Recent Legislation

Domestic Violence Act 1995

Since the late 1980s New Zealand has undertaken a number of significant community initiatives in the drive to combat family violence. These measures include extensive advertising, successive reviews of police policy relating to domestic incidents, the Hamilton Abuse Intervention Pilot Project and the commissioning of a report by the Victims' Taskforce on the response of the justice system to domestic violence.[1] The latest initiative comes in the form of the Domestic Violence Act 1995 ("the Act"). The long overdue Act embodies a progressive response to the needs of New Zealand in the 1990s. The Act aims "to provide greater protection from domestic violence" [2] as if acknowledging the inadequacies of previous legislation.

The objectives listed in s 5 of the Act address not only easier access to greater protection but also preventative initiatives in the form of compulsory attendance at programmes for offenders. Four significant areas will be addressed in turn:

(i) The range of relationships covered by the Act.
(ii) The forms of violence protected against.
(iii) Sanction and enforcement.
(iv) Effective implementation.

The Range of Relationships Covered by the Act

The growing awareness of the range of domestic relationships which characterise New Zealand society is reflected by the breadth of the protection the Act offers. Protection is extended to all persons in current or recently concluded domestic relationships.[3] These relationships are defined in detailed interpretation sections.[4] The concept of "the family" is broadened by the interpretation of such terms as "child" and "family member", the latter including marriage partners, blood relations, culturally defined families and de facto couples. [5] Further protection is accorded to cohabitees not in a familial relationship, such as flatmates.[6]

1 See Busch, Domestic Violence and the Justice System: A Study of Breaches of Protection Orders (1992).
2 Domestic Violence Act 1995, preamble.
3 Section 7 Protection Orders; s 52 Occupation Orders; s 56 Tenancy Orders.
4 Sections 2 and 4.
5 Section 2.
6 Section 4(1)(c).

A catch-all provision in s 4(1)(d) provides that any person claiming to be in a "close personal relationship with the other person" may seek protection under the Act. This provision is restricted only by specific exclusions which deny a presumption of such a relationship simply as a result of an employment agreement.[7] It is difficult to imagine a close personal relationship which does not come within the situations already provided for in s 4(1)(a), (b) and (c), yet which would justify the far-reaching protections of the Act. Given the restrictive definition of "partner" in s 2, the most obvious relationship covered by s 4(1)(d) is that of persons in a relationship that is more than mere friendship, but who are not cohabiting. However, the Act is clearly intended to provide protection to persons in platonic relationships who share the same household. [8] Thus, s (4)(1)(d) could be read as extending protection to other platonic friendships. Such an interpretation challenges the notion of what is meant by *domestic* violence by expanding the scope of protection to all forms of abuse by persons known to the victim. However, such violence is adequately addressed by the criminal justice system. The arguments supporting protection for family members and cohabitees in the specially tailored family jurisdiction include respect for the privacy of the family and the sanctity of domestic relationships. These rationales should not extend so far as to provide general protection against common assault between platonic friends. Such a result would carry significant implications for the concept of a "domestic relationship" and would extend the jurisdiction of the Family Court.

Forms of Violence and Protection Orders

The categories of violence covered by the Act are as broad. Domestic violence, defined in s 3 includes actual or threatened physical abuse, sexual abuse, and psychological abuse such as intimidation, harassment and damage to property. In this way the Act supports evidence that nonphysical abuse may be as damaging as physical violence. The use of the term "psychological" in the Act is deliberate and broad in scope, and includes the deliberate infliction of all types of mental anguish. Further, acts of violence need occur only once to support an application for protection.[9] Single acts may be categorised as violence when viewed in the context of other behaviour although "when viewed in isolation, may appear to be minor or trivial."[10] However, minor incidents on their own are less likely to justify a protection order, and will probably be used to support evidence of other acts of violence as pointing to a pattern of abuse deserving of protection. [11]

A number of protective measures are available to victims of domestic violence. The cumbersome non-molestation and non-violence orders of the Domestic Protection Act 1982 have been dispensed with in favour of a single, all embracing protection order. Property orders available under the old Act remain largely unaltered, however a new furniture order is available which allows the removal of

