# Submission on the Family and Whanau Violence Legislation Bill

WOMEN'S REFUGE
NATIONAL COLLECTIVE OF INDEPENDENT WOMEN'S REFUGES INC.
*Ngā Whare Whakaruruhau o Aotearoa*

## Introduction

1. The National Collective of Independent Women's Refuges (NCIWR) is a non-governmental organisation delivering services to women and children affected by domestic violence in New Zealand. NCIWR provides support, advocacy, legal, and health services to 16,507 clients annually. 52 percent of these are women, and 48 percent are children. Last year, 2,852 women and children needed to be admitted into our safe houses to protect them from ongoing violence.
2. Please note we wish to appear before the Select Committee for this Bill.
3. In principle, we support this Bill and see the majority of the provisions contained within it as having the potential to strengthen safety for victims of family and whanau violence and their children. However, we have also highlighted key areas of concern, chiefly relating to definitions and to issues of consent, system capability, privacy, and care of children. We outline the rationale for these concerns and suggest amendments relating to these provisions below.

## Changing Definition of Child

Previously, 16 and 17 year olds were able to make applications for protection orders if they were in de-facto relationships or marriages. The adapted definition of 'child' in Clause 19, Section 9 as anyone under 18 despite their relationship status has precluded young people's abilities to make applications for such orders without a representative, which does not take into account the growing capacity of young people to exercise autonomy and act without assistance to obtain protection. In addition, given the complexity and variability inherent in young people's relationships with helping services (and therefore with representatives) and the power differential that is unavoidably present in these, we argue that many young people may become disempowered by the requirement to use a third party, and should have the option of accessing avenues for safety of their own accord and where they are the principal actor in this process.

This is particularly pertinent given that in our experience, young people in need of such protection are those typically categorised as 'hard-to-reach', and often demonstrate distrust of designated 'helpers',

which may pose barriers to them seeking help through a representative, even in times of extreme need.

## Child of an Applicant's Family

We strongly support the extended definition, which takes into account complex family relationships and provides greater safety for children being cared for by protected persons.

## Definition of Family and Whānau Violence

Clause 9 (replacement of Section 3 of the DVA) incorporates economic abuse as a subset of psychological abuse as a distinct category of family violence, and uses the DVA's Section (3)(2)(iva) definition: "financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)" but we propose that this definition is expanded to state: "financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education, or the appropriation or manipulation of personal funds through force, coercion, or deceit").

According to our recent research into economic abuse in new Zealand, control and manipulation through appropriating funds, or using coercion or deceit to take out debt that would later preclude options for leaving the relationship, constituted a severe and debilitating method of power and control that insidiously but effectively created dependence, isolation, and long-term adverse social outcomes. We therefore argue that the primacy of economic abuse as a method of assuming power over a partner should be recognised through an expansion of the current definition.

## Consent to Contact with a Protection Order

Clause 19's proposed insertion of new Section 19(b) specifies that while consent to have contact must be communicated in writing to the respondent of a protection order by the applicant, the applicant may rescind this consent to contact through any means, including verbally. We feel this accurately reflects the often rapidly-changing dynamics in which agreed contact situations may suddenly escalate between an abuser and a victim, and support the victim's right to rescind that contact agreement

through whatever means available to her at the time, including verbally, which may be either face to face or over the phone.

It also sends a clear signal as to the gravity of the requirement for consent, and may be useful in terms of clarifying whether or not consent had been given following allegations of breaching the terms of a protection order.

## Protection of Persons other than Applicant

Clause 17, Section 16 of the Bill would allow for the court to direct that the order also provide for the benefit of any person with whom the person has a family relationship and is not a child (e.g. a sister or mother with whom the person is residing). We regard this as wholly positive, in that it recognises the range of intimidation strategies that may be exercised against people close to the victim.

As evidenced by the annual statistics of family violence-related deaths and the accompanying analyses by the Family Violence Death Review Committee, new partners of women who have been subjected to intimate partner violence are also at risk for severe and life-threatening violence by these abusers. We view the extension of orders to potentially cover these partners as supportive of their safety.

