



# **Joint submission: Family and Whānau Violence Legislation Bill**

**24 May 2017**

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## **About us**

### **CCS Disability Action**

CCS Disability Action is a community organisation that has been advocating for disabled people to be included in the community since 1935. As of June 30 2016, we were providing support to 3,505 children, young people and adults through our 17 branches, which operate from Northland to Invercargill. Our support focuses on breaking down barriers to participation. We receive a mixture of government and private funding.

### **Disabled Persons' Assembly NZ**

Disabled Persons' Assembly New Zealand (DPA) is the national assembly and collective voice of disabled New Zealanders. DPA is a Disabled Person's Organisation, which means disabled people govern it and the organisation's main purpose is to articulate the aspirations of its members.

### **IHC New Zealand**

IHC New Zealand Incorporated (IHC) is a community-based organisation that has provided advocacy and support for people with an intellectual disability and their families for 65 years. IHC raises awareness and advocates for the rights of over 65,000 people with intellectual disability at both a national and an international level. Our service arm, IDEA Services, works with approximately 5,600 people with intellectual disability.

## Introduction

We welcome the government's commitment to reducing New Zealand's high rate of violence in families, whānau and homes. Law changes must be backed by excellent implementation and a clear overarching strategy that addresses domestic violence<sup>1</sup> across age, sex/gender identity, sexuality, impairment/disability and ethnicity. Protection from domestic violence needs to be accessible and responsive to everyone. Everyone needs to know and understand how they can report domestic violence and be confident that action will be taken to stop the violence.

Based on the available evidence, children and adults with disabilities are at a much higher risk of domestic violence as well as violence in general. The government needs to make sure that domestic violence protections and responses are accessible and work for disabled people.

## The risk of violence in families and homes

Quantitative data on disabled people and domestic violence in New Zealand is unavailable because most studies do not ask about impairment/disability. Disabled people tend to be invisible in a lot of existing research and statistics. Nevertheless, there is enough evidence to show that disabled people in New Zealand face a higher risk of domestic abuse than non-disabled people. The regulatory impact statement for the review of family violence legislation notes that disabled people are at increased risk of family violence (The Ministry of Justice, 2017, p. 7).

In the 2013 Disability Survey, disabled people were more likely to experience violent crime, compared to non-disabled people:

- Disabled people aged 15 plus were 2.3 times more likely to have been a victim of violent crime in the last 12 months (Statistics New Zealand, 2014).
- Disabled people aged 15 to 44 were 4.2 times more likely to have been a victim of violent crime in the last 12 months than non-disabled people (Statistics New Zealand, 2014).

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<sup>1</sup> In this submission we use the terms "domestic violence" and "family and whānau violence" interchangeably.

Disabled people are also over represented in areas that can increase the risk of abuse and violence, such as poverty and social isolation (Pestkaa & Wendta, 2014). In the 2013 Disability Survey, disabled people, aged 15 to 64 were 1.8 times more likely to live in households that earn under \$30,000 a year. Disabled people aged 15 to 44 were 5 times more likely to have felt lonely often in the last four weeks (Statistics New Zealand, 2014).

An overseas systematic review carried out by the World Health Organisation and Centre for Public Health in 2012 found that disabled adults were 1.5 times more likely to experience violence than non-disabled people (at 95% confidence). The review also noted the need for more robust studies (Hughes, et al., 2012).

One of the most comprehensive studies of children with disabilities and the risk of abuse and neglect, which took place in America, found children with disabilities were 3.8 times more likely to be neglected, 3.8 times more likely to be physically abused, and 3.1 times more likely to be sexually abused when compared with children without disabilities (Committee on Child Abuse and Neglect, Council on Children With Disabilities, Desch, & Hibbard, 2007, p. 1019).

Based on the available evidence, children and adults with disabilities are at a much higher risk of domestic violence as well as violence in general. This risk is compounded by a lack of visibility and awareness of the issues and barriers disabled people face with domestic violence. As a result, the current law is unclear in a number of areas and does not always protect or respond effectively to keep disabled people safe from domestic violence.

