What is being done? Update – 2011 Family Court Reform – Part One

By Maria Kazmierow, barrister and mediator

The National Party-led Family Court Review has progressed since my initial article in Family Files, "What is to be done? Update – 2011 Family Court Reform" (*NZLawyer*, issue 168, 9 September 2011).

On 20 September 2011, the public consultation process commenced. The Ministry of Justice released *Reviewing the Family Court – A Public Consultation Paper* (Paper). It is a hefty but easily digestible document, amounting to 92 pages, and two addendums – *Reviewing the Family Court – A Summary* and *Reviewing the Family Court – Case File Sample*. This article will form part one of a two-part examination of the public consultation document for Family Court reforms.

As part of the National Government's advance in progressing reform, the membership of the consultative group (now entitled "Reference Group") has been named. They are:

Judge Vivienne Ullrich, Wellington District Court Judge
Jo Ann Vivian, Aotearoa New Zealand Association of Social Workers
Antony Mahon, New Zealand Law Society (NZLS) Family Law Section Chair
Professor Fred Seymour, University of Auckland, Professor of Psychology
Dr Suzanne Blackwell, Clinical Psychologist
Deborah Clapshaw, Dispute Resolution Mediator
Jonathan Loan, President of the New Zealand Association of Counsellors
Garry Collin, Acting Deputy Chair, NZLS Family Law Section.

Principal Family Court Judge Boshier has previously indicated this group will meet regularly to formulate advice, and also with Ministry of Justice officials in order to impart their advice as representatives of key stakeholders in the Family Court.

This article will pick up where its predecessor left of – at stage 4, public consultation.

STAGE 4: Public consultation

The Ministry has invited interested parties and stakeholders to have their say (at 67). The closing date for submissions remains 29 February 2012, despite the tight time frame presented by the RWC, the General Election, and the Christmas/summer holiday period. Submitters are encouraged to give their views on the 33 questions in the paper (see page 68), and to raise any further issues.

Given the scope of the reform proposed and the underlying drivers, "having a say" now is timely. Those with an interest in the Family Court and its future should read the questions and the Paper now, and make submissions collectively through the professional bodies they belong to (Family Law Section, ADLS Family Law committee, other professional bodies representing stakeholders), or personally as appropriate.

The review covers the following chapters or themes:

- A Court Under Pressure – Chapter 2;
- The Changing Family Court – Chapter 3;
- Focusing on Children – Chapter 4;
- Supporting Self-Resolution – Chapter 5;
- Focusing on alternative dispute resolution (ADR) services – Chapter 6;
- Entering the Court – Chapter 7;
- Pathways and Processes in the Court – Chapter 8.

Chapter 2: A Court under pressure

Costs and sustainability are the core of the revie and are the opening salvo of the substantive pa the review.

Unsustainable rises in costs?

The review targets what it states is an unsustain rise in costs since 2004-5 (since the commencer of the *Care of Children Act* 2004).

The review baldly states "Family Court costs" increased 63 per cent between 2004 to (presum today. What are Family Court costs? The definiti direct operational costs, professional services, a legal aid.

The only (limited) breakdown of Family Cour costs that is provided to substantiate the claim a 63 per cent increase is a graph in the following chapter (figure 4, page 20). It shows the largest increase in Family Court costs is legal aid, at a 9 per cent increase. Reform of legal aid (and its co is presently being dealt with as part of a separa government review of legal aid. Given that lega aid appears to form the biggest cost increase, it inclusion in this review motivated by Family Co costs could be regarded as creating a statistical distortion of Family Court "increased costs", to validate fiscal reform of the Family Court.

Additionally, "judicial costs" are said to have increased by 49 per cent (presumably over this time). This "includes Judges' salaries and allowa Again, no substantiating evidence (specific figu provided, and there is no identification of what is included in calculating the percentage.

The rise in costs is blamed (at [54]) on: growt in professional services payment rates; changes legal aid payment rates and eligibility; increase in remuneration for court staff and the judiciary

increases in requests for counselling; more appointments of professionals by the Courts; a widening in the scope of work undertaken; and an increasing number of events to dispose of similar applications over time.

