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LAW·COMMISSION
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Report 82

Dispute Resolution in the Family Court

March 2003
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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25 March 2003

Dear Minister

I am pleased to present to you Report 82 of the Law Commission *Dispute Resolution in the Family Court*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

J Bruce Robertson
President

The Hon Lianne Dalziel
Minister Responsible for the
Law Commission
Parliament Buildings
Wellington

Acknowledgements

IN RESPONSE to our preliminary discussion paper entitled *Family Court Dispute Resolution* we received over 120 submissions from interested individuals, groups, community agencies and government departments. The submissions drew upon on a wide range of personal and professional experience. We also consulted with community groups and individuals who work in close association with the Family Court. We are grateful and wish to extend our thanks to all those who took the time and who made significant effort to help us with our review. Their contributions have greatly assisted us and their names are listed in appendix G. As ever, the responsibility for the recommendations of this report rests with the Law Commission.

The Commissioner responsible for this project has been Vivienne Ullrich QC, assisted by Helen Colebrook, Senior Legal Researcher and Claire Phillips, Researcher.

1
Introduction

1 THIS GOVERNMENT REFERENCE was prompted by widespread criticism of the Family Court of New Zealand. Allegations include that: the system is biased against men; without notice applications are granted too readily; where orders are made without notice it takes too long for the other party to be heard; matters generally take too long to resolve; children suffer because of these delays; and, not all Family Court professionals are properly trained and skilled.

2 These criticisms are not surprising, because the Family Court is a unique jurisdiction. It deals with families in crisis, and emotions run high. Its judges are faced with extremely difficult decisions, which affect litigants in a profoundly personal way. The welfare of children is often at stake. Personal rights compete with protection and security. Fairness competes with the welfare of children. Such principles cannot always be balanced or compromised – one must prevail over the other. People are hurt by these decisions, however "right" they may be.

3 This report recommends new conciliation processes and court procedures that we believe would help resolve family disputes. Our strongest recommendation, however, is that the present system be resourced to perform at its most efficient, without the delays caused by lack of court time, shortage of report writers and lack of assistance from the Department of Child, Youth and Family Services.

4 The Family Court should be the place where family legal disputes are resolved as quickly possible, in a way that meets the needs of families – especially children.

5 To achieve this, the Family Court must:

- help families reach agreements;
- give families information and professional advice to inform their decision making;
- provide opportunity for children's views to be heard;
- give children representation;
- deal in the same place with matters relating to the same family;
- recognise differing cultural values;

- provide information and professional expertise to inform court decisions, where these are required;
- provide help from empathetic, well-qualified, and properly trained staff and professionals;
- liaise effectively with individuals and community groups that help families;
- keep pace with social change;
- provide a fair and just process;
- resolve disputes as speedily as possible;
- make urgent interim orders where necessary.

6 These have been the aims of the Family Court since it was set up in 1980. Over the last 22 years its jurisdiction has burgeoned, putting increasing pressure on resources. There has also been profound social change.

7 Our Family Court model acknowledges these changes, and takes a more focused and targeted response to dispute resolution. We believe it will achieve more enduring outcomes that are better for children.

8 The Family Court is, however, only a venue for dispute resolution. Overall, outcomes for New Zealand families depend on many other factors, such as health, poverty, education, and employment, all of which impact on the families who may seek assistance from the Family Court.

TERMS OF REFERENCE

9 The Government terms of reference were that the Law Commission consider what changes, if any, are necessary and desirable in Family Court administration, management, and procedure to resolve disputes early. It was asked to consider:

- the role of information-giving, counselling, legal advice, mediation, assessment, case management, and adjudication;
- who might best fulfil each of these functions;
- how these services are provided;
- the timing of various interventions and the means of accessing them;
- how the views and interests of children should be best represented, and at what stage in the process;
- culturally appropriate personnel and processes.

10 The Commission was also asked to look at resource allocation in the family jurisdiction and to consult widely.

11 The terms of reference imply that the Family Court is a useful institution; we were asked how its processes might be improved.

LAW COMMISSION PROCESS

12 Our preliminary paper, *Family Court Dispute Resolution*, published in January 2002, described the Family Court's background and history, its social context, how it operates and who is involved.[1] The paper also set out what we saw as the main problems in service delivery.

13 Since this paper was published, we have received 126 submissions from individual Family Court clients, and from representatives of most professionals who work there. We have also consulted further with community client groups and professionals who work in the Court.

RECOMMENDATIONS

14 The following is a summary of our recommendations:

1 Avoiding delay through improved systems and resourcing, and better targeting of assistance.
2 Addressing competence and gender bias issues by upskilling Family Court staff and contracted professionals.
3 Improving dispute resolution procedures as an alternative to judge-imposed decisions, by contracting Family Court mediators.
4 Providing more dispute resolution processes designed by Māori, and delivered to Māori by Māori.
5 Extending the Family Court co-ordinator role to oversee improved and more extensive conciliation services.
6 Making available in the community more information about the Family Court and its processes.
7 Ascertaining and incorporating children's views in conciliation processes.
8 Improving complaint procedures related to contracted Family Court professionals, including psychologists and counsel for the child.
9 Appointing a chief executive or general manager of the Family Court to the Department for Courts' national office.
10 Making available appropriate conciliation services that include information, counselling, and mediation, in respect of all proceedings that may be brought in the Family Court.

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[1] Law Commission *Family Court Dispute Resolution* (NZLC PP 47, Wellington, 2002).

ORGANISATION OF THIS REPORT

15 Chapters are ordered to reflect the steps a matter takes as it progresses through conciliation services and the Court process.

16 Discussion of Māori participation, immigrant groups, people with disabilities, self-represented litigants, and gender bias comes later in the report, not because we think these issues unimportant but because they cannot be fully discussed, or the relevant recommendations understood, without referring to processes described in preceding chapters.

BRIEF COMPARISON WITH SIMILAR JURISDICTIONS

17 We should not forget the key factors that make the Family Court of New Zealand a world leader in its field. Our recommendations are intended to strengthen this foundation. While criticisms of its operation are valid and there will always be ways to improve the court and its processes, the Family Court is a valuable institution providing a useful service to families in distress.

18 The Family Court of New Zealand is a specialist court with specialist judges. It has comprehensive jurisdiction over family matters. The legislation provides for the appointment of legal representatives for children involved in most cases that go to defended hearings. Contrast this with the prevailing situation in several comparable, democratic western nations.

19 Many countries do not have a dedicated Family Court. All family-related matters are dealt with in civil courts with non-specialist judges, alongside civil and commercial matters. In the United Kingdom, the County Court or the High Court deal with family matters, depending on the nature of the proceeding. In the United States, 12 of 51 States have no Family Court at all.[2]

20 Neither do dedicated Family Courts always have jurisdiction over all family matters. In New Zealand, the jurisdiction is comprehensive. Separating husbands and wives do not have to attend one court to deal with issues relating to the children and another to settle their property dispute. Where there are care and protection issues under the Children, Young Persons, and Their Families Act 1989, another court does not deal with issues relating to the same child under the Guardianship Act 1968. A child of a de facto

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[2] B Babb "Where we Stand Redux: Another Look at America's Family Law Adjudicatory Systems" (2002) 35 FLQ 627.

relationship has custody and access orders made by judges of similar status to those who determine custody and access for a child of a married relationship. Where a widow disputes her husband's estate, her relationship property issues are dealt with alongside competing claims to the estate by her husband's children.

21 Contrast this with the Australian situation, where the Family Court is a federal court with jurisdiction only over matters of marriage and divorce, and issues arising for the children of divorce. State courts generally deal with de facto relationships, issues for children with non-married parents, adoption, and care and protection issues. Only Western Australia has set up a comprehensive Family Court combining Federal and State jurisdictions.

22 In most proceedings over which the Family Court of New Zealand has jurisdiction, it is possible to appoint a lawyer to represent the child and give that child a voice in proceedings. This complies with the United Nations Convention on the Rights of the Child, to which New Zealand is a signatory.

23 In many other jurisdictions, appointing a representative for the child is at the Court's discretion, and the child may not necessarily be represented by a lawyer. The Australian Family Court may order the child be separately represented in any proceeding where its welfare or interests are a paramount or relevant consideration.[3]

24 In the United Kingdom, a Family Court welfare officer,[4] combining the roles of child representative and report writer, represents children in the equivalent of our custody and access cases. These officers are not necessarily qualified in social work and never have legal qualifications.

25 We consider that the representation of, and provision of information about, children in the Family Court of New Zealand is carried out with a greater degree of professionalism.

PROGRESS OF A TYPICAL DISPUTE

26 To illustrate how our recommendations might work in practice, we describe some typical processes for separated parents disputing over arrangements for their children.[5]

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[3] The circumstances are more restricted than in New Zealand: *Re K* (1994) FLC 92–461.

[4] From the Children and Family Court Advisory and Support Service (CAFCASS) set up under the Criminal Justice and Court Services Act 2000.

[5] See the flow chart Dispute Process Under the Guardianship Act 1968, appendix A.

27 Nicole and Tom are thinking of separating. Nicole contacts her lawyer. Tom talks to some mates, gets some pamphlets, and has a look at the Family Court website. He then contacts the Family Court co-ordinator. Tom and Nicole are referred to a parents' information session, and their two children invited to a children's programme. This helps Nicole and Tom talk with the children about the separation.

Nicole and Tom try to discuss all the issues, but don't seem to be getting anywhere. Nicole suggests contacting the Family Court co-ordinator again, and they are referred to counselling. They agree on arrangements for the children and withdraw from the system.

OR

After two counselling sessions, Nicole is convinced Tom is not facing up to the situation, and goes back to her lawyer. Tom is concerned that Nicole wants to take the children from Wellington to Christchurch where her parents live, so he applies for a court order to keep the children in Wellington. Nicole is given three days to respond to his application. The Court makes the order and refers the couple to mediation.

The mediation is highly successful. Nicole and Tom each feel they have been heard, and each understands the other's point of view a little better. They draw up an agreement. It covers arrangements for the children, and property issues. Nicole and Tom each see lawyers to have the property agreement approved. Everything is settled.

OR

There were various sticking points in the mediation. Nicole is now determined to go back to Christchurch. She sees her lawyer. She makes an application for custody and to be able to take the children to Christchurch. The Court appoints counsel for the child.

Counsel meets the children, then discusses their views and needs with their parents. The counsel is able to broker an arrangement. Nicole agrees to stay in Wellington once she realises how important this is for the children.

OR

Counsel for the child cannot break the deadlock and recommends a psychologist's report. This states the importance to the children of maintaining weekly contact with their father. Nicole's lawyer advises her that the Court is unlikely to give her permission to take the children to Christchurch. She reluctantly agrees to stay in Wellington and a consent order is drawn up.

OR

Nicole agrees to stay in Wellington, but Tom is unhappy that the children will be with him only every second weekend and half the holidays. Further negotiations helped by counsel for the child do not advance the matter. It is set down for a settlement conference with the judge. Nicole and Tom each tell the judge what they want and there is discussion about how far apart they really are. Compromises are made and the judge makes orders by consent.

OR

Nicole remains staunch. The matter is set down for a hearing. The judge hears all the evidence and decides the children will live five days a fortnight with Nicole and nine with Tom. Nicole and Tom comply with the court orders and the children are relieved to have the problem resolved.

OR

Nicole does not like the court order. She accepts her lawyer's advice not to appeal but keeps sabotaging arrangements for the return of the children to Tom. Tom has another talk to the Family Court co-ordinator, and specialist counselling is arranged. Nicole comes to accept the situation and complies with the orders.

28 The process would be modified according to the type of proceeding. In relationship property matters, family protection cases, and the like, the pattern would still be to provide information and opportunities for legal advice, followed by counselling and mediation options, before pursuing the court track. In such cases, an application may need to be filed to elicit disclosure of documents or prevent sale of an asset, but the matter can then revert to the conciliation services.

29 The intention is for the process to be flexible enough to respond to specific needs while at the same time always seeking to have the parties themselves resolve their dispute.

2
Conciliation services

OVERVIEW

30 THE 1978 ROYAL COMMISSION on the Courts recognised the conflict between the functions of a court and those of a social agency. It nevertheless considered that the Family Court should undertake conciliation, and aim, where possible, to resolve disputes before embarking on an adversarial process.[6]

31 When the Family Court was set up, it dealt with proceedings under the Family Proceedings Act 1980, the Guardianship Act 1968 and the Matrimonial Property Act 1976 (that is, mainly disputes between separating couples about marriage dissolution, spousal and child maintenance, guardianship, custody and access). Although its jurisdiction included custody and access disputes between unmarried parents, at that time most disputing parents were married.

32 The legislation emphasised reconciliation as a primary objective. Counselling sessions could be accessed through the Court, and were expected to result in spouses either reconciling or resolving their dispute. Once proceedings were filed, judges would hold a mediation conference in an effort to reach a settlement before a defended hearing and an imposed decision.

33 A 1993 committee headed by Judge Boshier advocated establishing a separate family conciliation service.[7] It envisaged a key role for the counselling co-ordinator, with the Court contracting services from appropriately qualified people in the community.

34 Since then, there has been continuing debate on the extent to which conciliation services should be tied into the Court system. The same debate has informed submissions and consultation for this report.

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6 *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978).

7 Judge PF Boshier "A Review of the Family Court: A Report for the Principal Family Court Judge" (Auckland, 1993, mimeograph).

35 The role of the Family Court is said to be adjudication. The Court is an arena of contest where each side is entitled to put its case and have the matter resolved by the ruling of a judge. The process is governed by rules ensuring even-handedness between parties. But this may lead unavoidably to competition between two "stories", a sense of victory and vindication for the party whose aims are endorsed by the judge, and a sense of defeat and loss for the other party.

36 This approach contrasts with conciliation services, which focus on healing rather than determination. Conciliation encourages each party to understand the other's point of view, and to co-operate in finding a resolution that accommodates both.

37 Although conciliation is likely to have more "user friendly" outcomes than adjudication, the fact is this is not always achievable. Some situations are so complicated by pain, violence, mental health problems, and plain bloody-mindedness that conciliation cannot, within a reasonable timeframe, resolve matters in a manner acceptable to both parties.

38 Some cases, such as when a child is in danger of being taken out of the country, or there has been a violent assault, require an urgent ruling from a judge before conciliation can be attempted. Sometimes, parties have tried conciliation but have been unable to agree, and the Court must decide for them.

39 The need for an urgent order does not rule out conciliation at a later stage. Where, for example, Family Court proceedings have been initiated and an order must be made to disclose property information, conciliation may still be useful once that information is available. The emotional seesawing and catch-up that often accompany relationship breakdown may make conciliation an option after a settling down period, even though it was impossible while emotions were running high.

40 We see the Family Court as a centre for resolving only those disputes over which it has statutory jurisdiction. The Court's conciliation processes should not be available for family disputes falling outside its jurisdiction; these are the province of other social and health agencies.

41 We believe conciliation must be clearly delineated from processes leading to adjudication. One process must not bleed into the other. Any concessions parties might have made during privileged negotiations must not be disclosed to the adjudicator during the contested court process.

CONCILIATION SERVICE AS PART OF THE FAMILY COURT

42 The 1978 Royal Commission on the Courts[8] and the 1993 Boshier report,[9] as well as submissions to the Commission, agree that the Family Court should provide conciliation services. Debate focuses on how these services should be delivered.

43 Conciliation aims to resolve disputes in a "user friendly" way. It allows parties to generate their own solutions rather than having them imposed, to provide healing as well as finality, and for less cost than a defended court hearing.

The current system

44 The Family Court contracts out conciliation services to organisations and individual private practitioners. The reference in the legislation is to counselling, and to promoting reconciliation and conciliation.[10]

45 The Family Courts Act 1980 provides, under the State Sector Act 1988, for the appointment of an officer of the Department for Courts. This position is currently that of Family Court co-ordinator, whose main role is to oversee provision of Family Court counselling services, co-ordinate provision of section 29A psychologist's reports, and the appointment of counsel for the child.

46 The only alternative dispute resolution process is the mediation conference chaired by a Family Court judge, under section 13 of the Family Proceedings Act 1980. The current situation is that Family Court conciliation services are shared between the mediation conference, the Family Court co-ordinator's administrative role and contract counselling services provided by people in the community.

The stand-alone model

47 Another option is for a completely separate body to provide all conciliation services for potential parties to Family Court litigation. It would be administratively separate from the Family Court, and could be modelled on the mediation service set up under the

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8 *Report of the Royal Commission on the Courts*, above n 6.

9 Boshier, above n 7.

10 Sections 8–12 Family Proceedings Act 1980.

Employment Relations Act 2000. One submission outlined a view of such a body:

> The institution could provide the intake and education services suggested in the paper, psychological expertise, counselling and mediation. Even a bit of social work as well. It would comprise a variety of the professionals that currently assist the Court but it would do so in a co-ordinated, professional, properly trained way. The institution would be able to respond to crises more quickly and would be of major assistance in the identification and management of high-conflict parties.[11]

48 This service would engage people to ascertain the view of children as an adjunct to counselling and mediation processes. Parties unready for mediation could be referred for preparatory counselling.

49 The Commission has several concerns about this model. Counselling services provided currently through the Family Court and by judges at mediation conferences are available in every centre where a Family Court sits. We doubt a stand-alone entity with permanent employees would be able to provide such good quality national coverage with the full range of professional services. The Employment Mediation Service operates out of only seven locations around the country[12] but helps complainants by holding mediations in other centres.

50 Our other concern relates to the necessary range of professional services. The background and expertise of mediators able to deal with disputes involving children may differ from those able to mediate relationship property disputes. High-conflict litigants need expert intervention. We believe that contract professionals, such as counsellors and psychologists, benefit the service by bringing in a range of community-based expertise that goes beyond Family Court work. This also helps prevent burnout. Sourcing community expertise means drawing on a range of training and cultural backgrounds, and avoids capture by a small group of exclusively Family Court personnel. Contracting allows services to be made available in smaller centres, while administration and service quality control remain in the larger centres where the Family Court is based.

51 Contracting allows the Family Court to offer more culturally appropriate conciliation services to groups within the community,

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[11] Submission 97.

[12] Auckland, Hamilton, Palmerston North, Napier, Wellington, Christchurch, Dunedin.

including Māori, Pacific Islands peoples, and immigrant groups, who may be concentrated in specific localities.

52 We believe that necessary professional expertise is better accessed by contract than by attempting to employ fulltime mediators. We foresee a grave risk that the qualifications and training of fulltime mediators would be of a lower standard than that of professionals contracted from the wider community.

The Boshier report model

53 Although the Boshier report proposed a distinctly separate family conciliation service, it still envisaged a key role for counselling co-ordinators (now renamed Family Court co-ordinators). They would be responsible for public education, and early case classification and referral. It envisaged community-based mediators engaged on contract rather than as permanent employees. Brief specialist reports from contracted psychologists and social workers would be provided to inform parties to custody mediations about the children's needs and wishes. The Boshier report envisaged counselling being applicable to fewer cases than at present, but counsellors were to continue to be contracted to the service rather than employed.

54 The report saw it as the counselling co-ordinator's responsibility to obtain section 29 social work and section 29A psychologist reports, and to administer the appointment of counsel for the child.

55 So although the Boshier report suggested a separate family conciliation service, what it actually proposed was administration by the counselling co-ordinator of a range of services provided by community contractors, not employees.

56 The recommendations in the Boshier report closely resemble our preferred model for providing Family Court conciliation services.

The Law Commission proposal

57 We do not support complete separation of the conciliation service and the Family Court. In our view, making similar social services available through a separate agency would result in administrative duplication and risk more delay. We are also concerned that adequate resources and expertise would be unavailable in smaller centres.[13]

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[13] See above paras 49–51.

58 We envisage several clearly delineated services, all accessed through the Family Court. These might be provided by community groups or individuals operating separately from the Family Court. Quality control, referral choice, and availability would be administered by the Family Court, with support from the Department for Courts.

59 This is essentially how counselling referrals are currently managed under sections 9 and 10 of the Family Proceedings Act 1980. We believe our recommended information sessions, mediation services, and high-conflict case interventions can be similarly managed. The Family Court co-ordinator plays a key role in maintaining these referrals; the co-ordinator will have overall responsibility for establishing and maintaining service links.

60 No ongoing record will be kept if parties referred to counselling services or information sessions through the Family Court resolve their disputes and have no further need of the Court. If, however, earlier services fail to resolve matters, it will be useful to have a record of what interventions were accessed, what the parties valued or found effective, and what they considered a waste of time. It can then be decided what process is needed later and whether parties are now ready to make use of what was inappropriate before.

61 Where the Court directs provision of a service, as under sections 10 and 19 of Family Proceedings Act 1980, the Family Court co-ordinator will arrange it.

62 Where service use is optional (such as current counselling under section 9 of the Family Proceedings Act 1980), parties will choose referrals, in consultation with the Family Court co-ordinator. This may involve discussion between the co-ordinator, the client, and the client's lawyer.

63 The Family Court would not, however, be the only channel for accessing these services. If agencies contracted to the Family Court provide similar services direct to the community, people would be free to contact them as they wish, just as now, for instance, they can access Relationship Services counselling through the Family Court or by direct contact.

Recommendations

A new, expanded conciliation service should operate out of the Family Court. Legislation will have to be amended so services such as counselling and mediation are available for a wider range of matters than they are now.

The conciliation service should include information sessions for guardianship disputes, and referrals for counselling, mediation and specialist counselling.

The conciliation service should be managed by the Family Court co-ordinator or conciliation service co-ordinator.

Information sessions, and counselling, mediation, and specialist counselling referrals will be contracted to groups and individuals but managed by the Family Court, which, along with the Department for Courts, will oversee quality control.

INTAKE PROCEDURES

64 Preliminary Paper 47 floated the idea of an intake procedure to ensure presenting parties are referred to the most appropriate service.

65 This suggestion has prompted several concerns. One is the perceived degree of compulsion in such a process: would a party lose the right to choose the service he or she wanted; would it give the Family Court co-ordinator too much power?

66 Lawyers are concerned that people referred to conciliation processes without legal advice might compromise their positions before they understand their legal rights, and thus be disempowered.

67 Counsellors, on the other hand, are concerned that parties who go to lawyers first will be encouraged to take up a position and adopt oppositional behaviour.

68 Under the present system, parties filing applications for custody are directed to counselling under section 10 of the Family Proceedings Act 1980 before the Court progresses their application (unless there are genuine reasons to by-pass counselling, such as urgency, or because parties have already had counselling).

69 The legislation may still impose preparatory steps on parties to Family Court proceedings; see, for example, the later discussion on information sessions.

70 However, clients will, in general, be able to choose a process, or agree to use one proposed by the other party or the Family Court co-ordinator. Once an application is filed, the choice of process will be subject to the direction of the Court.

71 An intake interview is a useful step: an opportunity to discuss and explore options. Given the service range – information sessions, therapeutic counselling, conciliation counselling, and mediation – parties might appreciate help in understanding what is available.

72 The intake interview is not meant to be a barrier: it would not be lengthy or diagnostic, but is intended to ensure parties have access to the service they need.

73 The interview might take place later if one avenue has become a dead end, or new issues have surfaced. Specialist advice might be needed where issues demand sophisticated distinction between available referrals.

Recommendations

Conciliation services should be available to all parties who apply, or by Court direction.

Intake interviews should be available through the conciliation service co-ordinator, who will facilitate the most appropriate referral for the parties concerned.

PRIVILEGE AND CONCILIATION SERVICES

74 Anything disclosed in therapeutic and conciliation counselling, or in mediation, must remain privileged and be withheld from the Court by both parties should matters remain unresolved and go on to adjudication. Settlement negotiations are unlikely to yield concessions, compromises or bargains if these can later be presented as evidence to a judge. This prohibition on disclosure applies not only to the parties, but to those facilitating counselling, mediation or negotiations.

75 There is, however, potential for abuse if someone is party to privileged or "secret" processes prior to adjudication. As one submission put it:

> As it is now, every stage is hidden from the stage before. This gives the biggest virtual bike shed in the country and plenty of bullying goes on behind it. Hidden processes tend to favour the manipulative and insincere and those who think the rules are for everyone but them.[14]

[14] Submission 126.

76 We are concerned that while the current system allows counsellors to assess parties during interviews and get a clear picture of the best way to resolve disputes, counsellors have no opportunity to express their views.

77 A counsellor submits either a record of what parties agreed, including any partial agreement, or a statement that they were unable to agree.

78 We believe it is inappropriate and undesirable for counsellors or others to comment later on what is said during counselling or on why a dispute has not been resolved. However, we consider that, where matters are not fully resolved, a counsellor's or mediator's report could helpfully suggest a next step.

79 Counselling service providers we have consulted tell of their concern that matters sometimes drift, when they consider there is an urgent need for judicial intervention or management.

80 They understand the need for privilege, but consider a "next step" recommendation would not be contrary to best practice.

81 This recommendation would inform the parties and the Court; it would not be binding. Parties could choose how to proceed, subject to the direction of the Court where parties could not agree or where they chose a Court-funded service (such as the appointment of counsel for the child, or provision of a section 29A psychologist's report).

Recommendation

Anything disclosed during a conciliation service referral is privileged by statute, provided that agreements can be reported to the Family Court and recorded as consent orders, and that the service provider can recommend a next step.

IDENTIFYING DIFFICULT CASES

82 Many submissions objected to identification of high-conflict litigants or difficult cases by psychological diagnosis. These objections may be based on a misunderstanding of our position: although our discussion paper referred to diagnostic psychological tests, we did not intend they be used this way in the Family Court.

83 We do believe, however, that some circumstances earmark cases for judge-managed and controlled interventions – those that will

not benefit from, or may even be exacerbated by, normal conciliation. Such cases must be identified, and managed accordingly. Some identify themselves by the nature of the dispute, (for instance, cases involving protection orders under the Domestic Violence Act 1995, or where there are allegations of sexual abuse). In others, the behaviour of parties during the case will quickly reveal it as one needing close management – extreme courtroom behaviour; more than one change of counsel; sacking of counsel; refusal to comply with Court directions; failure to attend hearings; and, rigidity. Any of these issues alone, on one occasion, is not significant; where they occur more than once, or several are in evidence, such a case clearly needs special attention.

84 We cannot rely on any particular procedure at any particular stage to identify cases needing close control and management; rather, everyone working in Family Court conciliation and in the Court itself must be alert for them. The nature of some cases, such as sexual abuse allegations, will mark them out. Others may be identified during counselling or mediation, and Court intervention recommended as a next step.[15] In still other cases, a party or the party's lawyer heading towards a hearing may apply for close monitoring. Judges might identify further cases and direct them appropriately.

85 It is important that all Family Court professionals, including judges, acknowledge there are situations that will not benefit from conciliation or time out. Here, firm management, backed by court orders and post-order assistance, will avoid expense and delay, which are damaging to parties and their children.

86 If the Court were to have psychologists' reports on adults, especially those party to guardianship disputes, as well as on children, these could include an assessment of the best means of progressing and resolving disputes.[16]

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[15] See above paras 78–81.

[16] This requires amendment of the Guardianship Act 1968 in line with s 178(2), (3) and (4) Children, Young Persons, and their Families Act 1989.

Recommendation

All Family Court conciliation professionals, and those working in the Family Court itself, should be trained to recognise situations requiring Court control and management, to avoid inappropriate use of alternative dispute resolution processes.

LEGAL AID

87 To be eligible for legal aid in some jurisdictions, parties must use conferencing/mediation services without legal help before accessing the Court. We do not support this practice; there should be no difference between the services offered to legal aid clients and to those paying their own fees.

88 All parties should be entitled to basic legal advice on their situation, and clients eligible for legal aid should be able to access this advice before being compelled to use conciliation. Others may want legal advice part way through conciliation; that is, after initial counselling but before mediation. In any case, those entitled to legal aid should able to get advice at any stage during conciliation and mediation; doing so might well avoid court proceedings altogether.

89 Accessing Family Court conciliation before issuing proceedings could become a prerequisite for a grant of legal aid so long as legal advice is available to assist and inform the conciliation process.

Recommendations

Parties could be required to access Family Court conciliation services through the conciliation service co-ordinator before they are allowed to get legal aid to start proceedings.

Legal aid should be available to those eligible from the start, so they can get legal advice while accessing Family Court conciliation services.

3
Family Court co-ordinator

OVERVIEW

90 THE FAMILY COURT CO-ORDINATOR (known originally as the counselling co-ordinator) has been an integral part of the Family Court since it was set up in 1981. The role has subsequently changed, and we recommend it be expanded and invigorated.

91 Section 8 of the Family Courts Act 1980 provides:

> *Counselling supervisors, counsellors and other officers*
>
> (1) There shall from time to time be appointed under the State Sector Act 1988, as an officer of the Department for Courts, a person whose principal responsibility shall be to perform such duties as the [c]hief [e]xecutive of the Department for Courts may direct to facilitate the proper functioning of the Family Courts and of counselling related services.
>
> (2) Without limiting subsection (1) of this section, there may from time to time be appointed under the State Sector Act 1988 such counselling supervisors, counsellors and other officers as may be necessary to enable Family Courts to perform any function conferred on them by any enactment.
>
> (3) Every such counselling supervisor, counsellor and other officer, while performing any duty under the auspices of a Family Court, shall for the purposes of the District Courts Act 1947 be an officer of that court.

92 Only counselling/Family Court co-ordinators have ever been appointed under this section, although the job description has also changed over time.

Original job description

93 The counselling co-ordinator's original job description stated: "The position ensures the effective functioning of the Family Court by co-ordinating arrangements for counselling, mediation conferences, appointment of counsel for child and the obtaining of specialist

reports. It creates a link between the Family Court system and the community it serves by fostering liaison and community education."

94 Key tasks included administering counselling referrals and specialist reports, and appointing counsel for the child.

95 The co-ordinator was also expected to:

- be regularly available to the public, in person and by telephone;
- help the public with accurate information and appropriate assistance and/or referrals;
- liaise with the legal profession, Marriage Guidance, and private counsellors;
- arrange training and information events for the Department of Social Welfare, the Department of Education, psychologists, social workers, and anger management and cultural groups, and inform them of changes and administrative requirements;
- inform interested community groups about the services Family Courts offer;
- distribute pamphlets and other material;
- encourage section 9 referrals as a first resort;
- arrange training events.

A large part of the job was, therefore, liaising between the Family Court and the community.

96 Counselling co-ordinators undertook these tasks throughout the 1980s. When the Family Court was first set up, its jurisdiction was much more limited than it is today. Since then, the number of applications processed annually has increased dramatically, and the co-ordinator's role changed accordingly.

Shrinking role since 1990

97 In response to changes that began earlier, the counselling co-ordinator's job description changed in 1995, and the position was renamed Family Court co-ordinator.

98 The objective of the new position was:

> To promote the effective functioning of the Family Court by co-ordinating arrangements for counselling, mediation, conferences, appointment of counsel for children and the obtaining of specialist reports.

99 Its scope and objectives changed so that tasks were oriented more towards administering counselling, obtaining specialist reports and making counsel for children appointments, and less towards community education and public liaison, and one-on-one interviews.

100 Although key tasks still include providing appropriate public assistance and information by telephone and over the counter, and crisis intervention counselling and referrals, the emphasis has been on administering services such as counselling and specialist reports. Family Court education has extended only to keeping the public informed about available services, accepting appropriate speaking engagements, and liaising with community service groups and organisations.

101 As the Family Court jurisdiction has expanded, so has the Family Court co-ordinator's administration of core services (especially in relation to the Domestic Violence Act 1995), so that maintaining the same national number of co-ordinators has meant reducing their tasks.

102 Many Courts do not offer co-ordinators any administrative, clerical or typing support, requiring them to make referrals, as well as manage administrative tasks and relevant documentation. Consequently, much of their work consists of clerical and administrative duties.

103 Co-ordinators in most Courts are obliged to offer crisis counselling to people presenting at the Family Court counter. But not all co-ordinators have time to give clients information, and counsel them about their situation and possible referrals. Most have time only for a minimal community education role.

104 The Christchurch Family Court is one court that has managed to keep its co-ordinators carrying out a full range of functions. They still do community liaison, interview people coming to the Court, and give basic counselling and information. The Christchurch Family Court is able to do this partly because it is a large court servicing a wide area and employing three co-ordinators, thus spreading the workload. Its co-ordinators also have clerical and secretarial support.

105 The counselling co-ordinators' shrinking role might be attributable to the Court's bigger workload and limited budget. Maintaining the original role would have meant employing more staff and possibly increasing their salaries. Changes that have made the position less professional and more administrative have contributed to a lack of appreciation of its value. There seems to have been ongoing tension between the Department for Courts, Family Court management, and Family Court co-ordinators themselves.

106 Some Courts are now suggesting there is no need for the co-ordinator role at all, and that it might be filled by case officers. If

the role is reduced to referrals, of course, that would be true. But even under the present system, co-ordinators organise and maintain availability of specialist services, which could not be done by case officers. The co-ordinator also helps other Family Court staff by being available to manage and cope with distressed and possibly angry parties. These are skills not normally demanded of administrative staff and should not be under-rated, especially in the Family Court context.

107 There are currently 30 Family Court co-ordinators employed in New Zealand Family Courts, only two of them men. This has prompted some male respondents to comment negatively on the predominance of women in Family Court administration.

108 Family Court co-ordinators are employed in salary band D, currently between $36 125 and $46 750. This compares with the Child, Youth and Family Services social worker salary range, where a senior without responsibility for staff earns between $45 000 and $55 000, and a senior overseeing staff gets between $47 500 and $60 000.

EXPANSION OF ROLE

109 We recommend a Family Court conciliation service that provides and manages referrals to information sessions, counselling, mediation and various specialist interventions.

110 We consider the Family Court co-ordinator the ideal person to take on this role.

111 Should our recommendations be adopted, New Zealand would need twice as many co-ordinators as it has now. Consideration could be given to creating senior and junior positions in each Court.

112 We consider the new position would demand higher qualifications. The qualification required currently is secondary school study to sixth form certificate level, or relevant work experience; a relevant tertiary qualification is desirable. The new role would require a tertiary or equivalent qualification in social work, counselling, clinical psychology or similar, as well as good administrative skills. If there were to be several co-ordinator positions in one court, the senior person would also need staff management skills.

113 The salary range for senior positions would have to be extended to attract people with the qualifications and experience we consider necessary.

114 We suggest renaming the position conciliation services co-ordinator or manager.

115 Although we believe the position justifies qualifications and skills not necessarily required of current co-ordinators, we consider the latter's experience to be valuable. They have institutional memory and a range of community knowledge it would be a mistake to jettison. We recommend retaining present staff, with recruitment for new positions undertaken on the new basis.

116 Conciliation service co-ordinator tasks would include intake procedures; co-ordinating and managing counselling and mediation referrals and specialist services; case management assistance; community education and liaison; and, possibly professional supervision, updating and education about new information services and programmes.

117 We visualise the new position incorporating all the key tasks allotted to the Family Courts specialist services co-ordinator as part of the Wellington Development Court trial. Key responsibilities are grouped under these headings:

- co-ordinate specialist service providers;
- manage cases;
- manage relationships;
- assess clients/cases;
- settle on appropriate actions;
- provide Family Court education;
- administer documents and files;
- maintain knowledge capital.

The full key tasks are set out in appendix B.

118 We understand that the Wellington Family Court co-ordinator considered this description reflected her current work. But the tasks we envisage are more extensive than could possibly be managed in that court by one person. The specialist services co-ordinator's job description does not cover all the new conciliation services co-ordinator's tasks because these relate to proposed new services, including co-ordinating information and mediation services, specialist interventions, and, possibly, an expanded community education role.

119 New conciliation service co-ordinator positions are a key factor in developing the Family Court's conciliation service.

Recommendations

There should be an extended Family Court co-ordinator role, renamed conciliation service co-ordinator.

A conciliation service co-ordinator would require higher qualifications and more skills than a current Family Court co-ordinator.

More conciliation service co-ordinators should be employed.

The salary for the position should be increased.

Tasks should include intake procedures; assistance with case management; co-ordinating and managing counselling, mediation referrals and specialist services; community education and liaison; and appropriate professional supervision, updating and education.

Current Family Court co-ordinators should keep their positions, with recommended criteria applying to new appointees.

Costing

120 Our proposal would require major expenditure, and would probably double the current co-ordinator wage bill. Family Courts would have to provide office space for these new employees, and interviewing rooms so parties could talk privately. Co-ordinators would need to be near case officers, to help with case management, but would also need private spaces for conducting face-to-face interviews and making confidential telephone calls.

4
Children's views

OVERVIEW

121 WE BELIEVE CHILDREN'S VIEWS should be heard both within families and within the judicial system. Ensuring children's perspectives inform decision making assists all those involved: child, parents, and any professionals helping to resolve a dispute. As Neale and Smart state:

> Recognising children as people in their own right and respecting their views, of course, poses difficulties for a system of family law and welfare practice that operates on the basis of pre-conceived ideas about what is best for children. … The current legal climate, in which the definition of the problem and the preferred outcome have already been decided upon, leaves little room for alternative ways of thinking about the issues. This is hardly conducive to listening to the child's interpretation of the problem with an open mind, or reaching an impartial decision about possible solutions. Not only is this a disservice to children, but arguably it also places unnecessary and difficult burdens of responsibility on professionals to interpret, re-interpret or override children's views.[17]

122 Our preliminary paper drew attention to the way the Court process hears and represents children's views. The responses we received reflected a range of opinion. Not everyone would endorse the above exhortation to listen to children's views with an open mind. One said:

> Children should not be given a role of this magnitude at all – parents are there to decide what is best for them. The only appropriate way to involve children is statistically in the abstract. It could be assumed that children want to live with both their parents and perhaps their wishes should take precedence over those of their parents.[18]

123 We believe, however, that children have valuable perspectives on family life; their views should not be discounted because they are "less than adult", nor distorted by adult preconceptions about what

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[17] B Neale and C Smart *Good to Talk: Conversations with Children after Divorce* (Nuffield Foundation, London, 2000) 49.

[18] Submission 7.

"ought" to happen. There should be a way for decision makers to hear children's voices, either through a judge, or perhaps more importantly, through parents.

124 There is unlikely ever to be consensus on balancing competing views as to how much say children should have in their family or in the Family Court system, but we endorse the views of the University of Otago's Children's Issues Centre (CIC):

> Encouraging children's participation in family and legal processes does not mean that the child's view would be determinative or that the child would be given responsibility for the decision. Children generally have some awareness of the problems facing their family and listening to what they have to say can allow any distress, anxiety or uncertainty to be properly voiced and sensitively dealt with in a reciprocal two-way process. Participation by children helps them to accept the decision made about them and facilitates their growth toward mature and responsible adulthood. However, it must be acknowledged that some children, although old or mature enough to understand and take part, may not wish to do so. Other children may be too young to participate formally, but their age should not necessarily prohibit communication with them.[19]

CHILDREN'S VOICES IN THE FAMILY

125 Although it is important that those in the Court system hear what children have to say, it is perhaps even more important that parents hear what children have to say within the family.

126 United Kingdom research shows that most children want to know more about what is happening when their parents separate.[20] Many separating parents do not tell their children what is going on, because of their own emotional turmoil, or because they want to protect their children from emotional harm. This reluctance to give children information and appreciate their perspective on a separation that affects them is concerning. Parental separation is probably one of the most momentous events in a child's life, and should be acknowledged as such.

127 Children understand more than many parents give them credit for, and CIC research shows they are aware of what is going on in their family, and want to know more about what will happen to them.[21]

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[19] Submission 36.

[20] N Lowe and M Murch "Children's Participation in the Family Justice System – Translating Principles into Practice" (2001) CFLQ 137.

[21] N Taylor, A Smith and P Tapp *Childhood and Family Law: The Rights and Views of Children* (Children's Issues Centre, Dunedin, 2001), 47.

128 The CIC research shows that, like English children, New Zealand children are rarely consulted about custody and access arrangements, which are decided either within the family or by the Court. Of the children CIC interviewed, only 19 per cent said their parents consulted them about initial, post-separation living arrangements.[22] This gradually changes, and after a while children usually come to play a bigger role in deciding about custody and access.

129 Many children surveyed had clear messages for separating parents:

> Parents, listen to your kids. Just make sure that you're listening to them and not having any preconceptions about what you think they want and make sure you listen to them and that you tell them what's going on.
>
> Make sure they know what's going on or else it gets really confusing for a kid. And so if they know what's going on then they can feel like they've at least got some control over the situation. (Kayla, aged 16)[23]

130 When we speak here of children's views we are not necessarily referring to an expressed preference for either parent. Neither does taking children and young people's views into account mean that parents and professionals should shift onto them decision-making responsibility. The CIC concluded:

> We believe that our research adds weight to the view that children are indeed competent social actors who reflect and devise their own ideas and strategies for coping with family life after their parents separate. Their views are worth listening to, and even quite young children have sensible views to offer. … We question the assumption that children are incompetent or will be overburdened by being consulted. Most children want to be consulted, which we reiterate does not mean that they want to take all of the responsibility for decisions.[24]

131 The CIC recommended everyone involved in the Court process encourage parents to share information with their children, and demonstrate ways of doing so:

> [P]roviding the child with information to assist the child to form their views on matters which affect them; giving the child the support they require to express their view; understanding and respecting the child's perspective; and explaining the decision the official was responsible

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22 Taylor, Smith and Tapp, above n 21.

23 Taylor, Smith and Tapp, above n 21, 50.

24 Taylor, Smith and Tapp, above n 21, 51.

for. Children are far more likely to understand and accept a decision if the person who made it explains their reasons and accepts responsibility for it.

132 The CIC suggests adopting the Scottish concept of the F9 form; this is automatically sent to all children over the age of 12 (with discretion to send to younger ones, if desirable) whose parents are separating. It tells them about the proceedings and asks them to tell the Court how they feel.

133 Other chapters of this report discuss services that might encourage families to share information and listen to one another with respect and compassion. In summary, we recommend:

- Children over the age of seven should be able to attend information programmes to help them express how they feel to their parents and others involved in helping the family to resolve their difficulties.
- Children should be entitled to see counsellors with expertise in working with children, to help them deal with family transitions and difficulties. Counselling might help children tell their parents directly how they feel; or, the child might want the counsellor to relay their view of the situation to parents. We do not believe the counsellor's responsibilities should include reporting to others in the Court process; this would compromise confidentiality, and blur the lines between conciliation services and Court processes.
- Some children might already have contact with a social worker who could pass information from the children to the parents, if children did not want to talk to parents directly.
- Children should, if they wish, be able to attend part of the mediation to ensure their views are heard.

134 Children can express their point of view in several ways, and the system should be sensitive and flexible enough to encourage and support it. Some children might want to come to a stage of the mediation process to tell their parents exactly how they see things. Others might prefer to write a story or draw pictures about their point of view and what they want. Children should have input on what is important to them; for example, a key concern might be ensuring they still have access to friends, pets, or particular activities.

135 Others might not want direct input, but would prefer to be left out of decision making. It is vital to ensure that the changes we are proposing respect children's dignity, and allow them to get the support services they need. On the other hand, we must avoid the

trap of "rights talk", and the risk of forcing children into participating when they would rather not.

CHILDREN'S VOICES IN THE COURT SYSTEM

136 Children's participation in the Court process is currently tightly circumscribed. In matters relating to the Children, Young Persons, and Their Families Act 1989 (CYPF Act), where the child is declared in need of care and protection, counsel for the child will be appointed. Counsel for the child will also be appointed in matters relating to the Guardianship Act 1968, usually after the judge has convened a mediation conference. These appointments may occur some time after proceedings have begun and several key events (counselling, mediation conference, family group conference) have already taken place.

137 Aside from appointment of counsel for the child,[25] the only other person in the Family Court process who has significant contact with children is the Court-appointed specialist report writer, or, in the case of CYPF Act matters, possibly a social worker. The psychologist often does not have contact with the child until a case is scheduled for a hearing.

Judges

138 The CYPF Act obliges judges to listen to children to ensure the children understand what is happening, and to inform them of reasons for the eventual decision.[26] The Guardianship Act 1968 is older legislation and thus puts less emphasis on finding out what children think. Some judges make an effort to listen to children, and might hear a child in chambers. Judges are increasingly concerned with ensuring children understand decisions and their effects, and with defusing any sense children might have that they themselves are responsible for what has happened. Explanation from a judge can be particularly helpful in contested cases with potential for children to be caught in the parental crossfire.

139 Some judges speak directly with children; others may direct counsel for the child or a specialist report writer to explain the basis of the decision and its effects.[27] Another means of encouraging judges to

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[25] Chapter 11 discusses representation of children in the Family Court system.

[26] Sections 8 and 10 Children, Young Persons, and Their Families Act 1989.

[27] See *T v T* [1998] 17 FRNZ 133 (FC) Boshier J; *K v O* (9 October 2000) Family Court Levin, FP 031/106/97 Carruthers J; *W v P* (10 November 2000) District Court Waitakere, FP 364–93 MacCormick J.

seek children's views would be to have counsel for the child ask the child if he or she wants to tell the judge any specific information or desires, or simply to meet the judge in person. We hope judges would accommodate such a meeting.

140 We have considered carefully remedies likely to address perceived problems of children's Family Court participation. Other chapters, as well as the above, recommend ways of encouraging children to have their say; chapters 5 and 6 discuss ways of encouraging parents to consider their children's views and interests; chapter 11 suggests how children's views and legal interests might be represented in court.

5
Information

OVERVIEW

141 People usually come to the Family Court via four routes:

- State intervention (Child, Youth and Family Services (CYFS) investigating a child's need for care and protection);
- requesting counselling under section 9 of the Family Proceedings Act 1980;
- filing an application requiring another party to engage in legal proceedings;
- obtaining a without notice protection or custody order that immediately changes the status quo and generates further proceedings.

142 Many people approaching the Family Court are confused, and need guidance and information on their options; some have already decided on a course of action but are unclear how to pursue it; others are looking for more information on specific issues. The common factor is litigants' desperation.

143 The more people know about a system, the better equipped they are to make informed choices and wise use of scarce resources. Family Court experiences are largely determined by what people understand of the options open to them and of court processes, how well they communicate with their former partner, the influences and attitudes of those operating the Court system, and its cost and accessibility.[28]

144 Needs differ, hence information and services should range from the general to the specific, with enough flexibility to allow people to get advice tailored to their situation.

145 New Zealanders are fortunate that, as Family Court clients, they can access State-funded counselling to help them explore their

[28] Lord Chancellor's Department *Information Meetings and Associated Provisions within the Family Law Act 1996: Summary of the Final Evaluation Report* (Lord Chancellor's Department, London, 2001).

feelings, consider issues and weigh options. Counselling is, in fact, the front line of personally tailored information. This report suggests enhancing the system by providing improved general and individually tailored information, to be delivered by:

- an intake process, ensuring parties are referred to appropriate services;[29]
- more extensive published information;
- parenting and children's programmes.

