

5 June 2014

Sandra Porteous
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Ministry of Justice
DX SX10088
Wellington

By email: sandra.porteous@justice.govt.nz

Dear Ms Porteous

Draft Family Courts Amendment Rules (No 5) 2014 and draft Domestic Violence Amendment Rules 2014

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the draft Family Courts Amendment Rules (No 5) 2014 and draft Domestic Violence Amendment Rules 2014. We note the Rules will support amendments to the Domestic Violence Act 1995 which are due to come into force on 1 October 2014. The Law Society's comments on the draft Rules are set out below.

Draft Family Courts Amendment Rules (No 5) 2014

Clause 17 – Schedule 5, form DV 3 amended

Draft Domestic Violence Amendment Rules 2014

Clause 15 – Schedule 1, form DV 2 amended

2. A lawyer acting for a party who applies without notice for a protection or property order or both is required by Rule 26 of the Domestic Violence Rules 1996 to sign a certificate certifying the matters set out in Rule 26(1)(a) to (c).
3. The Domestic Violence Amendment Act 2013 introduced section 51C(6) into the Domestic Violence Act 1995. This section contains a statutory obligation that every lawyer acting for an applicant for a protection order must:
 - (a) ensure that the applicant is aware of the applicant's right to make a request for the provision of a safety programme to the applicant, a child of the applicant or other specified person; and
 - (b) where the applicant wishes to exercise that right, take such further steps as the lawyer considers necessary to enable the applicant to do so.
4. The wording of the new certificate in clause 17(5) of the draft Family Courts Amendment Rules (No 5) 2014 and clause 15(5) of the draft Domestic Violence Amendment Rules 2014 is as follows:

Certificate of lawyer for application for protection order

[Note: Complete if applying for a protection order.]

I certify that I have advised the applicant that, if the court makes a protection order, the applicant may request the Registrar to authorise the provision of a

safety programme to the applicant and to any other person protected by the order, including a child of the applicant's family.

Date:

Signature:

(Lawyer for applicant)

5. Section 51C(6) codifies certain obligations of lawyers when acting for an applicant. All lawyers are subject to professional standards and obligations as prescribed by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Lawyers are also officers of the court and subject to regulation by the Law Society. These obligations already require a lawyer acting for an applicant for a protection order to advise and advocate for a client as contemplated in section 51C(6). The proposed certificate is not objectionable but it does not enhance or expand upon the obligations on lawyers that already exist when acting for applicants. Nor is it the best way for the court to be assured that an applicant has received and understood advice regarding the provision of safety programmes.
6. The purpose of the certificate is to ensure that applicants have knowledge of and understand their ability to access safety programmes for themselves and other protected persons. The best way to confirm that they have been made aware of this entitlement is a statement to that effect in their affidavit rather than a lawyer's certificate.
7. For the above reasons, clause 17(5) of the draft Family Courts Amendment Rules (No 5) 2014 and clause 15(5) of the draft Domestic Violence Amendment Rules 2014 should be deleted, and Form DV3 (Affidavit in support of application for protection order/property order) should be amended to include a statement that the applicant is aware that he or she is able to request the provision of a safety programme.

Recommendation

8. That clauses 17(5) of the draft Family Courts Amendment Rules (No 5) 2014 and clause 15(5) of the draft Domestic Violence Amendment Rules 2014 be deleted, and Form DV3 (Affidavit in support of application for protection order/property order) be amended to include a statement that the applicant is aware that he or she is able to request the provision of a safety programme.

Draft Family Courts Amendment Rules (No 5) 2014

Clause 20 – Schedule 5, form DV 14 amended

Clause 21 – Schedule 5, form DV 15 amended

Draft Domestic Violence Amendment Rules 2014

Clause 17 – Schedule 1, form DV 16

Clause 18 – Schedule 1, form DV 17 amended

9. The standard terms of protection orders (whether temporary or final) establish certain exceptions when contact by a respondent with a protected person will not constitute breach of the order.
10. The Domestic Violence Amendment Act 2013 introduced a new exception by the addition of section 19(2)(e)(v) to the Domestic Violence Act 1995, namely contact “as is necessary for the purposes of attending a settlement conference convened under section 46Q of the Care of Children Act 2004”. That amendment took effect on 31 March 2014.
11. The amendment to the standard conditions of a protection order is consequential upon that additional exception inserted into the Domestic Violence Act 1995.

12. The exceptions under section 19(2) of the Domestic Violence Act 1995 were previously silent as to the attendance by a respondent at any court event. Respondents were able to attend court conferences and hearings without that attendance constituting a breach of the protection order.
13. The amendments to the Care of Children Act 2004 and the Family Courts Rules 2002 that took effect on 31 March 2014 create several types of conferences in addition to a settlement conference which may occur in Care of Children Act proceedings to which a respondent and protected person are parties.
14. By providing an exception for attendance by a respondent only at a settlement conference it is implicit that there is no exemption for attendance at other conferences, at a hearing or at other court events. This would be contrary to the welfare and best interests of children if it hinders efficient administration and/or early resolution of cases and to natural justice if a respondent is prevented from effective participation in proceedings to which he or she is a party.¹
15. This should be rectified by either repealing or amending section 19(2)(e)(v) of the Domestic Violence Act 1995 to enable a respondent to attend all court events in proceedings to which he or she is a party. Consequential amendments to clauses 20(3) and 21(3) of the draft Family Courts Amendment Rules (No 5) 2014 and clauses 17(3) and 18(3) of the draft Domestic Violence Amendment Rules 2014 would then be needed to reflect the changes to the primary legislation.
16. The Law Society also notes there may be other non-court events where further exemptions should be considered – for example, a respondent’s attendance at Family Dispute Resolution (particularly when attendance is directed by a judge) and attendance at a round table meeting. Attendance at such events may well result in resolution of a dispute and exemptions should therefore be provided.

Recommendations

17. That section 19(2)(e)(v) of the Domestic Violence Act 1995 be repealed, or alternatively be amended as follows:

“as is necessary for the purpose of attending any conference or hearing in proceedings to which the respondent and protected persons are parties”.
18. That clauses 20(3) and 21(3) of the draft Family Court Amendment Rules (No 5) 2014 and clauses 17(3) and 18(3) of the draft Domestic Violence Amendment Rules 2014 be deleted, or alternatively be amended to reflect the changes to the primary legislation.

If you wish to discuss these comments further, please do not hesitate to contact the Law Society’s Family Law Section through the Section Manager, Kath Moran (ddi 04 463 2996 / kath.moran@lawsociety.org.nz).

Yours sincerely



Chris Moore
President

¹ See paragraphs 253, 254 and 257, New Zealand Law Society submission on the Family Court Proceedings Reform Bill, 13 February 2013 (available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0010/61597/Family-Court-Proceedings-Reform-Bill-13-2-13.pdf).