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## Family Files - Reforming family matters

By Maria Kazmierow, barrister

The passage of the Family Courts Matters Bill (the Bill) into enactment on Friday, 5 September 2008 was both welcome and a relief. Lengthy delays in obtaining a third reading lead to concerns the Bill would linger and not pass prior to the election. The Bill was passed divided, with the resulting 12 Amendment Acts updating the following Acts: Adoption Act 1955, Care of Children Act 2004, Child Support Act 1991, Children, Young Persons, and Their Families Act 1989, Domestic Violence Act 1995, Family Courts Act 1980, Family Proceedings Act 1980, Family Protection Act 1955, Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, Mental Health (Compulsory Assessment and Treatment) Act 1992, Property (Relationships) Act 1976, and Protection of Personal and Property Rights Act 1988.

The Bill's reforms will have a major impact on the administration of the Family Courts, amping up the role of alternative dispute resolution, addressing criticisms of "secrecy" levelled at the Court, and expanding counselling to include children. The themes of the Bill are:

- Openness;
- Efficiency – notably the innovation of Senior Family Court Registrars;
- Mediation focus;
- Counselling for children; and
- Formality.

### Openness

The balancing of public interest in proceedings and party confidentiality has been tilted more in favour of open justice by the Bill.

Who can attend Family Court proceedings is expanded and made consistent between statutes (except where expressly stated). Subject to conditions, the following persons may attend Family Court:

- Officers of the Court;
- Parties to the proceedings;
- Lawyers representing parties to the proceedings;
- Witnesses;
- Accredited news media reporters;
- Persons the Family Court Judge permits to be present as support persons for the party on request by that party; and
- Any other person the Family Court Judge permits to be present.

Publication has been promoted, with the attendance of media and reporting of Family Court decisions breaking down the confidentiality associated with Family Court processes. What remains is a blanket prohibition (except where leave of the Court has been granted) across the amended Acts that children and vulnerable persons are excluded from being identified in publications. As many of the amended Acts focus on children and vulnerable persons, anonymity is preserved for families.

Looking at the Property (Relationships) Act 1976 (PRA) amendment, in cases with no children or "vulnerable persons", extensive and sensitive private information of a financial nature could now be fully published. Barrister Mark Vickerman has grave concerns about the new statutory regime.

"Section 35A of the [PRA] prohibited publication of relationship property cases without the leave of the Court except where published in technical and professional journals and publications. The Bill has repealed that section and relationship property cases are now subject to [sections] 11B to 11D of the Family Courts Act 1980 as amended by the Bill. Now, general publication of relationship property cases is unrestricted except where there are, and only to the extent of, identifying details of vulnerable persons. A vulnerable person is not an adult spouse/partner free of any of the disabilities listed in section 11D unless the Court considers them 'likely to be particularly susceptible to any adverse consequences associated with the publication of a report of the proceedings that contains identifying information'.

"Counsel must now persuade the Court that publication of their client's financial and commercial details are likely to attract adverse consequences. The simple and hitherto guaranteed wish for personal privacy will not be enough. The effect of this will often be chilling, and resort to Court could be used as a threat of collateral damage unrelated to the merits. Why this change was thought necessary is unexplained.

"Section 35 of the [PRA] remains so that the Court must hear proceedings in private if either spouse/partner requests. But such privacy will not survive the release of the decision. It is not clear whether a 'report of proceedings' can extend to the evidence (including affidavits). If so, the potential for mischief will be even greater."

#### **Efficiency – Senior Family Court Registrars**

Principal Family Court Judge Peter Boshier sees the creation of Senior Family Court Registrars as an administrative boon. It promotes efficiency by enabling the delegation of aspects of the overwhelming "box work" that judges in the Family Court balance alongside extensive Court hearings and mediations. This is particularly helpful in isolated parts of the country, where 'judge time' is limited and families are unable to access justice through the Family Court, with necessary proceedings in limbo over extended periods.

The Bill permits the delegation of the following tasks to Senior Family Court Registrars:

- Appointing lawyer for the child, counsel for the subject person, or counsel to assist the Court;

- Appointing specialist report writers under the Care of Children Act and Protection of Personal and Property Rights Act;
- Making directions under the Family Protection Act;
- Deciding whether a mediation is appropriate for a particular case;
- Calling a respondent or associated respondent before the Court under the Domestic Violence Act, and confirming, varying, or discharging a direction to attend a programme; and
- Waiving, reducing, or refunding Court fees;

In addition, Judge Boshier anticipates that Senior Registrars will be able to make directions for consent orders emerging from both judge-led and non-judge-led mediations: "If a result has been arrived at with a demonstrably proper process and all that's being asked for is a consent order, that's the sort of case that should go before a Senior Family Court Registrar... In the more distant parts of the country, in terms of judicial resource, like the Far North and the West Coast of the South Island, we're not going to improve ... efficiency if we're on the one hand going to have non-judge's mediating, yet require orders to be dealt with by judges."

His Honour also augurs that regulations will prescribe that 'non-contentious' judicial work should be undertaken by Registrars to reduce the "box work [which] is often crippling and is unacceptably intruding into normal scheduled Court work" (Boshier, "New Pathways in the Family Court", ADLS Family Law Conference, 22 September 2008, p 12). This includes:

- Interlocutory matters;
- Applications made without notice;
- Pre-hearing conferences;
- Uncontested applications;
- Applications for leave;
- Matters that are not contested by the parties;
- Confirmation of orders made overseas;
- Holding inquiries; and
- Enforcement of orders and directions.

The Bill is silent on the qualifications for Senior Family Court Registrars undertaking "judicial work". They may not be specialist or experienced Family Court lawyers. Judge Boshier comments: "The Bill stops short of prescribing that Senior Family Court Registrars must ... be lawyers with a practising certificate and who practiced for x number of years... A very good experienced existing Registrar, if such a person wants to, could become a Senior Family Court Registrar. There will need to be a rigorous selection process... From my perspective... this role must attract people who have the profession's respect."

The development is not without its critics, particularly those concerned that non-lawyers will be exercising judicial powers, and the potential for problems this creates. Chair of the New Zealand Law Society Family Law Section Paul Maskell states, "We were disappointed with the Government dropping the Supplementary Order Papers for 'Senior Registrars' on Parliament. We had been very supportive of the 'Judicial Registrars' concept, but are not convinced that the new law will work effectively."

#### **Mediation focus**

The Bill endorses mediation as the significant option



In terms of counselling, the "exceptional need" threshold is undefined in the Bill. It is Judge Boshier's belief that "exceptional need" would be interpreted liberally by judges, for "hard end or intractable cases". In these circumstances, he says that where "quite intensive prolonged counselling is needed", then the counsellors engaged will have the right qualifications, which may include psychiatric qualifications.

Maskell remains concerned about the scope of counselling for children under the Bill. "Counselling for children was incorporated; although, as it is worded, [it] may not give the support children need. Judge Boshier's comments suggest that judges may adopt a liberal interpretation. However, ultimately, the law will need to be changed to offer across the board counselling services for children."

#### **Formality**

Judges will be permitted to wear gowns in Court, in a move designed to "[reaffirm] the serious nature of the proceedings and the importance that attaches to orders in the Court" (Boshier, p 12).

#### **Where to from here?**

While the Bill has been passed, the political context for funding its major developments remains in flux, with the nation on the eve of a general election. When queried about the possibility of funding being impacted by a potential change of Government, Judge Boshier was optimistic: "[T]his Bill was passed with multi-party support. There was no opposition from any party... [Therefore,] I think the funding will follow the political will."

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