NEW ZEALAND LAW SOCIETY

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Family Court (Supporting Children in Court) Legislation Bill 2020

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Submission on Family Court (Supporting Children in Court) Legislation Bill 2020

Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Family Court (Supporting Children in Court) Legislation Bill (**Bill**).

2. This submission was prepared by the Law Society's Family Law Section. The Family Law Section has existed as a group with voluntary membership since 1997 and represents the interests of approximately 1,100 family lawyers. Over half the Section's members have practised in the Family Court for more than 20 years, and many of these are experienced lawyers for children.

Executive summary

3. The Law Society and its Family Law Section endorse the objective of the Bill to enhance children's participation in decisions affecting their care and wellbeing, consistent with New Zealand's obligations under the United Nations Convention of the Rights of the Child. This aligns with an increasing international commitment to enhancing children's participation in private family law disputes.

4. However, careful consideration is needed to achieve the right balance between children being able to express views and participate in matters that affect them, and children being protected from being over-involved in acrimonious adult disputes and over-exposed to multiple professionals.

5. The Independent Panel's 2019 report on the family justice system recommended that research be undertaken into appropriate child participation models for Aotearoa New Zealand. It is highly unfortunate that this work has not been done. In the absence of research and the development of an agreed evidence-based model, proceeding with the Bill carries significant risks, including the risk of not achieving the fundamental objective of enhancing children's safe participation and wellbeing. The Law Society recommends the Bill is deferred until this work has been completed. If it were to proceed now, some drafting amendments are recommended to ensure clarity and consistency with other family law legislation.

6. In addition, this submission identifies two important matters not currently covered in the Bill: the absence of principles in the Family Dispute Resolution Act 2013 to guide children's participation in family dispute resolution mediation, and the absence of support (in the form of counselling) for children to participate.

7. The Law Society wishes to be heard.

Structure of the submission:

A. The 'voice of the child' – an overview

There are complex factors involved in determining if and when it is appropriate to ascertain children's views in family dispute resolution and court proceedings and, if so, how to do so. This section summarises some key considerations. This is important context for understanding the proposed reforms in the Bill.

B. The need for research on the appropriate model for Aotearoa New Zealand

Research on the appropriate model for children's participation is a priority if the Bill is to achieve its objectives. A proposed model should be developed, and critical and informed feedback obtained from key stakeholders before the model is finalised and enacted in legislation.

C. The role of lawyer for child in supporting children's participation

The primary way children participate in Family Court proceedings is through court-appointed lawyers for children. This is a statutory role that is central to facilitating children's participation in these proceedings and will therefore be central to helping achieve the Bill's objectives.

D. The 'voice of the child' in family disputes in New Zealand – current settings

The current settings provide the context for what the Bill is trying to achieve. It is a particular concern that currently there is considerable variation in how the child's voice is brought into out-of-court processes such as Family Dispute Resolution (**FDR**).

E. Analysis of the Bill and recommendations

The principle of enhancing the child's voice is supported. However, the fundamental difficulty with the Bill in its current form is that there is no agreed model for how that will work in practice in Aotearoa New Zealand. In the absence of research and development of an agreed evidence-based model, proceeding with the Bill carries significant risks, including the risk of not achieving the fundamental objective of enhancing children's safe participation and wellbeing. The Law Society recommends the Bill is deferred until that work has been completed. If it were to proceed now, some drafting amendments are recommended.

A. <u>The 'voice of the child' – an overview</u>

8. Children's participation and safety are significant considerations in parental disputes and Family Court proceedings. Children must have a voice in the process, as provided for in Article 12 of the United Nations Convention on the Rights of the Child (**UNCROC**). The Law Society's Family Law Section has advocated for many years for children's views to be heard and taken into account, supported by clear statutory mechanisms consistent with Article 12.

9. UNCROC introduced fundamental rights in international law for children's participation in legal proceedings. However, it did not address what amounts to best practice for children's participation in private law disputes. UNCROC is intended to be interpreted and applied in a manner most appropriate for each State Party signatory. This has resulted in a wide divergence internationally in the form children's participation takes in private law disputes.

10. Careful consideration is needed to enable the right balance between children being able to express views and participate in matters that affect them and protecting children from being over-involved in acrimonious adult disputes and over-exposed to multiple professionals. When children are over-involved, they feel responsible for decisions made about them. They do not want to be the decision-makers and it is important to ensure children do not find

themselves being held responsible by either parent for the outcome of the case – they should not be put in a position where they feel they are choosing between one parent or the other.[1]

11. Child participation could entail many things: for example, the child being served with court proceedings; the child's views elicited by a lawyer for the child about care arrangements or other matters; the child meeting with a judge; the child attending court hearings; and/or the child receiving feedback at the conclusion of a case. Any participation model also needs to preserve the child's right not to participate or provide views.[2]

12. There are competing views on whether children should physically participate in parts of the family justice system, such as FDR. A significant body of research shows that parental conflict and a child's exposure to that conflict can cause serious trauma and is one of the most damaging outcomes for children in terms of parental separation.

13. An additional concern is how to incorporate children's views when safety issues are present. These include factors such as family violence, parental substance abuse and mental health issues, which must be balanced carefully with the child's views, to protect the child.