Given this, a specific apportionment of these cost increases would more accurately inform public discussion and better target analysis for improvement on a costs-benefits analysis. It appears to be a fundamental omission.

The reform agenda paints costs rises as fiscally and qualitatively unsustainable, by linking this to performance. That is, delay in clearance rates of Family Court cases relative to increases in cases does not support the purported increase in Family Court and judicial costs. There would appear to be a lack of correlative financial data to evidence this in this public discussion document.

Costs and ideology

Ideology is brought into the mix, when examining the apparently underperforming and costly Family Court.

The role of the State in resolving (and funding resolution of) family disputes is a key focus. What should the State 'cross off' its funding list? "Children and vulnerable adults" are apparently in the state protection zone. With all else, "there is less certainty".

Individual families (and their children) resolving their disputes themselves outside of the Family Court is flagged as appropriate, in the context of the Government's fiscal concerns and limiting the State's role in private family disputes. The chapter highlights themes explored in later chapters of the review:

1. Early ADR (non-court based) intervention to resolve disputes in the Family Court's jurisdiction (funding of this is not elaborated on), and keeping ADR out of the Court;
2. Reforming the Court's processes for those cases which are permitted to enter the Family Court litigation process to make them less confusing and less prone to delay;
3. Making the Family Court more culturally appropriate;
4. Upskilling professionals who practice in the Family Court (judges, lawyers, psychologists, social workers, counsellors, and mediators).

Chapter 3: The changing Family Court

The review highlights that the number of cases being dealt with by the Family Court has not varied greatly over the last six years, but costs have dramatically increased.

Care of Children Act 2004

A major culprit blamed in this chapter is the *Care of Children Act* (COCA), with a 24 per cent increase in applications, while other applications have "dipped". The review links this numerical increase to the increased costs, specifically professional services. Note the earlier concerns about a lack of statistical evidence in this article.

The evidence of increased professional costs is apparently a 62 per cent increase in professional services, without a breakdown of what that is comprised of. Who has increased this, what is the breakdown?

Is it Lawyer for the Child appointments, appointments of Counsel to Assist, mediators appointed as Counsel to Assist, counsellors appointed under a variety of statutory provisions, psychologists and psychiatrists providing reports to the Court, social workers providing reports to the Court, cultural report writers, some other professionals? Again, the lack of specific data undercuts the analysis provided, and fails to accurately inform public discussion and better target analysis for improvement on a costs-benefits analysis.

The review argues that as COCA cases make up "a large proportion of Court activity, therefore changes in their volume can significantly influence expenditure trends [and] ... increases in [COCA] case volumes impact disproportionately on professional services expenditure because they incur the highest average professional services costs of any case type". If this is the case, then the need for statistical clarity and specificity is all the more critical, and troubling by its absence.

The review argues that COCA cases by their volume and professional services usage lack efficiency – with delays in resolution of applications, with ripple effects on other non-COCA applications. The offenders here are adjournments sought, changes in legal representation and repeat litigation, and specialist report writers. The analysis here will need to be examined with care to ensu systematic analysis of delay and its rectification occurs.

Expanded Family Court jurisdiction

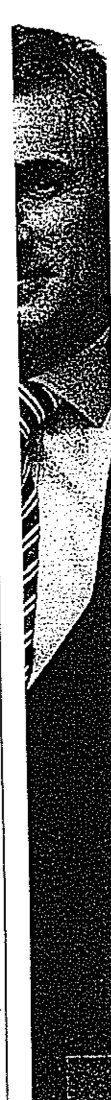
The review notes that the Family Court entered life in 1981 with eight Acts, currently has 23 Acts under its jurisdiction. The review argues that a cause the Family Court's issues of costs and delay is at least in part the engorging jurisdiction over 30 years. No statistical support was noted for this position review document.

Ironically, the review that recommended the existence of a Family Cour the *Report of the Royal Commission on the Courts 1978*, was highly informed fragmentation of jurisdiction of family-based disputes across courts prior t 1981, and the impact that had on the resolution of disputes in a timely wa That report squarely stated that "treating the family situation as a series of separate controversies may often not do justice to the whole or to the seve separate parts" (at 150). "An obvious reason why all family legal problems s be brought to the one court.... is to eliminate opportunities for harassmen cross filing of applications under different jurisdictions" (at 153).

