

# Regulatory Impact Statement:

## A Stronger Response to Family Violence: information sharing between court jurisdictions in domestic violence cases

### Agency Disclosure Statement

1. This Regulatory Impact Statement has been prepared by the Ministry of Justice. It provides an analysis of legislative options to improve information sharing between jurisdictions of the courts dealing with domestic violence cases.
2. The analysis of problems and nature of impacts has been largely informed by stakeholder consultation.
3. The analysis does not quantify the effect on judicial decision-making from existing permitted sharing of case information between court jurisdictions. It is particularly difficult to reliably ascertain this effect. Nor is it known to what extent the powers to request information under existing rules are being exercised. Our understanding of the precise impact on judicial decision-making and subsequent outcomes as a result of changes to the status quo is, therefore, also limited.
4. Our assumptions are based on stakeholder views and information from specific case studies. The key assumption is that exposure to more information from other jurisdictions would likely put judges in a better position to make the most informed decisions.
5. Finally, fully realising the impact of changes to legislation in this area is partly dependent on the ability of court staff and systems to deal with changes. This is a finite resource and would be unlikely to meet significant numbers of new requests for information. The fact that much court information is not in electronic form further adds to the effort required to meet information requests.

Chris Harrington

**Acting Policy Manager**  
**Courts and Tribunals Policy**

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## Executive summary

1. This RIS assesses options to enable better information sharing in domestic violence cases between court jurisdictions. Better information is needed to support judicial decision-making and therefore improve outcomes for domestic violence victims and applicants for protection orders.
2. The options focus on amendments to existing rules and regulations that permit certain case information to be shared between the criminal jurisdiction and civil/family jurisdictions. The rules and regulations further limit sharing by requiring a range of thresholds to be met.
3. The RIS identifies limits on sharing in the rules and regulations as likely impeding the adequacy of information provided to the court. The proposed amendments would reduce the existing restrictions to varying degrees.
4. Our analysis indicates that significantly widening the ability of each jurisdiction to share information would best achieve the objective of better supporting judicial decision-making. Possible concern about the use of additional information is mitigated by related legislative powers. Additional sharing would, however, be practically constrained by limits on court staff time to facilitate information requests.

## Background

5. This regulatory impact statement (RIS) arises from the Government's commitment to stronger action to increase the safety of victims of family violence and to reduce rates of family violence. This commitment is operationalised through the Government's *Stronger Response to Family Violence* work programme (*A Stronger Response*).
6. In June 2014, Cabinet made decisions on the nature of the work programme. This included an in-principle agreement to improve information sharing between jurisdictions in domestic violence (DV) cases. The Minister of Justice was to report back on any specific changes to legislation.<sup>1</sup> The information sharing work supports one of the action areas in *A Stronger Response*, which aims to support better judicial decision-making in family violence cases.
7. The work centres on the operation of existing rules and regulations that deal with information sharing between the criminal and family/civil jurisdiction in DV cases.<sup>2</sup> These DV cases involve DV offences, which are offences that contain domestic violence, as defined in section 3 of the Domestic Violence Act 1995, and the making of protection orders in the civil/family jurisdiction<sup>3</sup> under the Domestic Violence Act.<sup>4</sup>
8. The identification and assessment of options for potential amendments to information sharing rules and regulations are the focus of the RIS. The scope of the work is limited to these forms of secondary legislation since changes to them can be made quickly. Other workstreams in *A Stronger Response* are better placed to consider any changes to primary legislation that may better facilitate information sharing in DV-related cases.

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<sup>1</sup> The Cabinet paper is available at [www.justice.govt.nz](http://www.justice.govt.nz)

<sup>2</sup> The term "domestic violence" is used, rather than "family violence" because it is used in the legislation referred to throughout this paper.

<sup>3</sup> The paper refers to civil/family jurisdiction throughout because either the Family Court or the civil jurisdiction of the District Court may make these orders.

<sup>4</sup> Section 14 and Part 3 of the Domestic Violence Act 1995.

