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

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The last Family Files formed part one of an examination of the Ministry of Justice's public consultation document on the proposed reform of the Family Court (*Reviewing the Family Court – A Public Consultation Paper*, 20 September 2011 (Review)). The analysis of the review document is concluded in part two of this special edition of Family Files.

Chapter 5 – Supporting Self-Resolution

DIY separations are the emphasis of this chapter. The Government wants families to be given more information that encourages them to take a 'self-help' approach to sorting out their issues at separation. Whether this is limited to dissolution of marriage and care arrangements for children is unclear.

This aim is to discourage families using the Family Court, lawyers, and currently court-based (and funded) resolution services (counselling and mediation) to resolve issues arising from separation.

This Government wants to promote alternative dispute resolution (ADR) outside of court (and presumably instead of the government-funded ADR it is currently funding).

Websites and DIY separation

Key assistance for couples separating is web-based. That is, couples separating are directed to websites to work out what to do when their families break up.

Web-based separation information for DIY separation is proposed to explain court processes, identify service providers (domestic violence/ mental health/alcohol and drugs), promote child-focused separation, assist self-representation, provide culturally responsive material, and gender-specific material for men and women. Plain English applications should also be available online, and legal information, dissolution applications, and online dispute resolution tools.

It is clear that the review sees this as an *important* front-line tool for resolving family disputes. While an iPhone app approach to families separating may assist the state in financially straightened times, it is no substitute for one-to-one expert advice and trained dispute resolution assistance.

Recognising this, the Review suggests that the Court provide a telephone helpline. What that will be (legal advice or support in dealing with court processes etcetera) is unclear. What position this will put court staff in, when they are not lawyers (and do not have a lawyer-client relationship with the caller) is troubling. This is recognised by the Government, and in turn, the Review contemplates looking for this DIY support outside of the Court.

Community Law Centres/NGOs/Iwi groups and DIY separation

The Review suggests Community Law Centres (staffed by lawyers currently), NGOs (eg Citizens Advice Bureaus – staffed by pro-bono lawyers), the Ministry of Social Development (MSD), and iwi organisations should take on a greater role providing information and help for families resolving family disputes.

The Government notes that funding a newly emphasised DIY separation would be expensive. The Review notes a costs-benefit assessment would need to take place to see if this could be afforded.

No doubt these organisations would reasonably expect changes/expansion in their role to be supported by adequate state funding (an issue, given the cost-driven nature of this review).

Clearly, the Review contemplates separating families who cannot afford legal advice due to their own financial circumstances, and any changes in eligibility for legal aid, being dependent upon phone lines and web-based advice, or seeking legal advice from community groups who may or may not receive appropriate funding. Given these economically unstable times, that may be a numerically significant group with limited access to justice and expert legal advice.

Parent education and DIY separations

The existing "Parenting through Separation" parental education programme funded through the state is regarded as effective and the Review supports it. It suggests that parents be required to attend this – as opposed to the current voluntary attendance.

Education should be "beefed up" – by linking to other parenting programmes offered by the MSD and NGOs.

DIY is explicitly linked to *user pays*, with the Review flagging that it's considering "requiring participants to contribute to its cost".

Legal advice in parenting disputes and settlement outside of court processes

The Review acknowledges that expert legal advice can greatly assist clients in seeking a way forward that is appropriate for their circumstances, given the overarching statutory obligation to promote reconciliation or conciliation in the New Zealand context.

The Review highlights what it presents as a conflict between this and lawyers' statutory obligations to act on their client's instructions and promote their client's interests. It proposes looking at obligations on lawyers who are family law practitioners to work in a way that maximises the best interest and welfare of the children, by adopting a collaborative law model of practice in parenting disputes:

- Obliging lawyers to work cooperatively together (with lawyers who fail to settle disputes collaboratively being excluded from representing parties in court);
- Ensuring binding parenting agreements (certified by the lawyers concerned as being in accordance with the best interest and welfare of the children or registered at court); and
- Obliging the use of best endeavours to settle (including certification of settlement steps prior to filing applications).

The Review wants to further focus on this, by requiring an "accreditation scheme" for family lawyers, to promote "high standards in legal service provision" where members "are regularly reviewed to maintain standards of competency and expertise". The Review looks to Australia and the United Kingdom for examples of such accreditation schemes.

Chapter 6 – Focusing on ADR services

The Review profiles a major initiative to stem the flow of applications into the Family Court, by diverting them into user pays ADR, prior to Court.

It is acknowledged that self-determination of disputes via ADR can ensure agreements are more likely to 'stick', are reflective of the day-to-day needs of a particular family and children, and can be culturally more appropriate. However, the thrust of the review as noted in this chapter is financial as much as focused on these benefits.

The keys issues explored by the Review are:

- What ADR?
- Who provides it?
- When should ADR be used?
- Should ADR be the gatekeeper to access to Court?
- Who funds ADR?

Counselling?

ADR through conciliation – Family Court counselling is reviewed first. The Review attacks statutory-mandated counselling under the *Family Proceedings Act* 1980, calling it expensive and without proven effectiveness. In particular, it alleges an increase in counselling of 74 per cent (2004 – 2010).

Whether the six free sessions of counselling for separating couples will remain available into the future seems doubtful, given this attack. The review asks if any counselling should be funded by the state at all, or, at best, if this should be targeted at low-income families or those with dependent children, reduced in quantum of sessions, with a tighter focus for those sessions.

The Review then suggests that the proven effective "Parenting through Separation" education programme may be a better use of state funds in preventing parenting disputes escalating to court. That is, making access to counselling privately funded and therapeutic (rather than state-funded and conciliation focused).