The creation of the Family Court in 1981 enabled one Court to deal wit family's legal issues holistically, so that issues and families did not fall betw the cracks of multiple Courts. That was an important reason why a "one st court" was proposed, to simplify what was a complex and at times chaotic situation for families.

This review suggests a "back to the future" solution, by fragmenting th

continued o



your new career starts here...

Randstad Legal — Our knowledge, your talent
A combination you can trust.
Visit www.randstad.co.nz/legal

General Commercial Litigation **Auckland, 3+ Years P**

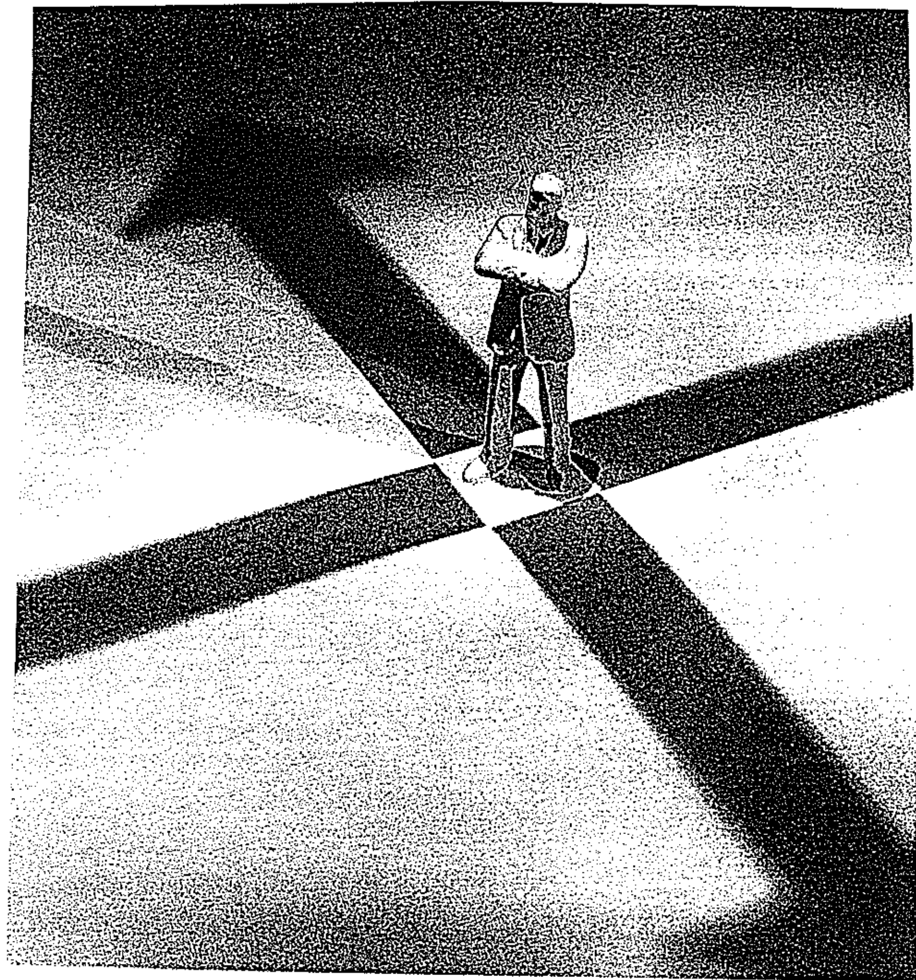
This firm has a culture rich in personality with a friendly group of individuals. Their busy team is seeking an enthusiastic Litigation Solicitor. Work on a wide variety of insurance and general commercial matters whilst maintaining a healthy work/life balance. **Ref: 313**
E: christina.kruger@randstad.co.nz T: (09) 368 1053

Litigation/Insolvency Litigation **Auckland, 3+ Years P**

We have several roles with leading top-tier commercial litigation practices with a strong insolvency slant. A chan to work with highly regarded partners in high performin collegial teams. A good litigation background, insolvenc experience desirable but not required. **Ref: 313**
E: mark.simpson@randstad.co.nz T: (09) 368 1050

Comm/Commercial Property **South Island, 5 Years P**

One of the leading South Island firms is seeking an ambitious and hardworking Solicitor to join their Commercial team. You will be exposed to challenging work and represent some of the South Island's leading corporates and entrepreneurs. **Ref: 31**
E: vaughn.summerton@randstad.co.nz T: (09) 336 0383



continued from page 11

Family Courts jurisdiction once more.

