

Action for Children and Youth Aotearoa Incorporated



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To: Domestic Violence Act Review
Ministry of Justice,
P.O.Box 180,
Wellington

Email: dvareview@justice.govt.nz

Please find attached our submission. We very much appreciate the opportunity to comment on this important Review.

Yours sincerely

Alison Blaiklock
Chairperson

**Submission from Action for Children and Youth Aotearoa Incorporated
for the Review of the Domestic Violence Act 1995 and Related Legislation
February 2008**

INTRODUCTION

This submission is made by Action for Children and Youth Aotearoa (ACYA). ACYA is a coalition of non-governmental organisations and individuals interested in children's rights in Aotearoa New Zealand. ACYA's purpose is to promote the well-being of children and young people in Aotearoa New Zealand through: education and advocacy on the rights of children and young people; encouraging the Government to act on the recommendations of the United Nations Committee on the Rights of the Child; and promoting opportunities for the voice and participation of children and young people.

In 2003, ACYA produced and published *Children and Youth in Aotearoa 2003*, the Aotearoa New Zealand NGO Report on New Zealand's implementation of the UN Convention on the Rights of the Child (NGO Report). The NGO Report was presented to the UN Committee on the Rights of the Child (the UN Committee) in Geneva in June 2003, accompanied by a video funded by ACYA and produced by Aotearoa New Zealand children called *Whakarongo Mai / Listen Up*.

Since then ACYA has advocated that the Aotearoa New Zealand Government act on the recommendations of the Committee on the Rights of the Child and improve the situation of children and youth. ACYA was one of the NGOs actively contributing to the development of the *New Zealand Action Plan for Human Rights / Mana ki te Tangata* and we note that this Review offers an opportunity for implementing the priority given in that plan to protecting children from violence. ACYA is developing a constructive working relationship with Government. ACYA also networks information about children and youth. ACYA is a member of the international coalition the NGO Group for the Convention on the Rights of the Child.

The DVA is important legislation for protecting some fundamental human rights and that the Review provides an opportunity for upholding in law and in practice New Zealand's commitments to respect, protect and fulfil the rights of children and young people to be free from violence.

This submission has been prepared principally by one of our members and advisors, Robert Ludbrook, to whom we are most appreciative. We understand that he is also making an individual submission.

We very much appreciate the opportunity to make this submission, and the Ministry's extension of the date for submissions.

Part 1 POINTS NOT COVERED IN THE DISCUSSION PAPER

1. Need for “principles” section to be added to Domestic Violence Act

Unlike other family law statutes the Domestic Violence Act (DV Act) does not contain a set of overarching principles to be applied by the Courts and others exercising powers under the Act. A “principles” section should be inserted in the Act and this should include:

Paramourncy principle

The DV Act does not require that the Family Court, in deciding whether to make a protection order, shall treat the welfare and best interests of the children whose protection is under consideration as the first and paramount consideration. The paramourncy principle is the guiding principle in the Care of Children Act 2004 (and its predecessor Guardianship Act 1968) and the Children, Young Persons and their Family Act 1989. When the Family Court considers making day-to-day care or contact orders in respect of a child against whom violence is alleged, the Court must treat the welfare and best interests of the particular child as the first and paramount consideration: s4 Care of Children Act 2004. A similar principle should be inserted in the Domestic Violence Act.

Child’s views

There is no requirement in the DV Act equivalent to that in s6 Care of Children Act that the views of children who are to be the subject of a protection order (or are likely to be affected by such an order) should be ascertained and given due weight. Section 6 of the Care of Children Act is based on Article (Art) 12 of the United Nations Convention on the Rights of the Child (UNCROC) and New Zealand has obligations under UNCROC to ensure that children’s right to be heard in decisions that affect them and their right to be given opportunities to be heard in court proceedings is incorporated into its domestic legislation.

Child’s safety

The principle in s5(e) Care of Children stresses that, when making decisions as to a child’s welfare and best interests, the Family Court must take into account the child’s safety and the need to protect the child from all forms of violence including family violence.

Recommendation

A principles section should be added to the Act along the lines suggested.

2. New Zealand’s obligations to protect, respect and fulfil human rights

The DV Act provides an opportunity to explicitly state New Zealand’s commitment to human rights and in doing so to publicly state that freedom from violence is a fundamental human right. The human rights approach, by giving priority to those who are least advantaged, provides a way of considering and balancing the interests of different parties.

Recommendation

New Zealand's international human rights obligations should be specifically referred to in the DV Act, in the long title, objects and principles of the Act, including recognition that this means giving special attention and if necessary priority for those who are most vulnerable or at risk should their rights not be protected.

