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29 August 2017

Zoë Lawton
By email: ocojresearch@gmail.com

Dear Ms Lawton

One court, One Judge – an integrated court system for New Zealand families affected by violence

The New Zealand Law Society welcomes the opportunity to comment on the discussion paper *One Court, One Judge – an integrated court system for New Zealand families affected by violence* (discussion paper). The Law Society's Family Law Section has considered the discussion paper and has consulted with practitioners who practise as lawyer for the child, youth advocates, and those who practice in the criminal jurisdiction.

Overview

The focus of the discussion paper is to determine whether a one court/one judge system would be better than a multiple court/multiple judge system, for New Zealand families affected by violence. Analysis of whether a one court/one judge system *could* be implemented in New Zealand is outside the scope of the paper, and if the proposal were to proceed the next stage would be to form a reference group of Ministry of Justice staff and key stakeholders to provide input into the operating model for a pilot court.[1]

The Law Society agrees there is merit in further investigation of an 'integrated domestic violence court' (IDV Court) for New Zealand, and if a reference group is formed the Law Society would like to participate. The proposal does however present some difficulties, particularly from a criminal law perspective, as discussed below.

Information sharing

Some aspects of the current legal framework for information sharing between the criminal and family jurisdictions are problematic (as outlined in the **attached** Appendix), and an integrated domestic violence court that facilitated information sharing could be beneficial. The extent to which improved information sharing in IDV Court proceedings might address these problems should be explored.

However, it is important to note there are different evidential rules and a different standard of proof between the criminal and family jurisdictions, and full information sharing between the two jurisdictions may not be appropriate. Information held on a Family Court file may have been permitted in the Family Court on the basis of that court's more relaxed evidential rules, but would not have reached the

1 Discussion paper, [179] – [181].

threshold for admissibility in the criminal jurisdiction. Family Court proceedings generally contain a significant amount of inadmissible material, which may have the effect of prolonging or, more significantly, prejudicing the criminal proceedings. (The risk of actual or perceived judicial bias is discussed further, below.)

One judge determining criminal and family matters

The Law Society has no objection to one judge determining a criminal and family matter where there has been an admission of guilt from the defendant and/or a conviction. It is assumed the majority of cases before the IDV Court involving criminal matters would be where the defendant has pleaded guilty.

There are however significant concerns about the proposed IDV Court where a criminal matter is defended. In those instances, there should not be one judge dealing with a defended criminal proceeding as well as a family court proceeding, particularly if the criminal proceeding is heard after the family court matter. There are different standards of proof in the two jurisdictions, a different body of case law regarding evidential matters, and different well-established principles with respect to the admissibility of evidence. The potential perceived and/or actual prejudice suffered by a criminal defendant, should the presiding judge have already heard evidence in the Family Court matter (including material not admissible in the criminal court), would be significant.

The discussion paper acknowledges this, and says:

> … the major exception to this general principle [that information and evidence obtained in the course of criminal proceedings can be used in family proceedings and vice versa] is that evidence provided in family proceedings cannot be taken into account by the judge in a criminal trial to determine the defendant's guilt. The judge only decides whether the defendant is guilty based on the evidence presented by counsel solely in the course of that criminal trial. This clear distinction is drawn on the basis that that evidence in the family jurisdiction is determined at a lower threshold (balance of probabilities) than the criminal jurisdiction (beyond reasonable doubt).[2]

From a pragmatic perspective, however, it is not possible for a presiding judge to "un-hear" or put to one side, information or evidence that they have considered and made a decision on in an earlier Family Court proceeding. As noted in the paper, it is important that parties perceive the judge is impartial – this is key to the parties having confidence and "buy in" to the court process. A District Court judge managing the family proceedings in the IDV Court should not be the hearing judge if there is a defended criminal matter.

Speedier disposition for families

It would seem inevitable that the speed at which matters are disposed of, is directly related to the resources allocated to the system. The New Zealand family justice system is currently under pressure with respect to registry staff, waiting time for hearings and an increasing number of Care of Children Act applications being filed. Whether any new system is able to result in speedier disposition of matters will depend on resources being allocated to enable this. This could be in the form of increased judicial

[2] Discussion paper, at [69].

resource or the re-allocation of judicial resource from the current family and criminal jurisdictions to an IDV Court.

As the discussion paper notes,[3] while efficient disposal of proceedings is generally desirable, it is not simply a case of "the faster the better". In many cases following separation, families need time to adjust to the new separation and living arrangements and, provided good interim arrangements are put in place, no detriment is caused. Overall delay is not necessarily a significant disadvantage. Often, the disadvantages arising from a delay in the final disposition of a matter can be overcome by the court being able to speedily make good interim arrangements for children and parents. A well-informed and safe interim arrangement made without delay in the first instance can often immediately address the day-to-day care and contact disputes parents face over their children, and can be in place for a significant period of time. An IDV Court may be able to more readily address this situation earlier on.

The discussion paper notes that proceedings in IDV Courts take longer to resolve than proceedings in separate courts.[4] If interim arrangements were made in the first instance as suggested above, a separate judge in an IDV Court could be appointed to hear defended family matters. This might be one way of addressing the delay in disposing of family proceedings in an IDV Court.

