



10 August 2023

Attorney-General

**Victims of Family Violence (Strengthening Legal Protections) Legislation Bill PCO
25683/4.3 – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/389**

1. We have considered whether the Victims of Family Violence (Strengthening Legal Protections) Legislation Bill (**the Bill**) is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). A copy of the Bill is **enclosed**.
2. The Bill limits s 27(1) of the Bill of Rights Act, and arguably s 27(2) (which affirm the right to natural justice and the right to seek judicial review, respectively). However, we consider the limits imposed in the Bill are reasonable and demonstrably justified in a free and democratic society. The Bill therefore appears to be consistent with the Bill of Rights Act.

The Bill

3. The Bill will introduce new powers for District Court (including Family Court) and High Court Judges to make orders restricting persons from taking further steps in family proceedings under certain specified Acts, or commencing new family proceedings under those Acts, without leave.
4. The new powers can be exercised in response to an interlocutory application by a party or on the Judge's own initiative. An order may be granted if a Judge:
 - 4.1 is satisfied that, having regard to all the circumstances, a party to a proceeding under a specified Act has exhibited conduct that is an abuse of the court; and
 - 4.2 has given the party a reasonable opportunity to be heard.¹
5. The "specified Acts" are the Status of Children Act 1969, Domestic Actions Act 1975, Property (Relationships) Act 1976, Family Proceedings Act 1980, Oranga Tamariki Act 1989, Child Support Act 1991, Care of Children Act 2004, and Family

¹ See cl 5 (Family Court Act 1980, new s 12B(1)); cl 10 (District Court Act 2016, new s 216A(2)); cl 14 (Senior Courts Act 2016, new s 169A(1)).

Violence Act 2018. The Bill defines “abuse of the court” as including “conduct that is intended to harass or annoy any other party to the proceedings”.²

6. These orders are different to existing restraint orders,³ and intended to supplement rather than replace them.⁴ In deciding whether to make an order, Judges must have regard to the party’s conduct in the course of the proceeding, their conduct outside of the proceeding (including in any related proceedings) that is intended to harass or annoy any other party, and any other matter the Judge considers relevant.⁵
7. By contrast, the current tests require a person to have initiated proceedings that are totally without merit.
8. The changes in the Bill will allow a restraint order to be made where, for example, a defendant to a Family Court case has not initiated any proceedings, and their position in the underlying proceeding may have merit, but they have conducted the litigation in a way that abuses the court’s processes or is intended to harass or annoy another party — for example, by filing numerous, meritless interlocutory applications.
9. An order against a defendant would also mean that party would require the leave of the Court to take any step in defending the underlying proceeding, which they did not commence. For example, in defending an application for a parenting order, the restrained defendant would need to seek leave to “continue” to take any steps in the proceeding – including filing submissions, evidence and memoranda in connection with the parenting order the applicant seeks.
10. An order lasts three years, unless the Judge specifies a shorter period, or forms the opinion that there are extraordinary circumstances that warrant a longer period of up to five years.⁶
11. The orders are only available in respect of certain proceedings within the Family Court jurisdiction, or where those matters are appealed or judicially reviewed from the Family Court jurisdiction to the High Court. An order granted by the Family Court or District Court would restrain the party from taking further steps in that court without leave, but not from lodging an appeal or filing a judicial review in respect of the underlying proceeding or a related proceeding.⁷ By contrast, the High Court’s orders would prevent a restrained person from

² See cl 5 (Family Court Act 1980, new s 12B(8)); cl 10 (District Court Act 2016, new s 216A(9)); cl 14 (Senior Courts Act 2016, new s 169A(7)).

³ See Senior Courts Act 2016, s 166 and District Court Act 2016, s 213.

⁴ See cl 5 (Family Court Act 1980, new s 12B(7)); cl 10 (District Court Act 2016, new s 216A(8)); cl 14 (Senior Courts Act 2016, new s 169A(6)).