## 'Responding'

In Clause 7 of the Interpretation, the new Section 1B titled 'Principles' states that decision-makers should collaborate whenever possible to identify and respond to family violence. It does not, however, identify what form that response should take – i.e., whether that compels the support of victims and the initiation of a multi-system response to protect the primary victim and, if applicable, that maximises their capacity to parent during and despite the abuse. At present, it could be interpreted as the right to intervene and to then regard the family unit as unsafe, risking further alienation or blame of the victim – especially as this is related to information-sharing. We therefore argue that this 'collaboration' be further refined, and that it aligns with the Capability Framework currently being developed in its analysis of victimisation impacts.

## Information Sharing

We have concerns about the implications of the proposed 51(C), Clause 31. Previously, a service provider for respondents had to provide information about safety risks during or after the intervention to the Registrar. If this is extended as proposed, providers of safety programmes will also be required to submit this information about clients who are not respondents, and the information would then also be required to be communicated to the District Commander at the appropriate police headquarters. In addition, if there is a perceived risk to a child, this information would be required to be communicated to the Chief Executive of the Ministry for Vulnerable Children/Oranga Tamariki. This is likely to impede full participation of protection order applicants in safety planning as they become aware that information is going to be passed on to police, the Registrar, and CYF – which could also then act as a deterrent for full disclosure during participation in these programmes.

The mandatory sharing of information upon request, as reiterated throughout the Bill and particularly the explanatory note, also presents challenges regarding the disparity between analyses or practitioners' impressions from service to service. These consequences could be far-reaching for victims if a practitioner records information that negatively portrays them and this becomes the accepted version of events by multiple providers (irrespective of the level of subjectivity), as victims would no longer have the opportunity to 'start over' with a new provider.

It can also be considered to impinge on true consent, and it is so far unclear whether or how Justice and Police will use this information to determine whether there is a history of violence. This includes schools, district health boards, and early childhood providers, who can request that information from specialist providers and are entitled to this disclosure – while this has to be in relation to a decisional plan for family violence, this scope is such that it provides a range of opportunities for this right to be abused and for victims to be disproportionately harmed by these disclosures.

We therefore argue that Section 124(v) should, at the very least, include a statement specifying that this information can only be used for the purposes of ensuring safety or supporting victims – as the purposes set out currently are too broad to ensure this information is used appropriately. There is some discretion for the information holding agency to have to be satisfied that this information will be

used for the purposes specified, but we remain concerned that until those purposes are made more specific and appropriately targeted, we, and other service providers, may be compelled to provide such information without just cause – and, in doing so, breach clients' privacy without their consent.

## Continued Absence of Required Consent

Clause 14, section 12(C) states that applications made on behalf of persons lacking capacity may be made if the person does not object, or that this objection is not freely made. This currently stands in the existing Domestic Violence Act; however, negates the right of the person to actively consent rather than passively comply with the wishes of a third party, even if acting in their interests. While we have sympathy with the intention of this provision and acknowledge the vulnerability of some victims subjected to ongoing abuse or coercion from partners or ex-partners regarding protection orders, we also affirm clients' (including those lacking capacity) rights to give true consent, rather than assent – particularly in legal processes.

We argue that assent is not sufficient to initiate a legal process, and that the onus should be on ensuring the victim has sufficient support to make such decisions. We believe that removing the imperative for true consent undermines victims' rights and agency, and that this provision as it stands is unnecessary and arguably paternalistic.

## Agency Applicants for Protection Orders

The Bill makes mention of agencies acting as applicants for protection orders. Our concerns about this provision are twofold.

Firstly, the Bill does specify that agencies applying agree to be responsible for any costs incurred by the applicant. Given that these agencies are likely to be predominately non-profit organisations with minimal capacity for unplanned expenditure, we contend that this merits further review. In addition, the additional work and consequent cost to these financially constrained helping agencies should be considered. This is likely to be time-consuming for these agencies, and may require significant upskilling of staff to ensure that protection order writers are trained in the construction of ethical and

appropriate applications for protection orders.

Secondly, our concern is for the quality of applications. The needs of victims harmed by partners or ex-partners may not be best served by helping agencies, irrespective of the level of support they have received or the high regard they might have for these pre-established relationships. The period during which victims apply for protection orders is typically characterised by intense vulnerability, pressure, and, often, chaos. Allowing agencies to take on a role previously held by lawyers - particularly given that most front-line staff are not trained in the law and may not have the communication skills to act effectively - may mean compromising the quality of assistance available, thus potentially jeopardising victims' safety.

We contend that, instead, we should re-institute a focus on making legal aid accessible for victims of family or whanau violence. If this provision is made into law, it should, at a minimum, be accompanied by a minimum capability assurance plan to ensure that victims are not adversely impacted by their decisions to accept agencies' offers to act as applicants for protection orders of their behalf.

