



Family law: Family violence

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Family violence is one of the most serious problems facing New Zealand (Hughes, 2008). In 2008, New Zealand Police recorded 38,369 family violence related incidents, and 32,675 family violence related offences, making up a total of 71,044 family violence related occurrences. In addition, 16 of the 49 murders that occurred in that year were recorded as domestic violence related (Ministry of Justice, 2007). The continuing prevalence of domestic violence evident in New Zealand has seen the situation described as “an epidemic” (Hand et al., 2001), and horrifying statistics predict that one in four women and just under one in five men will be the victim of domestic violence at some point in their lifetime (Morris, Reilly, Berry, & Ransom, 2003).

In this paper, I will discuss how domestic violence legislation has evolved in New Zealand and how the New Zealand Family Court currently responds to the issue of family violence, before considering what more I believe we need to do to reduce the incidence of family violence in New Zealand.

Present practice in New Zealand *Domestic Violence Act 1995*

The evolution of domestic violence policy in New Zealand mirrored international responses to this issue and reflected wider social trends (Newbold & Cross, 2008), with the late 1960s seeing the public vernacular associated with domestic violence grow to incorporate concepts such as “child abuse” and “wife battering” (Webb et al., 2007).

Consequently, legislation that specifically addressed evolving attitudes towards domestic violence was called for and the *Domestic Protection Act 1982* was passed. At that time, the legislation was revolutionary, and significant numbers flocked to take advantage of the powers of protection that it offered. But as time progressed, it became evident that the law was too restrictive for the evolving society that it was servicing, and that services such as counselling and mediation that form part of the emerging conciliatory arm of the Family Court were not being effectively utilised

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in conjunction with the legislation of the day. In essence, the exercise of best practice was being hindered.

The catalyst for further legislative change came in 1994, in the form of an inquiry and legislative review following the tragic death of three children and their father as a result of the father's violent actions. The end result was the *Domestic Violence Act 1995*. This Act, New Zealand's present-day legislation, is a modern and robust tool that enables the court to respond to family violence. It builds on definitions of domestic violence found in previous legislation by recognising the enormously negative effects of psychological abuse (National Network of Stopping Violence Services, 2007) and widening the variety of relationships that come within the ambit of the Act.¹ It further provides for protection orders alongside a raft of other orders—such as tenancy,² occupation³ and furniture orders⁴—and makes attendance at programs on stopping violence all but compulsory for perpetrators of domestic violence.⁵

Following the entry into force of the *Domestic Violence Act 1995*, there was initially a high uptake of protection orders, but this has tapered off in recent years. While some have expressed concern at the decreasing number of applications and consequent orders made—suggesting that it represents a perception that female victims of violence do not have confidence that protection orders are worth applying for (Robertson et al., 2007)—it should be remembered that protection orders have no time limit and do not expire. A protection order remains in place until a successful application is made to discharge it. This means that once the protection order is in place, the applicant will have no need to seek a new order, and

thus the pool of people in need of protection orders constantly decreases until new people in need of such orders enter the pool.

Care of Children Act 2004

The Family Court's response to family violence is not just limited to proceedings under the *Domestic Violence Act 1995*; a proportion of our child law cases have a family violence component to them.⁶

With respect to our private child law cases, when an application under the *Care of Children Act 2004*⁷ for day-to-day care or contact is made, the court is required to undertake a risk assessment if there is an allegation that one party has perpetrated violence against the child or a child of the family, or the other party.⁸ If an allegation of violence is proven, the court may not make orders giving the violent party day-to-day care or unsupervised contact unless satisfied the child will be safe with the violent party.⁹

I believe that when private child law disputes come before the Family Court it is essential to identify at an early stage whether the case involves pathological dysfunction such as violence. Accordingly, in April 2010 we commenced a new process for all applications filed under the *Care of Children Act*, which directs cases in one of two directions. If an application is regarded as urgent,¹⁰ it will assume a different course from standard cases.¹¹ There are strict expectations in terms of the steps to be taken, directions to be given and complied with, and the time for disposal of the case. This emphasis on urgent, robust judicial intervention is vital for those parents who separate and have immediate, serious issues. Cases involving violence cry out for prompt judicial oversight; for if they are allowed to proceed through the conciliatory arm of the court, the defaulting or abusive parent may gain an advantage to the detriment of the child.