14. It is now well recognised that the views of even very young children can provide important information for decision-making in parental disputes. It should also be noted, however, that a child's views about care or contact issues may not align with what is in their best interests, since they may lack the maturity to understand the competing factors. While children's competency to participate in proceedings needs to be facilitated and supported, children do not have the reasoning and decision-making capacity of adults.

15. For these reasons, it is essential comprehensive research is undertaken on the various models of child participation, here and in other jurisdictions, to identify the most appropriate model for Aotearoa New Zealand. An evidence-based model for children's participation and clear guidelines as to how, when and in what circumstances children are to be involved in this process, are vital if the Bill is to achieve its objective. It appears, however, that officials have not undertaken the research into children's participation in the family justice system that the Independent Panel recommended.

B. <u>The appropriate model for Aotearoa New Zealand?</u>

16. The final 2019 report of the Independent Panel examining the 2014 family justice reforms, *Te Korowai Ture ā-Whānau* (**Panel's report**) found that child-inclusive practice has developed in an ad hoc way, and there has been no resolution of critical issues relating to children's participation – such as how children might be involved, models for child-inclusive mediation, and appropriate professional development and experience requirements for practitioners working with children. Recommendation four of the Panel's report states:

> **Direct** the Ministry of Justice, in conjunction with relevant stakeholders, to undertake a stocktake of appropriate models for child participation, including at FDR as a priority. The stocktake should also include:

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1 Enhancing the participation of children and young people in family proceedings: Starting the debate, Voice of the Child subgroup, Family Justice Council Voice of Child Subgroup, United Kingdom, May 2008, paragraph 15.

2 Article 12, UNCROC.

a. consideration of key principles for children's participation, including requiring professionals to promote children's participation.

b. consideration of how children's views should be taken into account in cases where there is family violence.

c. development of a best-practice toolkit co-designed with children and young people.

17. The Law Society agrees with the Panel's recommendation that research is needed into appropriate models for children's safety and participation in the family justice system, consistent with New Zealand's obligations as an UNCROC signatory.

18. Lawyers for children are currently appointed to put children's views before the Family Court in family proceedings, and the Law Society is therefore a key stakeholder. The Ministry confirmed to the Law Society's Family Law Section on 9 February 2021 that it is only now in the initial planning stages of undertaking a stocktake of models for children's participation, as recommended by the Panel.

19. A proposed model for children's participation (including clear guidelines on how and when children are to be involved and in what circumstances) should be developed, and critical and informed feedback obtained from key stakeholders before the model is finalised and enacted in legislation. Until that research has been completed, the Law Society's view is that the Bill is premature and risks creating unsafe practices.

20. The Law Society encourages the Ministry to seek input from experts in this field, as it conducts research on the most appropriate model for Aotearoa New Zealand.[3] A summary of recent, highly relevant academic research is attached to this submission (**Appendix A**). In addition, cases currently before the courts regarding the extent of children's participation in Family Court proceedings illustrate the significant complexities involved in this area (**Appendix B**). Consultation with professionals in the field, including psychologists and lawyers for children, will be essential.

21. The model should be flexible, allowing the participation of children in appropriate cases and allowing a lawyer for child to carry out their statutory duty to put the child's views (as expressed by the child to the lawyer) before the Family Court and to advocate an outcome in the child's best interests. The current statutory direction that the lawyer must act for the child in a way the lawyer considers promotes the child's welfare and best interests, provides a useful discretion to ensure the child's participation can be appropriately tailored to his or her own unique circumstances. Strengthening the current model of children having court-appointed counsel would ensure that New Zealand remains at the forefront of best practice regarding child participation.

22. The proposed model will also need to include tikanga principles for the participation of Māori children and culturally appropriate principles for children of other cultures, together with how children with physical and/or intellectual disabilities are to participate.

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[3] For example, Dr Suzanne Blackwell, Professor Fred Seymour and Dr Jan Pryor, all highly regarded psychologists with significant experience in working with families and children in the family justice system. Professional bodies such as the New Zealand Psychologists Board also have relevant expertise in appropriate models of children's participation in the context of parental disputes.

C. The role of lawyer for child

23. New Zealand is recognised internationally as a leader in providing for the independent representation of children by lawyer for child, in compliance with its UNCROC obligations.

24. The role of lawyer for the child, in section 9B of the Family Court Act 1980, is to advocate an outcome in the welfare and best interests of the child informed by the child's views and to ensure that any views expressed by the child to the lawyer that are relevant to the proceedings are communicated to the Court. The reporting of children's views early in the process can assist parents to resolve matters and achieve better outcomes for children.

25. Some of the recent discussion by the Independent Panel and others indicates there may be a degree of misunderstanding about the role of lawyers for children. We briefly address these below.

