Family Files

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Family Court Proceedings Reform Bill and Family Court multi-reform update

The multi-reform of the Family Court moved into a frenetic and compressed phase of activity, with the Family Court Proceedings Reform Bill being issued. The Bill, which proposes radical reform of the Family Court, was introduced into Parliament on 27 November 2012, had its first reading on 4 December, and submissions to the Justice and Electoral Select Committee were due by 13 February 2013. Stakeholders had a small window to prepare submissions over the Christmas and summer holiday period.

Five full days of oral submissions were heard by the Select Committee in Wellington, Christchurch, and Auckland. Hundreds of stakeholders, both individuals and organisations made submissions, including his Honour Judge Murfitt on behalf of the Family Court Judges of Christchurch. The submissions process is now complete, with the Select Committee scheduled to report back on 3 June 2013.

The Bill's two major reforms, which had had no consultation whatsoever with stakeholders in the Family Court, were the most radical:

1. *Self-represented litigants the norm in Family Court*: lawyers banned from representing parents in child-related proceedings up to final proceedings (with limited exceptions);
2. *Gatekeeping access to justice:* an $897 fee for mandatory pre-Court Family Dispute Resolution (FDR), which makes non-payment of fees a barrier to accessing that mandatory dispute resolution and to the Court.

This article will profile these two major reforms, and will provide an update on the impact of another Family Court reform introduced last year: fixed fees for legal aid.

Family Dispute Resolution

Parental self-determination of disputes is commendable, and alternative dispute resolution is preferable to litigation, when suitable. It is not suitable in circumstances of urgency or risk. Self-determined resolutions are often more durable and workable than those 'imposed' by an expert stranger – a judge.

However, mandatory FDR as introduced by the Bill has many issues.

Mandatory FDR is introduced by inserting new sections 3A - 3E into the *Family Courts Act* 1980 (clause 60 of the Bill). It is believed to be a form of alternative dispute resolution. As it is undefined in the Bill, it is unclear what it is (mediation, counselling, or something else).

Parents with a dispute in parenting or guardianship matters *must* attend at FDR.

Parents obtain an FDR form from the FDR provider upon completion of their FDR. Without this, they cannot access the Court (except on limited grounds).

FDR is user pays: $897 including GST. Both parents are jointly responsible for payment. Payment is a private fee paying arrangement if the parent does not qualify for legal aid. Legal aid will not pay for a lawyer or legal advice. The State will not pay for a lawyer to represent the view and best interests of the children of that relationship.

FDR represents gatekeeping access to justice as:

- parents who cannot or will not pay, or delay, will not get FDR.
- parents who don't pay will not get access to court, as inability to pay or non-payment are not grounds for exemption for attending at FDR.

FDR, as it is set up in the Bill, has the potential to exclude the poor who are not eligible for legal aid, due to inability to afford the fee. This prevents parents resolving disputes about their children in the best interests and welfare of their children outside of court, and closes the court doors on them too.

It has the potential to leave parents 'out in the cold', in the acute stage of their separation, highly inflamed and unable to resolve their care arrangements. A high-conflict 'without notice' entry into the court system through that exception to mandatory FDR seems more likely. High conflict is harmful to children, and contrary to their best interests, and FDR as drafted potentially promotes this.

There are other significant issues with FDR, such as:

- *No child focus:* no advocate for children in the FDR room to ensure the best interests and welfare of children are paramount;
- *No legal advice or representation:* to provide scaffolding for FDR essential to workable, durable, and legally appropriate agreements and the smooth running of an alternative dispute resolution with reality checking 'built in';
- *Unsafe:* no safe risk-screening for the removal of vulnerable adults and children;
- *Untested and risky:* with no pilot having being trialled.

FDR, while having merit, has fundamental issues as drafted in the Bill. Without resolution of these major concerns, FDR remains flawed.

Self-represented litigants – prohibition on lawyers in Family Court

A Ministry of Justice study showed an average of 88 per cent of New Zealanders in 2009 elected to have lawyers in Family Court, and only seven to 17 per cent chose to self-represent (*Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*, July 2009). The Bill removes this choice.

Clause 5 of the Bill introduces a new section 7A into the *Care of Children Act* 2004, prohibiting legal representation for parties to child-related proceedings until or if a defended proceeding is directed with only three limited exceptions.

