LEGISLATION NOTE

Vulnerable Children Act 2014

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I INTRODUCTION

New Zealand's performance in measures of child well-being has historically been among the worst in the OECD.[1] Amidst renewed public outcry over New Zealand's failure to safeguard against the abuse of our most vulnerable, the Government introduced the Vulnerable Children Bill in September 2013. The Bill became the Vulnerable Children Act 2014 (VCA) and passed into law on 1 July 2014. As described by the *Children's Action Plan*, a document that accompanied the VCA upon its assent, the new Act aims to address New Zealand's high rates of child abuse and "forms a significant part of comprehensive measures to protect and improve the wellbeing of vulnerable children and strengthen our child protection system".[2]

This note will examine what is an important and much-needed piece of legislation. First, it will consider the legislative scheme for protecting children prior to the enactment of the VCA. Secondly, it will detail the background and legislative process that culminated in the VCA becoming law. Thirdly, it will analyse the key features and implications of the VCA as enacted, before drawing final conclusions as to the contribution of the VCA to the protection of children from violence and abuse in New Zealand.

II LEGISLATIVE LANDSCAPE PRIOR TO THE VCA

The VCA's measures were, as evidenced by the nature of parliamentary debate on the legislation, largely directed towards addressing a perceived lack of communication and responsiveness on the part of state agencies charged with monitoring the welfare of

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1 OECD "Comparative Child Well-being across the OECD" in Doing Better for Children (OECD Publishing, Paris, 2009) 21 at 23.

2 Ministry of Social Development "About the Vulnerable Children Act 2014" (February 2015) Children's Action Plan <www.childrensactionplan.govt.nz>.

vulnerable children.[3] The key enactment prior to the VCA for the protection of vulnerable children was the Children, Young Persons, and Their Families Act 1989 (CYPFA), which governed the permissible scope of state activity in identifying and protecting children whose circumstances put them at risk of harm.

The state agency primarily responsible for dealing with reports of child abuse or neglect, Child, Youth and Family (CYF), was tasked with responding to over 22,000 cases reported each year between 2010 and 2013.[4] The CYPFA's delegation of this responsibility to a single agency, coupled with a lack of standardised monitoring or prevention regimes in other government agencies, meant that the systems were considered to have been "failing" as a scheme for protecting children.[5] Indeed, in the five years preceding the first reading of the Bill, more than 50 New Zealand children had died as a result of abuse or neglect.[6] Even subsequent to the VCA's passing into law, New Zealand has maintained the fifth worst record for violence against children in the OECD.[7]

III BACKGROUND AND LEGISLATIVE PROCESS

Against this background, the Ministry of Social Development issued a White Paper for Vulnerable Children outlining the concerns and failings identified in an earlier Green Paper assembled from public submissions.[8] Chief among these concerns was the need for shared responsibility and collaboration among state agencies dealing with children, and for a coordinated monitoring regime of those who interacted with children through these agencies. Changes proposed in the White Paper for Vulnerable Children included "a cross-agency care strategy […] from government child protection, health and education agencies", a reformed process for "vetting and screening people working directly with children" and a tiered set of "core competencies and minimum quality standards […] within the core children's workforce".[9]

The Minister for Social Development, the Hon Paula Bennett MP, introduced the Bill on 2 September 2013, and it was referred to

3 (17 September 2013) 693 NZPD 13382–13404.
4 (17 September 2013) 693 NZPD 13383.
5 (15 April 2014) 698 NZPD 17280.
6 (17 September 2013) 693 NZPD 13382.
7 Katie Kenny "Child homicide in New Zealand: How do the numbers compare internationally?" (21 November 2015) Stuff <www.stuff.co.nz>.
8 Ministry of Social Development "The White Paper for Vulnerable Children" (11 October 2012) [White Paper].
9 At 19.

the Social Services Select Committee on 17 September. The Committee returned its report on 25 March 2014 after considering 115 public submissions.[10] The Bill enjoyed cross-party support throughout its passage through into law, and received 105 votes in favour on each of its readings. Only the Green Party and the Mana Party opposed the Bill, which passed a third reading on 19 June 2014, and received the Royal assent on 30 June 2014.