(a) Variation in practice of lawyers for children

The Panel's report noted that some lawyers for children "have inconsistent practices".[4] However, variation is appropriate and is in line with current social science research and advocacy for children in other international jurisdictions. The way in which a lawyer for child undertakes their role will vary according to the age of the child and the types of issues present in a specific parenting dispute. The nature and diversity of family life requires an individualised approach to working out future childcare arrangements. A "one size fits all" approach has been rejected in a number of other jurisdictions as being out of step with the welfare and best interests of children.[5]

Social science research confirms that there is no simple answer as to which parenting arrangements are best following separation. It all depends "on the child, the parents, and how the parents treat each other and their children ... what works for a child at one age may be harmful to the same child at another developmental stage. One size can never fit for all children or all families. What matters is the mental health of the parents, the quality of the parent/child relationship, the degree of open hostility versus cooperation between the parents, plus the age, temperament and flexibility of the child."[6]

(b) Children's voices are not sufficiently heard or advocated for

The Panel's report states that "consultations, submissions and research have established that ... children's voices are not sufficiently heard or advocated for."[7] This statement appears to follow one of the key findings in the UMR Research – that "children and young people appreciate being asked for their views but when they feel these are ignored, this can undermine their trust and make them feel powerless."[8]

The role of lawyer for the child involves a balance of obtaining views and putting those views before the Court, while at the same time advocating for an outcome in the best interests of

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4 Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, paragraph 280.

5 The role of lawyer for the child, Garry Collin, FLS Symposium, June 2011, Review of the Family Court, page 98.

6 Joan Kelly, Current research of children's post-divorce adjustment, no simple answers (1993) 31 Family and Consolidation Courts Review, 29-47.

7 Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, paragraph 280.

8 UMR Research, "A qualitative study on behalf of the Independent Panel examining the 2014 family justice system reforms, main report, April 2019, paragraph 7.3.

the child (a statutory duty under section 9B of the Family Court Act 1980). This will sometimes mean that what is in a child's best interests does not align with what a child wants. (For example, the child may wish to live with a parent who has a serious substance addiction. If the outcome of the proceedings is different to the child's wishes, the child may feel they have not been heard.)

Strengthening the role and obligations of lawyer for the child

26. The Regulatory Impact Statement for the Bill states at page 8 that "the Ministry will produce guidelines to implement the requirements for the lawyer for child to explain the proceedings to children". The Law Society is the statutory regulator of lawyers and issues guidelines on best practice where needed. The Law Society's Family Law Section has for many years had best practice guidelines in place for lawyers for children, and these guidelines are regularly updated in close consultation with senior lawyers for children and the Principal Family Court Judge. (Other aspects of the role that directly relate to the relationship between the lawyer and the Family Court are properly the subject of a practice note issued by the Principal Family Court Judge.)

27. Very recently, the Family Law Section has done substantial work in conjunction with the Principal Family Court Judge to strengthen both the best practice guidelines and the Court's practice note in respect of the role of lawyer for the child. The main changes to the practice note and best practice guidelines (reissued on 24 June 2020) include:

    (a) Mandatory and ongoing Continuing Professional Development (**CPD**) and professional supervision requirements.

    (b) A greater obligation on lawyer for child to provide more information on CPD and supervision when they are interviewed by the Panel at the three-yearly review, including a focus on upskilling in areas such as cultural competency.

    (c) The requirement for all lawyers for children to have a mentor for the first 12 months following their appointment to the Ministry's list.

    (d) New provisions relating to the suspension and/or removal of lawyer for child from the Ministry's approved list, including the ability of the Panel to consider urgent interim suspension if justified.

    (e) Ongoing obligations to disclose information to the Principal Family Court Judge of details of any Police investigation to which the lawyer for the child is subject.

D. <u>The 'voice of the child' in family disputes in New Zealand – current settings</u>

28. By ratifying UNCROC in 1993, New Zealand accepted the legal obligation to give effect to minimum standards for children's rights in the family justice system. Currently there are legislative and other provisions for children to participate, both directly and indirectly, in in-court proceedings and out-of-court processes such as Family Dispute Resolution mediation.

In-court

29. In Care of Children Act 2004 (**COCA**) proceedings, section 6 provides that the child must be given reasonable opportunities to express views on matters affecting them and that any views the child expresses, either directly or through a representative, must be taken into account. This mainly occurs through the appointment of lawyer for the child. The lawyer for the child

can also advise the Court if they consider it appropriate for the child to meet the judge, thereby enabling direct participation by the child.

Out of court

30. The Family Dispute Resolution Act 2013 (**FDR Act**) introduced family dispute resolution (**FDR**) mediation to assist parents to reach agreement about care arrangements for children following parental separation without the need to apply to the Family Court. FDR is mandatory before court proceedings can be filed, unless one of the exceptions applies (e.g., family violence or urgency).

31. The FDR Act is currently silent about how children's views are brought to the FDR mediation: there is no provision for the child's voice to be ascertained, expressed or given any weight or for a child to be represented at FDR. This does not support the UNCROC Article 12 right. It is also doubtful how FDR mediators are able to fulfil their statutory obligation to assist the parties to reach an agreement "that best serves the welfare and best interests of all children involved in the dispute,"[9] in the absence of information about the child's views (other than those articulated by the parties).

32. Parties may not be able to articulate a child's views because of their own psychological distress, lack of foresight or understanding or the existence of power imbalance. Parents' understanding of the child's views may be incorrect, as the child will often want to please the parent who is asking them about their views. Often, each parent presents the child's views to lawyer for the child (as reported to them) which accord with that parent's position. Each parent will be sure that the child has accurately and truthfully represented to them what their views are. The child is bound by loyalty to both primary attachment figures and therefore a parent presenting the child's views or preferences runs the risk that the views are not correctly represented. In the course of eliciting the child's views, the child has been placed in an emotionally untenable situation.

