

COURTS AND CRIMINAL MATTERS BILL
SUBMISSION OF
WAITAKERE COMMUNITY LAW SERVICE

This document is filed by Darryn Aitchison, Waitakere Community Law Service, 1A Trading Place, Henderson, Waitakere City

Phone: 09 8352130

Fax: 09 8372133

Email: darryn@waitakerelaw.org.nz

SUBMISSION OF WAITAKERE COMMUNITY LAW SERVICE

Introduction

1. Waitakere Community Law Service (“WCLS”) is a community law centre which was established to enhance the lives of people most in need and whose lives are impacted by unresolved legal issues. WCLS has a strategic mandate to monitor the effect of legislation on our communities and to anticipate the effect of proposed legislative changes. In this context, WCLS has a mandate to ensure that changes to criminal and civil enforcement procedures are structured in a manner that:
 - a. Does not aggravate social and economic exclusion within our community;
 - b. Does not increase alienation from the justice system;
 - c. Is based in established principles of natural justice;
 - d. Fairly balances the interests of creditors, debtors, the community and the state; and
 - e. Provides for effective recovery of debts or enforcement of penalties.
2. Many clients who attend WCLS experience various forms of social exclusion. They may be living in poverty, poor housing, experiencing domestic violence, be illiterate, have mental health problems. WCLS sees approximately 2000 clients per year, most of whom experience the types of social exclusion outlined above. We are one of 26 Community Law Centres.
3. This submission will now proceed to discuss amendments to each principal Act and the concerns that we have.

Amendments to District Courts Act 1947

4. WCLS assists two types of clients who will be effected by the amendments to the District Courts Act proposed by this bill:
 - a. Those who owe money; and
 - b. Those who seek to recover it.
5. Those who owe money are by far the greatest number of our clients and are certainly the most vulnerable. Those who owe money are of greatest concern to us because they are at the greatest risk of experiencing social and economic exclusion through the enforcement process.
6. Those who seek to recover money are also of considerable concern to us. One area of law that we work with regularly is consumer law, where we assist consumers. Consumer can find themselves being owed money by suppliers of goods or services. The effective recovery of that money is an important right.
7. The interests of a person seeking to recover debt and those liable a debt are not the same. However, WCLS believes the interests of both parties can be better promoted through changes to the bill. WCLS also believes the interests of the parties on opposite sides of a claim can be better balanced.
8. Furthermore, WCLS believes the bill is shortsighted and misses an opportunity to deliver justice better: in a way that advances other social policy goals; in a way that increases social and economic participation; in a way that leads to restorative outcomes, and in a way which may actually save money, increase financial literacy in our communities, and reduce levels of default.

Those Who Owe Money – Safeguarding Their Interests

9. Many clients who attend WCLS experience various forms of social exclusion. They may be living in poverty, poor housing, experiencing domestic violence, be illiterate, or have mental health problems. WCLS sees approximately 2000 clients per year, most of whom experience the types of social exclusion outlined above. We are one of 26 Community Law Centres.
10. The community has an interest in ensuring that these people are not further alienated and disenfranchised from social and economic participation. It is not only just that these people participate in our community but it makes good economic sense also.
11. The current bill does not have sufficient safeguards to ensure that an attachment order will not further alienate, disenfranchise and undermine the well-being of vulnerable members of our communities. The following thought experiment provides a framework to demonstrate some of the risks inherent in the current bill:
 - a. A beneficiary with low literacy, the debtor, is served with a civil claim.
 - b. The debtor cannot interpret the service documents so takes no steps in the proceedings.
 - c. Judgment by default is obtained.
 - d. A financing statement is filed by the creditor that understates the debtor's living expenses, and an attachment order is applied for.
 - e. The application is served or is served by post to an old address.
 - f. The debtor cannot interpret the document or does not receive it, either way they take no steps.
 - g. Evidence of financial means is presented by the creditor only.
 - h. An attachment order is made in the debtor's absence.
 - i. The order is served to the debtor or is served by post to an old address.
 - j. The debtor cannot interpret the document or does not receive it, either way they take no steps.
 - k. The attachment order has effect.