7 Section 4(3).
8 Section 4(1)(c).
9 Section 3(4)(a).
10 Section 3(4)(b).
11 Section 14(3).

household furniture by the person for whose benefit the order has been issued so that they may establish a home elsewhere without undue hardship. [12] In addition, the 1995 Act provides that a protection order and any relevant special condition is suspended for any period during which the parties are consensually cohabiting. [13] It is automatically reinstated when and if the parties cease cohabitation. [14] This provision is a significant improvement on the provisions in s 17 of the old Act which provided that the order would lapse on the resumption of cohabitation by the parties and which required a reapplication by the person for whose benefit the original order had been issued.

Access to orders has also been improved. Orders may now be issued on behalf of incapacitated persons[15] and persons who are unable to apply for an order by reason of "physical incapacity or fear of harm or other sufficient cause". [16] Orders may be issued without notice under s 13. The threshold for the issuance of an order without notice is also lowered by the express requirement that the court is to consider the perceptions of the applicant and the applicant's family in considering whether to grant the order.[17]

Sanction and Enforcement

While the penalty for breach of a protection order has been increased by the Act, it remains significantly lower than the sanction available for common assault. This inadequacy is an unfortunate indication that the Act fails to give full recognition to the need to recognise domestic violence in the public sphere. It is hoped that enforcement agencies will continue to encourage arrest and conviction for assault in addition to arrest for the breach of a protection order. Otherwise, the magnitude of the offending will be downplayed by the comparatively light sanction under the 1995 Act. Without a concurrent criminal charge, the crime which resulted in the breach goes unaddressed.

Section 50 of the Act provides a discretion to police to arrest persons in breach of protection orders, to be exercised with reference to criteria listed in the Act. These criteria call for a subjective analysis of the magnitude of the offending. The Act's failure to require mandatory arrest for breaches of protection orders is a significant weakness. Victims are left at the mercy of police policy on arrest and detention, which has failed to protect women in the past.[18] Given the broad range of people and types of violence which will support a protection order, it may be argued that this restriction on arrest is a wise one. However, the breach of an order is the equivalent of contempt of court and as such should be met by significant sanction. At the very least the exercise of this discretion will require careful monitoring by enforcement agencies to ensure that the protection order does not become the toothless tiger that its predecessors were.

12 Part III of the Act.
13 Section 20(2).
14 Section 20(3).
15 Section 11.
16 Section 12(1).
17 Section 13(2).
18 Supra at note 1.

Firearms

A significant amendment to the Domestic Violence Bill was the addition of a mandatory condition that all firearms licences be revoked,[19] and all firearms confiscated from owners against whom a protection order has been issued. [20] The court may revoke,[21] or modify,[22] the condition at its discretion,[23] or on the application of either the respondent or the applicant. [24] Initially the Bill did not require the automatic seizure of weapons, and abused partners were required to request special conditions, which was added stress in an already difficult situation.[25] Under the amended Act, the onus of proving the safety of the protected person is placed on the person against whom the order is issued. Thus, where there is any doubt or inaction on the part of enforcement authorities, the margin of error will fall against the weapon owner. The use of a firearm is thus appropriately seen as a privilege with potentially lethal consequences. As occurs with revoked drivers' licences, arms licences will be revoked until the owner is proven capable of exercising that licence with responsibility. Although weapon use is regulated by a specialist licensing authority, this control is reviewable through the procedures provided in the Act.

In assessing whether or not to discharge the condition against possessing a firearm the court is required to accord paramount importance to the safety of the protected person or persons.[26] However, regard must also be had to the nature of the violence and how recently it occurred,[27] the effect of the order on the restrained person,[28] and other matters the court considers relevant.[29] Under s 23(4)(b)(i), the court is also to consider whether the protected person consents to the variation of the order. This last consideration provides an incentive for abusers to coerce victims in order to secure their consent. Its inclusion contradicts current enforcement policies which encourage arrest and prosecution of abusive spouses without requiring the victim's consent. It is difficult to see how the courts will strike a balance which grants paramountcy to protecting the victim from the liberally defined forms of abuse, yet still pays regard to the form and frequency of the violence and the attitudes of the parties.

