



NEW SOUTH WALES

The Chief Magistrate of the Local Court

29 March 2012

Ms Merrin Thompson
Principal Council Officer
Legislative Council
Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Thompson

Further to my appearance before the Standing Committee's Inquiry into domestic violence trends and my letter dated 21 March 2012 I now enclose my response to supplementary questions.

Yours sincerely

Judge Graeme Henson
Chief Magistrate

Response to Supplementary Questions

The Court system

1. Practice Note 1 of 2012 governs the Court intervention model. This is a consolidated Practice Note incorporating the Campbelltown/Wagga Wagga DVCIM practice into an approach applicable in every Local Court throughout the state. Not all the consequences of the Practice Note are positive.

Those groups whose focus is on domestic violence should understand that the priority given to these types of matters comes at the cost of longer sitting hours and increased delays within other areas of the broad jurisdiction of the Local Court.

Additionally, the Court continues to experience instances where victims fail to attend for hearing resulting in dismissal of prosecutions for lack of evidence or change their evidence during the course of the hearing to such an extent that prosecutions fail.

The "elements of the DVCIM " approach that are useful are those relating to the early preparation of a mini brief of evidence by the prosecution and a commitment to proceed within the 3-month standard timeframe.

2. The reference to specialist resources refers to professional support for victims and where possible specialist services that can address the underlying aspects of causation.

Domestic violence is not just limited to the use of violence. Invariably there are many complex environmental factors, social, cultural and attitudinal that lead to the entrenched nature of domestic violence. Addressing issues to do with unemployment, poverty, housing, and access to social services, alcohol abuse, gambling addiction, poly substance drug abuse and the broad spectrum of mental health issues all play a part in contributing to this vexed issue.

It is not the function of an independent body of the judiciary to become all things to all people. The role of the judiciary is to remain independent and use its legislative powers only. As demonstrated by the CREDIT programme however there are means by which underlying contributors to offending can be addressed through involvement by external dedicated agencies.

3. The Local Court is neither an agent of government nor non-government agencies in the context of the Auditor General's report. Approaches by the range of bodies engaged in this area are dealt with on an individual basis but on the clear understanding that it is vital for the sake of transparency that the Court be seen as an independent body of the judiciary and not the captive of any individual party or pro party support group.

4. There is common belief that the administrative support within Courts and the Magistracy are inseparable. The concept of separation of powers is not widely understood.

Magistrates are Judges by another name. Other than that which takes place within the courtroom, responsibility for informing third parties lies elsewhere.

Apprehended Domestic Violence Orders

5. I do not know who Dr Wangmann is. I do not understand her ability to enter the minds of the judiciary such that she can reach a conclusion that finding a "fear has become routine". I do not know on what empirical evidence her conclusion that courts make such findings because they are under resourced is based.

I assume Dr. Wangmann is not a lawyer and has no experience sitting in judgment as a member of the judiciary. It does not appear clear from the question whether the doctor understands the Evidence Act 1995 in terms of admissibility of evidence, whether she appreciates the burden of proof in civil matters, whether she understands the objective and subjective tests to be applied in determining whether the evidence before the Court justifies the making of an order.

It is not clear whether Doctor Wangmann is aware that a significant number of orders are made 'by consent and without admissions' on the part of the respondent thereby removing any need to consider the two stage test set out in Section 19(1) of the Crimes (Domestic and Personal) Violence) act 2007.

As a member of the judiciary who as a matter of course makes decisions based on relevant admissible evidence led to establish an asserted fact I regard Dr Wangmann's assumptions as lacking in substance.

6. This proposal goes significantly to the essence of whether it is appropriate for the judiciary to be used as a vehicle for social work by engaging in the exercise of power without legislative support that effectively imposes a "penalty" upon an individual.

Moving down this path would undoubtedly take away the significant level of positive resolution of Domestic and Personal Violence matters by consent, whether with or without admissions. The level of intrusion into an individual's personal and perhaps working life to the extent that they are required to participate in an ongoing level of "rehabilitation or counselling" is highly likely to be resisted particularly if it impacts on their relationship with their employer. The product of such resistance will be an unwelcome increase in the level of defended proceedings with the resultant costs to the administration of justice and the parties.

Assuming however that such a capacity existed – how would it be enforced? Are anti social attitudes or culturally based mindsets that do not necessarily involve actual criminal offending behaviour to be cast in such a light, even if only by analogy? What penalties would flow? Who would enforce them? How would a financial penalty lead to anything other than reluctant participation in rehabilitation and counselling? Would those involved who do not wish to

participate but are "forced to do so" just go through the motions with little or no change?

It is not my function to answer such complex questions and the many other questions that arise from this suggestion however, if it is a course to be embarked upon and it is expected that the Local Court will play some follow up role in supervising the effectiveness of such orders then I can say the impact on the dynamics of the Court, its caseload and its ability to effectively involve itself in this type of social re-orientation could only be achieved through the allocation of additional resources and the construction of additional court premises.

