

Is New Zealand better served by a One Court, One Judge Integrated Court system for families affected by violence?

Feedback submission from McWilliam Rennie Lawyers

Our law firm has reviewed Ms Lawton's Discussion Paper in detail and discussed the pros and cons of an Integrated Domestic Violence Court. While we consider there would be some issues to overcome in implementing this system, overall we consider it could provide a more effective process and hopefully improve outcomes for the parties and children involved in domestic violence related Court proceedings.

Concerns with the current system

Our experience working in both the Family and District Courts has shown firsthand some issues with the current system, many of which are mentioned in the Discussion Paper. These issues relate to each of the Court systems, including how they work separately and together. The following problems are not uncommon:

- Insufficient information sharing between the Family Court and the District Court leading to inconsistencies in Court Orders, bail conditions and sentence conditions.
- Multiple lawyers acting for the same party which creates a more fragmented process. When there are multiple lawyers acting for the same party, submissions can be less well informed. The Judge is less well informed as a result. The information flow between a party's two or more lawyers varies. At times there is good communication and the cases can be run effectively alongside each other; at other times there is no communication and the cases can run at odds with each other. The multiple lawyer problem has been exacerbated by the change in Legal Aid preventing a defendant choosing their lawyer in less serious criminal cases – this means a defendant in the District Court is unable to choose to be represented by the same lawyer as represents them in the Family Court.
- Parties have more Court appearances. This means more time off work or study, more occasions when childcare must be arranged (or children are brought to Court), and more contact (sometimes unwanted) between the parties.
- Cases are delayed to ensure the stages of the case occur in the correct order. For example, all or part of Family Court proceedings can be delayed for very long periods until there has been a guilty or not guilty finding in the District Court.

- In instances where both parties are charged criminally as a result of the same event, cases can be unfairly resolved or even abandoned. For example:
 - former partners are both charged with assault against each other,
 - both plead not guilty and seek a Judge Alone Trial,
 - in the first case to be heard, the complainant refuses to give evidence based on their right against self-incrimination,
 - that case is therefore adjourned until after the other party's Judge Alone Trial,
 - when the second Judge Alone Trial is called, the roles reverse and a deadlock is reached,
 - if these cases cannot be resolved by agreement, both cases may be abandoned (charges withdrawn), or the Police must choose to proceed with just one party's case.
- The outcome of the Family Court proceeding can be at odds with the District Court proceeding, and vice versa.
- Multiple Judges are involved with the same family, both across the two jurisdictions and within the same jurisdiction. Occasionally a party will appear before a different Judge almost every time they appear in either Court. Consequently, more time is involved to bring the Court 'up to speed' with the case, less attention can be given to the specific needs of each family, and the parties may have less confidence in or respect for the process.

A better way forward?

We consider an Integrated Domestic Violence Court in New Zealand has the potential to achieve many of the same positive outcomes as have been seen in North America, including:

- an ability for the Judiciary to make better informed and more consistent decisions,
- a more streamlined process for all parties involved, with fewer Court appearances and less fragmented representation,
- increased confidence in the 'system' - which we consider is significantly connected to having the case managed by a single Judge.

The following may also be achieved:

- the Police would have the ability to make better informed and more consistent decisions when laying charges, collecting and analysing evidence, managing criminal cases, and considering options for resolution,

- support services may be able to provide more case specific services for at risk families (whether they remain 'intact' or separated),
- there could be a better system for encouraging or compelling parties affected by domestic violence to attend and complete programmes or counselling, including living without violence programmes, safety programmes, alcohol or drug programmes, and parenting programmes.

It is hoped a New Zealand Integrated Domestic Violence Court may also lead to:

- greater offender accountability,
- improved victim safety,
- a reduction in domestic violence.

Whilst an Integrated Domestic Violence Court may not provide the speediest disposition of cases, it should be remembered that these families will often remain involved with each other for many years. Furthermore, many of these families return to the District and Family Courts more than once, often over a period of years. So while the initial case may not be disposed of as quickly as the current system, hopefully the outcomes are more long lasting.

Lawyer for child perspective

Our firm has six lawyers, five of whom are Court approved Lawyer for Child. From the perspective of lawyer for child, an Integrated Domestic Violence Court is likely to better protect our child clients' safety and wellbeing. A more streamlined process would encourage transparency and openness in all aspects of a family's proceedings. We consider this could work to increase the accountability of the parties and reduce the risk for their children.