- l. The debtor has money deducted from their income without any knowledge that it would occur.
 - m. The debtor defaults on other obligations they have, such as the rent, or goes without something else to balance the books, such as food.
 - n. The debtor experiences significant financial hardship, or has the well-being of themselves and their family undermined. For example, they default on a tenancy order and become subject to immediate eviction; they cannot pay school fees or buy Christmas presents; they default on a car loan and have their vehicle repossessed.
12. This thought experiment is based on the real life experience of a client at WCLS (with the exception that they attended an examination hearing, as the current legislation provides, before an attachment order was made). People like this exist – this is not an isolated client. Many of those who experience literacy difficulties, or mental illness, or who live in poverty have reasons why they are unable to participate in civil claim and enforcement process.
13. The thought experiment demonstrates that the enforcement process can break down in many places. The potential for breakdown poses three key risks to vulnerable members of our communities who are being pursued for debts:
 - a. That service may not be adequately affected; or
 - b. That even where service is affected service itself is not always sufficient to ensure that appropriate notice of a pending claim or attachment event.
 - c. That inaccurate evidence may be relied on by Courts to make appropriate attachment orders that have realistic prospect of repayment and which do not aggravate social ills.
14. The current system builds in a safeguard around these risks, namely: the current system requires an examination hearing before an attachment order can be made.

15. In relation to service, points (a) and (b) above, the system under the current bill can *in practice* permit significant breaches of natural justice to occur. A breach of natural justice is unacceptable in principal. The principle that a person has the right to know of a decision that may impact negatively on them, and the right to speak to that decision, is a cornerstone of our justice system. The current bill significantly weakens requirements around service. This weakening puts in place a system whereby service is *presumed* to have occurred, rather than being *known* to have occurred. Making subsequent decisions in a person's absence on the *presumption* that they knew about the proceedings and simply did not engage is the hallmark of the arbitrary exercise of state power and has no place in New Zealand's justice system.
16. In addition to being unacceptable on principal, the effect of a breach of natural justice will in many circumstances be unexpected, damaging, wide-reaching, and will aggravate barriers to justice and social participation for those affected. This is discussed further shortly.
17. A solution in relation to service of adequate notice and the debtors participation (or lack of) in the enforcement process is to use the powers of summons and arrest more widely.
18. At the very least, no attachment order should be made until a debtor has had at least one hearing before a judge, either at the time the claim was originally decided, or at the time the attachment order is being considered. It is totally unacceptable that an attachment order could occur without a person never having been before a judge.
19. In relation to evidence, point (c) above, the current bill permits attachment orders to be made on the basis of evidence presented by the creditor only. This in turn creates two risks:
 - a. Finance statements could be falsified by unscrupulous creditors; and

- b. Inaccurate finance statements could be relied for the assessing of an attachment order, which in turn may lead to attachment orders that cause harm to debtors, their dependents, and the whanau's ability to participate effectively in the community.
20. Solutions available to manage this risk are to ensure greater resources or investigatory powers are available at all stages of the enforcement process. Greater capacity for the Court to investigate and compel evidence of the true financial situation of a debtor will enable better decisions to be made about the debtor's ability to pay. This, in turn, will make financial restoration more likely, and for financial restoration to occur in a manner that does not cause undue hardship and does not undermine the debtor's ability to effectively participate in the community.
21. It is acknowledged that these solutions may give rise to privacy issues around the accessing and sharing of debtor information. These issues give rise to important policy and philosophical issues that would need to be worked through.

Striking A Better Balance

22. WCLS would prefer to see a better balance struck between the needs of creditors and debtors. WCLS's strong preference is that:
- a. A hearing into a debtor's financial means, with the debtor in attendance, should be required prior to an attachment order being made; and
 - b. The Court should have sufficient powers to compel attendance at a hearing; and
 - c. The Court should have greater powers to compel debtors to prove their financial situation at an enforcement hearing

- d. The Court should have greater powers to discover and investigate the financial situation of debtors; and
 - e. The Courts should have a greater customer service focus so that:
 - i. Debtors can be helped to focus on the restitution aspects of their liabilities;
 - ii. Debtors understand the effects of orders made against them and their obligations;
 - iii. Realistic repayment arrangements are struck;
 - iv. Financial literacy can be improved for debtors; and
 - v. The risk that additional social and economic harm can be mitigated.
23. As an absolute minimum WCLS believes the current bill should be amended to ensure that at some point during the civil claim or sentencing process two things occur:
- a. A hearing where the debtor/defendant actually attends must occur; and
 - b. The debtor/defendant has actual knowledge that failure to pay a judgment sum may result in deductions from income.
24. It is an unacceptable risk to have a system whereby a person with low literacy may have money deducted from their income:
- a. Without actual knowledge of the claim; and
 - b. Without actual knowledge of the fact that failure to pay may result in deductions from income

Onus of Proof and Investigatory Powers

25. The current system lands creditors with the onus of enforcing a debt and proving the debtors ability to pay. WCLS believes that the balance should

shift to some degree toward the debtors having to provide restitution and proving any inability to pay. WCLS supports the general thrust of the current bill in this regard.

