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Legal Issues: a very brief overview of principles, dealing with disclosures, codes of practice

Faith Communities Against Family Violence

Auckland Workshop

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Goodman Fielder Room, Aotea Centre, Auckland

Topics to be covered

- Core legal and human rights principles – NZ statutes and international human rights treaties
- Disclosures of family violence – confidentiality vs duty to report
- Codes of practice

Core legal principles – NZ statutes

- NZ family law statutes are unequivocal:
- **Care of Children Act 2004 s5(e)** – establishes the principle that:

the child's safety must be protected and, in particular, he or she must be protected from all forms of violence from all persons... including members of the child's family, family group, whānau, hapū, and iwi

Core legal principles – NZ statutes cont.

**Children, Young Person and their Families Act
1989 – s 13(a):**

Establishes, in care and protection matters:

*the principle that children and young persons
must be protected from harm, their rights upheld,
and their welfare promoted*

Core legal principles – NZ Statutes cont.

- **Domestic Violence Act 1995: s5(1)** - Object of the Act:
to reduce and prevent violence in domestic relationships by—
 - (a) *recognising that domestic violence, in all its forms, is unacceptable behaviour; and*
 - (b) *ensuring that, where domestic violence occurs, there is effective legal protection for its victims.*
- **“Domestic relationship” – s4** -
 - is a spouse or partner of the other person; or
 - is a family member of the other person; or
 - ordinarily shares a household with the other person; or
 - has a close personal relationship with the other person

How is domestic violence defined?

- **Domestic Violence Act s3(2) –**
“violence” means—
 - (a) **physical abuse:**
 - (b) **sexual abuse:**
 - (c) **psychological abuse**, including, but not limited to,—
 - (i) intimidation:
 - (ii) harassment:
 - (iii) damage to property:
 - (iv) threats of physical abuse, sexual abuse, or psychological abuse:
 - (v) in relation to a child, abuse of the kind set out in subsection
- Family Court Proceeding Reform Bill - will add **financial or economic abuse** (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)

International Human Rights Treaties

- UN Convention on the Rights of the Child (ratified by NZ in 1993)

Article 19 – obligation on States Parties to take *all appropriate legislative, administrative, social and education measures* to protect children from all forms of violence from parents/caregivers

- Convention on the Elimination of Discrimination Against Women (ratified by NZ in 1985)

Article 16 regards protection from discrimination in family life

Disclosures of Family Violence to Ministers of Religion

- Complicated issue – one that can arise in the course of pastoral/confessional work
- Matters to consider:
 - Current legal provisions regarding disclosure or notification
 - Special status of communications with a minister of religion – “confessional privilege”
 - Analogous professional codes of practice

Current legal provisions regarding disclosure or notification

- **Children, Young Persons and their Families Act 1989 – s15**

*Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected, or deprived **may** report the matter to a social worker or a constable*

- Protection from liability unless notification made in bad faith

Current legal provisions regarding disclosure or notification

S195A Crimes Act 1961 – Failure to protect child or vulnerable adult

- Punishable by up to 10 years imprisonment
- Must know that the victim is at risk of death, GBH or sexual assault and fail to take reasonable steps to protect the victim from that risk
- Must be a member of the same household OR staff member of a hospital, institution or residence where the victim resides

Current legal provisions regarding disclosure or notification

- **Privacy Act 1993** – enables disclosure of personal information:
- To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution and punishment of offences
- Where disclosure of the information is necessary to prevent or lessen a serious threat to the life or health of the individual or another individual

Special Status of Ministers of Religion – “Confessional Privilege”

- The law provides a privilege regarding communications between a person and minister of religion – **s58 Evidence Act 2006**
- Regards communication between a person and a minister of religion if made in confidence to or by the minister in the minister's capacity as a minister of religion
- Communications must be for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit, or comfort.

Confessional Privilege continued

- Definition of “minister of religion” –
a person who has a status within a church or other religious or spiritual community that requires or calls for that person to receive confidential communications of this kind and to respond with religious or spiritual advice, benefit, or comfort.
- The communication must have been made at least in part as a result of the confessor's religious belief or practice.
- A person possessing the privilege may waive it, expressly or impliedly
- A person cannot be required to give evidence concerning communications made in confidence to a minister of religion for the purpose of religious advice

Professional Codes

NZ Association of Counsellors – Code of Ethics

6.1. Extent of Confidentiality

- (a) Counsellors shall treat *all communication between counsellor and client as confidential and privileged information, unless the client gives consent to particular information being disclosed*
- (b) Counsellors may discuss, in supervision, information received in counselling as part of the normal management of confidentiality.
- (c) Counsellors should take all reasonable steps to communicate clearly the extent and limits of the confidentiality they offer clients.
- (d) Any agreement between the counsellor and client about confidentiality may be reviewed and changed by joint negotiation.
- (e) Counsellors shall protect clients' identities when information gained from counselling relationships is used for purposes such as counsellor training, research or audit.
- (f) Counsellors shall respect confidences about the clients of colleagues.
- (g) Counsellors should establish procedures to ensure the ongoing management of client confidentiality in the event of the counsellor's death.

Professional Codes continued

NZ Association of Counsellors – Code of Ethics

6.2. Exceptions to Confidentiality:

- (a) Counsellors shall only make exceptions to confidentiality *in order to reduce risk*.
- (b) When counsellors need to pass on confidential information, they should provide only the minimum of information necessary and only then to those people to whom it is absolutely necessary.
- (c) Exceptions to confidentiality occur when:
 - There is *serious danger in the immediate or foreseeable future to the client or others*,
 - The client's competence to make a decision is impaired,
 - *Legal requirements demand that confidential material be revealed*,
 - Responding to a complaint about counselling practice.
- (d) Wherever possible, the decision to make an exception to confidentiality is made:
 - *After seeking the client's co-operation*, unless doing so would further compromise the safety of the client or others,
 - *After consultation with a supervisor*.

Professional Codes continued

Lawyers and Conveyancers Act (Lawyers Client Care and Conduct) Rules 2008:

Rule 8.4: A lawyer may disclose confidential information relating to the business or affairs of a client to a third party where—[includes]

- (a) the client *expressly or impliedly authorises the disclosure* (and where the information is confidential to more than 1 client, all clients have authorised the disclosure);¹¹ or
- (b) the information relates to the *anticipated commission of a crime or fraud*; or
- (c) it is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable effectively to protect his or her own interests; or
- (d) the lawyer reasonably believes that the lawyer's services have been used by the client to perpetrate or conceal a crime or fraud and disclosure is required to prevent, mitigate, or rectify substantial injury to the interests, property, or reputation of another person that is reasonably likely to result or has resulted from the client's commission of the crime or fraud...

Questions?