Programmes

The Act combines a rehabilitative perspective with the punitive aspects of enforcement mentioned above. The discretionary counselling provisions of the

19 Section 21(1)(c)(iv).
20 Section 21(1)(c)(iii).
21 Section 22(1)(c).
22 Section 22(1)(d).
23 Section 22(1).
24 Section 22(2).
25 Busch, supra at note 1, clearly illustrates the potential for firearms to be used as tools of intimidation and manipulation.
26 Section 23(4)(a).
27 Section 23(4)(b)(ii).
28 Section 23(4)(b)(iii).
29 Section 23(4)(b)(iv).

old Domestic Protection Act[30] are superseded by a comprehensive scheme of nonviolence programmes for both victims and offenders.[31] The word "counselling" is replaced by the term "programme" which better describes the preventative objectives of the scheme. Offenders are encouraged to take responsibility for their behaviour and redirect their responses in the domestic setting. It is hoped that these requirements will effect a horizontal integration of enforcement agencies with those community agencies which offer support services independently of the legal system. This in turn will support the implementation of a consistent approach to domestic violence. However, the Act fails to recognise deeper issues of causation. No preventative support is offered to families suffering from a high degree of stress and tension, which may predispose them to the risk of domestic violence.

Conclusion

The Act has the significant potential to not only offer protection to victims of domestic violence but serve as a conduit for rehabilitation through the education of violent spouses. However, the statute itself is only one step on the path to achieving these objectives. One concern expressed a number of times in discussion of the Bill in Parliament, and noted in the report of the select committee on the Bill, is that the efficacy of these provisions is heavily dependent on the level of resourcing provided by the government.[32] Financial support will be central to the multidisciplinary approach required to achieve the holistic solutions proposed by this legislation. The seriousness of domestic violence needs to be driven into the consciousness of the judiciary, enforcement officers and those both in need of protection and subject to protection orders. This will not be a cheap exercise. The Hon Judith Tizard commented during the second reading of the Domestic Violence Bill that "the lifeblood of [the Bill] must be the resources — the money — that this Government is putting into it."[33]

While attempting to achieve far-reaching and progressive objectives, the effectiveness of the Act will remain dependent on the level of resourcing and the commitment to enforcement which it receives.

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30 Sections 37 and 37A.

31 Sections 29-44.

32 551 NZPD 9583.

33 551 NZPD 9739.

Guardianship Amendment Act 1995

Under the Domestic Violence Act 1995 children are accorded more protections than adults.[1] Further protections have been granted under the Guardianship Amendment Act 1995 which implements a range of initiatives in relation to custody and access.[2] The Guardianship Amendment Act 1995 does not stand alone, but changes and adds to a number of provisions of the Domestic Violence Act 1995 ("the Act").

A new subs (1A) added to s 12 allows the court to make interim custody or access orders, or to vary any existing custody or access orders, in any proceedings for a domestic protection order where the court considers such action necessary for the protection of the child's welfare. This amendment improves administrative efficiency by requiring only one application to come before the court. In addition, evidence of domestic violence which may be relevant to a number of separate applications needs to be called only once.

A new subs (2B) to s 15 specifies that where the court is satisfied that the access parent has used violence against the child or the other parent, the court may make the access order subject to conditions which will protect the safety of the custodial parent while the right of access is being exercised. This section recognises that an abusive parent exercising access rights may use "change-over time" as an opportunity to harrass or abuse the custodial parent.