⁵ See cl 5 (Family Court Act 1980, new s 12B(4)); cl 10 (District Court Act 2016, new s 216A(5)); cl 14 (Senior Courts Act 2016, new s 169A(3)).

⁶ See cl 5 (Family Court Act 1980, new s 12B(5)); cl 10 (District Court Act 2016, new s 216A(6)); cl 14 (Senior Courts Act 2016, new s 169A(4)).

⁷ See cl 5 (Family Court Act 1980, new s 12B(3)); cl 10 (District Court Act 2016, new s 216A(4)).

commencing or taking further steps in any proceedings under a specified Act, *including* any appeal or judicial review of proceedings under a specified Act, without leave of a High Court Judge.⁸

The Bill limits the rights to natural justice, and seek judicial review

12. The Bill empowers Judges to make orders which will restrict a litigant's access to the courts, by preventing them from initiating or taking steps in certain proceedings (including proceedings they did not commence) without leave of the Court.
13. This engages s 27 of the Bill of Rights Act, which relevantly provides:
 - (1) Every person has 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.
 - (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
14. It engages s 27(1) because the restrained person's right to be heard in existing family proceedings is restricted (as they cannot take any steps without leave). It engages s 27(2) because if the High Court makes the order, the restrained person cannot seek judicial review of a Family Court or District Court decision, or continue an existing judicial review of such a decision, without leave. (Orders granted by the Family or District Court do not engage s 27(2) because the ability to apply for judicial review of those orders as of right is expressly preserved in the Bill).⁹
15. Access to the courts is of "fundamental constitutional importance".¹⁰ As such, the power to restrain someone from commencing or continuing civil proceedings has been described as a "drastic restriction of [a person's] civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge".¹¹ We conclude that the Bill limits the natural justice rights in s 27(1) of the Bill of Rights Act.
16. Arguably, the Bill does not limit the right to judicial review in s 27(2), because the right to apply for judicial review affirmed in that section is qualified by the words "in accordance with law". The purpose of those words was to recognise that the law may regulate review proceedings.¹² Even if a party is restrained by the High Court, such that they cannot apply for judicial review as of right, the Bill

⁸ See cl 14 (Senior Courts Act 2016, new s 169A(7)).

⁹ See cl 5 (Family Court Act 1980, new s 12B(3)); cl 10 (District Court Act 2016, new s 216A(4)).

¹⁰ *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].

¹¹ *Attorney-General v Jones* [1990] 2 All ER 636 (EWCA) at 640 (per Staughton LJ).

¹² Butler & Butler (eds), *The New Zealand Bill of Rights Act: A Commentary* (2ed, 2015) at [25.3.17], citing the White Paper commentary on the draft Bill of Rights Act at [10.175].

provides a process by which the restrained party may still apply for judicial review “in accordance with law” – that is, by first obtaining the leave of the Court. There are other contexts in which the law imposes a leave requirement or otherwise circumscribes access to judicial review;¹³ we would say the right to apply for judicial review “in accordance with law” is still available in such cases.

17. Even if we are wrong on that point, however, we consider it is immaterial because we take the view that any limitations the Bill imposes on s 27 are justified in a free and democratic society in terms of s 5 of the Bill of Rights Act.

The limits are justified

18. Crown Law has previously advised that orders under s 166 of the Senior Courts Act 2016 (the existing civil restraint orders) constitute justified limits on s 27 of the Bill of Rights Act,¹⁴ relying on Court of Appeal authority which held that the previous form of vexatious litigant orders were a “reasonable limitation upon the right of access to the Courts which the litigant has been found to be abusing”.¹⁵ The Court of Appeal has since held that the restraint orders in the Senior Courts Act are a justifiable limitation on the right of individuals to access the courts.¹⁶
19. Compared to the existing restraint orders in the Senior Courts Act, the present Bill lowers the bar for an order in the specified family proceedings in that it:
- 19.1 allows the party’s conduct in litigation together with “any other matter that the court considers relevant” to be taken into account as the basis for an order (even if the person has not initiated any proceedings); and
- 19.2 does not require steps taken by the party in the litigation to be “totally without merit”, but requires the party to have exhibited conduct that is an abuse of the court in the circumstances.
20. It also constitutes a greater limit on the rights protected by s 27(1) as it prevents a defendant from continuing his or her (legitimate) defence of the underlying proceeding, without leave. This is different to the existing civil restraint orders where the Court might have determined the whole proceeding (initiated by the restrained person) to be unmeritorious.
21. Limitations on rights are demonstrably justified under s 5 of the Bill of Rights Act when the following questions are answered in the affirmative:¹⁷
- 21.1 does the limiting measure serve a purpose sufficiently important to justify curtailing the right?

