

Child and Family Protection Bill

Government Bill

Explanatory note

General policy statement

Background: the need for reform

New Zealand has a comprehensive set of laws designed to protect children and families from violence and abuse. These include laws to protect the victims of domestic violence, laws to determine who should have the day-to-day care of a child, laws to prevent the removal of a child from New Zealand where this may disrupt their care arrangements, and laws to protect a child who is the subject of an application for adoption.

However, issues have been identified with current legislation that restrict the ability of the State to protect the welfare and best interests of children and their families. New Zealand continues to have high rates of domestic violence. In 2007, 6 400 children were involved in applications for protection orders. Most of these children had witnessed violence and some had been subjected to violence directly. Children are harmed by seeing, hearing, or living with violence in the home. Exposure to psychological abuse can be as damaging as any other form of violence. Children who have experienced violence may suffer from increased emotional and behavioural problems, and impaired social skills.

There has also been an increase in the international movement of children for adoption purposes. This activity creates a risk that children

will be adopted when they do not need to be and without appropriate safeguards.

It is critical that the courts can act to protect children and families from all kinds of violence and abuse. There is a need to ensure that court processes are effective, that the protection provided by court orders is clear, administrative barriers are minimised, and that the Family Courts are able to manage concurrent proceedings involving children appropriately.

It is important to address the risk of children being wrongfully removed from New Zealand. Current powers are inadequate to deal with the modern day international movement of children for adoption purposes. New provisions are required to fulfil New Zealand's commitment to protecting the welfare and best interests of children, and to make it easier to prosecute offences relating to intercountry adoptions.

Main changes to existing law

The Bill proposes amendments to the Domestic Violence Act 1995 (the **DVA**), the Care of Children Act 2004 (the **COCA**), and the Adoption Act 1955. Consequential amendments are made to the Summary Proceedings Act 1957, the Extradition Act 1999, and the Mutual Assistance in Criminal Matters Act 1992.

Amendments to Domestic Violence Act 1995

The proposed amendments to the DVA relate to providing greater protection for child victims of domestic violence and to improving court processes.

Providing better protection for child victims of domestic violence

The Bill makes it clear that a protection order applies for the benefit of a child of an applicant until the age of 17, unless the order is sooner discharged. It allows a young person reaching the age of 17 who knows they will no longer be protected to apply to the Court for the order to continue for their benefit until they no longer live with the applicant or until the order is discharged.

The DVA is currently silent on whether children covered by a protection order remain covered by that order when the applicant dies. A person's death will put grieving family members under stress, and

confusion over legal requirements at this time is particularly distressing. The Bill therefore clarifies that a protection order that has not lapsed or been discharged continues for the benefit of any child of a deceased applicant until the age of 17.

The Bill inserts in the DVA a provision to allow that, where a Family Court is dealing with an application under the DVA, it may make interim orders relating to a child's care or vary existing orders even though no application has been filed. This provision is currently contained in the Care of Children Act 2004 where it may be overlooked if an application regarding care of a child isn't also being considered. The Bill also ensures that any lawyer appointed to act for a child under the Care of Children Act 2004 is explicitly allowed to be present at a hearing of proceedings under the DVA.

Most protection orders prohibit contact between the respondent and the children covered by the order. Some respondents claim that orders made on a without notice basis unfairly deny them contact with their children. Issues of contact with children can become a focus of dispute and have the potential to cause an escalation in hostility between partners. Evidence also indicates that children can benefit from continued contact with both parents. In response, and to ensure a focus on the best interests of the child, the Family Courts have adopted a practice of reviewing contact arrangements within a few weeks after a temporary order is made. The Bill codifies this practice, providing the Courts with the discretion to offer a review of the care arrangements which takes place only if both parents attend or are represented.

Changes to court processes and procedures

Ensuring that respondents engage in a stopping violence programme is a critical aspect of New Zealand's system that attempts to stop and prevent domestic violence. It is therefore important to minimise all administrative barriers to engagement in programmes. Currently, only a Judge can direct attendance at a programme. This process can become problematic if the respondent has not been served with a copy of the protection order containing the direction prior to the date specified for his or her first attendance at a programme. The Bill therefore enables the Registrar to amend the direction to require attendance at a later time.

The Bill also provides amendments to ensure that when any temporary order becomes final by the operation of law after 3 months, the final order comes into effect immediately. This avoids any opportunity for a gap that could result in protected persons having no protection. The Bill also addresses the uncertainty that has arisen about whether a Judge needs to specifically discharge a temporary protection order when making a final protection order.

Amendments to Care of Children Act 2004

One of the inconsistencies between the DVA and the CoCA is that psychological abuse is explicitly provided for in the DVA, but not in the CoCA. The CoCA contains specific provisions which prescribe the way in which the Court must deal with care and contact arrangements where physical and sexual abuse is alleged; they do not apply to allegations of psychological abuse. The Bill amends the CoCA by providing that where a protection order has been made against a party to an application for a parenting order, the Court may only make an order allowing that party day-to-day care, or contact with, a child if the Court is satisfied that the child will be safe. If the Court is not satisfied that the child will be safe, it may make an order for supervised contact between the child and the party. This ensures that where a protection order has been made on the ground of psychological abuse, children who have been subject to, or witnessed, that abuse will be afforded additional protection.

Decisions under the CoCA are made in accordance with the welfare and best interests of the child having regard to the relevant principles in section 5. Section 5(e) states that a child must be protected from all forms of violence. The Bill amends this section to adopt the definition of violence in the DVA to clarify that all forms of violence means physical, sexual, and psychological abuse.

The Bill also strengthens the protection for children at risk of unlawful removal from New Zealand. The restriction in section 77 of the CoCA to situations involving imminent risk of removal has been removed in order to protect children in cases where the risk of removal may not be “imminent”. The Bill will enable orders preventing removal to be more flexible by specifying that the child can travel overseas with a specified person or persons. It will also allow for the suspension of orders for a set period of time (currently parties must

discharge orders and apply for new orders). This could, for example, allow a child to travel overseas to attend a family wedding or funeral.