Where it is alleged that a party to custody or access proceedings has used violence against any family member, custody and access will not be granted to that party unless the court is satisfied that the child will be safe. [3] In the absence of sufficient evidence substantiating the claims,[4] the court need only be satisifed that there is a "real risk to the safety of the child" before making orders to protect the child.[5] These determinations are based upon the information put before the court. [6] The legislation is careful not to place an inquisitorial onus on the court, [7] however, the very nature of the factors to be considered in deciding whether the child will be safe require some element of evaluative analysis. These factors are set out in detail in s 16B(5) and include how recently the violence occurred, the frequency of it and the likelihood of further violence occurring.[8]

The nature and seriousness of the violence is also to be taken into account.[9] The "nature" of the violence is restricted by definition to consideration of only physical and sexual abuse.[10] This requirement contrasts markedly with the

1 Section 3(3). All references in the text and footnotes hereafter are to the Domestic Violence Act 1995.

2 See Davison, *Report of Inquiry into the Family Court Proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol* (1994).

3 Section 16B(4).

4 Section 16B(6)(a).

5 Section 16B(6).

6 Section 16B(2).

7 Section 16B(3).

8 Section 16B(5) paras (b), (c), and (d), respectively.

9 Section 16B(5)(a).

10 Section 16A.

lengthy definition of domestic violence in the principal Act, which recognises pyschological abuse as a form of violence. [11] This definition is extended to protect children from behaviour which "[c]auses or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship". It is also considered to be violence to put the child at risk of seeing or hearing such abuse.[12] There is no apparent reason why the extended definition of violence was not adopted by the Guardianship Amendment Act 1995. The effect of this failure is that a protection order may be granted against a parent because a child has seen or heard pyschological violence being used against a family member, but that parent will be entitled to unsupervised access to the child.

In assessing the safety of the child the court shall also consider the physical or emotional harm caused to the child by the violence.[13] At this point the risk of pyschological abuse of the child of the form anticipated by s 3(3) of the principal Act may be taken into account. However, the risk of psychological abuse will not in itself support an application for access or custody to be restricted. The opinion of the other party to the proceedings is also taken into account in the assessment of the safety of the child in the care of the allegedly violent party.[14] The inclusion of this provision overlooks the potential for the abusive partner to coerce the other party into consenting to the withdrawal of the application to restrict custody and access.

Where the court finds that the safety of the child is at risk and refuses to grant access or custody to the allegedly violent parent, that parent may remain entitled to supervised access. Supervised access is defined in s 16A to mean:

> [F]ace to face contact between a parent and a child, being access that occurs —
>
> (a) At any place approved by the Court where access can be appropriately supervised; or
> (b) In the immediate presence of a person approved by the Court, who may be a relative, a friend of the family of the child, or such other person whom the Court considers suitable.

In the majority of cases it is unlikely that access will be able to be supervised by the custodial parent where violence is alleged to have occurred against that party. Therefore, the requirement for supervised access places a great onus on extended families to fulfil the supervisory role. An infinitely more sensible solution may be found in the provision of public access centres where parents may be allowed to spend time with their children supervised by impartial

11 Section 3(3)(a).
12 Section 3(3)(b).
13 Section 16B(5)(e).
14 Section 16B(5)(f).

observers. This would reduce the stress on the nonviolent parent and extended family. The principal Act does not address the provision of such services. Under that Act the price paid for adequate protection is a transfer of responsibility onto the community to provide programmes for violent parties. So too under this amendment, protection for parents and children comes at the cost of providing supervision so that children may continue contact with both parents.

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The Customs and Excise Act 1996

This comment outlines the major changes to Customs legislation as a result of the Customs and Excise Act 1996 ("the Act"). The Act was passed in June 1996 and came into effect on 1 October 1996. The Act has been organised so that all like provisions are located together.

The New Zealand Customs Service

The Customs Department has been renamed the New Zealand Customs Service, in accordance with changes to the internal structure of Customs to focus on trade facilitation. The Comptroller of Customs is now referred to as the Chief Executive, in line with the designation under the State Services Act 1986.

The new Act deregulates the customs broking industry, which is now to be self-regulating. In addition, the administrative process involved in the entry of goods into New Zealand has been streamlined. There is now legislative provision for electronic import entries. The Customs computerised entry processing system is established by the Act, and there is provision for users to be registered and provided with unique identifiers. There are penalty provisions for the misuse of the system.

