Family Violence Death Review Committee

Family Violence Death Review Committee submission on the Family and Whānau Violence Legislation Bill

24 May 2017

To:
Family and Whānau Violence Legislation Bill
Committee Secretariat
Justice and Electoral
Parliament Buildings
Wellington

From:

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1. Introduction

1.1. The Family Violence Death Review Committee (FVDRC) is a statutory committee of the Health Quality & Safety Commission (HQSC) mandated to (i) 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 (ii) develop strategic plans and methodologies that are designed to reduce family violence morbidity and mortality.

1.2 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.

1.3 The FVDRC would like to make an oral submission.

1.4 Appendix Two to this submission contains a list of the chair and current members of the FVDRC.

2. Family and Whānau Violence Legislation Bill (the Bill)

2.1 The FVDRC supports many of the changes in the Bill, including:

- principles to guide the achievement of the purpose of the Bill, and in particular the inclusion of collaboration in the new section 1B(k);
- the emphasis on the safety of children;
- coercive or controlling behaviour in the definition of family violence (although that phrase requires definition; see paragraph 3.5 below);
- codes of practice that will guide service delivery.

2.22 In addition to the need for further definition of coercive or controlling behaviour, there are two particular issues which the FVDRC has identified as requiring attention, namely, how the views of child victims should be ascertained and the priority which must be given to the safety of victims on sentencing.

3. The definition of family violence

3.1 Section 3 of the Bill defines family violence. Subsection (3) provides that "Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse and that may have 1 or both of the following features: (a) it is coercive or controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person): (b) it causes the person, or may cause the person, cumulative harm."

3.2 It is appropriate that the definition of *intimate partner violence* makes it clear that this form of family violence is about coercive control. This accords with a large body of international literature on the subject. However, there is no research suggesting that other forms of family violence are about exercising coercive control – although violence against other family members can be an extension of intimate partner violence because the different forms of family violence are entangled (for example, when a person harms their child in order to hurt that child's mother).

3.3 Some of the terms used to describe family violence are vague and may mean different things to different people or in different contexts. Psychological abuse is one of these terms. What to one person or in one context might be rudeness or bad behaviour to another person

or in another context might be psychological abuse. Evan Stark[1], who describes intimate partner violence as a liberty crime built around strategies of coercive control, makes it clear that the real harm of psychological abuse in the context of intimate partner violence is caused because the victim cannot walk away or exit from the abuse because they are entrapped.

3.4 The proposed section 3(3) as it is currently drafted is problematic because it is potentially over inclusive and uses terms that are not defined and could be interpreted differently from that which is intended by someone who is not familiar with the research literature from which they are derived. It might be appropriate, for example, to set boundaries with a teenager who is acting out in high risk ways which that teenager experiences as coercive and controlling and would define as psychologically abusive and harmful. Because, for example, the boundaries and consequences intrude on the teenager's privacy and isolate them from their friends. It is possible that one parent who denies another person access to their children during an acrimonious separation because they are not confident about the parenting of that other person would be experienced as engaging in coercive or controlling behaviour involving psychological abuse and causing cumulative harm by that other parent.

3.5 The FVDRC suggests that the problems with the current definition can be addressed by defining what is meant by the terms "coercive behaviour" and "controlling behaviour" in s.3(3)(a). The following definitions, borrowed from the UK context, are suggested:

"**Coercive behaviour** is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their every day behaviour."

"Controlling behaviour is an act or pattern of acts of assaults, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim."

4. The views of children

4.1 There are references to ascertaining and taking into account a child's views but no mechanism by which this can be achieved. Those references are section 1B(j) (inserted by clause 7), section 9A (inserted by clause 14) and section 47(1B)(j) (inserted by clause 27).

4.2 There needs to be specific jurisdiction to appoint a lawyer for the child; such is encouraged by Article 12.2 of the United Nations Convention on the Rights of the Child. It is unlikely that the child will be called upon to give evidence (depending on age and maturity) but the judge may well decide to speak to the child in Chambers. This is common practice under the Care of Children Act 2004 (COCA) and the Children, Persons, and Their Families Act 1989 (the CYP&F Act) and the child will almost always be represented by a lawyer in those cases. The FVDRC would also support the accreditation of family lawyers. Lawyers involved in family work should have expertise in child development and attachment, and in recognising and understanding the dynamics of family violence. An accreditation process could be used ensure that this was the case.

4.3 And there must be the ability to engage a psychologist (skilled in family violence) if necessary. Rather than having to rely upon section 82 (which enables the Court to "call as a witness any person whose evidence may, in its opinion, be of assistance"), there should be specific jurisdiction to obtain a psychological report (cf s.133(5) of COCA).