Number of court appearances

The Law Society agrees that minimising the number of appearances required in the court system is desirable for the individuals and families involved.[5]

There may however be an increase in costs as a result of both criminal and family counsel attending all court fixtures and hearings in the one court: in the New York and Toronto IDV Courts, counsel in criminal proceedings observed the family proceedings and vice versa. (This extra cost may be offset in part by the overall reduction in the number of appearances but it is unlikely to offset it entirely).

More consistent judicial decision–making

The discussion paper notes feedback from judges that they are more able to make more consistent decisions in an integrated one court/one judge system than a multiple court/multiple judge system.[6] Such a system would also avoid current delays in the Family Court when, for example, decisions need to be made about the safety and structure of interim contact between a child and the alleged offender. Often there is a delay until the Family Court or a lawyer for child can find out the terms of the offender's bail, and then there may be further delay if there is a need for the bail conditions to be changed, to enable the offender to have specific contact with a child. Sometimes this delay can be significant. The delay can have a serious detrimental impact on the welfare and best interests of a child who wants to see a parent but is unable to. If one judge who had all the information regarding the alleged offending, terms of bail etc, was able to make an immediate decision in respect of contact, the most significant benefit would be the ability to ensure immediate contact between the child and parent/s in a way that managed risk and protected the welfare and best interests of the child.

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3 Ibid at [132].

4 Ibid at [130].

5 Ibid at [133].

6 Discussion paper at [125].

Social services and other resources to address needs of family members

The discussion paper notes a wider range of programmes are available in the New York IDV Courts, compared to New Zealand.[7] If the main aim of the "one court" model is to reduce the number of court appearances for families and to provide a simplified model of court procedure, it will be crucial to have readily accessible information and a range of skilled support providers available to families when they are at court.

A court with a therapeutic component must have adequate resources, including suitable programmes available in local areas that parties can be referred to. Such services and programmes should include:

- Drug testing
- Drug and alcohol programmes
- Stopping violence programmes
- Parenting programmes
- Supervised contact
- Counselling and therapy for family members, including children

Such services and resources currently exist in the Youth Drug Court in Christchurch. A youth offender has to meet certain criteria for participation in the court and when they are accepted into the court, they must be engaged in a drug and alcohol programme. That is either through the Odyssey House day or residential programmes, one-on-one with the youth forensic team or some other agency providing drug and alcohol counselling such as the City Mission.

The Youth Drug Courts are an example where combining jurisdictions has achieved positive results, and experience with that model should be useful if the IDV Courts proposal proceeds.

District Court proceedings – child complainant/adult defendant

The Law Society agrees that offences against a child of the family should be part of the IDV Court's jurisdiction.[8]

Family Court proceedings

The discussion paper notes that "there appears to be no principled reason to exclude any type of proceedings normally heard in a New Zealand Family Court in a New Zealand IDV court".[9] The Law Society agrees, and considers that judges presiding in a New Zealand IDV Court should be District Court judges with a Family Court warrant.

Youth Court proceedings

The Law Society agrees that consideration should be given to including Youth Court proceedings in a New Zealand IDV Court, due to the considerable crossover between the care and protection jurisdictions

7 Discussion paper at [137].
8 Ibid, [152] – [154].
9 Ibid, [155].

of the Family and Youth Courts.[10] However, this is a complex issue that needs further investigation. It is unclear from the paper whether an IDV Court model would include all Youth Court proceedings or only some.

Some Family Court judges will often call for a care and protection file at the same time that they are dealing with Youth Court matters, to ensure that the Family Court plan is appropriate for a young person who is also appearing in the Youth Court. We refer to earlier comments made in respect of information sharing and the often highly relevant information held by the Youth Court that should be made available to a Family Court judge when deciding matters.

It is also noted that including youth justice/care and protection matters would require significant resourcing.

Eligibility criteria

The discussion paper notes that the definition of a 'family' in the eligibility criteria will need to be considered, and whether proceedings involving only immediate family members should be included.[11] The Law Society anticipates that the definition may need to be kept relatively narrow, at least in the initial stages if the "one court" model is adopted in New Zealand, given the obvious issue of resourcing and the number of families/cases able to be processed through the system.

Culturally appropriate court procedure

The Law Society agrees that a culturally appropriate court procedure will be an important consideration, and that, where appropriate, elements of the Rangatahi and Pasifika Court process could be incorporated in a New Zealand IDV Court.[12]

Privacy

While there is a need for open justice in relation to criminal charges, the Law Society agrees with the paper's suggestion that an IDV Court should be a closed court, with no public gallery.[13] If the "one court" model is to benefit families and protect children and victims, then there is a need to maintain privacy when dealing with the Family Court proceedings. This underscores the Law Society's view expressed above, that defended criminal matters must be dealt with separately.

