

What is to be done? Update – 2011 Family Court Reform



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On 23 February 2011, Simon Power, Minister of Justice, announced root and branch reform of the Family Court was on the National Government's agenda. The question – what is to be the "New Model" Family Court? What is to be reformed, what will remain – what is to be done? Over the last few months, there have been developments worthy of note. This article is one of a series which will spotlight the reform process for the profession, as and when developments merit updating.

STAGE 1 – the Government's reform agenda

The first public preview of the proposed Family Court review occurred on 19 April 2011. The Minister announced the formal review of the Family Court, by way of releasing a Cabinet paper seeking approval for a review of the Family Court and the terms of reference of that review. In summary, the terms of reference were:

1. Public Interest v Personal Matters – what role the Family Court should have in private family disputes;
2. The Family Court's purpose, role, and function (therapeutic role or Court applying the law?);

3. The role of professionals (lawyers, psychologists, counsellors, mediators, social workers etcetera);
4. What should be the Family Court's jurisdiction?
5. Family statutes/regulations and the impact of procedure on efficiency and costs;
6. Does the Family Court structure help achieve durable and financially sustainable outcomes?
7. Is the Family Court responsive and accessible to vulnerable individuals?
8. How to incentivise self-determination of family disputes rather than litigation?
9. Alternative ways to address emerging trends, needs, and issues.

The Cabinet Paper and terms of reference indicate this is to be a comprehensive review of the Family Court – its processes, role, and jurisdiction. Why change? Undoubtedly, the economy is the fundamental motivator of this review. As the Minister stated, "the most important issue currently facing the Family Court is its sustainability".

Cost-cutting Imperatives In tough economic times are understandable. As one commentator has put it, "Sorry, Snow White can't afford the dwarves this year" (Simon Jefferson, "Review of the Family Court", FLS Symposium, June 2011). Putting the nation's second busiest Court under the microscope for spending cuts would seem inevitable.

For the wider profession (and for many specialist Family Court practitioners and associated professionals), it has been difficult to gauge

what is "on the chopping block". Speculation has abounded. How circumscribed will litigant access to the Family Court be? Will civil and criminal District Court judges deal with 'slices' of the current Family Court jurisdiction? What will happen to conciliation in the Family Court? Is the end nigh for children being represented by lawyers? There have been uncertainties as to what input professionals and public alike will have into the process of this 'review'. What is to be done?

STAGE 2 – Family Law professionals' response

The New Zealand Law Society Family Law Section's (NZLS FLS) response to Power's reform agenda was the Symposium entitled "Review of the Family Court held in June.

In attendance were a select number of representatives of those with an interest in the Family Court and its future. Attendees included NZLS FLS Chair Anthony Mahon, and presenters and authors of papers Simon Jefferson, Nicola Williams, Garry Collin, and Alex Ashmore. Other attendees included Ministry officials, and judicial representatives the Chief High Court Judge the Honourable Justice Winkelmann, Justice Priestly, and Family Court Judges David Brown and Paul von Dadelzen. In addition, four family lawyers, three psychologists, two counsellors, and one mediator also attended.

The Minister of Justice attended for part of the day-long Symposium.

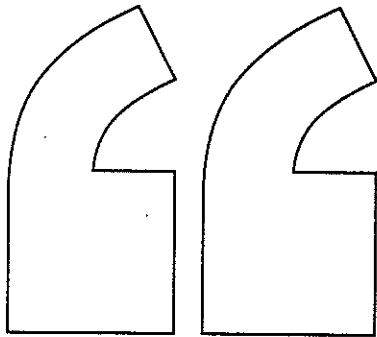
The purpose of the Symposium was to provide a privileged forum where Family Court change could be discussed by all those with a professional interest in the Family Court. Four papers were presented to the attendees; they focused on reform and addressing the key planks of Power's agenda for reform.