Amendments to the Adoption Act 1955

The Adoption Act 1955 contains important procedural protections to safeguard children who are the subject of an application to adopt. Section 27(1)(d) of the Adoption Act 1955 makes it an offence for any person to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child, or in consideration of making the arrangements for the adoption or proposed adoption, subject to certain exceptions. These exceptions relate to the payment of hospital and medical expenses, payments made to approved adoption agencies, and payments made pursuant to a court order. The offence is punishable by a term of imprisonment of up to 3 months or a fine up to \$15,000, or both.

However, this offence does not enable New Zealand to fulfil its international obligations to protect children and they are inadequate to deal with the modern day international movement of children for adoption purposes. Firstly, the offence carries a very low penalty of 3 months' imprisonment, which means that it is not an extraditable offence. Second, the provisions of New Zealand law require part of the offence to occur in New Zealand. Further, the penalties currently available under the Adoption Act 1955 are not severe enough to take into account the grave nature of the offence and are not commensurate with other penalties available for similar offences.

The Bill includes a new offence under the Adoption Act 1955 of improperly inducing consent for the adoption of a child to be punishable by a term of imprisonment of up to 7 years. The purpose of the proposed amendment is to ensure that New Zealand legislation fully complies with the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography so that it may be ratified.

Consequential amendments are also made to the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992, to ensure that New Zealand can carry out its international obligations in relation to the Optional Protocol. A consequential amendment is also made to the Summary Proceedings Act 1957.

Clause by clause analysis

Clause 1 is the Title clause. It is intended that the Bill will be divided, at committee of the whole House stage, into 3 separate Bills.

Clause 2 provides that the Bill comes into force 3 months after the date on which it receives the Royal assent.

Part 1 Amendments to Domestic Violence Act 1995

Clause 3 provides that *Part 1* amends the Domestic Violence Act 1995.

Clause 4 explains the purpose of *Part 1*.

Clause 5 amends section 2, which is the interpretation provision, and inserts definitions for the terms day-to-day care and parenting order, which are used in *new sections 28B to 28D*.

Clause 6 amends section 16 to clarify when a child of an applicant is, and is not, protected by a protection order. The amendments provide that:

- a child ceases to be covered by a protection order when he or she reaches the age of 17 years;
- a child of the applicant's family may apply to the Court for a direction that the protection order continue to apply to them until they no longer ordinarily or periodically reside with the applicant, or until the order is discharged;
- a protection order continues in force to protect a child of a deceased applicant until the child reaches the age of 17 years or the order lapses or is discharged (that being the conclusion reached in *Hemopo v Spark* (1999) 18 FRNZ 271).

Clause 6 also amends section 16 to provide that until a protection order lapses or is discharged, it continues in force after the death of the applicant to protect any other person for whose benefit the order applied pursuant to a direction under section 16(2).

Clause 7 inserts a new heading "*Interim care and contact orders*" and *new sections 28B to 28D*, which in essence re-enact section 54 of the Care of Children Act 2004 (which is repealed by *clause 20*). *New section 28B* provides that where an applicant who has a child applies for a protection order, the Court may make interim care or contact

orders to protect the welfare and best interests of the child. *New section 28C* provides that such interim orders cease to have effect on the earlier of 1 year after the date that the order is made or the date the child attains the age of 16. *New section 28D* requires a party in whose favour an interim order has been made to apply for a parenting order as soon as possible.

Clause 8 amends section 33 to address the difficulty that arises when the respondent or associated respondent has not been served with a copy of the protection order prior to the date specified in a direction for his or her first attendance at a programme. Section 33 is amended to provide that in these circumstances the Registrar can specify a later date in the direction and, if necessary, require the respondent or associated respondent to attend the programme at a different place.

Clause 9 amends section 36, which relates to directions to attend a programme made on applications without notice. The amendments—

- extend the time period between service of the direction and its taking effect from 5 clear days to 10 working days; and
- allow the respondent or associated respondent to lodge a notice of objection within those 10 days; and
- provide for the direction to be suspended from the time a notice of objection is received by the Court, until the Court confirms the direction.

Clause 10 amends section 60 to provide that where a temporary occupation or tenancy order becomes final by operation of law 3 months after the date on which it is made, the final order comes into effect immediately. This amendment is consistent with those made to sections 70 and 77 (in *clauses 11 and 12* respectively).

Clause 11 amends section 70 to provide that where a temporary ancillary furniture order or furniture order becomes final by operation of law 3 months after the date on which it is made, the final order comes into effect immediately. This amendment is consistent with those made to sections 60 and 77 (in *clauses 10 and 12* respectively).

Clause 12 amends section 77 to provide that where a temporary protection order becomes final by operation of law 3 months after the date on which it is made, the final order comes into effect immediately. This amendment responds to the decisions of *Police v Bragovits* (District Court, Waitakere, 16 March 2000) and *Police v Fox*

(High Court, Hamilton, 13 December 2000), to ensure there is no lacuna in the legislation in respect of when the final order can be enforced. Similar amendments are made to sections 60 and 70 (*see clauses 10 and 11*).

Clause 13 inserts *new section 79A* to provide an early opportunity to review contact issues after a temporary protection order is made. This addresses the criticism made by some respondents that a temporary protection order obtained on a without notice application unfairly denies them contact with their children in those cases where contact arrangements cannot be agreed with the applicant. *New section 79A* provides that when making a temporary protection order the Court may direct the Registrar to convene a review before a Family Court Judge of the contact arrangements between the respondent and a child of the applicant's family. Both the applicant and respondent are invited to attend the review. If both the applicant and respondent attend or are represented at the review, the Judge may do any of the following: make an interim contact order, impose conditions relating to the manner in which the respondent is to have contact, and make any necessary directions.

Clauses 14 and 15 address the uncertainty that has arisen about whether a Judge needs to specifically discharge a temporary order when making a final order. Section 80(1)(b) is amended to remove reference to the discharge of a temporary order and *new section 80A* is inserted to provide that where a temporary order is replaced by a final order, or is confirmed, the temporary order is automatically discharged.

Clause 16 amends section 83 to enable a lawyer who is appointed under the Care of Children Act 2004 to act for a child to be present at the hearing of proceedings under the Domestic Violence Act 1995 where the child is a child of the applicant's family. Currently, only a lawyer who is appointed under the Domestic Violence Act 1995 to represent a child may be present at the hearing of proceedings.

