
Victims of Family Violence (Strengthening Legal Protections) Legislation Bill

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1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Victims of Family Violence (Strengthening Legal Protections) Legislation Bill (the **Bill**).
- 1.2 The Law Society supports the intention of the Bill to strengthen the courts' statutory powers to protect victims of litigation abuse in family proceedings within a family violence context. However, a careful balance needs to be struck between a party's right to bring or conduct proceedings before the Family Court and powers that prevent applications from being brought or continued.
- 1.3 In the Law Society's view, powers in existing legislation and in the Family Court Rules 2002 (**Rules**) are underutilised. With careful case management, these powers could be exercised more readily by judges, registrars and by those who occupy the newly established Family Court Associate roles to address behaviour that can be described as litigation abuse.
- 1.4 If the Bill does proceed, the Law Society suggests the following amendments to ensure the underlying policy objectives are achieved:
 - (a) The definition of "proceedings" in section 4 of the District Court Act 2016 and Rule 1.3 of the High Court Rules 2016, along with the definition of "application" in rule 8 of the Family Court Rules 2002 should be amended to include an interlocutory application.
 - (b) The phrase "abuse of the court" (in clause 5) should be amended to use the term "litigation abuse". A definition of litigation abuse should then be provided in the relevant interpretation sections.
 - (c) The definition of "psychological abuse" in section 11 of the Family Violence Act 2018 should be amended to include "litigation abuse".
 - (d) To avoid the risk of an order made under proposed section 12B inadvertently increasing any litigation abuse via the appeals process, the Committee may wish to consider whether the right to appeal a Family Court proceeding (where an order has been made under section 12B), should be by leave of the High Court only.
- 1.5 Finally, the Law Society notes that resourcing of the Family Court currently presents a significant challenge in ensuring effective case management and responding to applications in a timely manner, often exacerbating the problem for those who are served with numerous interlocutory applications by way of litigation abuse. This is an issue that legislative change alone will not resolve.
- 1.6 This submission has been prepared with input from the Law Society's Family Law Section.¹

¹ More information regarding the Family Law Section is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/>

1.7 The Law Society wishes to be heard on the Bill.

2 General comments

2.1 The Bill's explanatory note states that case law (although limited) has highlighted that statutory powers presently available to judges, together with the court's powers to regulate its own processes, have not been sufficient to address the impact of litigation abuse on victims in family proceedings. As noted by the Minister of Justice, Hon Ginny Andersen, in the House when introducing the Bill:²

(a) Litigation abuse can form part of a wider pattern of violence and abuse against a victim.

(b) The threshold for victims to access statutory and common law protections available is high and difficult to meet in family proceedings.³

(c) Litigation abuse occurs when the court system is used to harass, contact or control a victim, as opposed to being used for the legitimate purpose of dispute resolution. This can take the form of fabricated allegations, multiple and unnecessary court documents being filed, or issues raised with the intention to punish, humiliate or engage a victim.

(d) The use of the court system to further cause harm is unacceptable.

2.2 Litigation abuse can be particularly prevalent in the Family Court given the high levels of emotion, conflict and stress that accompany many cases. Litigants may present with psychological distress, mental illness, socio-economic issues and/or limited conflict resolution abilities. Many will choose to represent themselves without the assistance of counsel. These factors heighten the risk of behaviour that may amount to litigation abuse, whether that abuse is intentional or unintentional.

3 The Bill's Purpose

3.1 Litigation abuse can be a form of family violence, as recognised in the title of the Bill and in the Regulatory Impact Statement. However, the Law Society notes there is no further reference to family violence in the relevant sections. If the intent is to protect against this specific type of family violence the legislation should make this plain.

3.2 Given the lack of specific reference to family violence in the Bill itself, the Committee may wish to consider removing the phrase from the Bill's title altogether. Currently the Bill's provisions apply to anyone (not just litigants in a family violence proceeding). Therefore, a broader reference to family court proceedings generally, may be more in line with the substance of the Bill.

3.3 It is apparent from the Bill's explanatory note and the comments made by the Minister of Justice above that the underlying purpose of the Bill is a narrow one: to strengthen

² Hansard, Volume 771, 29 August 2023: https://www.parliament.nz/mi/pb/hansard-debates/rhr/combined/HansD_20230829_20230830.