## Objectives

9. The core objective of this work is to ensure that judges are provided with better information on which to form decisions in DV cases. A related objective is that improved outcomes result from judges having better information available. In particular, these include:
  - better protection of victims and applicants for orders, and
  - reduced re-offending.
10. Other improved outcomes may also arise from better information for judges' decision-making. These include more appropriate and efficient sentencing of offenders. In addition, amendments should not adversely interfere with the robustness and integrity of the court process. These might be in the form of changes that impinge on a defendant's or respondent's right to natural justice or reduce the efficiency of court processes.

## Status quo

11. The information sharing dealt with in this RIS impacts on certain key decisions judges make in DV cases. These are:
  - for criminal cases:
    - determination of bail including specific conditions
    - the nature of the sentence, and
  - for civil/family cases:
    - the making of the substantive order (either on a temporary or final basis).
12. For these decisions, judges may, and do, use information provided by another jurisdiction of the court. This is in addition to evidential material obtained from other sources.
13. Not all judicial decisions may be informed by information requested by a court from another jurisdiction. In particular, judges are unable to use information they have requested from another jurisdiction to help decide a person's guilt. Under the Criminal Procedure Act 2011, decisions about guilt may only be determined on the basis of submissions made by the defence or prosecution and the evidence they present.<sup>5</sup>

### Information sharing enabled by rules and regulations

14. There are rules and regulations governing whether a court may obtain or access DV case information from another jurisdiction. The rules and regulations, forms of secondary legislation, do not, on their own, determine whether this information may be *used* in the decision-making ie, they do not help set out the information's admissibility. Primary legislation (and related case law) determines whether a judge may use information that has been obtained from another jurisdiction.

#### *Criminal jurisdiction information shared with the civil/family jurisdiction*

15. The Criminal Procedure (Transfer of Information) Regulations 2013 govern sharing of DV case information to the civil/family jurisdiction from the criminal jurisdiction (either the District or High Courts). The Regulations state that a registrar in the civil/family jurisdiction may request

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<sup>5</sup> Section 106, Criminal Procedure Act 2011.

from a registrar in the criminal jurisdiction “available information relating to the charge or conviction” including, where applicable and without limitation:

- the conditions on which bail has been granted to the respondent or associated respondent, and
  - a copy of the entry in the permanent court record relating to the conviction.
16. Only information about “DV offending” may be disclosed to another jurisdiction. This is offending consisting of or including conduct that is domestic violence committed while a protection order is in place, or an application for one is pending, against the protected person/applicant in that application.
17. The Regulations state that the judge or registrar in the civil/family jurisdiction must have reason to believe that the respondent has been charged or convicted of DV offending (or a breach of a protection order) before requesting information from the criminal court.
18. The regulations also require the criminal court registrar to notify the relevant civil/family court if a person has been convicted of breaching a protection order made by either of those courts. The RIS does not consider this provision as it is not regarded as needing change.

#### *Civil/family jurisdiction information shared with the criminal jurisdiction*

19. The Domestic Violence Rules 1996 and Family Courts Rules 2002 govern the information that can be shared with the criminal jurisdiction from the civil/family jurisdiction. They allow information to be provided to the criminal jurisdiction about the current status of the civil/family DV proceedings and copies of any protection order made in those proceedings.
20. The information may only be shared if a judge or registrar of the criminal jurisdiction reasonably believes:
- that the defendant in proceedings for a DV offence is, or was, a party to proceedings for a protection order, and
  - that the information about the civil proceedings may be relevant for the purposes of the related criminal proceedings.
21. The belief may come about, for example, because the court has become aware of the information through the Police.
22. The term DV offence is defined narrowly, in the same way as it is defined in the criminal procedure regulations. 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.

#### **Prevalence of information sharing in DV cases**

23. While secondary legislation allows for limited sharing of DV case information, the Ministry does not record how often the court or its registrars make information requests to another jurisdiction.
24. The Ministry does record information on how many cases there are under each proceedings category. In the criminal jurisdiction, there are approximately 13,500 DV offence defendants per year.<sup>6</sup> In the civil/family jurisdiction, there are about 4,000 applications for protection orders made per year. About a third of defendants charged with a domestic violence offence are also a party to proceedings for protection orders at some time. It is the overlap between these two sets of proceedings to whom information sharing rules and regulations potentially apply – around 1500 cases per year.

