Regulatory Impact Statement

Vulnerable Children's Bill -Child Harm Prevention Orders

Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice. It provides an analysis of options to address concerns around people who have been:

- convicted of, or found on the balance of probabilities (more likely than not) to have committed, a specified offence, against a child or children; *and*
- who pose a high risk of seriously harming a child or children in the future.

The preferred policy option is new legislation introducing civil Child Harm Prevention Orders which are aimed at mitigating the risk to children posed by these high risk people by imposing certain conditions on them.

In 2012 the Government released a discussion document - the Green Paper for Vulnerable Children (the Green Paper). This paper aimed to open up discussion around vulnerable children in New Zealand. Close to 10,000 submissions were received on the Green Paper.

The Government considered the response to the Green Paper, and began considering proposals that would address the problems that had been raised. The Ministry of Social Development considered various options and, after settling on a legislative option to address the concerns raised by the Government, asked the Ministry of Justice for assistance on developing an order regime through legislation. On 24 September 2012 Cabinet approved the release of the White Paper for Vulnerable Children (the White Paper) which set out its preferred policy options [CAB Min (12) 34/9 refers]. The White Paper was released 11 October 2012.

As the Government has expressed the view that a mix of legislative and non-legislative options are to address child abuse is required, it has "in principle" agreed to the introduction of Child Harm Prevention Orders in the White Paper. This has restricted the range of options that were considered.

The costs and benefits of options to address the ongoing risk posed by those who have abused children have been considered.

The potential volume of orders has been calculated by extracting from Police statistics for the year from 1 July 2011 to 30 June 2012.

These statistics yielded an estimate of 80 individuals who might be considered suitable for an order. These volumes are necessarily very approximate, since there is no reliable information on the precise number of individuals who present a risk that would be mitigated by the imposition of the proposed order.

Risk prediction is inherently uncertain, so that orders will inevitably be imposed on people who would not have subsequently acted on that risk in the absence of an order.

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Date:

Introduction

1. In early 2012 the Government released a discussion document -the Green Paper for Vulnerable Children. This paper aimed to promote discussion of ways to protect vulnerable children in New Zealand. Close to 10,000 submissions from the public, other agencies and organisations were received on the Green Paper.

2. On 11 October 2012, the Government released the White Paper for Vulnerable Children, which set out its response to the Green Paper and the subsequent submissions. The White Paper sets out a Children's Action Plan that the Government intends to implement in a concentrated effort to help New Zealand's vulnerable children.

3. The proposals in the Children's Action Plan are divided into ten areas:

    3.1. Children at the Centre of What we do (ensuring services for children and families are child-centred including a cross-agency Care Strategy, building a prototype of the Vulnerable Children's Information System, implement integrated care plans for each child in care, set up a free "Child Protect" line, and implementing Children's Teams);

    3.2. Reporting Child Abuse (acting early to prevent child abuse, developing tips, information and guidance for families, designing a national public awareness campaign, introduce a "Working with Children Code of Practice, training for frontline professionals working with children on how to identify abuse);

    3.3. Finding, Checking and Connecting (find, assess and connect the most vulnerable children to service earlier and better, ensure information sharing is available, develop a code of conduct on information sharing, implement the Vulnerable Children's Information System);

    3.4. Working Together and Sharing the Responsibility (Chief Executives of the Ministry of Social Development, Ministry of Health, Ministry of Education, Ministry of Justice, NZ Police, the Ministry of Business Innovation and Employment (Housing) and Te Puni Kokiri to be jointly accountable for achieving results for vulnerable children, establish multi-disciplinary Children's Teams, establish an early response system – identification and assessment tools, new integrated plans and a lead professional for each child, establish Regional Children's Directors to provide regional leadership);

    3.5. Focusing on What Works (fund only those programmes and services that make a difference based on evidence, identify how Well Child, Tamariki Ora and Family Start can be better integrated, ensure Government funding and purchasing decisions prioritise vulnerable children, the Social Policy and Evaluation Research Unit within the Families Commission will provide advice to Children's Teams on best practice and what works in their regions and review Government funded parenting support provisions to ensure the right balance and mix of services to address families' needs);

    3.6. Protect and Respond (achieve better results for children in care, develop and implement a new cross-agency approach (Ministry of Social Development, Ministry of Health, Ministry of Education and NGOs) to improve the outcomes for children in care, and support for children and young people transitioning from care);

3.7. Professionals Helping Children (provide a safe and competent children's workforce that takes a child centred approach, introduce new obligations for vetting and screening processes, and set minimum standards and core competencies for those working with children);

3.8. Dealing with Abusers (curtailing guardianship rights of abusive parents to support children, introducing tough new restrictions for adults who present an ongoing risk to children through Child Harm Prevention Orders, tracking and monitoring of high risk adults, stopping abusers working with children);

3.9. Mentoring and Supporting (individuals and corporate and other groups stepping up to help vulnerable children, encouraging individuals to volunteer to mentor vulnerable children, and encourage individuals, corporate and other groups to contribute to scholarships for vulnerable children);

3.10. When Agencies Get it Wrong (ensure a robust and fair Child, Youth and Family complaints system, complete a review of the complaints process relating to Child, Youth and Family).

4. The proposals in the areas listed above encompass both non-legislative strategies (including primary prevention such as early intervention and support for vulnerable families and at risk children) through to effective legislative measures to address the risk posed by actual or potential abusers. The White Paper for Vulnerable Children sets out the Government's view that a mix of measures across all of these areas is required. The options discussed and assessed in this Regulatory Impact Statement address only one component of this range of measures to keep children safe: the effective management of adults who pose an ongoing high risk to children (see paragraph 3.8 above).

