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Independent Panel, Family Justice Reforms
c/- Ministry of Justice
Wellington

By email: FamilyJusticeReforms@justice.govt.nz

STRENGTHENING THE FAMILY JUSTICE SYSTEM

Introduction

1. The New Zealand Law Society welcomes the opportunity to provide additional feedback to the Independent Panel (panel) examining the impact of the 2014 family justice changes. We endorse many of the proposals in the panel's second consultation paper, *Strengthening the family justice system*[1] (paper), and are pleased to note a number of recommendations from our November 2018 submission are reflected in the panel's proposals.[2]

2. The panel's process has provided a valuable opportunity to consider feedback from stakeholders in the family justice system, including parents who have experienced pre-court and in-court processes. It has also been an opportunity for professionals in the family justice system to critically assess their own roles and consider ways the system can be improved. The Law Society remains hopeful the current review will lead to design changes that deliver sustainable access to justice for the many New Zealanders who need support in resolving their family disputes.

3. This submission is structured as follows:

   - Executive summary
   - General comments
   - Responses to the panel's consultation questions

Executive summary

Judicial resourcing and delay

4. It is imperative that more judicial hearing time is available in the Family Court, including the allocation of more judicial resource.[3] The Law Society supports the proposal to establish a new role of Senior Family Court Registrar (SFCR). The combination of both increased judicial

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1 *Strengthening the family justice system – A consultation document released by the Independent Panel examining the 2014 family justice reforms*, Ministry of Justice, January 2019 ('the panel's paper').

2 *Examination of the 2014 family justice reforms*, NZLS submission dated 12.11.18, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/128722/l-MOJ-Family-Court-Review-12-11-18.pdf ('November 2018 submission').

3 November 2018 submission at paragraphs 11, 132, 166 – 167.

resourcing and the new SFCR role would have a significant impact on reducing delay so that matters are able to be heard in a timelier way. If more judicial hearing time is not available, we believe that other proposed changes will not be sufficient on their own, or collectively, to reduce the significant delay currently experienced in the Family Court.

5. Delay should also be addressed by:

- establishing an effective and efficient triage system;
- streamlining the process with fewer court events; and
- allowing parties to have legal representation at all stages in proceedings (including pre-proceedings).

6. If these issues were immediately addressed, we believe this would result in a significant reduction in delay and substantially reduce the number of without notice applications.

Family Court registries

7. An efficient and properly resourced registry is a vital component of a Family Court able to serve those who seek its assistance. Family Court registries that operate well do so largely because of experienced and knowledgeable staff.

Triaging

8. An effective triage system would identify and enable the most appropriate response available for parties seeking assistance to resolve parenting and guardianship disputes. It would divert matters amenable to out-of-court resolution, enabling entrenched and complex matters to be heard and resolved more quickly by the court. The establishment of a new Family Justice Sector Coordinator (FJSC) is a positive proposal and such a role will be key in triaging matters either to an out-of-court or in-court process.

Court events

9. Each court event should have a clear process and purpose, advance matters towards resolution and provide consistency and certainty for parties. Cases should be limited to four key court events unless circumstances require otherwise. Files should be allocated to an individual case manager at an early stage to ensure matters are dealt with and cases are progressed to ensure that judicial sitting time is only used when matters are ready to proceed.

Complex cases

10. Complex cases take up a disproportionate amount of time and are difficult and time-consuming for all involved. Complex cases need to be defined so they can be identified early and triaged appropriately. They need early and effective intervention and should be case managed by an individual judge, with assistance from an SFCR and case manager.

Family Justice Service Coordinator

11. The Law Society supports the establishment of the FJSC role and agrees it should be established by statute. The role will greatly assist in ensuring the Family Court and various community services work in a joined-up and collaborative way as envisaged by the panel's aim to strengthen family justice services.

Use of technology

12. The establishment of a robust IT platform enabling nationwide electronic filing for the Family Court would have significant cost savings and efficiencies for the family justice system and is well overdue. The increased use of technology, such as Audio-Visual Links (AVL) and teleconferencing would provide significant cost savings and efficiencies in the family justice system.

Implementation of a new system

13. Significant additional resource in terms of registry and judicial time will be needed at the point a new system is implemented. This would ensure that the intended efficiencies are achieved from the implementation date of the new system.

General comments

Delay

14. It is well known that delay is one of the most significant problems facing the Family Court. This is one of the reasons there has been a dramatic increase in without notice applications since the 2014 changes. It is essential more judicial hearing time is made available (the allocation of more judicial resource and establishing the proposed new role of SFCR) to reduce the delays. That is a critical factor; without it, the other proposed changes will not be adequate to make any substantial improvement.

15. At its meeting on 22 February with panel members, the Law Society's Family Law Section (FLS) executive were asked what could be done to address the current delays with proceedings already filed in the Family Court. Suggestions included:

- a greater use of round table meetings to increase opportunities of settlement of all or some issues in dispute, something already frequently embraced by lawyers;
- more referrals to Family Dispute Resolution (FDR) if parties have been exempted and not yet attended;
- greater use of teleconferencing for case management purposes to further progress cases;
- prompt action by registry staff in response to judges' directions (for example, in some registries there is a delay following a judicial direction to appoint lawyer for child, resulting in matters having to be adjourned in order for lawyer for child to meet with the child and file a report);
- a greater use by registrars of their existing powers; and
- an examination of aged cases to ascertain whether any matters can be progressed by a judge (we note this is already actively being addressed in some registries).

16. In terms of addressing delays in any proposed new system, suggestions included:

- a combination of additional Family Court judges being appointed and the establishment of the position of SFCR;
- the re-establishment of individual case managers to progress files, particularly in Auckland; and

- a strategy to address the training and retention of registry staff who are assigned solely to the family jurisdiction, rather than the sharing of roles across other jurisdictions (which can result in staff who are inexperienced in family matters).

17. Some of these matters are discussed in more detail below.

Proper IT platform and use of technology

18. The increased use of technology, such as electronic filing, greater use of Audio-Visual Links (AVL) and teleconferencing would provide significant cost savings and efficiencies in the family justice system.

19. However, there needs to be a robust IT platform established to enable nationwide electronic filing for the Family Court. While there is a limited ability to file electronically in Auckland, this is not necessarily extended to other parts of the country. For example, some court documents are able to be filed by email within the Auckland region, but the same documents are not able to be filed by email in other parts of the country. There are also varying page limits set in different registries for what is able to be filed electronically. Even when filed electronically, documents are printed and hard copies placed on the court file, sometimes multiple times.

20. Family lawyers experienced the introduction of the new operating model for District Courts in Auckland in 2011 when all physical files were centralised to Auckland and Manukau Courts (hub courts). The implementation of the model was grossly under-resourced in terms of registry staff, resulting in files being constantly transported between the hub and spoke courts, files being lost, documents not reaching the court file, directions not being actioned, and information not being put in front of a judge. Its impact almost brought a halt to any meaningful registry service, wasted precious judicial resource and caused significant delay to parties waiting for their matters to be heard. The model was implemented with no proper IT platform. Had such a platform been available, much of the cost and the ensuing chaos to the Family Court would have been avoided.

21. The introduction of a proper and robust IT platform would allow documents to be filed electronically throughout the country and placed on an electronic court file, allowing judges to access information electronically from wherever they were sitting in the country – in effect a 'paperless court'. Such a system would also allow proceedings to be 'tracked' so practitioners would be able to monitor progress of proceedings and confirm that documents are on the court file. This would reduce the need for calls to the registry and would also safeguard against the loss of physical files.

22. The establishment of a robust IT platform enabling nationwide electronic filing for the Family Court would have significant cost savings and efficiencies for the family justice system and is well overdue.

Recommendation

23. That a robust IT platform be established to enable nationwide electronic filing for the Family Court.

Implementation of a new family justice system

24. When implementing any changes to the family justice system, there will need to be adequate additional resources made available not only to progress applications filed under the old system but also to receive and progress applications under the new system.

25. The 2014 changes saw a large spike of applications prior to the implementation date (31 March 2014). In addition, new applications were made shortly afterward under the new system where lawyers were not able to act. No additional resource was made available. This resulted in significant delay to all applications, whether filed pre or post March 2014. This delay was the primary cause of the subsequent immediate surge in without notice applications. The delays increased over time, resulting in even more without notice applications being filed.

26. To avoid similar problems, significant additional resource in terms of registry and judicial time will be needed. This would be required for a limited period, to ensure that current matters and applications under the new system can be dealt with in a timely manner. This would ensure that the intended efficiencies are achieved from the implementation date of the new system.

Recommendation

27. That significant and additional resource is made available in terms of both registry and judicial time at the point a new system is implemented.

Children's safety and participation – further research

28. The Law Society supports the panel's proposal that further research is undertaken into children's safety and participation in the family justice system, in compliance with New Zealand's obligations under the United Nations Convention on the Rights of the Child (UNCROC).

29. Children's safety and participation are both significant considerations. Children must have a voice in the process. The right balance needs to be achieved between children being able to express views and participate in matters that affect them and children not being over-involved in acrimonious adult disputes, nor over-exposed to multiple professionals. Comprehensive research is required into the various models of child participation, in New Zealand and other jurisdictions, to identify the most appropriate model for New Zealand.

30. There are competing views on whether children should physically participate in parts of the family justice system, such as in FDR. While we agree that a child's voice must be heard in that process, until such research is undertaken and evaluated, the Law Society does not support the physical participation of children in FDR.

Recommendation

31. That further research is undertaken into children's safety and participation in the family justice system to identify the most appropriate model for New Zealand.

Focus on children

32. The Law Society agrees with the panel that children need to have access to quality child-friendly information to help them understand what is happening and to help them cope with the effects of separation. Information could be available in video format, an interactive website and other formats rather than just written information.

33. As stated in our previous submission, the issue of assessing and ensuring children's safety is a fraught one.[4] Numerous factors need to be balanced. The safety, welfare and best interests of children are paramount. Findings of fact need to be made where allegations of violence are made, not only to protect children and adults who are subject to family violence but also to protect parties where false allegations of violence are made.

34. Interim hearings, where the safety of children is first assessed in terms of day-to-day care and contact, need to be held in a timely way, in accordance with section 4(2)(a)(i) of the Care of Children Act (CoCA) – namely, that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child's sense of time. It is important to note that judges have at the forefront of their minds throughout the whole of a proceeding, the safety of children and the need to protect children from all forms of violence (section 5(a) of CoCA).

35. As referred to in our earlier submission, the delay in receiving section 132 reports from social workers and the lack of judicial time to quickly hear matters to determine interim contact, including addressing any safety concerns, often means that one parent may not have any contact with their child (sometime for months) until allegations of violence are determined.[5]

36. It is appreciated that time may be required to obtain information from a variety of sources in order for the safety of a child to be properly assessed. However, consideration should be given to amending CoCA or the Family Court Rules 2002 (rules) to streamline the timing and process for interim hearings as far as practicable, while retaining judicial discretion where required (for example, allowing more time for additional information to be sought).

Recommendation

37. That consideration is given to amending CoCA or the rules to streamline the timing and process for interim hearings, as far as practicable.

A joined-up family justice service

38. The unique nature of the family law jurisdiction with the Family Court's dual role – its judicial role to determine disputes based on the evidence before it and its protective jurisdiction to ensure children's safety, welfare and best interests are paramount – requires the court and the wider family justice system to have a maximum degree of flexibility to ensure that people can access the right service at the right time.

39. The panel has acknowledged the uniqueness of family law and the need for flexibility through the symbol of the korowai. It is hoped that by empowering, supporting and assisting parents to resolve their disputes this will significantly benefit parents, who need to have an ongoing relationship with their children, and children who are the subject of such disputes.

Consultation questions

Q1*. What should be included in a comprehensive safety checklist?*

40. The Law Society agrees with the panel's proposal that the former section 61 of CoCA should be part of the safety assessment process and included in the legislation (in practice, many

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4 November 2018 submission at paragraphs 127 – 132.

5 November 2018 submission at paragraph 132.

judges still refer to the checklist when assessing a child's safety). If the list is included in the legislation it should provide guidance only rather than being prescriptive. That would enable the court to focus on the elements in the list that are relevant to the child in each case.

41. We have considered the former section 61 checklist and believe the following could be added as guidance to matters already included:

- any ongoing monitoring taking place to check on a child's welfare;
- any current mental health issues of one or both parties and steps taken to address these;
- any alcohol or drug issues of one or both parties and steps taken to address these; and
- any ongoing counselling for one or both or the parties to address communication or other issues.

Recommendation

42. That former section 61 of CoCA and the additional bullet points above, be included in the legislation to provide guidance in respect of children's safety.

Q2. *What information should be available to the court to assess children's safety and in what circumstances?*

43. The Law Society agrees in principle that relevant information held by justice sector agencies should be available at an early stage when the Family Court is considering safety issues. This should include information from the criminal jurisdiction, the Police, Oranga Tamariki (OT), the Ministry of Justice, supervised access providers and results from any drug or alcohol testing.