Instead of Customs ports and airports, there will now be "Customs places". [1] Customs controlled areas are also created, and the user of an area will need to apply for that area to be licensed.[2] Examples of uses for customs areas may be the processing of arriving or departing passengers, the handling of cargo, or the sale of duty free goods. The effect of the licensing of a particular area is to define the scope of activities that may occur in that area. In many instances, the licence will also define who may lawfully be in that area.

Arriving and departing craft, which includes vessels and aircraft, must do so from Customs places. Part III requires Customs to be advised of the movement of craft, and for passengers to present themselves and baggage to Customs.

1 Section 9.

2 See s 10 for criteria for use of customs controlled areas.

Under Part V, the import or export of goods may be prohibited by Order in Council. Unlike the previous Act, such Orders are not permanent. In the case of imports they must be renewed annually, and for exports, every three years. This indicates that policies relating to the prohibition of goods should be reviewed if a particular situation has altered. An example might be the use of arms embargoes.

Administrative penalties are introduced by Part X of the Act which is designed to achieve voluntary compliance in the lodgement of import entries. Where an error has resulted in insufficient duty being paid, then a maximum penalty of $10,000 is available. One example of the role of Customs as border protection rather than as a revenue collecting agency is that if the error relates to GST, then the penalty is only $50, as errors in GST should be detected by internal agencies. Only one penalty per entry may be imposed, and no prosecution may be undertaken once this option is selected by Customs. There is also provision for avoidance of penalty where disclosure is made. Finally, a person may appeal a penalty to the Customs Appeal Authority established under the Act.

Powers of Customs Officers

The powers of Customs officers are set out in Part XII of the Act and include the traditional powers of Customs officers to patrol, stop craft, and board and search vessels. Section 144 provides a new power allowing Customs to stop and search vehicles where there are reasonable grounds to believe that the vehicle contains unlawfully imported goods, goods in the process of being unlawfully exported, or evidence of such offences. This power is not confined to Customs places. Customs officers still have the power to stop and question international and domestic passengers, and any person within Customs controlled areas.

Section 148 provides a power to detain a person for questioning up to four hours. The provision applies where the person does not satisfy an officer about goods, and the officer has reasonable cause to suspect an offence. The detention is for the purpose of making inquiries or for calling another Customs officer or someone with power to question or arrest.

The power to make a personal search is contained in s 149, and arises when a Customs officer has reasonable cause to suspect that someone has goods or evidence on their person. That person has the right to be taken before a Justice of the Peace[3] or a nominated officer. Customs may use reasonable force, and may seize anything found. The search may be carried out with the assistance of such aids as electronic devices or dogs.

The Customs requisition is detailed under s 160, which empowers Customs to require the production of documents, including electronic records, suspected of being evidence of breaches of the Act. The person to whom the requisition is directed must produce the documents, which may be copied, and answer questions in relation to the documents. Their attendance at a particular place and time may be required, in a similar manner to requisitions issued by Inland Revenue and the Serious Fraud Office.

3 Section 149(6).

Customs officer will no longer be able to issue their own search warrants. Section 167 requires Customs officers to make an application on oath to a District Court Judge, Justice of the Peace, or Registrar for a search warrant. The evidential standard for issue is reasonable cause to believe an offence against the Act exists. The warrant may be directed to any Customs officer, and allows for entry by force, and seizure and removal of anything mentioned on the warrant. Section 171 allows for an emergency warrant where an immediate search is necessary.

Part XIII of the Act deals with penalties, which have in general been increased. Making a false declaration and defrauding the revenue of Customs are now punishable by a period of imprisonment. Previously these offences attracted only fines.

The Chief Executive of Customs now has the authority to initiate prosecutions and nominate officers to lay informations. The time period for laying informations has been extended to five years. Similarly the existing power to deal with petty offences has been expanded. Section 223 now allows the Chief Executive to accept a penalty of up to $500 where the duty evaded is less than $1000. This option precludes a prosecution.