### **The higher risk can be significantly reduced**

The higher risk of violence and abuse is not inevitable for disabled people. This higher risk can be significantly reduced by disabled people having more choice and control over their lives as well as by providing education and support to the people disabled people rely on. Intervening early can also help prevent violence and abuse. It is also crucial that people with disabilities have access to the same protections in the law as people without disabilities.

Assumptions about disabled people can also increase the risk of abuse by lessening the chance of perpetrators getting caught and taken to trial. Sometimes the Police and prosecutors assume disabled people, particularly those with intellectual/learning disabilities will not be able to give evidence. The Solicitor General's guidelines discourage the Police from taking a prosecution to court if they think a conviction is unlikely. As a result, perpetrators of domestic violence against disabled people may feel like they can act with impunity.

Violence can also be normalised within institutional-like settings, such as residential care, and within support services in general. By challenging the normalisation of violence against disabled people, the higher risk can be reduced. Training and education initiatives are essential to raising awareness about, and building capacity to recognise and respond to, instances of violence and abuse against disabled people. This should include targeted work within the disability support sector as well as the wider community. It is also important to build the capacity of the Police to intervene to stop violence against people with disabilities and the court system to successfully prosecute perpetrators who target disabled people. .

Everyone needs to be able to access justice and legal processes to report and stop domestic violence. These need to be accessible, timely and safe for everyone. People need to know and understand how they can report domestic violence and be confident that action will be taken to stop the violence. This requires information to be provided in accessible formats (including for people with sensory impairments as well as plain language and easy read), legal processes to be explained in ways that people understand, and supports to enable access.

## **Law changes**

The current Bill fails to protect disabled people by excluding forms of abuse that disabled people are particularly vulnerable to and relationships disabled people are party to. The high level of abuse that disabled people experience will not change unless their experiences are explicitly addressed by the law.

### **Changes in terminology**

We are concerned that changing the name of domestic violence to family and whānau violence could result in fewer non-family close and personal relationships falling within the Act. Changes in terminology may also contribute to a perception that the law only applies to people who are in a family or whānau relationship. It will be important that the law is very clear about which non-family relationships are covered.

### **Principles**

We support the introduction of a new principles section, 1B. Given the increased vulnerability to violence that disabled people face, as well as the difficulty some disabled people face accessing protection and support, we believe it is important that a principle be added requiring family violence support to be accessible to all.

We question the use of the qualifier “whenever appropriate” in principles (b), (c) and (d) as it potentially weakens the impact of the principles concerned.

### **Definition of a child**

We support the definition of a child being extended to include all those aged under 18. It is consistent with both international and other domestic law, and will help avoid unintended gaps in protections and supports available to 17 year olds.

### **Views of the child**

We support the provisions in the Bill for taking the views of the child into account. Children with disabilities have the right to express their views on all matters affecting them and to have those views be given due weight in accordance with their age and maturity, on an equal basis with other children. They must be provided with disability and age-appropriate assistance to realise this right.<sup>2</sup> This is particularly important for those children and young people who have communication difficulties or who are non-verbal and so may need the help of others to have their views heard and understood.

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<sup>2</sup> Articles 3 and 7 UNCRPD, and Articles 12 and 23 UNCROC.

We recommend that the Bill recognise that disabled children are entitled to support to ensure their views are heard on an equal basis with other children.

### **Denying access to support and/or equipment**

The Bill does not currently explicitly cover psychological abuse specific to disabled people. We recommend two amendments. The new provision relating to animals should explicitly include service animals. In addition, psychological abuse should include a person in a domestic relationship deliberately denying the other person access to support and/or equipment they need to be independent and/or have a good quality of life.

### **Relationships between a support worker/carer and a disabled person**

The Bill does not clarify existing confusion around the relationship between disabled people and their support workers/carers (unless they are family members) (Grammer, Russell, & Van Eden, 2013, p. 16). These relationships should be covered, where the relationship is close and personal.