Lawyers are permitted to provide legal advice or prepare documents, if parties can pay, in an 'unbundled legal service' (new section 7A(7)). There is no legal aid for this.

Scope of Self-representation

Self-represented litigants must present submissions orally and in writing for court in pre-hearing matters (ie prior to a "defended proceeding" being directed).

Self-represented litigants must:

- Draft all their affidavits, memoranda, and written submissions (if unable to afford a lawyer);
- Sign documents;
- File documents at court; and
- Accept service from their ex-partner/spouse.

Legal aid will only be available for legal representation in the following areas (clause 71):

- Without notice proceedings;
- International Hague proceedings;
- Where a judge has directed a defended proceeding to hearing; and
- For legal advice, where an applicant/respondent has been directed to obtain legal advice before consenting to an order settling some/all issues in dispute in the proceedings.

The reform is based on the assumption that removal of lawyers will reduce costs, as the State will not have to pay for legal aid costs for lawyers or their advice for those otherwise eligible. It aims to cuts costs, without the politically unpalatable electoral step of making reductions in thresholds of eligibility for legal aid.

This reform is without precedent domestically in the Family Court. It appears to be without precursors internationally in other Commonwealth common law jurisdictions. ADLSi submissions on the Bill to the Select Committee confirm that "no Australian Court has introduced self-representation for litigant parents as the dominant court resolution process. A self-representation model has, however, been considered in detail and rejected". The proposed reform appears to have no tried and tested model for nationwide introduction of self-representation.

The Bill works on the assumption that self-

represented litigants are the answer to costs, more efficiency, and will be less adversarial, and that lawyers are the problem. Neither presumption is correct.

The evidence on self-represented litigants internationally is consistent – they increase costs by placing a heavy burden on the administration of justice. The reason: they are not litigators, they are laypeople:

- "Court staff... often encountered litigants' literacy problems or communication barriers" (2009 Ministry study at 15);"
- "Only 31 [per cent of] unrepresented parties participated in proceedings with competence", (Dewar, Smith, and Banks, *Litigants in Person in the Family Court of Australia*, 2000 at 55)
- "Filing and submitting applications including irrelevant and inappropriate information to judges that are often poorly written" (2009 Ministry Study at 15);
- "Often did not seem to understand what was happening" (2009 Ministry Study at 68);
- "Unlikely to know how to present an affidavit...(and) could not objectively separate the relevant facts" (2009 Ministry Study at 68);
- "Process and protocol mistakes included... failing to serve documents on the other parties, writing letters to the judge or the case manager instead" (2009 Ministry Study at 68);
- "[Three quarters] ... experienced difficulty representing themselves... The Courtroom scenario is overwhelming and daunting... [They] didn't understand any of what was said" (Dewar et al at 54);
- "86 [per cent] of pro se litigants suffered a problem in forming or arguing their case" (Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" 42 Loyola of Los Angeles Law Review 979 (Summer 2009));

Lay litigants understandably lack expertise and competence in litigation. Inefficiency and delay in the performance of their role is the natural outcome of their lack of expertise.

Inefficiency, delay, and self-representation

Domestic and international research shows that court inefficiency, marked delays, consumption of registry time, and frustration of parents/parties, judges, and Registry staff is likely to be high as the numbers of self-represented litigants will be high.

In her comparative study, "Access to Justice for Unrepresented Litigants: A Comparative Perspective", Professor Buhai found that in relation to New Zealand:

> "Using the General Linear Model, cases with self-represented litigants were found to *significantly increase the time taken for applications to reach an outcome*" (at 62);
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> "Judges spent more time explaining court procedure to self-represented litigants" (at 77);
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> "Court staff had an extra burden... [T]hey spent more time explaining procedure, terminology and process ... [and] dealing with applications incorrectly filed or filled in, and fielding queries" (at 78).

The experience is repeated in Australia, as evidenced in *Litigants in Person in the Family Court of Australia* (at 51):

> "[T]he principal effect on the Court system more generally was ... increased time and hence cost ... matters take longer at all stages, including at the counter, and that filing a document takes three or four times as long as normal because a person has to explain all the forms and court procedures in great detail. In addition documents which are incorrectly filled in, have missing information ... must be sent back."
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> "The principal effect on the judge or registrar ... was increased time spent on the case... Other effects reported included more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff ... increased stress and raised blood pressure for judges. Cases can become protracted because the judge has to tell litigants in person how to run their case."