As under the previous regime, goods may be forfeited to the Crown on the commission of a large number offences against the Customs.[4] Goods to be forfeited may be seized at any time up to two years from the time of forfeiture, except where seizure is prohibited. Condemnation of seized goods occurs on conviction or by order of the Court. Under the old Act, Customs had to lay an information to procure condemnation where there was no conviction.[5] The new regime requires the importer or person claiming an interest in the goods to apply for an order disallowing seizure within 20 working days; the application must comply with s 231. Customs must then file a notice to defend the action, in the normal civil manner. This change makes the work of Customs much easier, since no action is required unless a notice is filed by someone claiming the goods. The provisions for waiver of forfeiture to the Minister are set out in s 235, and allow the Minister to waive subject to conditions. The Minister will usually require payment of duty and costs.

Section 239 of the Act creates a presumption of the truth of any allegation made by the Crown relating to any facts set out in the section. The presumption exists until the contrary is proved, and allows the Crown to allege details such as the nature, value, or place of manufacture without proof. Similarly, Customs computer records and documents are admissible and presumed true unless the contrary is proved.

Part XVI of the Act establishes Customs Appeal Authorities to hear appeals from decisions of the Chief Executive. The Authority must be either a District Court Judge, or barrister or solicitor of not less than seven year's practice, and are appointed by the Governor General. The Authorities have judicial powers of review in respect of a number of sections of the Act.

4 The list of these offences is set out in s 225(1)(a) of the Act.

5 For example, where the importer has fled the jurisdiction.

Recent case law based on the previous Act dealt with the impact of the New Zealand Bill of Rights Act 1990. In particular the Court of Appeal decided that s 218 of the Customs Act 1966, which relates to requisitioning documents and requiring answers to questions, overrode the Bill of Rights Act 1990.[6] One can only speculate whether the new Act will see a resurgence in challenges based on the Bill of Rights.

Some sections of the new Act are more restrictive of Customs officers' powers than was the predecessor Act. In particular, the reform of the search warrant provisions demonstrates a willingness to require Customs investigators to submit to the same requirements for obtaining a warrant as their counterparts in the police.

Similarly, the new provision in s 148 which permits detention for questioning is a marked departure from the previous legislation. By allowing statutory detention under certain conditions, the Legislature may be indicating that more precision is required. The previous provisions allowing for questioning implied a power to detain. The new section allows for detention, but only where the answers to questions regarding the nature and value of goods specified in s 145 are unsatisfactory.

Detention under s 148 will undoubtedly invoke Bill of Rights warnings. For foreign-language speakers, issues of comprehension and consequently of knowing waiver of rights will arise. Four hours may be insufficient time to obtain an interpreter and a lawyer in order to carry out questioning. As a result, there may be more frequent recourse to either the power to requisition under s 160, or in cases where prohibited goods or passengers in transit are involved, the power to arrest under s 174 of the Act. Under s 174, Customs officers may arrest for offences which involve unlawful importation or smuggling.

Conclusion

The Customs and Excise Act 1996 has been designed to coordinate with changes within the structure of Customs itself. In particular the Act allows for the introduction of an electronic system of documentation, which will facilitate the process of importation. In line with other industries, customs brokers and agents will become self-regulating. All decisions regarding the classification of goods for duty purposes are now reviewable by an authority that is independent of the Customs Department. This is in addition to any right of judicial review. Formerly the only recourse was to the courts, which was expensive and time -consuming. The Authority should be able to deal far more quickly with classification disputes, which in turn will reduce the economic impact on importers who are seeking a review. This in turn will give substance to the Customs Service's aim of facilitating trade.

There are significant changes to the powers of Customs officers, which have traditionally been wide. While the existing powers to stop and question remain, the creation of Customs places and licensed areas have placed a greater degree of specificity upon the use of these powers. Similarly, the new Act retains the

6 See *R v Hoy and Hoy* (CA 315/91, 6/12/91).

provisions to obtain search warrants and require the production of documents and answers to questions, but the Act requires the approval of the Courts before the powers can be exercised.

Nevertheless, it must be recognised that border control agencies necessarily have intrusive powers. Whether the new Act is susceptible to challenges based on the Bill of Rights Act 1990, or whether the goal of reducing delays in passenger screening while stopping the commission of importation-based offending will prevail, remains to be seen.

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