44. We note there is a significant overlap between domestic violence cases in the criminal and family jurisdictions and consider there is benefit in sharing information across these jurisdictions to ensure the courts have the best information available to them. In our previous submission, we recommended that rule 143 be amended to enable the court to apply for information in respect of criminal histories and family violence information once an application for a parenting or guardianship order is filed, rather than multiple requests being made by lawyers for parties and lawyers for children.[6] We believe this would create efficiencies and would result in:

- the information being provided earlier to the court (improving the information available to the court and reducing delay);
- reducing the work (and cost) of legal aid providers and lawyer for child; and
- reducing the time and cost to police and ministry staff.

Recommendation

45. That rule 143 be amended to enable the court to apply for information from OT and the Police when an application for a parenting or guardianship order is filed.

(a) Police information

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[6] November 2018 submission at paragraphs 133 – 136.

46. Currently lawyers request family violence information from the Police, generally where the Police have attended a family violence incident involving the parties (where children may have been present).

47. It would be more efficient if the court was able to receive and disseminate this information, rather than the parties (potentially lawyer for child and lawyers for each of the two parties) making separate enquiries. Information could be provided by the court which would be admissible unless objected to by any party, in which case it would be required to be produced according to normal evidential requirements.

48. It would be beneficial if information could be obtained on any past Police involvement with either of the parties, including a history of arrest (if any) that did not result in any conviction. It would also be helpful to have information about family violence incidents not just from the current applicant/respondent but family violence incidents against previous partners and/or children, including whether either party has previously had a protection order issued against them.

(b) Information from the criminal jurisdiction

49. Currently, the Criminal Procedure (Transfer of Information) Regulations 2013 allow the registrar of a Family Court dealing with a domestic violence proceeding to obtain details of a respondent's criminal record (if any) from a court file, a database or the permanent court record to any criminal proceeding (regulation 7A(1). This includes a record of any charges laid against the respondent that have resulted in a conviction, convictions entered against the respondent, sentences imposed, and orders imposed as a result of a conviction. In addition, a registrar can obtain from any court file details of the respondent's current address for the purpose of arranging service on a respondent.

50. Sentencing notes, which include the agreed or determined facts of offending and the judge's reasons for imposing the conviction/sentence, would also be of benefit to a Family Court judge when undertaking a safety assessment. In the Law Society's view, regulation 7A(3) should be amended to allow this information to be obtained from the criminal jurisdiction.

Recommendation

51. That regulation 7A(3) be amended to allow sentencing notes and the judge's reasons for imposing a conviction and/or sentence to be obtained from the criminal jurisdiction.

(c) Ministry of Justice

52. Currently, requests are made to the ministry by lawyer for child for information regarding any criminal convictions of any party. This information should be available direct to the court when assessing safety.

(d) Drug and alcohol testing

53. The results of drug/alcohol testing may be relevant information for the purposes of the court's child safety assessment. A judge can currently direct a party to undertake a hair follicle test, with the person's consent. Although consent is often withheld, the Law Society considers that the requirement to obtain consent is an important safeguard and should be retained.

(e) Oranga Tamariki

54. Information is already sought from OT including a section 131A and 132 report. Section 131A reports are received relatively quickly, however we reiterate the concern expressed in our previous submission about the delays in receiving section 132 reports, which needs to be urgently addressed.[7]

Recommendation

55. That the delay in receiving section 132 reports is urgently addressed.

(f) Supervised access providers

56. There appears to be a lack of information provided by supervised access providers to lawyers for children and the court. In some regions (for example Dunedin) a report is filed by supervised access providers to the court, but not in other regions. There should be a statutory obligation on supervised access providers to report to the court, and the information to be included in the report could be stipulated in the legislation.

Recommendation

57. That a statutory obligation be placed on supervised access providers to report to the court.

Q3. *What role should specialist family violence workers have in the Family Court? Should there be separate support workers for adults and children?*

58. It is appropriate that assistance is provided to people who have experienced family violence and specialist family violence workers should have a role in the family justice system by having a presence in the Family Court registry.

59. The Law Society notes the panel's suggestion that this support role would be "similar to victim support that is available in the District Court". It will be important to avoid any duplication (and resulting confusion) between the new role and existing roles in the family justice system. The services provided by criminal court victim advisers[8] would for instance duplicate the assistance and advice already provided by the party's lawyer and a lawyer for child (such as how the Family Court system works and assistance through the court process). In addition, the new role of FJSC proposed by the panel would also cross over the role of the specialist family violence worker, as the panel suggest that one of the roles of the FJSC would be to refer parties to relevant community services.

60. The Law Society believes there is benefit in specialist family violence workers providing other information to adults, such as information on specific services and programmes to assist victims of family violence and entitlements, including financial entitlements, and assistance with referrals to such services and programmes as the case may require. Such support workers should have a specific understanding of family violence and, where that involves sexual violence, a specialist sexual violence victims' advisor should be available (although presumably there will be criminal proceedings in respect of the sexual violence). Care needs to be taken that such workers do not become advocates for adults or take on a role akin to a McKenzie Friend.

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7 November 2018 submission at paragraphs 184 – 188.

8 See www.victimsinfo.org.nz.

61. In respect of children, there are already programmes available that children who have experienced family violence can be referred to. It may be problematic to have separate family violence support workers in relation to children. For example, guardianship issues may arise if one parent agrees the support worker can talk to the child, but the other parent does not. It may also run the risk of the support worker being called as a witness to proceedings if a child discloses information about a family violence incident.

Q4. *Do you have any other suggestions for more child-responsive court processes or services?*

62. Relationship breakups and parenting disputes can be extremely distressing for children. Counselling would be beneficial for children to assist them to cope with the effects of parental separation.[9]

63. Reducing delay in the Family Court in terms of judicial hearing times (including safety assessments and completion of section 133 reports) would provide a more child-responsive outcome. Section 4(2)(a)(i) contains the principle that decisions affecting the child should be made and implemented in a timeframe appropriate to the child's sense of time. Currently there are instances where a child has had no contact with one parent for up to a year while awaiting a section 133 report. The current delays, and situations where a child has no contact with one parent for a considerable length of time, is neither child-responsive nor in the welfare and best interests of children.

64. Developing child-friendly resources would assist children to access information about Family Court proceedings and their rights to be heard and participate. We endorse the panel's suggestions that the site should be able to be accessed independently by children and that resources include animated videos, downloadable apps and other engaging activities.[10] The panel and/or ministry should consider the resources available on the Voice of the Young and Care Experienced (VOYCE) website[11] and also consider involving the Office of the Children's Commissioner in developing child-focussed resources.

Te Ao Māori in the Family Court

Q5. *Should obligations be placed on the Ministry and/or the Government to improve family justice outcomes for Māori? What would these obligations be?*

65. The Law Society has carefully considered the submission made by Te Hunga Rōia Māori of Aotearoa (THRMOA) in response to the panel's first paper, that the current family justice system does not cater for the Māori world view and underpinning concepts of tikanga (protocol), kotahitanga (togetherness), whānaungatanga (relationships), or manaakitanga (support). It is evident the current system is alienating for many Māori, as it may be for other cultures as well. Consideration should be given to how the family justice system could be more culturally diverse and supportive. Access to justice requires that changes are made to enable Māori to participate and be supported in the family justice system, by incorporating Māori principles into the conduct of proceedings.

66. This is discussed further at Q7 below.

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9 November 2018 submission at paragraph 39.

10 The panel's paper, at page 14.

11 See https://www.voyce.org.nz/.

***Q6**. How could the Ministry of Justice or the Government partner with hapū, iwi or Māori organisations to deliver services?*

67. Government currently partner with hapū, iwi and Māori organisations to deliver services in other areas outside of family law. Consideration should be given to the current models the government already uses, to establish a partnership model to deliver services in respect of the family justice system.

***Q7**. How would you incorporate tikanga Māori into the Family Court?*

68. We suggest the panel and/or ministry continues to consult and seek ideas on how to make the process more supportive for Māori (and other cultures) and various ways tikanga Māori could be incorporated in the Family Court. As a start, changes could include making proceedings whānau friendly by enabling attendance, incorporating simple courtesies such as a mihi at beginning of proceedings and hearing proceedings on marae.

69. The Māori Land Court judiciary are skilled at managing whānau conflict and may be able to assist the Family Court by sharing cultural skills, knowledge and expertise (including training in tikanga).

70. While dual warranting some Māori Land Court judges for Family Court proceedings may be beneficial, the judges would need to have experience in family law. Appointment of Māori family lawyers and family lawyers well versed in tikanga to the Family Court bench would be a good start.

***Q8**. Do you have any other suggestions to improve the Family Justice Service for Māori, including any comment on the examples provided above?*

One option would be to appoint a taskforce to generate suggestions for improving the family justice system for Māori.

Quality, accessible information

***Q9**. What information do you think would help service providers, community organisations, lawyers and family justice professionals to achieve a joined-up approach to the Family Justice Service?*

71. The Law Society agrees with the panel's proposals that the ministry should develop an information strategy and public awareness campaign to improve New Zealanders' understanding of the family justice system.

72. We also agree that the family justice system should have a stand-alone website where user-friendly information can be easily located, with a section especially for children. Information should be available in a number of languages to cater for New Zealand's multi-cultural society and should include details of the various support services and how people can access those services.

73. The website should work as a portal where people can access guidance and assistance easily and quickly. People should be able to ask questions, have those answered in a timely way (by email or a dedicated phone service), and be guided to the most appropriate service.

74. It would be beneficial to include a brief description of the roles of various family justice professionals to provide for better understanding of these roles. Bodies representing the various professionals should be asked to collaborate on the preparation of the information to ensure its accuracy.

Counselling and therapeutic intervention

Q10. *Would the three proposed types of counselling meet parties' needs, or are there gaps in the counselling services that need to be filled? For example, should there be counselling available to children?*

75. The Law Society believes the proposed three types of state-funded counselling would meet the needs of parties. However, we suggest that the first type of counselling[12] should also include prospects of reconciliation, as did the counselling that was available prior to 2014.

76. The Law Society believes that therapeutic counselling should be available for children. We acknowledge the counselling proposed by the panel will help parents resolve parenting disputes and improve their parenting relationship and behaviours; however, children will often be distressed and confused by relationship breakups and need support to enable them to cope and to understand any orders made by the court.

77. We agree that counselling should not be compulsory (counselling may not be appropriate in some circumstances), but are concerned by the suggestion that failure to attend counselling may be taken into account by the judge when making parenting orders or considering whether to order costs. It would be preferable for the legislation to contain a rebuttable presumption, i.e. that there will be attendance at counselling unless good reasons are given not to. This would give parties the opportunity to give reasons why counselling is not appropriate in their particular circumstances before any negative inference is drawn.

Recommendation

78. That:

- the first type of counselling includes prospects of reconciliation;
- therapeutic counselling is available to children
- if failure to attend counselling is able to be taken into account by a judge when making a parenting order or costs order, the legislation contains a rebuttable presumption to attend counselling unless there is good reason not to.

Q11. *Are Parenting Through Separation/Family Dispute Resolution suppliers, Family Justice Service Coordinators and Judges best placed to refer people to counselling? Are there any other service providers who should be able to refer to counselling or should people able to refer themselves?*

79. All professionals working in the family justice system should be able to 'refer' parties to counselling, not just those set out in Q11 (family lawyers and FDR providers are two obvious professionals missing from the list). Parties should also be able to refer themselves.

80. All referrals to counselling should be made through the new FJSC. This would enable statistics to be kept and regular evaluations undertaken to measure the cost effectiveness of counselling in parenting and guardianship disputes, particularly those disputes that resolve at counselling without the need for parties to apply to the Family Court to resolve their disputes. The lack of available data to determine the cost effectiveness of counselling was a criticism

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12 Counselling to help people deal with emotions that are stopping them from dealing with issues of care, contact and guardianship: see the panel's paper, at page 17.

included in the Expert Reference Group's report to the Minister of Justice on the Family Court review in April 2012.

81. This would not mean that judges, lawyers and other service providers could not refer parties to counselling or that parties could not refer themselves. It would simply mean that the formal referral of parties to counselling would take place through the FJSC, much the same as referrals to counselling took place prior to March 2014.

***Q12**. Should confidentiality be waived when parties are directed by the court to therapeutic intervention, in what circumstances and regarding what matters?*

82. The Law Society is concerned by the suggestion that confidentiality be waived about progress made and the outcome when parties are directed by the court to a therapeutic intervention (the second and third types of counselling). Waiving confidentiality runs the risk of parties not engaging fully at counselling or refusing to attend counselling at all.

83. It would be preferable to allow some information to be made available to the court, such as dates of attendance, whether or not the parties engaged, whether any matters resolved or whether further counselling was recommended.

84. If the parties want further information to be taken into account, they will be able to provide that information to the court by affidavit.