5. The White Paper for Vulnerable Children Volume II sets out that a key aspect of an overall protection strategy is the development of measures to prevent people assessed as posing a high risk of abuse or neglect from having contact with children. There are a number of measures available through the criminal justice system, but these are limited in their coverage. Work is also being completed by the Ministry of Education as lead agency on determining how adults are vetted and screened prior to entering the children's workforce, who should not be able to work with children and what will happen if someone is not properly checked prior to entering the children's workforce.

6. The Child Harm Prevention Order proposal should be assessed within the context of the various other measures set out in the White Paper for Vulnerable Children, in particular the vetting and screening proposals and the tracking and flagging of high risk adults. Once implemented, the Child Harm Prevention Order legislation will be administered by the Ministry of Justice.

Status Quo

7. The risk of harm to a child or children is currently mitigated through both non-regulatory actions, the law relating to children, young persons and their families, the criminal law and other related civil measures..

Non-regulatory interventions

8. There are a number of interventions that can currently be used by both government agencies and community providers to protect children from being harmed by high risk adults. One is the ability to report a concern that a child is being, or is likely to be harmed to Child, Youth and Family (CYF) or the Police. There are also a range of mechanisms in place currently to flag and track certain high risk adults, so that situations of risk can be identified, and reports made to CYF or action taken by Police.

9. A report of concern received by CYF or the Police requires an investigation into the safety of the child concerned, and if concerns about the safety of the child are substantiated, a range of actions may be taken to address the concern. At one end of the spectrum, a discussion might be had with the adult posing the risk (for example, if a person with previous child sex abuse convictions has been loitering near a school), and this might be sufficient to change the person's behaviour. At the other end of the spectrum, a place of safety warrant may be obtained to remove the child from home on an interim basis, and an application may be made to the Family Court for longer term orders (discussed below).

10. In some cases, a high risk adult may notify CYF that she/he is expecting a child or has commenced a relationship where children are present ('changed circumstances'), as agreed at the end of previous involvement with CYF.

11. A professional or other person involved with a person may also notify CYF of the changed circumstances. There are a number of mechanisms currently in place to alert an organisation or professional of the need to notify CYF:

    11.1. flagging and tracking with Work and Income - this relates to a limited number of tightly managed cases whereby a flag is put against a person in the Work and Income database because of concerns the person may present as future risk to a child;

    11.2. if the person is involved with Family Start, Family Start is required to notify CYF for an assessment where a child has previously been removed for care and protection concerns;

    11.3. Operational Level Agreement between Child, Youth and Family and Corrections (Community Probation) - if a person is involved with Corrections, a system is established to enable Corrections to seek information from Child, Youth and Family where there are any concerns for children or where it is proposed that an individual will move to a home where children reside (this includes pre-sentencing and parole reports);

    11.4. Corrections, Housing New Zealand, Police and MSD agreement relating to the exchange of information regarding sex offenders – this enables information to be provided by Corrections and matched with CYRAS and other data bases relating to sexual offenders; and

    11.5. advice and support provided by a hospital social worker (funded by CYF and present in every DHB) to professionals within the DHB who are involved with and/or concerned about the welfare of children.

12. If notified of a pregnancy where the person has had a previous child removed, CYF undertakes an assessment before the birth. If the assessment indicates that the child is unlikely to be safe remaining in the parents' care, CYF will apply to the Court for the child to be placed in the custody of the Chief Executive. This enables CYF to remove the child at birth.

13. If CYF become aware of the pregnancy or changed circumstances some time after the child is born or after the individual has moved to an arrangement where children are present, CYF will undertake an assessment when they are notified of the changed circumstances. On the basis of that assessment, if the grounds exist, CYF will apply to the Family Court for an order to remove the child. This includes being able to take legal action if they have serious concerns for the child's immediate safety in the period before the risk assessment can be completed.

Regulatory interventions

14. In addition to the non-regulatory measures identified above, there are a range of measures involving different levels of coercion that are available through the Children, Young Persons and their Families Act 1989, the criminal law and the civil law.

Children Young Persons and their Families Act 1989

15. Child, Youth and Family has formal regulatory interventions available under the Children, Young Persons and their Families Act 1989 (CYPFA).

16. Under CYPFA, where an adult is thought to have offended against a child in the home, the current options are to:

- develop a care and protection plan (with or without formal orders from the Family Court) to mitigate the risk to the child while he or she continues to live in the home;

- obtain a place of safety warrant to remove a child from hone when there is an immediate risk;

- obtain a care and protection declaration from the Family Court placing the child in the custody of the Chief Executive of the Ministry of Social Development, which might involve the placement of the child in a different home; or

- following a care and protection declaration, impose a restraining order (which can be made on an interim basis) preventing the adult from interacting (including residing) with the child in respect of which the declaration has been made, or any person with whom the child or young person is residing.

17. This care and protection legislation enables the Government to take action to protect children allegedly abused and neglected, but (but with the limited exception of restraining orders) this is by way of intervention in the lives of the children harmed, rather than taking actions against the alleged perpetrators. The care and protection system is limited in its ability to intervene to protect children until they are demonstrated to be at immediate risk. It also does not provide solutions that deal with adults who do not offend against children in the home.