Some relationships between support workers and disabled people are long-established, close and personal. They can involve a support worker having access to a person's home and significant involvement in their private life. This can give them a high degree of control and power over a person's life. Disabled people who lack of power and control over their lives and who are reliant on others for support can be particularly vulnerable to violence and abuse. And if the person who has control over your life is the person who is abusing you how do you speak up?

There are similar issues for people living in residential facilities (such as community group homes or aged care facilities). In such cases the facility is the person's home and it is extremely important that they are properly protected under the legislation.

Currently, courts cannot find a relationship to be a domestic relationship if it is an employer-employee relationship. This poses potential issues for people using Individualised Funding or any support arrangement where they employ the support worker.



We recommend two changes. First, an addition to the threshold criteria for a close personal relationship: whether the person in the relationship is reliant on the other person for significant care and/or support. Second, the Bill should be amended to give courts the discretion to decide if a support worker and disabled person's relationship meets the threshold of a close personal relationship, regardless of any employer-employee relationship. Currently, the courts have no discretion.

### **Accessibility and family and whānau violence**

Accessibility for people with disability is about both access to process and access to justice, to have equal recognition before the law.

The United Nations Convention on the Rights of Persons with Disability (UNCRPD), which New Zealand is a party to, requires measures to be taken to protect people with disability, both within and outside the home (Article 16.1). This includes legislative, administrative, social, educational and other measures.

The Convention emphasises prevention and the importance of gender and age sensitive assistance and support for persons with disabilities and their families through "...the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse."

Protection services should be age, gender and disability sensitive (Article 16.2).

Any law changes should be designed to make family and whānau violence protections and responses accessible and appropriate for disabled people.

### **Substitute and supported decision-making and protection from violence**

In the period since the Domestic Violence Act was passed in 1995 there has been a move away from substitute decision-making to supported decision-making. People with disability, including those with intellectual disability, are entitled to equal recognition before the law (UNCRPD, Article 12). This includes exercising legal

capacity on an equal basis with others in all aspects of life. People with intellectual disability are entitled to support to exercise their legal capacity and make decisions.

The Bill could do more to recognise this change and establish a process that enables people with intellectual disability and/or sensory or communication impairments to receive the support they need to apply for protection orders themselves and to have their views and preferences taken into account in decision-making under the Act.

Under the Bill if a person lacks capacity to understand or communicate decisions applications are made on their behalf by a representative. There is no provision for them to make the applications themselves with support. This is inconsistent with contemporary understandings of intellectual disability and, we suggest, New Zealand's obligations under the UNCRPD.

While we support the requirements that the views of a person lacking capacity (P) be ascertained we note that there does not seem to be any general requirement to take those views into account, except if P objects to the appointment of a representative.

We also support changing the terminology from "wishes" to "views" but are concerned that in doing so an element of preference has been lost.

### **Protection of Personal and Property Rights Act 1988, Welfare Guardians and domestic violence**

The Bill creates a presumption that if a person (P) lacks capacity but there is someone appointed under the Protection of Personal and Property Rights Act 1988, most likely a Welfare Guardian, that person will apply for an order on P's behalf. Alternative representation can only be sought if a welfare guardian has refused or failed to act.

There are two potential situations that would make it very difficult for a person with intellectual disability who lacked capacity to seek protection under the Act:

- (i) if the welfare guardian is the person who is being violent or abusive

- (ii) if the welfare guardian for some reason, (for example due to their relationship with the perpetrator) does not want an application made.

Welfare guardians and property managers do not receive any education or training on their role, neither is the way in which the role is performed adequately monitored. As a result limits of guardianship and what it means to take the person's best interest into account are not always well understood. Lawyers report welfare guardians can feel licensed to do anything, which can create very dangerous situations for all parties involved (Mirfin-Veitch, Gates, Diesfeld, & Henaghan, 2014, p. 40).

From our own work we are aware of situations where welfare guardians and property managers have been coercive and behaved unethically. This has resulted in decisions that have not been in the person's best interests and that have negatively affected people's lives.

Welfare guardians and property managers need to be educated about their roles and given support, if needed. Greater regular review and monitoring is required outside of the three yearly renewal of order process to prevent financial abuse and other types of domestic violence. People under guardianship often lack the knowledge to request a review and there is no straightforward way for friends or other people to raise concerns (Mirfin-Veitch, Gates, Diesfeld, & Henaghan, 2014, p. 40).

