



LEGISLATION DESIGN AND ADVISORY COMMITTEE

1 May 2017

Sarah Dowie MP
Justice and Electoral Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Ms Dowie

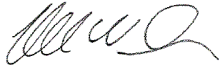
Domestic Violence – Victims’ Protection Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.
2. In particular, LDAC’s terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The External Subcommittee of LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC’s mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by LDAC prior to their introduction.¹
4. The Domestic Violence – Victims’ Protection Bill is a Member’s Bill so was not referred to LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission.

¹ Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the LAC Guidelines, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely



Karl Simpson

Acting Chairperson

Legislation Design and Advisory Committee



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Domestic Violence – Victims’ Protection Bill – supplementary submission

1. Introduction

- 1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government’s key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles. This submission supplements the initial written submission to the Committee date 28 April 2017.
- 1.2. The Domestic Violence – Victims’ Protection Bill (the **Bill**) has complex policy objectives. We question whether the design of the Bill is the most effective or workable means of achieving those objectives. In our submission we recommend:
 - (a) there ought to be an assessment of whether the provisions in the Bill are necessary and an effective and workable way to achieve the policy objectives for the reasons set out in Part 2 below.
 - (b) the definition of “victim of domestic violence” is very broad. It extends beyond that in, for example the Victims’ Rights Act 2002 and the Family and Whānau Violence Legislation Bill. Definitions in those pieces of legislation might be more appropriate.

- (c) the definition of “victim of domestic violence” is not necessary in the Domestic Violence Act 1995 (**DVA**) and should be removed.
- (d) if a definition of “victim of domestic violence” is included in the DVA, it should fall under section 2 (Interpretation) or section 3 (Meaning of domestic violence).
- (e) the definition of “victim of domestic violence” should then be included in the other enactments as required.
- (f) the definition of “domestic violence document” should be removed from the DVA and included in the other enactments as required.
- (g) that definition includes a range of documents that may be of little or no probative value in enabling an assessment as to whether there was domestic violence, by whom, to whom and of the nature of that. Such records often are found to be wanting in court proceedings. In our view it warrants reconsideration.
- (h) the ability for employers to refuse requests for flexible working hours should be amended to make it clear that employers may refuse a request if the employee fails to provide a sufficiently probative domestic violence document or that document is false, irrelevant, out of date, or invalid in some other way; or the employee does not meet the criteria in section 69ABB(1)(b) or (c).
- (i) the ability for an employee to dispute grounds for refusal should be amended to either provide that disputes can only be brought in relation to employer’s duties under section 69ABC, or that disputes can be brought in relation to all substantive grounds for refusal under section 69ABD (not just paragraph (1)).
- (j) the Bill imposes a range of duties, including requiring an employer to refer a victim to appropriate support services. Employers are likely to need support in this.
- (k) creating a new prohibited ground based on domestic violence in the Human Rights Act 1993 is inappropriate because it is inconsistent with the purposes of that Act.

1.3 There are three other broad points. First, it is known that the majority of domestic violence occurs towards women and the vulnerable.¹ The Bill may, wrongly, deter employment of women and the vulnerable.

1.4 Secondly, the Bill does not address the conduct of the perpetrator, who may be in the subject family or household. Courses and counselling may be of equal use to him or her.

¹ <http://areyouok.org.nz/family-violence/statistics/>

1.5 Thirdly, New Zealand has many small businesses and, sadly, hundreds of thousands of violence of domestic violence each year. Care will be needed to assess the impacts of this Bill, in that context and in the context of an extended definition of domestic violence.

1.6 We provide more detail regarding some aspects below.

2. Does this Bill effectively achieve the policy objective?

2.1. The Guidelines provide that the policy objective is the backbone of legislation and should be clear throughout policy and Bill development. Legislation and its provisions should be necessary and the best way to achieve the policy objective.²

2.2. We understand from the Explanatory Note that the policy objective of the Bill is to enhance legal protections for victims of domestic violence by supporting victims to stay in paid employment, reducing discrimination against victims of domestic violence in the workplace, and helping to protect victims from further domestic violence while in the workplace.

2.3. We are concerned that this Bill is not the most effective or workable means of achieving this objective for the following reasons:

(a) **The definition of domestic violence document includes a range of uncertain documents that may be of little or no probative value in assessing whether there was domestic violence, by whom, to whom and the nature of that.**³ This warrants further consideration. Consideration should also be given to whether the specificity of this definition and the resulting threshold it creates is proportionate to the matters it relates to. For example, such a level of specificity may be appropriate for applications for leave under the Holidays Act 2003, but it may not be appropriate for requests for flexible working arrangements under the Employment Relations Act 2000 (ERA).