Criminal Law

18. Where an offence has allegedly been committed against a child or children, it may result in a complaint to the Police, and the Police then investigate the complaint and bring charges if there is sufficient evidence. Investigating this type of criminal offending can involve significant Police time, resources and technical expertise.

19. Once charges are heard by the courts, a person can be convicted and sentenced for the offence. The sentence may involve imprisonment, home detention, a community-based sanction such as intensive supervision or a fine. If the person is sentenced to imprisonment, conditions to mitigate any risk that that person continues to pose to a child or children may be imposed when he or she is released from prison (eg, non-contact or non-association conditions). Unless the offender is subject to a life sentence, these conditions expire at or within 6 months of the end of the sentence. There is no power to apply conditions to a non-custodial sentence that persist beyond the end of the sentence.

Domestic Violence Act 1995 – Protection Orders

20. Victims of family violence (including children who have been harmed) can obtain a protection order if they choose to do so. Once issued, a protection order may contain non-violence provisions, firearms restrictions, programme conditions, and/or non-contact conditions.

21. Protection orders only protect the person or people named in the order and can be discharged by the Court on application.

22. These types of orders are generally sought where there has been a history of intimate partner violence and it is usually adult women who apply for protection orders against their abusive partners.

Police Safety Orders (PSO)

23. In addition, there is the ability for the Police to issue a police safety order (PSO) where they have reasonable grounds to believe that family violence has occurred or may occur.

24. PSOs can last for up to 5 days but are usually made for one to two days. The purpose of a PSO is to protect people named in the order who are at risk from violence, intimidation or harassment. The Police do not need the permission of the person at risk to issue a PSO.

25. Such orders will normally be imposed where there has been intimate partner violence. The PSO will typically extend to the woman who has been abused and her children.

Extended Supetvision Orders (ESO)

26. Where a person has been convicted of a sexual offence against a person under 16 years of age and sentenced to a finite prison sentence, and is assessed at the end of the sentence as presenting a real and ongoing risk of committing further sexual offences against persons under 16 years of age, the Department of Corrections can apply to the Court for an extended supervision order (ESO).

27. If an ESO is granted, the Department of Corrections will monitor the person under the ESO in accordance with the conditions of the order.

28. The Department of Corrections advises that work is being done that may involve the extension of ESOs to violent offences and sex offences against adults.

Public Protection Orders (PPO)

29. Public Protection Orders (PPOs, currently in the Public Safety (Public Protection Orders) Bill before Parliament), will allow the High Court to order the civil detention of an offender who, having completed a finite prison sentence for serious sexual and/or violent offending, presents a very high risk of imminent and serious sexual or violent offending.

30. These individuals will be detained in secure, but separate, public protection facility within the secure prison perimeter after they have completed their finite sentence.

Problem Definition

31. Children in New Zealand are still at risk of harm from adults who pose a high risk of offending against them, despite the various non-coercive interventions and regulatory measures we have in place to mitigate that risk. Many of the mechanisms currently in place disrupt the child's life, rather than focus on the adult who poses the risk or has committed the harm. Whilst current mechanisms do protect children, this is not the case on every occasion, and minimising the instances where protection is not provided is key.

Issues with non-coercive interventions

32. In the absence of intensive tracking and monitoring of high risk adults, reports of situations where children are at risk are inevitably partial and fragmented. This can result in cases where intervention would have been warranted falling through the cracks.

33. Measures that are available to identify and track high risk individuals are not comprehensive. There is no ability to require people to tell agencies where they are or who they are living with, which means that some high risk individuals are unable to be monitored appropriately.

34. Even where high risk adults are identified, any voluntary support and advice that is offered may not be accepted. Nor will such adults always remove themselves from high risk situations.

35. As a result, the only way to protect children under the current regime is to remove the child from the situations where high risk adults pose a risk. Intervening in this way may itself cause harm, and this harm could be averted if the high risk adult was instead removed or their risk mitigated in another way.

Issues with interventions under the Children, Young Persons and their Families Act 1989

36. The range of current options under the Children, Young Persons and their Families Act 1989 are also too limited.

37. First, care and protection plans, even if they involve visits by social workers to the home, leave the child exposed to risk if the adult is still in the home, and there is no ability to remove adults from the home without their consent unless a restraining order is obtained following a care and protection declaration. Such a declaration is a last resort that impacts on the life of a child, and ancillary restraining orders are rarely made.

38. Secondly, if there is a plan or court order requiring the removal of the child or children, this disrupts the lives of the child or children rather than that of the person who poses a risk to them.

Thirdly, if a restraining order is obtained to exclude the adult from the home, this does nothing to mitigate risk to other children that the person may come into contact with. This is because the person may move on to another family despite posing a high risk in a family context.

Issues in the Criminal Law

39. There may be occasions where a complaint is made against a person or an investigation takes place, but there is not enough evidence to prove the person's guilt to the requisite criminal standard (beyond reasonable doubt). Thus, even when a person has probably offended against a child or children, and he or she is thought to pose a high risk of causing serious harm in the future, there is limited ability to take action against the person to mitigate that risk. The risk to that child or children, and potentially to other children, may therefore be left largely unaddressed.

40. Even where a conviction is entered and a sentence imposed, the person may continue to pose a high risk to the child or children in question and/or any other children. Where the offence involves physical rather than sexual violence, there are no current measures to counter that high risk on the expiry of the person's sentence.