26. A debtor who has had a debt proved should make restitution. If they are seeking to do so by installments, particularly where these are meager, or if they are seeking to substitute an alternative sentence, the debtors should have a greater onus on proving their inability to pay in full.
27. Having said that, WCLS's comments around investigation and the needs for a hearing should be born in mind. The current bill appears to place a negative onus on the debtors. That is, the creditor can file a financial statement and an attachment order can be made in the creditor's favour. The onus then shifts to the debtor to prove their inability to meet the terms of the order. Where debtors do not attend hearings on attachment order applications or where they do not have the skills to advocate effectively on their own there are risks that oppressive attachment orders will be made. This risk should be managed by the requirement for a hearing coupled with greater powers of investigation for the Court.

Social Policy Agenda – A Customer Service Focus For Enforcement

28. It is not a new idea to leverage the justice system to improve the social participation of members of the community who come into contact with it. Dame Margaret Bazley's review of the Legal Aid System identified that many members of our community who experience the justice system, particularly the criminal justice system, come with the complexity of a multitude of social problems. Dame Margaret recognised that contact with the justice system provides an opportunity to address some of those social needs.
29. WCLS believes the bill should be amended so that the Courts have a greater customer service obligation in the manner that they deliver their services. For example, where debtors are present when a judgment was

entered against them or a financial penalty was imposed they should be walked through their obligations competent ministry staff. The effects of the order and the options available to them should be explained as a matter of course. It is conceivable that enforcement could occur immediately in many cases, provided sufficient information was available to Judges/Court staff at the time of judgement/sentence.

30. Where debtors are not present at the time a judgement is issued they should be brought to Court prior to an attachment order being made and be required to provide adequate information to ensure sound attachment decisions are made.
31. The ability to make sound decisions around the ability of debtors to pay without experiencing hardship depends on the availability of good financial information. It is conceivable that, in a customer service framework, that this information could be available in many circumstances.

Other Matters

Company Debtors

32. WCLS often helps clients who have a provable debt against a company. Many of those clients successfully obtain an order against the company for breach of, for example, the Consumer Guarantees Act. Consumer creditors often find it difficult to obtain attachment orders or other enforcement orders against companies.
33. A common scenario is where consumer creditors try to enforce a debt through an examination hearing. Company debtors often send a representative who simply states there is no means to pay the debt. The claims of companies are often accepted by registrars without any evidential support and without the company debtor being subjected to the close scrutiny of

their finances. Consumer debtors in the same situation are subject to a close scrutiny of their financial situation. an examination of their

34. WCLS supports the inclusion of provisions that provide power to the Court to demand proof of the financial situation of company debtors. The protections under consumer law are undermined if there is no teeth the powers to enforcement debts.
35. A second common scenario for WCLS clients are those who seek to recover money from companies whose director-shareholders have a policy of liquidating their companies to avoid liabilities (only for the same director-shareholders to transfer assets to another entity). It is acknowledged that the scope of this bill does not address this issue but it would be desirable to provide some greater capacity to enquire into and trace the divulging of company assets where provable claims existed antecedent to the assets being disposed of.

Discharging Attachment Orders

36. Regarding clause 18, WCLS supports the proposal that an attachment order can be discharged without the need for an application to the Court.

Contempt Proceedings

37. Regarding *clause 20*, WCLS does not believe debtors should be subject to penalties for contempt solely on the basis of evidence provided by the creditor. A hearing, with the debtor present, should occur that assesses whether the debtor has the means to pay and whether a breach of an order (i.e. contempt) has occurred.

Amendments to Land Transport Act

Driver License Stop Orders – Service of Warnings

38. WCLS has some concerns about the proposed procedures for the administration of driver license stop orders (“DLSOs”). The primary concern is around the provision of adequate notice to those who become subject to a DLSO.
39. The current bill does not require actual personal service of warning notices to be proved or, as an alternative, does not provide certainty that warning notices are being received. There are two types of clients who may be adversely affected by the absence of these requirements:
 - a. Clients who do not understand the implications of warning notices;
 - b. Clients who do not receive them
40. Regarding (a), many clients who attend WCLS experience various forms of social exclusion, such as poverty and literacy difficulties. These factors create barriers for these clients accessing and understanding the justice system. WCLS has no doubt that some people in this situation will become subject to DLSOs without prior warning.
41. Regarding (b), WCLS regularly deals with clients who do not receive notice of fines. One category of such clients is those who have experienced forms of identity theft. Some of these experience identity theft in relation to traffic fines. Often this occurs through false names being provided in relation to traffic offenses. At times clients do not find out they have fines until they are arrested at the roadside or they obtain details on their criminal records for other reasons.
42. Victims of identity theft are at real risk of not receiving warning notices in relation to DLSOs. WCLS has no doubt that some people in this situation will become subject to DLSOs without prior warning.