33. The FDR mediator is provided with no evidence, sworn or otherwise. They are unable to access records from the Police or welfare agencies. There is no triangulation of data or specialist reports, and no lawyer or other advocate for the child.

34. The current FDR model is in direct contrast to the mediation model available in the Family Court prior to the 2014 changes to the family justice system, where a lawyer for child was appointed to attend mediation to represent the child's views. The lawyer for child brought a range of salient information to the meeting about the child's best interests and welfare as well as the child's views.

35. Some FDR mediators currently offer a child-inclusive model of FDR. However, the current involvement of children in FDR is on an ad hoc basis and has no statutory guidance, with each supplier creating its own model of child participation. The absence of a requirement for the child to consent (or not) to attend FDR and of any legislative protection for the child are additional concerns.

36. The right to natural justice requires that children be given the right to be heard at, and otherwise effectively participate in, proceedings affecting them. This includes the right to be heard in the FDR process. Depending on the facts of the case, the effective exercise of this right may require that they have separate legal representation (Article 12(1) and (2)).

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[9] See section 11(2)(c) of the Family Dispute Resolution Act 2013.

37. In September 2016, the United Nations Committee on the Rights of the Child recommended to the New Zealand government that the FDR Act be amended to ensure the right of the child to be heard. The current practice used to obtain a child's view for FDR is not a practice mandated by Article 12 of the Convention. The Ministry of Justice issued guidelines to FDR suppliers in December 2016 (and updated them in July 2018) presumably in response to the UN recommendation, but the guidelines are problematic in a number of areas:

    a. The practice of obtaining a child's views in the FDR process is not universal amongst suppliers and in some cases, children's views are not obtained even where a child is able to express a view. Listening to what parents might say about their children's views in disputed Care of Children Act cases can be unreliable.

    b. The guidelines acknowledge there are different models of incorporating a child's view, including interviewing the child separately, having the child's thoughts communicated back to the parents or having the child's representative present during the mediation. The guidelines suggest that if the FDR provider "does not seek direct input from the child, the supplier must ensure they have suitably qualified and experienced FDR providers, or some other qualified professional, competent in capturing the child's voice, to deliver their model."

    c. Some suppliers, such as Fairway and Family Works, use a voice of child specialist (**VOCS**). The VOCS is required to present the child's views only and is not able to advise on how those views may intersect with the child's best interests.

    d. Children's views should be ascertained independently from the FDR provider. A trained mediator or FDR provider is not necessarily qualified to seek the views of children – they may not have specific training in interviewing children or in basic aspects of child development, as lawyers for children do as part of their core training. The guidelines are unclear in referring to "some other qualified professional".

    e. Some FDR processes are using a child-inclusive model whereby the child attends the mediation. While in limited circumstances attendance might be appropriate and beneficial for older children, for younger children it is unwise, as it directly involves the child in the dispute. The safer way is not to have any children attending FDR until a considered and appropriate child participation model has been established.

    f. If FDR does not resolve matters and the parties require the Court's assistance, it is highly likely the Court will appoint a lawyer for child. This means the child will need to meet another professional who is asking them (again) about their views. Over-involving children in adult disputes and over-exposing them to multiple professionals runs the risk of system abuse of children.

E. <u>The Bill: analysis and recommendations</u>

PART 1: Amendments to the Care of Children Act 2004

Clause 4 – Section 5 amended (Principles relating to child's welfare and best interests)

38. Clause 4 amends section 5 by inserting a new principle in section 5(g) – that a child should be given reasonable opportunities to participate in decisions affecting their care and welfare and that, commensurate with their age and maturity, their views should be taken into account.

39. The Law Society is concerned about the inclusion of the phrase "commensurate with their age and maturity, their views should be taken into account". The age and maturity qualifiers contained in the Guardianship Act 1968 were removed when the Care of Children Act 2004 (**COCA**) was introduced. This is because they reinforced an outdated impression that children develop along similar developmental trajectories and failed to take into account sociocultural considerations and that children's competence is not necessarily associated with age. That limiting condition also fails to take into account that children's participation can be enhanced with appropriately scaffolded support, and in cases of children with learning or communication difficulties, with the aid of a communication assistant. Article 12 simply requires that the child's views are to be taken into account. The age and maturity component of Article 12 is associated with the due weight to be given to those views.

40. Lawyers for children must always meet with the child if it is appropriate to do so,[10] unless there are exceptional circumstances and a judge directs that it would be inappropriate.[11] When meeting with the child, the lawyer for child will make an assessment about how views can be ascertained and how much involvement of the child in the proceedings is in their best interests.

41. In the Law Society's view, new section 5(g) should be amended to reflect this. We also note the wording of section 5(1)(a) of the Oranga Tamariki Act 1989, that "a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account". To provide consistency across both statutes it would be preferable if this wording was replicated in new section 5(g) of COCA.