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<sup>6</sup> Note that a domestic violence offence here is an offence that has domestic violence in it as defined in the section 3 of the Domestic Violence Act 1995. This is wider than the definition of domestic violence offence outlined under the rules and regulations.

## Issues with information sharing legislation

25. The Ministry has identified several problems with the current rules and regulations. All but one of these limit judges' access to information to better support their decision-making. The final issue involves a barrier to cross-jurisdictional information sharing that impedes administration of court orders, rather than the actual decision-making of the court.

### A. The types of information that may be shared between jurisdictions

26. The rules and regulations place limits on the types of court information that can be shared in either direction between jurisdictions in DV cases (this is in addition to limits on which cases are susceptible to information sharing). There may be a number of reasons for these limits, including that:

- certain types of information are unlikely to be relevant for the other court and so do not need to be specified in law
- sensitive or untested information about a person obtained from another jurisdiction ought not to be used by the court (perhaps for reasons of privacy or natural justice), and
- they may help manage demands on court [staff] having to respond to information requests.

27. The limited availability of information from other jurisdictions is likely to impact negatively on judges' decisions. There are cases the Ministry is aware of where a judge may very likely have made a different decision if he or she had been aware of information from another jurisdiction about the offender. A different decision could have directly impacted on the victim's safety.

28. While the examples the Ministry is aware of do not constitute a comprehensive view of the impact legislative restrictions have on judicial decision-making, they do indicate that limits on information sharing between jurisdictions can have severe consequences. They also show that not all information judges need is necessarily available from non-court sources.

29. A closely related problem is that the criminal DV case information that may be shared with the civil/family jurisdiction is not tightly defined. It could be interpreted tightly to mean factual or proven information, such as the conviction itself or charge information. Alternatively, it could be interpreted more generally to include untested information, such as victim impact statements.

### B. The definition of "domestic violence offence"

30. The definition of domestic violence offence used in the various rules and regulations limits information from DV cases being shared unless the cases involve the same offender/respondent and victim/applicant to a protection order in common. Even then, not all of these cases necessarily qualify for sharing to occur.

31. The definition of domestic violence offence prevents potentially relevant information being provided to another court that could give them a better sense of how the offender/respondent may behave. The definition may reflect a now outdated view that information about an offender or respondent's behaviour towards a previous partner does not predict their likely behaviour towards another person.

### C. Reason to believe

32. The requirement on the court or registrar of the court to have reason to believe the defendant or respondent has been involved in related proceedings in the other jurisdiction appears to unduly limit access to information for judges.

33. There is an element of circularity in the requirement, with the court effectively needing to know about a related case before it can ask for associated information. We understand court staff may be made aware of other proceedings by another party, for example, the applicant for a

protection order. This begs the question of whether the information from the other jurisdiction would add much more than confirming what the court already knows.

#### D. Assessment of relevance

34. The requirement that the court or registrar must reasonably believe that the information requested from the civil/family jurisdiction will be relevant potentially further limits useful information from being accessed by the court. This requirement presupposes that decisions can be made about the relevance of information without assessing it first. The mechanism may have been created to help manage demands placed on staff time spent responding to requests for information or it may have been a de facto admissibility requirement.
35. The requirement places considerable responsibility on registrars to determine relevance, despite assessment of the relevance of evidence usually being a task carried out by judges.

#### E. Address information

36. There is uncertainty about reliable access to address information held by the criminal jurisdiction. This information assists with timely service of protection orders on the respondent, especially when the criminal jurisdiction has more up-to-date address information. Currently, any requests of this nature must be [individually] considered by the court holding the information. Addresses are not supplied as of right. This leads to inefficiencies in the requesting process.

### Options and impact analysis

37. In this section, we set out the status quo and potential options to address each of the identified issues. The nature of impacts for each option are aligned against the objectives stated in paragraph 9.
38. Non-legislative options are not covered. There are several reasons for focusing on legislative approaches including that:
  - legislation is the only way government can determine what information may be shared between courts (by tradition, as well as statute, what access to court information is permitted is usually for the courts to determine)
  - guidance about the meaning of existing legislation is operationally useful but, without the force of law, would not definitively remedy unclear legislation, and
  - relying on other non-legislatively directed sources to supply the same information (where these exist) is problematic, because a source may not always supply information just because it is in their possession.