¹³ See for example Immigration Act 2009, s 249; Employment Relations Act 2000, s 184.

¹⁴ Judicature Modernisation Bill (PCO 17309/14.0): Consistency with the New Zealand Bill of Rights Act 1990, 20 November 2013, available [here](#).

¹⁵ *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [23]. See also *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC).

¹⁶ *Siemer v Complete Construction Limited* [2022] NZCA 262 at [23]. See also *Siemer v New Zealand Law Society* [2019] NZHC 3075 at [23].

¹⁷ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J; [217] per McGrath J.

- 21.2 is the limiting measure rationally connected with its purpose?
- 21.3 does the limiting measure impair the right no more than is reasonably necessary to achieve its purpose?
- 21.4 is the limit in due proportion to the importance of the objective?
22. The purposes of the Bill's limitations on the s 27 rights are to:
- 22.1 protect parties to family proceedings from "litigation abuse", as a contribution towards addressing family violence and sexual violence across Aotearoa New Zealand, and improving the experience of victims in the justice system;
- 22.2 protect the resources of the judicial system from being consumed by unmeritorious and vexatious litigation.
23. We consider these purposes to be sufficiently important to justify some degree of curtailment of the s 27 rights. The rights in s 27(1) and (2) are not absolute, but require a balancing of interests. The Courts have recognised that there will be times when it is right to restrain parties in civil proceedings, in order to protect "opponents who are harassed by the worry and expense of vexatious litigation"¹⁸ and the "very considerable burden of groundless litigation",¹⁹ and to avoid the squandering of judicial resources that could be better put towards affording justice to those with genuine grievances.²⁰
24. The ability to make restraint orders is rationally connected to those important objectives. Orders would protect a person subject to litigation abuse from steps intended purely to harass or annoy them, waste their time, or inflate their costs. They would allow genuine parties to focus their participation in the proceedings on responding only to steps taken by a restrained party that a Judge has considered sufficiently legitimate to warrant a grant of leave. The prospect of orders may also serve as a deterrent to a potentially abusive party, or at least give them pause for thought. The orders will ensure Judges are the gatekeepers of interactions between the restrained party and the other litigant(s), and that only legitimate documents or applications with some merit are accepted for filing. This will reduce litigation abuse and wastage of the court's resources.
25. The issue then becomes whether the proposed orders go further than is necessary to achieve these purposes.
26. While the Bill lowers the threshold considerably when compared to the existing restrain orders available, the limits it imposes on rights are still justified, in our view. Sometimes the way in which a party conducts a proceeding which they did not initiate has the potential to be just as vexatious and burdensome as the steps

¹⁸ *Attorney-General v Jones* [1990] 2 All ER 636 (EWCA) at 640 (per Staughton LJ).

¹⁹ *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].

²⁰ *Attorney-General v Jones* [1990] 2 All ER 636 (EWCA) at 640 (per Staughton LJ).

taken by a person who initiates a proceeding and conducts it in a vexatious manner. An example of this is *Khatri v Tomar*,²¹ in which the defendant filed 88 applications in the Family Court, most of which the High Court could not consider in deciding whether to make a restraint order because the applications were made within litigation initiated by his former wife (who had applied for a protection order and a parenting order).