146 The chapter discusses provision of general information about Family Court services and processes, emphasising what would be useful for couples with children who are contemplating separation, and information that would help children thrive in this transitional environment.

147 We give particular attention to separation, custody and access disputes because public submissions indicate this area of Family Court work is causing most concern. Only two submissions dealt specifically with the Protection of Personal and Property Rights Act 1988 (PPPR Act), and a couple more with matrimonial property and child support issues, usually in conjunction with complaints about the outcome of custody and access cases.

GENERAL INFORMATION ON FAMILY COURT SERVICES AND PROCESSES

148 The Family Court provides basic information about the services and processes families are likely to encounter, in a series of Department for Courts pamphlets. These deal with counselling, mediation conferences, dissolution of marriage (divorce), domestic violence, paternity, guardianship, custody and access, and matrimonial property.

149 Pamphlets are available from courts, Citizens Advice Bureaux (CABs), and other community agencies, as well as online at the Department for Courts website (www.courts.govt.nz/family/index.html).

150 This website has been significantly expanded over the past two years, and now contains the same information as the printed pamphlets. It also has a general information section, with papers, reports, feature articles and a "current awareness" column.

151 Practice notes are available online so people can find out what is expected of them in court interactions. The website makes available

[29] See chapter 2 "Conciliation Services".

several forms that can be filled out onscreen and printed, or downloaded, printed, and filled out by hand. Not all forms are available this way, however. Those on the Family Court website cover disputes about dissolution of marriage, international child abduction, PPPR Act matters (including enduring powers of attorney) and relationship property.

152 Other kinds of application forms, for example, custody and access, and protection orders, are unavailable online, and the Department for Courts has no immediate plans to make them available in this way.

153 The Family Court provides little information on, for example, the effect of parental separation on children, particularly where there is intense conflict. Nor is the information enough to help those considering representing themselves in court.

154 Other than Family Court pamphlets, its website and counselling services, sources of information for prospective Family Court users are:

- CABs;
- community law centres;
- lawyers;
- domestic violence programme providers and Women's Refuge;[30]
- other interested community groups.

155 Lack of comprehensive information about the Family Court leaves the field clear for interest groups to promulgate their own ideas of how it operates and what the current state of the law is. Some of these views are less than objective. We were told of groups removing Family Court pamphlets deliberately and replacing them with their own material.

156 While we agree that consumer advocacy groups have an important part to play in providing information, we believe it should supplement, not supplant, information from official sources.

Public access to information about the law

157 District law society libraries, law school libraries, and lawyers' offices hold copies of New Zealand statutes (often in both printed and electronic forms), as well as official law reports and specialist texts, but people have no access to these as of right.

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[30] Even though the Women's Refuge is not funded to provide services for clients approaching them directly, rather than through the Family Court.

158 Government is, however, taking steps to improve public access: on 9 September 2002 it launched a temporary website <http://www.legislation.govt.nz> containing statutes, regulations and bills. It will run until the Parliamentary Counsel Office website goes live in 2003, with similar free public access. This welcome development enhances significantly public access to the law.

159 Most libraries do not hold law reports or a comprehensive range of legal texts, making it difficult for people to discover their legal rights and obligations, especially if they want to represent themselves in court. While we appreciate it can be expensive for libraries to subscribe to all official reports,[31] there ought to be some way for the public to access these, as well as judgments, more easily.

160 Some might consider this lack of access to information about the laws that govern us fundamentally undemocratic. It certainly fails to encourage informed participation in the judicial system, and may contribute to a perception that the legal system is incomprehensible and unfair.

161 We believe it would be useful if every public library and CAB held several core family law texts. These might include the *Butterworths Family Law Service*, which comes loose-leaf or in an edited two-volume textbook format, or *Trapski's Family Law* (although this is in seven loose-leaf volumes). While there are several other New Zealand family law texts, these two are regarded as seminal, and give a comprehensive overview of family law and practice.

WEBSITE INFORMATION

162 People increasingly use the Internet to access information on various subjects. The 2001 census revealed that of a total 1 289 127 households, 482 361 had access to the Internet at home.[32] Statistics New Zealand estimates that, on current trends, more than 50 per cent of households will have Internet access by 2002.

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[31] In the case of family law, specifically, these are the New Zealand Law Reports (NZLR); New Zealand Family Law Reports (NZFLR); and Family Reports of New Zealand (FRNZ); not to mention reports dealing with other legal areas, such as the District Court Reports (DCR); Criminal Reports of New Zealand (CRNZ); Employment Reports of New Zealand (ERNZ); and the Procedure Reports of New Zealand (PRNZ).

[32] Statistics New Zealand "Table 22 Number of Usual Residents in Household by Access to Telecommunication Systems (Total Responses) for Households in Private Occupied Dwellings, 2001" 2001 Census (Statistics New Zealand, Wellington, 2001).

163 In 1998, more than 80 per cent of primary and 90 per cent of secondary schools reported access to the Internet. Many businesses also have access.

164 These trends highlight the significance of the Internet as a conduit for information. We would like to see the Department for Courts provide more comprehensive information about Family Court services online. We discuss below the Australian Family Court website – a good example of how to make information available in this way.

Australia

165 The Family Court of Australia website has far more detailed information than our own on court processes and services, on other helpful community agencies, and on relevant law. It has a wealth of information covering family law and how to find out what the law is in a given area: the Court, its services and contact details; a guide for litigants planning to manage their own case; advice on making an application to the Court, and do-it-yourself kits; and information for children whose parents are separating.

Managing your own case, and do-it-yourself kits

166 The website emphasises the three limbs of Family Court process – prevention, resolution, and determination – and the fact that not all cases will go, or need to go, to trial, thus encouraging co-operation and self-determination. The case management section explains what happens once proceedings are on track for a court hearing before a judge.

Client information and services

167 The section of the website dealing with client information and services has comprehensive and easy to understand information about:

- children and consent orders;
- child abuse;
- child support;
- child abduction;
- divorce, separation, marriage and families;
- legal advice and money matters;
- mediation services;
- enforcement of orders, and fees and costs.

168 Following is a brief example of what litigants can find out under these headings: children and mediation; how children react to

separation; how children can maintain strong relationships with both parents after parents separate. This last topic includes pages headed *Every Family is Different*; *No Longer Partners – But Continuing as Parents*; *Grandparents*; *Making Your Arrangements Work*; *Parental Responsibility and Parenting Orders*; and *Parenting Plans*. These focus as much on the emotional and practical aspects of separation as the legal.

169 Case management information in *Managing Your Case* sets out procedural steps and explains what legal terms mean. It explains what happens at each stage; what, for example, a case conference is, who will attend and what its outcome might be; what happens at trial; and what must be done before a trial (such as a pre-trial conference, family reports and the filing of affidavits).

Finding out about family law

170 The information section tells litigants how to research the law, and locate primary sources (legislation, judgments, Hansard, treaties and conventions) and secondary sources (text books, loose-leaf publications and journals).

171 It would be useful if information like this were on a New Zealand website and in printed form for distribution to libraries, CABs, and community law centres, for clients who wish either to represent themselves or better understand the law applying to their dispute.

Children and young people

172 The Australian website has material designed for children and young people. It is easy to understand, and laid out in a "reader friendly" format. It tells children about mediation, and has a general questions and answers section, as well as an article explaining what happens when parents split up, and the importance of children having their say about what is happening to them.

173 The material is aimed at various age and ability levels. The website contains links to other sites of interest to children and teenagers.

174 Such information would be valuable to young New Zealanders. It could be posted on a website as well as printed, and incorporate games and exercises, particularly for younger children.

Canada

175 Manitoba, and Ontario especially, make extensive use of the Internet to inform people about family law, access to services and, where necessary, where to get legal assistance.

176 Ontario provides excellent materials for parents and children, describing relevant law and legal processes in understandable terms. The document *What You Should Know About Family Law in Ontario*[33] deals comprehensively with several family law issues relating to children, relationship formation and dissolution, relationship property, child and spousal financial support, and domestic violence. It describes key Family Court players and their role in the Court process.

177 *A Guide to Procedures in the Ontario Court of Justice* takes litigants step-by-step through the Court process.[34] It covers mediation, how to start proceedings, how to respond once proceedings have been issued, first court dates and case conferences and motions. One section contains general information sheets about serving and filing documents, and going to court.

178 *Where Do I Stand: A Child's Legal Guide to Separation and Divorce* explains clearly and simply what happens when parents separate, and what the practical effects are on children.[35]

179 The children's materials also contain a dictionary of terms, with clear explanations and a list of suitable reading material. There is space at the end where children are encouraged to make notes or a diary of how they feel about the changes in their lives.

A PROPOSAL FOR NEW ZEALAND

180 The Department for Courts should make available more information about the Family Court and its processes. The Department's revised information pamphlets and website are a step in the right direction, but we believe that people using the Family Court need more comprehensive information.

181 Those seeking Family Court help should be able get information on:

- the various proceedings over which the Court has jurisdiction;
- the stages of these proceedings;
- what documents need to be filed, and when;
- the practicalities of separation and divorce;

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33 *What You Should Know About Family Law in Ontario* <http://www.attorneygeneral.jus.gov.on.ca /english/family/famlawbro.asp>. Revised March 2002.

34 Ministry of the Attorney General *A Guide to Procedures in the Ontario Court of Justice* (Queen's Printer for Ontario, Toronto, revised June 2000).

35 *Where Do I Stand: A Child's Legal Guide to Separation and Divorce* <http://www.attorneygeneral. jus.gov.on.ca/english/family/wheredoi.asp>.

- the psychological, emotional, and social aspects of separation and who to contact for help;
- how children might react to their parents separating, what parents can do to help and contact details for helping services;
- matters involving children, to help them understand guardianship, custody and access, parental separation, child support, and children's rights to have their views considered in the final decision. (The Ontario materials, the Family Court of Australia website, and materials piloted in the United Kingdom are a good starting point for a New Zealand guide for children whose parents are separating);
- the social and financial assistance available to families; this would be provided by government agencies such as CYFS, Work and Income, and the Department of Inland Revenue, but should be available at all Family Courts, CABs, community law centres, legal offices, and from social workers, counsellors and mediators.

182 We recommend that the written materials and videos discussed below are made publicly available via a range of sources, such as courts, public libraries, CABs, community law centres, and community groups, and through CYFS offices around the country.

Recommendation

More comprehensive information about family law and the Family Court should be publicly available.

New ways of delivering information

Online

183 Information for Family Court users could be delivered in ways that go beyond the traditional paper-based format. The existing Family Court website could be expanded. We commend the Family Court of Australia website as a resource for Australians trying to resolve family disputes, and would like to see similar information available on the New Zealand Family Court website.

Recommendation

The existing Family Court website should be further developed, and modelled on the Family Court of Australia website.

Videos

184 Videos are a good way of reaching a wide audience. One Family Court co-ordinator in Hastings uses the video *You're Still Mum and Dad* as a basis for discussions about post-separation parenting. Anecdotal reports are that this video, although dated, is well received by parents.

185 A Wellington-based company, Educational Resources, has produced two videos about the Family Court process. One, in the company's *Understanding the Law* series, is about a separated family and the difficulties parents and children have adapting to their new circumstances. Another, entitled *Custody and Access*, is narrated by television presenter Joanna Paul. It takes snippets from the previous video and intersperses it with commentaries from professionals and those who have experienced separation and negotiated parenting arrangements with ex-spouses. The video is well presented, comprehensive, balanced and easy to understand.

186 We understand that Educational Resources is currently producing a video featuring children talking about how they feel about their parents' separation. If the *Custody and Access* video is any guide, this will be a useful resource, and we hope such material would be shown to separating parents.

187 We recommend this type of video be available to everyone using the Family Court. It demystifies the Court process, encourages people to take control of their situation, and, wherever possible, to co-operate for the benefit of their children.

Recommendation

> Videos targeted at separating parents should be produced and made available from various sources, such as courts, public libraries, Plunket and CABs.

Public information campaign

188 We think a Family Court media campaign would give the public a better understanding of what the Court does.

189 The Mental Health Commission recently commissioned a series of television advertisements featuring well-known New Zealanders who suffer from mental illness. These dispel some of the myths, stigma, and discrimination associated with mental illness. The

campaign was accompanied by radio discussions aimed at Māori and Pacific peoples, and a magazine campaign aimed at young Māori (a section of the population disproportionately represented in mental illness statistics). The campaign was followed up by an hour-long television documentary in which the same celebrities, and their families, told their stories.

190 By all accounts, the campaign was a success: more than 80 per cent of people over the age of 15 remember the advertisements, and 62 per cent report having discussed them with others.

191 We suggest that, if our Family Court recommendations are implemented, there be a significant public information initiative to ensure all New Zealanders understand what the Family Court does. Ignorance is fertile ground for myths; these are hard to counteract and can discourage people from getting help at a time they need it most.

Recommenation

There should be a substantial media campaign, once the Law Commission's Family Court recommendations have been implemented, to inform the public how the Court can help them, and what they can do to help themselves and their families.

6
Programmes

OVERVIEW

192 THE WELL-BEING OF CHILDREN of separated parents depends on the way parents manage the transition, and on a post-divorce relationship functional enough for co-operative parenting. This chapter looks at programmes offered in other countries to help families cope with the transition to divorce.

193 The personalities, skills and behaviour of parents can all adversely affect children, along with the following:

- hostile conflict;
- frequent conflict;
- poor parental communication;
- poor problem-solving skills;
- lack of co-ordination on parenting styles, and disagreement as to how the children should be raised.

194 Some jurisdictions, notably the United Kingdom and the United States, run information programmes for divorcing couples,[36] some aimed at the majority of Family Court litigants, others at litigants with specific needs.[37] Some countries also run programmes for children.

PARENT PROGRAMMES

United Kingdom

195 The UK Family Law Act 1996 aims, where possible, to support marriages and offer services to couples (with or without children) who are contemplating separation. Part II of the Children Act 1989 recommended running information sessions for parents contemplating separation. Rather than implement a nationwide

[36] Usually, but not exclusively, related to separation, divorce, and custody and access arrangements for children.

[37] In particular, parents in a high-conflict relationship who are unable to discuss and decide matters about their children co-operatively.

programme, a study of the efficacy of such programmes was carried out in several centres, the results to determine whether Part II of the Children Act 1989 should be implemented across the country.

196 The Family Law Act 1996 specifies what information should be given, and includes the following broad topics:

- the importance of considering children's welfare, wishes and feelings;
- how parties can better help children to cope with the breakdown of a marriage;[38]
- what parties should expect of the legal/Court process.

197 Information sessions educate parents about the effects on children of the decision to separate, and encourage them to behave in a way that minimises its potentially negative impact.[39] Sessions help children by reinforcing that the separation is not their fault, and by giving them simple information about mediation and the judicial process.

Information delivery

198 The UK trial sent information packs to parents before they attended either a one-on-one or group meeting. Packs included material about the emotional and legal aspects of separation, its potentially negative effects on children and how to minimise them, and age-appropriate materials telling children what separation is about and what it might mean for them in practical terms.[40]

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[38] In a New Zealand review of more than 200 studies of the effect of family dissolution on children, its authors Jan Pryor and Bryan Rodgers state that families need information about their children and the likely effects on them of family dissolution. See J Pryor "Family dissolution: What About the Children?" (1998) 2 BFLJ 310, 312.

[39] Family Law Act 1996.

[40] The material is written in a child-friendly manner and, depending on the age and maturity of the child, may include a workbook for the child to complete with a parent or other adult, a worksheet with puzzles, a board-game, and a diary that includes comments from other children whose parents have divorced. These leaflets were reformulated during the trial; they have, in the main, been positively evaluated by parents and children. C Stark and A Rowlinson "Chapter 24 Providing Information for Children" in Lord Chancellor's Department *Volume 2: Information Meetings and Associated Provisions within the Family Law Act 1996: Final Evaluation Report* (Lord Chancellor's Department, London, 2001).

Group meetings

199 The pilot project trialled a range of information delivery methods. A successful one was the group information meeting conducted by two presenters, usually a solicitor and a Family Court welfare officer.[41] Participating parents were shown a purpose-made video depicting the mediation process, and featuring children talking about their experiences of divorce.

200 This general session was followed by another chaired by relationship counsellors and solicitors talking about separation and divorce. Parents were given an opportunity to ask questions; the most commonly asked related to mediation, children's issues and the legal process.[42]

201 Participants found information about children's experiences interesting and relevant, but some de facto couples said information about the divorce process was irrelevant for them. The video was rated well, and the group meeting seemed a good way to educate people on the use of mediation in resolving disputes.[43]

Electronic information delivery

202 The UK trial tested information delivery by CD-ROM. Many people receiving information this way rated its efficacy lower than those who attended meetings. The problem was not that attendees were technologically illiterate, but that they felt they got more from a session where they could ask questions and get information tailored to their experiences.[44]

203 Some participants, however, said they liked being able to start and stop the CD-ROM, and absorb information at their own pace. Some commented that the information should either be available on the Internet, or people should be able to take home the CD-ROM to view in private in their own time.

204 We believe the provision of more comprehensive, web-based material would meet the needs of people, giving them the opportunity to absorb information privately, at their own pace.

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41 Lord Chancellor's Department Research in Progress *Information Meetings and Provisions* (June 1999, <http://www.opengov.uk/lcd/research/general/srp/srpsec3.htm>).

42 Lord Chancellor's Department Research in Progress, above n 41.

43 Lord Chancellor's Department Research in Progress, above n 41, 25. It did not, however, result in an increased uptake in mediation services.

44 Lord Chancellor's Department Research in Progress, above n 41.

Findings

205 A survey of information session participants showed positive results.[45] Most parents reported being better informed, as a result of the sessions, on child-related topics such as how divorce affects children, and how family mediation and family counselling services operate.

206 Some parents said the sessions made them more aware of the importance of dealing responsibly with divorce, and not involving children in their own dispute. Eighty per cent said the information on how children feel about separation was useful; in many cases, it encouraged parents to change their behaviour, or to co-operate for the children's sake.

> It made me realise that you have to be careful not to involve children in the blame between two parents. The information I got from the meeting was well worth listening to. It made me realise sometimes you do things and you don't even realise you're doing them.[46]

207 Ninety per cent of those attending the UK meetings felt they had learned something, and that the meetings positively affected how they felt, and helped change the way they looked at their situation and options. Many said the sessions gave them the strength to move forward, confident they had made the right decision. Another positive spin-off was that participants reported an increased awareness of what lawyers do, enabling them to use lawyers' services more prudently.[47]

208 Unfortunately, the Lord Chancellor's Department announced, just after the release of the final report, that the Government would not implement Part II of the Family Law Act 1996. There was a fundamental conflict between the Lord Chancellor's stated aim to "save marriages", and that of professionals involved in the trials, who saw information sessions and counselling as a way of improving relationships, whether parties stayed together or separated. Information sessions tended to confirm decisions participants had already made.

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[45] Lord Chancellor's Department Research in Progress, above n 41.

[46] Comment from the father of a child aged 16, and twins aged 19, to the Lord Chancellor's Review Team, above n 41, 49.

[47] Lord Chancellor's Department Research in Progress, above n 41, 43.

United States

209 It is impossible to generalise about the US experience; not all States have specific Family Courts, and many deal with family matters in courts of general jurisdiction.[48]

210 United States mental health professionals and counsellors developed education programmes to help parents better understand the potential effect of their conduct, and model coping strategies for engaging more constructively with one another and their children.

211 Many States, however, offer both Court-mandated and voluntary psycho-educational programmes designed to inform parents on the effect of divorce on themselves and their children. More than 1500 US counties now offer Court-affiliated educational programmes for separating parents.[49] Some States have made it mandatory for divorcing couples to attend such a programme.[50]

212 Generally speaking, programmes aim to change parents' thinking, and to encourage them to solve their own problems rather than relying on judges to do so. Programmes are designed to build on parental strengths, rather than focus on their weaknesses.[51] The programmes' specific goals are to:

- Increase parents' ability to communicate.
- Help parents adjust to divorce.
- Improve parenting skills.
- Enhance parents' knowledge of the effects of divorce on children.
- Reduce children's exposure to conflict.
- Help parents ease children's adjustment.
- Prevent behavioural problems in children.

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48 Courts that deal with a wide range of matters including criminal, commercial and civil cases, as well as family matters.

49 J Pedro-Carroll, E Nakhnikian and G Montes "Assisting Children Through Transition: Helping Parents Protect Their Children from the Toxic Effects of Ongoing Conflict in the Aftermath of Divorce" (2001) 39 Family Court Review 377, 379.

50 Arizona, Connecticut, Delaware, Hawaii, Iowa, Vermont.

51 G Stone, K Clark and P McKenry "Qualitative Evaluation of a Parent Education Program for Divorcing Parents" (2000) 34 Journal of Divorce and Remarriage 25.

- Enhance parents' understanding of Court proceedings.
- Decrease the number of complaints to the Court.[52]

213 Education sessions aim to achieve these goals by focusing on the following topics:

- Stages of divorce, for adults.
- Parent's reactions and adjustment to divorce.
- Children's reactions and adjustments to divorce.
- Responding to children's reactions to divorce.
- Co-parenting communication skills.
- Co-operative and parallel parenting.
- Parenting plans.
- Custody and visitation.
- Referrals to services and materials.[53]

214 The Court may offer these sessions directly, or community-based organisations may provide them. Below are examples of programmes that have been evaluated and found useful.

Workshop sessions

Mixed format – ACT – for the children

215 The *ACT – for the Children* programme consists of two three-and-a-half-hour sessions, one week apart.[54] Two professionals (psychologist, and social worker or family therapist), and a judge or lawyer facilitate the programme, which has three components:

- mental health – teaching parents about the effect of divorce on children, and telling them how to seek support for themselves or their children, if they need it;
- legal – informing parents about the legal process and alternatives to litigation;
- skill development – teaching parents strategies to avoid conflict, and avoid drawing children into parental disputes.[55]

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[52] M Geasler and K Blaisure "1998 Nationwide Survey of Court-connected Divorce Education Programs" (1999) 37 Family and Conciliation Courts Review 36, 51.

[53] Geasler and Blaisure, above n 52.

[54] This programme was developed by the Children's Institute of the University of Rochester and the 7th District. See Pedro-Carroll, Nakhnikian and Montes, above n 48.

[55] Pedro-Carroll, Nakhnikian and Montes, above n 49, 383.

216 The first session focuses on children's reactions to divorce, encouraging parents to be sensitive to children's needs. It emphasises not putting children in the centre of parental disputes, and teaches parents anger management and communication skills to help prevent disputes. Parents are encouraged to develop a "parenting partnership", and taught the importance of structured family life and consistent parenting styles. Parents are taught to look for signs of distress in their children, and given contact details for professional help, should their children require it.

217 The second session gives participants information on the legal process, and encourages parents to develop a parenting plan, although where there has been domestic violence the programme steers parents towards parallel parenting.[56]

218 Most material is presented orally, but role-play and videos are used too. Participants are given a 68-page handbook at the first session; this reinforces session content, and includes a full list of available family resources.

219 Sixty-two per cent of those on the programme characterised their relationship with their spouse as involving a high level of conflict.[57] Ninety-nine per cent of those surveyed afterwards agreed the programme helped them understand the negative effects of parental conflict on children, how to avoid involving children, and the need to try to co-operate with their former spouse.[58] More than 90 per cent agreed they learned how to help themselves and where to seek help.[59] Ninety-eight per cent would try to use skills taught in the programme, and 95 per cent would try to implement and comply with a parenting plan to ensure their children spent time with each parent.[60] Comments made to researchers illustrate what messages parents took from the programme:

> The message that we need to love our children more than we dislike our former partners.

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[56] This is where the parent with physical custody of the child has complete decision-making power, and absolutely minimal contact with, or reference to, the other parent. This is clearly not ideal, but it can reduce the potential for conflict between parents who otherwise have adequate parenting skills, but are unable to co-operate.

[57] Pedro-Carroll, Nakhnikian and Montes, above n 49, 384.

[58] Pedro-Carroll, Nakhnikian and Montes, above n 49.

[59] Pedro-Carroll, Nakhnikian and Montes, above n 49.

[60] Pedro-Carroll, Nakhnikian and Montes, above n 49.

> I came with no particular expectations and leave with information that I think will change my life.
>
> There will be two healthier children because of what we have learned here.[61]

220 Another positive aspect was that, following the programme, 87 per cent of participants said they would be likely to use alternative dispute resolution (ADR) rather than litigation to resolve their disputes.[62]

221 Maryland courts offer a programme called *Making it Work* for divorcing parents, to teach them communication and conflict resolution strategies over two three-hour sessions.[63] The first session deals with children's and adult's adjustment to divorce, and the importance of parents understanding children's developmental needs and how they might be affected. The second session discusses parenting plans, and how to structure custody and access agreements to meet children's needs. Participants are given a handbook reinforcing session information and techniques, and a directory of community resources.

222 Parents attending the programme report improved communication with their children and former spouse,[64] and fewer sessions with lawyers or mediators.[65] Most said that they thought the programme should be mandatory for separating parents, and would even have been happy to pay for it.

Video format sessions

223 The *Children in the Middle* programme is a two-hour discussion about a video that shows constructive ways of dealing with conflict. A study following parents' progress for six months found improvement in their communication and conflict resolution.[66] Parents rated the programme highly, saying it improved their awareness of issues

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61 Pedro-Carroll, Nakhnikian and Montes, above n 49, 387.

62 Pedro-Carroll, Nakhnikian and Montes, above n 49, 386.

63 C Gray, M Verdieck, E Smith and K Freed "Making it Work: An Evaluation of Court-mandated Parenting Workshops for Divorcing Parents" (1997) 35 Family and Conciliation Courts Review 280.

64 Gray, Verdieck, Smith and Freed, above n 63, 288.

65 Gray, Verdieck, Smith and Freed, above n 63, 289.

66 J Arbuthnot, K Kramer and D Gordon "Patterns of Relitigation Following Divorce Education" (1997) 35 Family and Conciliation Courts Review 269, 270.

affecting their children. A two-year follow-up study found it highly effective in reducing re-litigation.[67]

224 In central Missouri, all divorcing parents attend the *Focus on Kids* programme – one two-and-a-half hour meeting structured around a video of children giving their own perspective on divorce.[68] Scenes show parents dealing with custody and access problems, and post-separation changes. The tape is stopped after each scene so participants can comment on what the parents did wrong and how they should approach the problem. The next scene shows the parents trying to resolve their conflict, and is followed by more group discussion. This video and discussion format seems to have been effective.[69]

Role-play

225 Role-play seems particularly useful in one of the programmes we examined. The PEACE[70] programme is a two-and-a-half-hour seminar chaired by mental health professionals, using a range of delivery mechanisms – lectures, role-play, videos and group discussion.

226 When interviewed four to six years after participating in the PEACE programme, many participants remember best, and comment most on, the role-play section.[71] It made them more aware of issues affecting children, and at times made them empathetic towards their former partner. Parents who attended the programme thought

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67 Arbuthnot, Kramer and Gordon, above n 66, 276. However, those conducting the study also said there is some evidence that the programme only works as a protective factor when parents participate at an early stage, rather than once litigation has begun.

68 See also P Feng and M Fine "Evaluation of a Research-based Parenting Education Program for Divorcing Parents: The Focus on Kids Program" (2000) 34 Journal of Divorce and Remarriage 1, 6.

69 Feng and Fine, above n 68, 16 and 17. However, they found the programme was less effective for people who had been married longer and had older or adult children. Similarly, it was less effective for parents who had been married more than once, who often had much more complicated relationship issues to negotiate.

70 Parents' Education about Children's Emotions Program. See Stone, Clark and McKenry, above n 51, 30.

71 The researchers suggest in their summary that role-playing is a key element in changing how people behave. Stone, Clark and McKenry, above n 51, 37.

it worthwhile, and said they had improved their behaviour as a result.[72] Parents made the following comments:

> It is hard to see things through a kid's eyes when you are not a kid anymore, but that's one of the advantages to the program. It sort of shows you through the kid's eyes.
>
> When I walked out that night (from the program) I thought boy, I really shouldn't be doing things like that. And I didn't do right, and it's no wonder I upset my child.
>
> It made me more aware of some of the things we were doing, not necessarily spiteful or on purpose to hurt one another, but things that were affecting the kids.[73]

Intensive programmes for high-conflict litigants

227 Some Courts offer, in addition to the programmes described above, more intensive education programmes for parents whose relationship is characterised by a high level of conflict, or substance abuse problems. They also offer step-parent programmes, education for parents of youth offenders, and general parent support groups.

CHILDREN'S PROGRAMMES

228 Parent programmes might, we hope, successfully encourage parents to modify their behaviour towards one another and their children. We believe, however, that it is vital to support and reassure children through this difficult transition. Up to a quarter of children whose parents divorce will show signs of behavioural and emotional problems, compared with 10 per cent of children from intact families.[74]

229 Children need to know they are not to blame for the break-up, and that even though their parents are splitting and may often seem angry or upset, they still love and care for them. They also need to know other children have been through the same thing and that it

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[72] The negative behavioural patterns they reported formerly indulging in were "bad mouthing" the other parent in front of the child, and using the child as a messenger.

[73] Stone, Clark and McKenry, above n 51, 31.

[74] See C Ahrons *The Good Divorce: Keeping Your Family Together When Your Marriage Comes Apart* (Harper Collins, New York, 1994); and E Heatherington, M Bridges and G Insabella "What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment" (1998) 53 American Psychologist 167, 184.

is natural to feel confused, upset or angry. Helping children identify and express what they are feeling will help them communicate and cope better with changes.[75]

230 Early 1980s US studies found intervention programmes can enhance children's ability to cope with the rapid and drastic changes in their lives as a result of parental separation.

231 Programmes set up to meet the needs of children with divorcing parents were found to have beneficial results. Compared with children not taking part in a programme, those who did reported:

- decreased anxiety about their situation;
- increased positive feelings about themselves and their families;
- more confidence dealing with the changes within their families.[76]

232 Several US courts[77] offer programmes for children of separating parents.[78] Some courts even make it mandatory for parents to enrol children in such programmes.

233 United States programmes generally aim to:

- give children information, and encourage them to think about how they feel;

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[75] For a discussion of educational interventions that can be helpful for children of separating parents, see R Emery, K Kitzmann and M Waldron "Psychological Interventions for Separated and Divorced Families" in E Hetherington (ed) *Coping with Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective* (Lawrence Erlbaum Associates Inc, Mahwah, NJ, 1999) 323–344.

[76] See J Pedro-Carroll and E Cowen "The Children of Divorce Intervention Project: An investigation of the efficacy of a school-based prevention program" (1985) 53 Journal Consulting and Clinical Psychology 603. See also J Pedro-Carroll and L Alpert-Gillis "Preventative Interventions for Children of Divorce: A Developmental Model for 5- and 6-year-old Children" (1997) Journal of Primary Prevention 213; and, J Pedro-Carroll, J Sutton and P Wyman "A Two-year Follow-up Evaluation of a Preventative Educational Program for Young Children of Divorce" (1999) 28 School Psychology Review 467.

[77] In total, 152 counties offer children's programmes. R Geelhoed, K Blaisure and M Geasler "Status of Court-connected Programs for Children Whose Parents Are Separating or Divorcing" (2001) 31 Fam Court Rev 393, 394.

[78] For further details about some of the programmes see: Kids Turn <www.kids turn.org>; Parents Forever: Children's Sessions <www.parenting.umn.edu>; Children in the Middle <www.divorce-education.com>; Families in Transition Program <www.aoc.state.ky.us/jefferson/fit.htm>; Rainbows <www.rainbows .org>; Rollercoasters <www.familiesfirst.org>; Sandcastles Program <www. sandcastlesprogram.com>; Children of Separation and Divorce Center, Inc <www.divorceABC.com>.

- reassure children their feelings are normal;
- help children adjust to the change in their lives, and support them through it.[79]

234 People from a wide range of backgrounds – counsellors, mental health workers, social workers, or teachers – usually present the programmes. Most presenters have at least masters-level qualifications, and some, doctorates; almost all programmes require presenters to have at least bachelor-level qualifications.

235 Programmes usually run for five-and-a-half hours, with some a single one-hour session and others a 15-hour course. Most children are either primary (elementary) or secondary (high) school level.[80]

236 Some programmes run parallel with parent education programmes. This has the advantage of solving childcare problems, as well as ensuring both parents and children get the information and support they need. Sometimes parents and children spend time together as part of the course, to practise any techniques and skills they have learned.

237 Most courses are held in the community, usually in public facilities such as court buildings, schools and churches. Parents might have to contribute to the cost of courses, but this varies between counties. Most fees are less than $50, and are often capped or reduced if more than one child from a family attends.

Success

238 Children and parents report high levels of programme satisfaction,[81] and the children attending the course adjusted well to their family changes.[82]

New Zealand

239 In New Zealand, the Skylight Foundation, Presbyterian Social Services, and Helping Understand Grief (HUG) all run courses

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[79] S Bloch and E Crouch *Therapeutic Factors in Group Psychotherapy* (Oxford University Press, Oxford, 1985). See also Table 3 in Geelhoed, Blaisure and Geasler, above n 77, 397.

[80] Geelhoed, Blaisure and Geasler, above n 77, 398.

[81] *Kids Turn* programme evaluation <www.kidsturn.org/others/longterm.htm>.

[82] *Families in Transition* programme <www.louisville.edu/kent/community/fit/fiteval.html>. See also R Fischer "Children in Changing Families: Results of a Pilot Study of a Program for Children of Separation and Divorce" (1999) 37 Family and Conciliation Courts Review 240.

for children dealing with loss as a result of death in the family or separation.

A NEW ZEALAND RESPONSE

Parent information sessions

240 The UK trial of information programmes shows that information on paper or in electronic form is no substitute for one-on-one (or group) information meetings. Written material can be a useful starting point, but it would be unwise to focus on it entirely. It must be borne in mind that the 1996 International Adult Literacy Survey found one-in-five New Zealanders have very poor literacy skills. Most Māori, Pacific Islands peoples, and those from other ethnic minorities have a lower level of literacy in English than is necessary for everyday life.

241 English and American programme experience indicates the value of a general information session for all separating parents who want to resolve issues to do with caring for dependent children.

Recommendation

> General information sessions should be designed and made available to all separating couples with children.

242 We focus on parents who are separating and who have dependent children because community concern about the Family Court and its services has centred almost entirely on custody and access disputes. This is not to deny that such programmes might be useful for other kinds of dispute, but given the reality of limited resources, we feel programmes would be best directed to this area.

243 Some parents might need help separating anger with their ex-partner from concern for their children. They need to put themselves in their children's shoes to see how the way they interact with their ex-partner can affect their children. Making sure their children know what is happening is important, but does not mean drawing children into the parents' dispute. Children often display clarity and wisdom; a Children's Issues Centre study asked children what advice they would give separating parents, and Gabrielle, aged 14, said:

> Don't let the kid get caught in between all their problems. Don't let the kids be the piggy in the middle. If you're going to have a fight don't bring the kid into it.[83]

We hope parents would take at least this one message away from parent information sessions.

244 We would like to believe that most parents want the best for their children and try to act in their children's best interests. We see parent information sessions as having the potential to give parents information that will be useful to them and their children.

245 The Department for Courts should, with appropriate professional input, design and fund programmes for separating parents. The models outlined above are useful examples of content, format and delivery.

Recommendations

> The Department for Courts should, in consultation with professionals, organisations, and community groups that support families, develop education programmes for separating parents.
>
> Programme provision should recognise cultural diversity.

246 It must be determined which format produces the best results. Most US parent programmes were one-off, two-and-a-half-hour sessions, or two sessions a week apart. The UK sessions were often a half-hour individual meeting followed by a one-and-a-half-hour group meeting.

247 It is difficult to be sure which format promises the best results, but we have formed a tentative view. We suspect most people would find a two-and-a-half-hour session too long to concentrate (especially if fitted into a busy day). We would prefer two, one- to one-and-a-half-hour sessions a week apart. We hope the shorter session time would let people process and retain more information, and that the gap between sessions would give them time to reflect on the first session's information.

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[83] Taylor, Smith and Tapp, above n 21, 51.

Recommendation

Two, one- to one-and-a-half-hour information sessions should be held over two weeks.

248 We suggest that, to engage parents' attention, the first session should outline the potentially negative effects on children of a poorly handled separation, and particularly the effect of parental hostility when children are exposed to the conflict. This session might also offer suggestions on communication techniques, although the better approach might be to give general information and suggest parents discuss communication and parenting issues at counselling, if they feel this is necessary.

249 The second session should consist of information about services available through the Court, as well as about the key people and stages in the dispute resolution process, such as counselling, mediation, issues/settlement conferences with judges and adjudication.

Whether programmes should be voluntary or mandatory

250 Some US courses were voluntary and some mandatory. Interestingly, although many parents attending a mandatory programme initially resented it, after the programme almost all said they thought it useful and that all parents should attend. The satisfaction ratings of parents attending courses was uniformly high.

251 We suggest attendance at a parent information course be compulsory for those seeking Family Court services, with discretion to waive this requirement if there is an urgent application to the Court. It may be, however, that parents are approaching the Court with a number of issues and that once the urgent matter is settled, a parent information session might be useful.

252 We do not think it appropriate to require parents to attend the session together, although they may choose to do so.

Recommendation

Information sessions should be mandatory for separating couples with children who are seeking Family Court assistance with custody and access.

Nobody should have to attend the same session as their ex-partner.

Children's programmes

253 Children need support through family transition, yet often have only sketchy knowledge of what is going on with their parents. A UK study found 99 per cent of parents said they had told their children about the impending divorce, yet only 71 per cent of children recalled being told anything, and more than a third said they could not remember divorce being mentioned when their parents separated.[84]

254 The UK trial of parenting education sessions found that although parents were given age-specific information kits to pass on to their children, most parents surveyed did not actually do so. This omission probably stemmed from the best parental intentions, but we believe it is important that children understand what is going on.

255 Many children also understand little of the Court's role in helping resolve family difficulties. Children interviewed in the United Kingdom about their perceptions of the Family Court answered in ways that showed many of them saw it as a place of punishment. One eight-year-old girl, whose father was going though family proceedings, said:

> … that she thought she would: "have to go with him, and stand up in one of those boxes, and say who we wanted to live with and who we wanted put down as guilty".[85]

Recommendation

Children – who are the unintentional casualties of parental separation – should have specially designed materials and programmes that provide information on the process of parental separation and family transition.

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[84] N Lowe and M Murch "Children's Participation in the Family Justice System – Translating Principles into Practice" (2001) 13 CFLQ 137, 153.

[85] Lowe and Murch, above n 84, 152.

256 Children should be given basic information about what might happen, in particular about counselling (which we suggest making available to children) and the role of counsel for the child. It should be emphasised that no-one is going to ask them to choose between parents, and that Court services are there to help their family sort out their own problems.

257 Programmes can help children articulate what is happening to them and how they feel about it. They are also a good way of giving children information independently of parents. We recommend programmes be created for school-age children with separating parents.

258 Programmes for children must be developmentally appropriate; information and format suitable for teenagers would clearly be unsuitable for six- or seven-year-olds. We suggest the Department for Courts liaise with child psychologists and childhood educators to develop programmes. As mentioned above, some are already operating in New Zealand, and their content and format might be a guide in planning others.

Recommendation

We suggest the Department for Courts liaise with child psychologists and childhood educators to develop programmes for children.

Location

259 We suggest parent and children's programmes not be held in courthouses. Holding programmes away from a judicial setting might be less intimidating, and encourage more participation. Programmes could be delivered in the community, at times and places suitable for families. Community and school facilities, libraries, Plunket rooms, and social service and voluntary sector offices could all be used.

Recommendation

Parent and children programmes should be offered in a variety of community settings.

Funding

260 The Department for Courts must make a policy decision on whether to fund the entire cost of parent and children programmes or have participants make some sort of contribution.

7
Counselling

OVERVIEW

261 THE FAMILY PROCEEDINGS ACT 1980 has changed the way family disputes are resolved. Parties are encouraged to seek counselling to help reconcile their differences, rather than litigating; lawyers have to explore with clients the possibility of reconciliation or conciliation.[86]

262 Couples may approach the Court for counselling while they are still together or in the process of separating, or after they have separated.[87] Counselling can take place before proceedings have been filed or at any stage after proceedings have begun. The Court can also direct a couple to attend counselling if a custody or maintenance order has been applied for.

263 Counselling can be useful in several ways. It can give couples who are unsure about separating an opportunity to explore options, including staying together, and addressing relationship difficulties. For most of the couples that come to the Family Court, at least one party will have decided on separation. One partner may need counselling to come to terms with the separation, while the other may be ready to discuss post-separation arrangements for children, and division of property.

264 Either party can ask for counselling, but where there has been domestic violence the couple cannot be made to attend counselling together.[88] Relationship Services, the organisation providing most New Zealand counselling services, informally offers clients an individual session followed by a joint session. The initial session gives parties an opportunity to express concerns about violence or safety.

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[86] The extent to which this obligation is being promoted is questionable. There is a perception amongst some Family Court co-ordinators we spoke with that some lawyers are now actively disparaging about the counselling process and make no attempt to encourage their clients to approach counselling with an open mind. Section 19 Family Proceedings Act 1980.

[87] Section 10(1) Family Proceedings Act 1980.

[88] Section 10(2) Family Proceedings Act 1980.

265 Relationship Services is the biggest single Family Court counselling provider, although individual counsellors are contracted separately. Most Relationship Services counsellors have a tertiary qualification and two years practical experience before coming to Family Court work. Once they join Relationship Services, they take a course that familiarises them with Family Court work. We support this commitment to qualifications, experience and training.

266 Overall, most of those responding to the preliminary paper were fairly satisfied with their counselling. Some, however, were unclear about the goals of counselling. Men commented on the low number of male counsellors and cited it as an example of systemic gender bias in the Family Court.

THOSE ATTENDING COUNSELLING

267 Both married and de facto couples are eligible for counselling under the Family Proceedings Act 1980. But Relationship Services believes the legislation should allow a wider circle of people to attend if, in the view of parties, counsellor or judge, it might help resolve the problem.[89]

268 Some counsellors we spoke to were concerned that the Act's references to "marriage", "husband", and "wife" prevent lesbian and gay couples from accessing Family Court counselling.[90] We agree this is not a sensible or fair distinction, and recommend counselling services be made available to all couples, regardless of sexual orientation.

269 We also believe it would be useful to offer counselling to people who are parents of the same child, but who have never been in a de facto relationship, particularly if they both want to be involved in parenting. Such parents may have distinct needs, especially where they have little relationship history, and must develop trust, confidence and communication.

270 Some Family Court co-ordinators are unwilling to refer only one partner to counselling, on the basis that agreement cannot be reached without both parties being present. We consider there are circumstances where it would be useful for one party to ask for and get counselling even if the other party does not wish to. It may remove a hurdle to resolution, or help a party accept circumstances

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89 Meeting with the Law Commission 24 August 2001.

90 Particularly in light of the Court of Appeal decision in *Quilter v A-G* [1998] 1 NZLR 523 where the Court of Appeal held that the wording of the Marriage Act 1955 could not be read to accommodate persons in same-sex relationships.

that cannot be changed. The Family Court co-ordinator should assess this at the intake interview.

271 Children of the relationship, step-parents, and extended family members may currently only attend counselling if the judge so directs.[91] The Family Proceedings Act 1980 does not expressly allow this, but judges have, in their discretion, so directed.[92]

272 Extended family involvement might be useful, for example, in the case of reconstituted families. Where parents have separated and re-partnered, and custody and access issues arise, it might be useful to involve children, parents, and step-parents (and step-parents' children) in a group counselling session. Reconstituted families have special needs that can only be met with the co-operation of all involved.

273 Relationship Services and many other respondents agreed that extended family support for, and input into, resolving problems via counselling would be useful.

274 Some Māori, particularly, felt whānau support would be helpful for Māori families, and would acknowledge the important role of whanaungatanga in Māori families.[93]

Recommendations

Counselling should be available to all couples regardless of sexual orientation.

There should be discretion to offer counselling to people who are parents of the same child, who have never lived together.

Counselling should, in appropriate circumstances, be made available to one party only.

People other than the separating parents should be able to attend counselling, if, in the view of the Family Court co-ordinator (or on the recommendation of the counsellor and parties) it is thought this might help resolve the dispute.

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91 Section 19(1(b)) Family Proceedings Act 1980 is often used to justify such directions.

92 Presumably relying upon the inherent powers of the Family Court to make such orders as are necessary to facilitate the adequate disposal of proceedings.

93 See chapter 13 "Māori Participation in the Family Court".

SPECIALIST COUNSELLING SERVICES

275 Ascertaining the counselling needs of parties, either initially or later in the Court process, and referring them to the most appropriate provider will be an important part of the extended Family Court co-ordinator role.[94]

Culturally appropriate counselling

276 Relationship Services and other organisations offer Family Court counselling services by and for specific ethnic groups; for example, Māori and Pacific Islands peoples. Chapters 13 and 14 discuss these services.[95]

Recommendation

> Counselling services should be developed for specific ethnic groups.

Children

277 Chapter 5 on providing information and chapter 8 on mediation suggest children would benefit from counselling. Parental separation, particularly where there is extreme conflict or non-co-operation, can damage children, and we recommend developing programmes and materials to help them through the transition.

278 We believe counsellors can be useful in discovering whether children want a say in what is happening in their family, and how they might want to do so. Children who want to tell their parents, the mediator or the judge how they feel, might need encouragement to find their voice.

279 We do not envisage it as the counsellor's responsibility to report what the child says or wants, but rather to help a child work out:

- whether he or she wants input into the process;
- how he or she would like to have input.

280 A child should be able to ask the counsellor to tell parents something, if he or she feels uncomfortable about raising the issue with parents directly.

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94 See chapter 3.

95 Chapter 13; chapter 14 "Immigrant Groups".

281 We suggest counsellors use materials like those developed by the UK Lord Chancellor's Department (LCD). The LCD designed workbooks that gave children an opportunity to talk, write, and draw about what is important to them in their family life, and day-to-day arrangements.

282 Existing counsellors might need additional training to work with children. Some family therapists experienced at working with children could be accredited as Family Court child counsellors/therapists.

283 We believe such counselling should be available at the request of a child, parents, Family Court co-ordinator, counsel for the child, specialist report writer or judge.

Recommendation

Children should have access to counselling services.

Material should be specially designed for the use of children.

