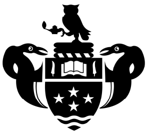
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15 September 2011

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By email: patricia.bailey@justice.govt.nz

Dear Patricia

Submission on the Draft General Principles for Judicial Communications within the International Hague Network of Judges

1. Thank you for inviting comment on the "*Emerging Rules Regarding the Development of the International Hague Network of Judges and Draft General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Communications in Specific Cases, Within the Context of the International Hague Network of Judges*" (the paper). The Family Law Section's International Family Issues Standing Committee, on behalf of the New Zealand Law Society (Law Society), has prepared this submission on the paper.

2. The paper discusses two distinct forms of judicial communications:

   (a) General communication between the International Hague Network of Judges[1] in terms of disseminating/sharing 'Hague' information from the Hague Network with colleagues in their jurisdiction and assisting with reverse flow of information, and at times includes involvement in international judicial conferences/seminars (i.e. non-case specific/general communication); and

   (b) Direct judicial communication between Judges in respect of specific cases – "the object of such communications being to address any lack of information that the competent Judge has about the situation and legal implications in the state of habitual residence of the child".

3. The Law Society has no concerns regarding the first form of judicial communication (i.e. general information transmitted by the allocated Hague Network Judge to judicial colleagues and being a representative at international Hague conferences/seminars).

4. However, the Law Society has concerns in respect of the second proposition of direct judicial communication in respect of specific Hague cases.

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[1] Each Hague state appoints a Judge from their country to be the judicial representative on the Hague Network.

Direct judicial communication

5. The paper provides the following matters that may be the subject of direct judicial communication in specific Hague cases:

   (a) Is it possible to schedule the case in the foreign jurisdiction:

      (i) to make interim orders e.g. support, measure of protection?

      (ii) to ensure availability of expedited hearings?

   (b) Are protective measures available for the child or other parent in the State where the child would be returned?

   (c) Can the foreign court accept and enforce undertakings offered by the parties in the initiating jurisdiction?

   (d) Is the foreign court willing to entertain a mirror order (the same order in both jurisdictions) if the parties are in agreement?

   (e) Were orders made by the foreign court?

   (f) Were findings about domestic violence made by the foreign court?

   (g) Would a transfer of jurisdiction under Article 8 or 9 of the 1996 Hague Child Protection Convention be appropriate?

6. The Law Society's view is that the matters listed in (a) to (g) above can all be readily dealt with (and already are in New Zealand) in ways other than direct judicial communication:

   (a) Is it possible to schedule the case in the foreign jurisdiction:
   (i) to make interim orders eg support, measure of protection;
   (ii) to ensure availability of expedited hearings?

   These matters are administrative matters that can be dealt with by the Registries in each court in conjunction with counsel appointed by the Central Authority, as well as by the Central Authority itself when required.

   (b) Are protective measures available for the child or other parent in the State where the child would be returned?

   This is a question of fact to be provided by counsel, and can be checked if required. The information can be provided with the assistance of the Central Authority and provided in affidavit form by a lawyer with experience/expertise in the field from the state where the child is to be returned.

   (c) Can the foreign court accept and enforce undertakings offered by the parties in the initiating jurisdiction?

   This is a question of law and can be provided to the Court by way of expert evidence – which is able to be tested.

   (d) Is the foreign court willing to entertain a mirror order (same order in both jurisdictions) if the parties are in agreement?

This is a question of law and can be provided to the Court by way of expert evidence – which is able to be tested.

(e) Were orders made by the foreign court?

This is a question of fact and a matter of record, and can be established by the production of evidence of the existence of any orders.

(f) Were findings about domestic violence made by the foreign court?

This is a question of fact and a matter of record, and can be established by the production of evidence of the existence of any orders.

(g) Would a transfer of jurisdiction under Article 8 or 9 of the 1996 Hague Child Protection Convention be appropriate?

This is a matter suitably dealt with by way of submission.

7. As can be seen from the above discussion, all of the specific examples provided as reasons to justify direct judicial communication can be dealt with in other ways.

8. There may be a perceived benefit of expediency of process provided by direct judicial communication (although that is not necessarily accepted by the Law Society). However, direct judicial communication is contrary to the principle that Judges act and determine matters on the basis of properly adduced evidence presented and tested in court (New Zealand does not have an inquisitorial judicial process as some European countries do). Justice must be done and seen to be done. This requires counsel having the opportunity to comment on and challenge information put before the court.

9. The Law Society has a number of concerns about the proposal to allow direct judicial communication:

   (a) There would be no record of what was said between Judges (unless recorded and made available to counsel);

   (b) Who would have input into what questions were asked?

   (c) How would counsel question the information provided if they did not accept it?

   (d) Direct judicial communication might result in a Judge being subject to subpoena.

   (e) It is possible that a Judge who sought and obtained an opinion/information from an overseas Judge might disagree with the material supplied – risking a situation of automatic deferral to the opinion of a judicial colleague.

   (f) And, perhaps most importantly, direct judicial communication raises concerns of actual pre-determination and/or collusion, or the appearance of pre-determination and/or collusion.[2]

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[2] See *R v B* HC, Auckland, CIV-2006-404-1666, 12 May 2006 - Asher J re appearance of bias being sufficient for Judge to recuse himself even absent actual bias

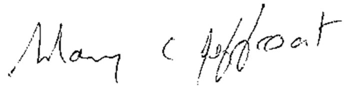
10. The paper discusses certain safeguards in the proposal for direct judicial communication (for example, that the communication is "normally" to be in writing). The Law Society's view is that no safeguards are sufficient in circumstances where there is no justification for direct communication because alternative, transparent communication methods are available. All the examples provided as reasons to support direct judicial communication can be better dealt with in other transparent, testable, evidentially sound processes, or via administrative assistance and/or input from the Central Authority itself and/or Court Registries.

Summary

11. The Law Society's view is that judicial communication for general (non case specific) purposes, in terms of sharing information and/or developments with their colleagues and providing feedback, raises no concerns. However, the Law Society believes that, regardless of the proposed safeguards, there is no justification for direct judicial communication in specific cases.

12. If you wish to discuss this submission further, please contact Ms Kath Moran, Family Law Section Manager (ph (04) 463 2996 / kath.moran@lawsociety.org.nz).

Yours sincerely



Mary Jeffcoat
Vice-President