42. In terms of the age and maturity component, in our view that sits best in section 6 of COCA. A new section 6(2)(c) could be added that reads:

> *The views of the child must be given due weight, commensurate with their age, maturity and level of understanding".*

Recommendations:

43. That:

(a) new section 5(g) be deleted and replaced by the wording in section 5(1)(a) of the Oranga Tamariki Act 1989; and

(b) section 6 of COCA is amended by including a new section 6(2)(c) to read as suggested above.

Clause 6 – Section 6 amended (Child's views)

44. Clause 6 amends section 6 of COCA by inserting new section 6(1AAA) to make it clear that the purpose of section 6 is to implement Article 12 of UNCROC. In the Law Society's view, the Family Dispute Resolution Act 2013 (**FDR Act**) should also be amended to mirror new section 6(1AAA). This would provide legislative consistency in terms of giving effect in New Zealand to Article 12 of UNCROC in respect of parenting disputes, which may include attendance at FDR.

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10 See section 9B(2) of the Family Court Act 1980.

11 See section 9B(3) of the Family Court Act 1980.

Recommendation:

45. That the FDR Act is amended to mirror new section 6(1AAA), to provide legislative consistency in terms of giving effect in New Zealand to Article 12 of UNCROC in respect of parenting disputes.

Clause 8 – New section 7AA inserted (Lawyer appointed to represent child must explain proceedings to child)

46. Clause 8 inserts new section 7AA which states:

> *"A lawyer appointed under section 7 to represent a child must, if it is reasonably practicable to do so having regard to the age and maturity of the child, explain the **nature** of the proceedings to the child in a manner that the child is most likely to understand [emphasis added].*

47. The role of a lawyer appointed to represent a child or young person is contained in section 9B of the Family Court Act 1980. The FLS best practice guidelines contain detailed guidance on the lawyer for child role, seeking a child's views and communicating to the child about parental disputes or court proceedings affecting the child.

48. The main concern with this proposed amendment is the mandatory requirement for the lawyer to explain the "nature of the proceedings". Not all COCA proceedings are straightforward parenting disputes. The majority of parenting disputes that come before the Family Court are complex and often involve significant safety concerns for either a child, a parent or both.[12]

49. For example, a child may have limited contact with one parent or have been moved from a parent's primary care because of a parent's drug and alcohol abuse; use of family violence; or mental health issues. In these instances, a child's views will carry less weight because the welfare and best interests of a child dictate that safety is the governing principle.

50. This does not mean that the lawyer for child does not explain the proceedings to the child or that the child's views are not elicited: the lawyer must still seek the child's views and give the child information about the case. However, where significant safety concerns are present, this will always be undertaken in a careful way, but it may mean that the exact nature of the proceedings are not explained to the child. To illustrate the point, a common explanation may be:

> *"Mum and Dad cannot agree on the amount of time you should spend with each of them, so they have asked the judge to decide that for them. My job is to make sure that Mum and Dad and the judge have heard what you think about things. Your views are one of the things they need to consider."*

51. The explanation will not include, for example, one parent's prevalent use of methamphetamine that makes them violent towards the other parent and/or the child so one parent may only have supervised access to a child; or the inability for a parent to care for the child because of significant mental health issues. The explanation will be tailored to the

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[12] The legal threshold for filing without notice in COCA proceedings is that "the delay that would be caused by making the application on notice would or might entail serious injury or undue hardship, or risk to the personal safety of the applicant or any child of the applicant's family or both": see section 24(2)(a)(i) of the Care of Children Act 2004 and rule 220(2)(a)(ii) of the Family Court Rules 2002.

specific circumstances of the child within their family environment at a particular point in time.

52. Another example might be where a child has witnessed significant family violence. The lawyer for child may talk to the child about the lawyer's concerns (depending on the understanding of the child) about the violence and the negative impact on the child and the other parent. The lawyer might explain that the violent parent needs to learn better ways of communicating so that the child is safe when they have contact with that parent but in the meantime another adult needs to be there when the child has contact with the violent parent.

53. The Law Society recommends that clause 8 should be amended by replacing the words "explain the nature of the proceedings" with the words "give the child appropriate information about the proceedings of which the child is the subject". It is important the information given assists the child to understand what is happening and why and what steps are needed before things can be resolved, without further traumatising the child with detailed information about the "nature" of the dispute.

54. That amendment would preserve the discretion necessary for lawyers for children to assist the children they act for, without over-involving them in acrimonious adult disputes.

55. For consistency, if the Law Society's recommendation in relation to clause 4 is adopted, the words "age and maturity of the child" in clause 8 should also be amended to "age, maturity and level of understanding of the child".

Recommendations:

56. That clause 8 is amended by replacing the words:

    a. "explain the nature of the proceedings" with the words "give the child appropriate information about the proceedings of which the child is the subject".

    b. "age and maturity of the child" with the words "age, maturity and level of understanding of the child".

Clause 9 – Section 7B amended (Duties of lawyer when giving advice)

57. Clause 9 inserts new section 7B(2) which imposes a new duty on lawyers that before commencing a proceeding, a lawyer must take any steps that, in the lawyer's opinion, will promote conciliation and will enable the issues in dispute "to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice".