Special needs

284 Certain cases come before the Family Court that might benefit from targeted counselling, facilitated by a specially trained counsellor. These might include cases where:

- One or both litigants adopt a highly conflictual stance with one another and others involved in the conciliation/court services.
- There is a history of violence or abuse against the other parent and/or children by one or both parents.
- One parent has made allegations of sexual or physical abuse against the other parent.
- One parent with a history of little or no contact re-enters the child's life to seek or claim custody or contact.
- Both parties are immature and inadequate.
- One party is "mentally normal" but has suffered a severe shock, outrage and ongoing deep distress because of a sudden loss of partner and/or betrayal and who is creating barriers to the children's contact with the other parent.
- One parent is "mentally normal" but has developed a fixed, intransigent position because of a political position about gender issues, or with the support of extended family is claiming sole custody.

- One parent seeks to change location (especially challenging if they wish to move to another country).
- A child has become alienated from one parent and after investigation there appears to be no rational basis for the refusal to have contact.
- One or both parties has a mental disorder – either a psychosis (especially dangerous if accompanied by substance abuse) or severe depression or personality disorder, for example, obsessive/borderline/narcissistic.
- One or both parties abuse drugs or alcohol.[96]

285 Specialised counselling in situations like these would most likely take place after parties have filed proceedings, when they might behave in a way that alerts a counsellor, Family Court co-ordinator, specialist report writer, or judge to the need for specialised services.

286 Similarly, a Family Court counsellor who believes specialist counselling would be desirable, should be able to make a next-step direction for the Family Court co-ordinator to consider when making a referral.

287 The Family Court co-ordinator and specialist report writer should be able to recommend that any party to a Family Court dispute attend specialist counselling.

288 We believe it desirable that judges be able to refer any party to a Family Court dispute to specialist counselling services.

DURATION OF COUNSELLING

289 Parties now approaching the Family Court are offered six free counselling sessions. As mentioned above, the first session is individual, followed by up to five joint counselling sessions.

290 Because provision of information about the law and Family Court services is not as comprehensive as it might be, counsellors also currently inform clients about the Family Court.

291 Some Relationship Services counsellors we spoke to said they also conduct what they described as mediation during counselling sessions.[97]

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[96] Submission 128.

[97] Relationship Services courses offer some mediation training, but how comprehensive this is, is unclear.

292 We consider information giving, parenting programmes, mediation and specialist counselling to be separate processes. These should be kept distinct, and provided by professionals with appropriate expertise.

293 This report makes several recommendations about information, extending counselling services to a wider range of people than is currently offered, and specialist counselling services. Chapter 6 recommends providing information about the Family Court and its processes through printed material, an expanded website, videos, media campaigns, and information sessions for parents and children. Improved access to information is likely to reduce the counsellor's role in explaining the law and the Court process to couples.

294 We also recommend that mediation be available to those seeking help to resolve their disputes. Qualified mediators with specialist Family Court training would conduct these mediations. This means it would no longer be necessary for counsellors to undertake mediation while counselling clients.

295 In view of the increased emphasis we propose on providing information and mediation, we do not believe all clients will necessarily need six counselling sessions. Some might resolve their disputes in less, others might not be amenable to general counselling, or might require urgent direction for court orders.

Recommendation

Counsellors should not conduct mediations during counselling; a mediator should conduct mediations.

Automatic provision of six initial counselling sessions should be abolished, making the number of sessions discretionary but capped at six, unless there are exceptional circumstances.

8
Mediation

OVERVIEW

296 MEDIATION IS A PROCESS, rather than an event, during which a mediator helps parties explore issues and move towards agreement. Proponents of mediation believe it is better than litigation at revealing the needs and concerns of parties, and moving them towards a mutually agreed resolution. The benefit of mediation is its flexibility, allowing for the fact that because no two parties are alike, their resolutions will also be unique.

297 Some people claim that truly voluntary mediation is impossible in a Court setting. Professor Robert Mnookin coined the phrase "bargaining in the shadow of the law" to characterise Court-mandated mediation, or the use of mediation as an adjunct to, or entry into, a system that might eventually yield a judicial determination.[98] We believe, however, that mediation, even with the law as a backdrop, can benefit participants.

Mediation and emotion

298 Family disputes can be highly emotional. Separating parties often experience sadness, regret, and insecurity, as well as bitterness, anger, blame, and a desire for retribution. They must be able to put those feelings aside to resolve their dispute, particularly where children are involved, but this is easier said than done.

299 Mediators have to be aware how difficult it is for parties to let go of these feelings; they must acknowledge their existence rather than ignoring them. Clients, in general, want to feel that the mediator understands them and their fears and anxieties before they are ready to focus on the future. In some cases, the mediator's acceptance and validation of the parties feelings will not be enough, and parties might benefit from pre-mediation counselling.

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[98] R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case for Divorce" (1979) 88 Yale LJ 950.

Amenability of disputes to mediation

300 It is generally accepted that mediation is inappropriate for couples locked in an intractable dispute, or with a history of domestic violence, alcohol or drug dependency, psychopathology, or extreme power imbalances.[99] The Law Commission for England and Wales warned that:

> There are also dangers in relying too heavily upon conciliation or mediation instead of more traditional methods of negotiation or adjudication. These include exploitation of the weaker partner by the stronger, which requires considerable skill and professionalism for the conciliator to counteract while remaining true to the neutral role required ...[100]

301 Some feminists argue that mediation reinforces differences in power that existed before the relationship broke down, and thus disadvantages women.[101]

302 Several studies, however, discredit the claim that mediation always disadvantages women; they show that appropriately conducted mediation can in fact redress some injustices and imbalances.[102] A review of family mediation by the Family Court of Australia comments that:

> A small percentage of mediation applicants are considered unsuitable for the mediation process, particularly due to family violence and other bases of power imbalance between ex-spouses. The mere disclosure of potentially "disqualifying" factors does not automatically exclude

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99 H Astor "Violence and Family Mediation: Policy" (1994) 8 AJFL 3; F Kaganas and C Piper "Domestic Violence and Divorce Mediation" (1994) JSWFL 265; T Grillo "The Mediation Alternative" (1991) 100 Yale LJ 1545; D Ellis and N Stuckless *Mediating and Negotiating Marital Conflicts* (Sage Publications, California, 1996); E Kruk "Promoting Co-operative Parenting After Separation: A Therapeutic/Interventionist Model of Family Mediation" (1993) 15 Journal of Family Therapy 235, 246.

100 Law Commission (England and Wales) *The Grounds for Divorce* (Report 192, HMSO, London, 1990) para 5.34.

101 See the discussion of the pros and cons of mediation in A Diduck and F Kaganas *Family Law, Gender and the State* (Hart Publishing, Oxford, 1999) 354–362. See also M Fineman "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making" (1988) 101 Harv L Rev 727–774; and Grillo, above n 99, 1545–1610.

102 RE Emery *Renegotiating Family Relationships, Divorce, Child Custody and Mediation* (Guildford Press, New York, 1994) 243; J Kelly "A Decade of Divorce Mediation Research" (1996) 34 Family and Conciliation Courts Review 373; J Pearson "The Equity of Mediated Divorce Settlements" (1991) 9 Mediation Quarterly 179; K Mack "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 Adel LR 123.

clients from the service. Instead a careful assessment is made of the extent to which these factors would impair the negotiation process and the couple's ability for constructive communication that is based upon trust.[103]

303 The review identified factors affecting suitability for mediation, which include:

- whether parties accept that the relationship has broken down;
- the intensity of the dispute, the degree of conflict, and how well parties can communicate;
- the parties' capacity to discuss matters rationally, and co-operate with one another;
- power imbalances.[104]

304 The reviewers concluded that key determinants of successful mediation are appropriate timing of referrals, and screening to winnow out inappropriate cases (where there is a protection order in place, for instance, mediation should not proceed).

305 The literature suggests that where there are severe power imbalances (including domestic violence), the victim of violence must give truly independent and informed consent to mediation, and that highly skilled mediators or co-mediators are required.[105] No victim of abuse should ever be forced into mediation with the perpetrator. It is important, however, not to freeze victims in that role forever; if someone who has suffered violence feels mediation might help them, this possibility should be explored.

The mediation conference

306 Family Court judges held approximately 3000 mediation conferences in 2000.[106] Mediation is available under the Family Proceedings Act 1980 where a party has applied for a separation or maintenance order, or for a custody or access order. Mediation conferences may also be convened under section 170 of the Children, Young Persons, and Their Families Act 1989 (CYPF Act).

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[103] S Bordow and J Gibson *Report no 12: Evaluation of the Family Court Mediation Service* (Family Court of Australian Research and Evaluation Unit Research, 1994).

[104] Bordow and Gibson, above n 103.

[105] If mediation were to be used where there has been domestic violence, it might be desirable to have co-mediators conduct the mediation to ensure sufficient protections and parameters.

[106] His Honour Judge P Mahony "Private Settlement – Public Justice?" (2000) 31 VUWLR 225, 229.

Mediation is not available for other types of Family Court proceedings.

307 Before a case reaches trial, a judge will hold a one- to two-hour mediation conference. Only the parties, their lawyers and, if applicable, counsel for the child may attend, but from time to time judges will allow in others. The judge encourages parties to settle their dispute.

308 The mediation conference can be a reality check for Family Court litigants, canvassing possible outcomes if they proceed to adjudication. Some parties settle at the mediation conference and do not proceed to litigation, which can be seen as a successful outcome. Yet it is no measure of the long-term success of such agreements, and not everyone believes this is a good thing. The organisation Lawyers Engaged in Alternative Dispute Resolution (LEADR) comments:

> Parties tend to defer to a judge/mediator. This may be because of the office that the judge holds, or because of a sense that the judge "knows best", or even because they think it wise to keep "onside" with the judge. Lawyers in the Family Court have experienced all these reactions. They can deprive a party of negotiating capacity and ultimate(ly) skew the outcome. They are less likely to occur if the mediator is not a judge.[107]

309 There has been criticism that the Family Court mediation conference model blurs the distinction between adjudicator and mediator roles. As LEADR's submission states:

> LEADR has trained many judges and former judges in mediation. Some make good mediators. But some feel unable, despite training, to shake off the decision-making role that judging requires and to adopt the facilitative approach that is characteristic of much mediation.[108]

310 Our preliminary paper noted that the mediation skills of judges vary. They are trained by a group of judges who were themselves trained by mediators, but at a standard below that required to become a panel member of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ).

Mediation in employment disputes

311 The Employment Mediation Service (EMS) is the first port of call for those in an employment dispute. Parties are expected to attempt

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[107] Submission 95 LEADR, 9 April 2002.

[108] Submission 95 LEADR, 9 April 2002.

mediation before going to a tribunal member or Employment Court judge for a decision.[109] The EMS focus is on resolving disputes and moving on, rather than on attempting to heal fractured relationships.

312 If one party refuses to engage in mediation, the other can apply to the Employment Relations Authority (ERA) for a direction to the party to mediate. If that party still refuses, the ERA may hear the application on an ex parte basis, and costs will be awarded against the absent party.

313 New Zealand has approximately 40 employment mediators, who are fulltime public servants.[110] A few are fluent in te reo and have a good knowledge of Māoritanga.

314 The EMS mediators come from a variety of backgrounds; experience in mediation was one of the criteria for appointment. Some have formal mediation or dispute resolution qualifications. All have taken a three-day LEADR mediation training programme. Approximately a third are lawyers or people with legal training. Nearly all have employment law experience; for example, many have worked as union advocates. Mediators are selected, where possible, so that overall they reflect New Zealand's gender and cultural diversity.

315 Parties cannot choose their mediator. In special circumstances, they might be allowed to discuss a preference with the other party and make a request, but there is no guarantee it will be met. More experienced mediators are usually assigned to difficult or protracted disputes.

Employment mediation case volumes and costs

316 The EMS is contracted to provide 7500 mediations a year; since it was set up, it has mediated 10 000 disputes. It is currently operating 20 per cent above its target, conducting approximately 8500 mediations annually.[111]

317 The EMS mediates every type of dispute. If there are concerns about a power imbalance, the mediator will institute safeguards for the weaker party. Approximately 60 per cent of all mediations involve

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[109] See Part X Employment Relations Act 2000.

[110] The salary scales range from $60 000 to $117 000 per annum.

[111] Contrast this with the Employment Relations Authority, which deals with approximately 2500 cases a year.

personal grievances, which are mediated in one four-hour session.[112] Single mediations cost an average of $800.[113]

318 The success rate of the EMS, or the proportion of disputes leaving the system, is around 85 per cent. Not all such disputes are necessarily settled; some claims are dropped when legal and bargaining positions are made clear to the parties. Ninety per cent of cases are resolved within 12 weeks from the initial approach to the EMS.

319 When parties agree, the mediator explains the terms of their agreement and its binding nature before parties sign. Once signed, there is no right of appeal and the agreement can be enforced in the District Court or by means of ERA compliance orders.

MEDIATION IN OTHER JURISDICTIONS

320 The United Kingdom, Australia, the United States and Canada all use mediation in family law matters, although not without controversy.[114] Views differ on whether mediation is appropriate for every family dispute.

Effectiveness

321 Other jurisdictions have trialled Court-connected mediation.[115] The claimed benefits are that it takes less time and expense than litigation, and that it encourages more comprehensive arrangements for children.[116] A comprehensive US study followed up families randomly assigned to mediation rather than litigation, and found

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[112] The average cost of a personal grievance mediation that is a long-term dispute requiring repeated mediations is $800. A simple personal grievance, however, might cost as little as $200 to $250, if it is mediated in a single four-hour session.

[113] In comparison, the average cost of a dispute heard by the ERA is $6000, and disputes in the Employment Court have been estimated to cost $13 000.

[114] For a description of selected US and Canadian models see J McLeod (ed) *Family Dispute Resolution: Litigation and its Alternatives* (Carswell, Toronto, 1987) 86. See also J Pryor and F Seymour "The Mediation Debate: A Contradiction in Terms?" (1998) 2 BFLJ 261.

[115] Australia, Canada, the United States and the United Kingdom.

[116] See J Pryor and F Seymour, above n 114, which gives a comprehensive overview of the benefits and criticisms of mediation of family disputes. See also Kelly, above n 102; M Benjamin and H Irving "Research in Family Mediation: Review and Implications" (1995) 13 Mediation Quarterly 53–82; J Walker "Family Conciliation in Great Britain: From Research to Practice to Research" in J Kelly (ed) *Empirical Research in Divorce and Family Mediation* (Jossey-Bass, San Francisco, 1989) 29–53.

that parents who went to mediation were more involved in their children's lives and more likely to co-parent.[117]

322 However, the benefits and efficacy of mediation can be difficult to measure. The following section discusses studies in Australia,[118] Canada[119] and the United States that have analysed measures of family mediation effectiveness.

Measuring effectiveness

323 An Australian Family Court study reported a high rate of client satisfaction with mediation, irrespective of whether parties reached agreement.[120] Parties were positive about the mediator's skills and said the mediator listened to them, identified their concerns, and reflected them during mediation.[121] Many thought the process helped them better understand the other party's point of view. Some, though, were disappointed that mediation did not have much effect in highly acrimonious situations.[122]

324 A US survey showed 75 per cent were positive about mediation and would recommend it to others. Many said it gave them a chance to put across their point of view and be heard. They also reported that it helped them concentrate on their children's interests. Sixty-five per cent said mediation was a better option than litigation. Negative comments were usually about limited time for mediation.

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116 *continued*

However, the Government should probably not assume that such mediation services will be cheaper than judicial intervention. Some overseas studies are cautious about the alleged benefits of mediation in relation to costs. See R Ingleby "Court Sponsored Meditation: The Case Against Mandatory Participation" (1993) MLR 441, 442. See also the references in footnote 12 of page 442 of Ingleby's article.

117 R Emery and others "Child Custody Mediation and Litigation: Custody, Contact and Co-parenting 12 Years After Initial Dispute Resolution" (2001) 69 Journal of Consulting and Clinical Psychology 323.

118 Bordow and Gibson, above n 103.

119 Alberta Law Reform Commission Research Paper 20 *Court-connected Family Mediation Programs in Canada* (Alberta Law Reform Commission, Edmonton, Alberta, 1994) "The Canadian study". In 80 to 90 per cent of cases, the participants felt the mediator was fair and gave them the chance to express their feelings.

120 Bordow and Gibson, above n 103, 8, conclusion 5.

121 Bordow and Gibson, above n 103, conclusion 6.

122 Bordow and Gibson, above n 103, conclusion 8.

325 United States studies conducted in Denver (the Denver study), and Los Angeles, Connecticut and Minneapolis (the multi-city study) revealed that 40 per cent of voluntarily mediated cases settled in full, and a further 20 per cent partially settled. Where mediation was mandatory, between 60 and 70 per cent settled.[123]

326 Participants in a Canadian study rated mediation highly, with 80 to 90 per cent saying the mediator was fair and gave them a chance to express their point of view. Eighty to 88 per cent of those who did not use mediation, however, said they were satisfied with their lawyer's services. Sixty-four per cent of the mediated cases fully[124] or partially[125] settled through mediation, but of the couples actually interviewed, only 38 per cent said a settlement was reached.

327 In the Canadian study, couples who mediated were four times more likely to agree to joint custody than those who litigated.[126] In spite of concerns that women would agree reluctantly to joint custody because of the cost of contested litigation, couples agreed on joint custody because they genuinely believed it best for their children. These results were reflected in other US studies.[127]

Speedy resolution

328 The Canadian experience suggests mediation is a way of fast-tracking matters to an order. Clients reported that delays increased the anxiety of family breakdown. Reducing the time it takes to reach an agreement and have it embodied in an order, might defuse potential conflict.

Cost

329 The Canadian study found that parties who mediated paid higher legal costs (between $385 and $508 more) than parties who litigated.[128] But this was not the case in Montreal, where the Court retains a staff lawyer for parties to consult. There, legal costs were between $133 and $517 lower for those who mediated.

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123 Alberta Law Reform Commission, above n 119, 49.

124 Forty-nine per cent of the mediated cases studied fully settled. Alberta Law Reform Commission, above n 119, 42.

125 Fifteen per cent reached a partial settlement. Alberta Law Reform Commission, above n 119, 43.

126 Joint custody was agreed to in 47 per cent of cases, whereas only 5 per cent of non-mediated cases agreed to joint custody.

127 Alberta Law Reform Commission, above n 119, 49.

128 Alberta Law Reform Commission, above n 119, 44.

330 The Denver and Californian studies found mediation was more cost-effective than litigation. Denver couples who mediated spent an average of $1630 on legal fees. Couples who mediated but did not reach an agreement spent $2000 on legal fees. The Californian study found the legal fees of couples who litigated were twice as high as those who mediated.[129]

Compliance with mediated agreements

331 Degrees of compliance with mediated agreements varied in the Canadian study. In Montreal, 97 per cent of couples complied with their agreements, but in Winnipeg mediating couples were more likely to default. In Saskatoon and Saint John there was little difference between groups who mediated and those who litigated.[130]

332 Eighty per cent of clients in the Denver study complied with their mediated agreement, compared with 60 per cent of parties who litigated. In the multi-city study, none of the clients who mediated custody and access matters complained about infrequent access visits, whereas 30 per cent of those who litigated had infrequent access to their children. These studies indicate that parties who negotiate their own agreement are more likely to stick to it.

Post-separation relationship and parenting

333 Most people taking part in the Australian mediation trial felt mediation helped them stand up to their ex-spouse and increased the likelihood of their sorting out future problems without outside help.[131]

334 The Canadian study, however, showed mediation had little impact on post-divorce relationships and parenting. There was little difference in the level of conflict and hostility between parties who mediated their disagreements and those who litigated. Almost 15 per cent of the Winnipeg mediation group had already begun court proceedings to change the mediated agreement, and a further 41 per cent expected to litigate in future.

335 The US studies showed mixed results for re-litigation patterns and post-divorce relations. In Denver there was a lower re-litigation rate, but those in the multi-city study who had mediated were as

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[129] J Kelly "Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs" (1990) 8 Mediation Quarterly 15.

[130] Alberta Law Reform Commission, above n 119, 44.

[131] Bordow and Gibson, above n 103, conclusion 7.

likely as those who had litigated to seek the Court's help.[132] The US researchers concluded that although mediation does not encourage re-litigation, it does not deter it. The ongoing parental interaction encouraged by having brokered a compromise at mediation can create more opportunities for parties to come into conflict.

PROPOSALS FOR NEW ZEALAND

336 We recommend mediation by contracted Family Court mediators as part of the conciliation service. We believe mediation has the potential to resolve disputes faster and more amicably than adjudication. We want to encourage families to resolve disputes themselves in a way that will preserve and enhance the healthy aspects of their relationship and minimise the dysfunctional. Mediation promises to achieve this better than litigation, which reduces direct communication and emphasises parties' differences rather than their shared interests.

337 We believe mediation should be available to everyone who would otherwise have their dispute settled in the Family Court. This includes guardianship/custody and access issues, relationship property disputes, and family protection and testamentary promises claims. Parties involved in other proceedings, such as adoption, or appointment of a welfare guardian under the Protection of Personal and Property Rights Act 1988, could also use mediation.

338 We do not think mediation useful in mental health matters. There may be no need for a separate mediation process for applications for declarations under the CYPF Act, because the family group conference procedure precedes the opportunity for a judge-led mediation conference.

Recommendation

The conciliation services offered currently by the Family Court should be expanded.

The Department for Courts should contract trained mediators to offer mediation services to Family Court clients.

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[132] Alberta Law Reform Commission, above n 119, 51.

Timing of mediation

339 Mediation should be something that the conciliation service co-ordinator offers clients. In many cases it would be best for parties to attend an information session or counselling before attempting mediation, but some cases might be suitable for mediation without prior counselling. The conciliation service co-ordinator, in consultation with a mediator, should decide whether a case is suitable for mediation or whether it should be deferred until after counselling.

340 Some cases might involve issues needing urgent resolution by a judge. Once these are resolved, however, outstanding issues might be resolved by mediation. There should be enough flexibility for a judge to be able to refer parties back to mediation.

Legal advice

341 Mediation is no substitute for proper legal representation. The Legal Services Agency pilot of mediation services gives the added protection of legal advice for mediating parties.

342 We do not, however, think it necessary or desirable to have lawyers present at all mediations, because the purpose of mediation is to encourage parties to communicate with one another and resolve their dispute.

343 We recommend parties get legal advice before the first mediation session. This would give them an overview of the legal issues and the law relating to their situation. Parties should enter mediation knowing their legal rights and obligations.

344 Many Family Court disputes, such as custody and access disputes not involving complexities such as relocation, are not legally complicated. Also in this category are many relationship property disputes where the family home is in contention, along with chattels and possibly some savings. If parties received preliminary legal advice and their agreement was later referred to their legal advisors, parties could attend mediation without their lawyers. The extent of preliminary legal advice and work would depend on the dispute and the issues involved.

345 Where matters are more complex, such as relationship property disputes involving businesses or trusts, it might be unproductive to attempt mediation without the parties' lawyers being present.

346 The Property (Relationships) Act 1976 entitles each party to independent legal advice before an agreement is enforceable; any mediated agreement would have to comply with this requirement.

347 Where parties have managed to agree as a result of mediation, they should, as an additional safeguard, be given separate legal advice to ensure they fully understand what they are agreeing to.

Recommendation

> Mediating parties should get legal advice before mediation, and before ratifying any agreement reached during mediation.

Participation

348 We recommend extending the categories of those entitled to participate in mediation beyond the immediate parties to the proceeding. In order to acknowledge the growing number of blended families and the different patterns of family life of Māori and other cultures, all "main players" may need to be represented at mediation to make solutions viable.

349 Participation could extend beyond kinship. Some situations might involve step-parents or new partners. It might sometimes be beneficial to bring in a professional such as a doctor or a therapist who has been involved with the family, provided privilege and confidentiality issues can be resolved.

350 There should be enough discretion for participation to be decided case by case, following consultation with the parties, and where appropriate, the children.

Recommendation

> There must be flexibility about who may attend mediation.

Children

351 Our preliminary paper asked whether children should be involved in mediation. Many submissions supported such an idea as a way of expressing the right of children to be heard under the United Nations Convention on the Rights of the Child.

352 Some, though, pointed out potential drawbacks, such as putting the child in a position that might lead to him or her being pressured by one or both parents.[133] We affirm the importance of children being visible during mediation, but would not want to see a poorly conducted mediation that puts a child in the invidious position of having to "choose" between parents.

353 A properly conducted mediation, where a child has the opportunity to tell his or her parents how he or she feels about what is happening, would focus on children's views and interests, and could help clarify matters for disputing parents.

354 Having considered the arguments for and against child participation, we favour enough flexibility to allow participation to be decided case by case.

355 There are several ways children's views can be ascertained and represented. The question is which form of participation is most appropriate. In some circumstances, it might be appropriate for children to attend part of a mediation, but we do not envisage children being present as a matter of course. The mediator should meet with the child or young person, or consult them through a counsellor or counsel for the child, to find out whether they wish to participate in mediation and whether this is desirable.

356 Another option might be for children to prepare a statement of their views and wishes to be conveyed to the parents during mediation.

Recommendation

Children or young people with enough maturity to have a point of view and to be able to express it, should have their views sought and taken into account in the mediation process.

The mediator, together with the counsellor, should consider whether children or young people want to be involved in mediation, and whether it is desirable that they should.

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[133] Although there is scope for this, with or without mediation. Certainly a poorly conducted mediation could have long-term negative effects for the child/ren involved.

Child participation could be encouraged in several ways. Mediation should be flexible enough to ensure the child's voice is heard whenever possible, on matters affecting them. But a child who expressly does not want to be involved must not be compelled. Some of the ways children's views could be represented are:

- children are present during part of the mediation;
- children ask someone they trust to state their wishes at the mediation;
- a counsellor meets with the child and passes on his or her views and wishes to the mediator, either verbally or through any statement or pictures the child may want to execute;
- the mediator meets with the child to determine his or her views and relay them to the parents.

Potential savings

357 The extent to which the State should fund mediation services must be considered. If we accept that more than 90 per cent of parties coming to court settle without judicial intervention, one might ask whether the State should fund mediation. Alternatively, should the State fund mediation only when it is apparent that the dispute will need a hearing if there is no other intervention? Or can we safely assume that those who manage to settle before the hearing anyway are unlikely to seek mediation?

358 The answers to these questions depend on how one measures the success of mediation: by how efficiently resources are used, or by how participants rate the qualitative experience.[134] Mediation benefits participants because it is more responsive to their needs, less formal, and easier to access than litigation. It is potentially cheaper for the parties, and should reduce the number of cases going

[134] See C Menkel-Meadow "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'" (1991) 19 Florida State University Law Review 1, 10.

through to litigation.[135] We hope it might encourage parties to see the benefits in maximising shared interests, particularly where children are involved.

359 Because we see mediation as an adjunct to current procedures, we would expect there to be fewer judge-led conferences because more disputes would settle at mediation and not proceed to adjudication.

Recommendation

We recommend trialling mediation services and monitoring their total cost, so as to compare them with similar disputes being adjudicated, in order to assess quantitative and qualitative aspects of mediation. The study could compare cases in a court running a mediation pilot with similar cases under the current Family Court process.

TYPES OF MEDIATION

360 Australian Family Law Rules describe a family law mediation conference:

> (a) as a decision-making process in which the approved mediator assists the parties by facilitating discussion between them so that they may:
> (i) [c]ommunicate with each other regarding the matters in dispute; and
> (ii) [f]ind satisfactory solutions which are fair to each of the parties and (if relevant) the children; and
> (iii) [r]each agreement on matters in dispute.[136]

361 There are many types of mediation.[137] More traditional models see the mediator as an impartial facilitator who avoids influencing the outcome and will accept any decision parties reach.[138] The types of

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[135] Many of these cases might currently settle before trial, but will have progressed down a case-management track towards litigation, potentially incurring significant costs in terms of solicitors' fees, costs for counsel for the child, and psychologists' reports, not to mention the costs of Court staff time and judge time, especially if a mediation conference has been held.

[136] Australian Family Court Rules, r 10(1)(a).

[137] See K Foy "Family and Divorce Mediation: A Comparative Analysis of International Programs" (1987) 17 Mediation Quarterly 83.

[138] Provided that decision is not clearly harmful to any party.

mediation described here are techniques that experienced mediators can call on to help resolve family law disputes; they will differ according to the dispute being mediated and the capacity of the parties to use the process.

362 We are not in favour of prescribing a specific model, but suggest that therapeutic mediation might be useful in family disputes requiring more intervention than most.

Therapeutic mediation

363 The therapeutic mediator helps participants understand the mediation process, and facilitates co-operative arrangements known to work well for families.[139] The mediator might also offer ongoing support as the family adjusts to its new circumstances. This model lends itself particularly to negotiating parenting plans; it helps families draw up new arrangements that ensure both parents take an active and constructive part in their children's lives. Therapeutic mediation is pragmatic: the mediator focuses parents on the practical implications of their plans.

364 Therapeutic mediation usually works through the following phases: assessment; education; advocacy; facilitation of communication; and ongoing support.[140]

Assessment

365 The assessment process (which we envisage being initially carried out by the conciliation service co-ordinator or counsellor) determines whether parties are ready for mediation and whether there are any contra-indications. It should take the following factors into account:

- the extent to which parties have accepted the end of the relationship; the degree to which they can separate past relationship issues from current and future parenting issues; and their willingness to co-operate;
- their current relationship; the level of hostility; whether there is or has been domestic violence; whether there are power and control issues; and, whether one party might use mediation to manipulate the other or stall the process;

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[139] Also known as a facilitative or interventionist mediator.

[140] Guidelines as expressed by E Kruk "Promoting Co-operative Parenting After Separation: A Therapeutic/interventionist Model of Family Mediation" (1993) 15 Journal of Family Therapy 235, 243.

- the relationship between child and parents, and whether there has been abuse;
- what parents expect and want in their relationships with their children.

Education

366 To be able to mediate, parents need information about the divorce process and children's needs, and communication and problem-solving skills. It should be made clear to them that shared parenting agreements must answer the child's, not the parents' needs. Helping parents discover what these needs are can focus them on arrangements that will suit their children.

367 Information sessions demonstrating communication and problem-solving skills help prepare parents for mediation, as well as equipping them to negotiate inevitable changes in their parenting lives. Chapters 5 and 6 recommend such information be offered to all separating parents.

Facilitating negotiation

368 The core function most people associate with mediation is facilitating negotiations towards an agreement, whether it relates to a parenting plan, living arrangements, roles, responsibilities and activities, property issues, or how a relative who is older or infirm might be cared for.

Ongoing support and troubleshooting

369 Once a plan has been implemented, the mediator can help resolve any practical problems that might arise, in the hope of avoiding repeated litigation over apparently minor issues.[141]

Key players

370 We suggest the conciliation services co-ordinator carry out the information function during an intake interview, which is discussed in chapter 2.

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[141] In a model of mediation known as impasse-directed mediation, the mediator will often play an ongoing role in supporting the family while they implement their agreement. See L Campbell and J Johnston "Multifamily Mediation: The Use of Groups to Resolve Child Custody Disputes" (1986–87) 14/15 Mediation Quarterly 137.

371 The second and third functions could be covered by a parenting information programme, and materials such as booklets, videos and website information.

372 Facilitating negotiation and ongoing support could be carried out in the context of mediation. Another option would be to have the conciliation services co-ordinator, counsellor or psychologist offer follow-up assistance to parties having difficulties with parenting plans negotiated during mediation.

MEDIATOR QUALIFICATIONS

Current training

373 Mediation has evolved dramatically over the past 20 years; it is now a well-established academic discipline with an extensive research base. General training and education programmes leading to mediator qualifications are available in New Zealand.

374 Mediation is taught in several New Zealand university law faculties and business studies departments. The Massey University Dispute Resolution Centre offers comprehensive one- and two-year, graduate- and postgraduate-level courses. Students can take courses extramurally, but must attend an eight-day residential practicum, and five-day block courses where they develop practical mediation skills. These are AMINZ-affiliated programmes.

375 Several New Zealand bodies offer mediation training, including LEADR. The three-day LEADR course is an intensive weekend workshop during which participants develop practical mediation skills.

376 It is vital that mediators be appropriately trained and supervised, and have the knowledge and skills necessary to work with Family Court clients; the success of mediation depends on it. Using lesser-trained mediators could doom a proposed mediation scheme.[142] As a review of Australian Court-annexed mediation services stated:

> Mediation practiced badly can be detrimental to participants and is likely to waste resources for the parties and for courts and tribunals.
>
> … A mediator who is not skilled – or who is not sufficiently skilled or qualified to handle a particular dispute – will find it hard to achieve these outcomes. The parties are then unlikely to have a good experience of mediation, are unlikely to achieve settlement of

[142] We suggest that the Massey University/AMINZ-accredited course and affiliation to a professional organisation is an appropriate level of training.

> appropriate issues or to be inclined to use mediation again. Costs to courts and tribunals will increase. Complaints may be generated or parties may decide to ["]lump["] an unfair agreement. The mediator may be unaware of the power relationships between the parties and how to handle them appropriately so that one party may feel pressured to accept an unfavourable agreement. [143]

377 Enthusiastic amateurism is no substitute for the training and experience demanded by the social and emotional complexities of Family Court cases.

378 Should the Government water down our recommendation and permit lesser-qualified people to provide mediation services, we would oppose mediation as a form of Family Court dispute resolution.

Specialised training

379 As well as core mediation skills and professional affiliation, Family Court mediators would need specific Family Court training covering the following topics:

- family systems theories and child development;
- gender awareness;
- domestic violence and power imbalances, and how to deal with unequal bargaining positions;
- how to deal with highly emotional clients;
- the challenges of dealing with unrepresented clients;
- disability awareness;
- knowledge of tikanga Māori
- knowledge of other cultures and cultural practices;
- knowledge of community-based organisations and support groups offering families help;
- basic knowledge of law applying to Family Court disputes;
- case management and Family Court processes.

380 We recommend that a special Family Court committee design this course. The committee should draw on the full range of professional Family Court experience: judges, counsellors, social workers, psychologists and lawyers, along with representatives from AMINZ and/or LEADR. For ease of access, the course should be offered at least in Auckland, Wellington and Christchurch.

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[143] H Astor *Quality in Court Connected Mediation Programs: An Issues Paper* (Australian Institute of Judicial Administration) Carlton, Victoria, 2001, 13–14.

Appointment and selection of mediators

381 Mediators would not be appointed to Family Court work without an accredited mediation qualification, and completion of the specialist Family Court course outlined above, to prepare them for working in the Family Court.

382 The special Family Court committee proposed above would approve an appointment once a mediator had successfully completed the course.

383 The professional mediation bodies as well as the Family Court committee could formulate family mediator standards of practice and a code of conduct.

384 Some mediators will inevitably be more skilled than others, and we envisage the more experienced mediating more complex cases. The Family Court co-ordinator will play an important part in matching mediator skill and experience to dispute.

Supervision and development

385 Trained, experienced mediators should supervise new mediators.

386 Australian Family Law Regulations require family mediators to undertake at least 12 hours of continuing education in child and family mediation every year. We believe there should be a similar requirement in New Zealand.

Recommendation

Only fully trained and accredited mediators should conduct family mediation.

Family mediators should have additional Family Court training in the areas outlined below:

- family systems theories and child development;
- gender awareness;
- domestic violence and power imbalances, and how to deal with unequal bargaining positions;
- how to deal with highly emotional clients;
- the challenges of dealing with unrepresented clients;
- disability awareness;
- knowledge of tikanga Māori
- knowledge of other cultures and cultural practices;

- knowledge of community-based organisations and support groups offering families help;
- basic knowledge of law applying to Family Court disputes;
- case management and Family Court processes.

Family Court mediators should have frontline mediation experience, or be supervised initially by an experienced family mediator.

Mediators should undertake ongoing education in child and family mediation.

Contracted versus employed mediators

387 Mediation services can be provided in several ways. The EMS, Tenancy Tribunal and Disputes Tribunal mediators/adjudicators are permanent employees. The Health and Disability Commissioner, the Privacy Commissioner, and the Environment Court all contract mediation services, as does the Medical Council, for disputes arising under the Medical Practitioners Act 1995.

388 Our preference is for contracting services from mediators who are working simultaneously in the community, because:

- mediation encourages people to solve problems without resorting to the Family Court and expecting another person or system to solve their problems for them;
- it would give a range of people better access to mediation;
- Court-based facilities are under pressure, and it is unlikely the Government would want to construct new facilities around the country; even should there be appropriate Court facilities, Court-located mediation might inhibit some clients;
- community facilities are likely to be more user-friendly than court-based facilities; there should, ideally, be comfortable rooms, whiteboards and flipcharts, tea and coffee facilities, and office and communications equipment so agreements can be processed and copied for parties to take away to consider, and discuss with their lawyer;
- community-based mediators would be flexible about the timing of mediation appointments; if mediation is progressing well, parties might want to continue outside nine-to-five office hours.

389 Good mediators may prefer to conduct family mediation as part of a mixed mediation practice. The LEADR sees the contracting of mediation services as having the following advantages:

- Greater flexibility and choice allowing for a more diverse and changing "panel" of contractor mediators.
- Diversity in the composition of the panel is attractive. Mediators need to be able to "translate" for the parties to enable them to hear each other. This requires an empathy with the class, culture and gender of the parties.
- The diversity of the "panel" of contractor mediators would allow more sophisticated matching of disputes and mediators.
- Mediators of a high standard could be contracted on an ad hoc basis. Qualifications, experience and accreditation/professional organisation would be required.
- A higher standard of service would be achievable as:
  (a) the maintenance of professional standards would be overseen by the professional body which the mediator is affiliated (to); and
  (b) contractors would have private professional reputations to maintain.
- Contractor mediators would not become "institutionalised" and would be less likely to be perceived as "institutionalised" by the parties.
- Private mediators would be less likely to be concerned by "success" rates statistics than with durable outcomes.[144]

390 We agree with these points. If available mediators came from a permanent in-house pool, they would risk being accused of insider capture. It is also possible mediators might not want to devote themselves to Family Court work because they would not want to give up their practices and the diverse work they currently undertake.

391 Another issue is burn-out of those conducting many family mediations. We have been told of Court-appointed psychologists suffering burn-out, and we assume mediators would be similarly vulnerable. The risk would be exacerbated by the increased exposure to Family Court work arising from permanent employment as Family Court mediators.

Recommendation

The Family Court should contract mediation services from approved mediators.

[144] Submission 95 LEADR.

RENAMING MEDIATION CONFERENCES AS SETTLEMENT CONFERENCES

392 The provision of non-judge-led mediation raises the question of what would become of the mediation conference procedure now provided under the Family Proceedings Act 1980.

393 We do not propose abolishing the existing judge-led mediation conference. It is a valuable opportunity to define and limit issues, reality test each party's position, prioritise, and in some cases, conclude the dispute by a consent order.

394 We believe the judge-led conference might be better characterised as a settlement conference.

395 Judges should also be able to conduct settlement conferences for other kinds of proceedings; they would be particularly appropriate for Family Protection Act 1955 and testamentary promises claims.

Recommendation

Judge-led mediation conferences should continue, but be renamed settlement conferences to emphasise their differing role and dynamics.

Settlement conferences should be available but not mandatory in all family law proceedings.

9
Court management

OVERVIEW

396 THIS CHAPTER CONSIDERS the tasks Family Court staff undertake currently, how these are managed, and how management might be improved.

397 We have drawn on submissions from the Department for Courts and other Family Court professionals because this is not an aspect many court users can comment on in detail. We have also visited courts of varying sizes serving different communities. We have spoken to Court staff, including Court managers, caseflow managers, team leaders, Family Court co-ordinators, case progressors, Court takers and counter staff. We have also met with staff in the Department for Courts national office.

398 The Family Court is regarded as a "Court with a difference" by the Department for Courts and Court managers, whose responsibilities extend across the District Court (that is, management of the Family Court and its staff is only part of their job).

399 The rationale for establishing a Family Court was to allow for a different way of dealing with family disputes, and to resource conciliation services, thereby making judicial decisions more of a last resort. The Family Court Bench, and professionals such as lawyers, counsellors, and psychologists, have encouraged that sense of difference by endorsing the Court's specialist nature and its focus on conciliation.

400 But the Department for Courts has failed, in some respects, to recognise the implications of this approach. Departmental objectives for the overall Court system often conflict with the aims of the judges and professionals working in the Family Court; a clear example of this is the way the Family Court co-ordinator role has been changed since the 1980s.[145]

[145] See chapter 3.

The present situation

401 The Department for Courts distinguishes between caseflow management and case management. Caseflow management is a system for managing disposal of cases; case management is what is done to progress an individual case.

402 The Department is completing the Courts Modernisation Project, which will facilitate active case management. A model of how the Courts will operate has been developed, emphasising improved processes and job designs within Court registries. This operational model will be supported by computer-based information technology in the form of the new Court Management System (CMS) expected to be introduced in all Family Courts by June 2003.

403 The new operational model is designed to complement and support the caseflow management practice note issued by the Principal Family Court Judge in September 1998. This deals with essential principles, management guidelines, operation of registrars' lists, judicial directions and timelines for progressing cases through the Family Court.

404 The operational model improves caseflow management to minimise delay and promote early settlement by:

- increasing individual responsibility for completing business processes;
- encouraging "ownership" by specific personnel;
- encouraging proactive case management by early review of documentation completeness and preparation, and scheduling events at defined stages of proceedings;
- having the Court take responsibility for facilitating co-operation between all stakeholders in a case;
- reducing the average number of hearings per case.

405 The CMS will alert staff to critical dates, enabling them to monitor closely the progress of a case and liaise with parties where necessary. Most Family Courts have made substantial moves towards implementing operational model business processes, but the new system cannot be fully introduced until the CMS goes live.

406 As new staff have been employed, Court management has been encouraged to move them at the outset into roles aligned to the operational model.

407 The introduction of the operational model and the CMS will require major change management. At the time of writing, each Family Court was aware of the intended changes and the systems

that would apply to their Court. It is not fully known, however, how the system and new staff designations will work in practice, so we are not in a position to comment on their effectiveness.

408 The following comments must be interpreted against this background of change.

FAMILY COURT STAFFING AND ORGANISATION

409 Apart from a concentration in the Auckland region, New Zealand's population is widely spread. It benefits most people, therefore, that the Family Court operates registries and conducts hearings in small centres throughout the country.

410 Family Court judges are attached to courts in larger centres, where a Family Court co-ordinator is also based. Smaller centres have fewer staff, and the judge usually attends once a fortnight or once a month. Some of these centres, such as Papakura (attached to the Manukau Family Court), are big enough to support a Family Court co-ordinator. Others, such as Whakatane (attached to the Tauranga Court), do not have a Family Court co-ordinator, and the co-ordinator's functions are performed partly by local staff and partly by the co-ordinator from the main centre.

411 A large District Court in a main centre such as Christchurch is headed by a Court manager who is cluster manager for surrounding District Courts, and District Court registrar. This manager would not normally be directly involved with the Family Court. The Christchurch Court has a Family Court manager as well as criminal, civil and support services managers.

412 At a smaller centre, such as the Tauranga Court, the local Court manager is responsible for criminal, civil and family cases. A caseflow manager, who is deputy registrar, reports to the Court manager. At Tauranga, the caseflow manager is responsible for both family and civil work. In a bigger Court like Christchurch, four managers report to the Family Court caseflow manager, and they may be designated team leaders. Team leaders are responsible for staff but, under the new system, will undertake case progressing along with those who are not team leaders. Court taker and customer services officer positions are more junior, but the case progressor position will subsume aspects of these roles in smaller courts.

413 In very small registries, Family Court case progressors are also likely to be involved in civil work.

414 The range and number of staff at each registry has implications for the way work is organised and how specialised individual staff functions can be.

415 Family Court co-ordinators do not fit easily into the Court management hierarchy. They report to the caseflow manager, and their salaries fall between caseflow manager and case officer/case progressor level.

416 Family Court staff vary considerably in experience and education. Some Courts are fortunate enough to have stable, long-serving staff; in others, especially in the Auckland area, staff turnover is high. Staff in the same positions have educational qualifications ranging from school certificate to bachelor's degrees.

417 Below are Family Court staff salary scales:

Band	Minimum salary $	Fully competent salary $	Maximum salary $
A	19 491	22 930	25 223
B	25 500	30 000	33 000
B+	28 050	33 000	36 300
C	31 025	36 500	40 150
D	36 125	42 500	46 750
E	44 492	52 343	57 577
F	53 755	63 241	69 565

418 Case officers or progressors fall into the $31 025 to $40 150 salary range, Family Court co-ordinators into the $36 125 to $46 750 range, and caseflow managers into the $44 492 to $57 577 range.

HOW FAMILY COURT CASE MANAGEMENT DIFFERS

419 Family Court case management differs in several ways from that of other District Court divisions.

420 The Family Court administers a range of statutes all with different statutory procedures and caseflow management tracks; for example, Mental Health (Compulsory Assessment and Treatment) Act 1992; Domestic Violence Act 1995; Protection of Personal and Property Rights Act 1988 (PPPR Act); Children, Young Persons, and Their Families Act 1989(CYPF Act).

421 Not all stages of these proceedings are under the direct control of the Court or parties, because other people and agencies have a role in progressing cases; for example, under the PPPR Act, counsel is appointed for the subject person and must report to the Court; under section 29A of the Guardianship Act 1968, a judge can order a report from a psychologist; hearings under the Mental Health (Compulsory Assessment and Treatment) Act 1992, although heard by Family Court judges, are usually held at hospitals rather than in court; under the Domestic Violence Act 1995, applicants, respondents and children may be directed to programmes.

422 Court staff must implement these referrals and procedures, monitor timeliness, and reintegrate the case into the Court procedure track as each step is completed and reported on.

423 The Family Court processes many urgent, without-notice applications under the Domestic Violence Act 1995, as well as the usual without-notice applications for directions as to service, which are quite common across the civil jurisdiction. These applications must be urgently referred to the area's duty judge, which might mean they are faxed into the central court where the duty judge is sitting. Programmes must be organised for the respondent as soon as an order is made. Special procedural tracks ensure that if respondents wish, they can be heard within the specified statutory timeframe.

424 The Guardianship Act 1968 and Family Proceedings Act 1980 provide, in certain circumstances, for referral to counselling, that must be actioned by the Family Court co-ordinator or the case progressor.

425 The Family Court co-ordinator or case progressor must also action directions for psychologist and social worker reports under the CYPF Act and the Guardianship Act 1968. Receipt of these reports must also be monitored and, once the report is available, the case reintegrated into the caseflow management system.

426 Court staff have to liaise with, and manage lists of, professionals such as psychologists, social workers, and counsel for the child willing to undertake Family Court work.

427 Because of the various interventions, there is more contact between Court staff and the parties or their lawyers in Family Court proceedings than in other civil proceedings in the District Court.