A similar style of Court

The concept of an Integrated Domestic Violence Court is not entirely new for New Zealand. The Hutt Valley District Court is one of the regions that runs a weekly specialist Family Violence list. Hutt Valley Family Court also has a weekly list day. Often the same Judge presides over the District Court's weekly Family Violence list, as well as the weekly Family Court list. At times these Courts have operated in a more integrated way than is usually seen in either the District or Family Courts. When a family has matters running concurrently in both Courts, the Judge is aware of both proceedings. This means that prior knowledge of the case can be used to provide a more holistic response to the family with the aim of ensuring consistency and promoting safety. Examples of this are:

- Addressing inconsistency between Family Court Orders and bail conditions by varying bail conditions within a Family Court List rather than waiting for the next District Court List.
- Allowing lawyer for child (who may happen to be present in the District Court for other matters) to provide relevant information or make submissions on a parent party's bail matters.
- The Presiding Judge expressing her familiarity with one or both parties, being aware of the progress of their case(s) in both jurisdictions, and being better informed when determining:
 - how to move both the criminal and family cases forward,
 - what bail conditions are required,
 - what type of sentence is appropriate,
 - whether any referrals to third parties are required, and
 - the terms of Family Court Orders.

In our observation, allowing these Courts to run in a more flexible and integrated way has enabled the justice system to better meet the needs of particular families who have proceedings in both jurisdictions.

Issues to be overcome if New Zealand was to implement an Integrated Domestic Violence Court

Privacy

One concern mentioned only in passing in the Discussion Paper is privacy. At the current time Family Court proceedings are mostly held in private with only the parties and their lawyers present. Sometimes other family members or support people can attend by agreement. In contrast, domestic violence cases in the District Court are dealt with in open Court with members of the public free to attend. While acknowledging the importance of open justice, we would be concerned if domestic violence Family Court matters were heard in an open and busy District Court list with no limit on who is present. This concern relates to the privacy of offenders, complainants and their children.

Evidence

At times the evidence admitted in the Family Court falls short of what would be deemed admissible in criminal proceedings. There are good reasons for this. However, care must be taken to ensure the quality of evidence admitted in the critical stages of a criminal proceeding is not diluted. We note this is overcome in the New York system by allowing a free flow of information and evidence except when determining guilt, at which time only properly admitted evidence is considered. We consider it important that the rules of a New Zealand Integrated Domestic Violence Court ensure:

- only admissible evidence is used to determine criminal guilt,
- the higher standard of proof remains and is respected in criminal proceedings,
- the burden of proof remains and is respected in criminal proceedings.

Maximum penalty threshold

We are of the view that an Integrated Domestic Violence Court would need an upper threshold of criminal offences that fall within its jurisdiction. To protect the integrity of outcome (acquittal or finding of guilt), we consider cases of serious physical or sexual violence should be dealt with outside the integrated system, at least in instances when there is a not guilty plea. A maximum penalty of seven years imprisonment is mentioned in the Discussion Paper. This may not be high enough. The charge of threatening to kill is a common domestic violence charge which carries a seven year maximum penalty. While not wanting to minimize the seriousness of that charge, it is one that is commonly laid alongside other domestic violence charges. In most cases it is be appropriate to deal with this charge alongside 'less serious' charges (being charges that have a lower maximum penalty). Therefore, in setting a maximum threshold, we consider a New Zealand Integrated Domestic Violence Court's jurisdiction should be limited to criminal charges with a maximum penalty of seven years or less.

Defended hearings

To maximize trial fairness and to minimize the perception of prejudice or bias, we consider there is merit in the Toronto process of having a different Judge hear the case if it proceeds to a defended hearing (particularly the criminal case). The Judge hearing the defended case should ideally be another Judge who regularly presides over the Integrated Domestic Violence Court so that they are familiar with the process and dynamics of the system. We acknowledge this would require significant judicial resourcing. This may not always be possible, particularly outside of the main centres.

Judicial training

Ideally the Judge should be specifically trained for their role in the One Judge system.

Legal aid

Legal Aid Services is a major stakeholder in our justice system and aspects of their current processes would need to change if New Zealand implemented an Integrated Domestic Violence Court. Just some aspects requiring change would be:

- Ensuring Integrated Domestic Violence Court duty lawyers have experience in family and criminal law matters, or having a duty family lawyer as well as the duty criminal lawyer.
- Allowing assigned lawyers sufficient time to engage properly in the process including attending both Court proceedings.
- Alternatively (or additionally) reinstate the lawyer of choice regime so a party can be represented by the same lawyer for the whole proceeding. This lawyer would need to have some experience in both jurisdictions. The information from North America notes that lawyers' submissions are best informed when the same lawyer is acting on the criminal and family matters, therefore this may be the best option.

Conclusion

In conclusion, subject to the considerations mentioned above, McWilliam Rennie supports the implementation of an Integrated Domestic Violence Court in New Zealand. We note with realism that the implementation of an Integrated Domestic Violence Court is a big project which will require 'buy in' from all the stakeholders, including the Ministry of Justice, Legal Aid, the Judiciary, the Court Registries, the Police and Crown lawyers, Corrections, Oranga Tamariki, defence and family lawyers, support services including Victim Support and Restorative Justice, and the Court users themselves. But as noted in the Discussion Paper, *"we owe it to the considerable number of families affected by violence to have an open mind"*.

McWilliam Rennie is a specialist family law practice. We provide legal advice and representation in all areas of family law including family violence and childcare issues. We also represent clients in criminal law matters, both legal aid and private paying.