Issues with Protection Orders and PSOs

41. Protection orders and PSOs are also very limited in the protection they offer to children.

42. First, they only protect children named in the order. They are therefore unable to be used to protect other children who are at risk.

43. Secondly, protection orders are available only on application from a victim of any family violence or at sentencing for a domestic violence offence. However, many vulnerable people, particularly children, are not in a position to take affirmative action against the person who is abusing them.

44. Finally, although PSOs may be issued by the Police without an application, they last for a maximum of only 5 days. They are designed to allow Police to deal with domestic violence incidents on the spot by removing an aggressor from the home. It is unlikely that this short period of time will be long enough to address the type of risk about which the Government is concerned. High risk adults may continue to pose a high risk to a child or children after a PSO has expired.

Issues with Public Protection Orders and Extended Supervision Orders

45. ESOs currently only apply to people who have been convicted of sexual offences in the criminal courts. While the Department of Corrections advise that they are completing policy work on the potential extension of ESOs to those who have committed certain violent offences and sex offences against adults, Cabinet has yet to approve these proposals. In any event, ESOs are available only at the end of a sentence; they do nothing to address the risk posed by those who have not been convicted.

46. PPOs are not currently law in New Zealand. They will only apply to a small group of high risk offenders who have been convicted in the criminal courts and have finished

serving a prison sentence. They will not provide protection in the range of circumstances that arise following the end of a sentence, and again they will do nothing to address the risk posed by those who have not been convicted.

Summary of all issues

47. As indicated above, the current law and practice are only partially effective in mitigating the risk to children posed by persons who commit violent or sexual offences against them. Whilst non-regulatory interventions provide some ways of intervening to reduce the risk high risk adults pose to children, they are only partially effective. These measures cannot be forced and may ultimately require an intervention in the life of a child. In terms of regulatory interventions, at one end of the spectrum, orders such as PSOs and protection orders are limited in scope and duration and not specifically directed towards the protection of children. At the other end of the spectrum, measures such as ESOs and the proposed PPOs involve either confinement or varying conditions ranging from parole-type monitoring to intensive residential restrictions and accompaniment.

48. There is a need to be able to ensure interventions are more likely to be effective by introducing some form of coercion. There is also a need for effective measures that reduce the risk to children by high risk adults whose risk cannot be adequately addressed by protection orders or PSOs, and who do not qualify (or do not require) the very far-reaching curtailment on liberty that results from an ESO or PPO. This measure addresses the White Paper for Vulnerable Children's expectation that children will be protected from serious harm from high risk adults.

49. Such measures inevitably run the risk of imposing restrictions on people who would not have offended as predicted. However, that risk needs to be weighed against the risk of further harm to innocent children who are not in a postion to take steps to protect themselves. In some circumstances, it is justifiable to avert the latter risk by running the former. The current law does not sufficiently allow for that.

50. The people for whom such measures are required fall into two groups:

- those who have been convicted and pose a high risk but to whom ESOs and PPOs do not apply or cannot be justified; and

- those who have not been convicted but on the balance of probabilities have offended against a child or children and pose a high risk in the future.

51. These four categories of people present a risk to children in a number of different circumstances:

- Some have committed prior sexual or physical abuse within an identifiable family group, continue to live or associate with that family group, and present a high risk only to children within it.

- Some have committed prior sexual or physical abuse within a particular family group, but present a high risk to children in other family groups to which the offender is not yet attached, particularly if they have left the family where the conduct occurred, or have a history of moving from one relationship to another.

- Some have offended, and present an ongoing risk, solely in situations where there is an opportunity for them to "groom" victims, for example through their

employment. Examples of this include someone who is a teacher, youth leader, or sports coach.

- Some have a pattern of offending that is not circumstance-specific, so that they present a more general risk to children.

52. In all these circumstances, existing measures, both non-coercive and regulatory, are sometimes inadequate because:

- the interventions require the voluntary co-operation of the high risk adult; or
- the person may have been convicted and sentenced, but no measure to mitigate their risk is available at the end of their sentence; or
- the person may have been prosecuted for offending but not convicted; or

  the person is not prosecuted because the children are young and no other evidence that reaches the criminal threshold is available.

53. In these cases, Protection Orders provide only time-limited protection in relation to specific identified children, and rely on an adult to apply on the child's behalf. They do not provide the protection required. Measures such as ESOs and PPOs apply only at the end of a sentence and only to a limited number of qualifying offences. They again provide only partial protection. And Child, Youth and Family may be involved with the child to whom the person poses a risk, but this is not always the case, and even when they are, they focus on the needs of the child rather than on the offender's conduct.

54. The provision of mandatory restrictions is likely to be effective in addressing the risks that are not currently addressed because offending is a function, not only of a person's disposition to offend, but also of their opportunity to offend. It is well established in the crime prevention literature that measures that effectively reduce opportunities to offend by limiting the access of offenders to situations in which offending can occur is effective in reducing crime.

55. The potential scale of the problem has been calculated by extracting from Police statistics for the year from 1 July 2011 to 30 June 2012:

- all of those believed to have committed a specified sexual offence against a child (but not convicted for it); and
- all of those believed to have committed a specified offence of physical abuse or neglect of a child (but not convicted for it) who were the parent, relative or caregiver of the victim or otherwise residing with the victim

where the offender had two previous contacts with the police as a suspect for one of the specified offences since 1 July 2005.

56. These statistics yielded an estimate of 80 individuals who potentially present a high risk to children that is not presently being adequately addressed. However, these are necessarily very approximate, since there is no reliable information on the precise number of individuals who present a risk that would be mitigated by the imposition of the proposed order.