Promoting conciliation

58. In the Law Society's view, it is unnecessary to include a duty to promote conciliation in the Bill, as there already is a duty on lawyers to promote conciliation by virtue of section 9A of the Family Court Act 1980.

59. Section 9A states:

> (1) A lawyer acting for a party in any proceeding in the Family Court must, so far as possible, promote conciliation.
>
> (2) In subsection (1), *party* includes a proposed party.[13]

60. Repeating this duty, using slightly different words, carries a risk of competing interpretations.

[13] The definition of "party" in section 9A(2) makes it clear that the duty includes pre-proceedings.

61. It is also important to note that a duty to promote conciliation cannot override the welfare and best interests of children where there are safety concerns. Where there are safety concerns, a court determination about safety is required and conciliation is not always possible. In addition, it would not usually be appropriate for parties to engage in out of court resolution processes in cases where there are significant power imbalances, substance abuse issues, mental health issues or family violence issues.

62. If new section 7B(2) is to be retained, the wording should reflect section 9A(2) of the Family Court Act. New section 7B(2) should read:

> *Before commencing a proceeding under this Act, a lawyer must, so far as possible –*
>
> *(a) promote conciliation; and*
>
> *(b) enable the issues in the dispute to be resolved as fairly, inexpensively, simply, and speedily as is consistent with justice.*

Recommendations:

63. That:

    a. Clause 9 is deleted.

    b. If clause 9 is retained new section 7B(2) should read as set out above.

PART 2: Amendment to the Family Dispute Resolution Act 2013

Clause 11 – Section 11 amended (Duties of FDR providers)

64. Clause 11 amends section 11 to propose a new duty on FDR providers to *"facilitate the participation in those discussions of the children involved in the dispute to the extent (if any) that the FDR provider considers appropriate"* [emphasis added]. The clause as currently drafted is unclear in a number of respects:

    a. *children involved in the dispute*

65. Clause 8 contains the phrase "… children *involved* in the dispute". Children are not parties to the dispute – they are the subject of the dispute or proceedings, as is correctly described in the explanatory note to the Bill. The Law Society **recommends** the clause is amended to replace "involved in" with "affected by".

    b. *facilitate participation*

66. Based on the current drafting it is unclear whether Parliament intends that children will physically attend FDR with their parents to "participate" in those discussions. As discussed earlier, the Law Society agrees that the child's voice must be heard in the FDR process, but there are competing views on whether children should physically participate in parts of the family justice system such as FDR. The Panel recommended that officials "undertake a stocktake of appropriate models for child participation, including at FDR as a priority".

67. The Law Society is one of the current four Alternative Dispute Resolution Organisations who appoint FDR providers and is therefore a key stakeholder who would expect to be consulted on appropriate models for children's participation in FDR. The importance of undertaking comprehensive research and identifying the most appropriate model for New Zealand cannot be overemphasised. Lawyers and others involved in the FDR context need to have clear guidelines about how and when children are to be involved in this process.

68. It is also unclear how and when a child's participation is to be "facilitated". It may be that both parties agree for a child's views to be sought, or that the child should "participate", yet the FDR provider may not consider that appropriate for a number of reasons. What if both parties do not want the child participating but the FDR provider considers it appropriate? Or one party agrees, and one party does not agree? What if the child does not want to express a view? There is no obligation on a child to express a view. Children must be given a reasonable opportunity to express a view pursuant to section 6(2) of COCA and a child has a right to freely express their view in all matters affecting them and provided an opportunity to be heard (Article 12(1) and (2) of UNCROC). This means that children should not be forced to participate if they choose not to do so.

c. *If it is not intended that children physically attend mediation*

69. If it is not intended that children physically attend and participate in the FDR mediation, it is unclear what "participation" entails. As mentioned above, clear guidance is needed as to the level of participation required and how it will be facilitated, particularly in FDR, to ensure that the child is protected against over-involvement and there is consistent practice amongst FDR providers.

d. Onus on FDR provider

70. Clause 11 places the onus of the FDR *provider*, rather than the FDR *supplier*, to facilitate the participation of children in the mediation process. In the Law Society's view the statutory duty has been placed on the wrong party. It **recommends** that the duty be on the FDR *supplier* rather than the *provider*. This is because of the current statutory scheme for FDR, and contractual arrangements between the different statutory actors. Clause 11 as currently drafted is inconsistent with these settings and will not work in practice. In particular, it will exacerbate the current wide divergence in practice in relation to how the child's voice is 'heard' in FDR.

71. Currently, the Ministry contracts directly with several FDR suppliers who in turn contract with individual FDR providers. The Ministry's current operational guidelines state (at page 11) that a supplier must have in place a system to ensure that the child's voice (views) is represented at the mediation. Suppliers must have their model approved by the Ministry before it is implemented, and if the model seeks direct input from a child, the supplier must ensure that a suitably qualified person is engaged to seek that input.

72. Some suppliers, such as Fairway Resolution and Family Works, already include child participation in their model of mediation. These "voice of child specialists" are generally experienced lawyers for children or other experienced professionals qualified to work with children. The parties to the mediation complete an agreement to appoint a VOCS, which sets out their role and the process. The VOCS meets with the child to get the child's views and bring those views to the mediation. It is not mandatory, however, and some parents choose not to have their child consulted. In addition, a child may not want to be involved and in accordance with Article 12 of UNCROC, they are not obligated to provide views.