An option proposed is siphoning off relationship property, testamentary promises, family protection, and trust cases to the High Court, or some sort of hybrid arrangement (Family, District - Civil, or High Courts). Given the proliferation of trusts in family asset structures, aging baby boomers' population bulge resulting in more deaths (and potential for testamentary disputes), as well as linking property and capacity issues as the boomers age, a 'slice and dice' approach to this aspect of the Family Court's jurisdiction could be highly problematic and complex with proceedings occurring in multiple courts.

The Paper further suggests vulnerable adults and children being protected across a variety of courts – Family, District Court (Criminal) for family violence matters under the *Domestic Violence Act* 1995, violence (COCA) being heard under the Family Court, and Hague Convention Cases being restricted to the High Court. Complex cases have issues that intersect. Cases with parenting arrangements, care and protection issues, and violence can commonly occur in the same case. How realistic is it to propose that these should be dealt with in different forums? How safe is this for vulnerable adults and children?

Chapter 4: Focusing on children

This chapter states the obvious and indisputable: that children's outcomes after parental separation are enhanced by minimising parental conflict. Parental cooperation and child focus post-separation is the ideal situation.

The Family Court agrees, and has promoted this through education (Parenting through Separation Courses), conciliation (through counselling), as well as introducing EIP mediation – to enhance self-determination of parenting disputes and to minimise conflict.

The chapter also advocates parents listening to children's voices and having them consulted by their parents (although not burdened by decision making). It promotes children having the opportunity to make their feelings known about parental conflict and ensure that any decision made works for them.

The review acknowledges that this happens in the Family Court, but suggests that this should happen earlier, prior to litigation. It suggests positive obligations placed on parents to consult with their children about important matters should be enacted – strengthening section 16 of COCA.

Lawyers for the Child come under criticism in this part of the review. The review suggests that obtaining children's views by professionals should be done by those who have experience and training in interviewing children, not lawyers, as their training for this was "inadequate". They were further criticised for their dual role of advocating for the children they represented, and their best interests and welfare role. The review states it creates confusion and expense. Further, their appointment was regarded as being too early in the piece, driving up government costs. It was suggested that this role be carried out in-house by specialist lawyers, or by using other professionals such as social workers to obtain children's views.

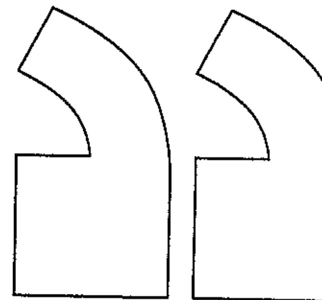
The review stated that children's best interests and welfare were not being promoted by the current system, as the review argued the best interests test created uncertainty and encouraged unnecessary litigation.

It proposed a more predictable and guided focus on best interests and welfare.

This included a presumption of equal sharing of care post-separation, or pre-separation care arrangements reflecting post-separation care. It proposed standard parenting orders based on social science/psychological best evidence, geared to the children's age and stage, modifiable by the child's particular circumstances. Orders were to be in three age groups of precedents: pre-school, school-aged, and secondary school-aged children.

Specific recommendations were also made – for modification of guardianship obligations, where there is domestic violence, and in the situation of relocation cases.

Part 2 of this article will review chapters 5 – 8 of Reviewing the Family Court – A Public Consultation Paper, in the next Family Files column.



The creation of th
Family Court in 19
enabled one Cour
deal with a family
legal issues holisti
so that issues and
families did not fa
between the crack
multiple Courts