Objectives

57. The Government's objectives are to ensure that:

- there is better risk mitigation of the harm some high risk adults pose to children;
- measures provide a cost effective solution to the inadequacies in the current legislation identified above;
- compulsory measures to provide that protection are proportionate to the risk and no more intrusive than is required to mitigate that risk.

Regulatory Impact Analysis

Options

58. A number of non legislative and non-coercive measures to mitigate ongoing risk to children are included in the White Paper. The White Paper fact sheets found at www.childrensactionplan.govt.nz outline these measures, including:

58.1. a new Child Protect Line providing a single point of contact for all New Zealanders to report any concerns they have about children or young people;

58.2. legislation requiring all agencies working with children to have policies covering how to recognise and report suspected child abuse and neglect;

58.3. a new system to find, assess, and connect vulnerable children to services earlier, and a Vulnerable Children's Information System to draw together information from government agencies and front line professionals about vulnerable children. The latter system will also enable the tracking of high risk adults;

58.4. new local Children's Teams bringing together frontline professionals working with children to protect vulnerable children and young people. These teams will ensure vulnerable children's needs are assessed, all parties required to address those needs are at the table, a single multi-agency plan for each vulnerable child is developed and implemented and a lead professional is assigned to see the plan through;

58.5. supporting caregivers, including improving support to whanau and non-whanau caregivers by strengthening recruitment, approval, training monitoring and support processes;

58.6. a public awareness campaign targeted at involving all New Zealanders in promoting awareness and the safety of children. The initiative will communicate the consequences of not protecting children, increase the understanding of child abuse and neglect and the effect it has on a child's development, increase willingness, capability and the confidence of individuals and communities to take responsibility for responding to child abuse and neglect;

58.7. an action plan for the workforce in order to ensure that anyone working with children has consistent quality of practice, new standards and competencies.

Workers will be able to identify, assess, respond to and monitor vulnerable children;

58.8. mandatory worker safety checks to ensure people who pose a risk cannot work with children;

58.9. investigation of a law change that will limit guardianship rights of parents who present an ongoing serious risk to their children. For example, the Court could decide which aspects of a child's life will be the responsibility of the caregiver they have been placed with and what aspects the birth parents have a say in; and

58.10. flagging and tracking of high risk offenders so that a person's status as a high risk adult would be flagged with other government agencies, for example Housing Corporation New Zealand, enabling situations of risk to children to identified and acted upon before further abuse occurs.

59. Although these measures as a package will ensure that risk to children is mitigated in many circumstances, there is still room to further mitigate the risk some adults pose to children. The measures above will not be sufficient on their own, as they do not impose any restrictions on what an offender can do, and therefore do not intervene to prevent the circumstances in which risk of offending arises. High risk individuals even with better support will sometimes put themselves in situations where they pose a risk and cannot be prevented from doing so.

60. In order to address this gap, some form of coercion is required so that such adults are less able to put themselves in risky situations. That intervention requires legislative authority.

61. Many options to achieve these objectives were considered prior to the publication of the White Paper for Vulnerable Children, including:

- further review of sentencing of people who abuse and neglect children, including the introduction of minimum sentences and increasing the length of maximum sentences;
- introducing a requirement that 'serious abusers' cannot live or work with children;
- mandatory reporting of child abuse; and
- legislative change so that orders are made on sentencing of serious abusers that state they cannot have further children.

62. Further review of sentences for child abuse was not considered to be required given recent changes to strengthen the way the justice system responds to those who abuse of neglect children. These changes include making offending against children an aggravating factor in sentencing in 2008, and new offences against children under the Crimes Act introduced in 2012. These changes may have effect on those convicted but do not mitigate those who pose a high risk who are not convicted or who continue to pose a risk after the end of their sentence.

63. Introducing a requirement that people whose existing children who have had them removed is being considered as part of changes to the Children, Young Persons and their Families Act 1989, however it is a limited option that addresses only one circumstance in which the risk to children is posed.

64. Mandatory reporting was rejected in the White Paper. Such measures are not effective in preventing harm as they necessarily occur after harm has occurred. As such, the costs outweigh the benefits.

65. An order that a serious abuser not have further children was considered too restrictive, and as raising human rights compliance issues.

66. Flagging and tracking of high risk adults is a potential non-legislative option that was considered, and that Cabinet has agreed to pursue as part of the Children's Action Plan. The work involves assessing the existing mechanisms government agencies have in place with a view to developing a more comprehensive system between government agencies to share information to allow identification of situations of risk to children. This will complement, and allow for the implementation of Child Harm Prevention Orders.

67. The options outlined above were found not to be viable and are not included in the White Paper for Vulnerable Children initiatives or this Regulatory Impact Statement.

68. Two viable legislative options to address the problems outlined above were identified:

- Introducing a new regime which aims to mitigate the high risk of serious harm to a child or children posed by convicted offenders; or

- Introducing a new regime which aims to mitigate the high risk of serious harm to a child or children posed by adults, whether or not they have been convicted in the criminal courts.

69. Consideration has been given to the benefits and costs of maintaining the status quo and adopting either of the other options.

Maintain the status quo

Benefits

70. Maintaining the status quo would be seen to be consistent with the principle that the State should not interfere in the liberty of people on the basis of their behaviour unless that behaviour is proved beyond reasonable doubt.