73. The onus should remain on the supplier not the individual provider to facilitate a child's voice in FDR. A provider does not contract directly with the Ministry but with an individual supplier, who is bound by the Ministry contract they hold. A provider must follow their supplier's guidelines about the mediation process, which includes ensuring children's participation according to whichever model of child participation has been mandated by that supplier and approved by the Ministry.

74. As already noted, mediators are not necessarily qualified to seek children's views. If a mediator is qualified to seek children's views and they do meet with the child, they run the risk of compromising their impartiality with the parties, particularly if the child's view does not accord with one (or both) of the parents. As noted above, an FDR supplier's model must be approved by the Ministry before it is implemented. By putting the onus on the FDR provider to facilitate a child's participation, this might mean that each individual FDR provider's "model" requires Ministry approval.

75. In addition, it is unclear how an FDR provider is to make the determination that it is appropriate for a particular child to participate in a mediation. They are likely to have very limited information about the child and, as mentioned above, are not necessarily qualified to make that decision or to seek children's views.

76. It is also difficult to see how children's participation, including physical attendance at an FDR mediation, can be easily implemented by an FDR provider in the existing timeframe and remuneration allocated to conduct the FDR mediation.

Matters that are recommended for inclusion in the Bill

Principles needed for the FDR Act

77. The only references to the welfare and best interests of children in the current FDR Act are in section 4 under the definition of "family dispute resolution". Under section 11(2)(c) one of the duties of an FDR provider is to "assist the parties to reach an agreement on the resolution of those matters that best serves the welfare and best interests of all children involved in the dispute".

78. Clause 11 of the Bill includes a duty on the FDR provider to facilitate the participation of children in discussions about their care to the extent (if any) that the FDR provider considers appropriate. If children's participation is to be included in the FDR Act, the Law Society is concerned about the lack of reference to the relevant principles in COCA relating to the child's welfare and best interests and the child's views. In the Law Society's view, the FDR Act should be amended to include reference to sections 5 and 6 of COCA.

Recommendation:

79. That the FDR Act is amended to include reference to sections 5 and 6 of COCA.

Counselling for children

80. It is disappointing the Bill does not include provision for counselling for children, which would provide support to them throughout the process of resolving parenting disputes affecting them. The Bill's explanatory note indicates the focus is on enhancing children's participation in proceedings that affect them. Providing counselling for children would be a meaningful and logical way to provide the support they need to participate in proceedings.

81. An article titled, "Children's Participation in Family Actions – Probing Compliance with Children's Rights" (Morrison, Tisdall, Warburton, Reed & Jones) raised a concern that children going through the Family Court need support and that support was not available, with the consequential anxiety that arises for children "in the event of their having expressed views in a vacuum". Typically, once a child views are obtained, the child's involvement with the court ends. There are no other mechanisms to provide children with information about legal processes, decisions made by a judge or an explanation of the influence that the child's views

as expressed may have had on the decision made. In Aotearoa New Zealand, lawyers for children must advise the child of the Court's decision and advise them of their appeal rights, however this does not always happen in practice when resolution has been reached by means other than a judge making a decision. (For example, many resolutions are reached at round table meetings convened by the lawyer for the child.)

82. It would be in the spirit of the Bill for section 46G of COCA to be amended, to require that counselling be provided to children, to support them through the parenting dispute (in both in and out of court processes) and to encourage compliance with any court direction or order relating to the child's welfare.

Recommendation:

83. That section 46G of COCA is amended to provide counselling to children to both support them through the process of a parenting dispute, both in and out of court processes and in terms of encouraging compliance with any direction or order of the court in matters that impact on a child's welfare.

Herman Visagie
Vice President

25 February 2021

Attachments

Appendix A: Children's participation – research on models in family justice systems

Appendix B: High Court cases relevant to child participation

Appendix A: Children's participation – research on models in family justice systems

The 2019 thesis "Children's Participation in the Context of Private Law Disputes in the New Zealand Family Justice System" (thesis) by Deborah Inder discusses in depth the theoretical underpinnings of children's participation and identifies how these contribute to developing a framework for children's participation in the family justice system. There is also a plethora of peer-reviewed research evaluating child participation models and child participation studies to consider what may work best in Aotearoa New Zealand.

Chapter Five of the thesis undertakes an international comparison of children's participation and highlights various ways children can participate in family law disputes in both out-of-court and in-court processes. Despite significant diversity amongst the jurisdictions, the comparison confirms an increasing international commitment to enhancing children's participation in private family law disputes.

Each child participation process has its own strengths and weaknesses. This chapter highlights a number of important issues for consideration in the establishment of any model. These include:

- the evident gap between the principle and practice of children's participation.
- barriers to children's participation including prevailing attitudes of professionals and parents and unsupportive legal processes.
- the lack of procedural consideration given to the timing of children's participation.
- the need for further research to examine the effectiveness of existing processes and the extent to which they benefit children and adults and enable effective and meaningful participation for children.
- exploring new ways of participation for children, informed by children's views.
- the need for an established template model for children's participation to ensure the practice of children's participation accurately and effectively reflects the principles of Article 12 and confirms a minimum standard for children's participation.