The experience of delay and inefficiency with lay litigants is echoed in Canada. In "*Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario* (2005) 30 Queen's Law Journal 825 at 833, Anne-Marie Langan noted that unrepresented litigants "take up more court time, and are less likely to reach a settlement with the other party" and that:

- 65 per cent believed their matter took longer to resolve because of their lack of legal representation;
- 57 per cent reported that they had tried to settle the matter with the other party but failed;
- 29 per cent had not even attempted to reach a negotiated settlement with the other party.

The United States' experience of delay and inefficiency with self-represented litigants is little different, with research showing self-represented litigants increase burdens on court staff, judges, and administrators and cause increases in the amount of time or other court and judicial resources needed to process cases (Berenson, "A Family Law Residency Programme?: A Modest Proposal in Response to the Burden Created by Self-Represented Litigants in Family Court" (2001) 33(1) Rutgers Law Journal 105).

The themes in research are consistently negative and strikingly similar internationally.

There is a significant potential for 'clogging the system'. The need for significant additional judicial and registry resources is clearly flagged. Time and delay cost money. Savings on legal aid may be lost.

Less adversarial and better access to justice?

Access to justice is significantly impaired when parties are unequal and vulnerable before the law.

Wealthier litigants compensate for 'no lawyers' by privately funding lawyers for "unbundled legal services". Lawyers can 'ghost write' documents, rehearse them for court, and provide shadow advice in negotiation and settlement strategy also. This shifts the playing field considerably to their side for a 'win', come their day in court.

'No lawyers' increases vulnerability for adults and children. Child vulnerability is lessened by lawyers for the parties (as well as a lawyer for children):

> "Judges, judicial registrars and registrars considered that the children's best interest would have been promoted if one or more of the parties had been represented in 28 of the 43 cases where it was applicable." (Dewar et al at 55)

Inequality of presentation of written and legal argument due to vulnerability results in potentially serious discrimination. As Catherine Caruana stated in "Meeting the Needs of Self-represented Litigants in Family Law Matters (Winter 2002) 62 Family Matters 38-42:

> "Poorly presented evidence and argument carries with it the risk of a miscarriage of justice for the unrepresented party, and affects the Judge's ability to make a decision

which is in the best interests of the child".

This can occur at pre-hearing court processes, and an order may be the outcome. Due to a lack of critical information that order may not be:

- Workable;
- Safe for the party or child; nor
- In the best interests and welfare of the child.

The potential for this to occur is heightened, where the power imbalance is accentuated where one party is not 'vulnerable', and the other is. For example:

- inarticulate;
- mentally ill;
- ESOL;
- special learning need;
- hearing or sight-impaired;
- intellectually disabled;
- a young adult (16 years+);
- uneducated;
- addiction issues; and
- victim of domestic violence.

Imbalances are worsened by the simple experience of being joint self-litigant parties. Studies note that self-representation creates vulnerability for litigants. The 2009 Ministry study noted costs to time, mental, and physical health (at 66). In "The growing challenge of pro se litigation" (2009) 13(2) Lewis & Clark Law Review 439 at 451, Professor Stephan Landsman stated that the experiences of the self-represented appeared "in a substantial number of cases to produce frustration, anger, and even violence" and that "the absence of counsel deprives the pro-se counsel litigant of a 'reality check' to reign in unrealistic expectation ... [and] removes the sort of lawyerly counselling that can temper strong emotions".

'Face-to-face' engagement is likely to be intensely emotional, draining to health, and potentially places parties at risk of harm. Appearing in court and serving an ex-partner/spouse enhances vulnerability, risk, and negative experiences for parties. Matters are more emotional, volatile, and potentially violent, and do not support vulnerable adults.

With no lawyers, and the risk of no lawyer advocating for the child's best interests and welfare, this potentially entrenches inequality, discriminating against vulnerable parties and children while suppressing their voices.

The Bill's proposed new section 7A 'self-represented litigation' promises a volatile and combative Family Court environment, less efficiency and effectiveness, discrimination against the vulnerable and poor, and higher costs – all without any tested model for national wide introduction come October 2013. It is New Zealand's families, and vulnerable adults and children who will face this model and its fallout, should this not be deleted from the Bill.

Fixed fees for family legal aid

Fixed fees for family legal aid were introduced on 23 July 2012.