3. ss9 & 12 Need to appoint a representative for child who applies for protection order

Sections 9 and 12 of the DV Act state that a minor under 16 years can only apply for a protection order through a representative appointed by the Court. "Representative" means a guardian ad litem or next friend appointed under r90 Family Courts Rules 2004. The terminology "next friend" and "guardian ad litem" is archaic and has replaced in the High Court Rules by the term "litigation guardian" and we use that term below.

The appointment of a representative for a minor is a cumbersome and time-consuming process. In most civil litigation a litigation guardian will be a parent of the child but in family litigation this is seldom appropriate. The litigation guardian must be a person who does not have a contrary interest to that of the child: r90(3)(c) FCR. Where there is an application for a protection order by a person aged 16 or younger who is living at home, his or her parents or carers are likely to have a contrary interest and will usually not be eligible for appointment as the child's litigation guardian. This means someone has to chase around and find a person willing to take on the role of litigation guardian for the child. Some people may be put off by the fact that they are not paid for their time and responsibility and can be liable for costs in the proceeding: r95. Once a suitable person is found, application has to be made to the court to make or confirm the appointment. The role of a litigation guardian in family matters has never been clearly defined but it is generally believed that a litigation guardian is not obliged to act on the child's instructions or act in accordance with the child's views but can make decisions in relation to the proceedings that the child could have made if s/he had been an adult. A litigation guardian might decide to discontinue the proceedings thus denying the child the opportunity to obtain a protection order.

Section 9(3) of the DV Act is an odd provision and is obviously an attempt to meet the requirements of Art 12 UNCROC. It states that, notwithstanding the appointment of a representative, nothing shall prevent a child from being heard in the proceedings and expressing views on the need for, and the outcome of, the proceedings. It further states that the Court must take into account the child's views to the extent it thinks fit having regard to the age and maturity of the child.

While is an attempt to meet the requirements of Art 12 UNCROC, it provides no mechanism whereby the child's views can be ascertained and transmitted to the Court. A litigation guardian is not obliged to advise the court of the child's views and there is no requirement in the DV Act that a lawyer for the child be appointed. The qualification that the child's views shall be taken into account only to the extent of the child's "age and maturity" can result in the child's views not being ascertained because the child is seen as too young to have views worthy of consideration. It was

for this reason that the qualification “having regard to the age and maturity of the child” was omitted from s6(2)(b) Care of Children Act.

Recommendations

A person under the age of 18 years who applies for, or wishes to apply for, a protection order should automatically have a lawyer for the child appointed unless the child has expressed a wish to arrange private legal representation. If the child is represented by a lawyer, no useful purpose is achieved by the appointment of a litigation guardian. As Justice Baragwanath has observed in a recent decision, “litigation guardian” requirements may reflect an out of date attitude towards children.

The child’s right to express views and have those views taken into account should be an overarching principle applying to all proceedings under the Act and the “age and maturity” qualification should be removed

4. s10 Protection orders against minors

Section 10 DV Act states that no application for a protection order may be made against a minor who is under the age of 17 years unless the minor is married or in a civil union or de facto relationship.

This section is unsatisfactory in a number of respects and should be reviewed. The logic in preventing protection orders being made against children under the age of 17 unless they are married or in a civil union or de facto relationship is not obvious.

If persons under the age of 17 have acted in a manner that constitutes “domestic violence” within the meaning of the DV Act and other family or household members are at risk then the youthfulness of perpetrators should not be a reason for exempting them from having a protection order made against them. Some teenagers may behave violently or in a sexually inappropriate manner to younger siblings or to young members of their household and the needs of the younger children for protection should have priority in such situations. Under the CYPF Act, criminal proceedings cannot be brought against anyone under the age of 14 years and if a protection order was able to be made against a child under 14 years it could not be enforced through criminal prosecution. For this reason there would be some justification for fixing the age at which a protection order can be made against a young person at 14 years. Parents and carers have a responsibility to care for their children until their guardianship responsibilities end when the child reaches 18 years and a protection order requiring a child to leave home should not be made against a child under the age of 18 years except in special circumstances. Children can leave home and live independently of their parents at age 16 years and, if necessary for the protection of younger children in the family, a protection order should be able to be made requiring a 16 or 17 year old to leave home.

The current provision that a protection order can be made against a person under 17 years if that person is married, in a civil union or in a de facto relationship only applies to 16 year olds because under-16s cannot marry or enter a civil union and the

term “de facto relationship” as defined in the Interpretation Act applies only to over 16s. It is illogical to treat 16 year olds who are married or partnered differently from those who are not. Parent abuse occurs in this age group and abuse of younger siblings or household members is not uncommon.