#### The types of information able to be shared between jurisdictions

39. The options outlined here apply to information sharing in both directions (from criminal to civil/family and vice versa).

Status quo	Option A	Option B
Limited access to DV case information between jurisdictions	Additional types of criminal information could be shared with the civil/family jurisdiction eg, victim impact statements, pre-	Access permitted to all of another jurisdiction's DV case information (types of information not

		sentence reports, summary of facts. No change in civil/family sharing with criminal jurisdiction.	specified)
- <b>Provides judges with greater information for decision-making</b>	= No new information could be obtained	? Provides judges with some additional information	< Provides judges with a full range of information from other jurisdictions
- <b>Better outcomes from decision-making</b> - Especially in relation to protecting of victims and complainants and reduced re-offending	= No change	? Improved outcomes likely but dependent on how many and which additional information types are shared	< Enables greatest access to information so most likely to assist courts' decision making and therefore improved outcomes
- <b>Maintains integrity of the court process</b> - Including protection of a party's rights and confidence in the justice system	< Generally no concern that permitted information is shared inappropriately = Confidence in court system undermined when adverse outcomes occur (which could have been averted with greater access to information)	< Provides court with certainty about what can be shared < Legislation provides for a variety of information to be sought and used by judges, if relevant < Although not bound by the Privacy Act, judges have powers to protect sensitive information from going beyond the parties involved ? Additional types of court information may be private/sensitive or untested so should not be used in key decisions ? Additional requests likely to add to court workload and/or introduce delays in court process	The considerations listed for Option A) apply except that the scope of requests may generate further work for court staff and/or introduce delays in court process

40. The ability to share conviction history for non-DV offences to the civil/family jurisdiction is a possible variation on Option B. We consider that this could provide additional useful

information to judges about the prospective behaviour of a respondent to a protection order. It may be, however, that not all convictions might be considered relevant. The issue of relevance is dealt with in options for assessing relevance described later in the RIS.

### The definition of “domestic violence offence”

41. The options outlined here apply to information sharing in both directions (from criminal to civil/family and vice versa).

	<b>Status quo</b> DV case information may be shared between jurisdictions only if case involves the same parties and a protection order in place/applied for when offence occurred	<b>Option A</b> Like status quo but no requirement for protection order to be in place/applied for at the time against the offender	<b>Option B</b> Allows protection order/DV information from another jurisdiction to be shared if the same defendant/respondent is involved in DV case
- <b>Provides judges with greater information for decision-making</b>	= No change	? Would allow more information to be shared, although only from cases involving the same parties	< Gives judges full DV case information relating to a particular offender/respondent
- <b>Better outcomes from decision-making</b> - Especially in relation to protecting of victims and complainants and reduced re-offending	= No change	? Improvement likely to be limited since access is only to a subset of related DV cases	< Maximum scope for improved outcomes since judges have the opportunity to access fully offender/respondent DV case history
- <b>Maintains integrity of the court process</b> - Including protection of a party’s rights and confidence in the justice system	? Limits on cases considered favours protection of defendant/respondent rights over the potential safety of a victim  < Operational demands on courts reduced as fewer cases in scope	< Gives judges better sense of offender/respondent DV history  ? Increases potential for questions about relevance of additional cases coming into scope	< Broad scope likely to give judges best access to relevant case information  ? Increases potential for questions about relevance of additional cases brought into scope  = Would place considerable demands on court staff if used in every instance and/or introduce delays in court processes



## The reason to believe

	<b>Status quo</b> The court or registrar must have a reason to believe there is or has been a related proceedings in another jurisdiction before requesting information from it	<b>Alternative option</b> Remove requirement for court or registrar to have reason to believe before requesting case information
- <b>Provides judges with greater information for decision-making</b>	= No, impedes the court from accessing at least some relevant cases	< Provides more flexible and efficient mechanism for the court to make inquiries for any cases that may have relevant information
- <b>Better outcomes from decision-making</b> - Especially in relation to protecting of victims and complainants and reduced re-offending	= No improvements possible	< Increase in access to relevant information should enable better informed decisions
- <b>Maintains integrity of the court process</b> - Including protection of a party's rights and confidence in the justice system	< Reduced operational demands on courts as unlikely that the court has reason to believe in every case	= Would place considerable demands on court staff if used in every instance and/or introduce delays in court process