Parenting through separation

***Q13**. Do you agree that there should be an expectation on parties to attend Parenting Through Separation, rather than having it as a compulsory step for everyone?*

85. The Law Society supports the continuation of free and compulsory attendance at PTS except in cases of risk or urgency. We do not support the suggestion of an expectation on parties to attend rather than having it as a compulsory step.

86. If the suggestions made in our November 2018 submission were adopted,[13] we believe this would overcome the problems expressed in the panel's paper – i.e. difficulties in accessing the programme for those with full-time care of children and those living in remote areas, delay in access to a programme generally and language, culture and disabilities making it difficult for people to take part.

87. The Law Society also recommends that attendance should be compulsory prior to attendance at FDR or the filing of an on-notice application. Section 47B(f) provides an exemption to attendance at PTS if the applicant can provide evidence they are unable to participate effectively or at least one party to proceedings, or a child who is the subject of proceedings, has been subject to family violence by one of the other parties to an application.

88. The Law Society recommends that section 47B(f) is amended to allow for an exemption in the following two circumstances:

    (a) There have been situations where there are delays in PTS being available in some regions. Enrolment to attend a programme is not currently sufficient grounds to be granted an exemption under section 47B(f).

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[13] November 2018 submission, at paragraphs 26 and 28.

(b) Some applications are made on notice but a reduction of time is also applied for (due to semi-urgent matters that need determination but the threshold to file without notice is not met).

89. In the Law Society's view, attendance at PTS should still occur but should not be a barrier to making an application to the Family Court.

90. There appears to be a high level of applicants attending PTS due to its mandatory nature, but significantly fewer respondents attend, notwithstanding section 46O which enables a judge to direct a party to attend PTS if they have not attended in the preceding two years. Consideration should be given to increasing the attendance of respondents. Section 46O could be amended so that a judge *must* direct the respondent to attend PTS if the applicant has attended or a decision is made in favour of the applicant. Such an amendment could also include statutory consequences for a respondent's non-attendance.

91. The paper notes that it needs to be determined whether PTS is suitable for all parties, such as grandparents.[14] The Law Society recently recommended an amendment to section 47B to provide an automatic exemption for caregivers, grandparents or other extended family members in parenting roles from the requirement to attend PTS (which is heavily focused on separating parents rather than the situation of a child or young person being in the care of a family member), and this has been enacted.[15]

92. We agree with the panel's proposals that a review of PTS should be undertaken, and a review take place every three years to ensure its content remains relevant and reflects current research.

Recommendation

93. That:

- Section 47B(f) be amended to allow an exemption from attending PTS where a person has enrolled in a programme or an on notice application is filed together with an application for a reduction in time.
- Section 46O be amended so that a judge must direct a respondent to attend PTS if the applicant has attended or a decision is made in the applicant's favour.

Q14. *If PTS is not mandatory, how should this expectation of attendance be managed and achieved?*

94. Making attendance at PTS voluntary runs the risk that parties will simply not attend. This would be counter-productive; feedback from family lawyers, the ministry's research[16] and results from the University of Otago's initial online survey of separated parents[17] all indicate that parents find the programme helpful.

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14 The panel's paper at page 18.

15 NZLS submission 16.2.18 on the Courts Matters Bill, at [5.2] – [5.4], available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0009/118926/Courts-Matters-Bill-16-2-18.pdf. See Courts Matters Act 2018, section 104: new section 47B(3)(e).

16 *Evaluation of Family Dispute Resolution and Mandatory Self-representation*, October 2015, paragraph 6.8.2.

17 *Family Law Reform in New Zealand: Research Insights*, Associate Professor Nicola Taylor, NZLS CLE Ltd Conference, The Future of Family Law, 20 September 2018.

95. We believe attendance at PTS assists parents to focus on the welfare and best interests of their children, which prepares them to mediate and/or negotiate settlement of their dispute. If settlement is not achieved, that focus still remains if parties have to apply to the court for a decision.

Family Dispute Resolution

96. The Law Society's views on FDR put forward in the previous submission can be summarised as follows:[18]

(i) FDR, along with other pre-proceeding services, should be brought under the umbrella of the Family Court with dedicated court staff to manage pre-proceeding processes;

(ii) parents should have access to free counselling prior to FDR;

(iii) FDR is voluntary (unless directed otherwise by a judge) and free;

(iv) there is one supplier to provide FDR on a nationwide basis;

(v) legal aid is available for legal advice prior to FDR and for lawyers to attend FDR where parties request legal representation; and

(vi) an easy way to obtain consent orders in respect of mediation agreements is established where no filing fee is necessary.

97. In respect of a child's voice and attendance at FDR, our view is that:[19]

(a) children should not attend FDR;

(b) the Family Dispute Resolution Act 2013 should be amended to include the process by which a child's views are heard;

(c) an FDR supplier should contract with a lawyer for child currently on the ministry's list to ascertain a child's views; and

(d) if the matter is not settled and an application for a parenting order is made, the same lawyer for child is appointed to represent the child in proceedings.

98. Following discussions with the panel, the Law Society has reconsidered its views in relation to two aspects of FDR, as outlined below.

Children's voice in FDR

99. The Law Society remains concerned about the lack of formal mechanism by which a child's views are ascertained and the varied practice among FDR suppliers. We proposed in our earlier submission that an FDR supplier should contract with a lawyer for child currently on the ministry's list to bring the child's voice to FDR. We remain of the view that there are advantages to this in the event that the dispute subsequently proceeds to court.

100. After further discussion, the Law Society acknowledges there are a range of highly experienced and qualified professionals who work with children. The primary concern is that an appropriately qualified and experienced professional obtains the child's view (this group is not limited to lawyers for children currently on the ministry's list). However, there should be a transparent process for appointment to a list of appropriately qualified professionals, much

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18 November 2018 submission at paragraph 55.

19 November 2018 submission at paragraph 80.

the same way as the process for appointment to the lawyer for child list or the court-appointed psychologists list.[20]

101. The Law Society notes however that should the matter not settle at FDR and proceed to the Family Court for determination, this professional may be called as a witness and be subject to cross-examination. It will also mean that a child will be exposed to an additional professional. For these reasons there is a distinct advantage in having children's views at FDR represented by a lawyer for child.[21]

Recommendation

102. That a transparent process is established for appointment to a list of appropriately qualified professionals able to obtain a child's views in FDR.

Access to legal advice

103. The Law Society previously recommended disestablishing FLAS and reinstating pre-proceeding steps under legal aid for initial legal advice prior to attendance at FDR and legal representation at FDR if parties wish to be legally represented.[22] As discussed below (paragraphs 126 – 131), after considering the panel's paper the Law Society supports the proposal for an enhanced FLAS 1 service (with some amendments, discussed below). This is because, as the panel notes, "FLAS has benefits that are not available under legal aid [namely] FLAS is income tested only, not asset tested, and does not have to be paid back".[23]

Comments on the panel's other FDR proposals

104. The Law Society's comments on the panel's other proposals for FDR are outlined below.

Children's attendance at FDR

105. The Law Society supports the panel's proposal that a review is undertaken of child participation in FDR and further research is undertaken in the area of children's participation generally, to ensure that a proper model is established in New Zealand. This is a positive step as we are concerned about the over-exposure of children to multiple professionals. Children should also be protected from being actively involved in adult disputes.

106. Until this research is completed and the appropriate New Zealand model determined, the ministry should issue amended guidelines to its suppliers that children are not to attend FDR.

Recommendation

107. That the ministry amends its guidelines to FDR suppliers that children are not to attend FDR.

Record of the child's voice in FDR

108. We understand from FDR providers that the child's voice in FDR is recorded in the Resolution Management System (RMS) under the section pertaining to preparation for mediation (PFM). It would be useful to amend the RMS programme to separately record how the voice of the

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20 November 2018 submission at paragraphs 75 – 76.
21 November 2018 submission at paragraph 78.
22 November 2018 submission at paragraphs 41 – 50.
23 The panel's paper at page 23.

child is obtained, and the time taken to obtain it, so that statistics on this aspect of FDR can be obtained for the purposes of evaluation.

Recommendation

109. That RMS is amended to enable a record to be made of how the child's voice was obtained, and the time taken to obtain it.

Referral to FDR by the court

110. We agree with the panel that the process for court referrals to FDR should be clearly outlined in the rules,[24] and consider that a formal rules committee should be established to undertake a comprehensive review of the rules.[25]

111. We also believe that the statutory mechanism enabling the court to refer parties back to FDR is under-utilised.[26] The ministry's FDR operating guidelines[27] issued to FDR suppliers provides more flexibility, allowing referrals back to FDR and in the Law Society's view, amending section 46F to reflect the guidelines would provide greater clarity and would likely increase the number of referrals back to FDR. The guidelines permit an exception to the statutory '12-month rule' (under the guidelines, a judge is able to direct parties to attend a further 12 hours of FDR in the same 12-month period, and this is funded if parties qualify).

Recommendations

112. That:

- Court referrals to FDR should be clearly outlined in the rules.
- Section 46F be amended to reflect the guidelines in relation to the exception to the 12-month rule for FDR attendance.

Time allocation for FDR

113. The current timeframe allocated for FDR is 12 hours within a 12-month period. The 12 hours encompasses time for PFM, obtaining the voice of the child (when appropriate) and the actual FDR mediation.

114. This allocation of time is insufficient for parties to attend PFM, the child's voice to be ascertained and adequate time for the mediation to take place.

115. Consideration should be given to increasing the 12 hours to enable sufficient time for these three parts of the FDR process to be carried out. It is suggested that a minimum of three hours is allocated for parties to attend PFM; five hours for a child's voice to be heard; and nine hours for an actual mediation to be held. However, the suggested increased time allocation of 17 hours should be available to be allocated by the FDR provider as appropriate in any individual case.

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24 The panel's paper at page 21.

25 November 2018 submission at paragraphs 207 – 211.

26 Section 46F(3)(b) is under-utilised by judges and counsel do not commonly seek directions for parties to be referred to FDR after proceedings have been filed.

27 *Family Dispute Resolution Operating Guidelines*, Ministry of Justice, 1 July 2018, page 20.

Recommendation

116. That consideration is given to increasing the time allocation for FDR to 17 hours.

Q15. *Do you agree with the idea of a rebuttable presumption? If so, how might it be worded to make sure that parties take part in Family Dispute Resolution unless there are compelling reasons not to?*

117. The panel wants to promote a higher level of participation in FDR and proposes that FDR should be available at the most appropriate time for parents whether or not an application to court has been made. The Law Society supports that proposal. In our view, FDR should be voluntary (rather than mandatory) and free.[28] We believe making FDR voluntary and free would increase the uptake of FDR for a significant number of parties and should be available at a time when parties are readier to mediate. In our view, the current system (mandatory FDR before applying to the court) creates a barrier to the Family Court and is a significant reason for the large number of exemptions being sought and granted.

118. The Law Society does not support the potential option of an automatic referral being made to FDR unless good reasons are given not to (a rebuttable presumption). We do not believe such a presumption aligns with the panel's proposal that FDR should be available at the most appropriate time for parents. Parties could still be required to include in an application and notice of response the steps they have taken to attempt to resolve the dispute prior to entering the court system.[29] Judges are still able to refer parties to FDR post-filing (section 46F of CoCA).

Recommendation

119. That:

- A rebuttable presumption is not introduced.
- Parties must include in an application and notice of response the steps they have taken to attempt to resolve the dispute.

Q16. *Do we need stronger obligations on family justice professionals to promote FDR and conciliatory processes generally?*

120. The Law Society does not believe there needs to be stronger obligations on family justice professionals to promote FDR and conciliatory processes generally. Lawyers already have a duty to promote conciliation pursuant to section 9A Family Court Act 1980. The term "family justice professionals" has potential to capture a significant group of service providers including PTS providers, counsellors, mediators, supervised access providers, NGO staff and court staff. Including a statutory duty to promote FDR and conciliatory processes may well change the specific roles these professional have in the overall system. For example, how might a supervised access provider discharge this obligation in practice?

121. The Law Society believes that "family justice professionals" already promote conciliatory processes as an alternative to applying to the Family Court. We do not believe it is necessary or desirable for stronger obligations to be put in place.

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28 November 2018 submission at paragraphs 63 – 69.

29 November 2018 submisison at paragraph 65.

Q17. *What could a streamlined process for court referrals to FDR look like?*

122. In its previous submission, the Law Society recommended that FDR should be under the 'umbrella' of the Family Court and specialist registry staff (this should be the new FJSC) allocated solely to manage FDR referrals to the various FDR suppliers, whether pre-proceedings or when parties are referred to FDR by a judge. This could be done in much the same way as prior to March 2014 where parties accessed counselling via the Family Court Coordinator.

123. By having a streamlined referral process such as this, matters could be case-managed by the FJSC, to ensure that FDR, if appropriate, occurs in a timely way.

