a), CLAUSE 11 - Section 7(2), and CLAUSE 13 - Section 9A.
[3] http://www.peoplefirst.org.nz/who-what-where/who-is-people-first/

CLAUSE 28

Section 50

As with the Domestic Violence Act (DV Act), the new proposed s.50 gives a constable the discretion whether or not to arrest for a breach of a protection order. At the very least, there should be a presumption that an arrest will occur. The FVDRC proposes the following wording, 'Where a protection order is in force, unless there is a justifiable reason not to do so, any constable shall arrest, without warrant, any person who …'

CLAUSE 36

Section 51I(4)

Subsection (4) reads:

> (4) On receiving a copy of a notification under subsection (3), the Judge may make such orders or directions as the Judge thinks fit in the circumstances.

That notification is to the effect that a service provider has concerns (which are 'imminent, escalating, or grave and adds to the concerns that supported the making of the protection order') about the safety of a protected person. It is not clear just what 'orders or directions' are available to the Judge.

In its September 2015 submission on the Ministry of Justice's *Strengthening New Zealand's Legislative Response to Family Violence: A Public Discussion Document*, the FVDRC highlighted how non-violence programmes (NVPs) in New Zealand are currently siloed. If such programmes are to be effective, the Bill needs to stipulate that NVPs are to be part of a multi-agency response. This includes participation within case management processes and with agencies (such as the New Zealand Police, family violence non-government organisations, the Department of Corrections, and the Ministry for Vulnerable Children etc.) in the provision of feedback, assessments of risk, and monitoring of men's behaviour change.

This would significantly strengthen the programme providers' ability to provide an accurate report or raise concerns under clause 45, 51R (1)(a)(b). Furthermore, a multi-agency response is likely to be more effective in enabling victim safety than the direction or orders available to a Judge.

The inclusion of the suggested principle, 'identifying, reducing, and preventing family violence requires responsible people and organisations to work together, and to work effectively to maximise the safety and wellbeing of victims (including children) and stop the abusive behavior of the person using family violence', provides specific direction for such practice.

NVPs also need to be required to be run in accordance with international safe practice, which involves having parallel services for victims that focus on victim safety and enable victims' views to be sought as part of the ongoing assessment process.

CLAUSE 43

Section 51Q(1)(e)

If a respondent is called before the court for breaching a programme direction, the court can 'make any order or direction [it] thinks fit in the circumstances'. It is not clear just what orders or directions are available.

CLAUSE 45

Section 51R

Upon the completion of a programme, the provider must report to the court and that report goes to a Judge if there are any concerns about the safety of the protected person or if the respondent has not met the objectives of the programme or prescribed service. There is nothing to say what the Judge can do; so, referring that report to her/him is pointless unless there is jurisdiction to call the respondent to account.

CLAUSE 69

Section 124E

This amends the section regarding the effect of a Police Safety Order (PSO). Section124E(5)(i) refers to types of contact. There should be specific reference to social media, such as Facebook and Twitter.

CLAUSE 73

Section 124HA(2)

This provides that, where a PSO is in place, a constable or police employee 'may' require the bound person to undertake an assessment by a service provider. It would be preferable for 'may' to be replaced by 'must' or, at the very least, there should be a presumption that such an assessment take place.

4. Part 6B: Information use and disclosure, and service delivery codes of practice

Section 124V

The FVDRC is concerned that all the provisions about the use and disclosure of information are discretionary. Should these be mandatory? Notwithstanding the fact that the protection principle overrides any privacy concerns, potentially a busy agency or practitioner could hide behind the discretion.

Section 124W

Again, the disclosure is discretionary; the agency or practitioner only has to 'consider' disclosing information.

5. Part 2: Amendments to other enactments

CLAUSE 94

Section 5A (CoCA)

The present section is replaced and now requires the court to take into account on an application for guardianship and parenting orders the existence of final and temporary protections orders, any breaches or safety concerns expressed by a service provider. It would be desirable to state specifically that the court can decline an application if it is not satisfied that any safety issues have been addressed adequately.