Part 2

Amendments to Care of Children Act 2004

Clause 17 provides that *Part 2* amends the Care of Children Act 2004.

Clause 18 explains the purpose of *Part 2*.

Clause 19 amends section 5, which sets out the principles relevant to the child's welfare and best interests. Paragraph (e) states that a child's safety must be protected and, in particular, the child must be protected from all forms of violence. The words "as defined in section 3(2) to (5) of the Domestic Violence Act 1995" are added to paragraph (e), to clarify that the reference to violence includes not only physical and sexual abuse, but also psychological abuse.

Clause 20 repeals section 54, which provides that when an application is made under the Domestic Violence Act 1995 for a protection order, the Court may make interim care and contact orders. This provision has been carried over to the Domestic Violence Act 1995 (*see clause 7*) and can therefore be repealed.

Clause 21 makes a technical amendment consequential on the repeal of section 54.

Clause 22 amends section 58 to define allegation of violence, protection order, and violent party, which are terms used in sections 59 and 60 (as amended by *clauses 23 and 24*).

Clauses 23 and 24 amend sections 59 and 60 respectively, which set out the procedure for dealing with applications for day-to-day care of, or contact with, a child when there is an allegation that one of the parties has used violence against the child or the other party to the proceedings. In such cases the Court must have regard to a number of matters and only make an order if it is satisfied that the child will be safe while the violent party provides day-to-day care for the child, or has contact with the child. If the Court is not satisfied of this, it may make an order for supervised contact between the child and the violent party.

The effect of the amendments in *clauses 23 and 24*, combined with the new definition of violent party, is to extend sections 59 and 60 to apply not only where an allegation of violence is made, but also where there is currently in force a protection order against one of the parties for the protection of the child or the other party.

Clause 25 amends section 77, which deals with preventing the removal of a child from New Zealand. Under section 77, an order can be made preventing the removal of a child. Currently, an order can only be made if it is believed on reasonable grounds that a person is about to take a child out of New Zealand. This is a high threshold and does not acknowledge that the risk of removal may not be im-

mediate, but is nonetheless real and ongoing. Section 77 is amended to lower this threshold and enable an order to be made when there are reasonable grounds to believe that a person may take a child out of New Zealand. Rather than a blanket prohibition on removal, the amendment affords flexibility to enable an order to name persons with whom a child may leave New Zealand.

Clause 26 inserts *new sections 77A and 77B*. *New section 77A* provides that, unless there are special circumstances, an order made under section 77 preventing the removal of a child from New Zealand—

- may not be made in respect of a child of or over the age of 16 years:
- will expire when a child attains the age of 16 years.

New clause 77B provides that an order preventing the removal of a child from New Zealand may be suspended for a specified time and in relation to a specified person. An application may be made to—

- a High Court Judge, District Court Judge, or a Family Court Judge; or
- a Registrar of the High Court or of a District Court, if the application is made by a person who was a party to proceedings under section 77 and every other person who was a party to those proceedings consents to the suspension of the order.

Clause 27 amends section 118(3) so that *new sections 77A and 77B* also apply where a Judge makes an order under section 77 preventing the removal of a child in the circumstances set out in section 118.

Clause 28 inserts *new section 122A* to enable the discharge of an order made under section 105 that a child abducted to New Zealand be returned to a person or country specified in the order. After a section 105 order is made, parents can subsequently come to an agreement on the child's care arrangements, including that the child remain in New Zealand, and that the order not be enforced. There is currently no mechanism in the legislation for discharging a section 105 order and this was confirmed in the recent Court of Appeal decision *Butler v Craig* [2008] NZCA 198. This means that a party who obtains an order under section 105 could choose to enforce it at any time until the child attains 16 years. *New section 122A* empowers a

Judge to discharge a section 105 order on the application of a person who was a party to the proceedings under section 105 if—

- all the parties to the earlier proceedings under section 105 consent; or
- the application is made not earlier than 1 year after the order was made and the Court is satisfied that the child is settled in New Zealand and that in all the circumstances the discharge of the order is warranted.

Part 3

Amendments to Adoption Act 1955

Clause 29 provides that *Part 3* amends the Adoption Act 1955.

Clause 30 explains the purpose of *Part 3*.

Clause 31 amends the heading to section 27 and repeals section 27(3).

Clause 32 inserts *new sections 27A to 27D*.

New section 27A provides that it is an offence for a person to induce another person, by improper means, to consent to an adoption. The penalty for this new offence is up to 7 years' imprisonment.

New section 27B re-enacts the provision in section 27(3) (repealed by *clause 31(2)*), but with a broader application. It enables a court to order that a child be removed to a place of safety in any case where an offence under existing section 27 or *new section 27A* has been committed in respect of that child.

New section 27C provides for extraterritorial jurisdiction in respect of an offence against *new section 27A*. This jurisdiction will ensure that New Zealand complies with its obligations under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000.

New section 27D requires the Attorney-General's consent to be obtained where jurisdiction is claimed under *new section 27C*.

Clause 33 amends Part 2 of Schedule 1 of the Summary Proceedings Act 1957 to provide that the indictable offence in *new section 27A* may be tried summarily.

Clause 34 makes consequential amendments to the Extradition Act 1999.

Clause 35 makes consequential amendments to the Mutual Assistance in Criminal Matters Act 1992.

Regulatory impact statement

Executive summary

Despite a comprehensive set of laws designed to protect women, children, and men from violence and abuse, New Zealand continues to have high rates of domestic violence, affecting thousands of New Zealanders from all cultures, backgrounds and circumstances. During the 13 years of operation of the Domestic Violence Act 1995 (**DVA**), concerns have been raised about the need to strengthen the ability of the DVA to achieve its object of reducing and preventing domestic violence, and providing victims with effective legal protection. Legislative amendment is underway in regard to strengthening the responsiveness of the criminal justice system to victims of domestic violence in the Domestic Violence (Enhancing Safety) Bill. Further amendments are required to protect children and families from violence and abuse. Concerns have also been raised regarding the need to update powers in the Care of Children Act 2004 (**CoCA**) restricting children being wrongfully removed from New Zealand and the powers available to deal with the modern day international movement of children for adoption purposes. New Zealand is among a minority of countries that have not ratified the Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography (the **Optional Protocol**), as part of the United Nations Convention on the Rights of the Child (**UNCROC**).