Legal advice and representation

Q18. *Is there a place for more accessible provision of funded legal advice for resolution of parenting disputes outside of court proceedings? What would the key elements of this service be and how could it be achieved? For example:*

- *Should it be part of a legal aid grant, or*
- *could there be an enhanced role of FLAS 1 (giving a person initial information and advice on the out-of-court processes), including the creation of a solicitor-client relationship?*

Legal advice

124. We agree with the panel's proposal that parties should be allowed to have legal representation in all stages of proceedings, including pre-proceedings.[30]

125. Pre-proceeding legal advice, prior to March 2014, enabled more opportunity for settlement of issues. Parties were able to obtain legal advice and be legally represented in negotiations with the other party's lawyer. This often led to the settlement of issues without the need for an application to the court.

Enhanced FLAS 1

126. In respect of the proposal to enhance FLAS 1 it is unclear whether the panel are considering a FLAS provider who is not a lawyer with a current practising certificate. Information and initial advice on out of court processes and 'explaining the family justice system' (which includes in court processes) given by FLAS providers under the current scheme are carried out by lawyers who are approved legal aid providers. This already establishes a solicitor/client relationship, albeit on a limited retainer basis.

127. If an enhanced, informative stand-alone website on the new family justice system is established, together with the creation of a new FJSC, the Law Society questions the need for an enhanced FLAS 1 if it is intended only to provide initial information and advice on out-of-court processes (not legal advice). People would be able to access this information via the website or the FJSC.

128. The Law Society acknowledges that FLAS is income tested only, not asset tested, and does not have to be paid back, which are benefits not available under legal aid. In our view, there is

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[30] November 2018 submission at paragraphs 48, 95 – 97.

therefore merit in enhancing FLAS 1, and consider that this should include not only information on the out of court process of FDR and counselling but also:

- initial legal advice;
- facilitating resolution;
- attending counselling or mediation sessions, including FDR, if parties want representation;
- reviewing agreements made during FDR; and
- representing clients at negotiations with the other party's lawyer, if clients choose this option rather than FDR.

129. The remuneration rate for providing an enhanced FLAS 1 would need to reflect the enhanced services parties would receive. In addition, there should be an up-lift for additional factors for example, English as a second language and mental health issues, in the same way such an up-lift is available for legal aid. A reasonable remuneration rate may increase the number of family lawyers who would be willing to undertake FLAS work.[31]

130. If matters do not settle and parties wish to file an application in the Family Court, continuity of legal representation should be available, particularly if the parties are also eligible for legal aid. This would alleviate the current source of confusion and stress for parties arising from the limited retainer under the current FLAS and the fact that the FLAS provider currently cannot represent parties in court should they apply on notice.[32]

Recommendation

131. That FLAS 1 is enhanced to include the tasks suggested above; and if enhanced, the remuneration rate is reviewed and increased to reflect the additional tasks, including an uplift for additional factors such as English as a second language and mental health issues.

Case tracks and conferences

Q19*. How do you think we could improve the efficiency of court processes?*

132. Each court event should have a clear process and purpose, advance matters towards resolution and provide consistency and certainty for parties.

133. Achieving certainty and consistency needs to balanced with giving sufficient discretion and flexibility to judges, particularly in terms of complex cases and without notice applications.

134. We reiterate the view from our previous submission that while it is important timeframes are included, they need to be realistic in terms of the Family Court's resource, reflect the level of urgency and/or complexity in some matters and recognise that matters may need to be adjourned to enable all the relevant information to be available before a determination is made.[33]

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31 November 2018 submission at paragraph 47.
32 November 2018 submission at paragraph 46.
33 November 2018 submission at paragraph 154.

135. Files should be allocated to an individual case manager at an early stage to ensure matters are dealt with within prescribed timeframes, information is on the file and cases are progressed to ensure that judicial sitting time is only used when matters are ready to proceed.

136. Cases should be limited to the following four key court events unless circumstances require otherwise:

i. Judicial conference

ii. Settlement conference

iii. Setting down/pre-hearing conference (to be conducted by teleconference

iv. Substantive hearing

137. We refer the panel to our previous submission, which gives more detail on these events including diagrams of events on a without notice and on notice basis.[34] For ease of reference these are attached at **Appendix 1**.

Without notice applications

Q20. *Will reinstating legal representation be enough to reduce the number of without notice applications? Or would other interventions be required? For example, are sanctions required for unnecessary without notice applications? If so, what sanctions would be appropriate?*

138. In the Law Society's view, allowing parties to have legal representation at all stages of proceedings (including pre-proceedings) will be a significant factor in reducing the number of without notice applications. However, unless the significant delay in getting a matter before a judge is addressed, allowing parties to have legal representation at all stage in proceedings alone will not resolve the issue.

139. The premise of the test in respect of filing without notice is that the delay caused by filing on notice would or might entail the types of harm set out in rule 416H.[35] As expressed in our previous submission, it is important that the legal threshold for without notice applications is retained in order to address high risk and urgent situations envisaged by rule 416H. It remains our view that these applications should only be made in exceptional circumstances.

140. Delay should be addressed by:

- increasing judicial resources and hearing time;
- establishing the position of SFCR, as discussed below (removing some of the administrative 'box work' currently undertaken by judges has the potential to significantly address current delays);[36] and
- streamlining the process with fewer court events would also free up judicial resources.[37]

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34 November 2018 submission at paragraphs 157 – 181.
35 November 2018 submission at paragraph 168.
36 November 2018 submission at paragraphs 137 – 143.
37 November 2018 submission at paragraphs 150 – 152, 157 – 160.

141. In addition, the concern expressed in our previous submission – reducing the time taken to deal with semi-urgent matters to ensure they come before a judge in a timely manner after the deadline for a filing of a defence has elapsed – needs to be addressed.[38]

142. If these issues were immediately addressed, we believe this would result in a significant reduction in the number of without notice applications.

143. As for the question whether sanctions are required for unnecessary without notice applications: sanctions are already available in respect of lawyers who file without notice applications that do not meet the statutory threshold. Costs can be awarded, and matters can be referred by a judge to the New Zealand Law Society's Lawyers Complaints Service as well as to Legal Aid Services in situations involving a legal aid provider.

144. Sanctions should also be available against self-represented litigants who file without notice applications that do not meet the statutory threshold. Since March 2014, lawyers have experienced a two-tier system where self-represented litigants have filed copious numbers of irrelevant affidavits and without notice applications that do not meet the threshold.[39]

Q21. *Do you think there is value in clarifying that parenting orders made without notice can be rescinded?*

145. Yes. The Law Society considers that reform is needed to enable the court to rescind interim orders, to provide a remedy where the application contains false allegations or full disclosure was not made (insufficient or incomplete evidence).

146. Section 49A(4) of CoCA has recently been amended to allow the court at the hearing to replace an interim order with a further interim order or a final parenting order, but the amendment does not allow for the interim order to be rescinded.[40]

147. Rule 34 of the rules provides a mechanism for orders to be rescinded but it is not available for Part 2 (guardianship and care of children) COCA applications, including section 49A applications.[41]

148. The Law Society recommends that a new section 49A(4)(c) be inserted, enabling the court to rescind interim orders. Alternatively, rule 416A should be amended to enable rule 34 to apply to Part 2 of COCA applications. The latter is preferable as it would give greater certainty and reflect existing case law. It is necessary for the court to be able to rescind an interim order, to provide a remedy where the application contained false allegations or full disclosure was not made.

Recommendations

149. That:

- Rule 416A should be amended to enable rule 34 to apply to Part 2 of COCA applications; or

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38 November 2018 submission at paragraphs 167, 179 – 181.

39 November 2018 submission at paragraphs 87 – 89.

40 Courts Matters Act 2018, section 105. See NZLS submission 16.2.18 on the Courts Matters Bill (footnote 15), at [171] – [174].

41 See R416A(2), Family Court Rules 2002.

- Alternatively, that a new section 49A(4)(c) be inserted, enabling the court to rescind interim orders.

Triaging

150. An effective triage system would identify and enable the most appropriate response available for parties seeking assistance to resolve parenting and guardianship disputes. It should divert matters amenable to out-of-court resolution, enabling entrenched and complex matters to be heard and resolved more quickly by the court.

151. In our previous submission, we suggested that the Family Court should be a 'one-stop-shop' for parents to access out of court services, such as counselling and mediation, and the Family Court, in terms of applying for parenting orders if the dispute requires a decision from a judge.[42] It is not suggested that there should not continue to be multiple entry points to the family justice system as a whole. People should be able to continue to access help and assistance as they do now.

152. The establishment of a new FJSC is a positive proposal and such a role will be key in triaging matters either to an out-of-court or in-court process.

Q22. *How best should integrated assessment, screening and triaging be implemented? What other measures would you like to see implemented in order to improve the interconnection of the Family Justice Service?*

153. As noted above, the Law Society believes the establishment of a new FJSC is key to achieving more integrated assessment, screening and triaging.

154. The role being proposed is essentially the same role that used to be carried out by the Family Court Coordinator role (FCC, originally known as the counselling coordinator). The FCC role was created when the Family Court was established in 1981. It was an integral part of the family justice system that provided a vital link between the Family Court and the community. The FCC was often the first point of contact for separating parents seeking assistance. They were skilled and experienced in seeking information from parents to enable the FCC to point the person in the right direction – either to seek legal advice and assistance if their matter required an application to the court, or to refer the person to counselling, mediation or to another local community service (for example, Women's Refuge). They fostered strong relationships with services in the local community and were often contacted by service providers for advice when parents went directly to a service provider for assistance.

Complex cases

155. The Law Society agrees with the panel that complex cases take up a disproportionate amount of time and are difficult and time-consuming for all involved.

156. The paper states that the number of complex cases is small. The Law Society does not agree. The experience of family lawyers is that there are a greater number of complex cases in respect of parenting and guardianship applications, and that these cases appear to be more common now than previously.

157. A fundamental problem is how complex cases are defined so they can be identified early and triaged appropriately. Most cases that family lawyers would describe as 'complex' have

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[42] November 2018 submission at paragraphs 145 – 146.

multiple elements of drug and alcohol abuse, mental health issues, family violence, cross cultural issues, parental alienation and relocation. Generally speaking, it is the cases where parties have taken entrenched positions and require substantive hearings to determine their disputes. Psychological reports are nearly always necessary in these cases.

158. It would be useful if the ministry could supply statistics to identify the proportion of parenting and guardianship applications that are deemed to be 'complex'. This would assist in identifying the actual number of these cases and the scope of additional resources required to manage them more effectively.

159. We agree with the panel that complex cases need early and effective intervention. The first step is an effective triage system that identifies the case as complex from the outset. It is vital that complex cases are closely managed so that they are progressed.

160. In the Law Society's view, complex cases should be case managed by an individual judge, with assistance from an SFCR and case manager experienced in complex cases. Assistance given by an SFCR and case manager may address the issue where there is no resident judge at a particular registry and/or scheduling problems that prevent the same judge presiding at court events in the same proceedings. In addition, greater use of technology, for example appearance by a judge via AVL, rather than teleconferences, may assist to progress these cases in a timelier manner.

161. The Law Society notes that in some regions, judges have a 'judge-directed day' where they are able to continue to deal with matters in order to progress a particular case. If additional judges were available in combination with the establishment of SFCRs, there may be scope to expand the time available for 'judge-directed days', particularly to enable individual judicial case management for complex matters.

Recommendations

162. That:

- 'Complex' cases are defined, and the ministry provides statistics to identify the number of complex cases so that the additional resource to manage them can be established.
- Complex cases are case managed by an individual judge, with assistance from an SFCR and case manager.
- There is greater use of technology for complex cases.

Q23. *What other powers do you think might be helpful to enable judges to better manage complex cases?*

163. It is essential that judges have the discretion to make appropriate directions in complex cases (for example, the ability to call more than one judicial conference if required).

164. One such power might be the ability for a judge to convert a judicial conference in a defended matter to a short cause hearing where interim orders can be made. Rule 175D could be amended in this respect.

Q24. *What types of therapeutic intervention would be useful in complex cases? For example, should a judge have the power to direct a party for psychological or psychiatric assessment or alcohol and other drug assessment?*

165. Highly complex cases can have a profound impact on children and can give rise to care and protection concerns for children.

166. The Law Society supports giving judges more powers to direct parties to therapeutic interventions (psychological or psychiatric assessment and an alcohol or drug assessment) in complex cases. However, funding needs to be available if such directions are made. Consent of the party will still be required before a direction is made.

167. Parties directed to attend in-depth family therapy and/or communication counselling, so they are able to function as a family, may be a useful therapeutic intervention in an appropriate case.

168. The panel state that if parties attend therapeutic interventions, they should waive confidentiality so that the counsellor or psychologist can report directly to the judge. In the Law Society's view, parties would need to consent to waive confidentiality in these cases.

Recommendation

169. That judges are given greater power to direct therapeutic intervention for complex cases, including the power to direct a party for a psychological or psychiatric assessment and a drug and alcohol assessment.