71. The status quo also has no immediate fiscal impact and would therefore not add to existing fiscal pressures faced by the justice and social sectors.

Costs

72. However, the maintenance of the status quo would do nothing to achieve the objectives of reform set out above. It would rely instead upon voluntary solutions in the rest of the Government's package of measures in the Children's Action Plan to reduce the current level of risk, which would be inconsistent with the Government's view that a mix of legislative and non-legislative solutions is required.

73. As indicated, there are gaps in the existing legislation for those who have *probably* offended and who pose a high risk of reoffending. Such people are subject to few constraints. Without the introduction of more effective and comprehensive compulsory measures that currently exist, the risk they present will continue to go largely unaddressed.

74. Moreover, if legislation is not strengthened, increasing social willingness to take action in response to observed child abuse may be undermined and community action may be less likely to materialise. This will mean that the social tolerance of child abuse will remain unchanged.

75. Evidence shows that the estimated additional cost to the state of meeting the lifetime needs of children who have been maltreated to the extent that they are brought into the care of CYF is over $750,000 per child.[1] This is a significant long term cost.

76. In addition to those children who end up in care, the fact that child abuse will continue at the current level will mean that the cycle of abuse continues, with many current victims becoming abusers who will harm a future generation of children.

Option 1: Introduce a new regime for convicted offenders

77. The first alternative option considered as a means of addressing the gaps in current legislation is to introduce a new civil order that would apply to persons who have been convicted of a specified offence against a child and are found to present a high risk of causing further serious harm to children. The purpose of such an order would not be to punish or sanction the person, but to restrict activities that are thought likely to pose a risk to children.

Benefits

78. A regime that applied only to convicted offenders would be seen to be consistent with the principle that the State should not interfere in the liberty of people on the basis of their behaviour unless that behaviour is proved beyond reasonable doubt.

79. This option would also have a minimal fiscal impact, as the numbers of people subject to the orders would be very low.

80. The regime would partially meet the Government's objectives as it would be capable of mitigating risk only if imposed at the end of a sentence. It is anticipated that this would occur only rarely and would be at the cost of increasing the risk in some cases (see below).

Costs

81. The regime would incur significant costs.

82. First, this option would do nothing to address the risk posed by those not convicted or sentenced, and would therefore fail to address most of the real gaps in the current regime outlined in the problem analysis. People who have probably offended against children but not convicted would still generally be free to continue to live with those children or to move on to another family and pose a high risk to children in that family.

83. Secondly, even in relation to convicted offenders, an order would have utility only at the expiry of a person's sentence. That is because existing sentences are able to provide the required protection while they are in force. If an offender is sentenced to

[1] Rankin, D (2012). Meeting the needs of New Zealand children and young people who have been abused and neglected. Best Practice Journal, 37, 4-9. http://www.bpac.org.nz/magazine/2011/augusUupfront.asp.

imprisonment, he or she is not able to offend against children while in prison and is subject to conditions after release on parole or at the statutory release date. If the offender receives a non-custodial sentence, he or she can be subject to appropriate conditions to mitigate risk through home detention, community detention, intensive supervision or supervision.

84. Thirdly, some are likely to criticise it in the belief that, notwithstanding its express protective purpose, the imposition of a civil order in addition to the sentence for the offence of which the offender was convicted would amount to double punishment and infringe the rule against double jeopardy. It would accordingly be seen by some as an infringement of fundamental rights.

85. Fourth, if an order was imposed at the end of a sentence and contained conditions restricting that person beyond the end of their sentence, there is a risk that this may militate against their effective rehabilitation or reintegration. Offenders who have served their sentence may also resent restrictions beyond the end of the sentence and may be unwilling to comply with the conditions of an order.

86. Fifth, because prediction of risk is inherently uncertain, orders would inevitably be imposed on people who would not have committed child abuse in the absence of the order during the period of its currency. In those cases, therefore, they would impose costs in terms of the curtailment of fundamental freedoms without any corresponding benefits.

87. Sixth, making CHPOs applicable to sentenced offenders only would likely result in the view that CHPOs are criminal in nature and this would give rise to Bill of Rights Act challenges of arbitrary detention or restrictions on freedom of movement that would not be proportionate to the risk they pose. This might also lead to United Nations Human Rights Council challenges.

88. Finally, the orders themselves might lead to unrealistic expectations. There are inherent limitations on what monitoring in the community, short of 24 hour surveillance, can achieve. It will never stop all potential offending, and the extent to which it reduces that offending is dependent on many factors, including the degree to which the conditions are properly targeted to the presenting risk and he capability of agencies to monitor compliance with those conditions. There might therefore be an unrealistic public and political expectation that orders may have a greater effect on child abuse that they are capable of achieving.

Option 2: Introduce a new civil regime (preferred option)

89. The second alternative option considered as a means of addressing the gaps in current legislation (and the preferred option of the Ministry of Justice) is to introduce a new civil order that would apply to high risk persons whether or not they have been convicted. This order would be available for persons who have been found on the balance of probabilities (ie, more likely than not) to have committed a specified offence against a child and are found to present a high risk of causing further serious harm to children. Such a finding would be able to be made by the High Court or the District Court following an application by the Commissioner of Police or the Chief Executive of the Ministry of Social Development or the Department of Corrections. An application would be able to be lodged following an acquittal at a criminal trial, at the end of a sentence or at any other time.

90. As with Option 1, the purpose of such an order would not be to punish or sanction the person, but to restrict activities that are thought likely to pose a risk to children.