(b) **Existing flexible working, good faith, and discrimination provisions in the ERA appear sufficient to accommodate victims of domestic violence.**⁴ Victims of domestic violence could request flexible working arrangements under Part 6A, and discrimination on the basis of being a victim of domestic violence could be prohibited and dealt with under disability grounds (e.g. where the victim suffers physical or psychiatric illness as a result of domestic violence). Whether an employer has acted appropriately would be governed by whether they have acted in good faith.

² LAC Guidelines (2014 edition) at Chapter 1.

³ Clause 4, new s 2(a), Domestic Violence Act 1995.

⁴ Employment Relations Act 2000, Part 6A; s 4; s 104.

- (c) In relation to the proposed flexible working provisions, given existing Part 6A is flexible enough to accommodate domestic violence, the only new aspect of proposed Part 6AB is that it would allow requests on behalf of victims of domestic violence. Creating a whole new Part 6AB is not an effective means of achieving this objective.

We suggest if the material change sought is to provide for agency, the Committee should consider (a) whether it is appropriate to allow agency only for victims of domestic violence, or whether it should be available to all requests for flexible working arrangements under Part 6A; (b) if it is appropriate for some or all requests under Part 6A, is legislation necessary to achieve this⁵ or can it be dealt with under the general common law right to appoint an agent;⁶ and (c) if it is necessary to include this in legislation, can this be done by amending existing Part 6A rather than creating an express Part. **We suggest existing common law principles of agency sufficiently address this policy objective and legislation is not necessary.**

- (d) Treating victims of domestic violence differently in employment legislation may create inconsistencies that are not justified or are disproportionate to other groups under this legislation. **These kinds of interactions with existing policy contexts need to be considered.** For example:

- (i) Providing specifically for victims of domestic violence to request flexible working arrangements may impliedly limit the reasons behind other general requests for flexible working under Part 6A of the ERA.
- (ii) The provisions relating to flexible working hours draw a distinction between those bound by collective agreements and individuals.⁷
- (iii) The Bill affords more leave for victims of domestic violence than victims of other crime or other difficult circumstances, e.g. bereavement or death of a family member, that may be equally compelling.⁸

- (e) **The Bill does not account for the fact that a longer term solution to preventing and resolving domestic violence might be to allow a perpetrator of domestic violence flexible working hours or leave to access the support and services to change his or her behaviour.** Solely focusing on victims of domestic violence is a one sided approach to a more complex issue and does not recognise the potential

⁵ The LAC Guidelines (2014 edition), at 1.2., provide that legislation must be necessary to achieve the policy objective. A policy objective may be more effectively achieved through education programmes, reliance on the common law or existing legislation, or reliance on existing private law civil remedies.

⁶ A person has a general right at common law to appoint an agent to act on his or her behalf. The rule that whatever a person has power to do personally may be done through an agent includes powers created by statute, unless the statute expressly provides that the act cannot be done by an agent. See C Hawes and D Lester, "Agency" in *Laws of New Zealand* (Wellington, Butterworths, 1998) at [1] and [27].

⁷ Clause 7, new section 69ABD, Employment Relations Act 2000.

⁸ Clause 14, new Subpart 5, Holidays Act 2003; cf Holidays Act 2003, ss 64 and 70.

benefits of working with perpetrators to ameliorate and prevent domestic violence in the first instance.

- (f) The Bill requires employers to refer victims to appropriate support services.⁹ **Employers are not the appropriate persons to be tasked with this kind of job and are likely to need support in this.** Arguably this should be the job of others with suitable expertise.
- (g) **It is not necessary to amend the definition of “hazard” in the Health and Safety at Work Act 2015 (HSWA) to provide for domestic violence.**¹⁰ Existing duties on employers to manage risks to health and safety in the workplace include managing hazards such as persons’ behaviour and workplace stress and fatigue, and are arguably broad enough to capture matters relating to, or arising from domestic violence.¹¹ Guidance to employers about how to deal with hazards relating to domestic violence could be done through non-legislative means, or alternatively it could be provided in regulations under the existing regulation making power in the Act.¹² This approach would be more consistent with the principle-based design of the HSWA and regulations.
- (h) Requiring employers to have policies relating to domestic violence¹³ is a rigid means of dealing with matters relating to domestic violence. The existing requirement in the HSWA on employers to respond to risks “so far as is reasonably practicable” allows for proportionate and tailored responses to hazards, including domestic violence, and could conceivably include developing a domestic violence policy.¹⁴ If more certainty is desirable, existing regulation making powers could be used to flesh out requirements on employers relating to domestic violence.¹⁵
- (i) **The Bill does not recognise that victims can also be perpetrators of domestic violence themselves.** This approach ignores the often complex scenarios involved in domestic violence cases, and it is unclear how the Bill will deal with this.