27. There are good policy reasons for protecting a person involved in litigation, and the court's resources, from another party who is abusing the court's processes, for example by filing documents just to harass or annoy another party, to cause delay or detriment to the court's processes or for some other wrongful purpose. We understand this is a particular problem in the Family Court jurisdiction, where conduct in litigation may be part of a pattern of coercive, controlling or vindictive behaviour which might also compound past family violence or harassment. This can severely impact another party's wellbeing, as responding to vexatious proceedings and steps in proceedings is often time-consuming and/or expensive.
28. Not all documents that are filed to delay the court process or annoy another party will amount to "litigation abuse". The Bill also requires a Judge to have regard to conduct outside the proceedings (whether in related proceedings or outside of court) and any other matters that may be relevant.
29. By focusing on the party's overall conduct, rather than simply the number of meritless proceedings they have filed, the orders in the Bill expand the courts' discretion to address problematic behaviour in family litigation. The courts empowered to make these orders are required to act consistently with the Bill of Rights Act, so could not make an order which amounted to an unjustified limit on s 27 rights and went further than was reasonably necessary to achieve its purpose.²² The court would balance the objective of the order against the litigant's s 27 rights and would need to be satisfied that the harm posed is sufficient to justify the impact on the litigant's rights in a particular case.²³
30. Existing powers to grant restraint orders have been invoked conservatively by Attorneys-General²⁴ and exercised reluctantly by courts.²⁵
31. Further, an order does not deny a restrained person's access to the courts and ability to be heard altogether. It imposes a leave requirement, and only for a finite period of time. Leave can be granted to ensure that the restrained party can continue with their conduct or defence of litigation, provided the documents

²¹ *Khatri v Tomar* [2021] NZHC 3091.

²² Bill of Rights Act, s 3(a), see *Siemer v New Zealand Law Society* [2019] NZHC 3075 at [24] and see generally *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101]-[102].

²³ At [101]. See *Brogden v Attorney-General* [2001] NZAR 809 (CA), at [23] "The relevant considerations in any particular case, including rights guaranteed to a litigant under s 27 of the Bill of Rights [Act], can by this means be weighed and accommodated."

²⁴ *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].

²⁵ *Attorney-General v Jones* [1990] 2 All ER 636 (EWCA) at 639 (per Donaldson LJ): "Any court is very properly reluctant to make such an order and the circumstances in which it becomes necessary to do so are always sad."

they file are legitimate and not vexatious or abusive. This means the restrained party will still be able to be heard in the underlying proceeding and continue with any legitimate steps they reasonably want to take; they will just need a Judge's approval to do so. The Bill does not provide specific criteria that a Judge must apply in determining applications for leave, but we anticipate the judiciary would continue to balance the relative interests already discussed, and exercise appropriate discretion in assessing whether such applications are genuine and reasonable.

32. The fact that the decision to grant an order is itself expressly amenable to appeal is another important safeguard of parties' rights of access to the courts. For orders granted (or refused) in the Family or District Courts, the decision may be appealed to the High Court as of right;²⁶ for orders granted (or refused) in the High Court, the decision may be appealed to the Court of Appeal as of right, or to the Supreme Court with the leave of that court.²⁷
33. In conclusion, we are comfortable that the provisions of the Bill that limit rights under s 27 of the Bill of Rights Act are demonstrably justified in a free and democratic society.

Conclusion

34. For the reasons set out in this letter, we conclude that the Bill does not appear to be inconsistent with the Bill of Rights Act. In accordance with Crown Law's policies, this advice has been peer reviewed by Kim Laurenson, Crown Counsel.



Anna Bloomfield
Crown Counsel

Noted / Approved / Not Approved



Hon David Parker
Attorney-General

17 / 18 / 2023

Encl.

²⁶ See cl 5 (Family Court Act 1980, new s 12B(6)); cl 10 (District Court Act 2016, new s 216A(7)).

²⁷ See cl 14 (Senior Courts Act 2016, new s 169A(5)).