We recommend proposed section 11 be amended to enable a person lacking capacity to seek support to make an order from someone other than their welfare guardian without first having to show that their welfare guardian has refused or failed to act.

## Law change recommendations:

### *Principles*

We recommend

- (i) the following addition to Section 1B Principles:
  - (m) responses to family violence should be accessible to all and ensure that disabled people have equal access to support and protection under this Act.
- (ii) the qualifying phrase “whenever appropriate” be deleted from paragraphs (b), (c) and (d) in Section 1B Principles.

### *Meaning of family violence*

We recommend the following amendments to Section 3 Meaning of Family Violence (changes in red):

#### 3B Psychological abuse for purposes of section 3(2)(c)

Psychological abuse includes —

- (a) threats of physical abuse, sexual abuse, or of abuse of a kind stated in paragraphs (b) to (g)
- (b) intimidation or harassment (for example, all or any of the following behaviour that is intimidation or harassment:
  - (i) watching, loitering near, or preventing or hindering access to or from, a person’s place of residence, business, or employment, or educational institution, or any other place that the person visits often:
  - (ii) following the person about or stopping or accosting a person in any place:
  - (iii) if a person is present on or in any land or building, entering or remaining on or in that land or building circumstances that constitute trespass):

- (iv) threats of physical abuse, sexual abuse, or of abuse of a kind stated in paragraphs (b) to (g)
- (c) damage to property:
- (d) ill-treatment of 1 or more of the following:
  - (i) household pets:
  - (ii) **Service animals, being an animal that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.**
  - (iii) other animals whose welfare affects significantly, or is likely to affect significantly, a person's well-being:
- (e) financial or economic abuse (for example, unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education):
- (f) in relation to a child, abuse stated in subsection (2).
- (g) **denying or limiting access to support and/or equipment that a person needs to be independent and/or have a good quality of life.**

#### *Meaning of family relationship*

We recommend the following changes to Section 4 Meaning of Family Relationship:  
Amendments to Section 4 Meaning of Family Relationship:

(3) For the purposes of subsection (1)(d), a person is not regarded as having a close personal relationship with another person by reason only of the fact that the person has—

(a) an employer-employee relationship **unless that relationship is for the provision of personal support and/or care**; or

(b) an employee-employee relationship—

with that other person.

(4) Without limiting the matters to which a court may have regard in determining, for the purposes of subsection (1)(d), whether a person has a close personal relationship with another person, the court must have regard to—

(a) the nature and intensity of the relationship, and in particular—

- (i) the amount of time the persons spend together;
- (ii) the place or places where that time is ordinarily spent;
- (iii) the manner in which that time is ordinarily spent;
- (iv) any reliance of the person on the other person for significant personal care and/or support.—

but it is not necessary for there to be a sexual relationship between the persons:

(b) the duration of the relationship.

#### *Views of the child*

We recommend that sections 9, 9A, and 12C provide for children with disability to be supported to express their views.

#### *Supported decision-making*

We recommend that:

- (a) Provision be made for a person lacking capacity to be able to apply for a protection order themselves with support from a representative, rather than the application being made **on their behalf** by the representative.
- (b) There is a requirement to ascertain P's preferences as well as their views in sections 11-13.
- (c) Section 12A specify that P is entitled to support to express their views

#### *Welfare guardians*

We recommend that proposed section 11 be amended to enable a person lacking capacity (P) to seek support for an application from someone other than a person with powers under the Protection of Personal and Property Rights Act 1988, without first having to show that person has refused or failed to act.

## **Associated issues raised by the Bill**

### **Choice and control**

A lack of choices and options can compound the risk of violence for people with disability.

For disabled people with access or support needs, a lack of accessible housing and transport can limit their alternative living options, which makes it harder for them to leave an abusive relationship and increases the implicit power others have over them. Some domestic violence services have inaccessible buildings and/or provide information in inaccessible ways (including easy read formats), which can make it harder to get help. Domestic violence support services also sometimes lack the capacity and capability to support disabled people.