³ There is currently the ability for a Judge of the District Court to make an order restricting a party from commencing or continuing civil proceedings if, "... *in civil proceedings about the same matter in the court, the Judge considers that at least 2 or more of the proceedings are or were totally without merit*" pursuant to sections 213 and 214 of the District Court Act 2016. For several reasons, this threshold will be difficult to meet in Family Court proceedings.

the courts' statutory powers to protect victims of litigation abuse in family proceedings. However, in the Law Society's view we do not consider the Bill achieves that narrow purpose. Instead, the Bill goes wider by including an assessment of the parties' conduct outside of the litigation. If the purpose is to address litigation abuse which takes the form of family violence, then the Law Society invites the Committee to consider whether the purpose and intent of the Bill would be better achieved by:

- (a) Clearer and specific reference to family violence in the substance of the proposed amendments (rather than the mention of behaviour as "harassment" or "annoyance"); and
- (b) Litigation abuse being expressly recognised as a form of family violence by adding it to the listed examples of psychological abuse within section 9 of the Family Violence Act 2018.

3.4 Finally, in the Law Society's view, the phrase "litigation abuse" is preferable to the phrase "abuse of the court" (as seen in clause 5 for example). "Litigation abuse" more aptly reflects the intention of the Bill to protect victims, not the court, but from this specific type of family violence. As noted earlier, often those who conduct litigation abuse are like to be self-represented and do not have the benefit of legal counsel. Therefore, any proposed changes should be clear and easy to understand, without the use of unnecessary legal terms that may require further definition.

4 Balancing Rights

4.1 The New Zealand Bill of Rights Act 1990 guarantees every person in New Zealand the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.⁴ Therefore any restrictions on that right must be imposed with care, and on the basis of clear and carefully considered criteria.

4.2 Appropriate thresholds should be observed to ensure the right balance is struck. A threshold that is too high⁵ would prevent the protection from being effectively evoked. A threshold that is too low risks encroaching on rights of access to justice.

5 Unintended Consequences: The Right to Appeal

5.1 The Law Society notes that a party's right to file an appeal or judicial review is preserved in the Bill, notwithstanding any restrictions placed on that party in Family Court proceedings (or a court of concurrent jurisdiction). Therefore, unintended consequences may arise when a party's ability to commence or continue proceedings in the Family Court is curtailed. A litigant may simply default to relentlessly pursuing an appeal or judicial review following the making of an order restricting their participation in lower court litigation. This could also result in a delay of the original or underlying proceeding whilst such appeals or reviews are pursued.

5.2 To avoid the risk of such orders inadvertently increasing any litigation abuse via the appeals process, the Committee may wish to consider whether the right to appeal a

⁴ New Zealand Bill of Rights Act 1990, section 27.

⁵ For example, the current wording of sections 213 and 214 of the District Court Act 2016.

Family Court proceeding (where an order has been made under section 12B), should be by leave of the High Court only.

6 Existing Legislative Responses

Family Court Rules 2002

- 6.1 Existing powers in the Rules enable the Family Court to respond to litigation abuse. However, in the Law Society's view, these are often underutilised.
- 6.2 As noted above, there needs to be a balance struck between the right of people to be heard in Family Court proceeding and the need for proceedings to be heard efficiently and in a cost-effective way.
- 6.3 Rule 3 sets out the Rules' purpose. Family Court proceedings are to be dealt with:
- (a) Fairly, inexpensively, simply and speedily as is consistent with justice;
 - (b) In such a way to avoid unnecessary formality; and
 - (c) In harmony with the purpose and spirit of the family law acts under which the proceedings arise.
- 6.4 The following rules contain powers that may be used to deal with behaviour that can be categorised as "litigation abuse":
- (a) Rules 14 to 16 give a judge the power to regulate the court's business. This power is broad and unfettered so long as any practice is not inconsistent with the rules or a family law Act.
 - (b) Rule 17 provides that where there has been a failure to comply with the rules, a judge may make orders of his or her own initiative whether or not a party has made an interlocutory application for the purpose.
 - (c) Rule 176 provides powers to deal with parties who do not comply with judicial conference directions.
 - (d) Rule 181 provides powers to a judge to ensure proceedings are dealt with speedily.
 - (e) The court has the power to strike out pleadings under rule 193 or to stay or dismiss proceedings under rule 194 on three grounds being:
 - i. No reasonable basis for the proceedings or application;
 - ii. The proceedings are frivolous or vexatious; or
 - iii. The proceedings are an abuse of the court's process.The power in rule 193 is a broad and flexible power. An order may be made by the court:
 - i. On its own initiative or on an interlocutory application for the purpose;
 - ii. At any stage in the proceedings; and
 - iii. On any terms the court thinks fit.
 - (f) Rule 195B allows a respondent whose substantive application is discontinued under rule 195A to make an interlocutory application to set aside the

discontinuance. The judge has a broad discretion to set aside the discontinuance if satisfied that in all the circumstances it is appropriate to do so.

