

Submission by



GROWING PROSPERITY AND POTENTIAL

to the

Justice and Electoral/Law and Order Select Committee

on the

Domestic Violence Bill

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SUBMISSION ON DOMESTIC VIOLENCE – VICTIMS’ PROTECTION BILL

1.0 INTRODUCTION

1.0 BusinessNZ¹ would like to make a late submission to the Bill and seeks the permission of the Committee to do so. If accepted it wishes to appear before the Committee.

2.0 RECOMMENDATIONS

2.0 It is recommended that the Bill not proceed or, should the Bill proceed, that changes be made in accordance with this submission.

3.0 GENERAL COMMENTS

3.0 First and foremost, BusinessNZ shares and supports the widely expressed concern over the frequency and severity of domestic violence in New Zealand. It joins with those calling for more to be done to combat this blight on society. We also agree that employers can and should do what they can to mitigate the impact of domestic violence on the workplace. However we do not believe this Bill is the most effective means of achieving a satisfactory outcome in this regard. We believe a more effective response would be to increase awareness of both the issue and the options available to employers in dealing with employees affected by domestic violence and to encourage them to take measures appropriate to the nature and capabilities of their business.

3.1 In our view, the role workplaces can and should play in alleviating the consequences of domestic violence comes under the general rubric of Corporate Social Responsibility (“CSR”). This concept deals with the interface between business and society, and envisages that businesses will proactively seek ways to enhance that interface with the “greater good” in mind, i.e. the wellbeing of the wider population who are directly or indirectly supported by those who are employed in the workplace. Typically this manifests itself in the communities in which employees live and work.

3.2 We accept that, while employers cannot be held accountable for the private lives of their employees they inherently have some responsibility for their employees’ general wellbeing. In the first instance this relates to ensuring that the workplace is not a source of risk or harm, and that measures are in place to address any instance of such. However, there is a limit to what businesses can and should be expected to do.

3.3 In that regard we are concerned that the introduction of this Bill may have disproportionate impact on different businesses without necessarily improving the circumstances of victims of domestic violence. We also believe that appropriate legislative workplace based tools are already in place.

¹¹ Background information on BusinessNZ is attached as Appendix One.

General impacts of domestic violence

- 3.4 The two main sources of concern for employers of employees affected by domestic violence are the loss of performance caused by mental stress arising from the violence and the possibility of physical harm in the workplace, enabled by the predictability of the employee being in the workplace. The possibility of physical harm in the workplace is likely to relate mainly to circumstances where the employee is the victim of actual violence whereas stress-related harm may arise also from violence being inflicted on others, e.g. their children.
- 3.5 There are several examples of how domestic violence might manifest in the workplace. These fall mainly into three categories; viz, preventing the employee from getting to work by various means, abusive visits, calls and emails, and the sheer strain of dealing with domestic violence at home.
- 3.6 However, no amount of legislation can prevent a determined person from perpetrating violence; it can only deal with the aftermath. Any solution to the question of how violence manifests in the workplace therefore must be a practical one based on the workplace context.
- 3.7 For instance, while an employer can trespass an abusive person from the workplace, that employer cannot control the means by which an abusive person may prevent the employer's employee from getting to work. Nor can an employer prevent an abusive partner from trying to phone, text or email their employee, albeit they can place filters on workplace equipment or have other employees filter calls to prevent or limit access by that means.
- 3.8 To be effective, legislative changes must mandate a real change in the situation of concern. We believe existing provisions are already capable of enabling appropriate responses. Offenders can be trespassed or subjected to non-molestation orders. Employees can be supported by EAP schemes and supportive workplace policies and practices. These options are all available now. The use made of them may be deficient but not their availability.

Specific domestic violence based entitlements may have disproportionate impacts on business

- 3.9 Evidence suggests that domestic violence disproportionately affects women and children. Statistically at least, this makes it probable that more women than men are likely to be at work at any given time whilst or after being subjected to or affected by domestic violence.
- 3.10 It has also been argued that women who are subjected to systematic or prolonged domestic violence are likely to have a more disrupted work history, are often on lower pay, have had to change jobs frequently and are more often employed in casual and part time work than women not affected by domestic violence².

² Domestic Violence and the Workplace, Employee, Employer and Union Resources, Australian Domestic and Family Violence Clearinghouse (ADVFC) 2011

- 3.11 These characteristics are common in the lower socio-economic spectrum of society. Indeed, while domestic violence can and does manifest itself at all income levels and in all communities, it appears there might be a greater correlation between domestic violence and its occurrence in the socio economic spectrum in which low paid jobs, unemployment and frequent changes of job are more common.
- 3.12 Statistically, businesses with higher concentrations of less skilled, lower paid, jobs appear more likely to employ people affected by domestic violence than those with higher concentrations of highly skilled, higher paid workers. If this is so, businesses employing predominantly lower skilled, lower paid workers will bear disproportionately more of the costs and consequences of any blanket legislative intervention on this issue. This may in turn bring pressure to bear on their employment capacity. Small businesses will be impacted more than large ones. All this points to the needs for approaches that are appropriate for the employee **and** the business.