New Zealand's Family Court has therefore singled out the factors that should give clear indicators as to whether a case is truly urgent. If any of those factors exist (demonstrable violence being one), a judge is likely to make interim orders, and, after a short judicial conference, hold a further hearing with the parties present to make factual findings on essential issues. Often, until such findings are made the case cannot move in the correct direction.

The future

Despite all the work that has been done, recorded rates of violence in New Zealand have





continued to rise. In 2009, recorded crime in New Zealand rose 4.6%, with a total of 451,405 offences on record, and violent offending increased by 9.2%, driven largely by recorded family violence increasing by a massive 18.6% (New Zealand Police, 2010). Actual levels of offending would have been even higher.

Therefore, if we are to move forward and begin to affect these statistics I believe that, in addition to an efficient court process, we must facilitate victims' access to a reasonable support system. With this in mind, I followed with interest the Family Court of Australia's Mental Health Support Pilot Project in 2004, which looked at the needs of those who came to court and were unduly affected by the court process. It was felt that for people to merely be treated as "customers of the court" by the court filing and receiving applications, was short of what a court of excellence should be doing. The pilot had four broad elements (Family Court of Australia, 2006):

1. a referral service to link clients in need of assistance directly to a professional counselling service through community based organisations;
2. a skilling programme to provide staff with the skills to deal with clients who present with mental health or emotional wellbeing issues;
3. protocols to guide staff when dealing with clients who present with mental health or

emotional wellbeing issues, including those who threaten harm to themselves or others; and

4. a mental health literacy program to improve client and staff awareness of mental health and emotional wellbeing issues during separation. (p. ii)

As the pilot's final report states: "the pilot was a success with performance measures showing that it achieved all agreed outcomes and most to a high level" (Family Court of Australia, 2006, p. ii). All this was achieved while recognising that the courts do not have a direct role in providing mental health services to clients, are neither resourced nor funded to do so, but do have a facilitating role in ensuring clients are able to access mental health services provided by external organisations. Specifically, the Courts acknowledged—through staff, judicial officers and court processes—that they should (Family Court of Australia, 2006):

1. identify those who may require assistance and refer them to appropriate agencies within the mental health support community;
2. ensure clients are aware of the mental health and emotional wellbeing services provided by community based and government organisations;
3. support clients with mental health illnesses by ensuring staff, judicial officers and processes do not (as far as can reasonably

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be avoided) do harm or make worse any mental illness;

4. acknowledge that some court processes may present difficulties for those with mental health problems; and
5. develop a coordinated and cooperative approach in partnership with other organisations and initiatives within the community to assist clients who present with mental health issues. (p. 1)

There is a widely held belief in New Zealand that our protection of victims in the Family Court does not go far enough, notwithstanding the legal and judicial schemes. What is said is that victims are vulnerable and courts must go the extra mile in ensuring that victims regard the court as user-friendly, are encouraged to use it and have a raft of support services to which they can be referred. It is said that unless this occurs, there is a disincentive to use the court system and, further, that case enforcement alone does not ensure actual protection.

Conclusion

I conclude then by indicating that when family violence is alleged, it must be treated promptly and carefully, and that resolution of disputes where there is violence must, for the most part, be judicially undertaken. Alternative dispute resolution may well be inappropriate in family violence cases.

Equally important is the fact that a judicial system alone will not protect victims, and that support services, in addition to court relief, must be provided.

Endnotes

- 1 *Domestic Violence Act 1995* (NZ), s4.
- 2 *Domestic Violence Act 1995* (NZ), ss56–69
- 3 *Domestic Violence Act 1995* (NZ), ss52–55.
- 4 *Domestic Violence Act 1995* (NZ), ss66–69.
- 5 *Domestic Violence Act 1995* (NZ), s32(1).
- 6 In 2007, 19% of cases with a “case type code” of “guardianship” were cross-referenced to domestic violence cases that involved applications for protection orders (Ministry of Justice, 2009, p. 79).
- 7 New Zealand’s primary private child law legislation.
- 8 See the *Care of Children Act 2004* (NZ), s60. In accordance with the *Care of Children Act 2004* (NZ) s58, violence that triggers a mandatory risk assessment refers only to physical and sexual abuse.
- 9 See the *Care of Children Act 2004* (NZ), s60.
- 10 Cases involving demonstrable violence are considered urgent.
- 11 These grounds are: reduction of time granted, enforcement proceedings (warrants, admonishment), repeat proceedings, unilateral relocation, suspension of contact and demonstrable violence issues.

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