Family Files

By **Maria Kazmierow**, barrister and mediator

Family Court reviewed – Parliament endorses 'new model Family Court'

By the slimmest of majorities, the Family Court Proceedings Reform Bill passed its second reading under urgency on 2 July by a vote of 61 to 58. That three-vote majority reflected the 4 June Justice and Electoral Select Committee report which was polarised along partisan lines – those following Minister Collins and the National Government, and the rest. With that vote, the new model Family Court is a fait accompli.

Family Court professionals will greet this with grave concern given the huge disquiet with the reforms, their policy basis, the highly probable negative outcomes for families and vulnerable children/adults, and the non-consultation on two radical changes – self represented litigants and user-pays family dispute resolution (FDR). The 385 written submissions and oral submissions over five days to the Select Committee made these concerns abundantly clear. Those concerns have largely not been addressed by the amendments to the Bill in the reporting from the select committee.

The changes

When?

When will the "New Model" arrive, and be introduced? A third reading and other committee processes are still required. The Bill stated the reforms would come into force on 1 October 2013. They will now come into effect on a date appointed by the Governor-General by Order in Council or 1 October 2014, whichever is earlier.

What?

What is that "new model"? The overall changes in the Bill have been profiled in previous Family Files columns, and readers are referred particularly to the article dated 22nd March 2013, as well as NZLS FLS, and ADLS Family Law Committee, submissions on the Bill.

The New Model has had some 'tweaks' now, with the reporting back of the Select Committee on the 4th of June. Those are the subject of this article to help practitioners at the coal face of Family Law come to terms with the 'brave new world' separating couples will be facing upon the Bill 'going live'.

Self-represented litigants – remain

There is some expansion of the limited exceptions to the scope of self-representation in *Care of Children Act* 2004 (CoCA) proceedings. They are noted here:

- the party is the Crown section 7(3);
- the application is without notice, until such time (if at all) a judge directs that the application proceed on notice section 7(4)(a);
- the application is commenced on notice, from such time (if at all) a judge directs that the application proceed as if it were an application made without notice section 7(4)(b);
- Concurrent proceedings: the application is to be heard by the court in conjunction with an application that is filed under any other Act section7(4)(b)(ii);
- At a settlement conference, if one is convened and if a judge directs that the parties may be represented at that conference section 5A, if the judge considers that at least one of the parties needs representation, and that legal representation would be likely to facilitate settlement of the issues in dispute section 5B.

Other changes

- A settlement conference can be convened by a judge at any time before a proceeding is set down for a hearing section 46K.
- A judge may direct parties to attend counselling when making a final order section 46E(2).
- A judge will be able to refer parties to Parenting Through Separation section 46I.
- Sections 59 to 61 remain repealed. An amendment to new section 5 is proposed, requiring the Court to consider whether a final protection order is still in force; the circumstances in which the protection order was made; and written reasons given by the judge who made the protection order for their decision section A.
- A Registrar can request brief written advice from a social worker on the nature and extent of any involvement CYF has had with the parties and allow the court to obtain a short-form psychological report on any matters specified in the definition of psychological report.

FDR

Mandatory user-pays FDR remains in the Bill, with some changes. Crucially, key aspects remain unamended:

Negatives:

FDR remains:

- ***user-pays;***
- ***no clarity as to what the model is:*** mediation or other, and the credentials/professional standards/CPD of who would be providers (this is largely to be determined by regulation);
- ***no child focus:*** absent of an independent voice for the child in the FDR room;
- ***unsafe:*** absent of qualified risk assessment of the participants (of domestic violence, mental health issues, care and protection concerns, special needs and disabilities, addiction issues, and other power imbalances);
- ***absent of legal advice or representation;***
- ***untested and risky:*** with no proposed trial of the model;

Astonishingly, the Bill makes the as yet undefined FDR provider an expert opinion on 'legal representation' under proposed section 60B(6). FDR providers are required to provide their opinion on which parties needed legal representation and if the dispute is 'settlement conference suitable' and record this. Given that the parties are not legally represented in FDR itself (and may not have had the benefit of legal advice), and the FDR provider may not be legally trained or have any Family Court legal expertise/experience, the potential quality of that opinion is concerning. Why provide an opinion - is it intended that it in some way fetter the Presiding Judge in exercising their discretion under section 5B in relation to settlement conferences and legal representation of parties?

Minister Collins indicated that there would be provision of three hours preparatory counselling for FDR – but this is not included in the Bill. The introduction to the Bill refers to Counselling as an "operational matter" (page 7). It is not clear if this will be available to newly separated parents to assist them manage preparation for FDR or not. Those making a submission noted the critical importance of this to FDR.

Positives:

FDR involves gatekeeping to court, with the provision of the FDR Form in order to obtain access to court (with limited exceptions).

Concerns were raised with 'torpedoing' of FDR, by one party electing not to pay the fixed fee, not attending, or not to fully participating and thereby parents not obtaining the FDR form from the FDR provider - effectively barring the dispute from Family Court (except in circumstances of urgency). Amendments to the Bill may have dealt with this now.