4.0 SPECIFIC ISSUES IN THE BILL

Part 1 – Domestic Violence Act

Interpretation

- 4.0 The ability of an employee affected by domestic violence to access the provisions of the Bill is predicated on them producing a *domestic violence document* as “proof:” of the victim status. The Bill identifies a number of reports and records that will suffice for this purpose. These are all independently sourced (e.g., from police or court records. This is important. It also raises a difficult issue. Employees who suffer from domestic violence may not always report it. Corroborative documents such as police or court reports therefore may not exist. This does not mean there is no issue. However, without such verification, it becomes an issue of trust if an employee claims to be affected and requests leave or support. Employers would want to have some assurances that requests for domestic violence leave or support have integrity. It would therefore be useful for employers to have the ability to refer employees to a medical practitioner if they felt this was appropriate, in exactly the same way as they can now for medical reasons under the Holidays Act 2003..

Part 2 - Employment Relations Act 2000

Interpretation

- 4.1 Current section 69AAA of the Employment Relations Act 2000 (ER Act) defines working arrangements, in relation to employees seeking to change their working arrangements, as 1 or more of the following: (a) hours of work, (b) days of work and (c) place of work (for example, at home or at the employee’s place of work).
- 4.2 For the purposes of domestic violence, the Bill’s proposed section 69ABA expands upon the flexible working arrangements in ER Act s69AAA by adding (d) location of workplace, (e) duties at work, (f) the extent of contact details that need be provided to the employer and (g) any other term where the employee believes variation is necessary in order for him or her to deal with being a victim of domestic violence.

- 4.0 With regard to (c) and (d), "place of work" and "location of workplace" both deal with location, and therefore duplicate each other. We suggest that "location of workplace" is more limiting than "place of work", and should be deleted.
- 4.1 With regard to (e) and (g), seeking to change duties or any other terms of employment is a very significant difference to the changes that may be sought under existing Part 6AA. Effectively they enable an employee to seek to change the nature of their job, not just the hours or location of it.
- 4.2 While this is relevant if an employee is in a role that is dealing with the effects of domestic violence (e.g. social workers), or with open access to the public (e.g. reception and public counters), these criteria are not likely to be relevant in all cases. In fact these factors are present in only a small proportion of all jobs. It is therefore suggested that the ability to cite duties, or terms that are not hours or location based, be limited to employees in jobs where the role itself exacerbates or creates exposure to the impacts of domestic violence. To do otherwise would effectively compel all employers to consider requests to "change jobs", as well as changing start and finish times, and would increase the chance of requests being declined, particularly as many employers will be unable to provide a different job or a job with different duties.

Request

- 4.3 The Bill's proposed ER Act s69ABB requires that an employee has been employed continuously for a period of 6 months immediately preceding a request. If the Bill were to proceed, it would seem inconsistent to restrict access to relief from the impacts of domestic violence on the basis of service. A similar provision was repealed from the present flexible working provisions of the ER Act for much the same reasons and it would be appropriate to do the same here.

Refusal

- 4.4 Proposed ER Act s69ABD(3) requires an employer to refuse a request if the arrangements sought would be inconsistent with a collective agreement that binds the employee. While this is technically consistent with the provisions of ER Act s61(1) it seems to be inconsistent with an employer's obligations to prevent harm under the Health and Safety at Work Act 2015 (HSWA) in general, and the provisions of proposed section 37(1A) in particular. It would also be inconsistent with the object of the Bill in that, in effect, access to relief from the pressures of domestic violence would be prevented by a technicality. A means of ameliorating this conflict could be avoided in part by allowing changes that are not consistent with an applicable collective agreement but only to the extent necessary to comply with obligations under HSWA. However, following this path would simply make the Bill more complex than it is already and BusinessNZ therefore does not recommend it.

Privacy

The Bill makes no provision for protecting the privacy of employees who might choose to avail themselves of the rights provided under this Bill. Domestic violence

by its nature is not something many if not most victims wish to be widely known, even though its exposure is possibly its greatest deterrent. The fear of stigmatisation or retribution is very real for victims, and any provisions granting them rights to seek relief must recognise this. Without adequate measures in place for the process of receiving, deciding recording and monitoring requests, victims of domestic violence could in fact experience greater stresses than had they applied for relief under current provisions. Adequate provisions for the protection of privacy of domestic violence victims would be essential for this Bill to proceed. Alternatively, and as BusinessNZ recommends, existing provisions for seeking changes to working arrangements and using sick leave would obviate the need for specific protections. It should also go without saying that before employers can do anything to assist an employee, they must first be made aware that the employee is currently subject to domestic violence.

5.0 EXISTING LEGISLATIVE SUPPORT

Employment Relations Act

- 5.0 Part 6AA of the Employment Relations Act permits employees to seek changes to their working arrangements for any reason at any time and provides a default process to be followed in the absence of satisfactory informal arrangements being effective. These same provisions arguably already enable employees at risk from domestic violence to seek changes to their working arrangements without the need for provisions specific to domestic violence.