Benefits

91. This regime would prevent reoffending by high risk adults by imposing an array of restraints on high risk offenders targeted at situations in which that risk arises. It would thus provide additional protection for vulnerable children and reduce the incidence of abuse. It would more effectively meet the Government's objectives than either the status quo or Option 1.

92. This order would focus on the safety of children by protecting a wider range of children than other interventions and is offender focussed by ensuring the onus is on the offender to change their behaviour to keep children safe. This is opposed to some current interventions that require, for example, a child to move house rather than an adult changing their behaviours.

Costs

93. The option carries a number of costs and risks.

94. First, it would be seen by many to be punitive and contrary to the presumption of innocence, and therefore as an infringement of fundamental rights.

95. Secondly, it would impose costs on the individuals subject to the orders in the form of restraints on their freedom. Conditions would be likely to limit where a person subject to an order could go, where they could live or who they could live with. This would potentially give rise to non-quantifiable costs to their quality of life and their ability to maintain relationships with others.

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99. Fourthly, as with option 1, the inherent uncertainty of risk prediction means that orders would inevitably be imposed on people who would not have committed child abuse in the absence of the order during the period of its currency. The number of such cases would be much greater than those arising under Option 1, and would therefore impose significant costs in terms of the curtailment of fundamental freedoms without any corresponding benefits.

100. Fifthly, the orders themselves might lead to unrealistic expectations from the public. There are inherent limitations on what monitoring in the community, short of 24 hour surveillance, can achieve. The public might believe that an order would have a greater effect on child abuse that it would be capable of achieving.

101. Sixthly, there is a risk that the volume of applications would be substantial and encompass cases that were not sufficiently serious to justify the proposed order.

102. However, the following features of the regime would go some way towards mitigating this risk, so that administrative costs and burdens did not outweigh the benefits associated with the order:

- the requirement that there be inter-agency consultation and agreement as to the need for, and content of, an application according to an established protocol;
- the requirement that the assessment of risk be supported be informed by a robust and properly tested risk assessment tool;
- the need for restrictions to be proportionate to the risk and no more than necessary to address the risk posed.

103. Seventhly, should the regime be unduly restrictive or apply for any longer than is required to address the risk posed, there would be a potential for both enforcement agencies and individuals and their families to disregard the orders, undermining the credibility and impact of the proposed regime. This would be mitigated by some statutory and administrative safeguards to ensure the orders were properly targeted to the person's particular risk and sufficiently specific to be able to be monitored and enforced. Annual reviews by the Review Panel and a Court review after every 3 year period for those orders that are imposed for 3 years or more should also mitigate this risk.

104. Finally, there is a risk that a condition prohibiting the person from living with children could result in women who become pregnant while they or their partner were subject to an order hiding their pregnancies, or not engaging with professionals, for fear that the child or the partner might be removed following the child's birth.

105. It is anticipated that any potential risk would be mitigated (as it is currently) by agencies involved in the mother's life ensuring appropriate support and treatment was available to address the risks presented, thus increasing the chances that the mother had sufficient trust and confidence in the professionals involved to disclose the pregnancy. The existence of the order might also increase the chances of family member or agencies involved disclosing the pregnancy to Child, Youth and Family and enabling a risk assessment to be undertaken.

International comparisons

106. The White Paper for Vulnerable Children Volume II sets out in detail steps that comparable jurisdictions have taken to protect children. In Australia, Child Protection Prohibition Orders provide a preventative mechanism that permits courts to order that registered offenders not engage in certain types of behaviour or employment, go certain places, or contact certain people.

107. In the United Kingdom the courts can impose a Disqualification Order to prevent an individual from working with children due to a previous offence, which include the abuse of children. They can also impose Sexual Offences Prevention Orders (SOPOs) on people who are convicted of serious qualifying offences. SOPOs include prohibitions such as the person is prohibited from loitering in playgrounds. Risk of Sexual Harm Orders (RSHOs) are also available and are used to protect children from the risk of harm posed by individuals who don't necessarily have previous convictions for sexual or violent offences, but who have, on at least two occasions, engaged in sexually explicit conduct or communication with a child and pose a risk of further such harm. An RSHO could be used to prohibit a person using the internet.

108. In the United States, the state of Vermont has a Child Protection Registry – a database of all substantiated reports of child abuse and neglect. A range of other measures has also been introduced in the US to manage sexual offenders, including electronic registries of sex offenders, notifying communities and neighbours of the whereabouts of offenders ('Megan's Law'), statutes and ordinances that restrict where sex offenders can live and visit ('Jessica's Law'), and increased incarceration through lengthened sentences, the abandonment of parole, and the use of 'three strikes laws'.

Conclusions and Recommendations

109. The Ministry of Justice prefers Option 2 (Introduce a new civil regime), which has been labelled a Child Harm Prevention Order. In its view, provided that the conditions of the order are proportionate to the risk and no more intrusive than is required to mitigate that risk, the proposal does not violate fundamental freedoms. The Ministry accepts that there are other costs and risks in Option 2, but considers that its benefits in providing protection for vulnerable children who cannot take steps to protect themselves outweigh the fiscal and other costs associated with it.

110. The Ministry notes that the use of civil orders to protect people at risk of violence is not new. In the domestic violence context, protection orders as discussed above are civil and are based on proof on the balance of probabilities. Such orders can also involve quite powerful and restrictive conditions on those who are the subject of a protection order, including the removal of that person from a house they own or occupy; barring them from taking their own furniture; and restrictions of movement or contact with those protected by the order.