Fixed fees are cost-cutting driven. They were introduced as the current legal aid funding model is financially "unsustainable" and needs to "better match public funding to New Zealanders legal needs" ("Fixed Family Fees Framework: Proposal for Change", Ministry of Justice ADLSi presentation, 8 March 2012). Furthermore, "family fixed fees are part of a range of initiatives to deliver savings in legal aid expenditure" (Family Fixed Fees: Policy and Procedure, Ministry of Justice, November 2012).

Fixed fees cut the funding pool for legal aid in three ways:

- *Price cutting:* a 21 per cent reduction in the charge-out rate for providers from a maximum of $134 to $105 flat rate for all, regardless of experience.
- *Fixed time contract:* less time to do the same work, or to do more work than previously;
- *Bulk funding by classification:* deeming 85 to 95 per cent of the Family Court's work as "not complex", funded on low fixed fees.

They represent a significant cut in time available for Family Court lawyers to spend on the necessary work for clients. Time was reduced by up to 65 per cent in some cases. In all cases, they were over 10 per cent total reductions of the time available for Family Court lawyers to attend to a client.

It was predicted that family lawyers would reduce/stop legal aid. Lawyers were unable to provide a competent and professional standard of legal representation on fixed fees, as the time provided was insufficient. It was uneconomic to work on fixed fees and maintain offices with overheads and provide competent and professional representation. Fixed fees and family lawyers' professional, ethical, and business models were largely incompatible. This restricts access to justice for families.

In November 2012, *Official Information Act* requests were made from the date of the introduction of fixed fees (23 July 2012), to get a comparison with the previous year, to see what impact (if any) there was.

Four-month Comparison 2011/2012:
Family Providers Receiving Grants of Aid for Fixed Fees

Years	Less than 5 cases	5 – 10 cases	11 + cases
2011: 23 July – 23 November	322	253	337
2012: 23 July – 23 November	284	210	306
Total Decrease:	38	43	31
Per cent Decrease:	11.8	17	9.2

There is an across-the-board reduction of lawyers undertaking 'new fixed fee briefs', particularly those prepared to take on one to 10 cases. Most notable is the 28.8 per cent decline in grants of aid to providers who have less than 10 new cases. The total pool of those prepared to do new work on fixed fees has shrunk.

The Ministry of Justice's latest information confirms this:

> "Very few remained active or undertook the same number of legal aid cases they had been doing two to five years ago. There were some areas of New Zealand were it was becoming increasingly hard to obtain a family lawyer, which resulted in clients being put on waiting lists. Lawyers were leaving because the work was no longer attractive to either individual lawyers or firms."
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> ("Workshops on purchasing legal aid services: summary of discussions", 7 February 2013)

New Zealanders have struggled to find a lawyer on legal aid to represent them in their parenting, guardianship, domestic violence, or care and protection matters. These are all areas of risk, safety, and vulnerability for parents and children. Access to legal advice and representation, on an urgent basis, is essential. The absence of this is a safety issue.

The other consequence of this is the rise in self-represented litigants in the Family Court since July 2012. The Principal Family Court Judge Laurence Ryan has drawn attention to this recently:

> "The biggest challenge facing the Family Court right now ... is the increasing number of unrepresented litigants – a situation forced by changes to Legal Aid make last year. Ryan says, the changes aren't working... having the public represent themselves causes a raft of problems for the system – it takes up more of court staff's time explaining processes to those without lawyers, and more time in court when people are forced to represent themselves in unfamiliar territory. 'They just don't know how to identify the issues the judge wants to know about and then how to articulate them... So you end up with an unrepresented litigant that has no idea of the law and it's a hugely stressful thing for them to go through. Then to expect them to think logically and advance their case unemotionally, it's a huge ask."
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> ("In the court of public opinion", *Sunday Star-Times*, 10 March 2013)

The 2012 family legal aid reforms represent a 'double jeopardy' situation, with no representation for victims of domestic violence/care and protection issues with risk and safety concerns PLUS self-representation and administrative inefficiency, delay and costs to the administration of justice. Fixed fees represent a potentially high personal and State monetary cost.

We thank the NZ Centre for Human Rights and the Legal Research Foundation for permission to extensively reference Maria Kazmierow's paper in this article, first presented 11 March 2013, at the "Access to Justice in an Age of Austerity" conference. The paper was entitled: "2013 Family Court Reform - The impact on New Zealand families' access to justice during austerity driven reform".