Adequacy statement

The Ministry of Justice confirms that the analysis contained in this regulatory impact statement meets the adequacy requirements. The need for regulatory reform has been considered in consultation with a range of stakeholders, and included a public domestic violence discussion document as well as consultation with government agencies and non-government organisations (**NGOs**) involved in the domestic violence sector.

Status quo and problem

New Zealand is committed to protecting the welfare and best interests of children. This goal lies at the centre of New Zealand family law legislation including the DVA and the CoCA. New Zealand is a party to UNCROC, but is among a minority of countries that have not ratified the Optional Protocol.

Despite a comprehensive set of laws designed to protect children and families from violence and abuse, New Zealand continues to have high rates of domestic violence, affecting thousands of New Zealanders from all cultures, backgrounds, and circumstances. For example, Police responded to 82 692 domestic violence incidents in 2008. Although it is difficult to measure, the social and economic cost of domestic violence is significant, both for victims experiencing violence, and for children who witness it. Offending inflicts emotional harm, serious physical injury, and death.

Children are often the victims of physical and sexual abuse in the home. Lifetime estimates of child abuse suggest 4–10% of New Zealand children experience physical abuse, and 24% of girls and 11% of boys experience sexual abuse. Children are also harmed by seeing, hearing, or living with violence in the home. In 2007, 6 400 children were involved in applications for protection orders. Most of these children have witnessed violence and some have been subjected to violence directly. Children who have experienced violence may suffer from increased emotional and behavioural problems, and impaired social skills.

Although there is a general consensus that the principles of the DVA are sound, concerns raised with the Ministry of Justice about particular aspects of the DVA during its 13 years of operation indicated a need for further examination and consultation. Many concerns related to the need to strengthen the ability of the DVA to achieve its object of reducing and preventing domestic violence, and providing victims with effective legal protection. This strengthening requires legislative reform in order to improve the way the DVA operates. Further non-legislative reform is being undertaken including improvements to law enforcement procedures.

Some of these concerns regarding legislative reform are being met through the Domestic Violence (Enhancing Safety) Bill currently before Parliament. This Bill focuses on providing adequate protection for victims through an appropriately strong enforcement response,

especially at the time that Police are called to a domestic violence incident. It also enhances the response of criminal courts to domestic violence.

There are also a number of technical concerns regarding the implementation of the DVA that have been raised by the judiciary and Court staff. These include the treatment of temporary orders and the ability for a Registrar to amend the date and time of a direction to attend a programme when a direction has not been served before the start of that programme.

There remain other concerns that the DVA does not provide an adequately balanced approach to issues relating to children, and that provisions relating to children, between the DVA and the CoCA could be better aligned. Examples include respondents' access to their children, especially where access is denied after the issue of a temporary protection order (issued without notice to the respondent); and the interface between the DVA and the CoCA relating to parenting orders and issues of psychological abuse. Finally the DVA also lacks clarity about whether a protection order continues for the benefit of children after they reach 17 years of age, or in situations where the applicant dies.

Issues have also been identified regarding the legal framework set out in the CoCA for dealing with the wrongful removal of children from New Zealand. Wrongfully removing children from New Zealand disrupts care arrangements and puts children at risk of harm. There is a particular interest in preventing further harm to children in cases which involve violence. The proposals in the Bill enhance the current framework to reduce the risk of wrongful removal.

Issues have also been raised that New Zealand has yet to ratify the Optional Protocol. The Optional Protocol aims to enhance the international legal protection for children from sexual and other forms of exploitation by requiring State Parties to prohibit various activities associated with the sale of children, child prostitution, and child pornography, whether they are committed domestically or transnationally. The Optional Protocol also deals with issues which arise from the commission of or conviction for these offences.

The Optional Protocol was signed by New Zealand in September 2000, at which time the Ministry of Justice was directed to identify the extent of legislative change that would be required before New Zealand could ratify the Optional Protocol. Since that time, a num-

ber of legislative amendments have been made to ensure that New Zealand's domestic law complies with the Optional Protocol. However, one legislative amendment remains before New Zealand can ratify—an offence with extraterritorial application that prohibits improperly inducing consent to the adoption of a child.

The purpose of adoption law is to provide a child who cannot be cared for by his or her own parents with a permanent family life. The Adoption Act 1955 contains important procedural protections to safeguard children who are the subject of an application to adopt. Generally speaking, a child cannot be adopted without the consent of the child's parents. Section 27(1)(d) of the Adoption Act 1955 makes it an offence for any person to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of making the arrangements for the adoption or proposed adoption, subject to certain exceptions. These exceptions relate to the payment of hospital and medical expenses, payments made to approved adoption agencies, and payments made pursuant to a court order. The offence is punishable by a term of imprisonment of up to 3 months or a fine up to \$15,000, or both.

There has been an increase in the international movement of children for adoption purposes. This movement creates a risk that children will be adopted when they do not need to be and without appropriate safeguards. The offence provisions in the Adoption Act 1955 are currently inadequate to deal with the modern day international movement of children for adoption purposes. Because of the low penalty (3 months), the offence is not extraditable. The Extradition Act 1999 requires an extradition offence to be punishable by 12 months' imprisonment. In addition, the offence does not have extraterritorial effect, as the provisions require part of the offence to occur in New Zealand. This prevents New Zealand authorities from prosecuting this offence in New Zealand where it has occurred overseas and New Zealand does not extradite the offender.

There is also concern that the existing penalties, in particular the term of imprisonment, are not severe enough to take into account the grave nature of the offence. For instance, similar offences in Australia and Canada carry terms of imprisonment of up to 2 years. Further, the penalties currently available under the Adoption Act 1955 are not commensurate with other penalties available for similar offences. Under section 105C of the Crimes Act 1961, bribery of a foreign

public official is an offence punishable by a term of imprisonment of up to 7 years. As such, under the current regime, there is a disconnect in that inducing a foreign individual to consent to an adoption carries a far less severe penalty than bribing foreign officials for other, arguably less destructive, purposes.