A "Seven Essential Steps" model has been designed to identify the crucial components required for any child participation model to illustrate how children and adults can engage and interact to ensure effective child participation that encapsulates the essential elements of Article 12 and is UNCROC compliant.

As noted, the Ministry will need to undertake its own research on children's participation and develop a model that is appropriate to New Zealand family law disputes, including how Māori children and children of other cultures are able to participate in a way that aligns with their cultural beliefs and practices.

Appendix B: High Court cases relevant to children's participation in family dispute proceedings

As noted above, there are two current proceedings before the High Court (one of which is now in the process of being appealed to the Court of Appeal), and the outcome of these cases may have significant implications as to the extent of children's participation in Family Court proceedings.

A series of recent High Court decisions have focussed on whether the views of children are required to be ascertained before the Family Court has jurisdiction to direct a section 133 psychologist's report in proceedings under the Care of Children Act 2004 (**COCA**).

In the substantive proceeding, a maternal grandmother applied to the court for contact with her grandchildren following the death of their mother. Prior to their mother's death, both children suffered from attention deficit disorder and anxiety exacerbated by their mother's death and were under the care of a psychotherapist and paediatrician. The proceeding came before a judge in the Family Court by way of a directions conference. At that time, the children's court-appointed lawyer had not yet met the children because of concerns raised about their emotional wellbeing. In her memorandum to the court, the children's lawyer had indicated that a section 133 report should be considered. The judge proceeded to direct a section 133 report and provided a brief for the report.

The father applied to the High Court for a judicial review of the judge's decision, on the basis of the failure to address the mandatory considerations under section 133(6) and (7). The father argued that the court had failed to take into account that the children's views should be ascertained about whether a psychological report should be obtained. The Law Society intervened in these proceedings due to the significant implications the outcome of these proceedings may have on the role of lawyer for child and the impact on children involved in Family Court proceedings.

The father argued that until the children's lawyer had spoken to both the children's doctor and to the children themselves, it was premature to direct that a section 133 report, particularly as the children were being treated for anxiety. Justice Courtenay agreed, and held that[14]:

> "*it is difficult to see how the Court could have been satisfied that a Psychological report was essential for the proper disposition of the application without knowing what* [the paediatrician] *had to say*".

Significantly, the judge added[15]:

> "*Nor have the views of the children been taken into account in making the decision that a Section 133 report was required,* ***as required by Section 133(7)****. The children are of an age where it would be usual to seek their views and incorporate those views into the decision making process. That is a task that fell to lawyer for the children and could be obtained prior to a decision being made about a Section 133 report*". [emphasis added]

Justice Courtney remitted the matter back to the Family Court for further consideration. The matter came before a different Family Court judge, who after consideration delivered a judgment in which he found that the children's views did not need to be ascertained before a section 133 report could be commissioned. The reasons given were:

a. children are not "parties" for the purposes of section 133(7) – that subsection requiring the court to "have regard to the parties' wishes" before obtaining a section 133 report.

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14 *AA the Family Court at Auckland* [2018] NZHC 1638, at [32].

15 *AA the Family Court at Auckland* [2018] NZHC 1638, at [33].

b. obtaining a psychologist's report is not "a matter affecting the child" under section 6 of COCA, but rather a procedural matter.

c. the obtaining of a report falls under the "best interest considerations" that the lawyer for child is able to decide under section 9B of the Family Court Act 1980.

d. it would be circular if children's views opposing the psychologist's report were to be taken into account in light of the risk that children providing their views will be open to manipulation.

e. the judge considered Justice Courtney's decision noting the views of the children as pre-requisites to obtaining a section 133 report were obiter.

The proceeding was again taken to the High Court on judicial review. In that review, Justice Duffy held that the Family Court judge was required to act consistently with the reasoning of Justice Courtney and in accordance with her findings on fact and law, and that it was not open to the judge to disregard the reasoning of Justice Courtney on the need to obtain the views of the children before a section 133 report was ordered.

The applicants have now filed proceedings in the Court of Appeal against the decision of Justice Duffy. The central issue in the statement of claim in those proceedings is that children's views should be obtained before the court is asked to seek a psychological report and before that report is obtained. Crown Law have filed a cross-appeal seeking the appeal of the original High Court decision of Justice Courtney, and it has sought leave to appeal out of time.

The outcome of the Court of Appeal proceedings may mean that consideration should be given to the effect of obtaining, or not obtaining, the child's views in respect of other procedural matters, for example, the obtaining of a section 132 report, or consenting to an adjournment of proceedings and other matters such as the content of lawyer for child reports to the court.

In addition, the Law Society is aware of another Family Court proceeding where the issue in dispute is whether or not the child's views should be obtained before seeking the direction of the court in the making of a temporary protection order. This matter is now being heard via judicial review in the High Court on 12 February 2021.

The outcome of both matters may have significant ramifications for both the role of lawyer for child and the extent to which children "participate" in future Family Court proceedings. This will undoubtedly have a bearing on any future model of children's participation in New Zealand.