Family Court – 30 years (1981 - 2011)

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The Family Court reaching its thirtieth birthday is a landmark worthy of reflection. It pays to remind ourselves that the Family Court is "the second busiest Court in the country ... the Court that the breadth of New Zealanders are most likely to have contact with" (Judge Boshier, Speech to the Hawke's Bay Family Court's Association, 13 May 2011). Given its three-decades milestone and fundamental role in the Justice system, "Family Files" felt it was time for a retrospective, looking back at the Court's inception.

Thirty years ago, why was the Family Court established? What was the policy foundation underpinning the setting up of the Family Court? At its inception, what was the 'wish list' for its form, function, and jurisdiction? Reflecting on the Family Court today, is it recognisable after 30 years of growth and evolution?

The starting point on this retrospective must be the *Report of the Royal Commission on the Courts* 1978 (Report).

Family Court retrospective

The New Zealand Family Court emerged from the social upheaval of the '60s and '70s, with the prevalent changing social structures and cultural values. As marriage breakdowns and unconventional family structures became more commonplace, the New Zealand Courts needed to respond in more appropriate ways. The Royal Commission recognised this social change as creating "complex personal and legal problems" (Report at 146). "Different types of relationship, in which groups of people not previously regarded as families create social and sometimes legal obligations to each other, pose new questions for resolution by the Courts," said the Report.

The Royal Commission identified that there was an *urgent and essential need for reform* (at 146). This was grounded in the identification that families who were separating were not being well served by the Courts' status quo. The Commission's recommendations are best retrospectively grouped around three themes.

First: Conciliation Focus

There were clear concerns about the adversarial approach to separation in New Zealand at the time of the Royal Commission. The Royal Commission was of the view that this was counterproductive to resolution in a way that left families with functional relationships, although separated. Consequently, the Royal Commission overwhelmingly stressed that the "conciliative intent of family law should be emphasised" (at 149). The Family Court – its judges and staff, and practitioners with this speciality should put this focus to the forefront.

The Royal Commission noted at 147 that the "aim of the Court should be to help resolve problems with the co-operation of the parties, wherever that is possible, with the minimum of disruption in all cases".

This focus on conciliation put the spotlight on providing services which assisted families to cooperatively resolve disputes. The Royal Commission recognised that self-determination, rather than judicial determination, often required expert assistance. That expertise was counselling and mediation.

Explicitly, the Royal Commission stated at 152, "[T]he Family Court concept demands that the Family Court should be essentially a conciliation service, with Court appearance as the last resort, rather than a Court with a conciliation service. *The emphasis placed on mediation rather than adjudication.*"

Second: Fixing Fragmentation.

The Royal Commission was clear that the family unit should be dealt with as an organic whole. It was not uncommon for different courts to be dealing with one family's separation in a piecemeal way, often simultaneously. As the Royal Commission noted, quoting from international research, "treating the family situation as a series of single separate controversies may often not do justice to the whole or to the several separate parts" (at 150). Cohesive, efficient, and conciliatory resolution of separation for a family would seem remote, with that family having different judges in separate Courts, often with different legal representation.

Reducing fragmentation also had positive *jurisdictional and administrative implications*. The Commission noted, that "gathering all family law matters into one court is logical and more simple to administer" (at 152).

Jurisdictionally, the Royal Commission thought (at 152) that "the Family Court should exercise a wide jurisdiction, in relation to the family, including matters covered by the:

1. *Domestic Proceedings Act*;
2. *Guardianship Act*;
3. *Adoption Act*;
4. *Matrimonial Proceedings Act*;
5. *Matrimonial Property Act*;
6. *Marriage Act*;
7. *Status of Children Act*;
8. *Domestic Actions Act*;
9. *Children and Young Persons Act*;
10. *Mental Health Act*;
11. *Alcoholism and Drug Addiction Act*;
12. *Aged and Infirm Person Protection Act*; and
13. *Minors Contracts Act*."

In addition to the obvious, core, family-related matters being dealt with in the same court (separation, divorce, maintenance, paternity, custody and access, and adoption), it was thought that abuse of process would be limited by the broad jurisdiction. "An obvious reason why all family legal problems should be brought to the one court ... is to eliminate opportunities for harassment by cross filing of applications under different jurisdictions" (at 153).

A further implication of the 'one stop shop' Family Court is "possibly the most important requirement of a Family Court to be readily accessible to all who wish to use its services, in particular to deal with urgent matters" (at 151). Families could now hope to obtain urgent property, child-related, and other Orders as part of the same proceedings, filed at the same Court – with an accessible District Court structure.

Third: Specialist Court

The Royal Commission sought to have a Court with judges, ancillary staff/services, and a Family Court Bar committed to working with families, in a family-focused way. The flow through was that the Court needed to have "comprehensive jurisdiction and sound judicial philosophy with judges and ancillary personnel of the highest calibre" (at 147). Family Court judges were to specialise in the jurisdiction of the Court, as well as holding District Court warrants for civil and criminal matters.