1 Stark, E., *Coercive Control: How Men Entrap Women in Personal Life,* New York, Oxford University Press, 2007.

5. Sentencing Act 2002

5.1 The Sentencing Act 2002 must be amended to provide that victim safety is a mandatory and the primary consideration when determining the appropriate sentence in family violence cases.

5.2 Family violence is a unique form of offending in that it is a pattern of harm. Ongoing victim safety – including the safety of hidden victims (such as children) or future victims (for example, future partners in the event of a separation) – must always be a consideration in any response to family violence. This is not guaranteed in our current approach to sentencing. An incident based approach to family violence, for example, results in each family violence offence that is part of that ongoing pattern of harm being reacted to as a separate event – the sentence consisting of the appropriate punishment for that event.

5.3 Victim safety is an explicit consideration when making family violence bail decisions, reinforced by proposed amendments in the Bill. However, it is not currently an explicit or mandatory consideration when determining sentences in family violence cases. The irony is that when bail decisions are made the defendant is entitled to the presumption of innocence but, at the point that they are being sentenced, guilt has been established. It follows that there is an even stronger case for victim safety being considered at sentencing. The FVDRC notes that in its in-depth reviews, more offenders had committed homicide whilst on sentence for prior family violence offending than on bail.[2]

5.4 The purposes of the Sentencing Act 2002 are set out in section 3; see Appendix One. It is section 3(d) which refers to victims; that reads:

(d) to provide for the interests of victims of crime.

Whilst the interests of the victim could and should include their safety, this is not explicit. It is possible to interpret the interests of the victim as meaning reparation, retribution or denunciation for past harm, for example.

5.5 The purposes of sentencing are set out in section 7 of the Act; see Appendix One.

Once again, victim safety is not explicit here. Holding the offender accountable for harm done to the victim (7(a)) is retrospective – a reaction to harm that has already occurred – rather than a consideration of the victim's safety needs going forward. The interests of the victim (7(c)) could, and we would argue should, include their ongoing safety but this is not explicit. Deterring the offender from similar offending (7(f)), protecting the community (7(g)) and rehabilitating the offender (7(h)) also implicitly raise issues of victim safety but, once again, this is not explicit. Judges are not directed to turn their minds to a consideration of this particular victim's safety and the safety of others who might be in close family relationship

[2] In its *Fifth Report* the FVDRC noted that while cases where violent offenders have reoffended on bail have received attention in the media, family violence homicides committed while on sentence for previous violent offending were more common in the regional reviews. For example, of the 24 regional reviews involving IPV predominant aggressors, 10 (40 percent) were on bail and/or community-based sentence at the time of the homicide. The majority (eight) were on sentence (one of these was also on bail). All eight had been sentenced for violence offences (six were family violence offences). The three who were on bail (one of whom was also on sentence) were all bailed for family violence offences. A number of other predominant aggressors were not on sentence at the time of the homicide. However, they would have been had they received more serious sentences for their recent family violence offending. Two others had received diversions and/or discharges without conviction for their prior family violence offending, which was within two months of the homicides. In two other instances, the police were not informed of the offending by another agency or they were informed but did not investigate sufficiently in order for charges to be laid. Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015*, Wellington, Health Quality & Safety Commission, 2016, p. 91.

with the offender. In addition, as section 7(2) makes clear, none of these purposes has priority over any of the others.

5.6 Section 8 sets out the principles of sentencing; see Appendix One.

The only reference to victims in this provision is section 8(f) which provides that the court:

(f) must take into account any information provided to the court concerning the effect of the offending on the victim;

This mandates the court to consider the effect of the offending on the victim. It is retrospective and does not require a consideration of how the victim's safety can be supported going forward.

5.7 When courts are deciding on a sentence the current practice is to first set a starting point sentence by comparing the offence for which the offender was convicted with similar offences committed by other offenders in the sentencing case law. The focus here is on the incident that took place (for example, whether a weapon was used, how it was wielded, etc). Once this starting point sentence is determined, it is then adjusted up or down for aggravating and mitigating factors personal to the offender. Considerations of victim safety are neither circumstances of the offending nor matters personal to the offender and do not easily fit into this sentencing structure. For that reason, it is very important that judges be explicitly mandated to consider victim safety when sentencing in family violence cases and for this to be a priority consideration.