2.4. **We recommend the Committee consider these matters and satisfy itself that the provisions of this Bill are necessary, effective and a workable way to achieve the policy objective.**

⁹ Clause 7, new section 69ABC, Employment Relations Act 2000.

¹⁰ Clause 10, new section 16, Health and Safety at Work Act 2015.

¹¹ Health and Safety at Work Act 2015, ss 16 (definition of hazard), 22 (Meaning of reasonably practicable), 36-37.

¹² Health and Safety at Work Act 2015, s 211.

¹³ Clause 11, new section 37(1A), Health and Safety at Work Act 2015.

¹⁴ Health and Safety at Work Act 2015, s 22.

¹⁵ Health and Safety at Work Act 2015, s 211.

3. Definition of “victim of domestic violence” - clause 5, new s 5(2A), Domestic Violence Act

Definition of “victim of domestic violence” should be removed from the DVA

3.1. Clause 5 amends section 5 of the Domestic Violence Act 1995 (the **DVA**) to include a definition of “victim of domestic violence”. It is not clear why the Bill includes this definition in the DVA given the content of the Bill relates to employment law, not the DVA itself. The term is not referred to anywhere else in the DVA. **We suggest the definition of “victim of domestic violence” is not necessary in the DVA and recommend it is removed.**

3.2. The Family and Whānau Legislation Bill currently before this Committee does not include an overarching definition of “victim” for the purposes of the Act, but provides a definition for the purpose of information requests, use, and disclosure, and service delivery codes of practice.¹⁶ We suggest the approach taken in the Family and Whānau Legislation Bill is the correct one and the Bill should be consistent with that approach.

If the definition is to be included, it should be included in section 2 (Interpretation) or section 3 (Meaning of domestic violence), not section 5 (Object)

3.3. If a definition were to be included in the DVA, it should not be placed in section 5. The Guidelines provide that the legislation must be easy to use, understandable, and accessible to those who are required to use it.¹⁷ Usually definitions applying across an entire Act are found in the interpretation section or, if the term is fundamental to the legislation, are set out in a separate section dedicated to the definition. If a term is specific to a particular Part, it will be found at the beginning of that Part.

3.4. It is not clear or accessible to define “victim of domestic violence” in section 5. **If a definition were to be included, we recommend including the definition of “victim of domestic violence” in section 2 (Interpretation) or section 3 (Meaning of domestic violence) of the DVA.**

The Bill should not define “victim of domestic violence” in the DVA for the purposes of other enactments; the definition should instead be included in the other enactments

3.5. Clause 5, new section 5(2A)(b) defines “victim of domestic violence” for the purposes of other enactments. It is unusual and complex design to include a definition in an Act for the purposes of other enactments. The Guidelines provide that each provision of the proposed legislation should be consistent with its purpose and the policy objective that underlies it.¹⁸

3.6. In this case, the definition for the purposes of other enactments is not relevant to the purpose or policy objective of the DVA. Although related, the content of this Bill makes changes to

¹⁶ Family Violence and Whānau Legislation Bill, clause 124U.

¹⁷ LAC Guidelines (2014 edition) at p 4.

¹⁸ LAC Guidelines (2014 edition) at 1.5.

employment law, rather than family violence law. **We recommend removing new section 5(2A)(b) and suggest it is more accessible to include the relevant definition in the other enactments as required.**

- 3.7. **We also recommend removing the definition of “domestic violence document” from the DVA for the reasons given above. The definition should be included in the other enactments as required.**

The definition of “victim of domestic violence” is broad

- 3.8. The definition of “victim of domestic violence” is very broad. It extends beyond that in, for example the Victims’ Rights Act 2002 and the Family and Whānau Violence Legislation Bill. Definitions in those pieces of legislation might be more appropriate.

More thought should be given to how the definition of “victim of domestic violence” for the purpose of other enactments works with the requirement to provide domestic violence documents

- 3.9. Clause 5, new section 5(2A)(b)(ii) provides that for the purposes of other enactments, “victim of domestic violence” includes a person who is able to produce a domestic violence document because the person provides care or support to an individual in the person’s immediate family or household who requires care or support because the individual suffers domestic violence in the individual’s family.
- 3.10. **If 5(2A)(b) is retained and included in the other enactments as we suggest, there needs to be more thought given to how persons in (ii) provide evidence/documents of domestic violence under the ERA, HSWA, and Holidays Act** because the documents will not be about the person, but will be about the individual they support who is suffering from domestic violence.
- 3.11. In particular, does a person in (ii) need to provide evidence that the individual they are caring for or supporting is “immediate family” or that they live in the same household when required to provide domestic violence documents throughout the Bill?¹⁹ We suggest this is clarified in the Bill.