111. The Ministry also notes that the fiscal costs are likely to be outweighed by the longer term fiscal benefits alone. In calculating the costs, the Ministry has made the following assumptions:

- there will be 200 people subject to an order (cumulatively over time);

- 100 of those will true positives (ie, 100 people of the 200 would have in fact offended without the order);
- the true positives will commit on average of an offence against one child per year;
- an order will prevent 25% of those from committing the offence – resulting in 25 less child abuse cases per year.

These assumptions are speculative because the information to enable an accurate estimate of the numbers and proportions is not available.

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Consultation

113. In formulating the proposals outlined in the White Paper for Vulnerable Children, the Government released a discussion document (the Green Paper), which received almost 10,000 public submissions from academics, the media, both government and non government organisations, children, young people, frontline workers and the general public. Submissions argued that the Government should step in as early as possible, particularly where risk is identified.[2] Submissions expressed support for greater consequences for those who neglect and/or abuse children.[3] Children and young people saw the Government as responsible for providing environments free of abuse[4].

114. In an issues paper on possible reforms to alternative pre-trial and trial processes, the Law Commission proposed a possible reform for criminal cases related to sexual offences involving child complainants. Under the proposal, either the criminal court or the family court could make an assessment of risk regardless of the trial outcome. If it was determined on the balance of probabilities that the defendant had offended and either the victim in the case or other children were still at risk, the court would have the ability to make child protection orders in relation to the accused. Such orders would not involve detention but could include non-association with children or treatment. There were 73 submissions on the Commission's suggestion: 22 from organisations and 51 from individuals. The proposed reform was almost universally supported by sexual violence and victim support centres, the New Zealand Law Society, the Human Rights Commission, Victim Support, and the Police Association. Many were in favour of extending the proposed reform to cover physical as well as sexual abuse, as proposed by CHPOs.

115. In developing the CHPO proposal, the New Zealand Police, Crown Law Office, Department of Internal Affairs, Treasury, Department of Corrections, Ministry of Social Development, Ministry of Health, Ministry of Pacific Island Affairs, Te Puni Kokiri, the Ministry of Women's Affairs, the Ministry of Education, Parliamentary Counsel Office, and the Office of the Privacy Commissioner have been consulted on the proposals in this paper.

[2] The Green Paper for Vulnerable Children, Full Summary of Submissions, page 44
[3] The Green Paper for Vulnerable Children, Full Summary of Submissions, page 59
[4] The Green Paper for Vulnerable Children, Full Summary of Submissions, page 40

116. Concerns were raised as to the nature of monitoring, information sharing, impact on Maori, qualifying offences to be considered for a Child Harm Prevention Order and the nature and intrusiveness of the conditions that would be imposed. Meetings were held with agencies to work through issues raised and their concerns have been addressed in the Cabinet paper.

Implementation

Legislation

117. The changes discussed in this Regulatory Impact Statement are to be included in an Omnibus Bill that creates a new Act and will include consequential amendments to other Acts. It is intended that this Bill be introduced into the House in July 2013.

118. As the Ministry of Justice will be responsible for the new Act containing Child Harm Prevention Orders, it is intended that the Ministry of Justice assist with the parliamentary process of the Vulnerable Children's Bill, alongside other Ministries with responsibility for other new Acts or current Acts that are being amended.

Operational implementation

119. Police and Child, Youth and Family will be responsible for the operational implementation of Child Harm Prevention Orders.

120. Police, in collaboration with the Department of Corrections and Child, Youth and Family, will contract external experts to develop a robust and empirically validated risk assessment tool. Legislation will come into force by Order in Council (anticipated to be August 2014), only after the risk assessment tool is completed and decisions as to availability of funding to resource the regime are made.

121. Police will also work with the Ministry of Social Development and other relevant agencies to develop a register of active and past orders, including the conditions of orders and information required to monitor compliance with them. The register of CHPOs has linkages with other proposed developments such as the proposed sex offender register and should be managed by the same agency and apply a similar model and concept. Potential linkages with the Vulnerable Kids Information System should also be investigated as the register is developed.

122. Again, this register will be developed as funding is provided, and the legislation will not come into force until the register is in place.

Evaluation and review

123. There will be three levels of review of Child Harm Prevention Orders.

Review and evaluation of orders

124. Orders that have been imposed will be reviewed by an independent review panel either on application by the applicant agency or the respondent, or if no such application is made, annually. The Court will also be required to review orders that have been imposed for 3 years or more, after every 3 year period.

125. This will ensure that orders themselves remain appropriate in respect of risk mitigation strategies and that any changes in the circumstances of a respondent are taken into account.

Evaluation of statistics

126. It is proposed that the register of orders will provide statistics on the number of applications made, the number of orders granted, the nature of conditions imposed, the length of orders and number of breaches (whether or not resulting in prosecution). This will provide:

- an overview of the nature of orders once they are implemented;
- some indication of the extent to which orders are being used appropriately; and
- information on the impact of the monitoring of orders.

Review of legislation and operations at an appropriate time

127. It is intended that the Children's Action Plan will be evaluated through an evaluation programme. This programme is being developed to monitor the effective implementation and outcomes of initiatives under the Children's Action Plan, including Child Harm Prevention Orders. It is likely that a group with evaluation representatives from agencies is formed to ensure a coordinated approach and an evaluation plan.