Recommendation

Section 10 should be amended so that a protection order can be made against any person aged 14 years or older but a protection order requiring a person under 18 years to leave home shall not be made unless the young person is 16 or 17 and there are special circumstances

5. Family Court exercising powers under the DV Act has no power to order that contact between a parent and a child be supervised

Under s48(1) Care of Children Act, the Family Court has power to make an order that a parent, guardian, partner of a parent or member of a child’s whanau or family group have contact with the child and it can make a contact order subject to a condition that contact be supervised. Where an allegation has been made that a party to the proceedings has used violence, the Court is must order that contact with the violent party be supervised unless satisfied the child will be safe with the person having contact: s60(3)(b) and (4) There is no equivalent power under the DV Act to order that contact with a person who has been proved to have been violent or abusive be supervised, nor is there any power under the DV Act to vary an existing contact order to attach conditions to ensure the child’s safety.

Recommendation

The Act should be amended to give the Family Court power, in deciding an application under the DV Act, to make a supervised contact order or to vary an existing order by attaching conditions to ensure the safety of the child.

6. The review of Victims of Domestic Violence immigration policy

Paragraph 332 of the 5th Periodic Report of the International Covenant on Civil and Political Rights raised issues around the Victim of Domestic Violence (VDV) immigration policy.

Recommendation

This review should take into account the rights of children caught in such circumstances, and ensure that New Zealand is compliant with its obligations under UNCROC, including acting in the best interests of the child (Art 3).

Part 2 ISSUES RAISED IN THE DISCUSSION PAPER

Para 1.1.1 p16 *Should police be able to issue short term protection orders when called to a domestic violence incident*

We strongly support the proposal that police who attend a domestic violence incident should be able to issue a short term protection order for up to 72 hours. The police should also be able to apply to the Family Court for an extended or permanent protection order. We favour option 2.

Currently the police, if they have sufficient evidence that a serious offence has been committed, can arrest the offender who will be held in police custody until appearance before a court. It will be for the court to decide whether to grant bail and the conditions of such bail. Where the alleged violence is not so serious as to justify arrest, the offender will be given a warning and the victim will be advised to see a lawyer and apply for a protection order. The process of applying for and obtaining a protection order takes time and involves the applicant in expense for legal fees or delays while a legal aid application is made and decided. In the intervening period, the victim may be heaved by the perpetrator not to take the matter further. If the violence has been directed towards a child there are additional procedural complications because of the necessity to appoint a “representative” for the child and this is likely to means further delays.

From the point of view of children of the family who have seen or heard the violence or have been affected by the psychological abuse (shouting, threats, swearing, verbal abuse) the immediate issue by the police of a protection order would offer them on the spot protection from further violent incidents. If there is a statutory requirement that the local police station and the closest 24 hour police station be notified promptly of the protection order, rapid police intervention is possible and the perpetrator will be aware that even minor violence may result in arrest for breach of the protection order.

In several Australian states and territories police can apply to the court for a protection order or restraining order. New Zealand has chosen to go in a different direction with protection orders being made by the Family Court on the application of the victim. This involves the victim having to see a lawyer and apply for legal aid (which may require the victim to make some financial contribution). Having practised in Australia we see advantages in the police applying for protection orders. It is a recognition that domestic violence is criminal offending and that the state, through the police, has a responsibility to protect victims of violence. Giving police the power to issue short term protection orders and the power to apply for extended or permanent protection orders would simplify and speed up the process. It would mean that the victim does not have to take the initiative of seeing a lawyer and commencing proceedings in the Family Court with the accompanying delay, anxiety and expense. Some victims of domestic violence move to a women’s refuge or some other temporary accommodation as a means of self-protection and it may be difficult for them to get into a lawyer’s office because they are busy making accommodation arrangements. Under the current system, because the victim has to take the initiative to apply for a protection order, the perpetrator’s anger will be turned against the victim who may be discouraged from applying for a Family Court protection order

by threats or manipulation. If the protection order is seen as a police matter rather than a civil proceeding instituted by the victim the perpetrator will be less likely to be provoked to further violent behaviour.

Para 1.1.2 p20 *Should the Courts have to give written reasons when declining to make a temporary protection order or requiring that the application be put on notice?*

Para 1.1.3 p20 *When a “without prejudice” application for a protection order is declined or put on notice should the applicant be entitled to a Court hearing to review that decision?*

We support both these proposals.