The above issues raise concerns about the effectiveness of the current provisions in the DVA, the CoCA, and the Adoption Act 1955 that affect all parties—victims, respondents, and children, as well as the Police and the court system. Keeping the status quo exposes all of these key stakeholders to levels of risk that will be minimised by the reform proposals.

Objectives

The reforms seek to strengthen the DVA and related legislation to ensure an optimal response to domestic violence. The policy objectives of the reforms are to—

- ensure consistency between CoCA and the DVA, in order to better support children involved in protection orders and parenting order proceedings:
- clarify whether children and young people remain covered by a protection order in certain circumstances:
- reduce the risk of children being wrongfully removed from New Zealand, disrupting their care arrangements and placing them at risk of harm:
- clarify processes for serving directions to attend programmes in order to remove obstacles to respondents completing programmes:
- resolve technical details in relation to temporary orders:
- enable New Zealand to ratify the Optional Protocol.

Alternative options

Non-regulatory options

An effective legislative response to protect the welfare and best interests of children forms an important component of the overall government's work to strengthen families and take action against family violence, but it operates within other measures such as prevention and education. This reform package has been designed to work with and

strengthen a range of other non-regulatory measures, including improved inter-agency responses and the work programme of the Taskforce for Action on Violence within Families.

In each case where legislative reform is proposed, regulation is viewed as providing the best way to achieve the desired policy objectives and non-regulatory options are considered to provide a less effective response.

Alternative regulatory options

The public domestic violence discussion document *A Review of the Domestic Violence Act 1995 and Related Legislation* sets out a range of regulatory options for some reform proposals. These alternative regulatory measures were discounted after careful consideration of the issues and after consultation. Many offered a weak or partial solution, especially in terms of victim safety. Other options did not adequately balance the rights of all parties.

Ratification of the Optional Protocol cannot be achieved without the creation of a new offence in the Adoption Act 1955. Current legislation falls short of the requirements of the Optional Protocol because the existing offence is not extraditable, does not have extraterritorial effect, and the penalties are not severe enough to take into account the grave nature of the offence.

Status quo

Problems with the status quo gave rise to the issues consulted on in regard to proposals for change. Therefore, retaining the status quo in each case would only serve to perpetuate the particular problem under consideration.

Preferred option—legislative reform

The preferred options involve amending the law to—

- ensure consistency between the CoCA and the DVA by—
 - providing that when a protection order is issued under the DVA on the basis of psychological abuse the supervised contact provisions of the CoCA are triggered:
 - adopting, in section 5(e) of the CoCA, the definition of violence in the DVA:

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- allowing an early opportunity to consider contact issues in the case of a temporary protection order:
 - providing access to protection order proceedings under the DVA to a lawyer appointed to act for a child under the CoCA:
 - ensure greater clarity in the DVA in regard to some aspects that affect children by—
 - making it clear that a child remains covered by a protection order in the event of the death of the person for whose protection the order was made:
 - making it clear that a young person who has reached the age of 17 years is no longer covered by a protection order:
 - enabling a 17-year-old child of the applicant's family to apply to have a protection order continue for his or her benefit:
 - prevent the wrongful removal of children by amending the CoCA—
 - making it easier to obtain an order preventing the removal of a child from New Zealand by removing the requirement to show that the risk of wrongful removal is imminent:
 - enabling conditions to be placed on orders preventing removal:
 - clarifying that the maximum duration of orders will be until the child is 16 years of age, unless otherwise stated:
 - allowing for the suspension of removal orders for a set period of time:
 - allowing for the discharge of an order for the return of a child abducted to New Zealand:
 - ensure greater clarity in court processes regarding—
 - the treatment of temporary orders:
 - the ability of a Registrar to amend a direction to attend a programme:
 - enable New Zealand to ratify the Optional Protocol by—

- amending the Adoption Act 1955 to create an offence of improperly inducing a consent to the adoption of a child:
- making consequential amendments to the Summary Proceedings Act 1957, the Extradition Act 1999, and the Mutual Assistance in Criminal Matters Act 1992.

Benefits

The proposed reforms will improve Justice sector outcomes and assist in enhancing the safety of New Zealand society. The proposals assist in achieving these outcomes by reducing the impact of crime, increasing the accountability of offenders, and creating a more trusted justice system.

The reforms will increase protection for private individuals, especially children, who are victims of domestic violence. Alignment between the CoCA and the DVA will be achieved by providing for a protection order made on the grounds of psychological abuse to trigger the supervised contact provisions and ensuring that the parenting order provisions in the CoCA refer to the definition of violence set out in the DVA. Continued protection order cover will be provided for the children of deceased applicants, while the reforms will provide clarity that cover will end for any child included on a protected persons order once they turn 17 years of age, unless an application is made to the Court for their continued protection. Provisions to prevent the wrongful removal of children will promote children's safety and ensure the consistency of care arrangements.

Technical changes to temporary protection orders will ensure a smooth transition between temporary and final orders. Provisions that enhance programme attendance by respondents will support the prevention of future violence through the education of perpetrators.

The proposed amendment to the Adoption Act 1955 will make it easier to prosecute offences related to intercountry adoptions. The amendment will also enable New Zealand to ratify the Optional Protocol. New Zealand is a party to the Convention on the Rights of the Child, but is among a minority of countries that have not yet ratified the Optional Protocol.

Costs

Any implementation costs of the proposals will fall on Vote Courts. However, it is considered that the costs will be minimal and will be met within existing baselines. Many of the changes allow for clarification or codification of existing practice.

Implementation and review

The proposals will be implemented through the Child and Family Protection Bill, which currently has category 4 priority on the 2009 legislation programme, to proceed to select committee in 2009.

The Bill will come into force 3 months after the Bill receives Royal Assent. This will allow for the implementation of changes to court rules, revisions to court guidance and training materials, and staff training.

Consultation

One hundred and three submissions were received from a wide range of stakeholders, including individuals, community organisations, and government agencies, in response to a public domestic violence discussion document released in December 2007. The domestic violence discussion document invited comment on preliminary proposals. Proposals for reform were consulted on widely within government, and with a variety of NGOs, taking these submissions into account. Many of the proposals in the Domestic Violence Reform Bill that did not appear in the Domestic Violence (Enhancing Safety) Bill were raised in submissions to the Justice and Electoral Committee during its consideration of the latter Bill.