Cultural information in court

170. The panel propose that:

- information and guidance be developed for parties, lawyers and the community about how cultural information can be helpful, and use is encouraged of the existing provision for a person to speak in court (section 136 of CoCA); and
- the provision for a person to speak in court be strengthened so that the court must hear from a person called under section 136

171. The panel are still thinking about:

- recommending further policy work to develop an improved framework for the provision of cultural information to the court;
- what training, support and ongoing professional development is needed to increase the number and capability of cultural report writers; and
- whether the threshold for requesting cultural information should be changed

Q25. *What could be done to encourage lawyers and judges to make better use of s133 cultural reports? For example, should there be a different threshold for cultural reports? If yes, what would be an appropriate threshold?*

172. The panel's paper states that the Family Court bench has identified that the major obstacles to obtaining cultural reports are the small pool of report writers, particularly for immigrant parties, and the lack of framework around the provision of the reports. The Law Society agrees. In addition, the cost of obtaining a cultural report may be prohibitive if the Cost Contribution Orders (CCO) regime is to remain.

173. Reducing the threshold for obtaining a section 133 cultural report will not remove the obstacles identified. However, if section 136 is to be used more widely for the provision of cultural information, there is sense in lowering the threshold in section 133 in respect of

cultural reports. An appropriate threshold might be that the court may give approval if it is satisfied that a cultural report should be obtained.

Recommendation

174. That consideration be given to lowering the threshold to obtain a section 133 cultural report.

Q26. *Do you think greater use of section 136 of the Care of Children Act 2004 would prove more valuable than presenting cultural information in a report format? If so, what type of information and guidance would be needed to support parties to use section 136? What barriers are there for parties to use section 136 of the Care of Children Act 2004?*

175. The Law Society agrees that greater use of section 136 would allow more cultural information to be brought before the court. In the Law Society's view there are no barriers to using section 136, although, in practice, there may be arguments raised as to the qualifications and experience of the person providing the information to the court on a child's cultural background.

176. Information and guidance should be available as to the type of cultural information that would be beneficial to the court to receive under section 136. Such information must first be relevant to the matter in issue. The type of information that could be useful might include:

- information that gives an understanding of a child's past experiences;
- cultural norms of the child's particular culture, including a general background of that culture; and
- a child's world view (their world experience) and how current care arrangements have impacted on that.

177. There should be no restriction on what information is brought before the court, so long as it is relevant (therefore admissible) to the matter at issue.

178. It is important to note that cultural information provided under section 136 would not be considered expert opinion evidence as would information contained in a section 133 cultural report. The Law Society recommends that if section 136 is to be utilised more often to bring cultural information before the court, it should be presented as an affidavit so that the person bringing the information is a witness and the information is able to be tested through cross-examination.

Recommendations

179. That the type of cultural information discussed above (paragraph 176) is made available to the court under section 136.

180. That section 136 cultural information should be provided to the court as sworn evidence (affidavit).

Q27. *Do you have any other proposals for improving the quantity and quality of cultural information available to the court?*

181. We suggest the ministry consults with various communities to identify what resources are already available and to identify people in those communities with the requisite cultural knowledge. The ministry should also consult with OT in respect of the information and knowledge already available: OT has a wide range of culturally diverse social workers and also partners with community agencies to place Māori children with whanau, iwi and hapū.

182. That consultation will assist in establishing a list of suitably knowledgeable people who may be able to assist with cultural information and knowledge.

Recommendation

183. That the ministry consults with OT and various communities to identify what resources are already available and the people in those communities with the requisite cultural knowledge.

A new role – Family Justice Service Coordinator

Q28. *What do you think of our proposal to create a new role; the Family Justice Services Coordinator (FJSC)?*

184. The role being proposed is essentially the same role that used to be carried out by the FCC; the current FCC role has been centralised (rather than local) and is largely administrative in nature. The Law Society has long advocated for the retention of the FCC role, which unfortunately has been significantly diminished since the 2014 changes.

185. We support the establishment of the FJSC role and agree with the panel that it should be established by statute.

186. We assume such a role will be established in every Family Court registry. For the larger registries, several FJSCs will be required if the role is to be an effective link between the Family Court and the local community.

187. The establishment of the role will greatly assist in ensuring the Family Court and various community services work in a joined-up and collaborative way as envisaged by the panel's aim to strengthen family justice services.

Out of court

188. In many ways, the FJSC will be the first port of call for parents who seek information and assistance following a relationship breakup. The previous FCC fielded phone and counter enquiries from the public about what a person should do on separation. Parents were often referred to counselling and/or mediation or to a lawyer for legal advice should the case require. Referrals were also often made to other agencies such as Women's Refuge, Birthright, DOVE and other community services.

189. A key component of this role will be developing strong working relationships with key staff who deliver community services.

In court

190. The panel propose that once an application is filed, the FJSC will triage applications to ensure that on notice applications that need urgent judicial attention are referred to a judge for directions. Other key areas of the role would be following up court directions to obtain section 132 and 133 reports, arranging to have lawyer for child appointed if a direction is made, and working closely with case managers to ensure matters are ready within directed timeframes. This will enable more efficient use of judicial resource.

191. In 2003, the Law Commission provided an overview of the FCC role as it was then. It discussed how the role had changed and diminished since its establishment in 1981. The report recommended an expansion of the role and suggested in detail the various tasks and responsibilities the new role of Family Court Specialist Services Coordinator should have. The

report is highly relevant and instructive in light of the panel's proposal, in particular Chapter 3 and the appendix setting out the key responsibilities of the role.[43]

Recommendation

192. That the role of FJSC be established in law and positions based in all Family Court registries.

A new role – Senior Family Court Registrar

Q29*. What do you think of our proposal to establish a Senior Family Court Registrar position?*

193. The panel propose that a new position of SFCR is established to speed up court processes and reduce the judicial administrative workload, thereby increasing judicial hearing time. The Law Society supports this proposal, for the reasons set out in our previous submission.[44]

194. It is imperative that more judicial hearing time is available in the Family Court, including the allocation of more judicial resource.[45] The combination of both increased judicial resourcing and the new SFCR role would have a significant impact on reducing delay so that matters are able to be heard in a timelier way. If more judicial hearing time is not available, we believe that other proposed changes will not be sufficient on their own, or collectively, to reduce the significant delay currently experienced in the Family Court.

195. We agree with the panel that SFCRs should be able to use their full range of powers across all Family Court proceedings, not just in CoCA proceedings. The potential to free up judicial resource in proceedings other than CoCA is self-evident.

196. The identification of appropriate qualifications and experience is a pre-requisite to ascertaining the nature of the work and the powers that should be held by an SFCR. An appropriate, alternative title (not necessarily 'Senior Family Court Registrar') should also be considered, to reflect to parties the importance of the position and the wide range of powers likely to be held (particularly in view of feedback to the ministry from parents that they want their matters determined by a judge).[46]

197. While we agree with the panel that the position would not have to be established in every registry, because the SFCR could operate electronically or travel to other registries as required, it is vital that an SFCR is physically present in the larger registries (for example, Auckland, Manukau, Wellington, Dunedin and Christchurch) and in regions where there is no resident judge.[47]

198. Care also needs to be taken that without first improving the functioning of some registries (for example, Auckland), introducing another layer to an already problematic registry may make matters worse rather than better. For example, in Auckland there are no individual case managers assigned to be responsible for a file, so clients and/or practitioners are unable to contact one person at the registry if required.

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43 *Dispute Resolution in the Family Court*, New Zealand Law Commission, Report 82, Wellington, March 2003, available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R82.pdf.

44 November 2018 submission at paragraphs 137 – 144.

45 November 2018 submission at paragraphs 11, 132, 166 – 167.

46 *Without Notice Applications in the Family Court*, Ministry of Justice, July 2017, paragraphs 67 and 68.

47 November 2018 submission at paragraph 142.

Recommendations

199. That:

- The role of SFCR is established, and SFCRs are able to use their powers across all Family Court proceedings;
- Consideration is given to the requisite qualifications, experience, powers and title of the new role.

Q30. *What powers do you think Senior Family Court Registrars should have in order to free up judicial time?*

200. The Law Society notes the panel's comment that *"Registrars in the Family Court already have a wide range of powers available to them ... although many are not used in practice"*.[48] We question why this is the case and assume that currently these powers are being exercised by judges.

201. While we do not wish to criticise the important work registrars undertake in the Family Court, the reasons registrars are not using the range of powers available to them need to be identified. Potential explanations might include that registries are under-resourced, registrars are less experienced so are unaware of the available powers, or registrars require more ongoing training in the exercise of their powers. Assisting registrars to exercise their powers would go some way to freeing up limited judicial resource.

202. If a matter can already by dealt with satisfactorily by a registrar, that power should remain with the registrar. However, it might be preferable that both registrars and SFCRs hold those specific powers. It may also be appropriate for a registrar to have the ability to refer a matter to an SFCR for consideration and for an SFCR to have the ability to refer a matter to a judge. One of the roles an SFCR could undertake is to assist a Family Court judge (and case manager) in the case-management of complex cases.

203. We do not agree with the panel that the SCFR powers could include "… applications made without notice, …" per se. We wonder whether this refers to applications for reduction in time and substituted service, rather than substantive without notice applications?

204. In order to establish the appropriate powers suitable for an SFCR to exercise, detailed analysis is needed of the powers currently available to judges and registrars. While it might be appropriate for some interlocutory matters to be dealt with by an SFCR, there may be decisions required, for example, in complex cases involving alienation and estrangement that even at an interlocutory stage would be best made by a judge.

205. The ministry should undertake this work (with reference to the consultation already undertaken in 2008)[49] and release a consultation paper to the judiciary and profession for feedback. This would greatly assist to identify specific and appropriate powers that might be available to an SFCR and would also assist the ministry to identify powers that should be retained by Family Court judges.

206. We agree that the legislation should set out the jurisdiction and powers of SFCRs, and the criteria and terms of appointment. The rules, rather than regulations, should set out the kinds

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48 The panel's paper at page 34.

49 November 2018 submission at paragraphs 137 – 140.

of orders and directions SFCRs are able to make in family proceedings. New rules should be considered by a formal Family Court Rules committee.

Recommendations

207. That:

- The ministry should identify current registrar powers and current judicial powers that might be suitable for SCFRs and consult with the Family Court judiciary and legal profession.
- The role, including its jurisdiction and powers, should be established by legislation.

Q31. *What sorts of competencies should Senior Family Court Registrars have?*

208. In the Law Society's view, a legally qualified person with at least seven years' experience practising in the Family Court, or at least the same practical experience in court matters as a Family Court registrar, should be the minimum level of experience required.

Lawyer for child

209. It is well recognised internationally that New Zealand is a leader in providing for the independent representation of its children by lawyer for child, in compliance with obligations under UNCROC. Reporting on children's views early in the process can assist parents to resolve matters and achieve better outcomes for children.

210. The Law Society supported the two key 2014 changes in respect of lawyer for child, namely the statutory description of the role in section 9B of the Family Court Act 1980 and when a lawyer for child is appointed.[50] Giving power to a judge to appoint where the court has concerns for the safety or well-being of a child and considers the appointment necessary, ensures this resource is targeted to where it is most needed.

211. It is unfortunate the ministry's research reports to date have not considered the impacts of the 2014 changes in respect of lawyer for child. In the Law Society's view, the ministry should undertake a comprehensive evaluation that includes seeking the experiences of children who are, or have been, the subject of proceedings. We draw the panel's attention to a report of Dr Nicola Atwool where children's views were sought about their court-appointed lawyer.[51] Views should also be sought from the judiciary, court staff and parents. We believe such an evaluation would reflect the greater reliance the changes have placed on lawyers for children – to obtain additional information, case manage files (in many instances, carrying out some functions of an under-resourced registry), and support self-represented litigants in navigating the court process.[52]

Recommendation

212. That the ministry undertakes an evaluation of the role of lawyer for child and impacts on that role of the 2014 changes.

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50 November 2018 submission at paragraphs 105 – 106.

51 *Children in care – A report into the quality of services provided to children in care*, Office of the Children's Commissioner, September 2010.

52 November 2018 submission at paragraphs 107 – 111.

213. The panel propose that:

- new criteria be introduced for the appointment of lawyer for the child, to make sure each child's needs are met by the most suitable lawyer (focussing on personality, cultural background, training and experience, suitability of their qualification);
- information given to parties and children about the role, obligations and limitations of lawyer for the child be improved;
- lawyer for the child training, professional development and supervision requirements be regularly reviewed and strengthened;
- the list of approved lawyers for the child be regularly reviewed and updated; and
- remuneration rates for lawyer for the child be reviewed.

Information about the role of lawyer for the child

214. The Law Society has considered the comments made by various submitters to the panel about the role of lawyer for the child. A number of these comments illustrate a misunderstanding of the role, including the specific obligations placed on lawyers for children and the limitations of the role.[53]

215. The Law Society's Family Law Section (FLS) has drafted an information sheet (**see Appendix 2**) setting out the role of lawyer for the child, to enable the public to gain a greater understanding of the role. We encourage other professionals who play a role in the family justice system to do the same in respect of their roles.