Given that specialist family focus, the Commission identified that the Family Court had a two-fold function: "*judicial and therapeutic* ... each complements the other in the rather special context of a Family Court" (at 151). The therapeutic approach was referenced in the community that the Family Court served. In Court, the less adversarial approach supports this. Outside of Court, the self-determinative conciliation approach of counselling and mediation reflects this.

The therapeutic jurisdiction is also referenced by a "clinical services" approach. In particular, social workers, psychologists, and psychiatrists providing support on a consultative basis for cases (children, custody and access, and mental health).

The specialist family focus was supported by the Family Court being set up as a 'family friendly' environment. That is, Family Court rooms should be separate from others (particularly Criminal Courts), comfortable, and intended to put families at ease. Judges and lawyers should operate in an environment where the usual adversarial rules are relaxed. Facilities outside of the Court (rooms and play areas for children and parents) were also important considerations (at 180-181).

The special child focus of most family legal disputes was recognised by the recommendation that a Family Advocate Service (to intervene on behalf of a child, to attempt to resolve issues in the best interests of the child and family) be set up. It would have the power to brief independent lawyers for children, to protect the children's best interests, and ensure a fair hearing, and assist in negotiating an outcome if possible.

The wide jurisdiction for the Family Court also reflects the "specialised" nature of the Court, with judges and practitioners focused on all matters which relate to families and their personal legal issues.

Funding

Underpinning this all was the explicitly stated necessity for this to be funded so that the Family Court was set up to succeed. "Proper funding and best use of resources, including those already available," the Report said at 147.

After 30 years of growth and evolution?

The *Family Courts Act* 1980 (commencing 1 October 1981) established the skeleton of the Family

Court, with judges, conciliation, jurisdiction, the avoidance of unnecessary formality all being mandated. The *Family Proceedings Act* 1980 was its parallel, with the substantive muscle of the Royal Commission's reform recommendations being enacted. Other specific statutes were amended to incorporate evolutionary changes.

Conciliation 30 years on?

Counselling and conciliation were introduced at the outset of the Family Court being established. Sections 9 and 10 of the *Family Proceedings Act* enacted counselling for conciliation and reconciliation. Conciliation by judge-led mediation commenced at the same time, under the same Act. Legal advisers are under a statutory duty to promote conciliation and reconciliation with separating couples.

For 30 years, separating couples have had the ability to access skilled and experienced relationship counsellors, prior to commencement of proceedings or after filing applications, to try and self-determine issues arising out of their separation or assist them with reconciliation.

Over the same time frame, experienced judges have mediated disputes. However, mediation by trained mediators as opposed to trained adjudicators commenced only in April 2010, under the Early Intervention Programme (arising out of the Family Matters Bill 2008).

Currently, this conciliation focus is fully realised with mediation – allowing separating partners to seek the maximum expert assistance of skilled expert mediators, to self-determine disputes and avoid the polarising impact of defended hearings.

The above is supported by the *Parenting through Separation* programme, helping separating parents to cope with the specific issues associated with children – again conciliation and educative in focus.

Today, a number of Family Court lawyers themselves have adopted a "collaborative law" practice reflecting the conciliation focus.

Overall, there remains a significant conciliation focus to the Family Court 30 years on.

Fragmentation 30 years on?

There is no doubt that the Family Court remains jurisdictionally the hub of legislation relevant to families needing the intervention of the Court. Jurisdictionally, the Family Court's original 13 Acts recommended by the Royal Commission have expanded to some 23 currently. Singularity of jurisdiction provides an administrative centre, which currently remains unfragmented.

The Royal Commission's concern about parallel and uncoordinated proceedings across different Courts remains less likely given the breadth of the Family Court's jurisdiction.

Although there is no doubt that multiple Family Court proceedings can be difficult to 'wrangle' even in the one jurisdiction, Registry case coordination currently remains the key tool to making the 'one stop shop' Family Court approach function effectively for families.

Specialist Court 30 Years On?

Over 30 years' evolution, a specialised and expert Family Court bench and court staff, bar, psychologist report writers, counsellors, and social workers has developed. Courtrooms are generally different, along with registries and physical support structures.

Specialist Senior Counsel advocating for children's best interests and welfare and views (previously wishes under section 30 of the *Guardianship Act*) have emerged from the original Royal Commission recommendations.

The Family Court's dual judicial and therapeutic approach has developed. Evidence and procedure when a judicial approach is required has "become more formal and more traditional in its approach" (Judge Boshier, 13 May 2011), an adjustment after the 2003 Law Commission Report.

Many 'therapeutic' approaches have been adopted by the Family Court. From specialist expert opinion reports (sections 132 and 133 of the *Care of Children Act* 2004, section 178 of the *Children, Young Persons, and their Families Act* 1989), to a therapeutic approach to hearings (*Mental Health (Compulsory Assessment and Treatment) Act* 1992 hearings) are but a few examples.

Thirty years on, the authors of the 1978 Royal Commission Report would recognise the foundations of the Family Court in the practice of today. The principles underpinning its inception have been largely realised, with evolutionary changes refining the principled foundation. What the future holds for the Family Court remains to be seen.