428 A further difference between the two courts is the increasing number of those representing themselves in the Family Court. Court staff are instructed appropriately: it is not their role to give legal advice. Nevertheless, self-representation results in many more

enquiries about forms, procedures and next steps. Staff often find it difficult to draw a line between giving self-represented litigants appropriate help, and help that goes beyond their role and training. Dealing with self-litigants can be very time-consuming.

429 Issues dealt with in the Family Court can be emotionally draining for staff, whether it is reading disturbing affidavits to determine appropriate referrals for applicants and respondents under the Domestic Violence Act 1995, or dealing with distressed, angry or suicidal people. Such situations arise often in the Family Court.

430 Staff in smaller Courts will also be handling civil and possibly criminal matters, and must manage competing workloads.

431 The range of tasks undertaken by the Family Court co-ordinator varies around the country, and this affects the work required of other Court staff.[146]

THE NEED FOR CHANGE

432 The Family Court is a specialist court, so its case management requires tasks and skills that extend staff roles. Family Court staff need:

- to understand the whole system, not merely the tasks specified by their job description;
- knowledge of relevant statutes and practice notes;
- the ability to use their initiative;
- the ability to organise and administer their own tasks and files;
- the ability to empathise with Family Court clients;
- the emotional capacity to deal with the type of work;
- a high level of literacy;
- acceptable computer skills.

Family Court co-ordinator

433 We recommend expanding and strengthening the role of the Family Court co-ordinator (see chapter 3). This may mean employing more co-ordinators to provide the extra services.

434 Family Court co-ordinators must have administrative support. It is not sensible to employ co-ordinators for their conciliation and management skills, then let them spend time mailing computer-generated letters and doing other minor administrative tasks that could be done by a less-skilled employee.

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[146] See chapter 3.

435 The extended role would have implications for Family Court co-ordinator salary bands.

436 The position must be incorporated into the administrative structure with appropriate lines of responsibility and accountability so the position is valued and supported.

Recommendation

> Expand the Family Court co-ordinator's role (see chapter 3), and employ more Family Court co-ordinators.

Case progressors

437 A case progressor[147] requires a broad range of knowledge and skills. The preferred operational model – and what is, in any event, necessary in smaller registries – is for each progressor to be allocated cases across all statutory jurisdictions.

438 In bigger Courts, it is essential that work is allocated according to statutory jurisdiction, especially care and protection, and mental health matters. These require specialist skills and good liaison with relevant outside agencies. Having one case progressor as the Court contact for all a local hospital's mental health enquiries allows relationships to be built up, with a consequent improvement in liaison and efficiency. The same dynamics operate between Child, Youth and Family Services (CYFS) and the Court. It would be wasteful to have four or five case progressors in one court, building relationships with local mental health workers and the local CYFS office.

439 There are plans to extend the decision-making role of case progressors by allowing them to exercise various registrar's powers.[148]

440 It is unlikely, as the skills, experience and responsibility of case progressors are increased,[149] that Courts will be able to employ and retain them without paying them more. Their current salary band is $31 025 to $40 150. Some might also be team leaders, employed in the $36 125 to $46 750 band.

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147 This is the term used by the Department for Courts. We prefer case officer.

148 See paras 462–467.

149 As team leaders, case progessors have additional responsibilities to provide performance plans and so on for junior staff.

441 There may be an argument that the experience, skills, and responsibility required of Family Court case progressors requires paying them at a higher rate than equivalent Civil and Criminal Court positions.

Recommendation

Consider extending Family Court staff salary bands (especially those of team leaders and case progressors), and raising their upper limits to reflect the level of experience, skill, knowledge, and responsibility these positions demand.

Training

442 Court workloads are usually such that it is difficult to train staff on site because they are fully occupied with their jobs.

443 The knowledge and skills base required of a case progressor is so extensive that, if one resigns without an immediate replacement, it compromises the Court's ability to deal with day-to-day work.

Recommendation

More consideration should be given to the training needs of Family Court staff, and the delivery of such training. On-site training must be factored into staff workloads.

All Family Court staff, and especially case progressors, need training on, for instance, the likely case track for each type of proceeding, relevant legal principles, and reasons for the requirements to file particular documents. Such training would help lawyers and Court staff liaise effectively over the progress of a case through the system.

Staffing

444 There are clear, ongoing difficulties in filling vacancies, and Courts often operate without their full complement of staff. Unfilled vacancies put pressure on existing staff, and make it hard to retain them; for example, Manukau Family Court was minus a team leader from January to July 2002, and another position was vacant from March to September 2002; Porirua Family Court had a vacancy

from May that was not filled until September 2002; at Taupo, Family Court work was run out of the Rotorua Court for about three months in 2002.

445 The current system has too little slack to cover for illness, holidays, resignations and new staff training. Many staff are working unpaid overtime and feel under pressure. We have been told of courts where Criminal Court staff can complete their work without a problem, but where the Family Court workload cannot be completed in normal working hours. Family Court staff do not feel valued.

446 We note that the *Validation Report on the Wellington Development Court* concluded that process changes alone would not generate the overall staff savings anticipated by the *Strategic Business Plan*. That report also said future salaries, and links between remuneration and performance management initiatives, would have to be determined.

Recommendation

Each Family Court should maintain staffing sufficient for its workload.

More consideration should be given to covering short-term vacancies resulting from resignations, illnesses, and holidays, so as to continue efficient case management.

Management

447 Some Court managers do not now have detailed knowledge of statutory requirements for case processing. There is a feeling among some staff that managers do not understand what is involved in their tasks. Managers with technical knowledge are in a better position to direct work flow and resolve difficulties

448 Team leaders with minor staff supervision roles, such as staff evaluations and performance plans, feel they have time to do no more than complete staff evaluations when required.

449 Managers have limited scope for resolving or managing problems, because of a lack of resources. They can listen, but are often unable to resolve difficulties because the desired response is impossible within the available budget.

Recommendation

Managers should have technical knowledge as well as management expertise. They should be a staff information resource, and be able to strategise with case progressors.

Hearing time

450 Many Family Court staff report a lack of judicial hearing time for mediation conferences, short causes and long hearings. A six- to eight-week wait for mediation conferences, and a two- to three-week wait for short cause times (that is, 15- to 30-minute slots) is not uncommon. At the time of writing, Wellington area delays of two months are common, as a result of the death of a judge, and there may be many months' delay (four to eight) for hearings longer than a day. Such delays cause duplication of work in corresponding with lawyers and parties.

451 There is not enough judicial time to cope with judges taking holidays, sick leave and sabbaticals. In November 2002, there were six acting warranted judges with family warrants. They sit as and when required, and not all their time is spent in the Family Court. If six acting judges cannot provide sufficient cover to avoid cancellation of hearing time when a judge dies suddenly, then current judge numbers are failing to meet system needs. Ideally, acting warranted judges should be available to fill unexpected gaps, rather than be included in the standard roster to cover basic hearing time.

Recommendation

Waiting times for mediation and settlement conferences, short causes, and full defended hearings must be shortened so that inefficiencies are not compounded by delay.

There must be enough judge time to cover the normal workload, so that acting warranted judges cover only temporary shortfalls.

MAIN PROBLEMS WITH THE CURRENT SYSTEM

452 Family Court management does not operate in isolation. Changes to the Family Court co-ordinator role, the availability of alternative dispute resolution procedures for Family Court clients, and taking some tasks away from judges will all impact on Family Court management and staff tasks.

453 We welcome the Courts Modernisation Project, with its role reallocation and redefinition, and the Court Management System. These developments will enable courts to work more efficiently.

454 The new operational model and CMS must be supported by staff skilled and competent to operate them. Staff should be adequately trained and supported, attracted and retained; inadequate salaries will make this difficult. Well-trained, competent and appropriately paid staff are likely to be a cost-effective way of improving efficiency and workload capacity.

455 Incompetent staff and high turnover cause inefficiencies – mistakes, delays and duplication of work. Submissions we have received cite problems such as failure to inform lawyers and parties of registrar's list dates; sending out a notice advising 21 days to file a defence when time had been abridged to three days;[150] no systems, for example, for automatically issuing final, undefended protection orders;[151] and, directions and orders not typed up and available within a reasonable time. The Family Law Section of the New Zealand Law Society and individual lawyers' submissions said staff seemed stretched to complete work within reasonable timeframes, and that staff shortages stressed the system further.

456 Family Court matters can be prolonged because of the number of stages in a proceeding. A delay of a few days referring a case to counselling, or a week in providing a section 29A psychologist's report brief, or three weeks wait for short cause hearing time, can compound, resulting in a long delay between application filing and eventual resolution. Each stage of the process has to be managed efficiently. The unavailability of section 29A psychologist's report writers and others also causes delay, but this is beyond the Court's control.

457 We received many reports about the Family Court's heavier

[150] Submission 20.

[151] Submission 79.

workload; for example, we were informed that CYFS work at the Tauranga Court has increased by 60 per cent over the past three years. There is a limit to the extent to which a heavier workload can be absorbed by existing staff.

DECISION MAKERS

Registrar powers

458 If registrars could undertake some tasks performed currently by judges it would make more time for judicial tasks that cannot be delegated.

459 Registrars are not currently exercising their jurisdiction to the full. Judges and the Department for Courts have been researching the extent to which registrars are not exercising all their powers, to identify what will allow them to do so.

460 Some tasks that judges undertake are largely administrative or quasi judicial, and might, with statutory changes, be handed over to registrars.

461 Caseflow managers and case progressors or case officers have been assigned registrar's powers. It would free up judge time if registrar's powers were enhanced, and/or registrars given wider jurisdiction. But this would increase the workloads of case progressors, necessitating the creation of more positions. If the responsibilities of case progressors were increased, the Department for Courts would also have to employ better qualified people and be willing to pay them more.

Recommendation

Judge time could be freed up by expanding the registrar role; although doing so would increase the workloads and responsibilities of registrars.

If demands on judicial time are to be reduced by expanding registrars' powers and alternative dispute resolution, the heavier workload that this will place on other court staff must be recognised.

Judicial registrars

462 It has been suggested that the system could accommodate a role between that of current Court registrars (caseflow managers and

case progressors) and that of judges. These officers would undertake minor decision-making tasks such as presiding over pre-trial directions conferences, making interlocutory orders, directions, interim orders and final orders by consent.

463 They would need legal qualifications but not those necessary for a District Court judge (that is, seven years post-admission experience).

464 We have reservations about the creation of such a role.

465 For such positions to save money, appointees would have to be paid much less than District Court judges. Consequently, they would have less experience and fewer skills; they would also probably be younger. They might see themselves as unlikely to advance in their own practice or be eligible for appointment to the bench. Such a position would not lead to appointment as District Court judge. We are concerned that such appointees might not be qualified to perform effectively, especially in the interventionist case track we envisage for the Family Court.

466 We would prefer the existing powers of registrars to be exercised by case progressors, paid appropriately for the extra responsibilities, and that our recommendations be trialled and implemented before the appointment of judicial registrars is considered.

467 We do see scope for a new position requiring more than a case progressor's expertise. Whether it would require a legal qualification needs further assessment. We would not consider such a position a stepping stone to judicial appointment.

Recommendation

The establishment of a judicial registrar position should be deferred until the changes we recommend have been considered, and the effects of implementing them assessed.

INNOVATION AND DEVELOPMENT

Judges

468 Family Court judges have always been concerned with best practice, with achieving resolution in the best possible way, and with avoiding unnecessary delay. They are particularly concerned with children involved in Court processes.

469 Judges have made many calls for change and for case management initiatives. Initiatives from the Principal Family Court Judge include:

- 1993 – "A Review of the Family Court" report by committee chaired by Judge Peter Boshier (Boshier report);
- 1992 – *Interim Report of Carruthers Committee for a Case Management Pilot in Three Courts*; Final Report 1994;
- 1998 – *Caseflow Management* practice note;
- Practice notes 14 and 15 on Counsel for Child – November 2000 effective 1 February 2001;
- Practice note 16 on Specialist Report Writers – effective 1 July 2001;
- Practice note 17 on Family Court Counsellors – effective 1 September 2001;
- New Family Court Rules – in force from 21 October 2002.

470 Individual judges have, with the backing of the Principal Family Court Judge, trialled new processes, such as the docket system in Auckland, and streamlining of CYPF Act procedures in Wellington and Porirua.

471 Some of these trials and initiatives have been incorporated into practice notes. Others have been lost because, unless the Department for Courts implements them nationally, they are difficult to maintain in an environment of staff changes, limited budgets, and a nationwide drive for comparable standards.

472 Judges with ideas for improving practice in their own courts want to implement them immediately, to address the problems that gave rise to them. Some interventions are within the management role of judges.

Department for Courts

473 The Department for Courts, on the other hand, views the country as a whole and does not introduce new procedures without extensive study and policy assessment. The Department prefers to trial new interventions as pilots in a few courts, and monitor outcomes. Only then is it willing to implement a nationwide procedure. But such a process takes time and resources.

474 The Courts Modernisation Project applies to all courts, including the Family Court, and has been a huge undertaking for the Department for Courts over several years. The changes it has prompted, including the new computer management system, will improve procedures, efficiency, and data availability.

Trial and implementation

475 We hope that our suggestion for a Family Court executive manager would improve liaison between judges and the Department for Courts so that innovative ideas are not lost, and proposals for change can be prioritised.

476 This would not bar individual courts from making minor changes to practice. It would mean, though, that if a change has implications for national practice management and is to be implemented across the country, choices must be made from the ideas on offer so that changes can be trialled and monitored.

JUDGE/DEPARTMENT FOR COURTS LIAISON

477 The Department for Courts is responsible for administering the entire court system. All Family Court staff are departmental employees.

478 The Principal Family Court Judge and individual Family Court judges manage their own courtrooms and procedures.

479 Clearly, judiciary and department must support each other. The judge must work with available resources, and cannot ask staff to go beyond the terms of their employment contracts.

480 The head of the Department for Courts national office family team reports to the operations manager for all courts, who is in turn responsible to the general manager of courts.

481 The Principal Family Court Judge liaises monthly with this team, and also with the general manager of courts.

482 The Family Court senior management team includes the northern regional manager, a Department for Courts national office representative, and several Family Court managers from a number of Courts, including Whangarei, Auckland, Wellington, and Christchurch.

483 We consider that although these groups are useful, a designated Family Court executive manager at national office, with a dedicated team, would be more effective.

484 The Principal Family Court Judge and this Family Court executive manager could liaise directly and regularly. This would allow other judges (including administrative judges) to be more readily involved with the dedicated team on relevant issues. There would also be a direct link between Family Court managers, the department's national office, and the Principal Family Court Judge. This should

result in effective liaison for innovation and solving problems, as well as more efficient day-to-day management and communication.

485 This group would be responsible for initiating research projects to monitor court processes.

486 It would also be helpful if there were a departmental position designed to be a consumer interface. That person could support committees set up from time to time to tackle specific issues. These committees could include representatives from relevant professional groups and client representatives.

Recommendation

Court management does not stand alone and must be integrated into case flow management and service co-ordination. A new chief executive role should be established, to keep an overview of administrative operations and co-ordination.

Overall Family Court governance must improve, taking account of Department for Courts and judicial concerns. A new departmental national office position (chief executive for the Family Court) with appropriate accountable staff would be likely to improve liaison, development and implementation.

If changes occur as a result of our recommendations, an adequate administrative base to implement and monitor changes[152] is essential.

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[152] Submission 79.

10
Court process

OVERVIEW

487 THIS CHAPTER looks at improving Family Court efficiency and effectiveness. Court process inevitably overlaps from time to time with court management. Although this chapter concentrates on case processing, it also examines points in the system at which cases are referred to, or sent back from, conciliation services.

488 The background chapter to Preliminary Paper 47, "Stages in the Court Dispute Resolution Process", set out case tracks from the caseflow management practice note that apply to each type of proceeding. It highlighted points in the process where delay is likely. These were a reference point for discussing problems and suggesting changes, and that material is not repeated here.

489 Submissions on comments in the preliminary paper on the progress of cases through the Family Court are incorporated in this chapter.

CASEFLOW MANAGEMENT PRACTICE NOTES

490 Caseflow management practice notes lay out for Court staff, practitioners, and litigants, anticipated processes for resolving matters in court. Standard timeframes are also a guide to reasonable expectations and a means of measuring delays. There will be occasional departures from these standards in order to intervene in a matter in the most effective way.

Recommendation

Caseflow management practice notes should remain a guide to the expected track for most cases.

INTERFACE WITH CONCILIATION SERVICES

491 Parties will normally ask for conciliation services through the Family Court co-ordinator. They may discuss with the Family Court co-ordinator the most appropriate referral, or make a specific request, in which case the court track may not be activated, and the matter may be resolved without Court intervention.

492 In the case of violence, for example, or where children may be taken out of the country, there will be an application for urgent court orders. The matter may or may not return to the Family Court co-ordinator for counselling, mediation, or some other conciliation referral.

493 Other parties may have been referred to information sessions, counselling, or mediation that has not resulted in settlement, and a court application has been filed. There will still be a court track option for the matter to be referred back later to mediation or counselling.

494 We hope specialist mediation and counselling will be used where appropriate. We envisage parties being able to apply for a specialist referral, or the Court directing it. Where it is an option, the judge might require input from counsel, the parties, and the Family Court co-ordinator (on conciliation intervention already provided, and on what might be available).

495 Interim or final court orders will sometimes be required, and judge time made available. The system should have the capacity to deal speedily with urgent applications.

496 Specialist counselling may also be offered after interim or final determination, to help implement orders, rather than being just an initial alternative to adjudication.

Recommendation

The Court should have power to refer a matter back to Family Court conciliation services at any stage in the Court process where conciliation is likely to help resolve it.

SETTLEMENT CONFERENCES

497 Chapter 8 recommends mediation be offered by qualified mediators, as part of conciliation services.

498 Counsellors currently undertake some mediation. Judges chair mediation conferences for matters under the Family Proceedings Act 1980, the Guardianship Act 1968, and the Children, Young Persons, and Their Families Act 1989.[153]

499 The one- to one-and-a-half-hour, judge-led mediation conference is an opportunity to discuss settlement, and often results in a consent order.

500 Settlement conferences are held regularly for other Family Court proceedings, especially relationship property matters, before a hearing is set.

501 A settlement conference is an important stage on the court track – the first chance for parties to put their case to a judge, and to settle before a full defended hearing. Judges are likely to be directive, and may indicate likely outcomes.

502 There should be an opportunity for a judge-led conference in all Family Court proceedings.

503 It should, ideally, operate on mediation principles so that options are explored. We would prefer it be renamed so as to distinguish it from the mediation that we recommend be part of the conciliation service.

504 Judicial authority will encourage some parties to resolve matters, even where the judge operates on an interest-based rather than an evaluative model. It remains to be seen whether judge-led mediation success rates will drop if parties have been offered mediation earlier, and only the more entrenched disputes enter the court track.

Recommendation

Legislation should be amended to provide settlement conferences in all Family Court proceedings; the judge-led mediation conference provided by section 13 Family Proceedings Act 1980 should no longer be available.

NEW RULES

505 Until now, the Family Court, unlike the District and High Courts, has not had its own comprehensive set of rules. Instead, separate

[153] See chapter 8 "Mediation".

rules have covered different statutory jurisdictions: Family Proceedings Rules 1981 (covering proceedings under the Family Proceedings Act 1980 and the Guardianship Act 1968); Property (Relationships) Rules 2001; Child Support Rules 1992 and so on. Most of these are less than comprehensive and where no procedure is specified, refer to the District Courts Rules 1992, adding unnecessarily to the mystique and complexity of Court proceedings.

506 New stand-alone Family Court Rules governing practice and procedure came into force on 21 October 2002. They do not substantively change existing rules under various family law statutes, merely consolidate them, and incorporate applicable parts of the District Courts Rules in Family Court proceedings.

507 We believe the new rules are more user-friendly and accessible, and will obviate the need to draw up separate rules for each new Act involving Family Court proceedings.

508 We hope more work will be done to simplify and standardise court forms, which seem unnecessarily complicated.

Recommendation

New standardised Family Court Rules, which came into operation on 21 October 2002, should be monitored to ensure they are easy to understand and use. Standard forms provided for in the rules should be easy to follow and complete.

FLEXIBILITY

509 Differentiated case management allows different time tracks for cases, depending on complexity, the need for discovery, services and protection, and unusual emotional factors. It is particularly useful in providing firm deadlines and timeframes for high-conflict custody cases.

510 Proactive judicial interventions that depart from standard tracks have successfully speeded up resolution. For example, under the docket system trialled by Judges Doogue and Boshier in the Auckland Court, earlier appointment of counsel for the child or earlier authorisation of section 29A psychologist's reports reduced considerably average case completion times.[154] Such flexibility does

[154] Law Commission, above n 1, paras 73–75.

not need to be tied to a docket system but is more achievable where only one or two judges handle a case.

Recommendation

There should be differentiated case management so that cases are progressed in the most efficient, appropriate manner for each case.

DOCKET SYSTEM

511 A docket system allows a case to remain with one judge, or a team of two, during its progress through the Court. This was trialled in the Auckland Family Court, and discussed in our preliminary paper.[155] The six Auckland Family Court judges have continued the system.

512 Having a file dealt with by one or two judges saves considerable time over the life of a case, compared with random allocation of cases from a list to whichever judge happens to be sitting on the day the matter is called. It also reduces the adjournments sought and granted, because when one person or a team controls a file, they can maintain expectations of actions occurring when they are scheduled to occur, and make it less likely that excuses for inaction will result in delay.

513 The Department for Courts believes that the new Family Court operational model ensuring one case officer/case progressor controls a file, will allow enough individual attention. We agree this will improve file administration, but do not believe it obviates the need for a judicial team approach. Registrars/case progressors have only limited extra powers. Judges will still deal with case conferences, disputed directions, non-standard interlocutory applications and hearings. Management by one or two judges will save judge time and lessen the chance of delay.

514 We appreciate the problems in developing a nationwide one-judge or judicial team approach. Illness or leave will mean allocated judges are unavailable on particular days for particular matters. But such occasions will be the exception, and must be managed in any system.

515 It should not be difficult to operate two-judge teams in larger Courts with several resident judges. The Auckland Family Court docket

[155] Law Commission, above n 1, paras 73–75.

trial found that having a two-judge team working week on, week off, allowed each judge, in his or her week off, to do other Family Court work, such as mental health matters, or to be available for District Court matters.

516 It should not be a problem in small Courts served by the same resident or circuit judge, either. These are already operating on a one-judge, one-case approach.

517 It would be a problem where circuit courts are served irregularly by different judges, and where judges from outside the area are frequently used.

518 We would like to think that any problems arising from incorporating this approach into the rosters of judges would not be insurmountable. A one-judge or two-judge team approach should be possible in a system that has enough judicial resources to cover illness and leave with temporary warranted judges, and all other work by permanent rostered appointments.

519 We consider such an approach allows for more proactive control of cases, that it will reduce delays for litigants, and overall demands on judicial time.

520 It has been suggested that for successful team operation, case progressors be attached to judges – the model the Employment Mediation Service uses.[156] Then, administrative support for case management and judge/decision-maker work together to progress the file, and freely sharing information reinforces compliance.

521 Smaller Courts, with one or two case progressors, already effectively have a team approach if judges are rostered by docket.

522 This "matching" will be impossible in larger Courts where case progressors specialise in certain areas. We doubt, though, that this will be less efficient if a team approach is generally encouraged in each Court.

Recommendations

Administrative systems and rosters for judges should aim to refer files to the same judge, or to one of a two-judge team, on each call in court. This will save judges time familiarising themselves with files, and make for more efficient progress by letting one or two judges accumulate knowledge of a case.

[156] Submission 97.

Case progressors, judges, and Family Court co-ordinators should liaise to bring to bear on cases all available resources in the most efficient way possible.

COMPLIANCE

523 Meaningful caseflow management requires litigants and lawyers to respect the Court's directions. Sanctions should follow where parties fail to comply with directions and have not applied for variation of directions. When the delay is not the fault of parties themselves, these sanctions might have to be imposed on dilatory lawyers.

524 The Family Law Section expressed concern at the Court's failure to require adequate performance from parties and their lawyers by means of appropriate sanctions. Orders can include prohibiting parties from filing further evidence or defending an application. The rules provide for such sanctions but they are seldom imposed.

Recommendation

The Family Court should impose sanctions for failure to comply with Court directions.

ENFORCEMENT

525 We received many submissions from those disillusioned with Family Court processes because, in spite of having obtained court orders, a party refused to comply, and the other felt there was no effective enforcement.

526 This can be an issue for property orders, although most submissions we received related to childcare arrangements.

527 A full solution is beyond our terms of reference because substantive law changes would be required; for example, new types of orders for enforcement, or new penalties. What the Court can do is limited unless its powers are extended by such statutory changes.

528 The following typical scenario illustrates the problem: Party A gets an access order that the child should be available to be picked up at 10.00am Saturday and returned at 5.00pm. But, when Party A arrives, the child is not there. On other occasions excuses are made that the child is sick or had another appointment and is not available for access. No alternative access is offered.

529 Someone who hinders or prevents access to a child by someone entitled to it under a court order is liable to summary conviction and a fine not exceeding $1000.[157] A conviction can only result from a summary prosecution in the District Court. Imposition of the penalty is not a Family Court procedure but a criminal matter and dealt with in the District Court.

530 Someone who hinders or prevents access is also subject to punishment for contempt of court.[158]

531 Compliance might possibly be more effectively enforced in the Family Court, with penalties imposed by Family Court judges. To action such a penalty, Party A would have to file a complaint.

532 Another option for Party A is to apply to the Family Court for a warrant to have the child uplifted by a police officer or social worker. This requires a separate application, and is the only way a party can get police help to enforce an access order. It may, of course, exacerbate the situation and upset the child if Party A arrives for access accompanied by police.

533 Applying for a warrant usually costs the applicant further legal fees, not to mention more time and trouble. Also, there is no guarantee it will be effective in securing long-term access.

534 It would be an unusual case where parties co-operated throughout the Court process and problems arose only later, in exercising access. Such situations would usually show signs of difficulty during the hearing and before an order was made. We hope the chances of orders being made but not complied with would be reduced by judges being proactive, possibly referring high-conflict cases for specialist help, and fast tracking them to decisions. We believe high-conflict cases must be identified, controlled and managed.

535 There will, however, inevitably be cases where access problems arise after orders have been made, and these require intervention if access is to occur. Sometimes, enforcing compliance will not be in the child's best interest and might cause trauma. Such cases might indicate the need for changing custody arrangements. For others, this will not be possible or desirable. Punishing the unco-operative party might often be more effective than issuing a warrant, which inevitably involves the child.

536 Punishment is more likely to change behaviour if it is combined with referral to specialist counselling. This resembles the Domestic

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[157] Section 20A Guardianship Act 1968.

[158] *Redman v Redman* (1988) 4 FRNZ 308; (1988) 4 NZFLR 697.

Violence Act 1995 model, whereby not only is a protection order obtained but the respondent referred to an anger management programme.

537 In some high-conflict cases it may be appropriate for the Court to authorise a warrant when the access order is made. This would simplify enforcement in the event of non-compliance.

Recommendation

Most options for enforcing court orders require changing the law, and are beyond the scope of this paper. Compliance might be improved by conciliation services that include specialist family assistance. Identification of high-conflict cases and intervention by judges might also help.

APPLICATIONS MADE WITHOUT NOTICE (EX PARTE APPLICATIONS)

538 Granting orders without notice to the other side is one of the most contentious Family Court issues, and prompts the most complaints. The principle that a judge should not make a decision without hearing both sides of a case is a basic tenet of our legal system. Any departure from it must be seen as an exception that only special circumstances can justify.

539 The law has, however, always allowed applications to be heard without notice to the other side in an emergency, or when proceeding on notice would seriously harm the applying party. Such situations arise in the Family Court when applicants seek protection from violence, or where children are at risk of serious harm. Orders may be made under the Domestic Violence Act 1995, the Guardianship Act 1968, and the Children, Young Persons, and Their Families Act 1989.

540 Although the statutes are worded in gender-neutral terms, most applicants under the Domestic Violence Act 1995 (more than 95 per cent) are women, and most respondents, men. We believe that much recent, negative Family Court publicity is a result of the way without-notice applications are handled. Men complain that the Court grants these applications far too readily, and that by the time they are aware orders have been made, there is little they can do.

541 Two issues arise:

- Do the statutes recognise fairly – in substantive law and process – the interests of respondents as well as applicants?
- How can current or future processes be made to work better, and what are the resource implications?

Perspectives of applicants and respondents

542 Many applications are made without notice to the respondent because applicants fear they will be at increased risk if the respondent knows they are going to court and intending to end the relationship.[159]

543 At the same time as applying for protection, many applicants apply for orders to exclude the respondent from the family home (tenancy or occupation orders), and to get possession of household goods (a furniture order). An interim custody order may also be sought for any children of the household.

544 If the applicant proves her case, the respondent may find himself forbidden to contact her, ordered out of his home, and barred from contact with his children. If the orders are made without notice to the respondent, he will have had no chance to put to the Court his side of the story. He will also be ordered to attend individual counselling or a group programme for violent men.

545 The Domestic Violence Act 1995 provides for a defended hearing within 42 days,[160] but often courts cannot comply, and the respondent continues to be barred from his home. He might possibly arrange a couple of hours fortnightly supervised access at a Barnardos Centre, but it is likely to take months to make better arrangements for seeing his children.

546 Women and children must be able to get protection urgently. If procedures are made more difficult, they may be deterred from applying when it is crucial. Some women take a long time to summon up the courage to seek help and should not be discouraged. They can also be at increased risk of violence when they apply for orders, and such circumstances justify granting relief without notice. But because granting relief without notice runs counter to fundamental principles, it is crucial that courts act within strict parameters.

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[159] We acknowledge that men can be victims of violence, but because over 95 per cent of applicants are women, we refer here to female applicants and male respondents.

[160] Domestic Violence Act 1995 s 76.

Interim protection threshold

547 There are two issues:

- Are the tests for obtaining an order without notice stringent enough?
- Are the respondent's rights and interests acknowledged sufficiently?

548 To obtain a protection order without notice, the applicant must satisfy two tests:

1 that the respondent is or has been violent to the applicant or a child of the family, and that an order is necessary to protect the applicant or child;[161]
2 that delay caused by proceeding on notice would or might entail a risk of harm or undue hardship.[162]

549 The Court must take into account the perception and effect of the violence on the applicant or child. It does not have to take explicit account of the effect of making the order on the respondent, or take his interests into account.[163]

550 Without-notice occupation, tenancy, and furniture orders are more intrusive, and there is a higher threshold: the Court must be satisfied that the respondent has physically or sexually abused the applicant or the child *and* that delay caused by proceeding on notice "would or might expose (them) to physical or sexual abuse".[164]

551 In all cases, the applicant and her lawyer must meet certain obligations. The "Caseflow Management Practice Note on the Domestic Violence Act" requires affidavit evidence to disclose fully and frankly all relevant circumstances, whether or not they benefit the applicant. The application should specifically include the material upon which the ex parte action is said to justified. The Domestic Violence Rules 1996[165] require counsel to certify that affidavits are based on all reasonable enquiries, that counsel is satisfied they comply with the rules, and the order ought to be made.

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[161] Domestic Violence Act 1995 s 14.

[162] Domestic Violence Act 1995 s 13.

[163] Domestic Violence Act 1995 s 13(a).

[164] Domestic Violence Act 1995 ss 60 and 70.

[165] Domestic Violence Rules 1996 r 26.

552 In some Australian States, judges have a specific duty[166] to take account of access arrangements and respondent hardship before making a without-notice protection order. This might have a place in our statute if it came second to safety, as in some Australian statutes.

553 We question how a respondent's interests can be considered adequately without his input.

554 Judges will be most willing to grant orders without notice where there is evidence of physical violence or serious threats, putting an applicant or child at risk.

555 A judge granting an order without notice should issue a brief minute giving his or her reasons for doing so, if these orders are not to seem arbitrary. This is not currently done, and would take up more judge time.

556 Instead of applying without notice, an applicant can and sometimes does, in less urgent cases, apply with notice to the respondent but requesting an abridgement of time for filing a defence. The respondent must then respond sooner than the usual 21 days for a defence: three hours, 24 hours, or up to three days, depending on the circumstances.

557 Where an application is made without notice, the judge always has the discretion to put the matter on notice, whether a matter of hours or days.

558 Another potential option for a without-notice application, when the respondent's whereabouts are known or he or she is represented, would be for the judge to consider whether the respondent should have an opportunity to attend the hearing (either personally or by telephone).

559 This is not current practice; the Principal Family Court Judge's practice note rules it out, requiring counsel to proceed either with or without notice, and imposing a high duty of candour on counsel proceeding without notice.

560 This may partly be because such a procedure would make serious practical difficulties for the Family Court, because most without-notice protection orders are dealt with on the papers at a central

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[166] Section 6(1)(b) and (d) Domestic Violence Act 1994 (South Australia); s 4(8) Domestic Violence Act 1999 (Northern Territory); s 12(1)(e) Restraining Orders Act 1997 (Western Australia); s 5(2) Crimes (Family Violence) Act 1987 (Victoria); s 10(1)(d) Domestic Violence Act 1986 (ACT).

court. Often the respondent will not have a lawyer and may be difficult to contact.

561 We doubt natural justice would be served by such a process. The respondent will probably be unrepresented, with no notice of what has been said. He is unlikely to be able properly to represent himself. The Court will be unable to reach a considered decision in the time available. The respondent is likely to be dissatisfied and his rights prejudiced.

562 We consider it better to hear short causes promptly after the respondent has had notice and been able to seek legal advice.

Immediate review and full contested hearing

563 The issues here are:

- Should legislation set a return date separate from the full defended hearing date?
- Should the Court set a return date within seven days, so it can be given relevant information and consider access issues?
- What will allow defended hearings to be held within the statutory 42 days?

564 Under a without-notice interim protection order, the respondent has five days to object to the direction to attend the programme,[167] and three months to file a defence to the temporary protection order.[168] If he files a defence, a hearing must be allocated within 42 days. If no defence is filed, the temporary protection order becomes final after three months.[169] Some Courts provide a review date within ten to 14 days (often longer for satellite courts).

565 We consider respondents should have the chance to put their side of the story within seven days of a without-notice order, and at a fixed date and time. Return date hearings for satellite courts may need to be by telephone. The importance of the return date is that it ensures there is an early opportunity for the person against whom the order operates to be heard in some way. If the respondent can prove on the return date that the without-notice order was made without justification, the Court could consider rescinding the order immediately.

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[167] Section 36 Domestic Violence Act 1995.

[168] Section 76 Domestic Violence Act 1995.

[169] Section 77 Domestic Violence Act 1995.

566 A brief return date hearing may also set up temporary access arrangements.

567 Where urgent orders are made, it may help respondents to talk the matter through with the Family Court co-ordinator, who might advise him of his options. This is no substitute for a quick return hearing, but another channel.

568 It might be appropriate to refer some cases to counselling, but where there is high conflict or persistent violence (the situations typically demanding urgent intervention), it is inappropriate to require joint participation in any process. Separate counselling or other expert intervention may be helpful. Domestic violence programmes for perpetrators, victims, and children are designed to address these issues.

569 If the protection order is still contested after the short return hearing, there will have to be a full defended hearing.

570 The Department for Courts commissioned an evaluation of procedures under the Domestic Violence Act 1995 in 2000,[170] and further research in 2002,[171] into reasons why Family Courts are unable to timetable defended protection hearings within the 42 days required by the Act.[172] The research indicates not only wide national variation in practice but widely differing approaches to implementing the legislation.

571 Informants agreed that the most common reason for delay was lack of available court time, especially in satellite courts, which have hearing days every six to eight weeks.

572 Delays were compounded when domestic violence proceedings were combined with other proceedings, such as custody and access. The hearing time was longer and specialised evidence had to be obtained.

573 Sometimes parties sought adjournments to bargain about promises given or programmes completed in return for withdrawal of an application. This may be effective but can sometimes expose the applicant to risk.

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[170] H Barwick, A Grady and R Macky *Domestic Violence Act 1995: Process Evaluation* (Department for Courts and Ministry of Justice, Wellington, 2000).

[171] Department for Courts *The Domestic Violence Act 1995 Day "Rules" and the Children, Young Persons, and Their Families Act 1989 60 Day "Rule"* (Department for Courts, Wellington, 2002).

[172] Section 76 Domestic Violence Act 1995.

574 Waiting to resolve criminal matters can delay the Family Court hearing. But we question whether a protection order hearing in the Family Court should be delayed by a hold-up in criminal proceedings arising out of the same incident. Where children are not involved, a delay may not matter, but if there are children, it is not in their best interests to defer the domestic violence issue.

575 Protection from violence, and custody and access, are two separate matters and the Court must determine whether violence has occurred before it can properly deal with risk to the children. The Court cannot be satisfied about this risk without knowing whether violence occurred, and what its nature and circumstances were. The Court cannot know what evidence it needs to determine custody and access risk issues without knowing the outcome of the protection order application.

576 Our proposals have serious resource implications for the Family Court. About 6000 applications are made every year. These cannot be predicted, and are often filed at satellite courts where no judge is sitting. Our proposals would necessitate much more judge time and administrative support, and could not be implemented on the basis of current resources.

Recommendations

Orders must only be made on without-notice applications when requiring notice would be likely to cause substantial harm. Specific evidence of the need should be provided.

Wherever possible, such applications should be put on notice with time abridged.

Judges should issue a minute giving reasons for any without-notice order.

The effect of requiring judges to take into account access arrangements, or any hardship to a respondent, should be considered.

The Family Court should be resourced so a definite return date within seven days can be set when the order is served.

The Family Court should be resourced so defended hearings take place within the 42 days stipulated by the Domestic Violence Act 1995.

Defended domestic violence hearings should not be delayed for parallel criminal proceedings or custody and access hearings.

Ex parte applications under the Guardianship Act 1968

577 Without-notice applications under the Guardianship Act 1968 that deal with custody and access arrangements are also a major concern. Here, we are dealing with orders not tied to protection orders. Applications may be filed on a without-notice basis where there is great urgency.

578 Where someone applies to prevent a child from being taken from New Zealand, the situation may be so urgent there is no alternative to dealing with it without notice. Once the order is made the matter can proceed through the Court with all parties having the opportunity to be heard.

579 When an applicant wants to change the status quo or a court order, and there is no serious risk to the child or of the respondent being about to abscond with the child, there is no reason to deal with it without notice to the respondent. A shortened response time and an urgent interim hearing can still be directed where appropriate.

580 If serious harm is alleged and an order made without notice, it is crucial that the Court has resources to investigate and respond to allegations as quickly as possible. As matters stand, if a child's care arrangements are changed in response to a without-notice application, it may be months before the facts can be ascertained, and by then the child is resettled in the new environment and it is difficult to re-establish the status quo. Such delays encourage applicants to exaggerate claims while giving them a chance to move a child to a new situation that the Court may be unwilling to disturb.

581 Where children are taken to another town without the knowledge of the second parent, we suggest a general practice whereby the second parent applies to the Court, the children are returned immediately, and the matter brought before the Court for urgent determination. If the child is allowed to remain in the new location and the determination is delayed months during which the child is settled in a new school, a new circle of friends, and a new family environment, it becomes difficult to send the child back.[173]

582 If the Court could respond quickly and assertively in such situations, parents would be deterred from taking such unilateral action without notifying the other parent or applying to the Court for permission.

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[173] This is the thinking behind the Hague Convention on International Child Abduction.

Recommendations

Without-notice applications for a change in custody should be put on notice with abridgement of time, unless there is a serious risk of harm to the child.

Where a child is taken somewhere else in New Zealand against the wishes of the other parent, there should normally be an order to return the child pending a hearing in the Court closest to the child's old home.

STAGES IN OTHER COURT PROCEEDINGS

Section 16B Guardianship Act 1968

583 Section 16B of the Guardianship Act 1968 bars a violent parent from custody of, or access to, a child until it has been shown that the parent poses no risk. Many submissions we received suggested that if the violence had not been directed at the child but to the other parent, this was no reason to restrict contact.

584 Section 16B is based on the premise that a child present during violent episodes, and living in a family where violence occurs, is already at risk; it is not necessary for the child to be a target before his or her safety is called into question. The nature and history of the violence should be assessed.

585 Endemic violence raises more serious issues than violence in a crisis. There will be situations where contact with the child is completely inappropriate. In others, supervised access may be an option if the perpetrator is willing to examine his or her violence, and attend anger management courses. In still other situations, contact between perpetrator and child might be reinstated without supervision, once there has been an investigation.

586 The problem for the Court lies in investigating and assessing risk factors quickly enough to avoid exacerbating any initial estrangement between child and parent.

587 The Family Law Section was in favour of an Invercargill Family Court practice whereby counsel for the child is asked to report urgently to the Court after a protection order is made and access suspended. In this situation, counsel is effectively providing a concise social work report. The Family Law Section notes that this procedure ensures the child's wishes are discovered early in the proceedings, and the respondent's access not delayed enough to

impact on their relationship. We do not consider, however, that counsel for the child has the experience and training for such assessments. Counsel for the child may be able to report what the child says, but that does not take into account context and safety. Most children want contact with a parent regardless of abuse. Safety must also be assessed.

588 We are concerned at delays resulting from correct application of section 16B. We believe these issues should be assessed more quickly than has been the practice in most New Zealand Family Courts. But to allow people who are not qualified to make assessments or to give evidence to report to the Court is to evade section 16B and compromise the best interests of children.

589 The Court needs access to social workers, psychologists, or others with the necessary qualifications who can respond speedily to a request for a report. The fact that counsel for the child is readily available does not mean he or she should be given this task.

590 Where applicant, respondent, and child have attended separate programmes under the Domestic Violence Act 1995, there is probably a better chance of resolving access issues. They will each understand themselves and their family situation better, and this will facilitate a safe way forward. We advocate that Courts and lawyers for parties make every effort to encourage programme attendance, especially if section 16B issues have been raised.

Recommendation

The Family Court should have the resources to deal quickly with issues arising after an application for a protection order under section 16B of the Guardianship Act 1968. The timeframe cannot be specified and will depend on the allegations. Obtaining social work or psychological reports within, say, three weeks would help greatly in disposing of these matters faster.

Supervised access

591 Supervised access will sometimes be necessary for the foreseeable future; if, for example, a parent has continuing mental health problems and poses a risk. Where supervised access is ordered after an application for a domestic protection order and before all section 16B issues are investigated the order should normally be temporary.

Either the violent parent completes certain programmes and/or attends counselling, so the Court can be satisfied the child is not in danger during unsupervised access, or the parent is an ongoing risk and may not be allowed access at all.

592 Access centre supervisors report that supervised access is sometimes ordered, and then neither party takes the matter back to court because of litigation fatigue, lack of funds, or the expectation of a worse outcome, and supervised access continues indefinitely. Supervised access centres do not see long-term supervised access as good practice.

593 Supervised access orders should, perhaps, include a review date when the matter will be brought back for a judge to reassess. On balance, we are reluctant to recommend imposing such a review and taking up valuable court time unless there is new information. Our conclusion would be different if it could be shown that children were being adversely affected. There would have to be more information on the circumstances in which this arises and how often it occurs. In future, Family Court conciliation services could be asked to help in such situations.

Children, Young Persons, and Their Families Act 1989

594 The CYPF Act requires hearings of applications for declarations to start within 60 days of filing, unless there are special circumstances.

595 The time limit is imposed because these are often situations where a child has been taken from his or her family, and there is the question of whether the child should be returned to the same household or an alternative long-term placement found. Determining the application is a necessary prerequisite for final decisions. If these decisions are delayed, a young child's long-term placement can be deferred for several months, which is never in the child's best interests.

596 Where a child is uplifted pursuant to an emergency warrant, the CYPF Act requires the child to be brought before the Family Court within five days.[174] Section 5 of the Children, Young Persons, and Their Families Act 1989 requires that parents be informed of any action or decision made under the Act. The parent can apply for access to the child or for the child to be released.[175] If the matter is

[174] Section 45 Children, Young Persons, and Their Families Act 1989.

[175] Section 44 Children, Young Persons, and Their Families Act 1989.

not resolved an application for a declaration that the child is in need of care and protection continues under section 67 of the CYPF Act.

597 A family group conference will not have been held where a child has been removed on an emergency warrant. A conference must be held before the matter can proceed to a court hearing. A family group conference must, therefore, be convened and held within the 60-day period so the hearing can proceed if the matter is not resolved. The Family Court is not responsible for holding family group conferences and can only require adequate performance from Child, Youth and Family Services (CYFS), which is obliged to hold a conference within the statutory timeframe. It has its own performance standards but they are not always met.

598 Delay in filing evidence also results in lack of readiness for hearing. Sometimes respondents delay filing evidence, but often social workers are late in supplying the Court with relevant evidence.

599 In June 2002, the Department for Courts published a report commissioned to discover why the Family Court sometimes fails to comply with the 60-day rule.[176] Research informants agreed that an opposed application for a declaration under section 67 rarely began within this timeframe.

600 Researchers uncovered disagreement as to what constituted a hearing within the meaning of section 200 of the CYPF Act. Some informants considered a pre-hearing conference met the 60-day requirement. Others thought that determining the application for declaration was required, and still others, that the declaration, the plan, *and* orders made under the plan were required to satisfy the section.

601 The research found that CYFS process delays were the most common reason for hearings not starting within the time limit. These included delays convening the family group conference and reporting on its outcomes. In small satellite courts, lack of judicial resources and hearing time were, regardless of case complexity, the most frequently cited causes of delay. For complex defended cases, timetabling issues caused delays in all Courts, regardless of their size.

602 Small Courts, those with ethnically diverse populations, and those serving poorer areas faced additional challenges in meeting statutory deadlines.

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[176] Department for Courts, above n 171.

603 Some Courts are unwilling to hold hearings for the declaration application until a plan is available, so disposition orders can be made.

604 If a declaration hearing were delayed for preparation of the plan, and a declaration eventually found to be unnecessary, resources would have been wasted. The legislation clearly intends the declaration to be made and then the plan prepared within a further period not exceeding 28 days.[177]

605 In many cases, the declaration is not the most contested aspect of the proceeding. Caregivers might be willing to concede that the child is in need of care and protection but unwilling to agree to care proposals from CYFS.

606 To allow a child certainty, the declaration and any orders required for implementing the plan should be decided as soon as possible. The plan determines whether or not the child's placement is permanent, or what steps must be taken to provide temporary relief and later reintegrate the child into the family. The younger the child, the more urgent the need for certainty.

607 Wellington and Porirua Family Courts have issued new practice directions in an effort to have applications for declarations heard within statutory timeframes. They are requesting CYFS compliance with its own performance standards, which require a family group conference to be held within six weeks or 30 working days. They also require CYFS evidence to be complete when the application is filed. Reports from psychologists and others, under section 178 of the CYPF Act, will not be expected before the care and protection issue is resolved, and the plan is to be approved. Any evidence parents or custodians want to file in response to the application will normally be filed as soon as possible after the family group conference.