Para 1.1.4 p21 *Should the judge be able to discharge a protection order only where satisfied that the protected person and the children will be safe from all forms of the respondent’s violence?*

We agree with this proposal and favour Option 2 with there being specific reference made to the safety of children. Too often the issue considered by the court is whether the respondent’s spouse or partner is in need of continued protection even though the protection order is also intended to provide protection for the children of the household.

Para 1.2.1 p26 *Should the criteria for arrest for breaching a protection order be retained, amended or repealed*

We consider the current criteria unhelpful. If the criteria are amended there should be a new emphasis on the safety of the children from physical, sexual and psychological abuse.

Para 1.2.2 p28 *Two-tier penalty system for breach of protection orders*

We favour one maximum penalty of up to five years imprisonment which should also apply to failure to attend a programme. Failure to attend a programme amounts to defiance of the court’s order and increases the risk to the victim and/or the children of further violence.

Para 1.3.1 p32 *Use of Domestic Violence affidavits in bail hearings.*

Such affidavits should be able to be used in any subsequent bail hearings where the offence is breach of a protection order, an assault against a protected person or any offence of violence or abuse against a child of the household.

Para 1.3.2 p35 *New power for criminal courts to make a protection order in favour of the victim of the offending*

We support this proposal and favour the New South Wales provisions. The power to make a protection order should extend to making a protection order in favour of

children of the household even where the criminal offending before the Court relates to a spouse or partner rather than the children.

Para 1.4.1 p38 *Review of contact issues after temporary protection order made*

We agree that parties to a protection order should be able to come to Court at an early opportunity to review arrangements for the care of children in the light of the constraints imposed by the protection order. Our earlier recommendation that, on the making of a protection order, the court should have the power to attach a supervision order to a current contact order or make a new supervised contact order may go some way to resolving the problem identified.

Para 1.4.2 p40 *Should the criteria for appointment of lawyer for child be widened?*

The criteria should be widened as proposed in Option 2.

Para 1.4.3 p42 *Should children remain covered by a protection order when a protected person dies?*

Children should continue to be covered by a protection order until age 18 years (not 17 years) or earlier discharge of the protection order even if the protected person dies.

Para 1.4.4 p43 *Should children be covered by a protection order after the age of 17 years?*

Yes. Children have a right to protection from abuse under UNCROC until they attain the age of 18 years. If they no longer want the protection of a protection order, application can be made to discharge the order and the application should be determined according to the welfare and best interests of the child after taking into account the child's views.

We are surprised that age 17 is used given the introduction of the CYPF Act (No6 amendment) Bill.

Para 1.5.2 p47 *Compulsory recall of respondent who fails to attend programme*

We favour Option 2

Para 1.5.3 p48 *Ability of respondents to attend further free programmes*

We support this idea where the organiser of the programme considers that the respondent would benefit from further attendance at programmes.

Para 1.5.4 p48 *Power to direct that respondent attend drug and alcohol (or gambling) programme*

There should be such a power. Such a direction should be in addition to addressing the issues of violence.

We note that there is a serious lack of drug, alcohol and gambling services in many parts of New Zealand.

Para 1.5.6 p52 *Programmes for children to be made more available*

Option 2 proposal is agreed with, subject to the age of eligibility being raised to 18 years, and there is recognition that because the effects of violence on the child may take time to become apparent, the child may require assistance years later.

Para 1.5.7 p54 *Protected persons to be informed of respondent's progress with programme*

This information should be made available only to protected persons who make an inquiry.

Para 2.1.1 p56 *Definition of violence*

We strongly agree that the definition of "violence" in the Care of Children Act should include psychological abuse as does the definition in Domestic Violence Act.

Para 2.1.2 p57 *Specialist reports before consent order- Care of children Act*

Obtaining a specialist report in these situations will result in delays and further interviewing of children and reports should be discretionary and not mandatory.

Para 2.1.3 p58 *Specialist reports before contact order*

We consider the present powers available to the Family Court are adequate.

Para 2.1.4 p59 *Amendment re relocation*

Such an amendment would make inroads into the discretion of judges in their assessment of the welfare and best interests of the child and we are opposed to it.

Para 2.1.5 p60 *Whether definition of "child" in Domestic Violence Act should include 17 year olds and 16 year olds who are married or in a civil union or de facto relationship*

The current definition of "child" in s2 DV Act is inconsistent with UNCROC and is different from the definition in s8 Care of Children Act. The UN Committee on the Rights of the Child recommended in 1997 and again in 2003 that New Zealand make legislative changes to bring age cut offs in legislation into line with UNCROC. There is a need to amend both the CYPF Act and DV Act to include all 17 year olds and married and partnered 16 year olds in their ambit.