The Law Society also agrees with the conclusion that judgments of the IDV Court should be published and media would be able to attend and report cases, although the identify of litigants would need to be supressed.[14]

10 Ibid, [156] – [157].
11 Ibid, [162].
12 Ibid, [174].
13 Ibid, [176].
14 Ibid.

Other matters

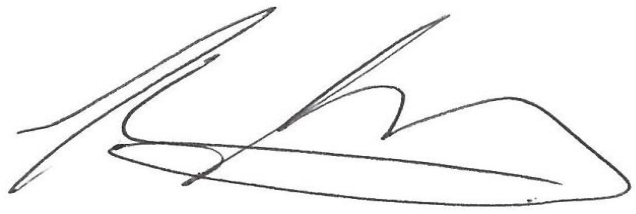
The Law Society is concerned about how unrepresented litigants would manage in an IDV Court, and considers that lawyers would be a necessary component due to the complexities with the interface of both jurisdictions.

Given the commitment in New Zealand to the out-of-court family mediation process, consideration would also need to be given to how that process might work alongside an IDV Court.

Conclusion

As noted above, the Law Society would welcome the opportunity to be involved in further discussions if the IDV Court proposal is to proceed. Contact can be made in the first instance through the Family Law Section's Manager, Kath Moran (kath.moran@lawsociety.org.nz / 04 463 2996).

Yours sincerely,



Kathryn Beck
President

Appendix (attached)

Appendix:

Current information-sharing between the family and criminal jurisdictions – comments

Current law – information sharing from criminal to family jurisdiction

The Criminal Procedure (Transfer of information) Regulations 2013 govern the sharing of domestic violence case information from the criminal jurisdiction to the family jurisdiction. A registrar in the family jurisdiction may request from a registrar in the criminal jurisdiction information about the criminal proceeding from the court file, any database or permanent court record relating to that proceeding, including the conditions on which bail has been granted to the respondent(s), and a copy of any conviction entered.[15] Only information about domestic violence offending[16] may be disclosed. The regulations also require the criminal court to notify the relevant family court if a person has been convicted of breaching a protection order made by either of those courts.[17]

The current framework for sharing information from the criminal to the family jurisdiction has some limitations:

- As the discussion paper notes, in the New Zealand court process there are several examples of inconsistent decisions judges may inadvertently make due to a lack of information about previous or current proceedings in other courts – in particular, bail conditions and sentences that conflict with protection, occupation and parenting orders.[18]
- The decision to release certain information from the criminal jurisdiction to the family jurisdiction is a matter of judicial discretion.[19] The Family Law Section suggests that consideration be given to making information held in the criminal jurisdiction about a family automatically available to the family jurisdiction.
- Lawyers for children appointed in family proceedings try to ensure that criminal histories, CYRAS[20] notes, family violence reports and other information are put before the Family Court prior to a hearing. However sometimes there are delays in obtaining this information meaning it is not available in time for the hearing. Other times it may not be up to date which means important information may exist but is unavailable to counsel, and of which the court is not aware.

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15 Criminal Procedure (Transfer of Information) Regulations 2013, regulations 7 and 7A.

16 This is offending consisting of or including conduct that is domestic violence while a protection order is in place, or an application for a protection order is pending, against the protected person/applicant in that application.

17 Above n 2, at regulation 4 and 5.

18 Above n 1 at [123].

19 For example, in a recent Family Court proceeding where the father had been recently acquitted at a jury trial of intentionally injuring a child, the Family Court needed to make findings (based on a different standard of proof) but the release of the expert evidence presented in the criminal jurisdiction and the transcript of cross-examination of that expert evidence was at the discretion of the District Court.

20 Care and Protection; Youth Justice; Residences; Adoption; System [database].

- Information sharing from the criminal court to the Family Court is currently limited to protection order applications. The Family Law Section considers there is a need to extend information sharing from the criminal court to the Family Court to include cases concerning the care of children.[21]

Current law – information sharing from family to criminal jurisdiction

The Domestic Violence Rules 1996 and the Family Court Rules 2002 govern the information that the family jurisdiction can share with the criminal jurisdiction. The Rules allow information to be provided to the criminal jurisdiction about the current status of domestic violence proceedings and copies of any protection order made in those proceedings. A judge may request further information be obtained including copies of affidavits or other documents on the court file for the protection order proceedings.[22]

The current framework for sharing information from the family to the criminal jurisdiction has some limitations:

- The term "domestic violence offence" is narrowly defined in both the criminal and family jurisdictions. The offence must be carried out while a protection order is in place, or an application for one is pending, against the protected person or applicant. For example, this would not cover a defendant who has criminal domestic violence proceedings which relate to a different party than the party involved in the family court proceedings.
- To illustrate the availability of information in some proceedings but not others, in a recent case in the Family Court, a lawyer for child was denied reports from social workers and the Ministry of Education that had been provided to the youth advocate for proceedings regarding the same young person, in the Youth Court. In the Family Law Section's view, these barriers are unhelpful and contrary to the best interests of the young person.

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21 A recent case in the Christchurch District Court illustrates the current restriction: the District Court judge refused to allow the summaries of fact to be provided to the Family Court judge who was trying to assess the risk to the children in the context of whether to remove unsupervised contact. The offending was drug and firearm offending together with a breach of a protection order. Details of all offending were requested by the Family Court but refused by the District Court.

22 Family Court Rules 2002 (rule 432).