The following government agencies were consulted on the Cabinet papers: The Office of the Children's Commissioner, Office for Disability Issues, Office of Ethnic Affairs, the Families Commission, Department of Labour, Legal Services Agency, Ministry of Pacific Island Affairs, New Zealand Police, Office for Senior Citizens, Ministry of Social Development, Te Puni Kōkiri, the Treasury, the Ministry of Women's Affairs, and the Department of the Prime Minister and Cabinet.

Hon Simon Power

Child and Family Protection Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Child and Family Protection Act **2009**.

2 Commencement

This Act comes into force 3 months after the date on which it receives the Royal assent.

5

Part 1

**Amendments to Domestic Violence Act
1995**

3 Principal Act amended

This **Part** amends the Domestic Violence Act 1995.

10

4 Purpose of this Part

The purpose of this **Part** is to strengthen the objects and implementation of the principal Act by—

- (a) providing for certain persons to have extended protection; and
- (b) enabling the Court to make interim orders to protect the welfare and best interests of a child; and
- (c) empowering a Registrar to amend the terms of a direction made under section 32; and
- (d) extending the period for objecting to a direction made
- (e) clarifying that where a temporary order becomes final by operation of law, the final order comes into force immediately; and

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20

- (f) allowing a lawyer appointed to act for a child under the Care of Children Act 2004 to attend the hearing of proceedings under the principal Act.

5 Interpretation

Section 2 is amended by inserting the following definitions in their appropriate alphabetical order: 5

“**day-to-day care** has the meaning given to it by section 8 of the Care of Children Act 2004

“**parenting order** has the meaning given to it by section 8 of the Care of Children Act 2004”. 10

6 Protection of persons other than applicant

- (1) Section 16(1) is amended by adding “until that child reaches the age of 17 years, unless the order is sooner discharged”.

- (2) Section 16 is amended by inserting the following subsections after subsection (1): 15

“(1A) The Court, on an application by a child of the applicant’s family, must direct that a protection order continues to apply for his or her benefit after he or she has attained the age of 17 years until whichever of the following occurs first:

“(a) he or she no longer ordinarily or periodically resides with the applicant; or 20

“(b) the order is discharged by the Court.

“(1B) An application for a direction under **subsection (1A)** may be made by—

“(a) the child; or 25

“(b) a representative of the child.

“(1C) A protection order continues to apply for the benefit of a child of the applicant’s family until the issue of a direction under **subsection (1A)** where—

“(a) an application for a direction under **subsection (1A)** is made before the child attains the age of 17 years; but 30

“(b) the direction has not issued by the time the child attains the age of 17 years.”

- (3) Section 16 is amended by adding the following subsection:

“(5) A protection order that has not lapsed or been discharged continues to apply for the benefit of a person described in subsec- 35

tion (1), **(1A)**, or (2) notwithstanding the death of the applicant.”

7 New heading and sections 28B to 28D inserted

The following heading and sections are inserted after section 28A:

5

“Interim care and contact orders

“28B Interim orders in respect of child of applicant’s family

“(1) This section applies when—

“(a) an application has been made to the Family Court for a protection order; and

10

“(b) there is a child of the applicant’s family.

“(2) The Court may make 1 or more of the following orders if it considers the order or orders are necessary to protect the welfare and best interests of the child concerned:

“(a) an interim order or orders about the role of providing day-to-day care for, or about contact with, a child of the applicant’s family:

15

“(b) any interim order or orders varying any order of the kind referred to in **paragraph (a)**.

“(3) An order must not be made under **subsection (2)** in respect of a child of the applicant’s family of or over the age of 16 years unless there are special circumstances.

20

“(4) In considering whether an order or orders are necessary to protect the welfare and best interests of the child concerned, the Court must take into account any of the principles specified in section 5 of the Care of Children Act 2004 that are relevant to the particular circumstances of the child.

25

“28C Duration of interim order

An interim order made under **section 28B** ceases to have effect (if it has not ceased to have effect sooner) on the earlier of—

30

“(a) the date that is 1 year after the day on which the order is made; or

“(b) the date that the child attains the age of 16 years, unless the Court in special circumstances orders otherwise on or after making the order.

35

“28D Application for parenting order under Care of Children Act 2004 must be made

“(1) Where 1 or more interim orders have been made under **section 28B**, a party in whose favour an order has been made must as soon as possible (if that party has not already done so) make an application under the Care of Children Act 2004 for a parenting order. 5

“(2) For the purposes of section 16(1) of the Legal Services Act 2000, proceedings that relate to, or arise out of, an application for a protection order under Part 2 of the Domestic Violence Act 1995 include proceedings commenced pursuant to an application referred to in **subsection (1)**.” 10

8 Terms of direction that respondent or associated respondent attend programme

Section 33 is amended by inserting the following subsections after subsection (1): 15

“(1A) **Section (1B)** applies if—

“(a) the Court makes a direction under section 32; and

“(b) the respondent or associated respondent, as the case requires, has not been served with a copy of the protection order at least 10 working days prior to the date specified in the direction for his or her first attendance at the programme. 20

“(1B) The Registrar may amend the direction made under section 32 to specify that the respondent or associated respondent, as the case requires, attend the programme for the first time on a later date and, if necessary, at a different— 25

“(a) time:

“(b) place.”

9 Direction to attend programme made on application without notice 30

Section 36 is amended by repealing subsections (2) and (3) and substituting the following subsections:

“(2) Where this section applies—

“(a) the direction does not take effect until 10 working days after a copy of the direction is served on the person to whom it relates; and 35

- “(b) that person may, within those 10 days, notify the Court that he or she objects to the direction.
- “(3) Where the respondent or associated respondent notifies the Court, in accordance with **subsection (2)(b)**, that he or she objects to the direction— 5
 - “(a) the Registrar must, if the respondent or associated respondent wishes to be heard, assign a hearing date, which must be—
 - “(i) as soon as practicable; and
 - “(ii) unless there are special circumstances, in no case 10
 - later than 42 days after receipt of the notice of objection; and
 - “(b) the direction is suspended from the date on which the Court receives the notice of objection until the Court, after considering the person’s objection, confirms the 15
 - direction (whether with or without variation).”