608 The Wellington and Porirua Family Courts have asked the legal profession and CYFS to co-operate in implementing these proposals. There are likely to be difficulties with judicial rostering and with compliance with performance standards by CYFS for a variety of reasons. This is an area where CYFS resources should be improved if it is to work effectively with the Court in children's best interests.

609 Co-operation between CYFS and the Family Court allows for various ways of progressing matters. The Family Law Section suggested family group conferences be held within 14 days of an

[177] Section 13 Children, Young Persons, and Their Families Act 1989.

application being filed in the Court, and the registrar's list hearing allocated 14 days after filing, so that a report on the conference outcome will then be available to the Court. The Family Law Section suggested that CYFS file any further evidence within ten days, and that parties opposing have 21 days to comply. This would ensure the hearing goes ahead within the 60-day limit.

610 These timeframes may be unrealistic for CYFS, but the essential aim is similar to that of the Wellington trial: to have the family group conference held and evidence filed so the matter can be set down for hearing within 60 days.

611 The Family Law Section suggests that these deadlines would allow a mediation conference to be held before a hearing within the 60 days. The Commission acknowledges that mediation settlement conferences are not used often enough in care and protection proceedings. After a family group conference has been held and evidence filed, a judge-led conference may be a way of resolving matters short of a hearing.

Recommendations

Child, Youth and Family Services should have the resources to carry out its responsibilities under the CYPF Act in care and protection hearings.

The Family Court should have the resources to provide hearing time for preliminary issues and the final hearing within the 60 days prescribed by the CYPF Act.

Relationship property

612 The Family Law Section queried whether mediation was appropriate for resolving relationship property disputes. It believes a mediator would need specialised legal knowledge and experience in relationship property disputes, and that full disclosure of the financial and other information of the parties would be necessary before mediation could take place. In such situations, they see a settlement conference with a judge as a better option.

613 We accept that mediation may not be the most appropriate dispute resolution process in cases involving complicated legal issues about the status of property, or accounting evidence. Many property disputes, however, involve few assets more than a home, family

chattels, and modest retirement investments, and where the parties are quite capable of understanding the legal issues. Such disputes are amenable to mediation. Appropriate preliminary conferencing should identify cases unsuitable or unready for mediation.

614 The Family Law Section is also concerned with the progress of relationship property matters through the Court. There are often repeated calls in registrars' lists, and the Court sometimes fails to use sanctions to enforce its directions. It suggests that after the first registrar's list, relationship property matters should be timetabled for a judicial conference (possibly by telephone). A standard timetabling memorandum should be sent to both parties before this conference as a formal checklist of issues and directions to be covered.

615 On 1 September 2002, a new practice note, "New Family Court Rules", was issued for relationship property proceedings, to come into force on 21 October 2002. It provides that:

- with the application, the applicant must file an affidavit giving basic information about the disputed property, the issues, and proposals for dividing it;
- the respondent must file a similar affidavit within four weeks;
- within a further seven days, counsel must file a joint (or individual) memorandum of issues, and state what alternative dispute resolution has been attempted;
- a judicial issues conference must be set down, whenever possible within six weeks; parties are to file affidavits of assets and liabilities before this conference, and to attend with counsel;
- a registrar's list date is to be set at the time of filing so the above steps can be monitored;
- at the issues conference the judge may make other directions if required, or settle issues, or set the matter down for a settlement conference or a hearing;
- matters being monitored in the registrar's list will be moved to the judge's list in the case of delays or non-compliance;
- standard track cases to conclude within six months of filing, and complex cases within nine months;
- counsel are to be aware of the Court's power to award costs for delay and non-compliance with directions;

The practice note addresses complaints we received about lack of sanction for non-compliance, and frequent unproductive calls in registrar's lists.

Recommendation

The Family Court should enforce directions in relationship property matters more strictly. The new practice note, "New Family Court Rules", in force from 21 October 2002 is designed to address these issues.

Spousal maintenance

616 Since amendments to the Property (Relationships) Amendment Act 2001 and the Family Proceedings Amendment Act 2001, applications for spousal maintenance need to be considered alongside applications for division of relationship property. Where applications are filed under both statutes, dispute resolution processes will have to deal with both applications simultaneously.

Recommendation

Where applications are filed for relationship property orders and spousal maintenance, the two matters will have to be progressed simultaneously through conciliation services and the Court process.

Adoption Act 1955

617 Where a father is not a child's guardian, he does not, under the Adoption Act, have to consent to an adoption. Section 7(3)(b) states that where the father is not a guardian "the court may in any such case require the consent of the father if in the opinion of the court it is expedient to do so". New adoption legislation is expected soon, and it is unclear what rights it may give the father. However, because the Court has a discretion to require paternal consent, it seems appropriate to standardise procedure for determining the identity of a proposed adoptee's father, and make an effort to get his view before making an adoption order.

618 An affidavit could be required from the mother. The Court could also appoint a social worker or counsel to help make enquiries and report back.

Recommendation

There should be a standard procedure for ascertaining the wishes of the non-guardian father when the mother consents to release the child for adoption.

Child Support Act 1991

619 Our preliminary paper questioned whether conciliation ought to be available for applications for departure orders that have already been before a review officer. The Family Law Section welcomes the opportunity for early conciliation, as it considers the standard 13-week timeframe to hearing a departure order is a problem, especially in the case of a suspension order pending the final outcome.

620 The Family Law Section pointed out the limited opportunities for parental agreement, especially if one parent is receiving a State benefit. It also questioned whether the custodial parent should have to provide an affidavit of financial circumstances. Because the legislation requires that there be special circumstances, and equity between the custodial parent, the liable parent and the child, we consider this information from the custodial parent is necessary.

621 A mediation referral might not be appropriate in some cases, but this should be assessed at a preliminary stage so mediation can be made available where appropriate.

Recommendation

Conciliation services mediation should be an available option where appropriate, for applications under the Child Support Act 1991.

Mental health

622 Family Court jurisdiction over mental health matters is governed by the Mental Health (Compulsory Assessment and Treatment) Act 1992. Any procedural changes would require amendment of the legislation.

623 The Family Law Section has raised the possibility of assessments under section 16 of the Act being carried out by another specialist

body, and the Court retaining an appellate function. This proposal is beyond our terms of reference, but if such an option were to eventuate, it would free up much Family Court judge time. Several days of judge time per month are likely to be spent on applications under the Mental Health (Compulsory Assessment and Treatment) Act 1992 in courts adjacent to mental health facilities. The Wellington Family Court allocates two mornings a week for such work from Porirua, Wellington and Lower Hutt hospitals. The time is always completely filled, and urgent mental health applications are dealt with outside it.

624 The proposal raises issues about the Court's protective jurisdiction, and whether it is appropriate for other bodies to take it over.

Recommendation

There should be further investigation of the feasibility and advisability of setting up a specialist body to assess applications under section 16 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, while reserving an appellate function to the Family Court. Such a change would require amendment of the Act.

Dissolution of marriage

625 When parties apply for dissolution (divorce), they can request the matter be heard by the Family Court, or choose to have it dealt with on the filed papers. The registrar deals with almost all dissolutions, whether by a single or joint application, without the need for an appearance. The Court has to be satisfied adequate arrangements have been made for any dependent children. The only ground for defending an application is that the parties have not been living apart for the requisite two years.

626 The question arises as to whether dissolution need any longer be a matter for the Court. It could, perhaps, be dealt with by the office of the Registrar of Births Deaths and Marriages, with applicants referred to the Family Court only if the application was defended or if child-related issues arose.

627 Dissolution of marriage changes the legal status of parties, and the traditional view has been that a court should confer such a change of status. But marrying also involves a change of status, and the office of the Registrar of Births Deaths and Marriages manages these

applications. Given present procedures for dissolution, should that office not be able to undo what it has done?

Recommendation

> The possibility of transferring responsibility for simple dissolutions of marriage to the office of the Registrar of Births Deaths and Marriages should be considered.

Sexual abuse allegations

628 Allegations of the sexual abuse of young children are among the most difficult issues the Family Court deals with.

629 These can come to the Court's attention via applications for declaration that a child is in need of care and protection under the CYPF Act or the Guardianship Act 1968, when the allegation is made by one parent against the other.

630 When an older child can give intelligible, testable evidence, there is usually no great difficulty. Neither is there difficulty when there is clear physical evidence, such as penetration injury, a sexually transmitted disease, or presence of semen. In such circumstances, a criminal prosecution is likely, and even if a conviction does not result, an order protecting the child can be granted on the evidential standard of balance of probabilities.

631 Difficulties arise with young children, particularly pre-schoolers or children who are developmentally delayed. There may be no physical or medical evidence. Concerns can arise from something the child has said, a drawing the child has done, or because of his or her sexualised behaviour. Evidential interviews often do not elicit more evidence.

632 In this situation, the child is given therapy, during which it is hoped he or she will make further disclosures. Unfortunately, in terms of evidence, any information yielded by such sessions is likely to be contaminated by suggestion, repetition, or leading questions.

633 The caregiver who originally alleged the abuse may then reinforce behaviour that suggests abuse has occurred. The child will pick up on the caregiver's anxiety and concern, and the truth becomes increasingly hard to discern.

634 We know there is sexual abuse in the community. We know it from those convicted of such offences, and from facts such as young

children presenting with sexually transmitted diseases. Community concern about sexual abuse has led to heightened sensitivity on the issue – concern, which in some circumstances may not be justified.

635 Submissions we have received suggest judges, counsel for the child, and lawyers for parties need more training about sexual abuse issues: about how children may still want a relationship with their abuser; about circumstances in which a child retracts allegations; and about the kinds of behaviour to expect from an abuser.

636 Some counsellors and therapists in the community are concerned about lack of action to protect children, and about the failure of the Family Court to make findings of sexual abuse.

637 The Family Court is sometimes unable to determine that sexual abuse has occurred when the full range of information comes to light at the final hearing. That information might raise questions about the behaviour of the parent who reported the abuse, and whether that parent's behaviour or the child's therapy has contaminated the evidence. There may well have been abuse, but the process might have tainted the evidence or prevented the full range of information from emerging until the hearing.

Process

638 Child, Youth and Family Services will normally remove a child living with an alleged abuser if there is sufficient evidence, and, if the matter cannot be resolved, an application for a declaration will be filed. Police may also be involved with a view to prosecution.

639 Where the alleged abuser is not a member of the child's household, the Police are likely to deal with the matter, unless the child's family are unwilling to keep the child away from the alleged abuser, in which case CYFS will step in.

640 Where the alleged abuser is a child's parent but not a primary caregiver, CYFS may not intervene if the accusing parent prevents contact between the child and the alleged abuser, in which case the service considers the child no longer at risk or in need of care and protection. Again, this does not rule out the possibility of a prosecution.

641 In this case, there can be long delays before the Family Court deals with the sexual abuse allegation, because the allegation becomes one factor in a custody and access dispute. During the wait for a hearing there are ongoing opportunities for the evidence to be contaminated.

642 Those involved, including the child, could be spared agony if there were a clear protocol for dealing with such matters, and priority given to completing enquiries, gathering evidence, and allocating hearing time.

643 We believe specialist teams should be set up to deal with all Family Court sexual abuse cases. The team should include CYFS social workers (or Iwi Social Service social workers), the Police, CYFS lawyers, specialist report writers, and skilled counsel for the child.

644 We consider that any allegation of child sexual abuse should be referred immediately to CYFS, which should be obliged to make immediate application that the child is in need of care and protection. Any proceedings initiated under the Guardianship Act 1968 should be put in abeyance until the sexual abuse care and protection issue has been dealt with. Child, Youth and Family Services would need to be resourced specifically to give this work sufficient priority.

645 Lawyers, report writers, and counsel for the child involved in such cases should have specialist training. The Court should prioritise any case that includes such an allegation so that the hearing takes place as soon after the initial allegation as possible.

646 There are not many defended sexual abuse cases. They would take up less time and have more satisfactory outcomes for all concerned if there were one procedure to deal with such cases, and they were the priority of specialist teams involved from the outset.

Recommendations

Specialist teams should be set up to deal with all Family Court cases where sexual abuse is alleged.

Whenever sexual abuse is alleged, CYFS should be obliged to make application that the child is in need of care and protection. Where proceedings are initiated under the Guardianship Act 1968, they should be put in abeyance until the sexual abuse care and protection issue has been dealt with. Such cases should be heard as soon as possible.

Child, Youth and Family Services would need resources to give this work priority.

11
Representing children

OVERVIEW

647 THIS CHAPTER describes the role of counsel for the child, their training and selection. It looks at criticism of their role, and considers calls for establishing a new position of child advocate.

648 New Zealand puts into effect Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) by ensuring children's views are legally represented in private law court matters, and in reports prepared by psychologists, social workers and psychiatrists.

649 Article 12 declares:

> Rights of the Child to Express Views
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

650 Some are concerned, however, that the Family Court process does not hear children's voices clearly enough. As the research in chapter 4 suggests, many parents do not listen to what their children are saying or tell them what is happening, nor do they invite them to have an appropriate say in custody and access arrangements. Neither does the Court system do a good job of supporting children or providing them with the skills to speak up.

651 There has been criticism of counsel for the child's effectiveness in representing children. In 1997, the Principal Family Court Judge asked the Department for Courts to review representation of children in the Family Court. The Department commissioned

research on current practice, and on the views and perceptions of children and counsel themselves.[178]

652 Although the research findings supported the claim that children in New Zealand are well represented in Family Court proceedings, they also identified inconsistencies, poor practice and lack of quality assurance. Consequently, two focus committees were set up to look at the role and practice of counsel for the child.[179]

653 The Principal Family Court Judge also issued two practice notes: "Counsel for the Child: Selection, Appointment and Other Matters", and "Counsel for Child: Code of Practice" (CCCP).[180] These, and the Counsel for the Child Best Practice Guidelines developed by the Family Law Section and the Principal Family Court Judge are what guide current and prospective counsel for the child.

654 Nevertheless, we still received criticisms about counsel for the child in response to our preliminary paper. These cover three main areas of concern:

- that counsel for the child are not adequately trained to deal with children, and do not meet with them long enough to ascertain or represent their views;
- that counsel drag matters out to earn higher fees (a criticism often made of lawyers in general);
- that counsel for the child is "working for" one parent and/or biased against the other.

COUNSEL FOR THE CHILD

Current practice

655 Counsel for the child legally represents children. The counsel must ascertain a child's views, research relevant law, devise a strategy to promote the child's case, negotiate on the child's behalf, represent the child's interests in any mediation or other dispute resolution process, gather evidence to support the child's case, and act as

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[178] N Taylor and others *The Role of Counsel for the Child – Perspectives of Children, Young People and Their Lawyers* (Department for Courts, Wellington, and the Children's Issues Centre, Dunedin 1999).

[179] These two focus committees reported in 1999, in *Report of the Focus Committees: Representing Children in the Family Court: The Role of Counsel for the Child* (Department for Courts, Wellington, 1999).

[180] Both practice notes were issued on 17 November 2000 and came into operation on 1 February 2001. They appear in appendix C.

advocate for the child if the matter goes to a hearing. How counsel performs these tasks depends, amongst other things, on the age and maturity of the child.

656 The Family Court appoints a counsel for the child in a particular case. The counsel is then given a brief settled by the Court, usually in consultation with counsel for the parties. This brief sets out what counsel must do for the child.

657 In guardianship matters, counsel will liaise, and possibly also discuss proposals, with the report writer.

658 In Child, Youth and Family Services matters, counsel for the child gets information from, and discusses outcomes with, the social workers. Counsel speaks with caregivers, family members, and any appropriate experts and liaises with CYFS solicitors.

659 Counsel must always advise the Court of any wishes the child has expressed. Counsel is obliged to put all relevant evidence about a child's situation before the Court. There is a long-standing debate about what counsel should do in the event of a child's wishes conflicting with the child's best interests.

660 The CCCP states that where a child's wishes or views conflict with his or her best interests, counsel should, where the child is sufficiently mature:

- try to resolve the conflict with the child;
- discuss the issues and obligations of the counsel with the child;
- advise the Court of the counsel's position, and in the (rare) case where the counsel is unable to resolve the conflict and as a matter of professional judgment can advocate only the child's wishes, invite the Court to appoint counsel for best interests issues.

661 There is a risk that the CCCP might be interpreted in a way that undermines the child's views and contrives to have them resemble counsel's view of what should happen.[181] Counsel for the child must act on the instructions of a child who is willing or able to give them.[182] Part 2 of the guidelines, however, potentially conflicts with this by stating that counsel for the child is free to interpret the role according to the counsel's professional judgment. The risk is that such a conflict makes the proper role of the child's representative uncertain.

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[181] *Trapski's Family Law* (loose-leaf, Brookers, Wellington, 1994) vol IV, GA30.11(2).

[182] *Trapski's Family Law*, above n 181, Part 3 of the guidelines.

Training and selection

662 Each Family Court must maintain a list of counsel available to be counsel for the child, and lawyers must apply to go on it. They are interviewed, and their application assessed, by a panel. The practice note "Counsel for the Child: Selection, Appointment and Other Matters"[183] states that counsel should have:

- a minimum of five years practice in the Family Court;
- proven experience in running defended cases in the Family Court;
- ability to exercise sound judgment and identify central issues;
- an understanding of, and ability to relate and listen to, children of all ages;
- good people skills and an ability to relate to, and listen to, adults;
- sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- relevant qualifications, training and attendance at relevant courses;
- personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
- independence; and
- knowledge and understanding of the Code of Practice contained in the practice note issued on 17 November 2000 and the Best Practice Guidelines for Counsel for the Child ratified by the New Zealand Law Society on 18 February 2000.

663 The New Zealand Law Society runs a three-day training course in Wellington for lawyers wanting to act as counsel for the child; a similar course is planned for Auckland. It covers the following:

- the roles of counsel for the child and those with whom they will interact, particularly specialist report writers;
- child development and children's needs;
- communicating with children;
- how to structure initial appointments with children;
- counsel for the child as negotiator and case manager, and what makes an effective counsel for the child;
- the role of counsel for the child in domestic violence cases;
- bicultural issues;
- court skills, including appearing in court and post-hearing matters;
- evidential matters;

[183] Above n 180, guideline 8–6.

- accountability and professional objectivity, including an assessment of counsel for the child's own knowledge and preferences in managing conflict situations.

664 We have reservations about this course: we do not think three days enough to equip lawyers with the skills they need to work closely with children of various ages.

CRITICISMS OF COUNSEL FOR THE CHILD

665 Some people believe that retaining counsel for the child is not the best way to ensure children's voices are heard in legal decisions affecting them. One survey found only 70 per cent of specialist report writers and 46 per cent of social workers thought counsel for the child should have direct contact with children; on the basis, presumably, that counsel's training does not focus on working with children.[184]

666 On the other hand, the Children's Issues Centre (CIC) found children believed their lawyers had consulted them. Approximately half the children said they had known what they wanted to say and counsel for the child heard them out. The other half said they formed their views after discussion with the counsel for the child and weighing up options. Very few reported feeling they had not been listened to.

667 Most of the interviewed children felt that having counsel for the child meant their views impacted on eventual decisions; most could give good reasons why they formed their particular view of the situation. The CIC observed:

> Perhaps surprisingly there was little indication that they had been heavily influenced by someone else in the family in coming to their view. Hence the view which we have heard expressed that children have been "coached" by someone (usually a parent) did not receive any support from what the children said.[185]

668 It seems, however, that after the Court makes a decision, the process falters. Some children were not told the outcome, while about half remembered their parents or caregivers telling them about the decision. This is not acceptable. Counsel's duty to a child client should not end with the decision; counsel should ensure the client is informed of it.

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[184] Taylor, Smith and Tapp, above n 21, 52.

[185] Taylor and others, above n 178, 4.

Opinions on counsel for the child

669 Some submissions to the Law Commission criticised the role and practices of counsel for the child. They said counsel were too adversarial, did not represent children, and did not ensure compliance with court orders.[186] Some felt counsel for the child were paid too much, creating an incentive to drag cases out. They suggested substitution of a child advocate, but did not say why they thought this would be a cheaper option. We outline below major concerns about counsel for the child.

Counsel for the child failing to meet with children

670 Several people commented on the degree to which counsel for the child is directly involved with the child he or she is representing. Some expressed concern that counsel for the child does not always meet with children.[187]

671 One man said counsel for the child scarcely met with his children and did not ask what they thought because counsel believed they had been coached by the parents.[188]

672 Apparently not all counsel for the child feel the need to have much direct contact with children. A survey of lawyers found they met only once or twice with children they were to represent.[189] In CYPF Act hearings, most lawyers met with the child twice a year prior to six-monthly reviews. One lawyer admitted to having no contact at all with the child other than at the hearing. It is hard to see in such a case how enough rapport could be established to encourage the child to say what he or she wanted.

673 Another lawyer confirmed that not all counsel for the child meet with children they are representing,[190] possibly because they assume all children of a particular age think the same and have the same interests. The lawyer criticised this assumption, pointing out that children differ developmentally even within a narrow age-bracket, and their needs will reflect this.

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186 Submission 7.

187 Submissions 19, 20, 24, National Collective of Independent Women's Refuges.

188 Submission 19.

189 Taylor and others, above n 178, 6.

190 Submission 20.

674 One submitter who had worked as a social worker for several years said she was still hearing reports of cases where counsel for the child did not meet the children.[191]

Bias

675 Some accuse counsel for the child of bias, because counsel refuse to interview those nominated by one of the parents. They claim counsel for the child is being obstructive if they do not automatically accept the evidence of parents.[192]

676 One woman felt counsel for the child had worked closely with the specialist report writer and alongside her ex-husband to make her look like "the mother from hell".[193]

677 Another woman said:

> Counsel for the child under the current system is most often seen to be getting in the road of the decision-making process of the parents. Counsel often ignores crucial concerns of the parent(s). … They often are seen to be taking sides of one or the other parent. … Often fail to recognise the fundamental nature of the bond between the child and the mother (who is the primary caregiver). … Often the [c]ounsel for [c]hild will take on the "surrogate" role of guardian thereby denigrating the parental role.

678 Another claimed counsel for the child was working for the father and ignored evidence she wanted to produce about the father's breach of court orders and his abuse of the child.[194]

679 One man felt counsel for the child was, in his case, biased against men. He suggested, however, the solution was not changing the role, but better monitoring of the selection process, and institution of a complaints procedure. He also suggested giving parents the opportunity to select jointly counsel for the child.[195]

680 The National Collective of Independent Women's Refuges alleged that one counsel for the child made comments strongly in favour of the "father's rights movement", and gave legal advice to the father of the child she was representing. Counsel for the child may

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[191] Submission 56.

[192] Submission 40.

[193] Submission 48.

[194] Submission 99.

[195] Submission 105.

often make suggestions to parents in an effort to settle their dispute; fine judgment is needed to avoid doing so to one parent's advantage.

681 Respondents have distinctly diverging views on the role of counsel for the child vis-à-vis parents. One said some parents have unrealistic expectations, assuming counsel for the child have decision-making power or the ability to enforce decisions.[196]

682 Counsel for the child is useful as a representative of the pivotal person in a guardianship dispute: he or she can speak directly with both parties, which parties' counsel cannot do, and therefore acquire independent knowledge. Counsel for the child can sometimes successfully negotiate with another party, but cannot be a mediator because he or she is representing one of the parties – the child.

683 The Court tends to see counsel for the child as someone apart from the dispute, and as offering more rational and measured input. In fact, given what is at stake emotionally for the parties, their likely power imbalances, and their lawyers' varying skills, the judge will not have the right information for a correct decision unless counsel for the child *can* take a more objective view.

684 Counsel for the child has sometimes been accused of bias because he or she has advocated on the child's behalf that one parent is preferable to the other. But if the child's views, and available information, show one parent would be better for a child, it is counsel's duty to advocate it, and to be "biased" on behalf of his or her client.

685 We suspect some parents will always be unhappy with counsel for the child, or indeed any other professional, who, after consulting the child, recommends a course of action the parent does not agree with. This might be inevitable in a system that truly values and respects children's perspectives.

Lack of skills or training

686 Presbyterian Support Central believes not all counsel for the child have the skills to do the job well.[197] They suggested there be more emphasis on child development training, and that counsel for the

[196] Submission 24.

[197] Submission 47.

child be encouraged to work closely with the other Court professionals, such as counsellors, social workers and case managers.

687 Presbyterian Support Central thought it would be useful to supervise counsel for the child and support the role by ensuring appropriate referrals to services for children, such as counselling or social work assistance.

CHILD ADVOCATES

688 Many respondents were enthusiastic about the concept of a child advocate. Most, however, only sketched in appropriate background or training and responsibilities. In almost all cases, suggested tasks replicate what counsel for the child do already (or should be doing). Common suggestions included:

- knowledge of legal issues;[198]
- willingness to meet with the child, family members and significant others;
- an ability to assess children's needs;[199]
- knowledge of child development and an ability to relate to and interview children;[200]
- knowledge of domestic violence and sexual abuse, and their effect on children;[201]
- background in disciplines such as law, psychology,[202]education, counselling and social work;[203]
- power to request specialist reports;[204]
- willingness to encourage dialogue rather than having parents communicate through lawyers;[205]
- willingness to ascertain children's views so as to represent them at mediation.[206]

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198 Submission 5.

199 Submission 61.

200 Submissions 5 and 23.

201 Submissions 88, 99, and National Collective of Independent Women's Refuges.

202 Submission 61.

203 Submission 29.

204 Submission 61.

205 Submission 61.

206 Submission 5.

689 To perform all these tasks, a child advocate has to be highly trained and skilled. Such qualifications do not come cheaply.

690 Others approved of the concept of a child advocate but thought counsel for the child should still be appointed where complex legal issues arose.[207]

691 Defining a child advocate role is problematic because many of the suggested tasks are already carried out by counsel for the child, or could be carried out by those currently playing another role in Family Court processes; for example, counsellors, specialist report writers and social workers.

692 We accept that not all counsel for the child are doing the job as it should be done, and that they should have better practical training in working with children.

693 We believe that when a case proceeds to a hearing, it is vital children have someone to represent their legal rights; a role that, in our view, can only be taken by a qualified legal professional. Even if a child advocate were appointed earlier, counsel for the child would still have to be appointed once a hearing date was set. Adding another player, though, risks duplication of appointments and further expense.

694 Not all respondents supported a new child advocate role, a group of psychologists among them, saying it would subject children to yet another round of interviewing.[208] They say children often complain of having to repeat themselves to many people, and that either they are not heard or may have given the wrong answers.

695 In our view, the best way to address criticisms of the counsel for the child is to ensure adequate training and monitoring. We do not believe adding another player to the process is justified.

696 We believe other professionals could help ascertain and represent children's views at an earlier stage. As discussed in chapters 6 and 7, we believe children should have access to programmes and counselling that will help them understand what is happening to their family and express how they feel about it. Whatever is relayed from a child to counsellors, mediators or social workers during conciliation, cannot be accessed later by counsel for the child unless the child agrees, because it is privileged information.

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[207] Submission 5.

[208] Submission 83.

697 We believe that as soon as it is clear that the case will advance to a hearing, counsel for the child should be appointed, and his or her role should be ascertaining the child's views, and representing and promoting their legal interests and welfare. We do not, therefore, envisage any fundamental change in the role of counsel for the child.

BETTER TRAINING FOR COUNSEL FOR THE CHILD

698 We recommend counsel for the child be offered more comprehensive training, covering child development and family dynamics, and techniques for interviewing children. Counsel must meet with children they represent and, following any decision, be sure the child understands what it means.

699 The CIC offers (largely theoretical courses) to those wishing to work with children: the Postgraduate Diploma in Child Advocacy, and the Postgraduate Certificate in Children's Issues. Students study by audio-conference and/or the Internet, and are encouraged to attend a two-day seminar in Dunedin. The course curriculum includes:

- advocating for children (parts one and two); the sociology of childhood; UNCRC; children's behaviour in various contexts;
- advanced early childhood studies focusing on early childhood development, and models and practices in early New Zealand childhood services;
- a paper on children and the law, looking at how the New Zealand legal system and UNCRC can enhance the rights and well-being of children and young people.

700 Such a course is a good model for further training of counsel for the child.

701 We suggest those wanting to act as children's legal representatives first undertake a year-long distance education course covering such areas as child development, family systems theory and basic psychology. There should be at least three additional weekend practicums spread throughout the year, to train counsel for the child to interview and talk with children. We believe the CIC is well placed to design and run such a course.

702 The course should be additional to existing prerequisites for appointment as counsel for the child and not necessarily replace the current New Zealand Law Society training course, which could presumably refocus on the role's legal aspects, and on the interface between counsel for the child and other Family Court professionals.

703 There should also be regular refresher courses to ensure lawyers and judges are kept up-to-date with social science research about children and families.

Recommendations

Counsel for the child should be required to meet with children he or she represents.

Counsel for the child should be offered more comprehensive training in child development, family dynamics and techniques for interviewing children.

Regular refresher courses should keep counsel for the child and judges up-to-date on social research about children and families.

12
Report writers

SECTION 29A PSYCHOLOGIST REPORTS

704 SINCE 1981, PSYCHOLOGISTS HAVE WRITTEN assessment reports on children for the Family Court, under section 29A of the Guardianship Act 1968 (custody and access proceedings), and more recently under section 178 of the Children, Young Persons, and Their Families Act 1989 (care and protection proceedings). New psychologists have been taken on, but others have been doing this work for more than 20 years.

705 Some report writers are clinical psychologists, some, educational psychologists, and a few are psychotherapists. The Court also occasionally gets reports from psychiatrists. Most of these professionals maintain their own practices while working on reports. Some also provide specialised counselling through the Court.

706 A number of people, in their submissions, expressed the view that the interviewing and investigation by report writers of them did not equal what was offered to the other party, and thus failed to give them fair opportunities to demonstrate their own parenting ability. They complained about interview sequence, timing and location, a failure to speak with people the parties nominated and bias in the written report.

707 Some complaints arise from misunderstanding the process, and might be avoided if parties were offered better information before assessment began. Report writers themselves could also give explanations at initial interviews.

708 Other complaints must be addressed by better Court management and complaint procedures.

Report writers' difficulties

709 Many psychologists working in the Family Court feel under extreme pressure. Consultation made us aware of their concerns, which include the following:

- They experience the Family Court as too adversarial, and failing to use a team approach to solving family problems. A team

approach would entail psychologist, counsel for the child, and parties' lawyers working conscientiously together to resolve matters, with helpful input from Family Court co-ordinators and judges.

- Report writers are increasingly at risk of dissatisfied Family Court litigants filing complaints about them with the Psychologists Board. Such complaints are stressful and time-consuming, and psychologists must protect themselves by carrying substantial insurance. They feel the Family Court does not support them in confronting such complaints.
- The work that psychologists undertake is subject to a burgeoning number of critiques authorised by the Court but carried out by independent psychologists retained by one party.
- When giving evidence, they feel they are increasingly subject to aggressive cross-examination that is often not properly controlled by the Court. They understand their opinions must be tested and critiqued, but object to belligerent and repetitious questioning that is rude and disrespectful.
- Counsel for the child is advised not to share information about the child with the report writer on the basis that to do so might undermine the report's independence.

710 The Family Court risks losing the expertise of these people. At the same time, newly qualified clinical psychologists are being advised not to enter the field. It is crucial to remedy these problems and support report writers. It is also important to re-state and reinforce the teamwork approach. There are many ways to operate as a team without compromising a properly conducted adversarial hearing.

Practice note 16 on report writers

711 In consultation with the Department for Courts, the New Zealand Psychological Society, and the New Zealand College of Clinical Psychologists, the Principal Family Court Judge settled a practice note to take effect from 1 July 2001.[209] It covers the criteria and process for selecting specialist report writers; review of the lists of specialist report writers and their administration; appointments for individual cases; case management; and complaints.

712 Each Family Court is required to keep a list of report writers available for individual assignments. The registrar will, from time to time, convene a panel to consider applications for inclusion on the list. This panel comprises the Family Court co-ordinator, two experienced report writers, a counsel for the child, a Family Court

[209] See appendix E for a copy of practice note 16 "Specialist Report Writers".

judge, a tangata whenua representative and the registrar as convenor. Applicants must submit an application form nominating their area of expertise and the Courts where they would like to be on a list. The panel enquires into and interviews each applicant.

713 Selection criteria are comprehensive: the person must be a registered psychologist with a current practising certificate, and a current member of the New Zealand Psychological Society or the New Zealand College of Clinical Psychologists. He or she must have five years clinical experience or the equivalent, including a minimum of three years in child and family work. He or she must show evidence of competence in several areas involving children, parents, and family systems, and must also demonstrate cultural awareness.

714 The Court, in consultation with counsel for the child and the parties, will draw up a brief whenever a report writer is appointed to a case.

715 The psychologists we consulted were concerned about the breadth of these briefs. They say the Court used to ask them to highlight issues characterising the conflict, or areas of potential harm for the child, as well as the nature of the child's attachments. They are qualified to comment on psychological issues, but often find themselves addressing factual and practical circumstances, which might have to be mentioned as background but should also be proved by independent evidence.

716 Psychologists are concerned that, rather than providing psychological information to be considered along with other aspects of the situation, they are being asked to advise on specific care arrangements.

717 Briefs should be designed to draw on the expertise of psychologists. They risk breaching professional ethics should they comment on any other matters.

718 Psychologists also feel that, although reports still form a basis for discussions about settlement, some of the conciliatory focus has been lost by the new types of brief requested.

719 They are concerned about suggestions they not confer with counsel for the child: that if counsel gives them information it can threaten the independence and objectivity of their reports. They believe that being able to discuss the case with counsel for the child, to receive pointers as where to direct their enquiries, and to be able to discuss issues with another professional in the case, are all valuable to the team approach and should not be lost.

720 In our view, information that counsel for the child gives the psychologist is no different from information supplied by parents or school, and whomever else the psychologist consults. It forms background information on which the psychologist can set up clinical observations. It is insulting to suggest the psychologist's independence might be compromised by this kind of discussion with counsel for the child.

721 Unfortunately, when lawyers for the parties have complained about such information-sharing, sometimes the Court has disallowed it. This seems inappropriate and unfounded. Counsel is acting on the child's behalf and should be allowed to pass on information so it can be taken into account.

Critiques of written reports

722 Report writers are expert witnesses the Court calls to give evidence. A Family Court report writer must comply with stringent criteria as to qualifications, expertise and experience.

723 The expert evidence of report writers is understood to be independent and non-partisan, because it is obtained by the Court and not by a party to the dispute.

724 Parties have an opportunity to challenge a report writer's evidence by bringing evidence that contradicts the conclusions, or by cross-examining the report writer.

725 The Court does not permit the child to be interviewed by other "experts", and an expert engaged by either party is unlikely to have an opportunity to interview, or comment on, the other party. The only expert allowed to interview and observe parent and child, together and singly, is the Court-appointed expert.

726 The practice has evolved (since about 1990)[210] of one party asking for the section 29A psychologist's report and the report writer's case notes to be released to a psychologist they have retained to prepare a critique. The Court must agree before this can happen.

727 The critique writer will then prepare a report on the report writer's processes. The critiquer does not meet either party or their children, or observe them interacting. Consequently, the critiquer cannot comment on the psychologist's conclusions or on the child/parent relationship, but only criticise the process by which the report writer reached his or her opinions.

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[210] *LG v LG* (1991) 8 FRNZ 52.

728 One must question the value of allowing such a critique to be part of the evidence, rather than being merely the basis for cross-examining the report writer.

729 We suggest that the Court review the management of such professional critiques, and, in most cases, permit access to the report and case notes as a basis for cross-examination only, rather than as new evidence, which has little probative value.

730 If the Court wishes to make decisions in the child's interests, it would be preferable to have the critiquer describe the defects in the report before the hearing so that the report writer has the opportunity to make further enquiries and observations should some aspect have been overlooked or mismanaged.

731 The Court should not accept evidence from a critiquer on the outcome of the case, because a critique writer does not have sufficient grounds for such an opinion.

Complaints about psychologists

732 Professional organisations have appropriate supervisory and disciplinary powers over the practice standards of members. Family Court report writers and counsellors who are registered psychologists are subject to the New Zealand Psychological Society code of ethics, and the disciplinary procedures of the Psychologists Board constituted under the Psychologists Act 1981. This discussion examines current procedures.

733 The Health Practitioners Competence Assurance Bill amends these procedures by providing that complaints about psychologists will be made to the Health and Disability Commissioner. The Commissioner may then deal with the complaint, or, if fitness to practice or appropriate conduct is in question, refer it to the relevant professional body. The Bill does not specifically address complaints about the work of professionals contracted to the Family Court. Further consideration must be given to the interface between the Family Court's role and the procedures the new Bill sets up. Our criticisms of current procedures also apply to those proposed by the Bill.

734 The Family Court has stringent criteria for appointing report writers. There will, nevertheless, be some occasions when a complaint is warranted. Complaints about Court assessments have, however, become fertile ground for harassment by disaffected parties to custody disputes.

735 Practice note 16, covering the appointment and case management of report writers, includes a section on complaints.

736 When they are appointed, report writers must inform the Court of any past complaints against them, and the region's administrative judge must be informed if a report writer is the subject of a complaint. The Family Court does not have jurisdiction to hear complaints against report writers once a case has ended. Any complaint at that stage must be referred to the Psychologists Board.

737 When the Court receives a complaint about a report writer while a case is in progress, it is referred to the presiding judge, and the complainant is asked to put the complaint in writing. Practice note 16 states:

> Matters of criticism or complaint regarding the investigation, interviews, preparation and content of reports, resulting for example in lack of balance, bias in favour for or against a party, failure to give due weight to one or other factor, should be addressed to the [c]ourt. The [c]ourt will deal with this either before hearing or in the course of a hearing, for example, by way of cross-examination, submission, critique or evidence called on behalf of the complainant party.

738 Where a complaint falls outside these parameters, it is referred to the Psychologists Board, or the Health and Disability Commissioner but only if it is unrelated to the case at hand, and concerns, for instance, sexual misconduct in another context.

739 Many parties will not complain during proceedings for fear it will prejudice their case, or because they prefer to have their complaint dealt with by the Psychologists Board rather than the Family Court. This is unfortunate because there is a difference in the way each organisation approaches a complaint.

740 A complaint is made in writing to the Psychologists Board secretary.[211] It is referred to the Health and Disability Commissioner who may refer it back, should it concern professional issues outside the health and disability code. When a complaint comes back to the Psychologists Board it is referred to a Complaints Assessment Committee (CAC), which considers whether to conduct a formal hearing. During hearings, the Psychologists Board must observe principles of natural justice, but may hear evidence not normally admissible in a Court. If findings are made against the psychologist,

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[211] An outline of the Psychologists Board complaints procedure appears in appendix F.

the Psychologists Board has the power to de-register, suspend, fine or censor. Appeals are made to the High Court within 28 days of notice of a decision.

741 The CAC cannot investigate a complaint related to a Family Court case until proceedings are completed. If the complaint goes to the Psychologists Board while proceedings are on foot, the Board does not refer it back to the Family Court but waits until the case is concluded by the Court.

742 The Psychologists Board has informed us that of the 17 complaints it is currently managing, 10, or 59 per cent, are Family Court-related, and that this category usually accounts for 55 to 65 per cent of the complaints it processes.

743 The complaint process is a long one. Even if the CAC decides against a full disciplinary hearing and the matter is dropped, the psychologist will have been subjected to weeks of stress. If the process culminates in a full disciplinary hearing, the duration from initial complaint notification to final ruling can be as much as two years.

744 Psychologists have no serious concerns with the way the Family Court handles complaints. Once the case has ended, though, the Court no longer has jurisdiction over complaints.

745 Psychologists are concerned with the following aspects of the Psychologists Board complaint procedures:

- Complaints Assessment Committee and Board members do not necessarily have clinical experience, or experience with children and the Family Court.
- The Psychologists Board imposes inappropriate and unrealistic standards of practice; for example, not recognising the value of observation by an experienced clinician; requiring equal time to be spent with each parent, and then with each parent with the children; requiring the same questions to be asked of each party; relying too much on standard psychological testing, rather than clinical observation.
- Some Psychologists Board members are psychologists who critique reports prepared for the Family Court, and this creates a conflict of interest.

746 The Psychologists Board will not deal with a complaint while a case is still before the Court. But a party is not bound to complain while the matter is proceeding and can reserve his or her complaint for the Psychologists Board once the matter is clear of the Court process.

A better complaints procedure

747 It might be preferable if the Psychologists Board were to refuse to handle complaints arising from psychologists' court work where it was not challenged or complained of during the proceeding. Requiring the complainant to make the complaint known to the Court during the progress of the case would give the Court an opportunity to deal with it in context. It would allow the Court to remedy any failure on the part of the psychologist that was affecting the quality of evidence or the interests of the child. It would also allow the Court to assess the shortcomings or otherwise of the report writer. This would be a more satisfactory outcome for everyone involved.

748 The findings of the Court as part of its complaint process could provide material for any subsequent investigation by the CAC or, eventually, the Psychologists Board.

749 Further protocols for such a process would require negotiation between the Psychologists Board and the Family Court. The process would also depend on specific notification to complainants or potential complainants. Protocols would be needed for the handling of complaints by the Family Court, to maintain confidence in the Court system and its integrity, and to form a proper basis for any future enquiry by the Psychologists Board.

750 If the psychologist were to be challenged by cross-examination, or by alternate evidence presented during the hearing, the judge would have to include in his or her judgment an exposition of the competing evidence, and specific rulings on the acceptability of the report writer's assessment methodology and procedures.

751 The process employed between the Court and the Psychologists Board would operate similarly to the Human Rights Commission's procedure for harassment complaints. Where an institution has its own complaint procedure, that procedure is followed. But if the institution has no such procedures, or does not follow them correctly, then the Human Rights Commission carries out an enquiry and makes findings.

752 The Family Court could employ similar processes for dealing with complaints about report writers. So long as these were properly followed, the Psychologists Board ought, in normal circumstances, to accept the Court's findings as a final resolution of the complaint. Only in exceptional circumstances would the Board revisit the circumstances of a complaint about the behaviour of a psychologist in the Court context.

753 If this suggestion for dealing with complaints against psychologists were to be pursued, further negotiations would be needed with the Psychologists Board. Judges would need training to ensure judgments recorded adequately psychological evidence and challenges to it, and findings in respect of that evidence.

754 The proposals outlined here could apply to the procedures set out in the Health Practitioners Competence Assurance Bill, but they would need to be expressly recognised in legislation. The Family Court would have its own complaint process, which, normally, would be adequate; only in exceptional circumstances would the matter be referred to the Health and Disability Commissioner.

PSYCHOLOGISTS' OTHER TASKS

755 During proceedings, a section 29A psychologist's report is often requested with a view to gathering information that might help parties agree. Report information can reassure one party with misgivings about the other, or offer a reality check for one who has been maintaining an untenable position regardless of the interests of the child or the practicalities of the situation. Some parties will use the report as a guide for arrangements that meet the child's needs.

756 Because the report writer has expertise as well as knowledge of the family, his or her input in discussions can be valuable in bringing about a settlement. To this end, report writers have sometimes been invited to a mediation conference with the judge, to give advice on arrangements that would be in the child's best interests. Such input might also be valuable in a round-table meeting organised by, for instance, counsel for the child.

757 Conflict can, however, arise at this point in the psychologist's role. A psychologist asked to prepare a section 29A report is an expert witness engaged by the Court to give evidence at a hearing. If the psychologist is involved in settlement discussions merely to confirm information provided in his or her report, there will be no conflict. If, however, the psychologist goes beyond that information-giving role to become a facilitator, or to offer an opinion on an arrangement, it might compromise the psychologist's perceived independence in the hearing. Stepping outside the assessment role poses a risk for the report writer.

758 Psychologists, and others qualified to act as Family Court report writers, do have experience and expertise that might well be valuable in settling disputes. The Family Court could employ them as facilitators in a role quite separate from their report writing

function; for example, they could provide useful information, expertise and reality checking at a mediation. They could be available as specialist counsellors where skilled intervention is required; such situations would include those involving high-conflict litigants, and those that have reached an impasse. Skilled intervention may be more productive than fast tracking the matter to a defended court hearing.

759 Were the Court to use psychologists for tasks other than report writing, the two roles would have to be clearly differentiated; one psychologist could not be a facilitator *and* a report writer for the same parties in the same case.[212]

Recommendations

It should be made clear that counsel for the child can confer with a report writer and give him or her background information without compromising the report writer's independence.

Courts should review the way they manage critiques of written reports.

Procedures for complaints about Family Court psychologists should be reviewed in consultation with the Psychologists Board, with a view to the Family Court dealing with any complaints about work done for the Court.

The Family Court should use psychologists as facilitators and counsellors, but clearly differentiate these roles from report writing.

REPORTS FROM SOCIAL WORKERS

760 Sometimes the Court seeks input from Child, Youth and Family Services social workers in proceedings other than those brought under the Children, Young Persons, and Their Families Act 1989 (CYPF Act).

761 The circumstances in which social workers are brought in include the following:

[212] See also chapter 2 "Conciliation Services", and chapter 9 "Court Management".

- The Family Court might, during guardianship proceedings, become aware of matters requiring intervention under the Act; for example, extreme conflict, sexual abuse or physical harm.
- The Court needs information that CYFS holds about a family.
- The Court wants a social worker's report under section 29 of the Guardianship Act 1968, usually in a custody and access dispute.

762 Preliminary Paper 47 discussed these circumstances in detail,[213] along with the Department for Courts and CYFS protocol. The protocol[214] sets out a process for the Court to refer matters to the Department[215] and the care and protection co-ordinator,[216] and for a social worker report.[217] It includes a procedure for responding to requests for information, and a response timeframe. Where a referral is made under section 15 of the CYPF Act, CYFS must prioritise the case as "critical to be responded to on the same day", or "low urgency within 28 days", or "no further action". The Court must receive a brief written report as soon as possible. A referral made under section 19 of the CYPF Act requires the care and protection co-ordinator to inform the Court of the intended action within seven days, and report back within 28 days.

763 The protocol identifies two types of section 29 social worker reports under the Guardianship Act 1968. The first is a limited report on what the Department already knows. Because it is limited and specific, it might be provided within one working day. A general report is a fuller assessment, and must address specific issues the Court identifies. It is expected to take six weeks to prepare.

764 It is our understanding that response to the protocol varies, but that it works best where there is good liaison between the local Court and the CYFS branch.

765 There remain areas where the Family Court might benefit from social work assistance but which are not covered explicitly by legislation and therefore not subject to the protocol; for example, urgent assessment reports where applications are made without notice or with time abridged. Sometimes on these occasions the

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213 Law Commission, above n 1, paras 229–257.