4. Refusal - Clause 7, new s 69ABD, Employment Relations Act

- 4.1. Clause 7, new s 69ABD(1) of the ERA provides that an employer may refuse an employee’s request for varied working arrangements “if the employer determines that the circumstances described in section 69ABB(1) do not exist”. That is, that the employer determines the employee is not a victim of domestic violence, was not employed for 6 months prior to the request, or it has been less than 12 months since a previous request was made.

¹⁹ For example, in clause 7, new section 69ABB(2)(h), Employment Relations Act 2000; clause 14, new section 72C(3)(c), Holidays Act 2003.

4.2. It seems inappropriate that an employer can determine the employee is not a victim of domestic violence (as per subparagraph (1)(a)). Surely an employer could only determine that the relevant circumstances in (1)(a) “do not exist” if the domestic violence document fails to provide sufficient probative value, or is false, irrelevant, outdated, or on the basis of some other technicality. An employer is not the appropriate person to decide whether a person is a victim of domestic violence beyond technical inaccuracies with the document. A determination going beyond document technicalities could be damaging to the employment relationship and personally to the employee making a request.

4.3. **We suggest the provision should be amended to make clear that an employer may refuse a request if:**

(a) The employee fails to provide a domestic violence document or that document fails to provide sufficient probative value, is false, irrelevant, out of date, or invalid in some other way; or

(b) The employee does not meet the criteria in section 69ABB(1)(b) or (c).

5. Disputes – clause 7, new section 69ABE, Employment Relations Act

5.1. Clause 7, new section 69ABE(1) provides that the dispute section applies if an employee believes the employer has not complied with the employer’s duties in section 69ABC or has made a wrong determination under section 69ABD(1) about whether the employee is a victim of domestic violence, the employee was employed 6 months prior to the request, or there was a previous request within 12 months prior to the request.

5.2. We query why the other grounds of refusal in new sections 69ABD(2) and (3) (reasons the request cannot be accommodated, and relating to a collective agreement) are not open to dispute. Conceivably the employer could make an error in determining grounds for refusal under paragraphs (2) and (3), and the employee should be able to dispute that.

5.3. We note that the provision appears to be modeled to an extent on section 69AAH of the ERA, which provides that an employee may refer a matter to the Labour Inspectorate where the employee believes that his or her employer has not complied with section 69AAE (Employer must notify decision about flexible working request as soon as possible). In section 69AAH, the substantive grounds for refusal in section 69AAF are not able to be referred to the Labour Inspectorate.

5.4. We suggest that the middle road taken in new section 69ABE is not appropriate. **The provision should be amended to either provide that disputes can only be brought in relation to employer’s duties under section 69ABC, or that disputes can be brought in relation to all substantive grounds for refusal under section 69ABD (not just paragraph (1)).**

6. Amendment to prohibited grounds of discrimination – clause 16, new section 21(1)(n), Human Rights Act

- 6.1. Amending the grounds of discrimination in section 21 of the Human Rights Act 1993 is inappropriate because including such victims is inconsistent with the purposes of the Act.
- 6.2. The grounds of discrimination in the Act relate to statuses that are immutable or only able to be changed at considerable personal cost.²⁰ In contrast, being a victim of domestic violence is a status that all people, including employers, should strive to change. Entrenching victim status as a prohibited ground may have unintended practical consequences and create a perverse incentive. Amending the Human Rights Act will also have consequences for employment relationship disputes on discrimination grounds under sections 103-105 of the Employment Relations Act.

7. Conclusion

- 7.1. Thank you for taking the time to consider the Subcommittee’s submission. We wish to be heard on this submission.

Yours sincerely



Geoff McLay

Chairperson

Legislation Design and Advisory External Subcommittee

²⁰ *Brookers Human Rights Law* (online edition) at HR21.08.

- (h) Clause 12, new Schedule 2, clause 10(1)(da) is a prescriptive and inflexible way to deal with domestic violence. We refer to our primary submission in relation to domestic violence policies.¹⁰

Delegated legislation

- (i) It is unclear why the regulation-making power in new s 36A(3) is required and how it is intended to be used. What kinds of matters will be addressed through these regulations and are they appropriate for delegated legislation in the first instance?
- (j) If a regulation-making power is required, it should be included in the existing framework for regulation-making in ss 211 – 219 of the Act.

Conclusion

4. We have requested to be heard in relation to this Bill and can address these issues in oral submissions.

Yours sincerely



Geoff McLay

Chairperson

Legislation Design and Advisory External Subcommittee

¹⁰ LDAC Submission on Domestic Violence – Victims’ Protection Bill, 1 May 2017, at 2.3(h).