Public and parliamentary attention towards the Bill during its passage through parliament largely centred around two key issues. The first was whether a proposed feature of the new law, a new judicial power to issue orders known as "Child Harm Prevention Orders", would be included in the final version of the new law.[11] It was proposed that this mechanism would allow courts to restrain or prohibit those subject to the order from having contact or interaction with specified children or classes of children if it could be shown that they posed a risk of harm to those children. Concerns from opposition parties over the low threshold and wide scope of this measure saw it removed at Select Committee stage, a decision supported by the Minister of Social Development.[12]

The second controversial aspect of the Bill was the scope and ambit of the protective and supervisory measures that did survive Committee scrutiny. The Labour Party, for example, criticised the definition of "vulnerable" provided in the Bill.[13] Despite supporting the measures taken, Labour MP Sue Moroney noted during debate that "[w]e did have the opportunity … to actually address the issues that do make 285,000 children in this country vulnerable, but instead the Government has chosen to do some things to assist 30,000 who are deemed to be at risk".[14] The class of children that the Bill "prioritised" were considered by those in opposition to be too narrow.[15] Further, the Government faced criticism for excluding volunteers from the class of public-sector workers who would face renewed monitoring against child abuse when in contact with children.[16]

10 Vulnerable Children Bill 2014 (150–2) (select committee report) [Social Services Committee Report] at 12.
11 (17 September 2013) 693 NZPD 13382.
12 Social Services Committee Report, above n 10.
13 (15 April 2014) 698 NZPD 17278–17279.
14 (15 April 2014) 698 NZPD 17276.
15 (13 May 2014) 698 NZPD 17801–17813.
16 (13 May 2014) 698 NZPD 17804–17806.

IV KEY FEATURES AND IMPLICATIONS OF THE VCA

The passing of the VCA into law has two important effects on the legal landscape of child protection and abuse monitoring in New Zealand, both of which require closer examination. First, the legislation compels the creation of "child protection policies" among state agencies, the chief executives of which are mutually responsible for those policies' implementation.[17] Second, the VCA introduces a new mandatory screening regime for those working or seeking to work in state agencies involving contact with children.[18] As mentioned, the VCA does not include protection order mechanisms proposed during the original drafting of the Bill. This omission also requires closer analysis.

Child Protection Policies and Joint Responsibility

Part 2 of the VCA sets out a new requirement for a number of state agencies that a cross-agency "child protection policy" be created and implemented within the operation of each agency. This requirement applies to the Ministries of Business, Innovation and Employment, Education, Health, Justice and Social Development, as well as Te Puni Kōkiri and the New Zealand Police.[19] Importantly, the VCA institutes joint accountability among the chief executives of these state agencies for the creation and implementation of these child protection policies.[20] School boards and District Health Boards are also required to adopt such policies "as soon as practicable".[21] Further, any organisation contracted or funded by any of these state agencies is bound to comply with the children protection policy of that agency.[22]

The envisaged content and effect of a child protection policy is not immediately clear from the language of the VCA itself. Accompanying documents from the Ministry of Social Development direct that child protection policies must "contain provisions on identifying and reporting child abuse and neglect" so as to assist agency staff to prevent such harm.[23] Policies developed subsequent to the passing of the VCA typically detail behaviours associated with neglect and abuse in children and provide a guide to best practice for

17 Section 16.
18 Sections 25–27.
19 Section 15. See also Ministry of Social Development "Child protection policies" (24 August 2016) Children's Action Plan <www.childrensactionplan.govt.nz>.
20 Section 16.
21 Sections 17 and 18.
22 Section 16(b).
23 Ministry of Social Development, above n 19.

staff in reporting, intervening and preventing abuse once identified.[24] Many policies also deal with confidentiality requirements, complaints about fellow staff and model approaches when dealing with vulnerable children.[25]

The implementation of child protection policies in agencies such as the Ministries of Health and Education is a major step in identifying and preventing abuse and neglect. The concept was criticised by opposition MPs in Parliament, largely on the basis that such policies, which s 20 of the VCA confirms do not create enforceable legal rules, arguably do not go far enough in addressing the underlying causes of abuse and neglect.[26] Concerns also arose, particularly from New Zealand First, around whether such policies were extensive enough to provide adequate training for staff to respond effectively to instances of neglect and abuse, and whether the agencies to which the policies applied were so limited that many instances of abuse and neglect would remain unreported.[27] Nonetheless, pt 2 of the VCA reflects something of a standardised commitment to awareness and prevention of child abuse in state sector organisations, and is thus a roundly positive feature of the legislation.

Children's Worker Safety Checking and the Workforce Restriction

Part 3 of the VCA introduces a mandatory safety-checking regime for any individual paid by a government agency to work with children and who is considered to have "primary responsibility" for children in the course of that work.[28] Such checks must be carried out by all "specified organisations", which are defined in the legislation as including all state services and departments, as well as all organisations which receive state funding and which employ individuals to interact regularly with children.[29] Government figures from 2014 estimated that 280,000 individuals would need to be safety checked under the new regime.[30]

The VCA makes clear that the requirement for specified organisations to conduct safety checks applies to both new and existing workers, and must be repeated every three years. Compliant safety check procedures involve requiring a current or prospective