5.8 The Bill proposes to amend section 9 of the Sentencing Act 2002 to include as an aggravating factor that the offence was a family violence offence committed whilst the offender was subject to a protection order against a person who was a protected person under that order. There are many reasons why this proposal is insufficient to address the victim safety issues raised here. First, and most obviously, not all victims of family violence will obtain a protection order. Victim safety should be a priority whether or not the victim has obtained a protection order – otherwise protection orders become simply another hurdle that victims have to surmount in a response to family violence that puts the onus for achieving safety on the victim themselves. Secondly, victim safety does not necessarily require longer sentences. It might require sentences that are crafted differently. For example, when sentencing an offender to curfew, instead of tailoring the sentence around the offender's sporting activities, a concern with victim safety might tailor the sentence around the victim's needs. For example, the need to provide the victim and her young children with a zone of safety so that she can pick the children up from school, feed them and get them to bed knowing that the offender is not at large. In other words, rather than a curfew starting from 8 o'clock at night, a curfew should commence at a time that is reasonable to take the children home from school or their after school activities. This is not a *longer* sentence (because family violence is an aggravating feature and adjusts the starting sentence upwards); it is a *different* sentence.

5.9 The reality is that we need different ways of responding to perpetrators of family violence. Sentencing responses should involve ongoing management of the offender, including having as many eyes on the offender as possible and escalating consequences for repeat offending. Sentencing responses cannot be one off and simply focused on determining the appropriate punishment for a past action on a particular occasion. Making victim safety an explicit consideration in the Sentencing Act 2002 would support the development of new approaches and strategies for responding to family violence offending at sentencing.

6. Clause 7

6.1 Section 1A should be amended to read as follows:

> "(a) recognising that family violence, in all its forms, is unacceptable and is a fundamental violation of human rights;"

6.2 The word "some" in section 1B(f) should be "appropriate"; the use of the word "some" is too vague.

6.3 The examples in section 1B(h) should include transport.

6.4 The term "decision makers" in section 1B(j) and (k) needs definition.

6.5 To ensure that the protection and safety of victims takes precedence, section 1B(j) should be re-worded as follows:

> "(j)decision makers must consider and respect the views of victims of family violence, including children, unless doing so would or may compromise victims' safety, provided that the protection and safety of victims must take precedence:"

6.6 This Principle was originally included in *Paper Two: Family violence and civil law*, and supports section 124V.

6.7 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 asking that they 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.

6.8 Section 1B(k) should be re-worded to emphasise the sharing of information. The following is proposed:

> "(k) decision makers shall integrate their responses to family violence and work together to curtail perpetrators' abuse and maximise victims' safety."

6.9 To be consistent with the principles, the word "should" in section 1B(l) needs to be changed to "shall". It is arguable that the same change should be made to the other principles where the word "should" appears.

7.Clause 8

7.1 With respect to the proposed definition of "partner" in section 8(1)(3), the "biological parent" in cases of assisted human reproduction should be excluded.

8.Clause 14

8.1 Section 10 enables the court to make a protection order against a child if that is justified by special circumstances. It is submitted that no such order should be made unless the child is

legally represented. Accordingly, there should be the requirement that the court appoint a lawyer for the child respondent if he or she does not already have representation.

9. Clause 30

9.1 As with the Domestic Violence 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 are special circumstances not to do so, any constable must arrest, without warrant, any person who …'

10.Part 2A

10.1 Section 51C(3) requires the service provider to notify the Registrar, the District Commander and the chief executive of any concerns about the safety of a protected person. The Bill sets out steps which the Registrar must take (in s.51U) but there are none for the other two persons; it is not clear what is expected of them.

10.2 Section 51E(3) enables the court, on making a protection order, to direct a respondent to undertake an assessment for a prescribed service (defined in section 2, as amended by clause 8) and engage in any such service that an assessor deems appropriate for the respondent. To ensure that the safety of the victim is not overlooked, it would be best practice for ss.(3)(b) to read (the suggested additional words being shown in italics) –

(b) engage with any prescribed standard service, provided by a service provider, that an assessor determines may be appropriate for and may benefit the respondent *and enhance the safety of the victim*.

10.3. Section 51S contains the judge's powers if a respondent is referred to the court under any of the paragraphs in section 51S(1). Section 51S(2) reads:

"(2) The Judge may make any order or direction (for example, under sections 51E, 51J, 51L, 51P, or 51Q) as the Judge thinks fit in the circumstances."

10.4 Of those four sections, only s.51E and s.51L specifically give the Judge the power to make an order or direction (see s.51E(3) and 51L(4)). The references to sections 51J, 51P and 51Q should be deleted.

10.5 Apart from those given in sections 51E and 51L, and in section 51S(3), it is not clear what other order or direction is available to the judge. The same concern arises in respect of the judge's powers in section 51W(1)(e).