## Standard Conditions of Protection Order

Clause 19, Section 19 proposes an amendment recognising the pattern of controlling behaviour that occurs alongside family and whānau violence, rather than discrete instances of offending. We strongly support this, as on-going expressions of control or dominance, despite often not meeting the threshold for any individual offence, are typically experienced by victims as tantamount to violent acts. This Section suggests an amendment removing the many examples of prohibited behaviour within the standard conditions, and replaces these with a standard prohibition of behaviour 'amounting to family violence'. We endorse this amendment on the grounds that this is simple, accessible, and captures the wide range of behaviours constituting family or whanau violence.

## Non-Contact While in Custody

Clause 109, proposed Section 168(A) changes the Criminal Procedure Act so that a judge may direct that the offender may not contact the victim or anyone else specified by the judicial officer while in

custody. This addresses a previous gap in provisions as historically offenders have been able to repeatedly call their victims while in custody without penalty. We are also pleased to note that non-adherence will then be considered in bail hearings. We support this as a positive step towards ensuring continuous safety from unwanted contact.

## Alternative Mode of Evidence-Giving

Clause 124, proposed Section 106(A) of the Evidence Act states that victims will have the right to elect alternative modes of giving evidence (previously only granted in certain conditions). This can be contested, but is still a giant step forward given the present high rate of attrition and onus of appearance for victims in court as a deterrent to continuing proceedings.

In our experience, victims drop out of court processes for a number of reasons, including pressure from families, constraints on their time and resources such as childcare or petrol costs, and feelings of guilt. However, the most commonly cited reason for choosing not to continue to participate in cases against their abusers is fear and the perceived risk of re-traumatisation, which they anticipate ahead of time and which then forms the basis of their decisions simply not to continue.

Additionally, we witness victims' reactivation of past trauma and significant distress during and immediately after court proceedings when they have had to be in close proximity to their abusers. We consequently applaud the introduction of this right to elect alternative ways of giving evidence, thus removing much of the basis for victims' fear and distress.

## New Section 51(D): Section 51(C)(5) not Re-Enacted

The current Act requires the Registrar to discuss with the service provider and then determine the number of sessions required by a protected person. According to the the Explanatory Note, Section 5(C)(5), will not be re-enacted due to unnecessary bureaucratic barriers. We see this as positive, as it gives the service provider greater discretion to exercise their ongoing professional judgement regarding protected persons' needs.

Victimisation through family or whānau violence is a widely variable experience; there is no potential

for the standardisation of required sessions to be effective for all victims. Rather, we respect and concur with the underlying assumptions inherent in this change of provision: that victims know their own needs best; that service providers are skilled, flexible, and can construct a plan for support in conjunction with protected persons; and that attempts to standardise session numbers hinders, rather than promotes, the safety and well-being of protected persons.

## Introduction of New Offences

Clause 93 introduces a strangulation offence; the penalty for which is on par with that for threatening to kill. We consider this excellent, as it constitutes an essential societal step forward in recognising the lethality and intentionality underpinning strangling as part of an abusers' strategies for demonstrating power and control. We also fully support the introduction of the other two new offences.

## Care of Children Act

We consider Clause 85, proposed Section 5(A) of COCA excellent in that the existence of protection orders or breaches of protection orders will be considered in decisions about care of children. However, we argue that the imperative to consider protection orders and breaches of these to include documented instances of family violence, given the intersection between harm to children and intimate partner violence, and the idea of abuse as a parenting decision by the primary aggressor. Our argument for this to be codified as an essential consideration is premised on the fact that this would then align more closely with the principles encapsulated in the government's Capability Framework.

We further submit that the wording of this Section could be easily reshaped to state that any previous proof (on the balance of probability, rather than on conviction) of family violence perpetration should be considered in care of children proceedings, rather than limited to only those that have progressed to protection orders. We view this as particularly important given that many women who have accessed our service and are victims of intimate partner violence have consciously decided that to seek protection orders would be counterproductive to safety.

This decision, while a rational one for safety, would then mean that their experiences are not included in Family Court care of children decisions, thereby disregarding the potential for harm to the children

and to the mother. We do not consider the attainment of protective orders as indicative of the extent of harm or the level of risk experienced by the primary victim and their children, and therefore see this provision as only serving some victims.