43. Other clients who do not receive notice of offenses are those who move frequently. WCLS has no doubt that some people in this situation will become subject to DLSOs without prior warning.
44. The current bill is defective in that it allows the possibility that people will become subject to DLSOs without warning. WCLS has no doubt this possibility will eventuate and dealing with the implications will be a regular feature of our work.
45. The service requirements in relation to DLSO warnings need to be strengthened to ensure that actual notice is obtained. The fact people could become subject to a DLSO without notice is a breach of natural justice. It also creates the probability that social harm will occur due to a person's lack of opportunity to mitigate the impacts of a DLSO (see the following section).

Risk of Social Harm

46. The fact people could become subject to a DLSO without notice creates the probability that social harm will occur for some people. People subject to DLSOs need the opportunity to remedy a breach and mitigate the impacts of a DLSO if they are unable to remedy the breach.
47. Many people, their whanau, and members of their community depend on vehicles for work, health, and social participation. The loss of a license can in many cases cause significant harm. A person subject to a DLSO must be provided with the opportunity to mitigate the impacts on themselves and those who rely on them. Those who are victims of procedural irregularities or identity fraud need the opportunity to challenge the order before it becomes effective.

Amendments to Summary Proceedings Act

Service - Evidence

48. Regarding clause 57, WCLS has some concerns about the level of proof required by a registrar under new section 78C. WCLS proof of personal service should be limited to proof of actual service in person or acknowledgment of by the defendant that they were served.

Service - Methods

49. Regarding clause 58 and the creation of new sections 79A-79D, WCLS has concerns about the impact of these sections on people with low literacy, those experiencing other forms of social exclusions, and victims of identity theft.
50. While it is acknowledged that in many cases the offences are not serious, this in itself is not a sufficient reason to weaken requirements around service. The whole notice of service of documents is tied to natural justice. People have the right to have actual notice of a claim or charge against them. This is not just due to a jurisprudential matter of principal. Actual notice provides defendants with the chance to mitigate the effects of a penalty so that they do not experience social dislocation due to the penalty.
51. If service is to be permitted through posting documents, it is critical that actual hearings occur in relation to DLSOs or attachment orders (through the treatment of fines as orders for payment for money: clause 67).

Credit Reporting - Defaults

52. WCLS understands the rationale behind the disclosure of default balances as providing both notice to creditor security-holders and an incentive to defaulters to resolve their fines.
53. WCLS is concerned that the weakening of notice provisions will lead to credit listings for people who do not know they have fines or that they are

in default. We have discussed people with low literacy and victims of identity theft above. The privacy and capacity to obtain credit for these people need to be adequately protected.

54. Two possible solutions are:
- a. Strong notice provisions requiring actual notice before disclosure is made; or
 - b. Powers of the Court to require credit listing companies to remove default listings that, when the fine or default is challenged by the defendant, cannot subsequently be proved by the prosecuting authority.

Third Party Compensation

55. Regarding new section 100, WCLS believes it is critical that the third party must make an application to the Court in order to obtain a remedy under this clause.

Summary

56. WCLS supports the some of the underlying principles behind this bill: those who owe money should make restitution to the creditors or to the community. Restitution should occur in a manner that is cost effective and timely.
57. Having said that, the community has an interest in ensuring that vulnerable people are not further alienated and disenfranchised through the enforcement processes of the Court. WCLS believes the current bill introduces a number of shortcuts to the judicial process which are both wrong in principal and will lead to social harm.
58. The short cuts we are particularly concerned about are those around service of notices and the making of decisions when debtors/defendant's are

not present. People with low literacy, people experiencing social exclusion, and victims of identity theft will be vulnerable under the proposed bill. Some of those people will experience further harms.

59. WCLS believes the bill needs to be amended so that vulnerable people, such as those who make up the client base of Community Law Centres, are not further alienated, disenfranchised and have their well-being undermined.
60. There are a number of ways that these changes could be made within the bill. WCLS has not provided a detailed analysis of how all the changes could be made. The issues we have raised call for some policy decisions to be made by the committee and the process of redrafting is subsequent to those policy decisions being made.
61. Thank you for the opportunity to make this submission. We would like to talk to this submission if the opportunity exists.

Darryn Aitchison
Senior Lawyer
Waitakere Community Law Service