- (g) Rule 207 provides for costs at the discretion of the court. Costs can be determined at any stage in the proceeding but frequently costs are reserved pending the completion of proceedings which may, in fact, create procedural unfairness for a party forced to respond to numerous applications and interlocutory steps. Making costs orders at the interlocutory stage could be utilised where litigation abuse has occurred.
- (h) Rules 228 and 229 provide procedures for interlocutory applications without notice and on notice. These rules provide a framework for applications to be dealt with promptly and it is likely that if timing requirements were adhered to, as envisaged in the rules, that would provide significant assistance for parties who are bombarded with numerous interlocutory applications by way of litigation abuse.

6.5 In the Law Society's view, the above rules could be utilised to a greater extent. Together with other mechanisms such as active judicial case management (including striking out irrelevant evidence, or parts of claims that have no reasonable basis) this could lessen the potential for the proceedings to be used as an instrument of abuse. However, such a mechanism will require more judicial resource which is already lacking in the Family Court and will not be resolved through legislative amendment alone.

6.6 Finally, Rule 8 (which does not define "abuse of the court's process") could be amended to include a separate definition of litigation abuse.

Care of Children Act 2004

6.7 The Care of Children Act 2004 (**CoCA**) currently gives the Family Court the power to deal with abuse of court processes and other related issues relating to the conduct of proceedings (such as vexatious or frivolous applications or proceedings). This includes:

- (a) Section 139A which provides that leave of the court is required for commencement of proceedings relating to guardianship disputes or parenting orders, where the new proceedings are substantially similar to previous proceedings and are brought less than two years after the making of orders in the previous proceeding.
- (b) Section 140 which gives the court the power to dismiss proceedings before it under the Act if it is satisfied that the proceedings relate to a specified child, and that the continuation of the proceedings is, in the particular circumstances, clearly contrary to the welfare and best interests of the child; or that the proceedings are frivolous or vexatious or an abuse of the procedure of the court.
- (c) Section 141 which provides the court the power to restrict commencement of proceedings if vexatious proceedings have been previously instituted under CoCA. However, this provision relates only to proceedings under CoCA and would not apply if there were vexatious proceedings under other Acts. Section 141(3) provides that sections 166 to 169 of the Senior Courts Act 2016 (which empower the High Court to make orders restricting the institution or continuation of vexatious proceedings) are not limited by section 141.

- 6.8 The Law Society notes the overriding principle in procedural issues in the application of CoCA:⁶

The general overriding principle must always be kept in mind that is that the “welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration” in the application of the Care of Children Act 2004 and “in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child”. This principle is capable of overriding procedural rules, the ordinary rules of natural justice, and legal professional privilege where necessary.

- 6.9 A large part of the Family Court’s work is CoCA proceedings and often these cases have aspects of family violence present. Even with the proposed amendments in the Bill, arguably the child’s welfare and best interests to have a case determined will prevail. The court will be faced with the same concerns when considering whether a proceeding or part of it is litigation abuse.

7 Using existing legislation – the importance of case management

- 7.1 The Law Society acknowledges that existing legislative powers to prevent abuse of the court’s processes are not lightly used as they can curb the right to access justice by preventing a party advancing a case or part of it.⁷ The Court of Appeal has observed that access to the courts is an important human right, but it is subject to “basic rules to maintain order.”⁸ In the experience of family lawyers, the Family Court will often take a cautious approach to using its existing powers under the Rules to respond to litigation abuse.
- 7.2 However, in the Law Society’s view, existing legislative powers (as discussed above), together with careful case management may assist in addressing the issue. The case of *Short v Short* [2021] NZHC 187 provides an example of how the court, through careful case management, can address litigation abuse. In that case, a party conducted a care of children proceeding in a manner which was psychologically abusive of the other party. The Family Court found this was family violence (psychological abuse) and made an interim order against the father (against whom the protection order was sought). The Family Court directed the father provide a signed undertaking not to engage in the conduct in the proceeding and to complete an approved non-violence programme. The judge set in place a plan involving judicial oversight and active case management. If the father did not agree to comply with the plan, a final order was to issue. However, the father undertook the steps required of him, and the interim order was discharged with the application for a final order struck out.
- 7.3 The approach of the Family Court was upheld on appeal to the High Court. Naton J recognised that one way of protecting the mother from the psychological abuse she had been a victim of, was for the Family Court to determine the issues between the parties in the further proceedings which the father was likely to file, for it to make whatever

⁶ See para 6.124 of Lexis Nexis Family Law Service. See also Care of Children Act 2004, section 4 which promotes the welfare and best interests of the child as the first and paramount consideration.