CLAUSE 189A

The FVDRC supports the following wording for strangulation or suffocation.

'Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person's normal breathing, blood circulation, or both, by doing (bodily, or indirectly using any aid) all or any of the following:
(a) blocking that other person's nose, mouth, or both:
(b) applying pressure on, or to, that other person's throat, neck, or both:
(c) applying pressure to impede chest expansion.'

The FVDRC supports a 7-year term of imprisonment given the terror strangulation or suffocation instils and the associated lethality.

Subpart 6 - Sentencing Act 2002
The FVDRC recommends the Sentencing Act 2002 be amended to ensure victims' safety is a mandatory and the primary consideration when determining the appropriate sentence in family violence cases. This would be consistent with how victims' safety is to be considered by judges making family violence bail decisions, through amendments to the Bail Act 2000.

Whilst the Bill proposes introducing as an aggravating factor at sentencing that the offence was committed whilst the offender was subject to a protection order, it does not propose that victim safety should be a mandatory consideration at sentencing. At present victim safety can be read into the Sentencing Act 2002 by a judge who is educated around family violence and understands that it is an ongoing pattern of harm from which the victim may continue to need protection. However, victim safety is not expressly mentioned in the Act and sentencing judges can choose to focus on a range of other sentencing considerations instead. At present the sentencing format that is followed by judges when arriving at a sentence (setting a starting point sentence based on the offence that took place and then adjusting that up and down for agravating and mitigating factors personal to the offender to arrive at the final sentence) does not easily accommodate considerations of victim safety – these are neither features of the offence that has taken place or matters personal to the offender. The irony is that designing a sentence with victim safety in mind does not necessarily mean imposing a longer sentence. It can mean simply crafting the conditions of the sentence to ensure victim safety. It may also mean considering the safety needs of the adult victim's children (hidden victims).

6. Further comments

1. The proposed new section 1B(1)(e) says –

> '(e) access to the court should be as speedy, inexpensive, and simple as is consistent with justice'

While the FVDRC is encouraged by the proposal to trial a non-legal service through which family violence victims can obtain funded support and assistance from a specialist family violence NGO to apply for a protection order, it is concerned that this does not extend to providing free (i.e. state funded) legal assistance, especially for those cases which are defended by the person using family violence. Further, it is not clear if the increase in the eligibility for civil legal aid will remove the financial barrier for those, who, although they do not qualify for legal aid, nevertheless cannot afford to fund legal assistance themselves. In summary, the FVDRC supports a policy, which would ensure that all those who apply for orders under the Family Violence Act are fully funded by the State, irrespective of their financial circumstances.

2. The Bill does not address two changes that should be made to the DV Act. Firstly, the District Court currently has the jurisdiction to order the removal of a perpetrator who does not leave a home in which the victim is entitled to exclusive occupation after a property order had been made. This jurisdiction should also be vested in the Family Court, with a removal order being able to be made on a without notice application. Secondly, the jurisdiction to make a temporary property order should not be restricted to cases of physical or sexual abuse. Any family violence, as defined, should give rise to jurisdiction.

3. In the FVDRC's submission on *Strengthening New Zealand's Legislative Response to Family Violence: A Public Discussion Document*, it stated that there is a particular provision in the CoCA that should be reformed. As the law stands, in circumstances where a child has two guardians (generally their biological parents) and one of those guardians is killed (for example, the mother by another abusive partner), the guardianship duties, powers, rights and responsibilities in relation to the child (as set out in ss15 and 16 of CoCA) vest solely in the surviving guardian. This provision is extremely problematic when the father is also a family violence perpetrator. In this case, the perpetrator becomes entitled to the day-to-day care of the child in the absence of any Court order to the contrary. The law should be amended so that in the absence of a surviving guardian who is not a perpetrator, sole guardianship should vest automatically in the Chief

Executive pursuant to s 110 of the Children, Young Persons, and Their Families Act 1989 until further order of the Court.

4. The FVDRC supports investigating further the concept of the 'integrated court' (i.e. the multi-jurisdictional family violence court).