Regular review of the list of approved lawyers for children

216. It is important a sufficient pool of qualified lawyers for children is retained so that appointments made can match the lawyer's skills and experience to the specific requirements of each case.

217. The Law Society agrees with the panel that the list of approved lawyers for children should be regularly reviewed and updated. The *Family Court Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters* states that:

- panels are convened as required, but no less than twice a year if there are applications waiting to be considered and a need for a lawyer to be appointed to the list (paragraph 9.7)
- a review of the list must be undertaken at intervals of not more than three years (paragraph 10.1)

218. The Law Society has expressed its concern to the ministry for many years that panels have not been convened regularly or consistently around the country, for both review and appointment. This is despite there being a shortage of lawyers for children in some regions and applicants waiting for a panel to be convened in order to be interviewed for appointment.

219. The FLS raised its concerns with Acting Principal Family Court Judge David Smith in August 2018. As a result, Judge Smith wrote to the ministry reminding it of the practice note

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[53] November 2018 submission at paragraphs 111 – 112.

requirements and expressing his concern that there did not appear to be an ongoing system in place to ensure that three-yearly reviews took place.

220. The judge stressed the importance of ensuring that new lawyers for children were appointed, in order to gain experience and to ensure that, as senior lawyers retire, there are sufficient lawyers for children available. In response, the ministry convened numerous panels across the country and advised that a system is now in place to monitor panel dates.

221. In respect of reviews, a consistent nationwide approach is required. In some reviews, lawyers for children are asked to show:

- details of current professional supervision, including regularity of sessions and topics discussed;
- experience in working with families from other cultures; and
- continuing professional development (CPD) undertaken during the past two years.

222. The same is needed in terms of appointment to the list. FLS developed guidelines for its representatives on lawyer for child appointment panels, in an effort to create consistency and ensure that candidates demonstrated knowledge and understanding of the law, best practice, child development, relevant literature and research, family dynamics and *Gillick* competence.

223. The Law Society agrees there needs to be ongoing regular review of and appointments to the ministry's lawyer for child list. It also supports the development of guidelines for the ministry's panels to ensure that all lawyers, whether being appointed or reviewed, demonstrate relevant knowledge and understanding of set criteria, including details of recent CPD undertaken and professional supervision arrangements.

Recommendations

224. That the ministry confirms there is a process in place, so regular panels are convened in in respect of review and appointment of lawyers for children to the ministry's list; and

225. A process and guidelines are developed to ensure panels convened for appointment and review are consistent nationwide.

Remuneration rates for lawyers for children

226. The Law Society welcomes the panel's proposal that lawyer for child remuneration rates should be reviewed and updated.[54] We are aware a number of senior lawyers for children will be retiring in the next two years. We are also aware of a number who have reduced the size of their lawyer for child practice, not because they do not want to do the work but because it is not economically viable.[55]

227. Remuneration rates have not been increased for 22 years and the Law Society is unaware of any formal review of the rates for at least 10 years. As noted above, it is crucial there is a qualified pool of lawyers for children of all levels of experience. A review of remuneration rates is well overdue.[56]

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54 Panel paper, at page 36.

55 November 2018 submission at paragraph 113.

56 November 2018 submission at paragraph 114.

Recommendation

228. That a review of the remuneration rates for of lawyer for child is undertaken as a priority.

Q32. *Do you agree with our proposal to introduce new criteria for appointment of lawyer for the child to make sure of the best fit?*

229. The Law Society would support the appointment criteria in section 159(2) of the OT Act being used where a lawyer for child is appointed in CoCA proceedings under section 7. However, the criteria for appointment contained in section 7(a) and (b) should be retained – the court may appoint a lawyer for child to represent a child who is the subject of proceedings under CoCA if the court has concerns for the safety or well-being of the child and considers an appointment necessary.

230. There should be a transparent system of appointment of lawyer for child to a file to ensure that various factors are balanced such as a match of lawyers' skills to the case requirements and an equitable distribution of work among lawyers on the list. This reflects the requirements at paragraph 6.2 of the practice note. Appointing lawyers for children solely based on ethnicity has the potential to overlook lawyers who may be well versed in tikanga and fundamentals of other cultures.

Recommendation

231. That criteria contained in section 159(2) of the OT Act is used in respect of a lawyer for child appointed under CoCA.

Q33. *What are the core skills for the role of lawyer for the child, and what training and ongoing professional development do you see as necessary to develop those skills?*

232. Based on a variety of sources,[57] the Law Society considers that the following core skills are essential for lawyers for children:

- An understanding of the role of lawyer for child (as set out in section 9B of the Family Courts Act 1980) and the limits to the role. An understanding of the distinctions between section 9B and the appointment provisions in CoCA and the OT Act, including any distinctions between section 9B and the brief from the court.
- The ability to manage conflict.
- Negotiation skills, particularly convening round table meetings (mediation).
- A thorough understanding of:
    i. child development and attachment theory;
    ii. care and protection issues for children;
    iii. family dynamics;
    iv. family violence; and

[57] See Family Law Section *Lawyer for the Child Best Practice Guidelines*, 23.2.18; Family Court Practice Note: *Lawyer for Child, Selection, Appointment and Other Matters*, 24.4.15 (paragraph 9.9); *Lawyer for child Application and Statutory Declaration*, Ministry of Justice; NZLS CLE Ltd course content for Lawyer for Child workshop (pre-requisite for appointment to panel) and Advanced Lawyer for Child seminars.

v. gender, ethnicity, sexuality and religious issues.

- In-depth knowledge of the Practice Note and Best Practice Guidelines.
- The ability to prepare reports for the court and an understanding of the correct way to introduce evidence.
- Advocacy skills including cross-examination of expert witnesses.
- An understanding of how to work with Māori families and families of other cultures.
- An understanding of and ability to communicate with children.
- An understanding of the role of specialists' reports, including psychological and cultural reports.
- the brief from the court.

233. All professions can benefit from ongoing training and professional development in key areas of practice to ensure they keep abreast of recent research. The Law Society supports the ongoing training and continuing professional development (CPD) of lawyers. That is one of the reasons CPD was introduced for the legal profession in October 2013.

234. There are a range of CPD courses offered by NZLS CLE Ltd and other providers in some of the key areas listed above (for example, negotiation and cross examination). In addition, specialist topics are routinely covered at the biennial family law conference and advanced lawyer for child seminars. There is extensive and ongoing research in respect of the impact of parental separation on children and on models to obtain children's views. NZLS CLE Ltd constantly reviews the content of their seminars to ensure it reflects the most recent research and best practice. Planning committees (and presenters) always include Family Court judges, psychologists and academics as well as senior family law practitioners.

235. For the last 20 years the FLS has run a regular lawyer for child forum in Hamilton. Over the last five years, this forum has been expanded and is now also held in other regions, annually in some places, including the Hawkes Bay, Northland, Dunedin and South Auckland. These forums are often oversubscribed and again content includes significant input from psychologists, Family Court judges and senior family practitioners.

236. In addition, the 30 FLS regional representatives based in 25 regions throughout the country run a range of educational events, many of which have high relevance to lawyers for children. In many regions groups of lawyers for children regularly meet to discuss issues arising from their practice, recent case law and relevant research developments, all of which contribute to the enhancement of their practice.

Q34. *Do you see a role for an additional advocate with child development expertise to work together with the lawyer for the child, to support the child to express their views and make sure they're communicated to the judge?*

237. The Law Society has significant reservations about the possibility of an additional advocate being introduced and does not support such a role being developed. Lawyers for children should have, by their training and expertise, the ability to communicate with children along with the ability to convey, within the rules of evidence, the child's views to the court.

238. It seems that there would be a number of disadvantages and risks associated with the development of this additional role, namely the risk of:

i. duplication;

ii. greater confusion about the differences between the roles of lawyer for child and the additional advocate;

iii. increased delay as meetings would need to be co-ordinated with two advocates and the child and reports would be required from both lawyer for child and the additional advocate;

iv. increased costs associated with both roles;

v. increasing the number of meetings for children and the related exposure of children to additional strangers/experts; and

vi. the additional advocate being available for cross-examination, similar to a social worker or psychologist, and the resulting complications (for example, if the advocate is cross-examined by lawyer for child).

239. The Law Society encourages the panel and/or ministry to seek input from professional experts, such as Dr Suzanne Blackwell, a highly regarded psychologist with significant experience in working with families and children in the Family Court system. Professor Fred Seymour and Dr Jan Pryor, also both highly regarded, were members of the minister's expert reference group during the last review of the Family Court and provided significant input on which professionals are best qualified to give a voice to children's views.

Recommendation

240. That the panel and ministry seek input from experts regarding which professionals are best qualified to give a voice to children's views in Family Court proceedings.

Psychological reports (section 133)

241. The panel propose that:

- the ministry should look at measures to improve recruitment and retention of psychologists; and
- in response to complaints about a section 133 report writer, that the judge's decision regarding the complaint be made available in any subsequent disciplinary hearing.

242. The Law Society agrees with both proposals.

243. We share the concern regarding the limited pool of report writers and agree the ministry should look at options to improve recruitment and retention of psychologists to provide section 133 reports and critiques. Section 133 reports provide crucial evidence in respect of children's welfare and best interests which cannot be provided by any other means. It is vital that the court's ability to direct such reports is retained and the pool of psychologists to provide the reports is increased.

244. In response to complaints about section 133 report writers, the Law Society agrees the judge's decision regarding the complaint should be made available in any subsequent disciplinary hearing.

245. The panel also proposes that a psychologist who undertakes a critique of a report should be required to be an "approved report writer" under section 133. This is already a requirement under the *Family Court Practice Note: Specialist Report Writers* although it is not specifically required by section 133:

- Section 133 does not define the term "psychologist". It does however define the term "report writer" in section 133(1)(b) to include "the psychologist requested under subsection (5) to prepare a report" (emphasis added).
- There is a list of psychologists approved by the ministry to provide section 133 reports in CoCA proceedings and section 178 reports in OT Act proceedings. The Family Court Practice Note: Specialist Report Writers covers a range of matters including the process of appointment to the list, the review and administration of the list, critiques and the process for dealing with complaints. Paragraph 13.1 of the practice note states that to be eligible for selection on to the list, a report writer must:
  - (a) be a registered psychologist with a current practising certificate;
  - (b) be a current financial member of the New Zealand Psychologist Society or the New Zealand College of Clinical Psychologists; and
  - (c) have five years' clinical experience or its equivalent, including a minimum of three years in child and family work.

246. Consideration should be given to whether section 133 needs to be amended to define "psychologist" as set out in the practice note, to provide clarity on who is able to provide psychological reports and critiques of those reports.

Recommendation

247. That consideration should be given to whether section 133 needs to be amended to define "psychologist" as set out in the practice note.

Q35. *Does the definition of 'second opinion' reports need clarifying?*

248. Yes.

Section 133 defines a second opinion as:

(a) a critique of a psychological report; and

(b) a report covering the same matters as those covered by a psychological report

249. A plain reading of the section indicates that a critique can only cover matters in the original report and not any subsequent evidence that may be given by the court-appointed psychologist.

250. However, the Law Society considers the phrase "second opinion" together with the wording of subparagraph (b) causes confusion and should be amended. Taken together, they suggest the work undertaken in the second report goes over the same ground as the initial report, including interviewing the parties, reading the pleadings, observing and/or interviewing the child. This is not the case. The critique is a peer review of the initial report (having regard to the issues in the case and considering the methodology, data triangulation and analysis of the first report); it is a critique of the findings and conclusions of the original psychologist's report.

251. The Law Society proposes the word "critique" is used instead of "second opinion" and the definition amended to make it clear that a critique of the initial report does not include re-interviewing parties and/or children.

Recommendation

252. That the word "critique" is used instead of "second opinion" and the definition amended to make it clear that a critique of the initial report does not include re-interviewing parties and/or children.

Q36. *What improvement do you think could be made to the process for obtaining critique reports?*

253. The approval of the court must be obtained before a critique may be prepared and presented (section 133(10)) and the court may only give approval if there are "exceptional circumstances" (section 133(11)). The Law Society considers that this threshold is too high.

254. A party who obtains the approval of the court for a critique is liable for the costs associated with the preparation of that report (section 133(12)). If there are valid reasons why a critique should be sought and a party is willing to pay for a such a report, they should be entitled to do so.

255. The Law Society proposes that section 133(11) be amended to lower the threshold from "exceptional circumstances" to the court may give approval for a critique if the court is satisfied, after weighing any competing considerations, that a critique should be obtained.

256. A psychologist preparing the critique report should have access to the notes and materials used in the initial report. We refer the panel to our recommendations (discussed below) regarding the disclosure of psychologists' notes and materials.