At 55 pages, Simon Jefferson's "A Review of the Family Court 2011 – Sorry, Snow White Can't Afford the Dwarves This Year" was an outstanding contribution to the discussion. I invite you to read this seminal paper, which is a comprehensive analysis of the merits for change and reform, arguing strongly for considered and measured reform, linked by an overarching strategy.

The second paper, by Nicola Williams, was entitled "Breadth of Jurisdiction in the Family Court". It addressed the Minister's "too wide jurisdiction" criticism of the Family Court. In essence, she rebuts the argument that "wide is bad" by undertaking a comparative analysis of the current Family Court jurisdiction with other Commonwealth countries, and a microanalysis of the legislation itself.

Third is Garry Collin's examination of the role of Lawyer for the Child in the Family Court, showcasing the wider statutory framework for the role, the process of representing a child, and the nature of the position. In effect, Collin was providing the rationale for why this role exists and why the Government should carefully consider reform of this role.

Last, Alex Ashmore addressed "Funding of Family Law – State Funding and the Family Court". This is best described as a cautionary tale, addressing the potential perils of the "narrow accounting approach" for Family Court reform. His message was the need to balance fiscal considerations with the disposal of



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disputes in a fiscally and chronologically efficient manner, yet achieving an acceptable qualitative outcome. He reminded attendees that an important Family Court function was to establish a set of norms for members of the community in resolving family issues by way of precedent and reflecting the norms of the community as a whole concerning the treatment of children and parents.

STAGE 3 – “Consultative Group”

As a direct result of the Symposium (and announced during the Symposium), Power announced the formation of a consultative group.

What exactly is this Consultative Group – who is on it, what is its role and sphere of influence in this reform process? Making enquiries of the Principal Family Court Judge Peter Boshier and a senior official at the Ministry of Justice, I was able to clarify this somewhat.

The Consultative Group is intended to be a group of experts. It is understood that representatives for the group have already been nominated and agreed, and will commence meeting following Cabinet’s approval to the release of the public consultation document on the Review sometime in September. The members were selected in consultation with the NZLS FLS and represent key professional groups associated with the Court.

Judge Boshier acknowledges that “the Consultative Group, which also includes Judge Vivienne Ullrich QC, will meet from time to time as a group and also with Ministry of Justice officials in order to impart advice”. The Ministry indicated that it is anticipated that the Consultative Group will meet monthly from the end of September through until submissions close on the review on 29 February 2012. The Ministry was not in a position to identify the other members of the Consultative Group prior to publication deadline for this article.

What is the Consultative Group’s sphere of influence? I was advised that the expert group will provide its own advice and views into the reform

process. Its aim is to support and advise the Ministry as the Ministry undertakes policy work on reform in the Family Court. Judge Boshier acknowledged that “ultimately reform will be shaped by a range of views including those expressed by the Consultative Group, and that any reform package put before cabinet would be informed by a range of views”. The influence of this expert group on the reform process remains to be seen.

STAGE 4: Public consultation

Upon Cabinet’s approval of the release of the public consultation document in September 2011, the profession, public, and Consultative Group will have until 29 February 2012 to make their submissions on reform.

After 29 February 2012, submissions received on the Review will be analysed and policy options for reform developed. Time frames for the ongoing work are yet to be agreed by Cabinet, and the Ministry was not in a position to discuss the ongoing process and time frames at this time.

Judge Boshier indicated that it was understood that a Cabinet paper would then be framed having regard to, amongst other things, the submissions and consultation. No time frames for the drafting of legislation are available as yet.

Where to from here?

What is to be done to the Family Court is a work in progress. There is a clearly articulated political agenda and initial response from the Family Law community. Consultation faces a tight time frame, with the undoubted impact of the Rugby World Cup, the election, and the Christmas/summer break. What effect the consultative process will have remains to be seen.

The next update from Family Files on the future of the Family Court will be after the release of the public consultation document sometime this month.

For those wanting to read the Symposium’s papers, they can be purchased from the New Zealand Law Society Family Law Section, who have published them in a bound 142-page booklet.

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