10 Application without notice for occupation order or tenancy order

Section 60 is amended by inserting the following subsection after subsection (2): 20

- “(2A) When a temporary order becomes a final order pursuant to subsection (2), the final order comes into effect immediately.”

11 Application without notice for ancillary furniture order or furniture order

Section 70 is amended by inserting the following subsection after subsection (2): 25

- “(2A) When a temporary order becomes a final order pursuant to subsection (2), the final order comes into effect immediately.”

12 Procedure where respondent does not require hearing

Section 77 is amended by inserting the following subsection after subsection (1): 30

- “(1A) When a temporary order becomes a final order pursuant to subsection (1), the final order comes into effect immediately.”

- 13 New section 79A inserted**
- The following section is inserted after section 79:
- “79A Review of contact arrangements**
- “(1) When making a temporary protection order, the Court may direct the Registrar to convene a review before a Family Court Judge of the arrangements for contact between the respondent and a child of the applicant’s family. 5
- “(2) On receiving a request under **subsection (1)**, the Registrar must—
- “(a) appoint a time and place for the holding of the review; and 10
- “(b) inform the applicant and respondent of the date, time, and place of the review, and invite them to attend.
- “(3) Only the following persons may attend the review—
- “(a) the applicant: 15
- “(b) the respondent:
- “(c) a lawyer representing the applicant:
- “(d) a lawyer representing the respondent:
- “(e) a lawyer appointed under section 81.
- “(4) If both the applicant and the respondent attend or are represented at the review, the Judge may— 20
- “(a) make an interim order relating to contact under **section 28B**:
- “(b) impose any condition under section 27 relating to the matter set out in subsection (2)(a) of that section: 25
- “(c) give any directions that the Judge considers necessary.
- “(5) The provisions of this section, so far as applicable and with the necessary modifications, apply to an associated respondent as if the person were a respondent.”
- 14 Procedure where hearing required** 30
- Section 80(1) is amended by repealing paragraph (b) and substituting the following paragraph:
- “(b) make the temporary order a final order (whether with or without variation); or”.
- 15 New section 80A inserted** 35
- The following section is inserted after section 80:

“80A Temporary order discharged when made final order under section 80(1)

“(1) Where a temporary order is made a final order under **section 80(1)(b)**, the temporary order is automatically discharged.

“(2) Where the part of a temporary order not already a final order is confirmed under section 80(1)(c)(i) or (ii), the temporary order is automatically discharged.” 5

16 Conduct of proceedings

Section 83(1) is amended by inserting the following paragraph after paragraph (d): 10

“(da) any lawyer appointed pursuant to section 7 of the Care of Children Act 2004 to act for a child who in proceedings under this Act is a child of the applicant’s family:”.

Part 2

Amendments to Care of Children Act 2004 15

17 Principal Act amended

This **Part** amends the Care of Children Act 2004.

18 Purpose of this Part

The purpose of this **Part** is to strengthen certain provisions of the principal Act to further promote the safety of children by— 20

(a) enhancing the protections against psychological abuse; and

(b) lowering the threshold for obtaining an order preventing the removal of a child from New Zealand, and providing for more flexibility in the terms of those orders; and 25

(c) providing for the discharge of an order for the return of a child abducted to New Zealand.

19 Principles relevant to child’s welfare and best interests

Section 5(e) is amended by inserting “as defined in section 3(2) to (5) of the Domestic Violence Act 1995” after “violence”. 30

20 Section 54 repealed

Section 54 is repealed.

- 21 Procedure if child’s parents are parties to interim order**
Section 57(5)(b) is amended by omitting “or section 54(1)”.
- 22 Interpretation**
Section 58 is amended by inserting the following definitions in their appropriate alphabetical order: 5
“**allegation of violence**, in relation to a party to proceedings, means an allegation that that party has used violence against—
“(a) another party to the proceedings; or
“(b) a child who is the subject of the proceedings; or
“(c) a child of the family 10
“**protection order** means a protection order, including a temporary order, made under the Domestic Violence Act 1995
“**violent party** means a party to the proceedings against whom—
“(a) there is currently in force a protection order for the protection of any of the following persons: 15
“(i) another party to the proceedings:
“(ii) a child who is the subject of the proceedings:
“(iii) a child of the family; or
“(b) an allegation of violence is made that, on the basis of the evidence presented by, or on behalf of, the parties to the proceedings (without the Court being required to make inquiries on its own initiative), the Court is satisfied is proved”. 20
- 23 Allegations of violence made in proceedings relating to parenting orders** 25
(1) Section 59 is amended by omitting the heading and substituting the following heading: “**Application of section 60**”.
(2) Section 59(1) is amended by omitting paragraph (b) and substituting the following paragraph: 30
“(b) in which there is a violent party.”
- 24 Procedure for dealing with proceedings in section 59(1)**
(1) Section 60(1) and (2) are repealed.
(2) Section 60(3) is repealed and the following subsections are substituted: 35

- “(3) In proceedings to which this section applies in accordance with section 59 (the **proceedings**), the Court must not make—
- “(a) an order giving the violent party the role of providing day-to-day care for the child to whom the proceedings relate; or 5
 - “(b) any order allowing the violent party contact (other than supervised contact) with that child.
- “(3A) **Subsection (3)** is subject to subsection (4).”
- 25 Preventing removal of child from New Zealand**
- (1) Section 77(2) is amended by omitting “is about to” and substituting “may”. 10
 - (2) Section 77(3) is amended by repealing paragraph (c) and substituting the following paragraph:
 - “(c) may, whether or not a warrant has been issued under paragraph (a) (either with or without an additional order under paragraph (b)), order that the child not be removed from New Zealand by— 15
 - “(i) any person; or
 - “(ii) any person other than a person named in the order.” 20
 - (3) Section 77 is amended by inserting the following subsection after subsection (3):
 - “(3A) An order made under **subsection (3)(c)** may specify that the order is to continue until—
 - “(a) the expiry of a specified period; or 25
 - “(b) a further order is made by an authority.”
- 26 New sections 77A and 77B inserted**
- The following sections are inserted after section 77:
- “**77A Orders under section 77(3)(c) in respect of children of or over 16 years** 30
- “(1) An order under **section 77(3)(c)** must not be made in respect of a child of or over the age of 16 years unless there are special circumstances.
 - “(2) An order under **section 77(3)(c)** made in respect of a child under the age of 16 years expires when the child attains that 35

age unless the Court in special circumstances orders otherwise on or after making the order.