## The assessment of relevance

	<b>Status quo</b> Registrars/court seeking civil/family information must be satisfied it may be relevant before requesting it from other jurisdiction	<b>Option B</b> Remove relevance requirement altogether
- <b>Provides judges with greater information for decision-making</b>	= No change	< Allows judges to consider relevance once they have seen the information < Judges still bound by admissibility tests in primary legislation/case law, including relevance considerations.
- <b>Better outcomes from decision-making</b> - Especially in relation to protecting of victims and complainants and reduced re-offending	= No change	< Improvements likely as more information could be considered
- <b>Maintains integrity of the court process</b> - Including protection of a	? Provides a safeguard against irrelevant information being used, Test requires court to	= Would place considerable demands on court staff if used in every instance and/or introduce delays in court process

party's rights and confidence in the justice system	know something about the information without seeing it first	< Allows relevance to be determined by existing legislation and checked by appeal/review processes if necessary
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### Access to address information

42. The alternative option we propose for remedying uncertainty of access to criminal jurisdiction address information is to provide for unrestricted access to it by the civil/family jurisdiction. The address information would only be for use in serving protection orders. While not directly aligning with one of the listed objectives in this work, it would help the integrity of the court process by ensuring the court can successfully and quickly serve protection orders.
43. We suggest an important caveat, in keeping with privacy principles, is that address information from the criminal jurisdiction may not be used for unspecified purposes. This is reflected in the option's targeted purpose of using the information for serving orders only.

## Consultation

44. The Ministry conducted a targeted consultation to draw out the issues and possible solutions in this area. The information from the consultation has informed the analysis and presentation of the RIS.
45. Consultation involved seeking comment on an issues paper from: the High Court and District Court (including the Family Court), the New Zealand Law Society, New Zealand Bar Association, Criminal Bar Association, Auckland District Law Society, government agencies and crown entities including the Department of Corrections, New Zealand Police, Crown Law Office, Office of the Privacy Commissioner. The Public Defence Service and the Family Violence Death Review Committee were also consulted.
46. Submitters provided feedback on a number of areas raised by the issues paper. The main theme of note was the division of views into two groupings. One group of submitters, including judges, was more supportive of greater sharing, suggesting the court should have more information because their decisions would then be better informed. This would potentially aid an applicant or victim's safety. The other group supported, at most, limited increases in permitted sharing due to concern that it may impact adversely on a defendant or respondent's rights, for example, to natural justice.

## Conclusions

47. Based on the assessment of options against objectives above, we conclude that the following options are preferable:
- *The types of information able to be shared between jurisdictions:* Option B
  - *The definition of "domestic violence offence":* Option B
  - *The reason to believe:* Alternative option, and
  - *The assessment of relevance:* Option B.

## Implementation plan

48. Cabinet will consider any changes to rules and regulations. Its decisions will be reflected in new secondary legislation, which would be promulgated on the New Zealand Legislation website prior to coming into force.
49. Any change to the scope and conditions for sharing information between jurisdictions is likely to result in amended guidance being provided for court staff. This would be prepared by the Ministry of Justice in consultation with the Judiciary. The Judiciary may prepare its own guidance for judges.
50. Implementation of the preferred options could place a significant workload on court staff particularly as much court information is contained in hard copy form and is therefore less easily accessed than electronic formats. The Ministry expects that it would need to work with the Judiciary to manage the demands on staff that numerous requests for information would bring. We also anticipate some changes to the functionality of the case management system could be undertaken to improve the efficient identification and retrieval of case information contained in electronic systems.

## Monitoring, evaluation and review

51. As indicated earlier in the RIS, we consider identifying the impacts of any change to rules and regulations to be methodologically difficult. However, we anticipate that discussions between the Ministry and the Judiciary once any amendments come into force could seek feedback on whether judges have found instances where previously unavailable material had helped influence their decision-making.