Health and Safety at Work Act 2015 (HSWA)

- 5.1 This Act essentially requires employers to do all that is reasonably practicable to prevent harm to workers in the workplace. This includes harm arising from physical and mental sources. The three main ways of prevent harm are to (in order) eliminate, isolate or minimise the risk of harm.
- 5.1.1 Elimination of the risk can only be achieved by the cessation of the violence. That is outside the capacity or responsibility of most if not all employers who have no legal right to involve themselves in the private affairs of their employees.
- 5.1.2 Isolation of the risk can be achieved only while the employee is at work. This is already possible through the use of such devices as non-molestation and trespass orders.
- 5.1.3 Minimisation of the risk requires mainly that the employee be assisted as much as possible to deal with the issues relating to stress arising from the abuse. The main mechanisms already available are assistance through EAP schemes and time off, normally available in the form of leave.
- 5.2 The scope of the HSWA is confined to the workplace. Expanding the scope of the HSWA to include domestic violence is likely to have unintended consequences, given that employers usually cannot control the source of the violence and may be unable to manage its effects directly. All too commonly they may be unaware of the fact an

employee is affected by domestic violence because the employee has chosen not to disclose this fact. Any obligation requiring employers to develop policies and processes for managing the effects of domestic violence therefore opens up the possibility of employers seeking to uncover information employees affected domestic violence have chosen to keep to themselves, in order to ascertain the degree of risk posed. The prospect of employers needing to intrude into employee private lives to identify and assess workplace risks posed by domestic violence is real.

- 5.3 Here again privacy is an issue with potential for unintended consequences. Privacy is paramount for the employee. However, the possible need to probe for the existence of an issue (to identify and assess risk), or to train other employees to deal with it (for instance health and safety representatives), is likely to lead to more and more people being involved in the processing and managing of requests for leave, and in managing risks. As the Bill stands it seems impracticable for its provisions to be given effect without breaching the essential need to protect the privacy of affected employees. This should not be allowed to occur.

Holidays Act

- 5.4 Making specific provision for domestic violence leave is in essence an expansion of the entitlement to take sick leave, as it deals with issues already covered by sick leave. The Holidays Act does not restrict the purposes for which sick leave may be taken, subject to employers' ability to seek a medical certificate if they are concerned at the reasons for the leave being taken. It may be taken in respect of illness or harm to the employee directly or because the employee is forced to care for someone close who is ill or harmed. Sick leave therefore already encompasses absences for reasons of illness and physical or mental harm, which in turn encompass the consequences of domestic violence.
- 5.5 There are potentially significant practical difficulties in monitoring and regulating the use of a specific entitlement to domestic violence leave. Currently, use of sick leave is relatively unrestricted subject to the ability of an employer to seek a medical certificate if concerned at the reasons for the leave being taken. Employers would want to have some assurances that requests for domestic violence leave or support have integrity. It would therefore be useful for employers to have the ability to refer employees to a medical practitioner if they felt this was appropriate, in exactly the same way as they can now for medical reasons.
- 5.6 Regulating the use of a specific entitlement for domestic violence leave would require additional, and potentially intrusive, monitoring by employers to ensure appropriate segregation of leave taken for domestic violence reasons and sick leave taken for other purposes including stress arising from non-violence related domestic issues. This would require formal confirmation of the fact that a person seeking domestic violence based entitlements was in fact a victim of such violence. As mentioned earlier this may not be readily forthcoming, necessitating referral to external agencies (e.g. doctors) for verification.
- 5.7 Furthermore, openly designating a person as a victim of domestic violence as a basis for entitling them to access specific rights in law may have the undesirable effect of

making victims reluctant to seek designation, for fear of being stigmatised. Using the existing, more general, provisions of the law largely avoids this risk.

6.0 CONCLUSION

- 6.0 Opposing this Bill does not mean opposing the reasons for it. BusinessNZ strongly supports efforts to lower the incidence of domestic violence and will support all effective means of doing this. However, the Bill creates an inherent conflict between provisions requiring the employer to support employees affected by *harm caused externally* to the workplace and health and safety duties requiring employers to manage the risk of *harm in the workplace*.
- 6.1 This conflict together with the issues of privacy and practicality canvassed above indicate that this Bill would be unlikely to achieve its objective. We believe that creating a regulatory framework to support victims in a workplace that is not the cause of their suffering is of marginal value. Rather, we would support efforts to increase awareness of the issue, improved means of recognising it, and means for supporting employees who are suffering because of domestic violence. Such support should encourage employers, to the extent possible and appropriate to business circumstances, to adopt measures such as those suggested in the Bill, on a voluntary basis. There are examples of this approach in operation already. It is through education and empathy that the greatest good will be found. Neither of these can be legislated for effectively.



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[Canterbury Employers' Chamber of Commerce](#) (CECC)

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