As "Parenting through Separation" is one session, recommended to be mandatory, and is now being promoted as part of a *user pays* ideology, this recommendation is cost and outcome effective in the eyes of the Government in comparison.

Mediation?

Mediation is promoted in this part of the Review as a primary dispute resolution process, prior to applications being filed in Court.

What mediation model is meant is unclear, given that the Review refers to Family Group Conferences as mediation. Who would provide mediation and monitor standards of mediators? Not the state.

Who pays for mediations? User pays: "[The] onus should be on parties to contribute to or pay for these services. Alternatively, funding could be targeted to low income people by some form of means testing" (at [161]).

Making mediation mandatory (as it is in Australia) prior to applications being filed is promoted by the Review. Agreements reached at mediation could be registered at the Family Court to make them enforceable.

Gatekeeping access to the Family Court through mandatory mediation is acknowledged to be problematic. How would people know which service was best for their needs – mediation or court? Related issues include:

- How to identify and direct urgent matters not suitable for mediation to court;
- How to encourage engagement with mediation for unwilling and unable participants without court oversight;
- Ensuring culturally appropriate mediation;
- Ensuring self-represented parties are not disadvantaged; and
- Preventing power imbalances and ensuring durable resolutions.

Family Disputes Tribunal?

Like the Disputes Tribunal, and as an intermediate step after counselling/mediation (but prior to access to Family or other Courts dealing with the current jurisdiction of the Family Court), a Family Disputes Tribunal is suggested to resolve "low level family disputes, about, for example, care arrangements for children where there are no safety concerns" (at [163]).

The Review clearly signals that "low level family disputes" are the jurisdiction for this proposed tribunal, with all manner of family disputes to potentially be dealt with here.

Given the 'slice and dice' approach the Review promotes for the Family Court jurisdiction (across the District Court – Criminal and Civil, and High Court), a further fragmentation of jurisdiction has a real potential for chaos. The Review invites families to DIY resolve disputes across a wide variety of forums and select the correct pathways. The potential for confusion, complexity, and delay, with uncertain end results or inconsistency of end results across multiple forums is self-evident. How safe is this for vulnerable adults and children, whose situations may fall between the multiple jurisdictional cracks?

Chapter 7 – Entering the Court

The Review is focused on restricting litigant access to the Family Court and how to manage the gatekeeping, demarcating access with fees at various stages and streamlining/simplifying applications.

A greater emphasis on DIY resolution outside of the Court aimed at stemming the flow of litigants into the Family Court has been explored in chapters 5 and 6.

The Review targets "repeat applications" under the *Care of Children Act* 2004 to reduce the flow of cases, and looks at "appropriate pathways" for applications deemed acceptable to be filed in the Family Court.

Triage of child-related cases into standard and urgent tracks is proposed, with cases with serious issues being raised being put into a programme where cases are intensively managed to focus on safety and to prioritise resources.

Gatekeeper?

Who should undertake screening – allowing and rejecting cases into the Court as well as triaging into urgent or standard track streams? The Review proposes that this role should not be carried out by a judge, or senior registrar, or a trained lawyer. Gatekeeping should be done by someone with a social science background. It seems remarkable to recommend that access to justice should be limited/determined by someone with no legal expertise or training.

Refining processes

The Review proposes tightening up on the criteria for urgent applications to prevent their abuse.

The content of affidavits is also targeted, with a 'questionnaire' form affidavit to support non-lawyer applicants, and reduce conflict with inflammatory affidavits.

Identification of issues under dispute, and prioritising of these by way of a checklist approach at case management conferences is recommended.

The Review recommends Court fees being introduced at the level of costs recovery. Setting down and hearing fees are also proposed.

Chapter 8 – Pathways and processes in the Court

This chapter focuses on clarifying pathways in the Family Court, which it regards as unpredictable, inconsistent, and unnecessarily adding to costs and delay.

The Review recommendations would include having conciliation (counselling and mediation) taken out of the court process, to pre-entry, with ADR and court mutually exclusive. However, ADR is a part of a number of courts in New Zealand – after filing. Most legal forums recognise that dispute resolution needs to be multi-purpose.

There is criticism of lawyers who mediate, suggesting that they are lawyers and not trained to be mediators. It is ill-informed criticism and highly ironic, given that university law degrees promote qualifications in ADR (including mediation), and that professional bodies that train mediators offer postgraduate specialist mediation qualifications to lawyers, recognising their aptitude to mediate (as well as negotiate and litigate). To suggest that lawyers as a group are ill suited to undertake a role in ADR (as mediators) smacks of wanting to cut costs (and not fund counsel-led mediation through the state), rather than promote "better skilled mediators".

Processes and certainty are a further aspect of this chapter. Specifically, a refining of case management to streamline matters, reducing delay and unnecessary reviews, with a standardised approach to cases. This would require reform of the Family Court Rules. This includes:

- Clear and durable orders, with an emphasis on final (rather than interim orders);
- Interim orders becoming final by default, if no further steps are taken;
- Stricter penalties and sanctions for breach of court orders to ensure compliance;
- Reforms of section 60 of the *Care of Children Act*, making specialist reports more timely, tightening up Hague Convention child abduction case time frames, and reviewing Child, Youth and Family plans on the papers are all suggested as appropriate areas to look more closely at, to decrease delay;
- Domestic violence programmes (for perpetrators and victims) should be re-evaluated and reframed.

Summary

With public consultation advancing in the context of the election and the summer holiday break, everyone with an interest in the future of the Family Court needs to take the time to make fully informed and considered submissions, collectively or individually as appropriate prior to 29 February 2012.