Recommendation

257. That section 133(11) be amended to lower the threshold from "exceptional circumstances" to the court may give approval for a critique if the court is satisfied, after weighing any competing considerations, that a critique should be obtained.

Q37. *At what stage in the court process would psychological reports be most helpful?*

258. In the Law Society's view there is no particular stage in the court process where a psychological report would be most helpful. Whether or not a report is obtained will depend on the particular circumstances of the specific case. Section 133(3) contains adequate guidance for the court when deciding whether a report is obtained – that the information the report will provide is essential to the disposition of the application; the report is the best source of the information; the proceedings will not be unduly delayed by the time taken to prepare the report; and any delay will not have an unacceptable effect on a child.

Q38. *Do you have any other comments about section 133, for example the threshold test for obtaining a report?*

Psychological assessments

259. In its previous submission, the Law Society recommended that the definition of psychological report in section 133(1) be amended to enable the court to direct a report to include a psychological assessment of a party.[58]

260. This is because in practice, psychological reports are often sought because of a concern about the psychological functioning of a party and the impact of that on their parenting capabilities.

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[58] November 2018 submission at paragraphs 189 – 192.

While judges in some cases have added to the standard brief under section 133(5)(b)(ii) to incorporate this as a term of the brief, there is no specific power for a judge to direct that a report include a psychological assessment of a party, even with consent of that party. This power is available to the court when seeking such reports under section 178(2) of the Oranga Tamariki Act 1989 and a similar power should be available under section 133. The definition of "psychological report" under section 133(1) should be amended in this respect.

261. In its previous submission, the Law Society recommended that where a section 133 report is directed, the case should be defined as complex and case managed by an individual judge who directed the report. (The management of 'complex cases' is discussed above at paragraphs 155 – 162).

Recommendation

262. That the definition of psychological report under section 133(1) be amended to enable the court to direct a report to include a psychological assessment of a party.

Section 133(5) amendment – disclosure of psychologists' reports and report-writer's notes and other materials

263. Section 133(5) was recently amended by the Courts Matters Act 2018, in relation to the disclosure of court-appointed psychologists' reports and the report-writers' notes and other materials used in preparing the reports.[59]

264. New section 133(15)(a) enables the court to permit disclosure of the report where it is satisfied that disclosure is required to assist a party to prepare for cross-examination (as was the case under the previous section 133(15)). Section 133(15) previously also allowed the disclosure of the report-writer's *notes and materials* on the same basis. However, new section 133(15)(b) only allows access to the notes and materials where the court is satisfied that disclosure is required to assist a party to prepare for cross-examination *and* there are "exceptional circumstances".

265. The Law Society does not agree this is an appropriate amendment, for the reasons set out in its submission to the select committee.[60] It is a principle of natural justice to allow evidence to be appropriately tested in court, and that right is affirmed by section 27(1) of the New Zealand Bill of Rights Act 1990. In appropriate circumstances, this may necessitate the disclosure of the report and the related notes and materials where a judge is satisfied that it is necessary to assist a party to prepare their cross-examination. A party cannot fairly and properly respond either to the issues raised or the conclusions reached by the psychologist without having an opportunity to review the psychologist's notes and materials in their totality. This is particularly so where a psychologist has obtained triangulating data from those who have not given evidence and whose statements to the psychologist cannot be tested.

266. For these reasons, the Law Society recommends that the previous wording of section 133(15) should be reinstated.

267. In addition, the Law Society did not agree with the select committee's recommendation that further changes should be considered to prohibit the release of psychologists' notes and

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59 Courts Matters Act 2018, section 106.

60 NZLS submission 16.2.18 on the Courts Matters Bill, at [5.7] – [5.10].

materials.[61] For the reasons given above, the Law Society does not agree with the suggestion that there should be a total prohibition on the release of psychologists' notes and materials.

Recommendation

268. That section 133(15) should not be amended and should remain as previously worded.

Costs

269. The Law Society agrees with the panel's proposals that:

- Parenting Through Separation be kept as a free service;
- counselling be funded by the government;
- automatic CCOs be removed and replaced with judicial discretion to make CCOs; and
- filing fees not be charged.

270. We understand the panel are still thinking about whether:

- FDR should be free for both parties where one party is eligible for government funding; or
- FDR should be free for all parties; and
- the eligibility threshold for government funding for FDR should be raised.

Q39. *Do you agree with the Panel's proposal that cost contribution orders are modified? For example, do you think a judge should order a party to contribute to the cost of professionals when making final orders based on the party's behaviour during proceedings?*

271. In its previous submission to the panel, the Law Society questioned whether the costs associated to the court, Legal Aid Services, the ministry and parties, compared with the revenue collected, was in fact cost-effective. An analysis of statistics suggested that it was not. The Law Society agrees with the panel that CCOs should be modified so that there is no automatic one-third contribution by each party to the costs of lawyer for child or any specialist report. This would remove the need for submissions to be made and heard in respect of whether payment of the CCO would result in serious hardship to a party or a dependent child of a party.

272. A judge should have discretion to make a CCO against one or both parties where a party's behaviour during proceedings has exacerbated matters and caused undue delay in proceedings, for example, where one party constantly files applications and affidavits or continues to ignore directions made by the court. This would give a judge more ability to be directive in case managing difficult parties by warning, for example, that a CCO will be made against a party if such tactics are used.

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[61] November 2018 submission at paragraph 198: "As noted in the background paper, the Associate Minister in his speech in the Bill's second reading said that he and the Minister of Justice agreed that this issue would be better dealt with in the panel's review of the 2014 family justice changes."

Q40. *Should FDR be fully funded by the Government for everybody, or should FDR be free for both parties where one party is eligible for Government funding? Should the eligibility threshold be raised?*

273. The Law Society considers that FDR should be voluntary rather than mandatory (unless directed by a judge during proceedings), free and more accessible.[62] Cost is a real barrier for many parents and is a disincentive to engaging in the process. Making FDR free, and therefore more accessible, would give parents greater opportunity to resolve parenting issues before they reach crisis point. This would reduce the number of without notice applications.

274. In the alternative, FDR should at least be free for both parties where one party is eligible for government funding. Under the current system where one party is funded but the other party must pay to attend FDR, there have been many cases where the paying party will simply not participate because the other party does not have to pay. This has led to exemptions being granted, even though both parties would have benefited from attending FDR and may even have resolved their issues without the need to apply to the Family Court.

275. If FDR is not free, consideration should be given to raising the eligibility threshold as this would create a more even playing field between the parties, increase the uptake of FDR (a process that offers significant benefits), and in some cases reduce the need for an application to be made to the Family Court.

Other matters

Removal of specialist Family Court registries

276. An efficient registry is a vital component of a Family Court able to serve those who seek its assistance. Family Court registries that operate well do so largely because of experienced and knowledgeable staff.

277. In recent years, there has been a decline in many of the well-functioning Auckland registries in particular, with the centralisation of services to the Auckland and Manukau Courts.

278. This change has meant the loss of experienced registry staff who had extensive local and institutional knowledge and strong working relationships with local services. Individual case managers also had strong and positive working relationships with family lawyers. This fostered a team approach of working together to progress matters through the family justice system to benefit parties and children.

279. In other registries, court staff have been shared between jurisdictions, meaning that in some registries, staff are not necessarily experienced in dealing with the family jurisdiction (although they may be experienced in the criminal jurisdiction).

280. There are some Family Court registries that do work efficiently and effectively (Dunedin is one example). The Law Society suggests that an evaluation is undertaken to identify why these registries appear to operate more efficiently than others. One reason might be that initiatives developed and implemented locally by court staff, the judiciary and practitioners have resulted in efficiencies. If there are current initiatives that are working well in specific regions, there is no reason why they could not be utilised to create efficiencies in other regions.

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[62] November 2018 submission at paragraphs 7, 55, 63 – 69.

Recommendation

281. The ministry should carry out an evaluation of particular court registries to identify efficiencies that might be able to be utilised in other registries.

Workforce strategy to address loss and high turnover of specialist Family Court staff

282. For Family Court registries to function efficiently, there needs to be an adequate number of counter staff, case managers and registrars experienced in dealing with matters in the family jurisdiction.

283. The Law Society agrees recruitment and retention, and training of current staff, need to be addressed.

A requirement to use Ministry of Justice forms

284. We note the panel's comments that the ministry's form is hard for parties, court staff and judges to access and use. The same can be said for family lawyers. In summary, the form:

- does not comply with the rules
- combines evidence with information that should be contained in a separate application and information sheet; and
- is time-consuming, unnecessarily long to prepare, repetitive and difficult to read

285. The difficulties with the ministry form were outlined in detail in our previous submission.[63]

286. While it may be necessary to produce a form for self-represented litigants to ensure they are able to provide adequate and legally compliant documentation, there is not the same necessity for lawyers to use such a form. Since 2014 the FLS has provided considerable feedback to the ministry in an effort to improve the form to ensure it not only complies with the rules but contains the salient information required by a judge to determine a matter.

287. The latest feedback was provided to the ministry on 30 January 2019. We are hopeful that either an amendment to the rules will be made to reinstate the format previously used under Part 5 of CoCA, or the ministry will use the wording from the revoked forms to issue guidelines approved by the Secretary for Justice to enable lawyers to file in the same format as they used to prior to the 2014 changes.

Family Court Rules 2002 being hard to understand and navigate

288. The Law Society agrees that the rules are hard to understand and navigate. Since 2002, the rules have been amended, largely on an ad-hoc basis and in some cases with no consultation with the legal profession, which has resulted in numerous anomalies. We consider there needs to be an urgent review of the rules as a whole. A formal rules committee should be established, akin to the District and High Court rules committees. Membership of such a committee should comprise members of the Family Court judiciary, senior family lawyers and senior ministry officials with in-depth knowledge of the family jurisdiction. A comprehensive review and rewrite of the rules would make the rules easier to understand and navigate, not only for judges and lawyers, but for those parties who choose to self-represent.[64]

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63 November 2018 submission at paragraphs 115 – 125.

64 November 2018 submission at paragraphs 208 – 210.

Lack of specialist services and supports for grandparents and family members raising children

289. More accessible specialist services and support for grandparents and family members raising children need to be provided. They often seek support from NGO organisations, such as Grandparents raising Grandchildren who often have limited funding to assist in any meaningful way.

290. Many grandparents taking on the care of their grandchildren are on a pension with limited income. If parenting and/or guardianship orders are obtained under CoCA in favour of grandparents, where those children had been the subject of OT proceedings, they lose the benefit of any service and support orders that may have been available to them under the OT Act.

291. If grandparents and other family members did not take up the role of raising these children, the state would be paying the cost in respect of OT caregivers, including costs associated with service and support orders.

Lack of specialist services and support for disabled people needing assistance to resolve disputes about children

292. The government has an obligation to ensure those who have a disability are able to meaningfully participate in out of court and in court processes when there are parenting disputes, in order to facilitate access to justice. There is often a need to provide communication assistance and in cases where there is an intellectual disability, appoint a litigation guardian. A review of current services and support should be undertaken to identify what additional support may be needed.

A need to better cater to self-represented parties to ensure they are not disadvantaged nor create unnecessary delay

293. Prior to the 2014 changes, many parties were compelled to represent themselves because they did not qualify for legal aid (due to the low income eligibility threshold), but could not afford to engage a lawyer.[65] Provision of sufficient legal aid for parties to obtain legal advice and representation would be one way to enhance the efficiency of the Family Court. In our view, the income eligibility threshold for legal aid is too low and is a barrier to justice; it needs to be urgently addressed to allow parties more access to legal representation.

294. Parties have a right to choose to represent themselves in court proceedings. However, the right to self-represent should not be at a detrimental cost to the court, including costs associated with the judiciary, registry, court-appointed counsel, legal aid providers and the other party. A fundamental lack of understanding of court processes and procedure leads to self-represented litigants filing and presenting irrelevant, excessive and disordered material and failing to properly identify the legal issues in dispute. This in turn impacts adversely on hearing times and case progression.[66]

295. In addition, there should not be a two-tier system where self-represented parties are treated more favourably and given more leeway, for example, in respect of reaching legal thresholds and affidavit content. There should not be a different standard or different rules for self-represented litigants than those who are legally represented.

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65 November 2018 submission at paragraphs 91, 93.

66 November 2018 submission at paragraphs 87 – 89.

296. There is a need to better manage self-represented litigants. Clearer information should be available to guide them through the process, including what is and is not allowed in terms of content of affidavits, filing of documentation within timeframes and also clearer information about what matters are able to be dealt with at various stages of the process. There is consensus that the rules are difficult to understand and navigate. A comprehensive review and rewrite of the rules by a specialist and formal rules committee would assist.

297. The judiciary should have greater discretion in terms of managing self-represented litigants. For example, an enhanced rule 175D could enable a judge to strike out evidence which is objectionable and irrelevant without the need for an applicant to apply for this to be done and an interlocutory hearing held.