Section 60B(1)(a) may now deal with this, where an FDR provider decides it is inappropriate to start or continue due to at least 1 of the parties being unable to participate effectively in FDR. The FDR provider will provide an FDR form to that effect in section 60B(2). Section 46CB(3)(f)(i) may also assist, as a dispute resolution form is not required to accompany an application where "where at least one of the parties is unable to participate effectively in family dispute resolution". In those circumstances, an affidavit providing reasonable grounds outlining this will suffice. Of course, this depends on the self-represented litigant being able to understand and accomplish this – no small barrier.

Judicial referral back for FDR upon proceedings being issued under section 46D is a useful amendment, requested by the NZLS FLS in their submissions to the Select Committee.

FDR has emerged from the Select Committee process and its second reading in Parliament without resolution of many of the fundamental flaws that drew criticism from the outset. What effect that will have on the users who pay for that untested service, the quality of their experience, the safety of it, and the durability and workability of the outcomes, remains a real concern.

Lawyers 'unbundled legal services' to self-represented litigants

The implications of truncated legal services to self-represented litigants will need to be 'thought through'. In particular, consideration of the implications of 'unbundled legal services' in the context of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

These concerns have been raised in the submissions of "The Family Court Judges of NZ", 12 February 2013, at 74: "there is a potential conflict for lawyers in accepting instructions, giving advice and preparing documents in terms of s7(6) but without being able to take other steps in the proceedings. Lawyers would put themselves at risk of being in breach of professional obligations under the Law Practitioners Act and Code of Conduct. There is a significant risk that good lawyers will be unwilling to give legal advice and prepare documents for a party they are prevented from representing at important stages of the proceeding".

Lawyers will need guidance from their professional bodies on this, so as not to breach their professional obligations due to a conflict of law reform and Conduct and Client Care Rules.

The Bill – second reading conclusion

The Bill, while amended by the Majority in the select committee process, has not changed significantly. The most radical reforms of self-representation in Family Court on parenting matters and user pays FDR have been 'tweaked' but not substantively changed. What is the end effect of this select committee process and second reading?

More complex system

There is no doubt that this new system will be more complex without a 'one-stop shop' local Family Court access point for counselling services, children's lawyers, alternative dispute resolution, and a Court.

There will be different entry points into the 'system' – with FDR and the Court. There are different and complex exemptions, and costs associated with each. Parents will navigate this on their own DIY, either without entitlements to legal advice/legal representation on legal aid or with highly limited entitlements in 'certain circumstances'. While new simple forms are promised and new Family Court Rules to make DIY 'doable', there are limits as to how 'simple' the law, rules of evidence, and complex court processes can be made for lay litigants.

New Zealand experiment

The New Zealand Family Court system in parenting matters will likely become a largely DIY Lay Litigant Court system. This is unique in District level Courts in New Zealand. It is also a nationwide introduction of an untested model of self-representation.

Auckland Family Court professionals remember the last recent untested model introduced by the Government – ASDP – the Auckland Service Delivery Programme or 'Centralisation'. It brought the Family Courts of Auckland to the point of dysfunction over several months in 2012, despite the best endeavours of the hard-working registry staff and managers. That was a regional experience. Understandable concerns are present for this untested nationwide introduction.

Inefficiency, delay, and costly reforms

Inefficiency and delay remain predicted as self-represented litigants lack expertise and competence in litigation. Inefficiency and delay in performance are the natural outcome of their lack of expertise. They clog up the system of justice, increasing cost. Those predictors are borne out in evidence, internationally and in New Zealand from research. They remain real concerns. It is predicted that the minor changes to the Bill will not lessen the impact of increased numbers of lay litigants. Court staff will struggle with lay litigants who seek their support.

Limiting Access to Justice and the Bill's inherent discrimination

The Bill continues to create an economic power imbalance, discriminating against those too poor to buy in legal advice. Access to legal aid is limited for drafting and early advice and favouring those who can buy that in privately. Minister Collins indicated in the media there would only be four hours of "legal support prior to court" – see section 71 3A(c).

It continues to discriminate against vulnerable parties (the inarticulate, victims of domestic violence, ESOL, mentally ill, special learning need, hearing or sight impaired, intellectually disabled, addiction issues, et cetera), who cannot have access to a lawyer in court to 'balance the scales' against parties who are not vulnerable, as well as considerably more than 'four hours' legally aided time to assist them in drafting and in advice.

High conflict and adversarial

The Bill, with its continued presence of self-representation and absence of counsel, promotes 'face-to-face' engagement between warring parents who cannot self-determine disputes. It promotes greater likelihood of frustration, anger, and even violence. This was a major concern of the submissions of the Family Court Judges of Christchurch.

It is acknowledged that there a number of working groups established by the Ministry of Justice to work on the extensive changes to be implemented. Whether they will limit the negative consequences that are the predictable outcome of the reforms is the question.