24 See, for example, Ministry of Education *Child Protection Policy* (June 2016).
25 See, for example, Ministry of Social Development *Child Protection Policy* (15 September 2015).
26 Social Services Committee Report, above n 10.
27 (13 May 2014) 698 NZPD 17804–17806.
28 Section 23.
29 Section 24.
30 Ministry of Social Development "Safety Checking and the Workforce Restriction" <www.childrensactionplan.govt.nz>.

employee to provide proof of identity, his or her employment history and a character referee.[31] Further, the employer must conduct an interview, seek a police report into the worker's criminal history and provide a report as to the organisation's assessment of the worker's risk to children.[32]

Subject to an exemption provision in s 35, safety checks operate to give effect to the VCA's new workforce restriction.[33] In essence, a safety check of a current or prospective worker revealing that the individual concerned has been convicted of a "specified offence" will preclude that individual from beginning or continuing to work at the organisation.[34] A list of "specified offences" is provided in sch 2 to the VCA. This schedule primarily applies to individuals convicted of sexual and indecency offences under the Crimes Act 1961. It is an offence for a specified organisation both to employ a worker who will work with children without conducting a safety check and to employ a worker who has been convicted of a specified offence.[35]

Like the child protection policy regime, this standardised method of screening workers in state and state-funded organisations is an important step in ensuring that children are never exposed to individuals who would do them harm. It was suggested by the opposition that the legislation ought to institute a registration scheme for "core" child workers, and that not doing so represented a missed opportunity to regulate the quality and monitoring of the industry.[36] It was further argued that the fact that the safety checks did not apply to volunteers or private-sector organisations unnecessarily limited the ambit of the regime.[37] Both points certainly have merit, and it may be the case that future legislation is now better placed to deal with such concepts with the passing of the VCA.

The Status of Prevention Orders

As mentioned earlier in this note, early drafts of the Bill featured a new power for courts, on application from the Ministry of Social Development, to impose restrictions or prohibitions on individuals' contact with certain children or classes of children if the Ministry could demonstrate a sufficient level of risk to the children in

31 Section 31; and Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015.
32 Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015.
33 Section 28.
34 Section 28.
35 Section 28(10).
36 (17 September 2013) 693 NZPD 13390–13391.
37 (15 April 2014) 698 NZPD 17275.

question.[38] The removal of these "Child Harm Prevention Order" mechanisms came as a result of opposition from both members of Parliament and the public during submissions.[39] The Labour Party noted that the proposed orders represented "a significant departure from the usual tests and thresholds" of the New Zealand justice system, and expressed particular concern at the ability of a judge to impose such orders on the basis of evidence which had not necessarily been properly tested at trial, or on the basis of alleged behaviours that had not been proven to the criminal standard.[40]

Nonetheless, the Prevention Order mechanism received support among groups representing the interests of children, making its removal from the Bill at Committee stage surprising to some extent. The Green and White Papers upon which the Bill was largely based lent support to the concept of a Prevention Order, arguing that it gave much-needed powers to courts, CYF and the Ministry of Social Development in counteracting abuse and neglect before serious harm occurred.[41] It was argued by many groups that prevention orders were a necessary and effective means of 'stopping harm before it started', and that without such measures in the Bill, safeguards against abuse of children would continue to be effective only after the abuse had occurred and the case had passed through the justice system.[42] By this point, it was argued, it was often too late to reverse the damage done by individuals to children in their care.

Of course, a mechanism which would have allowed a judge to inhibit the rights of an individual on the basis of untested evidence is inherently inconsistent with a number of fundamental legal principles. However, there is certainly merit in the argument that measures of the kind proposed in the original Bill were necessary, and therefore that the removal of the child harm prevention order mechanism at the behest of opposition parties was a missed opportunity to approach the core of child abuse. It is suggested that the introduction of a modified version of such an order scheme which more closely aligns with the principles of criminal and natural justice may be a positive move in future legislative steps of this kind.

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38 (17 September 2013) 693 NZPD 13384.
39 Social Services Committee Report, above n 10.
40 Social Services Committee Report, above n 10.
41 White Paper, above n 8.
42 (15 April 2014) 698 NZPD 17265.

V CONCLUSION

It is clear that New Zealand's record of violence and abuse of our most vulnerable is a blight on our social fabric requiring urgent attention. The VCA represents an attempt to address this record, and undoubtedly takes active steps to ensure that the public sector is uniform and vigorous in identifying and preventing abuse as soon as possible. However, the VCA has been criticised since its enactment for not doing enough to address underlying causes of abuse, as well as for its limited "paid public sector" ambit. These criticisms are not without merit. It is hoped that the safety checking and harm prevention policy mechanisms arising out of the VCA have a meaningful impact in reversing historical trends of child abuse, and that further steps might be taken by Parliament in the future to ensure that risks to children of harm in non-public spaces are identified and stopped before it becomes too late to do so.