Conclusion

298. The Law Society hopes these comments are helpful to the panel and would be very happy to discuss or provide more information if that would assist. Please feel free to contact the FLS Manager Kath Moran (kath.moran@lawsociety.org.nz) in the first instance.

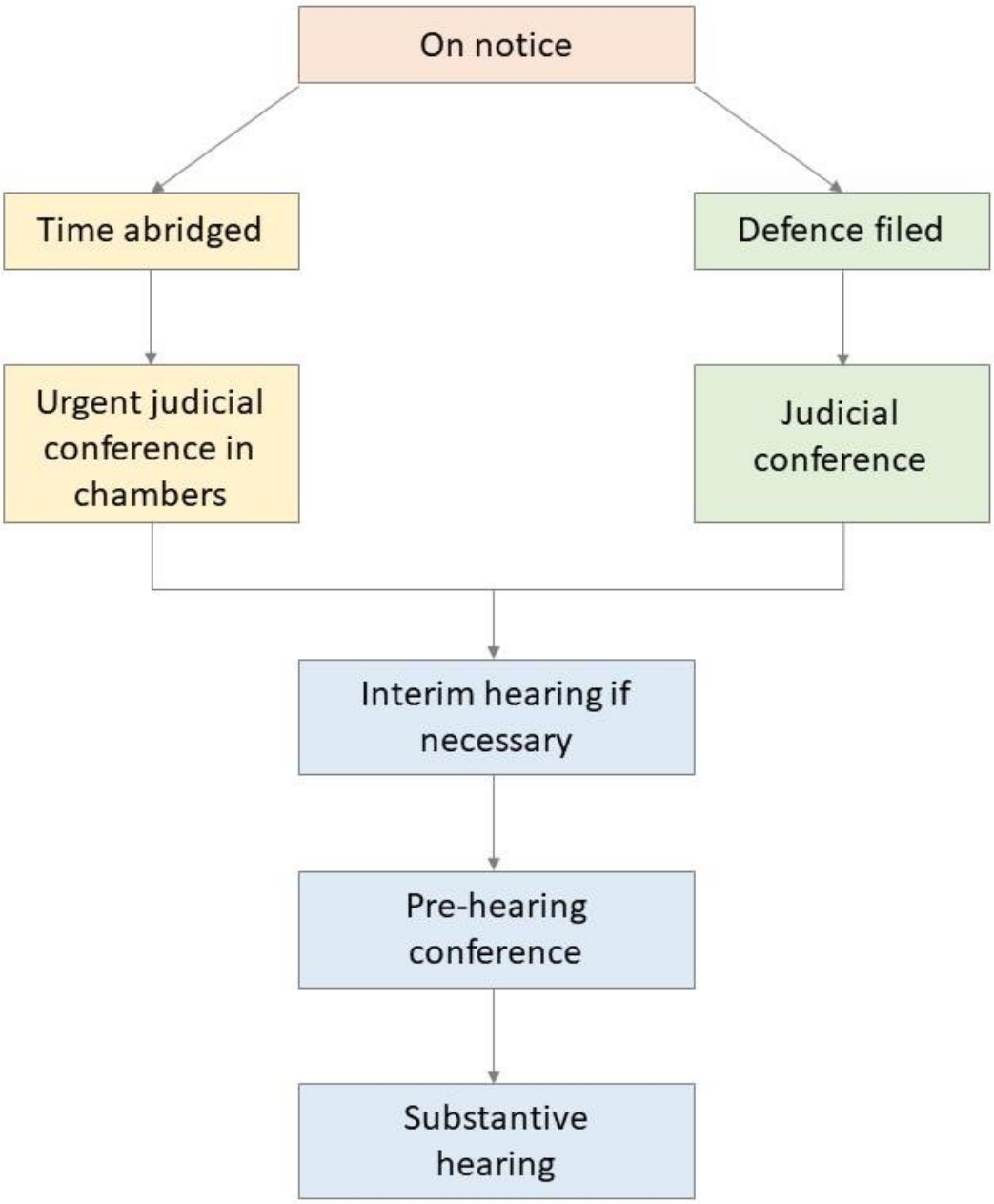
Yours faithfully

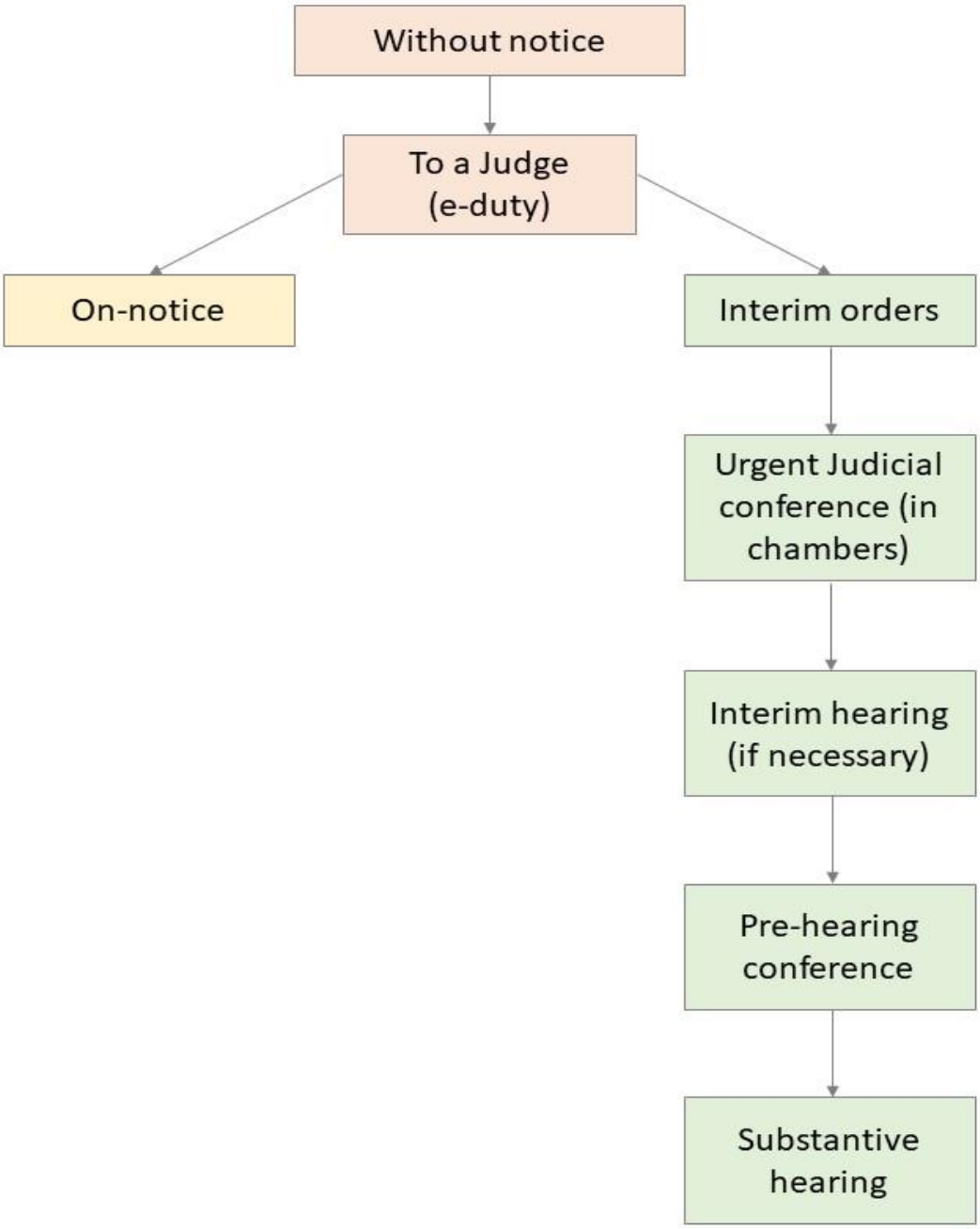
Kathryn Beck
President

Appendix 1: diagram illustrating recommended family justice system steps

Appendix 2: Family Law Section information sheet on the role of lawyer for the child

Appendix 1: diagram illustrating recommended family justice system steps





For more information, refer to *Examination of the 2014 family justice reforms*, NZLS submission dated 12.11.18, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/128722/I-MOJ-Family-Court-Review-12-11-18.pdf, at Section H "A new model for the Court": paragraphs [157] – [181].

Appendix 2: Family Law Section information sheet on the role of lawyer for the child

Appointment of lawyer for the child

When there are proceedings in the Family Court that involve children, a lawyer for the child will often be appointed to represent a child or young person. This can be where:

- parents cannot agree who should have day-to-day care of, or contact with the child
- parents cannot agree on guardianship issues involving the child, for example, where the child should go to school
- where there are allegations of family violence or where family violence has occurred in the child's home
- where there are other care and protection issues affecting the child, for example, ill-treatment and/or abuse of the child

A judge decides whether a lawyer for child is appointed in each case.

The welfare and best interests of the child is the most important consideration of the Family Court in all proceedings that involve children.

Rights of children

The following guiding principles are relevant to the rights of children who are the subject of Family Court proceedings:

- a child has the right to be legally represented by an experienced and skilled lawyer
- a child must be given a reasonable opportunity to express his or her views
- the court must take into account any views expressed by a child
- a child has the right to information about the case in which he or she is involved, including information on the progress and outcome of that case

The role of a lawyer for child

The lawyer for the child's role is to:

- act for the child in the proceedings in a way that the lawyer considers is in the welfare and best interests of the child
- ensure that any views expressed by the child to the lawyer on matters affecting the child and relevant to the proceedings are communicated to the court
- assist the parties (usually the parents) to reach agreement on the matters in dispute if that is in the best interests of the child
- explain to the child any right of appeal against the judge's decision and any merits of appeal

This role is contained in section 9B of the Family Court Act 1980.

Each lawyer for child uses their professional expertise and judgement to undertake the role in a way that promotes the child's welfare and best interests.

The lawyer for the child files a report with the Family Court setting out the views expressed to the lawyer by the child. The child's views may not always accord with what a parent may think they might

be. The report may make suggestions for how the matter might be resolved or progressed. It is up to the judge to decide what emphasis should be given to a child's views.

Meeting with the child

The lawyer must meet with the child *unless* there are exceptional circumstances *and* a judge directs that it is not appropriate for the lawyer to meet with the child.

In most cases, the lawyer for the child will meet with the child (sometimes more than once) without either parent being at the meeting and, if appropriate, seek the child's views on matters that are relevant to the court proceedings. The lawyer for the child might meet the child at their home, school, at the lawyer's office or some other place that the child is most comfortable with. The child does not have to talk to the lawyer but most children like being able to talk to someone about what is happening.

What the child says to their lawyer is confidential. The lawyer cannot tell anyone else what the child said if the child does not want them to, except if the lawyer finds out the child or someone else may be unsafe.

Talking to other people

Sometimes, the lawyer for the child might meet with the parents to discuss matters with them or talk to other people, for example, members of the wider family, whānau, teachers, police or social workers. Who the lawyer talks to will depend on the facts of the case.

Meeting with the judge

Sometimes the judge will meet with the child to hear their wishes and views about their future. Usually, the meeting will only involve the judge, a court official, the child and the lawyer.

Safety issues

The safety of children is of paramount concern to the Family Court. If safety issues arise or are alleged at any stage of the proceedings, there are various strategies the court may use including:

- conditions in parenting orders;
- notifying Oranga Tamariki or the Police so that any ongoing risk to the child can be investigated;
- requests to Oranga Tamariki for reports and involvement; and
- lawyer for child can themselves notify Oranga Tamariki and/or the Police if they have concerns about a child's safety.

The judge's decision

The judge decides what emphasis should be given to the child's views but must take the child's views into account when making the decision. Sometimes the judge will not follow what the child says they want if the judge does not consider that is in the child's welfare and best interests.

Training and qualifications of lawyer for child

Lawyers for children are specially qualified. They must complete a specialised course run by senior lawyers and psychologists which covers topics on family violence, cultural issues, child development and talking with children. There are a number of criteria that are taken into consideration before a

lawyer is appointed to the ministry's lawyer for child list. Once lawyers are on this list, they are expected to undertake ongoing education to make sure they are up to date with the latest research and education.

How lawyer for the child is paid

The lawyer for the child's fees are paid by the government. When the case ends, the court must consider whether the parents should contribute to the cost. There is a presumption that parents will pay one-third each, but they can ask the court to excuse them from making a payment. Generally, any parent who is funded by legal aid will not need to pay. The fees are based on a rate significantly lower than that which the lawyer would charge on a private basis.

Problems involving lawyer for the child

Lawyers for children are subject to regulations by the Family Court and by the New Zealand Law Society. Any complaints about the lawyer for child are to be made in writing to the Family Court where the proceedings are held. The judge who is hearing the case will consider the complaint. Complaints are also able to be referred by the judge and the parties to the New Zealand Law Society's Lawyers Complaint Services.