214 Dated 1 July 2000 between Department for Courts and Department of Child, Youth and Family Services.

215 Section 15 Children, Young Persons, and Their Families Act 1989.

216 Section 19 Children, Young Persons, and Their Families Act 1989.

217 Section 29 Guardianship Act 1968.

Court appoints counsel to assist, when a social worker might be more appropriate.

766 In guardianship matters, a report from a social worker might sometimes be more appropriate than one from a psychologist.

767 Most Family Courts no longer request section 29 social worker reports from departmental social workers because it is difficult to get them promptly. However, the psychologists available to prepare section 29A psychologist reports are very busy, and it would relieve pressure on them and the Court if some of the work were to be done by social workers.

768 Where risk to a child is raised under section 16B of the Guardianship Act 1968, the obvious person to investigate urgently and report to the Court is a qualified social worker. The Guardianship Act provides for social worker reports under section 29 but these are rarely, if ever, obtained because they cannot be provided quickly enough. Counsel for the child is sometimes asked to provide such a report. This is completely inappropriate as counsel is not qualified to assess risk.

769 Our preliminary paper suggested the Family Court contract private social workers to do this work. If it were to do so, it would have to pay for their reports in the same way it pays for section 29A psychologists' reports.

770 We are aware that some Family Courts have commissioned reports from private social workers in guardianship matters, but the legislation does not allow for it. A report under section 29 of the Guardianship Act can only be obtained from a CYFS social worker; reports requested under section 29A are medical, psychiatric or psychological.

771 The legislation would have to be amended if reports were to be obtained from private social workers. If this were done, we would expect qualified social workers in private practice to be interested in undertaking this Family Court work.

772 We would prefer CYFS social workers to be available for the work. They have access to departmental records, and powers to obtain information under sections 59 to 66 of the CYPF Act unavailable to a private social worker.

773 We suspect that different funding arrangements might improve the situation. When the Family Court requests reports from CYFS, it does not pay for them because the work is funded by CYFS itself. The Family Court is currently having this work done by

psychologists and counsel for the child, both of whom are paid by the Court.

774 Therefore, if CYFS were to be paid for guardianship reports from the Family Court budget, it would make little impact on the Court's budget.

775 At the same time, having the Court pay for these reports might enable CYFS to employ social workers specifically to undertake the work. It would be sensible to investigate this option, and cost it, in relation to Family Court and CYFS budgets.

776 The alternative is that CYFS receive a specific budget allocation for Family Court guardianship reports in each district.

Recommendations

The Family Court must have access to social worker reports when required.

Methods of funding the preparation of these reports must be investigated, including the possibility of the Family Court paying CYFS for the work.

If CYFS is unable to provide the Family Court with social worker assistance, the legislation should be changed so the Court can obtain reports from privately contracted social workers.

13
Māori participation in the Family Court

OVERVIEW

777 THE TREATY OF WAITANGI promised to protect Māori customs and cultural values, and to promote partnership between Māori and the Crown.[218] As tangata whenua and partner to the Treaty of Waitangi, Māori expect the justice system – including the Family Court and its processes – to recognise their values and practices.

778 The Family Court deals with issues arising from family life. Concerns that parties bring before the Court are, therefore, deeply personal and steeped in cultural values. How society organises and attributes value to family relationships is fundamental to Family Court business.

779 The western, individualist approach to family life and behaviour is so embedded in Pākehā value systems, it is difficult for most Pākehā to recognise the degree to which these values permeate and influence their attitudes and priorities. It is also difficult for those not brought up in Māori society to appreciate the profound and complex ways that Māori values create other attitudes and priorities. Thus, Māori and Pākehā often talk past one another.

780 The Court system has evolved as a formal process with strict procedural rules. A court is an unnatural environment for most parties appearing before it, and is familiar only to judges and lawyers. Family Court procedures are slightly more relaxed than those of other courts: lawyers are not required to robe, or to stand when addressing the Court, and rules of evidence are less strict. But these adaptations are insignificant for many participants, and Family Court processes are still rooted in Pākehā cultural norms

[218] Waitangi Tribunal Report findings and recommendations of the Waitangi Tribunal on an application by Aila Taylor for and on behalf of Te Atiawa Tribe in relation to fishing grounds in the Waitara District – Wai 6 (Department of Justice, Wellington 1983) and Waitangi Tribunal Te Reo Māori Report – Y11 (Wellington 1986).

781 The importance of familial relationships to Māori society cannot be overstated; values like whanaungatanga go to the heart of what it is to be Māori. This suggests that the Family Court and what goes on there is of central importance to Māori

782 The Family Court imposes processes at the conciliation stage and the Court resolution stage that do not necessarily accord with Māori concepts of whānau (family), tikanga (customs), or kawa (protocols).

MĀORI VALUES

783 We appreciate that to refer to Māori cultural values is to refer to a tradition and a moral system that may not be shared by all Māori living in New Zealand today.

784 Whānau is much more than a concept of extended family, including grandparents, aunts and uncles. Whanaungatanga covers all relationships based on descent (from a common ancestor) and marriage (with spouses and affines, or in-laws).[219] It includes relationships between whānau. But it means much more than a kinship link by blood or marriage. It carries obligations for managing group property, mutual support, raising children, and organising occasional gatherings, or hui. Whakapapa has been described as the glue holding the Māori world together, signifying the nature of relationships between all things. It implies mutuality and reciprocity of responsibilities.[220]

785 Flowing from, and supporting whanaungatanga, is tikanga Māori, or custom. The following central values underpin tikanga Māori:

- mana encompasses the political power ascribed through whakapapa and acquired by personal accomplishment;[221]
- tapu is sometimes described as "sacred or under ritual restriction", but the concept can be seen more broadly in terms of a code of social conduct based on staying safe and avoiding

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[219] There are differing views as to the etymological route of "whanaungatanga". Some writers consider that whanaungatanga derives from the same route as the word whānau (with the first "a" being long) meaning to be born, while others regard whanau (with a short first "a") meaning "lean inclined bend down" to be the relevant verb. New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington 2001), 30, footnote 168.

[220] J Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, Wellington, 1998).

[221] Law Commission, above n 219, paras 137–149.

risk; its political purpose is ensuring appropriate respect for hapū and iwi leadership, and keeping the ceremonial or special aspects of life separate from the quotidian; tapu is also centred in the spiritual;[222]

- utu is sometimes misconstrued as revenge for wrongdoing, but it carries a broader meaning of reciprocity, and maintaining relationships by imbalance of contributions (one is always under a duty to reciprocate). Utu denotes reciprocity between individuals, descent groups, and the living and departed;[223]
- kaitiakitanga denotes the duty of stewardship and protection, and is most often applied today to the obligation of whānau, hapū and iwi to protect the spiritual well-being of natural resources within their mana.[224]

786 These concepts inform hui protocols and the management of social interaction. Specific protocols vary from marae to marae, and some commentators claim references to tikanga Māori are inappropriate, and that reference should be made to specific hapū or iwi.

787 Māori concepts of whānau mean a child is not just the responsibility of its biological parents, but of the entire whānau, and that the child, in turn, is responsible to that whānau. Contrast this with the traditional Pākehā nuclear family.

FAMILY LAW AND THE FAMILY COURT

788 Areas of substantive family law that prescribe a narrow range of rights and responsibilities between biological parents and children, such as the Guardianship Act 1968 and the Adoption Act 1955, exclude key figures in traditional Māori families.

789 Discussion of substantive law reform is beyond this reference, but these areas of substantive law have consequences for procedure and processes that are our subject. Guardians, who are usually biological parents, have all rights in respect of their children. Consequently, when child-related issues come before the Court under the Guardianship Act, only the parents are offered counselling,[225] and only the parents are invited to the mediation conference with the judge.[226]

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222 Law Commission, above n 219, paras 150–155.

223 Law Commission, above n 219, paras 156–162.

224. Law Commission, above n 219, paras 163–166.

225 Section 10 Family Proceedings Act 1980.

226 Section 13 Family Proceedings Act 1980.

790 Some judges in various parts of the country allow other family members to attend mediation conferences. Broader-based hui are held under the umbrella of counselling, under section 10 of the Family Proceedings Act 1980. Such departures acknowledge Māori cultural values, and we have drawn on these for our recommendations.

BACKGROUND INFORMATION AND CONSULTATION

791 We have used earlier Law Commission publications, particularly the study paper, *Māori Custom and Values in New Zealand Law*,[227] and the report *Justice: The Experiences of Māori Women*,[228] as background. For the latter report, nationwide hui were held, and it was one of several papers prepared as part of the Law Commission reference on women's access to justice. Its extensive research and consultation took four years, from 1995 to 1999.

792 We also used a report prepared for Professor Ngatata Love as part of the Law Commission reference on the structure of the courts, giving feedback from nine hui around New Zealand commenting on the entire court system.

793 As part of this Family Court reference, we held a small focus group hui in Wellington to which we invited people interested and involved in Family Court matters. Our recommendations incorporate that group's ideas.

794 The group strongly recommended consultation through national hui, but we could not undertake this in the available time.

795 We have also had the benefit of research undertaken for other, related, purposes: *Evaluation of Programmes for Māori Adult Protected Persons under the Domestic Violence Act 1995*,[229] and a draft of *Guardianship, Custody and Access: Māori Perspectives and Experiences*, commissioned by the Ministry of Justice and Department for Courts from Strategic Training and Development Services and Ani Mikaere to background the review of the Guardianship Act 1968.

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[227] Law Commission, above n 219.

[228] Law Commission *Justice: The Experiences of Māori Women: Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, Wellington, 1999).

[229] F Cram and others *Evaluation of Programmes for Māori Adult Protected Persons under the Domestic Violence Act 1995* (Ministry of Justice and Department for Courts, Wellington 2002).

796 Our recommendations are, therefore, tentative. Their nature is such that any implementation would have to be explored locally, and would depend on the range of organisations and available expertise in a region.

MĀORI LAND COURT

797 One suggestion arising in several contexts is that Māori Land Court jurisdiction be extended to cover family law matters. Investigating this possibility is beyond this reference. It will, however, be part of the Law Commission's report, *Structure of the Courts*.

798 Even if Māori Land Court jurisdiction were to be extended, we doubt it would be appropriate to compel Māori to have family disputes dealt with in that forum; it would have to be a matter of choice. Parties to a dispute could agree on a forum, and in case of disagreement, there would have to be a default provision. Our conciliation services recommendations would be transferable to any conciliation service associated with the Māori Land Court. Alternatively, Māori conciliation services could remain attached to the Family Court, with hearings transferred to the Māori Land Court if conciliation were unsuccessful.

CHILD, YOUTH AND FAMILY SERVICES

799 We received several comments on Child, Youth and Family Services procedures; these include the failure to consult whānau before warrants to uplift children are obtained, and the way family group conferences are convened. Because these are CYFS-related, they are beyond our terms of reference. The Family Court is only involved in the Children, Young Persons, and Their Families Act 1989 matters after a Court application is filed, which occurs after a child has been uplifted urgently by warrant.

800 In most cases, family group conferences are held before an application is made, and the Court becomes involved only after a family group conference cannot agree. Family group conferences are convened and run by the CYFS care and protection co-ordinator. The Court has no control over family group conference convening or procedure.

COMMUNITY SERVICES

801 There was criticism of the fact that community resources, particularly those of Māori providers, are not used before, or instead of, Family Court procedures. The Family Court becomes involved only when a party comes to it for a counselling referral or to file an

application, and has no prior knowledge of the party's problem. It is clearly preferable, and less expensive, for parties to resolve disputes in the community before approaching the Family Court. It is the Government's responsibility to decide whether it is best to fund community or court services.

MĀORI CONCILIATION SERVICES

802 Māori want the Family Court to be cognisant of their cultural values. This demands processes appropriate to the tikanga of the iwi or hapū concerned.

803 This issue will not be addressed merely by contracting services to Māori providers, although such services are likely to be more comfortable for Māori clients.

804 It is important that providers are not only familiar with Māori values and tikanga, but also have professional knowledge about, for instance, family dynamics and family violence, and counselling and mediation skills.

805 Continuing tension is likely to occur between such professional expertise and the power relationships in some whānau and hapū. It is crucial that Māori Family Court service providers have enough expertise to distinguish situations where collective responsibility is in the best interests of parties and children, from situations where such collective responsibility would be unsafe because of family dysfunction; for example, the overall interests of the hapū must not be allowed to override the rights of a woman who seeks Family Court protection from a violent relationship or sexual abuse, and the right of her children to safety.

806 Some initiatives in the present system show what is possible.

Domestic violence programmes

807 Programmes set up for perpetrators, victims, and children under the Domestic Violence Act 1995 have been contracted to Māori providers.[230] The goals of the Domestic Violence (Programmes) Regulations 1996 specify that Māori values and concepts are to be taken into account, acknowledging the need for Māori-developed programmes and services to reduce domestic violence within whānau.

808 The Ministry of Justice published *Evaluation of Programmes for Māori Adult Protected Persons under the Domestic Violence Act 1995* in June

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[230] Cram and others, above n 229.

2002. This report discusses two programmes for Māori women. Both use kaupapa Māori as the basis for a political, social and cultural analysis of domestic violence. The report identifies three key, best-practice principles for delivering domestic violence programmes to Māori women: te reo Māori me ona tikanga (valuing tradition and culture); kaupapa Māori solutions; and individual as well as collective healing.

809 The report also shows what prevents some women attending programmes: lack of lack of transport, childcare and ongoing support.

810 We consider these principles and barriers to access crucially relevant to any delivery of Family Court conciliation services to Māori.

Relationship Services

811 Relationship Services (RS) is responsible for other initiatives, and in consultation with Māori, is developing a model consistent with whanaungatanga principles.

812 A trained Northland RS counsellor, Alva Pomare, has developed a process in keeping with tikanga Māori. She started her RS work in the usual way, by taking referrals under sections 9 and 10 of the Family Proceedings Act 1980 and meeting with husband and wife.

813 She has since changed this process to incorporate a more holistic, Māori approach. Instead of meeting the man and woman separately, she now meets with the man and his whānau, and the women and her whānau. These meetings usually include at least three generations, and often central hapū figures who may not be closely related but who are influential.

814 Once she has met with each "side" of the whānau, she decides if "mediation" involving both sides is appropriate. If it is, Alva sets up the meeting but does not run it. The tikanga is that of the hapū. Participants themselves decide when, where, and how the meeting will be convened. Meetings are usually held on marae but can be held elsewhere, including RS premises.

815 Before the whānau is brought together, Alva meets any children who are old enough to give their views.

816 The first part of the meeting is designed to inform participants about Family Court processes. Alva explains how the matter will progress through the Family Court should they be unable to resolve it.

817 The whānau hui then decides if this is an appropriate forum for resolving the dispute. If it is, they try to do so. If not, it is referred to the Court.

818 It may take up to ten sessions to resolve matters at the hui, should they opt to do so. Most disputes are settled like this. The tikanga allows distress to be dealt with so that business can be settled more quickly.

819 If the hui is unable to resolve the dispute, parties go back to their lawyers and proceed through the Court.

820 At the end of the process, Alva makes the standard report to the Court: points of agreement, or an indication that matters are unresolved.

821 Alva lives in the community and knows the people, which helps her get the right people to attend hui.

822 This model works well in Northland with its large Māori population, and where there are many links across local hapū whānau. It would need adaptation for a more urban, less homogenous locale.

Qualifications

823 Relationship Services is also, in partnership with Māori providers, developing a model to assist with professional affiliation and training issues.

824 All Family Court counsellors must have a professional affiliation that is usually acquired by completing academic qualifications and fulfilling membership requirements for a professional organisation.

825 These requirements can be obstacles for Māori providers because there are not enough qualified Māori counsellors.

826 Relationship Services can act as a bridge while Māori counsellors get the necessary qualifications. It can provide professional oversight, training, assistance and, crucially, accreditation to its organisation, while counsellors continue to work for a Māori provider.

827 In this way, enough Māori will be upskilled so Māori providers can eventually work independently. Te Korowai Aroha are also developing training for Māori counsellors.

828 Without this initial partnership arrangement, it would be difficult to provide enough Māori counsellors to set up Māori conciliation services.

Future possibilities

829 These two examples of Māori delivering tikanga-based services to Māori show such services are possible and potentially successful. To highlight these examples is not to ignore other groups, such as

the Lower Hutt Family Centre,[231] providing counselling and related services to Māori Family Court clients.

830 The Commission has neither the knowledge nor experience to make specific recommendations as to how services can be made available to Māori.

831 What we do know is that there is a need for Māori Family Court conciliation services and that Māori want them, but that there is a lack of community resources for providing a comprehensive service.

832 Provider availability would have to be assessed in each area, and training programmes set up to build on the skill and experience available already.

833 We believe a concerted effort should be made to train and contract Māori Family Court counselling and mediation providers. Māori providers could also be contracted to provide information sessions, and parenting and children's programmes.

834 It might be difficult to offer these services in areas with a low Māori population. Some families might, if it were an option, want to travel to family marae to involve whānau and consult a Māori service provider.

835 It will be even longer before professional specialist services – psychologists, psychiatrists and specialist therapists – can be provided by Māori for Māori.

Recommendations

Māori should be consulted about further changes to conciliation services and Family Court procedure that would better recognise Māori values and protocols.

Conciliation services should, as far as possible, be contracted to qualified Māori providers so that Māori clients can choose these services.

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[231] The Lower Hutt Family Court makes referrals under sections 9 and 10 of the Family Proceedings Act 1980 to counsellors at the Lower Hutt Family Centre who provide counselling services to Māori clients that accord with Māori cultural values. The Lower Hutt Family Centre also provides programmes under the Domestic Violence Act 1995.

REPORT WRITERS

836 A psychologist or social worker may have to prepare an assessment report if an application continues through the Court. Section 187 of the Children, Young Persons, and Their Families Act 1989 also provides for the possibility of a cultural or community report for care and protection proceedings. Child, Youth and Family Services employs qualified Māori social workers and, if section 29 reports could be more readily obtained by the Court, it ought to be possible to match Māori social workers with Māori families.

837 There are not, however, enough qualified Māori psychologists to offer a Family Court service for Māori, and we hope iwi will encourage their young people to train for this work. Pākehā psychologists working with Māori families must ensure they appreciate, and consult on, cultural differences.

Recommendations

Training needs for Māori psychologist and report writer providers should be assessed.

Ways to meet these training needs should be investigated, possibly in conjunction with organisations providing conciliation services already, such as Relationship Services, and Māori domestic violence programme providers.

CHANGES TO FAMILY COURT PROCEDURES

838 If conciliation services fail to resolve a dispute and parties decide to take the matter to the Court, an enforceable order will be required. There are, therefore, limits to the extent Court procedures can be modified to comply with tikanga Māori. But that does not mean Māori cultural concepts cannot inform evidence that is the basis for the Court's decision.

839 The Family Court currently observes certain formalities for introducing, beginning, and completing cases: announcement of the judge; everyone standing; judge and counsel bowing to each other; names of the parties announced; counsel introducing the party he or she represents. Lawyers and judges take these for granted.

840 It would be a small step to devise a protocol complying with tikanga Māori in cases involving Māori families. This could be standardised across Courts so that judges, Court staff and lawyers become familiar

with it. The protocol could be used whenever parties chose to use it, and could, for example, involve a greeting, a karakia, and a brief mihi. The presence of whānau supporting each party would be expected.

841 A proposed training module for Family Court judges looks at adapting tikanga (customs) and kawa (protocols) to the courtroom. The course would also include an analysis of whānau-related kinship and rituals. It was also suggested that judges learn several korero (deliveries), and some karakia and waiata appropriate to Family Court work. We endorse this proposal and recommend its implementation.

842 Another main change necessary to reflect Māori concerns is to admit into court whānau to support parties during settlement conferences or hearings. At present the Family Court is closed, without special permission from the judge, to all but the parties to the proceeding. Each party could request whānau support and the parties could agree about who might attend. Submissions we received indicated a need for the judge to control who is admitted so as to avoid one party being overwhelmed or dominated by substantial whānau support for the other party.

843 A further issue is whether those attending in a supportive role should, in certain circumstances, have speaking rights. Submissions suggest that it may be appropriate for kaumātua to speak on behalf of parties during a mediation conference (or settlement conference). It is likely that judges would want assurance that anyone speaking on behalf of a party was doing so with that party's consent, and that the party agreed with what was being said.

Recommendations

Standardised introductory procedures complying with tikanga Māori should be introduced into the Family Court. Judges and other Court staff should be trained in these procedures.

Legislation should be amended so judges can, at their discretion, permit whānau to attend Family Court settlement conferences and hearings.

MĀORI PRONUNCIATION

844 The failure of judges, lawyers, Court staff, counsellors, and counsel for the child to pronounce Māori correctly, and names especially,

has been raised in published Law Commission reports and in submissions on our preliminary paper. This failure is demeaning and offensive to those whose names are mispronounced.

845 It would be simple to address. All those working in the Family Court should be trained in Māori pronunciation, and if someone is still unsure about a name, it would be simple courtesy to ask the person.

Recommendation

Everyone working in the Family Court should be trained in Māori pronunciation and Māori cultural imperatives, to enable them to serve Māori clients better.

14
Immigrant groups

OVERVIEW

846 THE FAMILY COURT and its conciliation services have clear difficulties responding appropriately to cultural groups other than those from mainstream Pākehā backgrounds.

847 Census data on ethnic origin provide an idea of New Zealand's cultural and ethnic diversity.[232]

848 Most ethnic Europeans come from English-speaking countries. Of the thousands with non-English speaking backgrounds, the largest group is German.[233] Some recent immigrants will have language difficulties and find our Family Court system bewildering.

849 Pacific and Asian immigrants often have even greater difficulties with language and cultural difference.

850 It would not be unreasonable to target assistance to Pacific peoples with big enough populations; for example, the census identifies 115 117 Samoans resident in New Zealand, 76 581 of whom are in the Auckland region and 19 881 in the Wellington region. There are also 51 486 Cook Island Māori, 31 074 of them in Auckland, and 40 716 Tongans, 32 541 of them in Auckland.

851 We do not know how many people identifying with one of these ethnic groups are immigrants and how many have been in New Zealand for several generations.

852 Some 100 680 Asian people identify as Chinese, and 60 213 as Indians, without specifying further. Some of these will be fourth and fifth generation New Zealanders with good English skills, but some may be recent immigrants who would experience language and cultural difficulties in the Court system. It is likely that the 19 026 Koreans, 5265 Cambodians, and 3462 Vietnamese are more recent arrivals.

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[232] Statistics New Zealand, 2001 Census: Ethnic groups. Ethnic group (total responses) and by regional council (Statistics New Zealand, Wellington, 2001).

[233] 9057 people.

853 Third and fourth generation immigrants are unlikely to have serious difficulties using the Family Court. Difficulties are more likely to arise for first and second generation immigrants, who may have trouble with language as well as culture.

CONSULTATION

854 In July 2002 the Law Commission held two fono with Auckland Pacific Island community representatives, one at the Freeman's Bay Community Centre and one at the Ministry of Pacific Island Affairs office in Manukau.

855 Relevant concerns expressed at those meetings include:

- a need for better information in an accessible form;
- availability of information in community venues that targeted groups are likely to visit;
- availability of information in different languages;
- avoidance of Court jargon and provision of explanations of terminology where possible;
- directions to sources of further information and answers to questions;
- the need for Court processes to accommodate various family styles by, for instance, allowing children and elders to be present where appropriate;
- the need for available independent interpreters who understand the Court system;
- the need for the Court to take account of cultural values so that, for instance, cultural concepts like shame are understood, and decision makers appreciate how it can affect Court process and outcomes.

TARGETED ASSISTANCE

856 We recommend Family Court information be disseminated via pamphlets and websites, in as many immigrant languages as possible. We note that, according to the last census, 45.5 per cent of ethnic European households have access to the Internet, as do 20.4 per cent of Pacific households, and 61.6 per cent of Asian households.[234]

857 Some immigrant groups are represented well enough in various court catchments to justify targeted services. There are, for example, 76 581 Samoans in the Auckland region – a large enough number to make Samoan language conciliation services such as counselling

[234] Statistics New Zealand, above n 232. Ethnic groups selected summary characteristics.

and mediation possible, and in accordance with Samoan custom. We envisage these being developed in consultation with relevant communities, to take into account custom and language, in much the same way as we have recommended developing Māori conciliation services.[235]

858 Manukau Court catchment has counselling services for its Pacific Islands peoples population, and Pacific Islands lawyers, including some who act as counsel for the child.

859 Some groups, however, will always be too small for conciliation services to be provided from within their own community. It may be possible to train one or two counsellors from such a group through the auspices of organisations like Relationship Services, but there may be general reluctance to use a counsellor who is likely to know everyone else in the community. Different communities will raise different concerns, which will need to be met by the conciliation service.

860 Consultation in Manukau has made us aware of problems in the use of interpreters in some Family Courts; parties have been reluctant to divulge personal information before an interpreter from the same community. There have also been instances of translations that have "censored" information for reasons of cultural sensitivity. The Family Court and its services must be sensitive to such issues.

861 It could be a responsibility of the Family Court co-ordinator to liaise with immigrant communities in the Court catchment to find ways of providing access to the conciliation services the group needs. Elders or others of standing within each community may be able to help find interpreters and give cultural advice, working with families alongside accredited counsellors.

Recommendations

Pamphlets and websites should be available in several languages.

Conciliation services should be developed for any immigrant group with sufficient local numbers.

Consideration should be given to training counsellors from smaller immigrant groups within existing organisations such as Relationship Services.

[235] Chapter 13 "Māori Participation in the Family Court".

Family Court co-ordinators should liaise with immigrant groups in each Court catchment to find ways of providing access to conciliation services, possibly by having a representative work alongside existing accredited providers.

15
Disability awareness

OVERVIEW

862 THE MINISTER FOR DISABILITY ISSUES has said:

> Disability is not something individuals have. What individuals have are impairments. They may be physical, sensory, neurological, psychiatric or other impairments. Disability is the process which happens when one group of people create[s] barriers by designing a world only for their way of living, taking no account of the impairments other people have.[236]

Respondents to Preliminary Paper 47 highlighted the difficulties that those with disabilities, or parents of children with disabilities, have in accessing the Family Court.

863 We acknowledge that use of the term "disability" is contentious, but accept the Office for Disability Issues definition:

> "Disability" is now usually defined in terms of functional limitation in activity resulting from a long-term condition or health problem that cannot be readily corrected.[237]

864 Disability includes physical disabilities, sensory disabilities, such as hearing or visual impairment, intellectual disabilities, and psychiatric and psychological disabilities.

865 The *2001 New Zealand Disability Survey* found a total of 743 800 New Zealanders, or 20 per cent of the population, have some form of long-term disability.[238] Because our population is ageing and there is more disability among people who are older, we can expect this national rate to keep rising.

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[236] Office for Disability Issues *New Zealand Disability Strategy: Making a World of Difference – Whakanui Oranga* (Ministry of Health, Wellington, 2001) 7. The statistics cited in this chapter are for 2001, unless specified otherwise.

[237] Office for Disability Issues *Briefing to the Incoming Minister for Disability Issues 2002 "Towards a fully inclusive New Zealand"* <http://www.odi.govt.nz/about/minister-briefing/chapter2.html>.

[238] Statistics New Zealand: <http://www.statistics.govt.nz/domino/external/web/prod_serv.nsf/ htmldocs/Disability>.

Barriers faced by people with disabilities

866 People with disabilities often face barriers to full participation in everyday life: they are less likely to have educational qualifications or be employed, and more likely to experience financial hardship, and communication and transport difficulties than people without disabilities.[239] Forty-two per cent of all New Zealand adults with disabilities are slightly limited by their disabilities, 43 per cent are moderately affected, and the remaining 15 per cent are affected severely.[240]

867 People with disabilities often face ignorance and prejudice. Many identify the negative attitudes of others as a major barrier operating at every level of daily life.[241] One of the biggest difficulties is the assumptions of others about their capacity made on the basis of a generic disability status. Everybody is different, and those with disabilities no more homogenous a group than any other.

868 People with disabilities face barriers in the New Zealand court system. This is concerning, because the Family Court has jurisdiction over the Protection of Personal and Property Rights Act 1986 and mental health matters, and matters relating to the protection of children, all of which can involve disability issues.

869 While there are common elements in these barriers to accessing the courts, they vary with the individual and their disability.[242]

NEW ZEALAND DISABILITY STRATEGY

870 The *New Zealand Disability Strategy* aims to make New Zealand more inclusive by removing barriers that prevent people with disabilities participating in, and contributing to, society.[243] The strategy is a framework to ensure that government departments and agencies consider people with disabilities in their decision making.[244]

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239 Office for Disability Issues, above n 236, 12–13.

240 Statistics New Zealand: <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+2001+Disability+Survey+Snapshot+1+ Key +Facts?open>.

241 Office for Disability Issues, above n 236, 12.

242 Many New Zealanders have more than one disability. Statistics New Zealand: <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+2001+Disability+Survey+Snapshot+1+Key+Facts?open>.

243 Office for Disability Issues, above n 236.

244 New Zealand Disability Strategy overview, on Office for Disability Issues website: <http://www. odi.govt.nz/nzds/>.

871 The strategy requires government agencies to treat people with disabilities with dignity and respect, to improve the information available to them and make it available in formats that suit their needs, and to ensure all government agencies and public services are accessible.[245]

Physical disabilities

872 In 2001, 15 per cent of the total adult population reported a physical disability.

873 It may not always be easy for people with physical disabilities to make their way around court buildings. They need parking spaces close to court buildings, accessible entranceways, easy access to interior facilities such as bathrooms and telephones, and manoeuvring space and appropriate courtroom seating. The Department for Courts intends pinpointing court accessibility issues and ensuring accessibility in all future construction.[246]

Hearing impairment

874 An estimated 223 500 New Zealand adults are deaf or have a hearing limitation not correctable by a hearing aid.[247]

875 It is vital that people involved in the Court process understand what is going on. Given the verbal nature of Court proceedings, this is particularly difficult for the hearing impaired.

876 The Hearing Association Incorporated highlighted several problems with current court provision for the hearing impaired. It noted that while some general courts have loop systems fitted, incompatible hearing aids cannot pick up the loop signal. Some courts have an infra-red listening system that requires the issue of a compatible headset, and not all the hearing impaired are aware of this useful facility. No amount of technology is of use to people who are profoundly deaf, and other kinds of assistance are required.

877 In New Zealand, sign language interpreters are most often used to help the deaf understand and communicate. Signing takes time,

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[245] Office for Disability Issues, above n 236.

[246] "Implementation Work Plans 1 July 2002–30 June 2003" from Office for Disability Issues website: <http://www.odi.govt.nz/resources/implementation/2003/implementation-workplans-department-for-courts.html#7>.

[247] Statistics New Zealand: <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+2001+New+Zealand+Disability+Survey+Snapshot+6+Sensory+Disabilities?open>.

and means the person who is deaf will always be somewhat behind verbal exchanges. Court staff and associated professionals, judges, lawyers, and witnesses need reminding to pace their speech to give the deaf person and the signer time to translate.

878 The Deaf Association of New Zealand pointed out that legal terms (even those commonly understood in English) can make it difficult for people who are deaf to understand what is going on and to take part.[248] Many words such as *custody* and *guardianship* do not have a New Zealand sign language equivalent. If there is no sign, the translator or person who is deaf must fingerspell the word. The extent to which the person understands what is going on often depends on their English comprehension, and English, as the Deaf Association points out, is a second language for many people who are deaf.

879 Problems can arise where family members or others interpret proceedings. For several reasons, family members can "edit" or misrepresent what the person who is deaf is saying, or what a witness has said. It would be preferable to offer people who are deaf independent sign interpreters.

880 To be truly effective, signers would have to be available through every stage of Family Court conciliation services and proceedings, intake interviews, counselling, mediation, and interviews with lawyers, report writers, social workers and counsel for the child.

881 Interpreters are not always available at short notice and hearings may have to be rescheduled. The need for a signer should be noted whenever advance appointments are made.

882 Because a person who is deaf focuses usually on the signer, they can miss non-verbal cues such as the body language and expressions of others in the courtroom. People who are deaf often miss appointments because of communication difficulties, and reduce their interaction with others, which decision makers sometimes interpret as lack of co-operation.

883 Barriers often stand between people who are deaf and other Court specialists. Psychologists, counsellors, and others unused to deaf culture and language can do people who are deaf a disservice by misinterpreting their expression and behaviour. Once an impression has formed it can colour the assessment, and possibly the final outcome. Any professional working with a person who is profoundly deaf should be familiar with deaf culture.

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[248] Submission 109.

884 The Deaf Association says the hearing impaired are disadvantaged in exercising parental custody and access rights. If their child is a hearing child and the other parent does not encourage him or her to learn sign language, the parent who is deaf and the child can quickly become alienated. This highlights the need for community-based support for hearing impaired parents and children.

885 If these factors are not recognised by others they can compromise the participation of the person who is deaf in proceedings and stress them further. We recommend that people who are deaf be entitled to have a support person present, to allow them to participate more confidently in the Court process.

Visual impairment

886 An estimated 81 500 New Zealand adults are visually impaired, and 7800 completely blind. The Royal New Zealand Foundation for the Blind highlighted difficulties that the visually impaired experience in accessing Court-related information and finding their way around courts.

887 The Foundation called for more information on the layout of court buildings, and that it be available in forms suitable for "print-disabled" people – audio and videocassettes, large print and Braille, and text-to-voice computer software.

888 In the courts themselves, better lighting, and large print signage can make a big difference to those less profoundly visually impaired. Surface indicator matting would keep visually impaired people safe by warning of potentially dangerous obstacles, such as stairs, escalators and building entrances.

Intellectual disability

889 Some 32 400 adults, or 1 per cent of the adult population, have an intellectual disability, and 23 700 need help from support people or organisations such as IHC to run their daily lives.[249]

890 Those with intellectual disabilities are often disadvantaged by being unaware of their rights, and may have difficulty communicating needs and concerns. It is well documented that people with intellectual disabilities are more likely to appear in court as both

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[249] Statistics New Zealand: <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+2001+New+Zealand+Disability+Survey: +Snapshot +8+Intellectual+Disabilities?open>.

defendants and victims of crime.[250] This is a worldwide pattern, often resulting from a combination of vulnerability and lack of community support.

891 Historically, people with intellectual disabilities have been subjected to Court processes to place them under the Court's jurisdiction so that they can be sterilised without their consent, and to extinguish their rights as parents so that their children can be adopted. This has raised concerns about how well the functional capacity of people with intellectual disabilities is understood and how well their rights are protected during the Court process.

892 Attending court can be traumatic for people with intellectual disabilities. Unfamiliar people and locations, delays (such as waiting several hours for a court appearance) and last-minute case rescheduling can exacerbate disorientation.

893 People with intellectual disabilities often need more time and help to absorb information, and ask and answer questions, and will have particular trouble following the sometimes complex language lawyers and judges use in court. Plain language pamphlets and videos can be useful, if others are there to read, explain, and answer questions.

894 It is important to create a structured environment with which people with intellectual disabilities can become familiar. This might include court visits before any appearances. They should be entitled to have someone present to support them throughout the conciliation or Court process.

895 One respondent was concerned that her autistic son was assessed by a section 29A report writer with no particular training or experience in assessing autistic children. She was also concerned that counsel for the child did not have a good understanding of autism. Intellectual disability is an umbrella term for a variety of problems and needs, and specialist assistance is desirable wherever possible.

896 Any professional – report writer, counsel for the child, counsellor, or mediator – who works closely with someone with an intellectual disability during Court or conciliation processes, or who must assess

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[250] "People with an Intellectual Disability – Giving Evidence in Court". Committee on Intellectual Disability and the Criminal Justice System, June 2000, on *Lawlink*, the website of the Criminal Law Review Division of the New South Wales Attorney General's Department: <http://www.lawlink.nsw.gov.au/clrd1.nsf/pages /dis_report_2>.

them, should have expertise in intellectual disability generally, and preferably in that particular type of disability.

Psychiatric disability

897 The term "psychiatrically disabled" refers to those people whose mental illness interferes with major life activities, such as learning, thinking and communicating.[251] Approximately 4 per cent, or 104 500 of adult New Zealanders have a psychiatric or psychological disability.[252]

898 Those suffering forms of mental illness such as anxiety and depressive disorders, and schizophrenia often face public prejudice and lack of understanding.

899 The Family Court has jurisdiction over mental health matters and therefore has more contact with, and experience of, working with the mentally ill than have other courts. Judges receive training about mental illness, and the Court often asks psychologists and psychiatrists to prepare assessments. Apart from the Court's specific mental health jurisdiction, people with psychiatric disabilities also use the Court to help them resolve family disputes.

900 Submitters did not make any negative comments about the Family Court's treatment of litigants who were psychiatrically disabled. Nevertheless, we believe it appropriate to recommend that Court staff are trained in the needs of those with psychiatric disabilities, and the community support services available.

OPTIONS FOR CHANGE

901 People's requirements vary depending on their circumstances and the nature and extent of their disability; some have multiple disabilities. This demands an individualised approach to assessing the needs of people with disabilities. Court professionals must not assume that a particular disability implies a particular level of capacity, or that one accommodation will meet the needs of others with a similar disability. There are, however, aspects common to all people with disabilities accessing the Court, and which call for a more general, holistic approach.

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[251] "Reasonable Accommodation for People with Psychiatric Disabilities: An Online Resource for Employers and Educators". Boston University Centre for Psychiatric Rehabilitation: <http://www.bu.edu/cpr/reasaccom/whatis-psych.html>.

[252] Statistics New Zealand: <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+2001+New+Zealand+Disability+Survey+Snapshot+9+Psychiatric+and+Psychological+Disabilities?open>.

Court staff disability awareness training

902 Other people's attitudes are the biggest barrier in the daily lives of many people with disabilities. Such attitudes are not always ill-intentioned, but result from lack of knowledge about disability issues and how to help. Court staff trained in, or knowledgeable about, the needs of those with intellectual disabilities can, for example, modify procedures to reduce anxiety, provide quiet areas, and consult local support agencies and crisis services.

903 Court personnel may need to be aware of the extra time it takes to read information to people with disabilities, and to help them complete forms or other documents.

904 Judges, Court staff, and professionals all need disability awareness training to be able to offer a good service to people with disabilities. This training would need to cover issues particular to certain disabilities, while emphasising the diversity of disabilities and individual needs. It should also include the scope and nature of the means of addressing these issues.

905 Family Court-affiliated professionals, such as counsellors, social workers and, in particular, report writers, should, where possible, be expert in the particular disability of the person they are working with.

Recommendations

Judges, Court staff, and all professionals providing Family Court services should have disability awareness training.

Report writers should, where possible, be expert in the disability of the person they are assessing.

Better information for people with disabilities

906 Information about the law, legal and conciliation services, and the Family Court itself should be readily available. People with disabilities need more information on, for instance, building layout, in a form suitable for the visually impaired, and for the hearing impaired, written information on technological assistance. Forms that are regularly requested could be standardised in Braille. Notices and information about facilities and support services for people with disabilities at court should be advertised in Family Court buildings. Website information can be made more accessible to people with disabilities using currently available website disability scans.

Recommendation

Information must be provided in a variety of forms suitable for people with disabilities.

Scheduled hearing times

907 Long waits are particularly difficult for people with disabilities. They often depend on limited access public transport and the availability of support people, and may have strict medication schedules. For these reasons, Family Courts must arrange more flexible hearing times for those with disabilities.

Recommendation

Specific hearing times should be scheduled, wherever possible, for people with disabilities.

Expanding legal aid criteria

908 Many people with disabilities rely for representation in court on legal aid. Some respondents wanted legal aid extended to cater for the needs of people with disabilities; for example, they often need more time with a lawyer to participate fully in the Court process.

Recommendation

The legal aid ceiling should be raised to allow those with disabilities more time with their lawyers.

16
Self-represented litigants

OVERVIEW

909 THE LAW COMMISSION understands, from those working in the Court system and from litigants, that more people are choosing to represent themselves in the Family Court, and that their numbers are likely to go on increasing.[253]

910 This chapter discusses ways of improving information access for self-represented litigants. It also looks at overseas initiatives, at other forms of self-help, at unbundling, and at the role of judges and Court staff.

911 Reasons for not having legal representation given by submitters to the preliminary papers *Striking the Balance*[254] and *Family Court Dispute Resolution*[255] included:

- cost – there is a group of people who do not meet legal aid criteria but cannot afford a lawyer.[256] The Family Court of Australia found more than three-quarters of litigants interviewed said lack of funds was their main reason for self-representation;[257] most had limited assets and were not in paid work;[258]

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253 Law Commission *Striking the Balance: A Review of the New Zealand Court System* (NZLC PP51, 2002). This evidence is anecdotal; there are no statistics of the actual numbers involved. D Farrar "Litigants in Person – The Story So Far" (2001) 15 Australian Family Lawyer 4. At that time, the Australian Family Court had said that 38 per cent of parties in contested cases were unrepresented. This article also gives some US figures – for example, in 1990 in the Domestic Relations Court in a county in Arizona, 88 per cent were estimated to be self-representing, and in 52 per cent of cases both parties represented themselves.

254 Law Commission, above n 253.

255 Law Commission, above n 1.

256 Submission 15.

257 J Dewar, B Smith and C Banks *Litigants in Person in the Family Court of Australia*, *Report to the Family Court of Australia Research Report No 2* (Family Court of Australia, Canberra, 2000) para 4.5. A distrust of the legal profession was also cited as a main reason.

258 Dewar, Smith and Banks, above n 257, 5.5.

- educational disadvantage – the Australian study found a disproportionate number of self-represented litigants had limited formal education;
- lack of knowledge – not appreciating the difficulties of self-representation;
- lack of awareness of legal aid – not knowing about their right to legal aid or whom to contact for help;
- distrust of lawyers (associated with concerns about high fees) – lack of confidence in the legal profession;
- eagerness to represent themselves – because they have settled most matters amicably, or prefer to keep control, or believe they do not need a lawyer, or have dismissed a lawyer they thought was not helping them;
- shortage of lawyers – especially specialist lawyers; or being unable to find anyone to take their case (often a problem for the "vexatious" litigant).

912 Not all self-represented litigants are so by choice; some researchers characterise these as "unrepresented" litigants.[259]

Profile of self-represented litigants

913 Australian research shows that many self-represented litigants are disadvantaged by limited education and financial means.[260] United States research on the profile of the self-represented litigant supports this. A 1990 study of the impact of pro se filings on Maricopa County (Phoenix, Arizona) dissolution cases found that although self-represented litigants came from all walks of life and income brackets, the following people tended to self-represent:

- lower income;
- younger;
- less educated, particularly when correlated to income;
- blue collar workers, but only when correlated to income;
- people without children;
- those who do not own real estate.

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[259] See D Thompson and L Reierson "A Practicing Lawyer's Guide to the Self-represented" 19 CFLQ 529 and Family Law Council *Litigants in Person: A Report to the Attorney General* (Family Law Council, Barton ACT, Australia, 2000).

[260] See the Australian Law Reform Commission findings that the median age of self-represented applicants was 35 years. Some 42 per cent were not in paid employment; of those who were, the average weekly income was $492. Slightly more were male than female. Of respondents, the figures were very similar with 35 per cent not in paid employment and a slightly higher average income.

914 Half those interviewed said they decided to self-represent because they thought their case was "simple". Only 30 per cent said they could not afford a lawyer.

PROBLEMS OF SELF-REPRESENTATION

915 Self-representation poses problems – for the Court, the other party and litigants themselves.[261]

Problems for the Court

916 Self-represented litigants generally demand more time and resources from judges and Court staff than those represented by lawyers.[262] They have more questions about Court procedures, may be less organised in presenting their evidence and argument, and unaware of procedural steps and requirements.

917 Many self-represented litigants expect Court staff to help them bring their case; but legal advice is not a staff responsibility. It can be hard for staff to know where to draw the line between advice to self-litigants that is appropriate, and advice that exceeds their role and training.

918 Self-represented litigants require judges to take an active role in ensuring both parties benefit from a "level playing field", and that neither is disadvantaged by lack of legal representation.[263]

Problems for the other party

919 Proceedings involving self-represented litigants may be longer and more expensive for the other party (who is often paying for legal representation). Former partners may face aggressive, inappropriate, and irrelevant cross-examination, and see the Court as being more helpful to the unrepresented party. Cases that could have been settled had the other party been represented, often end up in court.

Problems for the self-represented litigant

920 Court appearances can be stressful for self-represented litigants, especially when they must cross-examine a former partner. It is

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[261] See Dewar, Smith and Banks, above n 257, para 1.4, and chapter 7 "Counselling".

[262] This was found to be the case in the Australian research by Dewar, Smith and Banks, above n 257, ch 10, 61.

[263] See R Pavone "Do Self-represented Litigants Receive a Fair Trial? The Challenge for the Family Court" (2002) 76 Law Inst Jnl 52, 55.

easy, in Family Court cases where emotions run high, to lose objectivity. Self-represented litigants may know little or nothing about the law, procedure, preparing a case, or appearing in court. They may be unaware of costs issues: when a party causes undue delay or unnecessary expense, the Court can make an order of costs against them. Self-represented litigants should made aware of this possibility.

921 Unrepresented litigants need clear, accessible information about the law, the Court system (procedure and etiquette), how to prepare their case (complete documents and forms) and respond to the other party's case, support services and alternative dispute resolution.[264] Some would clearly benefit from basic legal advice.

POSSIBLE SOLUTIONS

922 The best solution for self-represented litigants with complex cases who are not in this position by choice and have limited formal education is to make legal representation more widely available. For others, helping them help themselves may be best.

923 People representing themselves, by choice or default, need enough information to bring a case. Chapter 5 recommends making such information publicly available, and this would help self-litigants find out what the law is. Many, though, will need more help.

Unbundling legal services

924 Unbundling refers to providing legal services and support at the point in proceedings when they are most needed. It is based on the concept of a bundle of legal tasks for a proceeding, some of which a self-represented litigant can deal with, and some of which are best undertaken by a lawyer. The self-represented litigant still does some, or even most, of the work and retains control. Unbundling can reduce client costs, and the delays and inefficiencies of self-representation.

925 Because lawyers give only limited advice, there can be problems. This has prompted the United States to incorporate safeguards into legal professional rules, to protect lawyers providing unbundled legal services.

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[264] Compare Lord Woolf *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996).

926 Unbundling, a recent development in the United States, is being used in Canada, and is under consideration in New South Wales.[265] The Family Court of Australia Project mentioned below is exploring the unbundling of legal services,[266] and is consulting with legal aid commissions about further development.

