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Building the ideal Family Court

By Maria Kazmierow, barrister

In what promises to be significant law reform, the Family Matters Bill (the Bill) has been a hot topic for family lawyers. While still in its early stages, the Bill has had its first reading, and select committee submissions have closed. Media interest has largely focused on promised greater Family Court openness, and gown wearing for Judges "to give gravitas" to the Family Court (*New Zealand Herald*, 17 August 2007). This does little justice to the Bill's scope and the positive potential it holds for families facing separation.

What's in the Bill?

The Bill as it currently stands has three major focuses:

1. Opening more Family Court hearings to public scrutiny, allowing support persons and accredited media to sit in on more cases, and for media publication of reports of cases.
2. Widening dispute resolution services available to families through the Family Court, by including non-judge-led mediation.
3. Administrative reforms designed to improve the processes and procedures of the Family Court.

Openness

The Bill extends openness and transparency by allowing media (and judicially approved support persons) to attend previously closed parts of the Family Courts jurisdiction. This includes adoption, care and protection, and domestic violence cases. Accredited news services will also be able to publish reports on mental health-related cases, but not attend hearings. Reports of other proceedings can be published, but the Court's permission is needed to use information which might identify people in cases involving "vulnerable persons or children", or in other variable situations (which are statute dependent). The Bill makes it an offence to publish any identifying information without the leave of the Court. There are financial penalties for breaches of publication.

Non-judge-led mediation

Mediation as an alternative dispute resolution technique will be offered by professional mediators. The aim is early intervention to resolve less complex matters quickly and inexpensively. This also offers the hope of minimising the potential for polarisation of parents by diverting their dispute away from the path of court hearings.

Non-judge-led mediation will be available for disputes under the *Family Proceedings Act* 1980 and for care arrangements and guardianship issues under the *Care of Children Act* 2004.

The mediator will be required to provide a report to the Court detailing the resolution reached between the parties, the issues still to be resolved, and non-binding

recommendations as to the next steps to be taken by the parties.

Improved processes and procedures

The Bill expands the powers of Court Registrars, lessening the administrative burden on judges in areas such as making appointments for lawyer for the child or specialist report writers. Judges are mandated to wear gowns in court, and there are a variety of other helpful adjustments and innovations proposed.

Changes to the Bill

Both the judiciary and the family law bar have strong views on the Bill. As is inevitable for a Bill in its early stages, numerous amendments are being floated for what is a 'work in progress'. There is considerable agreement on the value of the major thrusts of the Bill (subject to fine-tuning) – and on what the Bill lacks.

When interviewed for this article, Principal Family Court Judge Peter Boshier identified what he regarded as its points of excellence, and what needed to be modified: "The single greatest thing the Bill achieves is opening up the Family Court in all other statutes... The second thing that the Bill moves towards is non-judge-led mediation. I would like it to go further, and have submitted that in the Family Court submission to the select committee... The third thing that I'd like to see which is not yet in this Bill, but which I think is inevitable, is that we look at extending counselling to children."

For the Family Law Section (FLS) of the New Zealand Law Society, the two major issues it has with the Bill in its current form are the omissions of child counselling and aspects of mediation as proposed.

Child counselling

For child counselling, there is much harmony between the judiciary and FLS in their joint support for counselling for children.

Judge Boshier signalled the need for child counselling to be part of this Bill: "I think this is a golden opportunity... for the Bill to enhance child-inclusive processes". Similarly, FLS Chair Paul Maskell expressed acute concern that counselling for children was not part of the Bill as it is presently drafted. When interviewed, he stated "Counselling for children is essential, and needs to be part of the Family Matters Bill. It just cannot be right that the most important people in a family breakdown, the children, are left right outside the process."

Maskell's observations on the potential scope and delivery of counselling for children showed a detailed concern: "Children should be able to obtain both 'therapeutic' and 'resolution' counselling. The therapeutic counselling to assist children come to terms with changes in their lives caused by parents separating. Resolution counselling should assist children to identify what matters to the child and their views. This may also help [the] lawyer for the child, if appointed. A referral to counselling should happen as soon as there is an application filed with the Family Court. The child should be counselled with an appropriately skilled counsellor."

There are differences on the 'nuts and bolts' of how this proposal would come into play in the Bill, as is evident in what his Honour disclosed when interviewed. "I see no real reason why counselling shouldn't be made available to children on the same basis as it's made available to their parents. So that upon the filing of an application... child-inclusive counselling is appropriate. As to whether a

health sector and everywhere else, and so I think that by undergoing that we will end up with cases ending up in the right place. At the moment, it's less exact than that."

The other major issue the FLS has with mediation is with the Bill permitting mediators to decide whether or not children are part of the mediation. Maskell stated that "the Section is completely opposed to this. First, the mediator is not qualified to make a decision on whether a child should participate. Second, the child, if participating, should be legally represented and their views ascertained. [The] lawyer for the child must participate. But the mediation may occur before [the] lawyer for the child is appointed – an impossible situation for the child. Third, it would not be appropriate for a child to participate in this adult process without some form of resolution counselling to assist with obtaining their views."

While not expressing a view on child participation in mediation, his Honour did indicate a clear wish for consultation on this major project. "I would hope that there's good consultation with the important players such as the Family Law Section and LEADR." This is echoed by the FLS also. Maskell commented, "The courts, judges, and the Section work in tandem. We have a good working relationship, even when there are the inevitable differences between us."

Openness

His Honour frankly acknowledged inconsistencies with drafting of the publication provisions of the Bill. "I do feel that the publication provisions ... are difficult. Varying Acts have differing publication prohibitions and provisions, and I think that the Bill in its wonderful attempt to open up the Court has complicated things more than I would've liked. I have proposed to the select committee one publication provision which would be in the *Family Courts Act* 1980 and which would be the same in every single Act." When pressed on what that provision would be, his Honour referred to section 139(1) and (2) of the *Care of Children Act* 2004 as an example of a generic clause which had subtlety. "Here, the Court can give leave on such conditions as it wishes. If we enable the Court to have that power while setting out basic guidelines, but having the ability to address each case specifically as it needs to, that will be helpful."

The future

While very much a work in progress, the Family Matters Bill shows huge potential for benefiting children and families by its forward thinking in the areas of mediated dispute resolution and child counselling. The benefits of sensitive publication and openness are self-evident. The public commitment of the judiciary and FLS to consultation on what can often be troublesome details bodes well for moving this Bill to its much anticipated status as legislation.

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