“77B Orders under section 77(3)(c) may be suspended for specified period

- “(1) On an application for the purpose by any person, a High Court Judge, a District Court Judge, or a Family Court Judge may suspend an order made under **section 77(3)(c)**. 5
- “(2) On an application for the purpose, a Registrar of the High Court, or of a District Court, may suspend an order made under **section 77(3)(c)** if— 10
- “**(a)** the application is made by a party to the proceedings under section 77 in which the order was made (the **earlier proceedings**); and
- “**(b)** every other person who was a party to the earlier proceedings consents. 15
- “**(3)** A suspension of an order made under **section 77(3)(c)** must be—
- “**(a)** for a specified time; and
- “**(b)** in relation to a specified person.”

27 Preventing removal of child to defeat application 20

Section 118(3) is amended by—

- (a) omitting “section 77(4) and (5)” and substituting “sections 77(4) and (5), **77A**, and **77B**”; and
- (b) omitting “applies” and substituting “apply”.

28 New section 122A inserted 25

The following section is inserted after section 122:

“122A Discharge of order under section 105 for return of child

- “**(1)** This section applies where a Court makes an order under section 105(2) for the return of a child (the **removal order**). 30
- “**(2)** A party to the proceedings under section 105 in which the removal order was made (the **removal proceedings**) may apply to the Court for the discharge of the removal order.
- “**(3)** On an application under **subsection (2)**, the Court may discharge the removal order if—
- “**(a)** the application is made not earlier than 1 year after the removal order was made, or any appeal in relation to the 35

removal order was determined, and the Court is satisfied that—

- “(i) the child is now settled in his or her new environment in New Zealand; and
 - “(ii) having regard to all the circumstances of the case, the discharge of the removal order is warranted; or
- “(b) every other person who was a party to the removal proceedings consents.”

Part 3

10

Amendments to Adoption Act 1955

29 Principal Act amended

This **Part** amends the Adoption Act 1955.

30 Purpose of this Part

The purpose of this **Part** is to enable New Zealand to meet its international obligations under Article 3(1)(a)(ii) of the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography by creating a new offence prohibiting the improper inducement of a consent for the adoption of a child.

20

31 Offences

- (1) The heading to section 27 is amended by omitting “**Offences**” and substituting “**Summary offences**”.
- (2) Section 27(3) is repealed.

32 New sections 27A to 27D inserted

25

The following sections are inserted after section 27:

“27A Offence to induce consent

- “(1) Every person commits an offence who induces another person, by fraud, duress, undue influence (by payment or otherwise), or other improper means, to consent to an adoption.
- “(2) Every person who commits an offence under **subsection (1)** is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

30

“27B Safety of child where offence committed

- “(1) Where a Court is satisfied that an offence against section 27 or **27A** has been committed in respect of any child, the Court may order the child to be removed to a place of safety until—
- “(a) the child can be restored to his or her parent or guardian; 5
- or
- “(b) other arrangements can be made for the child.
- “(2) **Subsection (1)** applies whether or not any person has been convicted of the offence.

“27C Extraterritorial jurisdiction in respect of offence under section 27A as required by Optional Protocol 10

- “(1) In this section, **Optional Protocol** means the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the General Assembly of the United Nations at New York on 25 May 2000. 15
- “(2) Even if the acts alleged to constitute an offence under **section 27A** occurred wholly outside New Zealand, proceedings may be brought in respect of that offence—
- “(a) if the person to be charged— 20
- “(i) is a New Zealand citizen; or
- “(ii) is ordinarily resident in New Zealand; or
- “(iii) has been found in New Zealand and has not been extradited; or
- “(b) if the person whose consent to an adoption has been induced— 25
- “(i) is a New Zealand citizen; or
- “(ii) is ordinarily resident in New Zealand.
- “(3) Nothing in this section limits the application of **section 27A** in respect of— 30
- “(a) acts that occurred wholly within New Zealand; or
- “(b) the application of section 7 of the Crimes Act 1961 to the occurrence in New Zealand of—
- “(i) an act forming part of an offence; or
- “(ii) an event necessary to the completion of an offence; or 35
- “(c) the application of section 8 of the Crimes Act 1961; or
- “(d) the application of section 8A of the Crimes Act 1961.

“27D Attorney-General’s consent required where jurisdiction claimed under section 27C

“(1) No proceedings for an offence against **section 27A** may be brought in a New Zealand court in respect of any person without the consent of the Attorney-General if jurisdiction over the person is claimed by virtue of **section 27C**. 5

“(2) However, a person alleged to have committed an offence against **section 27A** may be arrested, or a warrant for the person’s arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the Attorney-General’s consent under **subsection (1)** has not been obtained.” 10

33 Consequential amendment to Summary Proceedings Act 1957

(1) This section amends the Summary Proceedings Act 1957. 15

(2) Part 2 of Schedule 1 is amended by inserting the following item in its appropriate alphabetical order:

Adoption Act 1955 **27A** Inducing consent to an adoption

34 Consequential amendments to Extradition Act 1999

(1) This section amends the Extradition Act 1999.

(2) Section 101C(1)(c) is amended by adding “; and”. 20

(3) Section 101C(1) is amended by adding the following paragraph:

“(d) every offence against **section 27A** of the Adoption Act 1955 is deemed to be an offence described in any extradition treaty concluded before the commencement of **section 32 of the Child and Family Protection Act 2009** and for the time being in force between New Zealand and any foreign country that is a party to the protocol referred to in subsection (5).” 25

(4) Section 101C(2) is amended by omitting “of section 10 of the Crimes Amendment Act 2005” and substituting “referred to in subsection (1)(a), (b), (c), or **(d)**, as the case requires”. 30

35 Consequential amendment to Mutual Assistance in Criminal Matters Act 1992

- (1) This section amends the Mutual Assistance in Criminal Matters Act 1992.
- (2) Item 29 of the Schedule is amended by inserting the following 5 item in the second column above the first row:

An offence against the following section of the Adoption Act 1955:

<i>section</i>	<i>subject matter</i>
27A	Offence to induce consent