AUSTRALIA

Self-represented litigants project

927 The Family Court of Australia recognises that many people using the Court will not be represented by lawyers, and is dealing with this by, amongst other things, commissioning research.[267] *Self-represented Litigants – A Challenge* (Self-represented Litigants (SRL) project) aims for a consistent national approach to providing litigants with sensible, effective, understandable services. It aims to improve Court practices, procedures, protocols, and forms by making them clear, consistent, and comprehensible to litigants of average ability.[268]

Australian local initiatives

928 The Family Court of Australia has also been collaborating with organisations such as community legal centres (CLCs) and Relationships Australia to improve self-represented litigant support.

929 These collaborations include the Family Court support programme in Dandenong (near Melbourne), the Brisbane registry link with CLC, and the integrated client services scheme in Parramatta, Sydney. The SRL project aims to institute existing initiatives like the Dandenong programme nationally, and to review the suitability and development of partnerships needed to ensure they operate efficiently.[269]

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[265] See <www.lawlink.nsw.gov.au/lpac.nsf/pages/unbundling>. This site contains a comprehensive discussion of the concept, how it can work in practice, the advantages and disadvantages to clients and to lawyers.

[266] Also known as "discrete task representation" or "limited scope representation" or "coaching".

[267] Dewar, Smith and Banks, above n 257.

[268] Brief of the SRL Project 25 September 2000 on the Family Court website <http: //www. familycourt.gov.au/litigants/html/brief.html>.

[269] See above n 268.

930 The Dandenong Family Court programme is a one-day-a-week service for self- represented litigants.[270] It aims to provide a better understanding of the Court process, and access to independent legal advice. The Registry manager says clients who attend are better prepared for court appearances: their documents are better prepared, and lawyers for the other party can negotiate with Dandenong programme staff rather than directly with the client.[271]

Improving existing Family Court services and facilities

931 The Family Court is working at becoming more welcoming, flexible, and personalised; for example, providing private facilities for sit-down discussions with Court staff, and more self-help facilities. Increased use of teleconferencing and video-conferencing have the potential to improve service access for rural clients.[272]

Brochures and publications

932 The Family Court has produced brochures and pamphlets explaining court procedure – *The Trial*, *Service of Documents* and *Appeals*. These explain, step by step, what can happen, in easy language, with bullet points, questions and answers, coloured borders and flow charts. All are available on the Family Court of Australia website.[273]

Website

933 The Family Court of Australia website has detailed information on how people can represent themselves.[274] Comprehensive material helps the self-represented litigant understand proceedings, and what is required of them. It has do-it-yourself kits for applying for a divorce, and applying for and defending a maintenance application, as well as how to draw up parenting plans and consent orders.

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[270] The programme has been run since 1999 by the Registry in conjunction with Monash University Family Law Assistance Program, Victoria Legal Aid, and the Victorian Court Network.

[271] Above n 268.

[272] See *Fair Go for All* a newsletter from the Family Court of Australia for self-represented litigants, (March 2002) 3.

[273] <http://www.familycourt.gov.au/litigants/brochures>.

[274] <http://www.familycourt.gov.au/litigants>.

934 Kits include all the forms necessary for such applications, along with information about case management, and how to prepare for a Family Court hearing.

Role of Family Court staff

935 The Litigants section of the website sets out a service charter delineating the standard of service and help people can expect from Court staff, and indicates the boundaries between help and advice.[275] The section's two pages describe what Court help litigants can and cannot expect:

> **We can** tell you what forms you may need to file for an application.
>
> **We can** provide you [with] contact details for locally available free legal services (legal aid, community legal service centres), the Law Society and the Family Law Hotline.
>
> **We can** advise you of mediation/counselling services available within the Court and with agencies in the community.
>
> **We can** briefly explain and answer questions about how the Court works, its practices and procedures.
>
> **We can** give you blank copies of Court forms if you wish to proceed with an application or give you details of the Courts website. In some Registries we can provide you with access to the website.
>
> **We can** provide Court lists and information on how to get a case listed.
>
> **We can** give you information about how your case is managed and the processes involved in each step along the pathway to a trial.
>
> **We can** usually answer questions about court requirements such as when certain documents need to be returned to the Court.
>
> **We can** give you an estimated time of when your matter is likely to proceed to a trial.
>
> **We can** advise you how to go about modifying an existing order.
>
> **We cannot** give you legal advice.
>
> **We cannot** interpret orders made by a Judicial Officer.
>
> **We cannot** tell you what the decision of the Court will be or give you an opinion about what it might be.
>
> **We cannot** tell you whether or not you should bring your case to Court. We strongly advise you to seek legal advice before proceeding as to your rights, especially concerning children and property.

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[275] <http://www.familycourt.gov.au/brochures/welcome01.pdf>.

We cannot recommend a certain lawyer to act on your behalf.

We cannot tell you what words to use in your court papers nor whether you have put forward enough information. However, we can check your papers for completeness (for example, we check for signatures, and that attachments are present and signed by an authorised person within your state).

We cannot tell you what to say in court.

We cannot let you communicate with the Judge, other than at trial.

We cannot change an order once it has been made by the Court. The only way that may be considered is by you making another application to the Court.

We cannot enforce an order made by the Court unless you file an application for enforcement.

Judges

936 The Full Court of the Family Court of Australia has guidelines for dealing with matters involving self-represented litigants;[276] these have been criticised for being unrealistic.[277]

The other party's lawyer

937 The New South Wales Bar Association has guidelines for barristers dealing with self-represented litigants.[278] These are a useful summary of issues arising for lawyers who deal with unrepresented parties, and suggest possible strategies.

938 New Zealand has explicit rules for lawyers facing unrepresented parties in Court disputes; they are obliged to treat the other side with courtesy and fairness.[279]

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[276] In *Johnson* (1997) FLC 92–764; 22 Fam LR 141 revised in *Re F; Litigants In Person Guidelines* (2001) FLC 93–072 noting that guidelines must not compromise the neutrality of the Court. "Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality."

[277] See Dewar, Smith and Banks, above n 257, ch 10, 60. As far as Court staff are concerned, this need has to some extent been addressed in Australia: see above n 275.

[278] <http://www.nswbar.asn.au/Professional/Publications/Otherpubs/selfrepresented16_10.pdf>.

[279] Rule 7.01 New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (6th edn, Wellington, 2000).

CANADA

939 Ontario has produced the web-based *A Guide to Procedures in the Ontario Court of Justice*, a step-by-step guide to the Court process.[280] It explains mediation, how to start proceedings, and respond once proceedings have been issued, first court dates, case conferences, and motions, as well as general information sheets about serving and filing documents, and going to court.

940 The Unified Family Court of Ontario in Hamilton has a well developed and very well resourced self-help centre.[281] A facilitator fills out forms, and a lawyer gives a minimum of 20 minutes advice to all those using the centre. A referral co-ordinator refers people to counselling and other support services. The centre has videos, self-help guides and other information.

UNITED STATES

Superior Court of Arizona, Maricopa County Self-help Centre

941 The first US self-help centre was the Maricopa County Self-help Centre, in Phoenix, Arizona.[282] A third of all cases in Maricopa involve two self-represented litigants, and another third have one. The Court has information packs dealing with almost every kind of litigation undertaken in court. Each pack covers a stage of the process, and provides a flow chart to help litigants follow these stages.

942 The Centre is staffed by counter clerks and is extensively used. Staff advise litigants only generally on completing forms, and not on how a particular entry should be completed. Information is also available on the Internet.[283]

943 This information includes lists of lawyers, mediators, and other community services, a glossary of Court-related terms, a description of the Court and tips on self-representation (dress, courtesy,

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[280] Ministry of the Attorney General *A Guide to Procedures in the Ontario Court of Justice* (Queen's Printer for Ontario, Toronto, revised June 2000).

[281] Hon Justice I Coleman "Self-help Centres in the United States and Canada", a report of a study visit to Canada and the United States, 14 January–14 February 2000, printed at <http://www. familycourt.gov.au/papers>.

[282] Discussed in above n 281, by Justice Coleman, 4.

[283] See <http://www.superiorcourt.maricopa.gov//ssc>.

[284] <http://www.superiorcourt.maricopa.gov//ssc//forms>.

etiquette, punctuality, the importance of preparation). The forms section of the website helps users select and fill out appropriate forms.[284]

944 The Centre is Court-funded, but because it employs non-legal and paralegal staff, is not unduly expensive. Those in private practice are supportive of the Centre and unbundled legal services have increased as a consequence.[285]

Superior Court of Washington, Seattle

945 The Self-help Centre at the Superior Court of Washington is run by a paralegal who advises which forms to use and how to use them, but not on legal matters. It has videos on aspects of Court procedure. Having a paralegal check forms for completeness helps Court staff, and judges report the Centre's positive impact.[286]

Superior Court of California, Los Angeles

946 The Superior Court of California hears many cases and has many self-represented litigants. The Los Angeles Self-help Centre assists litigants in preparing and conducting their own cases. It has a facilitator – a lawyer – who occupies Court-provided premises, but the Centre is federally funded. The facilitator advises parties of their options and obligations, and helps them prepare court documents, but does not offer legal advice or representation.

RECOMMENDATIONS

947 Our recommendations fall into two categories: providing information, and helping and advising the self-represented litigant. Merely providing information will not help some people, no matter how clear and accessible it is. We urge research into the characteristics of New Zealand self-represented litigants, so we can target resources to different categories of self-represented litigant and various types of proceedings.

Providing information

948 The Family Court judges' submission suggested an 0800 telephone number to connect a self-represented litigant to an advice/information service operating outside office hours.[287] This could

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[285] Coleman, above n 281, 5. (Actually, Justice Coleman referred to "unbungled" legal services – we assume this was just a typographic error!)

[286] Coleman, above n 281, 2.

[287] Submission 112.

possibly be linked to a local self-help centre or be a separate service, perhaps run pro bono by a group of local family law solicitors.

Recommendations

The Department for Courts should develop self-help kits for self-represented litigants, with step-by-step instructions, diagrams and flow-charts, documents and forms. These should cover as many aspects of proceedings as possible – a separate kit for each.

Self-help kits should be available on the Family Court website.

Videos to help self-represented litigants should be produced.

Consideration should be given to an 0800 telephone number for information, advice and referrals to community services and lawyers.

Help and advice for self-represented litigants

949 We recommend investigating the unbundling of legal services so some litigants have the option of partly or mostly representing themselves, but can also get legal advice when they need it. There should be research on how this works in other jurisdictions, and further discussions between the New Zealand Law Society and the Legal Services Agency.

Recommendation

The New Zealand Law Society and the Legal Services Agency should investigate the unbundling of legal services.

950 The Department for Courts should investigate litigant self-help services. These could be inexpensively operated within Family Courts by Court staff who can differentiate between generally helping locate information and fill in forms, and specific legal advice. Such staff need not be legally qualified, in fact it might be best if they were not.

951 The centre could be simply a private room with a welcoming atmosphere where the facilitator or other staff can talk to a self-

represented litigant. It would need a brochure library, and as much other helpful information as possible, including videos, and maybe an Internet connection. The centre should link with other community centres and organisations (in particular, local community legal centres) that could help self-represented litigants. It should have an extensive referral network, and lists of useful resources. The Australian integrated programmes (in Dandenong, Brisbane and Parramatta) are good models of such partnerships.

Recommendation

The Department for Courts should consider setting up self-help centres at Family Courts.

17
Gender bias

OVERVIEW

952 THE FAMILY COURT has been criticised for gender bias in its processes and its application of law. Judges, Court staff, counsellors, lawyers, psychologists and counsel for the child are all alleged to exhibit this bias.

953 We are concerned by perceptions that the Court demonstrates a "pro-feminist, anti-male bias", which undermines Court integrity.[288] Justice must not only be done, but must be seen to be done. The closed, private nature of Family Court proceedings has exacerbated these perceptions of bias.

954 From a young age, we are given messages about gender roles and expectations. Judges, professionals, and Court staff bring assumptions to their work, and regardless of how committed they are to fairness and impartiality, unconscious gender stereotypes are likely to affect their decision making.

955 This chapter discusses problems in defining and identifying gender bias, and outlines key areas of concern about child custody and domestic violence procedures.

956 The report's terms of reference preclude us from recommending changes to the substantive law; our recommendations are restricted to procedural changes. These centre on education and equity training for all Family Court personnel, to promote awareness of gender issues and stereotypes.

THE THEORY OF GENDER BIAS

957 Gender bias can occur in the justice system when laws, processes and decisions advantage one gender over the other. It happens when conciliators and decision makers refer inappropriately to gender during Court processes, and base their actions on stereotypes about the nature and role of men and women.

[288] Submission 13.

958 Although there has been little research into gender bias in New Zealand, overseas studies have concluded it is prevalent in courts at all levels.[289]

959 Men have initiated much of the recent New Zealand debate on gender bias, but most research over the last ten years has been into the effects of gender bias on women.

960 In 1993, Dr Sheilah Martin, Dean of the University of Calgary, identified five commonly alleged sources of gender bias. While conceding that bias can arise in many situations and can assume a number of forms, she maintained that it typically occurs where decision makers:

- fail to be sensitive to the differing perspectives of men and women;
- apply double standards or rely on gender stereotypes in making decisions;
- fail to recognise harms that are done to one group only;
- apply laws or make decisions that exclude people on grounds of gender;
- are gender-blind to gender-specific realities;
- rely on gender-defined norms;
- make sexist comments.[290]

961 In *Women's Access to Legal Services*, Joanne Morris outlined the three classical approaches to equality that inform construction of law and policy:

- "formal equality" – dictates identical treatment of men and women as if there were no relevant, pre-existing differences in their circumstances;
- "differences approach" – justifies treating men and women differently on the basis of their biological and social differences;

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[289] In the United States, 42 of the 50 States had conducted inquiries into gender bias through judiciary-led taskforces by 2000. Canada and Australia have also carried out inquiries, including the *Report of the Law Society of British Columbia Gender Bias Committee* (Law Society of British Columbia, Vancouver BC, 1992); Federal/Provincial/Territorial Working Group of Attorneys-General Officials *Gender Equality in the Canadian Justice System* (Department of Justice, Ottawa, 1992); Senate Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* (Canberra, ACT, 1994); Chief Justice's Taskforce on Gender Bias *Report of Chief Justice's Taskforce on Gender Bias* (The Taskforce, Perth, 1994).

[290] J Morris "Women's Experiences of the Justice System" (1997) 27 VUWLR 649, 662.

- "substantive equality" – recognises that achieving equality depends on implementing policies and laws that will produce equal outcomes for men and women, possibly by treating them differently.[291]

962 There can be a conflict in the Family Court, where children's interests are paramount, between achieving substantive equality for men and women and promoting the best interests of children.

963 We keep these issues in mind as we consider criticisms of the Court.

ALLEGED BIAS IN CUSTODY AND ACCESS DECISIONS

964 Custody and access disputes have given rise to accusations of bias. Men and women have argued that they were disadvantaged by Court processes, and their cases determined arbitrarily. When making a custody and access order under the Guardianship Act 1968, a judge must put the child's welfare first. The test is necessarily flexible. It gives the judge wide discretion to determine the child's best interests, and requires the judge to balance competing factors.[292]

Allegations of bias against men

965 Male interest groups have argued that bias permeates the system. The Law Commission received submissions alleging that in custody and access proceedings, judges, lawyers, psychologists, and Court staff all favour mothers. One submission stated:

> For a couple of decades now, the feminist policies and doctrines of removing the father from the family unit and kicking him while he's down have given us a succession of solo-mothers raising fatherless

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[291] Law Commission *Women's Access to Legal Services* (NZLC, SP1, Wellington, 1999) 8–9.

[292] In *D v W* (1995) 13 FRNZ 336, Fisher J set out a summary list of non-exhaustive factors to be considered in determining the "best interests" of the child:

a) strength of existing and future bonding;
b) parenting attitudes and abilities;
c) availability for, and commitment to, quality time with the child;
d) support for continued relationship with the other spouse;
e) security and stability of home environment;
f) availability and suitability of role models;
g) positive or negative effects of wider family;
h) material welfare;
i) stimulation and new experiences;
j) educational opportunity;
k) wishes of the child.

> children. There can be little doubt that this is linked to … the disastrous increase in youth crime; drug and alcohol use and abuse; lack of respect for authority; lack of direction and youth unemployment; lack of purpose and youth suicide.[293]

And earlier:

> The Family Court is not, of course, the only place where the bias against men exists. But it is the one place where, since it deals in justice, law and order, one would not expect to find gender discrimination and a disregard for the human rights of parents and children.

966 In 1998, the Office of the Commissioner for Children reported that 41 per cent of the Family Court's clients surveyed believed fathers were discriminated against in proceedings, while 34 per cent were unsure, and 25 per cent disagreed.[294]

967 Fathers' groups argue that, in custody and access matters, it is assumed that women are natural nurturers, better equipped to care for children, and that this influences the outcome of such disputes. One commentator writes:

> Both men and women suffer from stereotyping in custody disputes … Many judges, domestic relations commissioners, family services officers, and custody evaluators have an underlying sense that women belong in the domestic sphere of the home, providing care to young and old, whereas men belong in the public sphere of the paid work world, bringing home the bacon but never cooking it.[295]

968 Certainly, there is a perception that the contributions of fathers to parenting are often limited to that of provider and breadwinner. Overseas studies report that judges often give little attention to fathers' financial and non-financial contributions to parenting. They focus instead on the mother's personal skills and attributes, which has led some commentators to question whether custody grants to men are largely won by default. Both Australian and US taskforces have noted that fathers tend to "win" custody where they argue that a mother ought *not* to be awarded custody, rather than on the positive basis of their own parenting ability.[296]

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[293] Submission 25.

[294] Office of the Commissioner for Children *Fathers Who Care: Partners in Parenting – Focus on Fathers* (Wellington, 1998).

[295] L Hecht Schafran "Gender Bias in Family Courts: Why Prejudice Permeates the Process" (1994) 17-SUM Fam Advoc 22, 26.

[296] L Moloney "Do Fathers 'Win' or do Mothers 'Lose'? A Preliminary Analysis of Closely Contested Parenting Judgments in the Family Court of Australia" (2001) 15 Int J Law, Policy and the Family 363, 373.

969 There is concern that a perceived preference for the traditional primary caregiver disadvantages men. Focus on past childcare arrangements ignores the fact that both parents' schedules are likely to change after separation, and this narrow focus can preclude consideration of future shared parenting.

970 As we heard from one female practitioner, "the concept of the 'primary caregiver' [may be] gender neutral but the social reality is that the majority of the primary caregivers are women".[297] This can distance non-custodial parents from their children. Both practitioners and fathers' groups are concerned that delays between separation and adjudication can give rise to a status quo that is difficult for non-custodians to challenge.

Allegations of bias against women

971 Women, on the other hand, argue they are disadvantaged by gender stereotypes. Several overseas commentaries claim that social stereotypes prejudice women whose lifestyles do not conform to traditional gender roles. Another commentator, Schwarz, maintains there is an assumption that "a career woman is a less competent parent", and that such assumptions underlie judicial decision making.[298]

972 There is a perception that women's behaviour is assessed differently from men's. One common view is that judges sometimes apply double standards in assessing men and women's behaviour and contributions to childcare. Feminist writers maintain that men's parenting efforts are rated more highly than women's, because women are expected to be natural caregivers.[299] A respondent in a Minnesota survey of gender fairness commented that while mothers are expected to take most responsibility for childcare in a relationship:

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[297] Submission 20.

[298] ES Schwarz "When 'neutral' doesn't really mean 'neutral': Louisiana's child custody laws – an attempt to erase gender bias in the name of neutrality" (1996) 42 Loyola Law Review 365, 381. In *Bezou v Bezou* 436 So 2d 592, 594, the Court, in awarding custody to the father, reasoned that although both parties were fit, it was significant that the mother was a professional woman who would be busy with her career and not "a traditional housewife available to her child all hours of the day". Likewise, in *Cooley v Cooley* 411 So 2d 750, 752 (La App 3d Cir 1982) the Court noted that the mother's housekeeping practices left "something to be desired" and that she was a young woman trying to establish herself in her business career. On this basis custody was awarded to the father who was engaged in full-time work 12 hours per day.

> … [f]athers seem to get more weight given to their direct care activities … Mothers may do 90 – 95 per cent of the actual caretaking, but if a father does anything at all he often gets credit for more than his five – 10 per cent.[300]

973 Similarly, it is argued that fathers are often advantaged in custody and access proceedings by the assumption that children will be better provided for in homes where the woman is a fulltime homemaker. Hecht Schafran contends that a father's fulltime employment is not usually considered a negative factor. Men have the advantage of easier access to financial resources, and may gain custody over a fulltime employed mother when they re-partner, and can provide a "mother-substitute".[301]

974 We received submissions from women alleging they had been negatively affected by gender bias and stereotypes. One, for example, reported that she felt disadvantaged when her husband was visited at home and had family support during the section 29A psychologist's investigation. She alleged this was unfair, because she was unsupported during the process. She believed family support enhanced her husband's position in their case.[302]

DOMESTIC VIOLENCE

975 Domestic violence was another focus of gender bias allegations. We were heartened to hear that the Court is responding quickly to allegations of physical abuse. From our consultation with community groups it appears that where applications are made for protection orders in cases of physical violence, judges, Court staff, and lawyers are treating allegations seriously.[303]

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299 Hecht Schafran, above n 295, 26. See also J Horne "The Brady Bunch and Other Fictions: How Courts Decide Custody Disputes Involving Remarried Parents" (1993) 45 Stan L Rev 2073, 2083.

300 Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report 24 (1989) cited in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (2 edn, LexisNexis Butterworths, Wellington, 2002) 279–280.

301 Hecht Schafran, above n 295, 26–27.

302 Submission 12.

303 The Family Law Section reports that without-notice applications appear to be being processed quickly around the country. While reports as to processing times vary from between two to 24 hours, it is expected that applications without notice will be dealt with within 24 hours.

See: Family Law Section *Domestic Violence Act 1995: Report to the Family Law Section Executive from the Domestic Violence Special Project Committee* (New Zealand Law Society, Wellington, October 1998) 12.

976 An average 140 applications for protection orders are made throughout New Zealand every week. Nearly 85 per cent of all without-notice applications result in a temporary order, while 50 per cent go on to become final orders.[304]

977 Some have expressed concern that where there is psychological but not physical abuse, the Court will rarely grant without-notice protection orders. Community workers claim this is dangerous, prompting applicants to withdraw applications for fear of retaliation.[305] They say this exposes victims to increased risk, because abuse typically escalates at separation, and psychological violence can be a prelude to physical violence.

978 This view was reflected in the experiences of women surveyed for a Massey University master's thesis into Court attitudes to domestic violence.[306] One applicant reported that the judge "lacked understanding [of] psychological abuse", and was "intimidating, condescending and patronising". While the judge did grant a protection order in her favour, he did so in a way that trivialised her experiences and minimised her ex-partner's behaviour. Her experiences echo those of other women surveyed.

979 Cost was another key issue raised in connection with protection order applications. Earlier this year, the Wellington Community Law Centre surveyed practitioners and community agencies about the effectiveness of the Domestic Violence Act 1995. It found cost to be a significant barrier to victims gaining protection. These costs increased when lawyers were retained to help with the application process, and this was criticised as deterring clients from accessing the Court.[307]

980 Men's groups have criticised Family Court attitudes to domestic violence, in particular, for failing to recognise the incidence of male-targeted harm. They argue that Family Court staff and professionals are unsympathetic to male victims' needs, and there is no discussion of the abuse that men suffer. One male practitioner commented:

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[304] Family Law Section, above n 303.

[305] Wellington Community Law Centre "Is the Domestic Violence Act Meeting its Objects?" (August 2002) *Council Brief* Wellington 6.

[306] R Pond, "Women's Experiences of Domestic Violence and the Legal System" (Massey University Masters Thesis, 2002).

[307] The Wellington Community Law Centre notes that despite the Domestic Violence Act 1995 being drafted to envisage the possibility of self-representation, the length and complexity of the application forms often means clients will need to obtain legal advice.

> In my view, male victims of domestic violence are … woefully neglected under the present system. I believe that there is not enough research into this area of the human experience and such a concept is generally viewed with a great deal of scepticism by the majority of the public, particularly if the female abuser has also made allegations of domestic violence herself … If male-to-female violence is generally hidden in society, it is even more so for female-to-male violence.

981 His views were reflected in a submission to the Commission:

> I spent the last year of my marriage living in terror of the woman I was then married to. Her abuse towards me included attacking me with hot fluids, household ornaments, kitchen implements … Fearing for my life … I approached the Family Court … I subsequently spelt out all of the above to Family Court lawyers, [c]ourt-appointed counsellors, a judge, psychologists and the [c]ourt [c]o-ordinator. Not one of them acknowledged my experience. One lawyer even had the crass insensitivity to ask me what I'd done to "deserve" such beating by my wife! The whole issue of female perpetration of spousal abuse was swept under the carpet as I met with the wall of frightening denial such as I'd never experienced before.[308]

982 Men's groups claim that even though the Domestic Violence Act 1995 is drafted in gender-neutral language, it is not used to protect men. Court publications and programmes are oriented towards male perpetration of abuse, and they claim the attitudes of Court staff belittle men who speak out. There is a perception that men should be able to defend themselves from female abuse, and that male-targeted harm is less serious.

983 The Court has also been criticised by men's groups for its readiness to grant protection orders on a without-notice basis, and for the impact this can have on custody and access issues. Under section 16B of the Guardianship Act 1968, a parent who has in the past used violence on his partner, will be prevented from having custody or unsupervised access until an assessment is made that the child will be safe. Some critics allege this policy damages the father–child relationship:

> Too often in attempting the impossible goal to eliminate all risk, judges have denied or severely restricted access to fathers who have strong psychological relationships with their children and the potential for positive parenting … Supervised access at authorised centres are seen as safe and easy options in many cases. The restrictions that this form of access (often unjustified) places on many children and fathers has the effect of damaging or destroying the relationship. Too often other safe and suitable alternatives are rejected by the applicant who has

[308] Submission 13.

the ultimate control over these arrangements under section 16B of the Guardianship Act.[309]

984 Commentators argue that without-notice applications made inappropriately or on the basis of insufficient evidence put an undue burden on the respondent to refute claims. They say there is often delay (and great expense) for respondents who want to defend the matter, and the delay can damage the parent–child relationship and influence the ultimate outcome of custody proceedings. Critics believe alternative supervised access providers are insufficiently resourced, and allege that some supervised access centres are not "father-friendly", or are inappropriate for minority groups.[310]

985 The Law Commission received submissions alleging that women were making strategic use of protection orders to prejudice fathers' positions in custody disputes. We have found no empirical or qualitative evidence to substantiate these allegations.[311]

986 The National Survey of Crime Victims recorded in 1996 that 15.3 per cent of women had experienced some sort of partner abuse in their lifetime. This compared with only 7.3 per cent of men, 5.2 per cent of whom claimed a partner had subjected them to force or violence.[312]

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309 Don Rowlands, Christchurch Caring Fathers Support and Education Group.

310 Don Rowlands of the Christchurch Caring Fathers Support and Education Group notes that Barnados is the only access centre approved officially by the Family Court. The Court does not refer respondents to alternative marae-based programmes such as Rehua (Christchurch) or the Father and Child Trust (Christchurch). He implies that as only one of the nine supervisors of the Barnados Access Centre in Christchurch is male, this is a "father-unfriendly" environment.

311 As a safeguard, lawyers must provide a certificate in their own name declaring the contents of the application to be true, and that the order is one that ought to be made (Rule 26 of the Domestic Violence Rules 1996). The evidence of applicants is also subject to scrutiny by judges and advocates who might be assisting the making of the order (such as Women's Refuge advocates).

It is of note also that in *H v H* [1997] NZFLR 869, 876, Judge Mahony commented that in cases where solicitors are not prepared to issue a R26 certificate in support of an ex parte application, the proper course for the solicitor will be to decline the work and refer clients elsewhere. This recognises the special ethical obligation imposed on solicitors to test the contents of their clients' affidavits.

312 Statistics collated by the Ministry of Justice also show a higher proportion of male-perpetrated homicide. In 2001, 20 of the 21 persons convicted of murder and sentenced to life imprisonment were male. In 2000, 24 males were convicted and five females, and in 1999, 23 males were convicted and no females. Research and Evaluation Unit, Ministry of Justice.

987 It could be argued that the fact that the Court is granting more protection orders in favour of women reflects the higher incidence of partner abuse by men. It might also mean that female-initiated violence is less frequent and serious.[313] This is not to say there are no serious instances of female-initiated violence against men, and that the Court should trivialise or discount instances of it.

988 Where there are proper grounds for granting a protection order, we support the status quo that limits the perpetrator's access to the child until domestic violence issues are resolved. The argument that those who have been violent to a partner but not to the children should be allowed unrestricted access fails to recognise the trauma experienced by children who witness violence.

989 There is, however, a need to distinguish the circumstances in which violence occurred. Violence that has flared on one occasion as a result of the stress of separation differs from endemic violence throughout the relationship, and might not have the same implications for children.

990 The Commission considers that response times for dealing with protection and custody issues, where orders were originally made without notice, should be improved.[314]

ECONOMIC INEQUALITY AND ACCESS TO THE COURT

991 It is often alleged that economic disparity is attributable to gender bias. Parties may not enjoy the same quality of legal representation or may be excluded from the legal process altogether.[315]

992 Men on low incomes allege that ex-partners who get legal aid have an advantage because the men cannot afford to mount an equally funded defence. Because legal aid is a loan, the advantage is only bestowed when the other party has no assets from which to repay the legal aid.

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[313] To obtain a protection order, the applicant must show that there has been a history of violence and that the order is *necessary* for their protection (s14(11) Domestic Violence Act 1995). This could be one of the reasons why proportionately fewer protection orders are granted to men, given that in many cases the gravity of harm experienced by men will be less severe.

[314] See chapter 10 "Court Process".

[315] The costs of litigation may be especially burdensome where proceedings are used maliciously to financially cripple the other party. This is contended particularly in the context of ongoing and protracted custody and access proceedings.

993 A Law Commission paper on women's access to legal services identified barriers to access that included:

- the high cost of private lawyers' legal services;
- lack of long-term funding security for community-based legal services;
- inadequate resourcing of the Legal Services Board;
- erosion of eligibility for civil legal aid;
- inadequate public awareness of the civil legal aid scheme, and New Zealanders' uneven access to legal aid lawyers;
- the unavailability of legal aid for advice unconnected with litigation;
- inequity in the capital test governing eligibility for aid.[316]

994 It is clear that both men and women are affected by the economic aspects of litigation. But, given the statistically lower economic position of women, largely as a result of the low paid and unpaid work that women do, financial issues are more often a factor for them. Research for the Legal Services Board in 1994 and 1995 found 70 per cent of legal aid recipients were women; 78 per cent of these were unemployed or beneficiaries with dependents.[317]

PERCEPTIONS VERSUS FACTS: DIFFICULTIES IN DETECTING BIAS

The exercise of discretion

995 The Law Commission recognises the difficulties of identifying bias in Court processes. Bias can be difficult to prove, particularly where decision makers exercise discretion. Several factors can influence the outcome of a case, and it can be hard to distinguish occasions when bias is operating from those when a decision has a proper basis.

996 This point is clearly demonstrated in the custody and access area. A judge in a custody and access case exercises wide discretion, and balances a range of competing factors. Unless a judge refers expressly to gender values or stereotypes, it can be impossible to distinguish bias from legitimate factors.

997 Mere perceptions of bias do not prove gender inequity. In the absence of objective proof, litigants tend to perceive bias wherever they have been dissatisfied with their court experiences. An

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316 Law Commission, above n 291, 105.

317 Law Commission, above n 291, 104.

Australian Family Court study of clients' perceptions of litigation found bias was often alleged in cases where there were high costs or delay, or where litigants did not get the results they wanted.[318]

Lack of empirical research into Court gender bias

998 Lack of research makes it hard to identify bias in the Court. Allegations are often made on the basis of anecdotal evidence that fails to identify systemic bias. Where research is cited, its design is criticised and its credibility challenged.

Self-fulfilling prophecies

999 *Perceptions* of bias can certainly impact on the outcome of cases. As Warshak warns,[319] it cannot be assumed that statistics showing mothers are awarded custody more often than fathers are evidence of actual judicial bias.

1000 Where, however, there is a perception that the law favours one gender over the other, it can affect the number and type of cases entering the Court. Fathers may not challenge custody if they believe they have a weak case,[320] while men with stronger cases may go to court more often, resulting in disproportionately more paternal awards where custody is challenged.[321]

1001 Men may also be reluctant to apply for custody because of what one New Zealand commentator calls "the confidence gap" in men's parenting. Rex McCann has commented on the lack of parenting options open to men, and the enduring expectation that men will be providers rather than children's caregivers.[322]

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[318] R Hunter "Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation" (2002) AJFL LEXIS 2, 18–19.

[319] R Warshak "Gender Bias in Child Custody Decisions" (1996) 34 Family and Conciliation Courts Review 396, 401.

[320] See R Erickson and G Babcock "Men and Family Law: From Patriarchy to Partnership" (1995) 21 Marriage and Family Review 31. These commentators note that where there is a belief that the Court is biased towards women, US attorneys commonly discourage male clients from challenging applications by advising them that their chance of success will be low.

[321] See Horne above n 299, 2086.

[322] R McCann (Speech to the New Zealand Law Society Family Court Conference, Wellington, August 2002).

1002 McCann argues that men's domestic participation is minimised, both by self-imposed ideas of masculinity, and by "maternal gatekeeping". This concept maintains the traditional gender division of domestic labour, and preserves women's dominance in the home.[323] He says this can affect men's willingness to take a more active role in their children's lives, and their ability to share in parenting.

1003 We accept that this "confidence gap" exists, and that while a relationship lasts, tasks are often divided along traditional gender lines.[324] If, for whatever reason, a father has not engaged in intimately nurturing his children before separation, the children's needs are more likely to be met afterwards by the mother, who has been so engaged.

1004 Encouraging men to "father" effectively is a challenge for men and society, and should occur before separation, not when the Court is asked to settle custody. Continuity of care and the extent to which the child is bonded with the parent are important factors in assessing what custodial arrangements will be in the child's best interests after separation. Judges, psychologists, and counsel for the child take into account each parent's ability to care for the child.

1005 Many men are caring and involved fathers, and many women continue their careers during marriage. For those couples, the transition to being separated parents may be less stressful, and both parents are more likely to see advantages in shared parenting.

WAYS OF COMBATING INEQUITY

1006 The Law Commission's current terms of reference cover Family Court procedures and processes. We suggest changes that might address perceptions of systemic unfairness.

Court culture

1007 Twenty years ago, most judges, Court staff, and lawyers were men. Women criticised processes they believed to be based on a male norm.

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[323] See also A Hawkins and S Allen "Maternal Gatekeeping: Mothers' Beliefs and Behaviors That Inhibit Greater Father Involvement in Family Work" (1999) 61 Journal of Marriage and the Family 199–212.

[324] The *New Zealand Time Use Survey* recorded that on average Māori women perform 30.9 hours and non-Māori women 30.6 hours per week on unpaid household tasks. This compared with 16.3 hours spent by Māori men and 17.4 hours spent by non-Māori men. Ministry of Women's Affairs *Gender Disparities Report Draft Report* (Ministry of Women's Affairs, Wellington, 2001) 40.

1008 Recent gender equity training has resulted in the almost complete disappearance of sexist language in court, and women work as judges, lawyers and other Court associated professionals. Court conciliation services are dominated by women, with currently only two of 30 Family Court co-ordinators being male, and 94 of 123 Family Court counsellors female. There are roughly equal numbers of male and female lawyers. Some 398 of the 762 members of the New Zealand Law Society's Family Law Section are women.[325] Twelve of 37 Family Court judges are women.[326]

1009 Men should be encouraged to seek employment as counsellors and Family Court co-ordinators. They might be more likely to do so if these positions were paid more. There should also be more women judges. In spite of equal numbers of men and women lawyers practising in the Family Court, trends indicate a risk of fewer men doing so in future.

1010 The Court must check what messages it sends out about gender. Men's groups complain that Family Court publications disregard men's experiences, and that brochures and posters about domestic violence ignore women's violence against men. We recommend redressing this imbalance by ensuring Court publications present the perspectives of both genders.

1011 Specialist services must also address the needs of both genders, particularly domestic violence and parenting programmes.

Recommendations

Efforts should be made to encourage equal numbers of qualified men and women among those employed in, or contracted to, the Family Court.

Specialist services should be provided to address men's and women's gender-specific needs. We particularly recommend post-separation parenting programmes for fathers.

Court publications should be revised to ensure they represent men's and women's experiences.

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[325] These figures include full and associate members of the New Zealand Law Society's Family Law Section only. We recognise that other lawyers may practise in the Family Court who are not members of the Family Law Section.

[326] Figures reflect the gender composition of judges in the Family Court as at 1 November 2002.

Education

1012 A national judicial seminar on gender equity was held in 1997 to promote awareness of issues affecting women, and their experiences of the Court system.

1013 The two-day seminar was chaired by the Hon Dame Silvia Cartwright and the Hon Chief Justice Sir Thomas Eichelbaum. One hundred and thirty-nine judges attended – 36 of the 42 permanent High Court appointees, and 103 of the 114 District Court judges.

1014 Topics included gender myths and stereotypes, equality and international human rights obligations, the socio-economic position of women in New Zealand, domestic violence and women's experiences of the justice system.

1015 The seminar was generally well received. Of the 123 participants who evaluated it, 85 per cent rated it highly, with 89 per cent saying the weekend had moderately, considerably or greatly extended their understanding of gender issues. Only 3 per cent of judges said they would not do things differently as a result of the seminar.[327] In response to a question about what they thought they would do differently as a result of attending, two said:

> I was aware of the issues and have tried to be sensitive to gender equity in the past. However the sheer volume of cases has a numbing effect. I need to be reminded from time to time of the different worlds and different perceptions of men and women. It is a long road to equality.
>
> I will bring a better understanding to issues affecting women as litigants, witnesses and advocates and am challenged to keep learning.

1016 Other judges said the most memorable aspect of the seminar was the simple coming together of all benches to discuss pressing social issues in a "positive and co-operative spirit".

1017 We believe improved education about gender issues is the key to addressing concerns about systemic gender bias. Training, like the judges' gender equity seminar, could be set up to address such issues because they apply to *both* sexes. It would have to include all involved in the Family Court, including Court staff, psychologists, counsellors, lawyers and judges.

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[327] "Summary of Seminar Evaluations" in *Conference Papers – The Judicial Seminar on Gender Equity* (Unpublished, Rotorua, 1997).

1018 The development of such programmes requires consultation with a range of professionals including lawyers, psychologists, and social scientists, with a gender balance to provide male and female perspectives. Inter-disciplinary courses could be offered, or gender equity training modules included in each discipline's training.

1019 These education sessions would aim to create an awareness of gender issues in all aspects of Court work, and to avoid bias by:

- making individuals aware of gender myths and stereotypes;
- making individuals aware of the extent to which their own values and beliefs about gender influence their professional function;
- promoting an understanding of "substantive equality";
- promoting understanding of the law's historical approach to men and women;
- promoting awareness of the economic and social realities men and women face.[328]

Recommendation

Education and training programmes should be established to address gender issues affecting both men and women. Such programmes should be incorporated in the training of all those working in the Family Court: Court staff, counsellors, psychologists, lawyers and judges.

Research

1020 Many allegations of bias are founded on individual stories, and unreliable or unsubstantiated statistics. These are picked up by the media and repeatedly used to undermine the credibility of the Court. Research into the gender attitudes of Court personnel would yield specific information that would be a basis for action.

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[328] Based on the six prerequisites for avoiding gender bias as outlined at the Australian Institute of Judicial Administration's Equality and Justice Conference in October 1995. These included:
1 being aware of the law's historical approach to women;
2 being aware of the facts about women's position in society;
3 having an understanding of the meaning of equality;
4 being aware of gender myths and stereotypes;
5 being prepared to question your own perspectives and values;
6 having an empathetic understanding of people from a different background and having different experiences to your own.

1021 There are methodological difficulties in relying on judgments in decided cases to identify gender bias. Statistical assessments based on such judgments may not be valid. The judge selects facts to background his or her decision, and this selection can distort the information that was actually available to the judge. Individual case studies, or publication and analysis of selective quotes from judgments are similarly criticised for being unrepresentative and open to misinterpretation where they are taken out of context.[329]

1022 While surveys and other kinds of research may yield valuable information, we do not advocate such research as a spending priority. We believe there is enough concern about gender issues, and enough general knowledge on gender stereotyping, to justify instituting the education programmes discussed above, for Family Court personnel.

Recommendation

> Judges should give detailed, factual information in support of their decisions, particularly when exercising discretion in custody and access matters.

Transparency

1023 We believe that promoting greater Family Court accountability and transparency would build public confidence. Accusations of bias are often made when clients do not get the decisions they want, and when processes are protected from public scrutiny.

1024 While we do not advocate doing away with Family Court privacy, we do urge the adoption of more transparent procedures. Giving clients and the public non-identifying information about the Court's work would reduce the secrecy surrounding family proceedings. The Law Commission will deal with this topic more comprehensively in its reference dealing with the structure of the courts.

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[329] S Martin *Conference Papers – The Judicial Seminar on Gender Equity* (Unpublished, Rotorua, 1997) 20.

1025 Our report recommends providing more effective conciliation services and more efficient court processes for matters to be decided by the Court. While these recommendations do not focus on gender bias, they may alleviate deficiencies in the present process, which are taken as evidence of gender bias.

18
Implementation and summary of recommendations

PRIORITIES

1026 OUR RECOMMENDATIONS fall into two main categories:

- those requiring efficiencies in, and extra resources for, the existing system; and
- those requiring new services.

1027 We believe priority should be given to the first category, which necessitates upskilling staff and improving their pay. Doing so might, of itself, improve efficiency and allow staff to cope with greater workloads. But it is likely that extra staff will also be required. We do not consider the Courts Modernisation Project and the new computer system will, on their own, increase efficiency enough.

1028 This category also includes providing sufficient resources, and possibly more Family Court judges, so that orders made on without-notice applications can be brought back before a judge within seven days and defended hearings held within the statutory limits.

1029 This priority category of recommendations includes creation of a Family Court chief executive or general manager, as discussed in chapter 9.

1030 It also includes the training and upskilling of judges, Court staff, lawyers, counsel for the child, psychologists and counsellors to cope with systemic issues such as gender bias, Māori pronunciation and knowledge of child development. The cost of educating contracted professionals would be borne partly by the contractors themselves, although the Department for Courts may be involved in planning the curriculum.

1031 Improving complaint procedures for psychologists also comes into this priority category.

1032 These changes would not make headlines, but they would allow the Court to function in the manner to which it aspires, and without so many complaints about delays and incompetence.

1033 The first category of recommendations covers all issues raised about Court process and management.

1034 Changes we suggest for the Family Court co-ordinator straddle the two categories. If that role were "re-professionalised" and its scope extended to more court intake interviews and an increased public education role, it would make a major difference to the Court operation. Current Family Court co-ordinators would be able to take on these extra responsibilities if their clerical and administrative tasks were reassigned.

1035 It is probably unnecessary to increase co-ordinator numbers until the new services are implemented. It will be necessary to employ another co-ordinator in any Family Court piloting the development of the new services.

1036 The second category of recommendations can be split into two sub-categories for the purposes of implementation. Recommendations on information, including development of pamphlets and websites, will require planning but could probably be implemented nationwide once information packages have been prepared, put out for comment, and revised. Feedback from litigants may be important in testing the effectiveness of this material. The whole exercise could be contracted out, with input sought from specialist advisors.

1037 We propose that new services, including programmes for parents and children, conciliation services for Māori, and mediator contracting, be planned then piloted in two or three Family Courts, and evaluated. This is likely to take two years, but planning and evaluation will ensure a more effective service.

1038 Some proposals for helping self-represented litigants come under the information and conciliation services umbrella. If self-help centres were planned, one or two of these should also be piloted and evaluated.

RECOMMENDATIONS

Conciliation services – chapter 2

A new, expanded conciliation service should operate out of the Family Court. Legislation will have to be amended so services such as counselling and mediation are available for a wider range of matters than they are now.

The conciliation service should include information sessions for guardianship disputes, and referrals for counselling, mediation and specialist counselling.

The conciliation service should be managed by the Family Court Co-ordinator or conciliation service co-ordinator.

Information sessions, and counselling, mediation, and specialist counselling referrals will be contracted to groups and individuals but managed by the Family Court, which, along with the Department for Courts, will oversee quality control.

Conciliation services should be available to all parties who apply, or by Court direction.

Intake interviews should be available through the conciliation service co-ordinator, who will facilitate the most appropriate referral for the parties concerned.

Anything disclosed during a conciliation service referral is privileged by statute, provided that agreements can be reported to the Court and recorded as consent orders, and that the service provider can recommend a next step.

All Family Court conciliation professionals, and those working in the Court itself, should be trained to recognise situations requiring Court control and management, to avoid inappropriate use of alternative dispute resolution processes.

Parties could be required to access Family Court conciliation services through the conciliation service co-ordinator before they are allowed to get legal aid to start proceedings.

Legal aid should be available to those eligible from the start, so they can get legal advice while accessing Family Court conciliation services.

Family Court co-ordinator – chapter 3

There should be an extended Family Court co-ordinator role, renamed conciliation service co-ordinator.

A conciliation service co-ordinator would require higher qualifications and more skills than a current Family Court co-ordinator.

More conciliation service co-ordinators should be employed.

The salary for the position should be increased.

Tasks should include intake procedures; assistance with case management; co-ordinating and managing counselling, mediation referrals and specialist services; community education and liaison; and, appropriate professional supervision, updating and education.

Current Family Court co-ordinators should keep their positions, with recommended criteria applying to new appointees.

Information – chapter 5

More comprehensive information about family law and the Family Court should be publicly available.

The existing Family Court website should be further developed, and modelled on the Family Court of Australia website.

Videos targeted at separating parents should be produced and made available from various sources, such as courts, public libraries, Plunket and Citizens Advice Bureaux.

There should be a substantial media campaign, once the Law Commission's Family Court recommendations have been implemented, to inform the public how the Court can help them, and what they can do to help themselves and their families.

Programmes – chapter 6

General information sessions should be designed and made available to all separating couples with children.

The Department for Courts should, in consultation with professionals, organisations, and community groups that support families, develop education programmes for separating parents.

Programme provision should recognise cultural diversity.

Two one- to one-and-a-half-hour information sessions should be held over two weeks.

Information sessions should be mandatory for separating couples with children who are seeking Court assistance with custody and access.

Nobody should have to attend the same information session as their ex-partner.

Children – who are the unintentional casualties of parental separation – should have specially designed materials and programmes that provide information on the process of parental separation and family transition.