10.6 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, Oranga Tamariki etc.) in the provision of feedback, assessments of risk, and monitoring of men's behaviour change.

10.7 This would strengthen the programme providers' ability to provide an accurate report or raise concerns. A multi-agency response will be more effective in enabling victim safety than the directions or orders available to a Judge.

10.8 The inclusion of the suggested principle in section 1B(k) (either as drafted in the Bill or amended as proposed in paragraph 6.8 above) provides specific direction for such practice.

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

10.10 Section 51X provides for penalties in the event of failure to comply with a direction under sections 51E or 51L. It is not clear why section 51S is not included.

11. Clause 42

11.1 Section 67 (power to make a furniture order) needs further amendment to refer specifically to a motor vehicle.

12. Clause 57

12.1 When a Police Safety Order (PSO) is made against a child under s.124D it is likely that there are care and protection issues which would justify an application for a place of safety warrant under s.39 of the CYP&F Act. Alternatively, a referral for a Family Group Conference under s.19 of that Act should be made. Either can be actioned by a constable.

13. Clause 62

13.1 Section 124HA(2) provides that, where a Police Safety Order is in place, a constable or police employee 'may' require the bound person to undertake an assessment by a service provider. Unless there are special circumstances not to do so, the person must be required to have an assessment.

13. Part 6B

13.1 Sections 124V and 124W - All the provisions about the use and disclosure of information are discretionary. Notwithstanding the fact that the protection principle overrides any privacy concerns, potentially a busy agency or practitioner could hide behind the discretion.

13.2 In keeping with Principle (k) in section 1B, disclosures should be mandatory unless there are special circumstances not to do so.

14. Clause 85

14.1 The present section 5A of the COCA 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. The section must state specifically that the court can decline an application if it is not satisfied that any safety issues have been addressed adequately.

15. Clause 93

15.1 The new section 189A of the Crimes Act 1961 creates a new offence of strangulation or suffocation.

15.2 The FVDRC supports the addition of the following after (a) and (b):

"(c) applying pressure to impede chest expansion."

15.3 The Law Commission in its Report 138, "Strangulation - The Case for a New Offence" dated March 2016 at paragraphs 5.22, 5.23 and 5.24 discussed suffocation and pressure to the chest (so that the lungs cannot work), recommending at 5.24 that "any new strangulation offence should also extend to suffocation".

15.4 Professional experience establishes that suffocation by impeding chest expansion is not uncommon.

16. Further suggested changes to the Domestic Violence Act

16.1 The Bill does not address two further changes that must be made to the Domestic Violence Act.

16.2 First, the District Court currently has the jurisdiction to order the removal of a perpetrator who does not leave a home to which the victim is entitled to have exclusive occupation after a temporary property order had been made. This jurisdiction must also be vested in the Family Court also, with a removal order being able to be made on a without notice application.

16.3 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, must give rise to jurisdiction.

17. A further suggested change to COCA

17.1 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 CYP&F Act until further order of the Court.

APPENDIX ONE

Sentencing Act 2002

Section 3

3. **The purposes of this Act are—**
(a) to set out the purposes for which offenders may be sentenced or otherwise dealt with; and
(b) to promote those purposes, and aid in the public's understanding of sentencing practices, by providing principles and guidelines to be applied by courts in sentencing or otherwise dealing with offenders; and
(c) to provide a sufficient range of sentences and other means of dealing with offenders; and
(d) to provide for the interests of victims of crime.

Section 7

7 Purposes of sentencing or otherwise dealing with offenders
(1) The purposes for which a court may sentence or otherwise deal with an offender are—
(a) to hold the offender accountable for harm done to the victim and the community by the offending; or
(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
(c) to provide for the interests of the victim of the offence; or
(d) to provide reparation for harm done by the offending; or
(e) to denounce the conduct in which the offender was involved; or
(f) to deter the offender or other persons from committing the same or a similar offence; or
(g) to protect the community from the offender; or
(h) to assist in the offender's rehabilitation and reintegration; or
(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

Section 8

8. In sentencing or otherwise dealing with an offender the court—
(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

APPENDIX TWO

The FVDRC Chair, Dr Jacqueline Short, is a Consultant Forensic Psychiatrist and Senior Clinical Lecturer at the University of Otago.

FVDRC membership:

- Denise Wilson (Deputy Chair), Professor Māori Health, Auckland University of Technology;
- Julia Tolmie (Deputy Chair), Professor of Law at the University of Auckland and immediate past Chair;
- Paul von Dadelszen, retired District and Family Court Judge and Board member Families Commission (Superu);
- 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.