Improving the accessibility of housing, transport, information and public buildings, is likely to indirectly decrease the risk of domestic violence for people with access or support needs. If people have more choices, they have more power and control over their lives. Improving the accessibility of domestic violence services is likely to directly decrease the risk of domestic violence for people with access needs, by allowing them to access help or support more readily.

As well as legislative change the government needs to put in place measures to make sure legal and court processes are accessible (such as providing communication assistants or advocates, responding to the different ways people communicate, allowing more video testimony and providing Plain English language information, Easy Read and judgements).

### **Information sharing provisions**

There is potential for the information sharing provisions, particularly those related to confidentiality (section 124V(5)) and the requirement to consider sharing information (section 124W), to undermine disabled people's control over their own personal information. These provisions do not appear to be necessary. In our view a better approach would be to use codes of practice and guidance to ensure a good balance

is struck between sharing information to keep people safe and respecting the individual's right to privacy and control over their own personal information.

It is not entirely clear from the Bill whether disability support services will fall within the definition of a family violence agency or social services practitioner. However, disabled people do often use social, education and health services for reasons associated with their disability and may, therefore, be more likely to fall within the information sharing provisions under the Bill. Information sharing codes of practice will need to guard against disabled people's information being shared more readily than other people's while at the same time recognising their potential vulnerability to violence and abuse.

### **Strengthening protections and investigating concerns**

Currently there is no pathway or mechanism for people to raise concerns about others and to have those concerns investigated and acted on. There is a need to provide better protection and advocacy for disabled people and others, and to ensure situations of violence are responded to in a timely way.

For example, in the Australian state of Victoria the Office of the Public Advocate is mandated by law to promote and safeguard the rights and interests of people with disabilities (Office of the Public Advocate). This includes:

- advocating for disabled people who have no other advocacy options and are at risk of abuse, exploitation or neglect
- advocating for the best interests of clients under statutory guardianship
- promoting supported decision-making
- responding to concerns and complaints about misrepresentation, exploitation, abuse and neglect
- making inquiries, intervening and requiring others to complete actions.

We urge the government to investigate options for mandating similar roles and functions in New Zealand. There may be multiple ways to do this. It is important,



however that there is an independent authority and resources to investigate and respond to concerns about vulnerable people.

### **Restorative justice**

In addition to being at greater risk of violence, some disabled people, particularly those with challenging behaviour, are a risk of harming others, including family members. Restorative justice processes as well as behaviour and early intervention support can be key to preventing violence and helping people with challenging behaviour and/or intellectual/learning disabilities understand the consequences of their behaviour (Mirfin-Veitch, Gates, Diesfeld, & Henaghan, 2014, pp. 44-456).

It is essential that restorative justice processes are accessible to all the participants. This means everyone involved needs to understand what is going on and have the processes explained to them in a way they understand.

We recommend the Bill establish restorative justice processes, so that violence is addressed in ways that enable disabled people to understand the consequences of their behaviour and provide them with the support they need to prevent them being violent.

### **Legal aid and counsel of choice**

Judges and lawyer have noted that the restrictions on legal aid and counsel of choice have deeply affected disabled people, especially people with intellectual/learning disabilities. For people with intellectual/learning disabilities being able to request a lawyer they knew was of enormous benefit. For some disabled people lawyers were the only uncompromised advocates in their life, especially if family members were not acting in their best interests (Mirfin-Veitch, Gates, Diesfeld, & Henaghan, 2014, pp. 14, 58-59).

Having mandated roles and functions similar to the Office of Public Advocate could also help to address these concerns.

## **Conclusion**

We know that disabled people do experience violence from those who care for them within their homes. This Bill is an opportunity to ensure disabled people are kept safe from this violence, and that violence against them is responded to, on an equal basis with others. It must explicitly cover living situations that can make disabled people vulnerable to abuse and violence. It must also provide reasonable accommodations and supports to ensure disabled people can access the processes and protections established under the legislation.

Thank you for considering this submission.

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