Sentencing and Penalties

Family violence in criminal law

i. Family violence as an offence or an aggravating factor

After consideration of the matters raised in the Consultation, it is the Court's view that, on balance, it is more appropriate to regard the commission of an offence in a family context as an aggravating factor rather than create a new offence of 'family violence'. As the Commissions have noted, it is difficult to conceptualise the appropriate elements of such an offence given the spectrum of criminality of conduct that may amount to family violence.

In the absence of an offence of family violence, the consistent approach of the courts in NSW has been to reinforce the need for general deterrence and denunciation in cases of offences occurring in a family context, particularly in circumstances where multiple offences have been committed over a period of time. Judgments from the Court of Criminal Appeal since at least 1994¹ have repeatedly emphasised this point. Magistrates are cognisant of and frequently apply this approach when sentencing individuals who have committed offences in a family context.²

The Commissions have also noted that the inclusion of specific aggravating factors in the *Crimes (Sentencing Procedure) Act* 1999 that may be relevant to offences committed in a family context. Many of these have operated since 2002, including:

- The offence involved the actual or threatened use of violence;³

¹ See *R v Glen* (Court of Criminal Appeal, Simpson J, 19/12/1994, BC9403423). For a useful summary of the Court of Criminal Appeal's approach towards perpetrators of family violence, see *R v Hamid* [2006] NSWCCA 302 at [68]-[75], [86], [88] per Johnson J (Hunt AJA and Latham J agreeing).

² An important resource for magistrates at sentencing is the Judicial Commission's Sentencing Bench Book, which highlights the importance of general deterrence, personal deterrence and denunciation in dealing with domestic violence offences at [50-130] (available online at http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html).

³ *Crimes (Sentencing Procedure) Act* 1999, s 21A(2)(b)

- The offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences);⁴
- The injury, emotional harm, loss or damage caused by the offence was substantial;⁵
- The offender abused a position of trust or authority in relation to the victim;⁶ and
- The victim was vulnerable, for example, because the victim was very young or very old or had a disability.⁷

In late 2007, the NSW Parliament added several additional aggravating factors to the list set out in section 21A(2), which often specifically arise in relation to offences committed in a family context. These include:

- Particular consideration of an offender's criminal record if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences;⁸
- The offence was committed in the presence of a child under 18 years of age;⁹ and
- The offence was committed in the home of the victim or any other person.¹⁰

It should be noted that the second reading speech of the Attorney General, the Hon. John Hatzistergos MLC, in relation to the 2007 amendments to section 21A evinced a clear legislative intention for certain aggravating factors to address offences committed in a family context. For instance, in relation to offences committed in the home of the victim, it was said:

*This aggravating factor preserves the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind. This protection should apply in any home. The courts have long recognised that it is an aggravating circumstance when victims are assaulted in their own homes. ...[A]ny offence committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, violates that person's reasonable expectation of safety and security.*¹¹

In view of the considerable judicial and legislative authority on the point, while also having regard to the available sentencing statistics that indicate the Court is applying the approach that offences occurring in a family context require

⁴ Note 22, s 21A(2)(d)

⁵ Note 22, s 21A(2)(g)

⁶ Note 22, s 21A(2)(k)

⁷ Note 22, s 21A(2)(l)

⁸ Note 22, s 21A(2)(d)

⁹ Note 22, s 21A(2)(ea)

¹⁰ Note 22, s 21A(2)(eb)

¹¹ Parliamentary Debates (17/10/2007), Legislative Council, available at <http://www.parliament.nsw.gov.au/Prod/parliament/hanstrans.nsf/V3ByKey/LC20071017> (at 20/5/2010)

significant penalties to be imposed, the Court is of the view that the current approach in NSW as treating the fact that an offence occurred in a family context as an aggravating factor necessitating general deterrence and denunciation is adequate and appropriate.

8. Policing

No system of intervention by the State into the private lives of individuals can be achieved with perfection. As with any environment populated by people with differing levels of expertise, education and life experience there is an ebb and flow in the success or otherwise of a generally accepted model of procedure.

As indicated in oral evidence, it is impossible to pursue a model that cements the careers and aspirations of individuals into an ideal. Like all institutional creations the longer those within its parameters increase their exposure to its objectives the better they are likely to operate. When they move on, as Domestic Violence Liaison Officers, Police prosecutors and others involved often do by reason of their employment within an hierarchical structure, then it takes time, training and experience to replace success.

It is reasonable to accept that a greater number of Domestic Violence Liaison Officers will be of benefit to the Local Court by reason of the capacity of such officers to act as a catalyst for the resolution of issues concerning the content of orders being sought by the Court. In that sense they are vital to the working environment of Police, persons in need of protection and also provide a relatively neutral point of contact for others involved in pending proceedings.

Evidence via closed circuit television and audiovisual link

The Court does not keep statistics regarding usage of CCTV and AVL facilities in domestic violence matters. If such details are considered important then that is a function for the administrative resources of the Local Court to undertake.

I have separately provided details of CCTV and AVL locations. Not all persons in need of protection, who appear in domestic violence applications or in prosecutions for domestic violence offences, seek to give evidence by CCTV or AVL. It is customarily the case that the prosecution ask the Court to arrange such access on a case-by-case basis.