⁷ Section 27 of the New Zealand Bill of Rights Act 1990.

⁸ *Faloon v Planning Tribunal at Wellington* [2020] NZCA 170 at [2].

orders were appropriate in the best interests of the child and to then severely limit the ability of either party to file further applications in the Family Court. Nation J found the protection order was unnecessary as the appropriate means of protecting the mother from the psychological abuse she had suffered and which she feared would continue, was through the Family Court Judge managing the court proceedings in the way he had indicated he intended to do.⁹

7.4 Nation J noted that the Family Court has the power to prevent an abuse of proceedings and the psychological abuse of another party through the way proceedings are conducted, by declaring a party a vexatious litigant in the same way as both the Court of Appeal and the High Court have done.¹⁰

8 Clause 5 – New section 12B inserted (Restriction on commencing or continuing proceedings)

8.1 Our comments in respect of new section 12B equally apply to new sections 216A (clause 11) and 169A (clause 15).

8.2 Behaviour that is often described as litigation abuse almost always involves the ongoing filing of interlocutory applications. This results in significant delay with the advancement of proceedings, often to the detriment of the other party. However as currently drafted, the Bill does not capture interlocutory applications. New section 12B(1) simply refers to “a party to a proceeding”. Section 4 of the District Court Act 2016 and Rule 1.3 of the High Court Rules 2016 defines a proceeding as:

*any application to the court for the exercise of the civil jurisdiction of the court **other than an interlocutory application.** (emphasis added)*

8.3 Therefore, consideration could be given to amending the Bill to address this issue.

8.4 New section 12B(8) defines “abuse of the court” as conduct that is intended to harass or annoy any other party to a proceeding. As discussed above, the Law Society considers the proposed definition does not adequately reflect the underlying policy objective of the Bill: to address litigation abuse. In our view, it would be preferable to use, and provide a definition of, the phrase “litigation abuse”. Any definition could include the *effect or impact* of the conduct on the other party.

8.5 New section 12B(3) provides that an order made under subsection (2) does not prevent the party from lodging an appeal or filing a judicial review in respect of a proceeding. The Law Society agrees with retaining this right as it is in line with section 27(2) of the New Zealand Bill of Rights Act 1990 which provides every person has the right to apply for a judicial review of a determination. As noted earlier however, an unintended consequence of explicitly retaining this provision, is likely to be an increase in the filing of applications for appeals and judicial reviews by the abusive litigant, regardless of their merit.

8.6 New section 12B(4) states that in considering the circumstances under subsection (1)(a), the judge must have regard to the party’s conduct *during the course of the proceeding*

⁹ At [153].

¹⁰ At [137].

(new section 12B(4)(a)). The Bill contains no definition of what conduct the court is to consider. In the Law Society's view "conduct" must be clearly defined. The wording of rules 193 and 194 of the Family Court Rules 2002 may be of assistance.

- 8.7 Further, new section 12B(4) also states that in considering the circumstances under subsection (1)(a), the judge must have regard to the *party's conduct outside of the proceeding...that is intended to harass or annoy any other party to the proceedings or the related proceedings*.
- 8.8 In the Law Society's view, reference to a party's conduct outside of the proceeding is too broad and may capture conduct that has no bearing on the proceedings and is capable of, and best, remedied through other means. As noted above, if the intention of the Bill is to capture conduct during related proceedings that amounts to family violence, then the Bill should clearly state what conduct is covered and what related proceedings are captured.
- 8.9 In addition, reference to the intention of the person's conduct in new section 12B(4)(b) is likely to be difficult to establish. The party conducting the litigation abuse is often a self-represented litigant. In the experience of family lawyers, current pressures on legal aid, increased complexity of cases (including alcohol, drug issues and mental health issues), and delays in the court system, can lead to significant frustration for all parties. In some cases, a party engaging in litigation abuse may genuinely believe in the merits of their case. In such situations the party's behaviour may become obsessive and irrational. Others may have engaged a lawyer (in some cases multiple lawyers) but choose not to accept the advice they have been given. They may find it difficult to accept a decision that goes against them.
- 8.10 If the new section 12B(4)(b) is to remain, the Law Society recommends it would better to use the words *effect or impact* of the conduct on the other party that would amount to harassment or annoyance.
- 8.11 Finally, clause 22 of the Bill repeals section 141 of CoCA. Section 141(1) gives the Family Court the power to restrict the commencement of proceedings if the court is satisfied that a person has persistently instituted vexatious proceedings under this Act or under any former Act. It is not clear if repealing section 141 will be sufficient to address litigation abuse outside of the family violence context, which can sometimes be described as 'vexatious litigation'.



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