

New Zealand Law Society

SUBMISSION ON CHILD AND FAMILY PROTECTION BILL

Introduction

1. The Family Law Section has prepared this submission on behalf of the New Zealand Law Society. The Society recognises the importance of the Government's intention to protect children and families from violence and abuse, to determine who should have the day-to-day care of a child and to prevent the removal of children from New Zealand where this may disrupt their care arrangements.

Part 1 - Amendments to the Domestic Violence Act 1995

Clause 13 – New section 79A inserted

2. The proposed new s79A allows for contact arrangements to be considered at a review following the making of a temporary protection order and records that if both parties attend the review, or are represented, the Court may make an interim parenting order. It is unclear whether the consent of the parties is required to undertake this review or whether the review can be undertaken without consent.

Recommendation

3. That the proposed new s79A be amended to provide expressly whether the consent of the parties is required before an interim parenting order can be made pursuant to s79A.

Clause 16 – Conduct of proceedings

4. Clause 16 amends s83(1) of the Domestic Violence Act 2005 (DVA) and allows a Lawyer for Child to appear in DVA hearings where they have been appointed in a Care of Children Act 2004 (COCA) application. This amendment is appropriate and confirms what has been common practice. However, if there is no appointment of Lawyer for Child under COCA, there is no provision to allow a Lawyer for Child to appear in DVA proceedings. This might occur, for example, where parenting orders are already in existence and there is no need for a COCA application to be made.

Recommendation

5. That the proposed amendment to s83(1) is made together with an additional amendment to s81 of the DVA (refer paragraph 6).

Proposed amendment to the Domestic Violence Act 2005**Section 81 – Court may appoint lawyer**

6. A practice has developed in the Family Courts to appoint a Lawyer for Child in DVA proceedings. However, there is no provision in the DVA for the appointment of Lawyer for Child unless under s9(2), the child is itself an applicant for the protection order. Possible solutions to this within the current law are to:
 - (a) appoint a lawyer to assist the Court; or
 - (b) appoint a lawyer for the child under COCA and then ask the Judge to direct that COCA and DVA proceedings to be heard together.
7. The Society proposes an amendment to s81 of the DVA to enable the appointment of a lawyer to represent a child in *all* proceedings where a protection order would apply for the benefit of the child of the applicant's family.

Recommendation

8. That s81 of the DVA be amended to enable the appointment of a lawyer to represent a child in all proceedings where a protection order would apply for the benefit of the child of the applicant's family.

Part 2 – Amendments to the Care of Children Act 2004**Clause 24 – Procedure for dealing with proceedings in section 59(1)**

9. Clause 24(1) repeals s60(1) and (2) of COCA. This removes the provision for the Court to consider whether to appoint Lawyer for Child, and also removes the requirement for the Court to determine the allegations of violence. Section 4 of COCA states that the child's welfare and best interests must be the first and paramount consideration. It is therefore imperative that children are legally represented, and the Court is required to determine the allegations of violence.

Recommendation

10. That the Bill expressly provide for the Court to be required to:
- (a) consider whether to appoint Lawyer for Child ,and
 - (b) determine allegations of violence.

Clause 25 – Preventing removal of child from New Zealand

11. Clause 25(1) proposes to amend s77(2) of COCA by omitting “is about to” and substituting “may”. As s77(2) currently stands, the threshold test of reasonable grounds that a person is about to take a child out of New Zealand with intent to defeat the claim of a person who has applied for, or is about to apply for, day-to-day care or contact or to prevent a Court order being complied with, is relatively high. The proposed insertion of “may” removes the temporal link inherent in “is about to”. The Society questions whether this proposed amendment relaxes the threshold too much.
12. There appears to be a wide divergence in approach by the judiciary to this threshold test. Some require strong proof, such as an airline booking, which cannot always be provided, while some are prepared to make the order on lesser evidence.
13. The Society believes that the current high threshold should be reduced but not to the extent of opening the floodgates to vexatious applications.
14. The proposed amendment is capable of two interpretations:
- (a) it is *possible* that a person may take a child out of New Zealand; or
 - (b) it is *probable* that a person may take a child out of New Zealand.
15. The threshold in the first interpretation is too low as it could potentially apply to almost any situation. The Society considers the second interpretation is preferable, as it would not only reinforce the need for evidence but would require proof on the balance of probabilities.

Recommendation

16. That the current s77(2) be amended to read “...if the Authority is satisfied on the balance of probabilities that a person may take a child out of New Zealand with intent to....”

Clause 26 – New sections 77A and 77B inserted

17. The Society is supportive of the proposed amendment to insert new s77A and s77B, as these proposed amendments will alleviate problems with the current legislation.
18. Under the Guardianship Act 1968, orders preventing removal were regularly suspended and it was straightforward for Interpol to implement those suspensions.
19. Following the introduction of COCA, there has been inconsistencies on how the law is applied. Some Judges still “suspend” orders, while others first discharge the orders and then make new orders preventing removal to replace the orders upon a child’s return to New Zealand. Some Judges have amended orders to allow travel, others have discharged orders preventing removal and simultaneously made orders preventing removal to be put in place upon a child’s return to New Zealand.
20. If orders are not made simultaneously, and new orders preventing removal are subsequently made, there is a risk they may not be properly registered through Interpol and, as a result, children could potentially be at risk of removal from New Zealand.

Recommendation

21. That the proposed amendment to insert new s77A and s77B be implemented.

Clause 28 – New section 122A inserted

22. Clause 28 inserts new s122A giving the Court a discretionary power to discharge a removal order if the criteria in new s122A(3)(a) and (b) are met. Section 122A(b) states that the Court has discretion to discharge a removal order if “every other person who was a party to the removal proceedings consents.” What if a party to the proceedings cannot consent? Take the example of a mother removing a child from the United Kingdom to Auckland. The father applies and is granted an order for the child to be returned. Before the order is implemented, the father dies in a car accident so he cannot consent. This example raises the issue of whether there should be power in extreme cases to ask a judge to rescind the order due to an unforeseen change in circumstances.

Recommendations

23. That the proposed new s122A be amended to vest power in the Court to rescind the order if there is an unforeseen change in circumstances.

24. That a new subsection 122A(c) be added:

“or where in all of the circumstances it is just and reasonable to do so.”

Appearance before the Justice and Electoral Committee

25. The Society wishes to be heard.

John Marshall QC
President
30.3.10