We suggest the Department for Courts liaise with child psychologists and childhood educators to develop programmes for children.

Parent and children programmes should be offered in a variety of community settings.

Counselling – chapter 7

Counselling should be available to all couples regardless of sexual orientation.

There should be discretion to offer counselling to people who are parents of the same child, but who have never lived together.

Counselling should, in appropriate circumstances, be made available to one party only.

People other than the separating parents should be able to attend counselling, if, in the view of the Family Court co-ordinator (or on the recommendation of the counsellor and parties) it is thought this might help resolve the dispute.

Counselling services should be developed for specific ethnic groups.

Children should have access to counselling services.

Material should be specially designed for the use of children.

Counsellors should not conduct mediations during counselling; a mediator should conduct mediations.

Automatic provision of six initial counselling sessions should be abolished, making the number of sessions discretionary but capped at six, unless there are exceptional circumstances.

Mediation – chapter 8

Conciliation services offered currently by the Family Court should be expanded.

The Department for Courts should contract trained mediators to offer mediation services to Family Court clients.

Mediating parties should get legal advice before mediation, and before ratifying any agreement reached during mediation.

There must be flexibility about who may attend mediation.

Children or young people with enough maturity to have a point of view and to be able to express it, should have their views sought and taken into account in the mediation process.

The mediator, together with the counsellor, should consider whether children or young people want to be involved in mediation, and whether it is desirable that they should.

Child participation could be encouraged in several ways. Mediation should be flexible enough to ensure the child's voice is heard whenever possible, on matters affecting the child. But a child who

expressly does not want to be involved must not be compelled. Some of the ways children's views could be represented are:

- children are present during part of the mediation;
- children ask someone they trust to state their wishes at the mediation;
- a counsellor meets with the child and passes on the child's views and wishes to the mediator, either verbally or through any statement or pictures the child may want to execute;
- the mediator meets with the child to determine the child's views and relay them to the parents.

We recommend trialling mediation services and monitoring their total cost, so as to compare them with similar disputes being adjudicated, in order to assess quantitative and qualitative aspects of mediation. The study could compare cases in a Family Court running a mediation pilot with similar cases under the current Family Court process.

Only fully trained and accredited mediators should conduct family mediation.

Family mediators should have additional Family Court training in the areas outlined below:

- family systems theories and child development;
- gender awareness;
- domestic violence and power imbalances, and how to deal with unequal bargaining positions;
- how to deal with highly emotional clients;
- the challenges of dealing with unrepresented clients;
- disability awareness;
- knowledge of tikanga Māori
- knowledge of other cultures and cultural practices;
- knowledge of community-based organisations and support groups offering families help;
- basic knowledge of law applying to Family Court disputes;
- case management and Family Court processes.

Family Court mediators should have frontline mediation experience, or be supervised initially by an experienced family mediator.

Mediators should undertake ongoing education.

The Family Court should contract mediation services from approved mediators.

Judge-led mediation conferences should continue, but be renamed settlement conferences to emphasise their differing role and dynamics.

Settlement conferences should be available but not mandatory in all family law proceedings.

Court management – chapter 9

Expand the Family Court co-ordinator's role (see chapter 3), and employ more Family Court co-ordinators.

Consider extending Family Court staff salary bands (especially those of team leaders and case progressors), and raising their upper limits to reflect the level of experience, skill, knowledge and responsibility these positions demand.

More consideration should be given to training needs and delivery. On-site training must be factored into staff workloads.

All Family Court staff, and especially case progressors, need training on, for instance, the likely case track for each type of proceeding, relevant legal principles, and reasons for the requirements to file particular documents. Such training would help lawyers and Court staff liaise effectively over the progress of a case through the system.

Each Family Court should maintain staffing sufficient for its workload.

More consideration should be given to covering short-term vacancies resulting from resignations, illnesses, and holidays, so as to continue efficient case management.

Managers should have technical knowledge as well as management expertise. They should be a staff information resource, and be able to strategise with case progressors.

Waiting times for mediation and settlement conferences, short causes, and full defended hearings must be shortened so that inefficiencies are not compounded by delay.

There must be enough judge time to cover the normal workload, so that acting warranted judges cover only temporary shortfalls.

Judge time could be freed up by expanding the registrar role; although doing so would increase registrars' workloads and responsibilities.

If demands on judicial time are to be reduced by expanding registrars' powers and alternative dispute resolution, the heavier workload this will place on other Court staff must be recognised.

The establishment of a judicial registrar position should be deferred until changes we recommend have been considered, and the effects of implementing them assessed.

Court management does not stand alone and must be integrated into caseflow management and service co-ordination. A new chief executive role should be established in order to keep an overview of administrative operations and co-ordination.

Overall Family Court governance must improve, taking account of Department for Courts and judicial concerns. A new departmental national office position (chief executive for the Family Court) with appropriate accountable staff would be likely to improve liaison, development and implementation.

If changes occur as a result of our recommendations, an adequate administrative base to implement and monitor changes is essential.

Court process – chapter 10

Caseflow management practice notes should remain a guide to the expected track for most cases.

The Court should have power to refer a matter back to Family Court conciliation services at any stage in the Court process where conciliation is likely to help resolve it.

Legislation should be amended to provide settlement conferences in all Family Court proceedings; the judge-led mediation conference provided by section 13 Family Proceedings Act 1980 should no longer be available.

New standardised Family Court Rules, which came into operation on 21 October 2002, should be monitored to ensure they are easy to understand and use. Standard forms provided for in the rules should be easy to follow and complete.

There should be differentiated case management so that cases are progressed in the most efficient, appropriate manner for each case.

Administrative systems and rosters for judges should aim to refer files to the same judge, or to one of a two-judge team, on each call in the Family Court. This will save judges time familiarising themselves with files, and make for more efficient progress by letting one or two judges accumulate knowledge of a case.

Case progressors, judges, and Family Court co-ordinators should liaise to bring to bear on cases all available resources in the most efficient way possible.

The Court should impose sanctions for failure to comply with Court directions.

Most options for enforcing court orders require changing the law, and are beyond the scope of this paper. Compliance might be improved by conciliation services that include specialist family assistance. Identification of high-conflict cases and intervention by judges might also help.

Orders must only be made on without-notice applications when requiring notice would be likely to cause substantial harm. Specific evidence of the need should be provided.

Wherever possible, such applications should be put on notice with time abridged.

Judges should issue a minute giving reasons for any without-notice order.

The effect of requiring judges to take into account access arrangements, or any hardship to a respondent, should be considered.

The Family Court should be resourced so a definite return date within seven days can be set when the order is served.

The Family Court should be resourced so defended hearings take place within the 42 days stipulated by the Domestic Violence Act 1995.

Defended domestic violence hearings should not be delayed for parallel criminal proceedings or custody and access hearings.

Without-notice applications for a change in custody should be put on notice with abridgement of time, unless there is a serious risk of harm to the child.

Where a child is taken somewhere else in New Zealand against the wishes of the other parent, there should normally be an order to return the child pending a hearing in the Court closest to the child's old home.

The Family Court should have the resources to deal quickly with issues arising after an application for a protection order under section 16B of the Guardianship Act 1968. The timeframe cannot be specified and will depend on the allegations. Obtaining social work or psychological reports within, say, three weeks would help greatly in disposing of these matters faster.

Child, Youth and Family Services should have the resources to carry out its responsibilities under the Children, Young Persons, and Their Families Act 1989 (CYPF Act) in care and protection hearings.

The Family Court should have the resources to provide hearing time for preliminary issues and the final hearing within the 60 days prescribed by the CYPF Act.

The Family Court should enforce directions in relationship property matters more strictly. The new practice note, "New Family Court Rules", in force from 21 October 2002 is designed to address these issues.

Where applications are filed for relationship property orders and spousal maintenance, the two matters will have to be progressed simultaneously through conciliation services and the Court process.

There should be a standard procedure for ascertaining the wishes of the non-guardian father when the mother consents to release the child for adoption.

Conciliation services mediation should be an available option where appropriate, for applications under the Child Support Act 1991.

There should be further investigation of the feasibility and advisability of setting up a specialist body to assess applications under section 16 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, while reserving an appellate function to the Family Court. Such a change would require amendment to this Act.

The possibility of transferring responsibility for dissolution of marriage to the office of the Registrar of Births Deaths and Marriages should be considered.

Specialist teams should be set up to deal with all Family Court cases where sexual abuse is alleged.

Whenever sexual abuse is alleged, CYFS should be obliged to make application that the child is in need of care and protection. Where proceedings are initiated under the Guardianship Act 1968, they should be put in abeyance until the sexual abuse care and protection issue has been dealt with. Such cases should be heard as soon as possible.

Child, Youth and Family Services would need resources to give this work priority.

Representing children – chapter 11

Counsel for the child should be required to meet with children he or she represents.

Counsel for the child should be offered more comprehensive training in child development, family dynamics and techniques for interviewing children.

Regular refresher courses should keep counsel for the child and judges up-to-date on social research about children and families.

Report writers – chapter 12

It should be made clear that counsel for the child can confer with a report writer and give him or her background information without compromising the report writer's independence.

Family Courts should review the way they manage critiques of written reports.

Procedures for complaints about Family Court psychologists should be reviewed in consultation with the Psychologists Board, with a view to the Family Court dealing with any complaints about work done for the Court.

The Family Court should use psychologists as facilitators and counsellors, but clearly differentiate these roles from report writing.

The Family Court must have access to social worker reports when required.

Methods of funding these reports must be investigated, including the possibility of the Family Court paying CYFS for the work.

If CYFS is unable to provide the Family Court with social worker assistance, the legislation should be changed so the Court can obtain reports from privately contracted social workers.

Māori participation in the Family Court – chapter 13

Māori should be consulted about further changes to conciliation services and Family Court procedure that would better recognise Māori values and protocols.

Conciliation services should, as far as possible, be contracted to qualified Māori providers so that Māori clients can choose these services.

Training needs for Māori psychologist and report writer providers should be assessed.

Ways to meet these training needs should be investigated, possibly in conjunction with organisations already providing conciliation services, such as Relationship Services, and Māori domestic violence programme providers.

Standardised introductory procedures complying with tikanga Māori should be introduced into the Family Court. Judges and other staff should be trained in these procedures.

Legislation should be amended so judges can, at their discretion, permit whānau to attend Family Court settlement conferences and hearings.

Everyone working in the Family Court should be trained in Māori pronunciation and Māori cultural imperatives, to enable them to serve Māori clients better.

Immigrant groups – chapter 14

Pamphlets and websites should be available in several languages.

Conciliation services should be developed for any immigrant group with sufficient local numbers.

Consideration should be given to training counsellors from smaller immigrant groups within existing organisations such as Relationship Services.

Family Court co-ordinators should liaise with immigrant groups in each Court catchment to find ways of giving them access to conciliation services, possibly by having a representative work alongside existing accredited providers.

Disability awareness – chapter 15

Judges, Court staff, and all professionals providing Family Court services should have disability awareness training.

Report writers should, where possible, be expert in the disability of the person they are assessing.

Information must be provided in a variety of forms suitable for people with disabilities.

Specific hearing times should be scheduled, wherever possible, for people with disabilities.

The legal aid ceiling should be raised to allow those with disabilities more time with their lawyers.

Self-represented litigants – chapter 16

The Department for Courts should develop self-help kits for self-represented litigants, with step-by-step instructions, diagrams and flow-charts, documents and forms. These should cover as many aspects of proceedings as possible – a separate kit for each.

Self-help kits should be available on the Family Court website.

Videos to help self-represented litigants should be produced.

Consideration should be given to an 0800 telephone number for information, advice, and referrals to community services and lawyers.

The New Zealand Law Society and the Legal Services Agency should investigate the unbundling of legal services.

The Department for Courts should consider setting up self-help centres at Family Courts.

Gender bias – chapter 17

Efforts should be made to encourage equal numbers of qualified men and women among those employed in, or contracted to, the Family Court.

Specialist services should be provided to address men's and women's gender-specific needs. We particularly recommend post-separation parenting programmes for fathers.

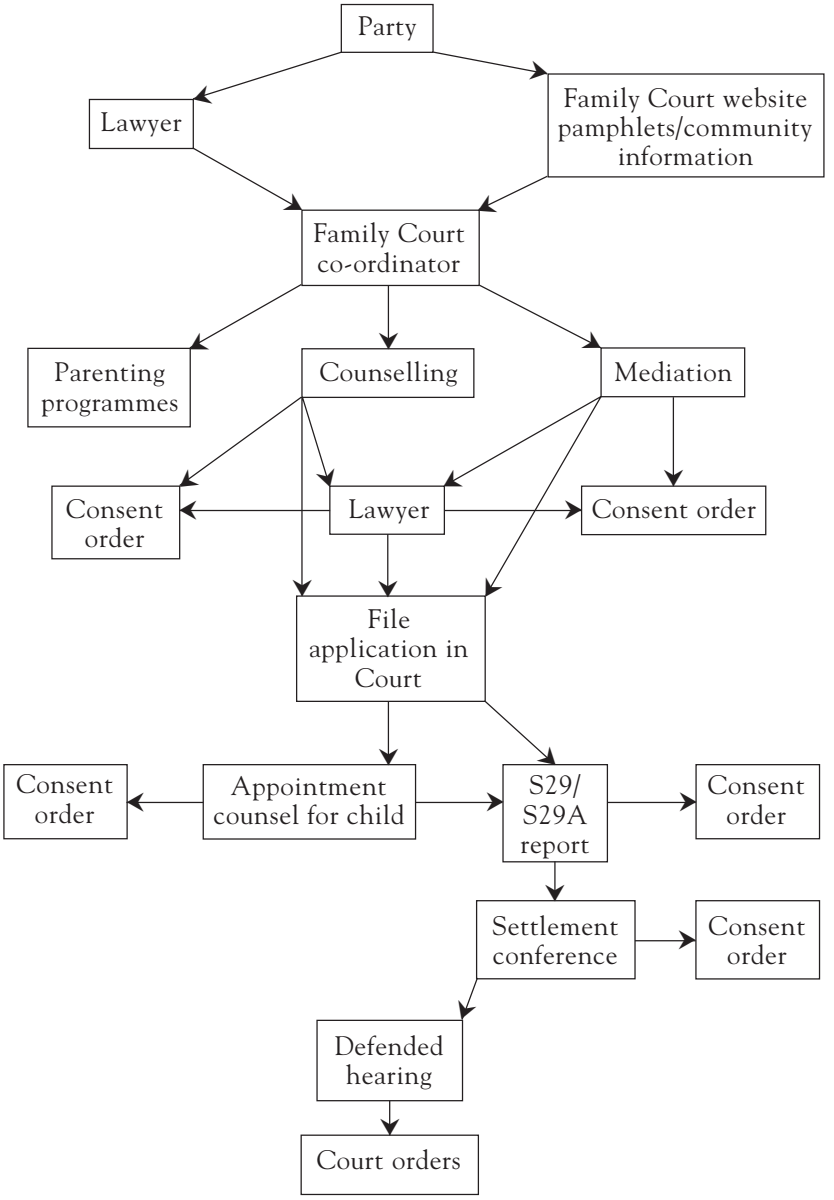
Family Court publications should be revised to ensure they represent men's and women's experiences.

Education and training programmes should be established to address gender issues affecting both men and women. Such programmes should be incorporated in the training of all those working in the Family Court: Court staff, counsellors, psychologists, lawyers and judges.

Judges should give detailed, factual information in support of their decisions, particularly when exercising discretion in custody and access matters.

APPENDIX A

Dispute process under the Guardianship Act 1968



APPENDIX B

Family Court Specialist Services Co-ordinator

Key responsibilities

Key areas	Key tasks
Co-ordinate Specialist Service Providers	Inform Specialist Service Providers of appointment to a case.
	Communicate with Specialist Service Providers to identify next steps/clarify needs for the case, taking into account cultural and gender needs and making appropriate recommendations.
	Encourage Specialist Service Providers to work within specified times of case event dates.
	Monitor service providers for addressing the brief and adherence to ethical standards, in conjunction with the Case Officer.
	Monitor, in conjunction with the Case Officer, Domestic Violence referrals for addressing the brief and adherence to ethical standards.
	Forward written or verbal complaints against Family Court professionals to the Family Caseflow Manager or in accordance with Department for Courts protocols.
	Co-ordinate ongoing support for Service Providers (eg. training, meetings on new information/queries/updates).
	Contribute to the development of a Family Court Service Providers selection and approval panel.
	Provide initial induction training to selected specialist service providers for the Family Court.
	Act as the first point of call for Specialist Service Providers.

Key areas	Key tasks
	Act as the first point of contact for general and professional issues in Domestic Violence Programmes.
Manage Cases	Work with Family Case Officer in particular and the Family Court team in general to share relevant information to improve Family Court Database.
	Ensure availability to talk to customers in crisis or customers requiring additional information in regard to professional service aspects of their case, as required.
	Forward case files to Judiciary, when appropriate.
	Liaise closely with Case Officers to assist with the effective and timely management of cases.
	Contribute to the operation of Case Officer Assessment Conferences.
	Receive the Specialist Service Provider report and forward to the appropriate Case Officer/Judicial Officer.
	Explore options with Case Officers regarding client needs for clients who are unsure of next step for their case.
	Explore options with the Case Officers regarding clients needs to ensure the best interests of the child are promoted in specific cases.
	Record the financial commitment to Specialist Service Providers on the Family Court Database as required.
Manage Relationships	Liaise with Family Case Officer to share relevant information to improve case management.
	Participate in Family Court meetings attended by the Judge, legal practitioners and Case Officers.
	Ensure availability to the Judiciary and Case Officer to discuss case details.
	Respond to daily enquiries on relationship and family issues from clients and members of the public on Family Court professional services.

Key areas	Key tasks
	Develop and maintain professional relationships with legal practitioners, the Judiciary, Specialist Service Providers and Community Groups.
	Attend and participate in Family Courts' Association meetings.
	Attend and participate in relevant meetings/ conferences to maintain relevant professional knowledge.
Assess Clients/Cases	Receive case referral from Case Officer or Customer Services Officer.
	Determine if Section 9 counselling is appropriate.
	Interview clients, self-referred or from lawyers or from agencies (such as Citizen's Advice Bureau), to assess nature of problem, take action and refer to counsellor where appropriate.
	Assess the needs of clients and provide them with options for further action to resolve issues, empowering clients to determine their own decisions.
	Assess most appropriate referral for client's cultural and gender needs.
	Consider ethics in regard to Family Court information and providing the appropriate information to parties and Court staff.
	Assess and make recommendations regarding release of specialist reports to the appropriate parties.
Select Appropriate Actions	Determine appropriate client referrals to Counsellors, Psychologists, and Domestic Violence Programmes.
	Recommend appropriate Specialist Report Writers and Counsel to Assist the Court/ Counsel for the Child.
	Select Counsel and/or Specialist Service Providers for client from an existing list on the Family Court Database.
	Select the appropriate Counsellor on a case-by-case basis, ensuring the service provider match is appropriate to the client and case needs.

Key areas	Key tasks
	Recommend and assign programmes in Domestic Violence cases.
	Receive applications from Domestic Violence programmes providers to vary the programme.
	Make recommendations, in consultation with the Case Officer, on any variances in Domestic Violence Programmes, prior to forwarding to a Judge.
Provide Family Court Education	Foster liaison between the Family Court and the community it serves through interaction and community education.
	Build skills in Family Court staff on how to provide information regarding Family Court Services to customers.
	Develop and facilitate training modules on the Family Court for presentation to the Community and to other Statutory Agencies eg. Citizen's Advice Bureau, Children and Young Persons Service, Refuge Family Violence Projects on the business of the Family Court.
	Inform Specialist Service Providers and Community Agencies of new Legislation such as Children and Young Persons Service Act, Domestic Violence Act, Protection of Personal and Property Rights Act.
	Inform specialist services and other government agencies of Court procedure/ legislative change and administrative requirements, if necessary.
	Provide guidance to Courts staff in managing people in crisis.
	Train and provide support for staff dealing with Domestic Violence cases and be accessible for discussions about work-related stresses.
Administer Documents and Files	Produce recommendation sheets and other documentation for each case file being sent to the Judiciary as appropriate.
	Ensure Applications are referred to Service Providers and Notices sent to Parties.
	Locate files and documents in response to correspondence queries.

Key areas	Key tasks
	Read through reports and distribute copies to appropriate lawyers and parties/alert relevant Case Officer that copies have been distributed and discuss with Judge anything of importance (eg. safety issues), in conjunction with the Case Officer.
	Prepare referral for Applicants and Respondents to groups such as Stopping Violence and Support Groups
	Collect statistical information for Family Caseflow Manager, Judges, Area Office, National Office.
	Respond to correspondence from parties, Specialist Service Providers and the community, and determine necessary actions, in conjunction with the Case Officer.
Maintain Knowledge Capital	Attend appropriate training courses, in consultation with the Family Court Caseflow Manager, to gain appropriate skills and knowledge.
	Read relevant professional material.
	Attend Supervision to ensure safe practice.
	Train and supervise Support Service staff if performing relevant work.

APPENDIX C

PN 20 Practice Note – Counsel for the Child: selection, appointment and other matters

1. Background

The terms of this Practice Note have been settled in consultation with the Department for Courts and the Family Law Section of the New Zealand Law Society.

2. Contents

The Practice Note covers the following matters:

- appointment;
- Children, Young Persons, and Their Families Act 1989 – review procedures;
- reports;
- selection process;
- review of lists;
- levels of remuneration; and
- complaints.

3. Introduction

In 1997, the Principal Family Court Judge asked the Department for Courts to undertake a review of the representation of children in the Family Court. Two Focus Committees, including representatives from the department, the New Zealand Law Society and the Judiciary, were established to address the issues associated with the role and administration of Counsel for the Child. The report of the Focus Committees was released in April 1999.

This Practice Note consolidates and supersedes previous Practice Notes only where they concern matters relating to Counsel for the Child appointments and incorporates recommendations from the report. These are:

- Practice Note issued by Principal Family Court Judge Trapski in January 1982 on Family Court procedure (refer "Separate representation of children");

– Practice Note issued by Principal Family Court Judge Mahony in April 1988 (refer "Periodic reports from Counsel for the Child and Guardianship Act 1968, ss 29 or 29A");
– Practice Note issued by Principal Family Court Judge Mahony in April 1988 on Counsel for the Child quarterly reports;
– Practice Note issued by Principal Family Court Judge Mahony in 1992 on CYPF Act 1989 – review procedures;
– Practice Note issued by Principal Family Court Judge Mahony in March 1996 on Matters affecting the appointments and payment of Counsel appointed by the Family Court (only where matters relate to Counsel for the Child);
– Department for Courts Circular issued on 1 April 1998 – outlining new fees for Counsel for the Child.

In this practice note:

– References to "Counsel", unless otherwise stated, refer to Counsel for the Child.
– References to "Specialist Report Writer" means any specialist report writer from whom a report has been requested under s 29A of the Guardianship Act 1968 and s 178 of the Children, Young Persons, and Their Families Act 1989. "Specialist report" has a corresponding meaning.
– The term "child" includes both "child" and "young person" as defined in the Children, Young Persons, and Their Families Act 1989.

4. Separate representation of children

– Section 30(1)(b) of the Guardianship Act 1968 authorises the Court to appoint a barrister or solicitor to represent any child who is the subject of or who is otherwise a party to proceedings under that Act.
– Section 162(1)(b) of the Family Proceedings Act 1980 gives similar jurisdiction in respect of a child involved in proceedings under that Act.
– Section 159 of the Children, Young Persons, and Their Families Act 1989 authorises the Court to appoint a barrister or solicitor to represent any child or young person

who is the subject of any proceedings under care and protection and, if the Court thinks desirable, for such other purposes (including any other proceedings under this Act or any other enactment) as the Court may specify.

- Section 81(1)(b) of the Domestic Violence Act 1995 authorises the Court to appoint a lawyer to represent the child in any proceedings on an application for a Protection Order (or in any proceedings relating to or arising out of a Protection Order) made on the child's behalf.
- Section 26(2) of the Matrimonial Property Act 1976 authorises the Court to appoint a solicitor or Counsel to represent children of the marriage if there are special circumstances which render it necessary or expedient.

5. Appointment of Counsel for the Child

5.1 (a) Appointments must be made by the Court. The Judge is responsible for settling the brief for Counsel for the Child. This will usually be done in consultation with Counsel for the parties. The initial brief (and any extensions approved by the Court) will cover the span of the appointment of Counsel for the Child up until the time of any hearing.

(b) As far as possible, the brief for Counsel for the Child should be settled at the time the decision is made to appoint Counsel for the Child.

(c) Unless any risks to the children are identified earlier, appointments under s 30(2) Guardianship Act 1968 generally will not be made until a mediation conference has identified the matters that are really in issue between the parties and, whether custody or access proceedings appear likely to proceed to a hearing.

(d) Where the solicitor for either party considers that an appointment should be made before a mediation conference, application can be made to the Court through the Registrar.

5.2 The Court will consider, in allocating the brief to Counsel for the Child, the following listed factors:

- match of skills to case requirements;
- availability of Counsel;
- current workload of Counsel;
- equitable distribution of work among Counsel on the list.

5.3 Every brief should include:

- a description of the issues to be addressed and, if appropriate, the task/s to be undertaken;
- any reporting requirements both written and otherwise;
- the time and funding allocated to carry out the brief;
- the timeframe for completion of the tasks.

5.4 The role of Counsel for the Child is referred to in detail in the Code of Practice for Counsel for the Child issued by way of Practice Note on 17 November 2000.

5.5 Once the Court has settled the brief for Counsel for the Child, the Registrar will negotiate an estimate for time and cost for undertaking the outlined brief with the proposed Counsel. This will include payment of any disbursements. Once an acceptable arrangement has been reached, the Judge will sign a Minute of Appointment.

5.6 A bill of costs should be rendered in a form usually acceptable to the Legal Services Agency and should be calculated in accordance with an agreed hourly rate of remuneration.

5.7 Where, during the course of the work, it becomes clear that the estimate of time does not cover the work required for the proper discharge of Counsel's function, Counsel should report the fact to the Court with reasons. Counsel should use best endeavours to report before the estimate is exceeded. Similarly, where the nature of the assignment changes and Counsel believes a different payment level should apply, Counsel should report to the Court as soon as practicable. Where Counsel and the Registrar cannot agree on any additional cost, the matter should be resolved by the procedures set out in s 30 of the Guardianship Act 1968.

5.8 Each Court will maintain a register, listing each appointment of Counsel, the date of appointment, the estimate of fees and actual fees paid for the type of case and the date on which the appointment terminates.

5.9 The register will be available for the regular monthly management meeting of each Family Court.

5.10 In areas such as Auckland, where several Courts use one pool of Counsel, there should be inter-Court communication to ensure that, as far as possible, there is a spread of assignments to all listed Counsel.

6. Children, Young Persons, and Their Families Act 1989 – review procedures

6.1 Counsel for the Child's appointment will continue after the initial proceedings have been finalised or have subsequently been reviewed with a further review to follow. Though Counsel's appointment continues in this way, no active work is to be undertaken until the time of the review, unless specifically authorised by the Court or issues arise unexpectedly or urgently.

6.2 Because the appointment continues, Counsel becomes a person who has to agree to the reviewed plan. Early consultation will be required by the person preparing the plan. (Refer s 132(1)(b) and s 135(3)(e) of the Children, Young Persons, and Their Families Act 1989.)

6.3 If there is no dispute about the reviewed plan and the direction in which the proceedings are to go, those preparing the reviewed plan should obtain the formal consent of all parties as required. The consent forms should indicate whether parties wish to attend a hearing or whether they consent to the review being conducted without a hearing. The Judge should be advised of any dispute when the plan is filed.

6.4 After filing, the plan will be placed before a Judge to consider release of the report and any other steps to be taken, and whether orders can be made on the papers.

6.5 The intention of this procedure is to reduce to a minimum any disruption to the lives of children, foster parents and others by having them attend the Court, but at the same time to protect all parties' rights under the Act. This is particularly appropriate where everyone agrees that the status quo should continue. It is also intended to lead to significant savings in time and cost.

7. Report from Counsel for the Child

7.1 As from the 1 February 2001, the Court will not require Counsel for the Child to provide three monthly reports on each case. Reports will be provided as specified by the brief or as directed by a Judge.

7.2 Copies of the reports must be forwarded to Counsel for the parties.

7.3 The report should summarise steps taken by Counsel and results that have been achieved. It should then outline further steps to be taken or recommended. The report should be short, factual, and informative, but should be couched in neutral terms and should not introduce any material that ought to come to the Court's knowledge only by way of evidence. Further steps recommended may include one or other of the following:

- that the parties be referred back to counselling;
- that a mediation conference be held;
- that a pre-hearing conference be held;
- that the matter proceed to a hearing;
- that a report be prepared under s 29 or s 29A of the Guardianship Act 1968 or s 178 or s 186 of the Children, Young Persons, and Their Families Act 1989. Reasons for such a report should be stated;
- that no steps need be taken and that the matter be left in the hands of Counsel for a further specified period.

7.4 Because circumstances differ so much from case to case, Judges have been reluctant to approve a set form or model to be used as a basis for reports required from Counsel for the Child.

7.5 Nevertheless, the following draft is included as a useful guideline. It focuses attention:

- on relevant issues;
- the point that has been reached by the parties;
- the input to date by Counsel for the Child; and
- advice to the Court on initiatives that may be appropriate.

7.6 It is comprehensive, but concise and to the point. In an appropriate case Counsel may refer in a neutral way to issues settled or still to be determined.

The Registrar

Family Court

Re: B Family – X/X/88.

Thank you for your letter of 18 June advising of my appointment as Counsel for the children.

This is my report of my attendance to date.

Summary of Issues:

1. The future of Mr and Mrs B's marriage;
2. Custody of three children;
3. Occupation of a state rental home.

Situation:

1. Mr and Mrs B and their children presently occupy the home;
2. There are three children directly affected by the dispute;
   (a) G – pupil Wellington College;
   (b) R – pupil Wellington College;
   (c) P – categorised as an autistic child, functioning in the severely handicapped range. P attends a Special School.
3. Mr and Mrs B have attended counselling;
4. A mediation conference was held on Friday 11 July. However, the problems have not been resolved, and an urgent hearing has been sought.

My attendance to date:

1. Read Court documents;
2. Formulated an approach;
3. Spoke on telephone and attended on the parties' solicitors;
4. Conference with Mrs B;

5. Conference with Mr B;
6. Conference with Principal, Special School;
7. Telephone conference with school Counsellor, Wellington College;
8. Telephone conference, social worker, Wellington Hospital;
9. Attended mediation conference;
10. Conference with school Principal preparing affidavit;
11. Conference with school Counsellor preparing affidavit.

It appears that the only and most appropriate means of resolution is an urgent Court hearing. I have, at this stage, decided to call witnesses to give evidence at the hearing and, to that end, am in the process of preparing affidavits.

I intend to speak to ..... of the Education Department Psychological Service as she/he has completed an assessment of P for the Education Department. I will also be speaking to G and R and intend to meet further with Mr and Mrs B and their solicitors prior to the hearing. I have to date spent X hours on the case as detailed by my interim bill, which is enclosed.

Yours faithfully,

8. Selection of Counsel for the Child

8.1 In each Court there will be a list of Counsel who are available to accept appointments from the Court as Counsel for the Child and from which Counsel may be appointed in individual cases.

8.2 The following selection process has been settled following the recommendations from the report of the Focus Committees on the role of Counsel for the Child and associated matters. The Department for Courts and the Family Law Section of the New Zealand Law Society have agreed to this process.

8.3 The Registrar will convene a Panel to consider applications for inclusion in the list of Counsel for the Child available to

undertake Family Court appointments. This Panel will consist of a Family Court Coordinator, two nominees from the Family Law Section of the New Zealand Law Society, a Specialist Report Writer nominated by the Court, a Family Court Judge nominated by the Principal Family Court Judge and the Registrar, as convenor. The Panel should normally have six people, but a panel of three could be convened in some circumstances (for example, where an interview would be unable to be arranged within a reasonable timeframe). Any Panel of three must include a Family Court Judge, a nominee from the Family Law Section of the New Zealand Law Society and the Registrar (or a Family Court Coordinator).

8.4 Panels will be convened as required but no less than twice a year, if there are applications waiting to be considered and a need for Counsel to be appointed.

8.5 The following appointment process should be followed:

- Counsel submit an application form to the Registrar in the Court region in which they wish to practise, nominating the particular Court or Courts where they wish to be on the list. The application is referred to a Panel convened by the Registrar.
- panel members make such inquiries as may be needed for them to be informed about the applicant's ability to meet the criteria. Panel members will be assisted by the requirement that applicants provide the names of referees who can provide professional, confidential comment.
- the Panel will interview each candidate. If the Panel has any concerns about a candidate's ability to meet the criteria, these concerns will be put to the applicant who will have the opportunity to reply.
- it is expected that the Panel's approval will be by way of a consensus decision.
- the Registrar will advise the applicant, the Court, the Family Law Section of the New Zealand Law Society (if required) and the National Office of the Department for Courts of the decision, in writing.
- there is no obligation for the Panel to provide reasons for non-selection onto the list, but it is expected that, if an applicant is not selected, the Panel will have discussed their concerns with the applicant during the selection process.

8.6 Counsel for the Child should meet the following criteria:

- ability to exercise sound judgment and identify central issues;
- a minimum of five years practice in the Family Court;
- proven experience in running defended cases in the Family Court;
- an understanding of, and an ability to relate and listen to, children of all ages;
- good people skills and an ability to relate and listen to adults;
- sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- relevant qualifications, training and attendance at relevant courses;
- personal qualities compatible with assisting negotiations in suitable cases and working cooperatively with other professionals;
- independence; and
- knowledge and understanding of the Code of Practice contained in the Practice Note issued on 17 November 2000 and the Best Practice Guidelines for Counsel for the Child – ratified by the NZ Law Society on 18 February 2000.

8.7 Counsel will be able to transfer their approval from one Court region to another.

9. Review of Counsel for the Child lists

9.1 A review of Counsel for the Child lists must be undertaken at intervals of not more than three years. The Registrar in each Court must ensure that lists of approved Counsel are reviewed at such intervals. Where several Courts use one pool of Counsel, the Registrars in those Courts may choose to review the lists of approved Counsel together.

9.2 The Registrar shall give notice to all Counsel who are currently on the list. Such notice will include a requirement for all Counsel whose names appear on the list to indicate, within a period of not more than 28 days:

- whether they wish to continue to receive Counsel for the Child appointments;
- whether they wish to withdraw from the Counsel for the Child list; or

– whether they have any matters relating to present or past appointments which they wish to draw to the attention of the Panel.

9.3 The Panel shall meet as soon as practicable and reconstitute the Counsel for the Child list. The Panel shall also consider any matters raised by Counsel that relate to the administration of the list.

9.4 The Panel shall notify all Counsel of the revised list and whether their names have been retained or deleted from the list, as the case may be. The reasons for deletion must be specified, and limited to either the practitioner's request or the practitioner's failure to respond within the stipulated time.

9.5 The Registrar shall send the revised list to the National Office of the Department for Courts and the Family Law Section of the New Zealand Law Society.

10. Levels of remuneration

10.1 Until regulations are made fixing levels of remuneration, the Court notes the levels of remuneration agreed between the Department for Courts and the New Zealand Law Society. Levels applying at October 1995 are:

Level 1

$130 to $155 per hour (GST inclusive). Range to be used in cases where the practitioner appointed has only recently been approved or where no approved Counsel is available and Counsel appointed is not on the list of approved Counsel.

Level 2

$155 per hour (GST inclusive). This fee will be used in the majority of cases.

Level 3

$155 to $170 per hour (GST inclusive). This range will be used to calculate fees:

– in cases where superior skills are required;
– in cases of extreme urgency;
– in cases where there are grave concerns about the immediate safety of children;
– in most Hague Convention cases;
– in cases where there are allegations of sexual abuse.

10.2 The Department has reminded Registrars that they have discretion to exceed the rate in exceptional circumstances.

10.3 Disbursements are not included in the rates set out above. Disbursements such as reasonable travelling expenses, toll calls, faxes etc, shall be paid by the Registrar on receipt of an itemised account from Counsel. Extraordinary expenses, such as long distance travel, should be approved in advance.

10.4 Where there are unresolved differences between Counsel and Registrar, Counsel should do the work, submit an account, and the provisions of s 30 of the Guardianship Act 1968 will then apply, ie taxation by the Registrar and judicial review where necessary. It is envisaged that this procedure will rarely have to be used. Proper recourse to this procedure will not prejudice the position of Counsel in relation to future appointments.

10.5 This Practice Note shall continue to apply following the making of regulations fixing levels of remuneration to the extent that it is not overtaken by the same.

11. Complaints

11.1 The Family Court does not have jurisdiction to hear any complaints against Counsel for the Child when the case has concluded. Any such complaint received by the Court should be referred to the New Zealand Law Society.

11.2 Applications for release of material to the New Zealand Law Society should be referred to a Family Court Judge.

11.3 Any complaints about Counsel for the Child received by the Court, when the case is in progress, should be referred to the presiding Judge. The complainant must put their complaint in writing.

Commencement date:

This Practice Note is issued as at 17 November 2000 and comes into operation on 1 February 2001.

Signed

Judge PD Mahony

PRINCIPAL FAMILY COURT JUDGE

APPENDIX D

PN 21 Practice note – Counsel for Child: code of practice

1. Background

This Code of Practice for Counsel appointed to represent children in Family Court proceedings arose out of a review of representation for children in the Family Court initiated in 1997. Two Focus Committees, including representatives from the Department, the New Zealand Law Society and the Judiciary, were established to address the issues associated with the role and administration of Counsel for the Child. The report of the Focus Committees was released in April 1999. This report recommended that the Principal Family Court Judge issue a Practice Note clarifying the accountability of Counsel for the Child (see para 5.4), and that the New Zealand Law Society develop and ratify Best Practice Guidelines based on a draft in the report. That has been done and the Guidelines were ratified on 18 February 2000 by the Council of the New Zealand Law Society.

At the request of the Family Law Section of the New Zealand Law Society I agreed to incorporate as many as possible of these Guidelines and in an appropriate form, into a Code of Practice to be issued as a Practice Note.

I have done so in consultation with the Administrative Family Court Judges.

I now issue this Code which also incorporates Counsel's accountability.

At the same time I recommend to all Counsel the full set of Guidelines ratified by the New Zealand Law Society as the pathway to consistently high practice throughout New Zealand. In any areas where the Guidelines differ from this Practice Note, the provisions of this Practice Note shall prevail.

2. Introduction

The welfare of children is the first and paramount consideration of the Family Court in all proceedings that involve children.

The role and practice of Counsel for the Child as described in this Code of Practice is guided by the United Nations Convention on the Rights of the Child, domestic legislation and a growing body of research and theory on best practice in working with children.

In this practice note:

- References to "Counsel", unless otherwise stated, refer to Counsel for the Child.
- References to "Report Writer" means any specialist report writer or social worker from whom a report has been requested under s 29 or s 29A of the Guardianship Act 1968 and s 178 or s 186 of the Children, Young Persons, and Their Families Act 1989. "Report" has a corresponding meaning.
- The term "child" includes both "child" and "young person" as those terms are defined in the Children, Young Persons, and Their Families Act 1989.

3. Discretion

The intent of the Code is to promote quality and consistency of practice without fettering the discretion of Counsel to exercise their professional judgment. As it is essential that Counsel respond to the characteristics of each case and client rather than following a formulaic approach, the Code seeks to establish some benchmarks for good practice while allowing Counsel to tailor their practice to the needs and circumstances of individual children including their age and maturity.

4. Guiding principles

4.1 Children have the right to be given the opportunity to be heard in any judicial and administrative proceedings affecting them as provided for by articles 9.2 and 12.2 of the United Nations Convention on the Rights of the Child, s 23 of the Guardianship Act 1968 and s 6 of the Children, Young Persons, and Their Families Act 1989.

4.2 Child clients have the right to be treated with the same respect as clients who are adults.

4.3 Children have the right to express their views and have their views given due weight in accordance with their age and maturity when adults are making decisions that affect their lives.

4.4 Children have the right to information about the case in which they are involved including information on the progress and outcome of that case.

4.5 Children have the right to competent representation from experienced and skilled practitioners.

5. Role of Counsel for the Child

5.1 The role of Counsel is to represent the child in accordance with the brief provided by the Court.

5.2 Counsel has a duty to put before the Court the wishes and views of the child but should not require the child to express a view or wish if he or she does not want to do so.

5.3 Counsel has a further duty to put before the Court other factors that impact on the child's welfare.

5.4 Where a conflict arises between a child's wishes/views and information relevant to the best interests of the child, Counsel should, where the child is sufficiently mature:

- attempt to resolve the conflict with the child;
- discuss the issues and Counsel's obligations, with the child;
- advise the Court of Counsel's position and in the case (anticipated to be rare) where Counsel is unable to resolve the conflict and as a matter of professional judgment can advocate only the child's wishes, invite the Court to appoint Counsel in respect of best interests issues.

6. Relationship with the child

6.1 Counsel should meet with the child he or she is appointed to represent other than in exceptional circumstances where in the opinion of Counsel such a meeting would be inappropriate. The timing for such meeting and any further meetings should be at the discretion of Counsel.

6.2 Counsel should attempt to build a relationship of trust and confidence with the child. Counsel should guard against

developing a relationship beyond what is necessary for the proper performance of the role. Counsel should assist the child to develop realistic expectations of the role and influence of Counsel.

6.3 Counsel should be clear about his or her objectives in meeting with the child and should consider the venue and style of meeting which will best meet those objectives.

6.4 Counsel should explore the options for resolution and the implications of each option with the child as appropriate.

6.5 Where the child favours an option which Counsel considers may not be in the best interests of the child, Counsel should explain to the child that the child's preferred option may not be acceptable to the Court and encourage the child to consider other options.

6.6 Other than is required by law, only in exceptional circumstances should Counsel show affidavits or reports to the child. Counsel should exercise cautious judgment in showing other documents to the child.

In every case Counsel should carefully consider the likely impact on the child and the child's relationships.

7. Interviewing the child at school

7.1 Counsel should exercise caution before deciding to interview children at school. The school's consent is required before any such interview is conducted.

7.2 If Counsel is to interview the child at school it is desirable to obtain the prior consent of the parents and to notify the school of those consents. If consents are not forthcoming Counsel may need to seek a direction from the Court. Counsel must also comply with any protocols or requirements of the school. If a formal order or letter appointing Counsel is available, this should be shown to the school principal.

8. Informing the child

8.1 Counsel should explain his or her role and define Counsel's relationship with the child in a manner and language the child will understand.

8.2 Counsel should reassure the child that the child is not responsible for any decision which will be made by the Court.

8.3 Counsel should inform the child of the progress of the case at regular intervals or at key points throughout the life of the case.

8.4 Counsel should ensure the child knows how to make contact with Counsel.

8.5 Counsel should ensure that the child is informed of the outcome of the case and its implications and where appropriate, any grounds for appeal or further applications.

9. Confidentiality

9.1 Counsel for the Child should in a manner and language the child can be expected to understand:

- explain the limits of confidentiality; and
- advise that the information the child provides may need to be made available to others including on occasions parents and the Judge.

10. Systemic abuse

10.1 Counsel for the Child must be aware of and actively manage the risk to children of systemic abuse. Systemic abuse occurs when children are required to talk about themselves, their families and events, sometimes traumatic, in their lives to a procession of professionals with whom they will have little or no on-going relationship and who may ask them to relive the traumas they have been through.

11. Case management

11.1 Counsel should be proactive in moving the case towards resolution except where Counsel considers to do so would be contrary to the child's best interests.

11.2 Where Counsel wishes to cross-examine the report writer (as opposed to leading evidence), Counsel should advise the Judge at the earliest practicable opportunity.

11.3 Counsel should recognise that while the resolution of the dispute may be the most important outcome for the child, the wishes of the child must not be overlooked and the best interests of the child must remain paramount.

11.4 In care and protection cases, Counsel should:

- be proactive in ensuring a Family Group Conference (FGC) is held as soon as possible; and that the matter proceeds to a hearing as soon as possible;
- be present at the FGC to ensure that the welfare and interests of the child shall be the first and paramount consideration;
- investigate the child's situation and other than in exceptional circumstances, meet with the child. Prior to every review by the Court, Counsel should investigate the child's situation and subject to para 6.1 meet with the child.

11.5 Counsel for the Child should not delegate the preparation, supervision, conduct or presentation of the case, but deal with it personally.

12. Judicial meeting

12.1 Where the child requests a meeting with the Judge, Counsel should discuss the request with the child and if appropriate confer with the Judge, in consultation with other Counsel.

12.2 Counsel should be present at any meeting between the child and a Judge.

13. Relationship with the Court

13.1 Any information provided to the Court by Counsel must be provided to the parties save in exceptional circumstances, such as where safety issues exist.

13.2 Cases involving children should not be unduly delayed. Before accepting any appointment, Counsel should be satisfied that he or she is able to give the time which the case requires to advance matters promptly for the child.

13.3 Counsel should ensure that he or she does not exceed the negotiated fee for the appointment without first obtaining approval from the Court.

13.4 In addition to the duty as an officer of the Court, Counsel's role shall be carried out in accordance with the instructions and brief provided by the Court.

14. Counsel for the Child and report writers

14.1 Generally, Counsel should liaise with the report writer to ensure that the report writer is properly briefed on the issues for examination and assessment.

14.2 Where Counsel has obtained the leave of the Court to lead the report writer's evidence, Counsel should:

- ensure that the report writer is familiar with Court procedures;
- alert the report writer to issues which are likely to be raised in cross-examination;
- ensure the report writer has either data collected from the interviews or theoretical material to deal with issues likely to be raised by the parties or the Judge.

15. Role of Counsel in negotiation between parties

15.1 Once Counsel has a clear appreciation of the issues involved in the case, Counsel should be proactive in exploring alternative methods of resolution where it is clearly in the child's best interests to have his or her parents negotiate a settlement rather than have the matter determined by the Court.

15.2 Counsel should not attempt to resolve disputed issues of fact relating to sexual abuse, violence or other safety issues upon which the Court should make findings.

16. Role of Counsel in cases under s 16B Guardianship Act 1968

16.1 If issues are disputed the Court will need to make findings of fact. It is the role of the Court and not of Counsel to make findings covering violence/assessment of risk.

16.2 Counsel must not compromise, for the sake of expediency, on issues where findings of fact must be made.

16.3 At all times Counsel should be conscious of the provisions contained in s 16B of the Guardianship Act 1968 and in particular Counsel should:

- take all necessary steps to expedite the hearing in accordance with s 16B(2);
- determine the most appropriate way of ascertaining the views of the child pursuant to s 16B(5)(g);

– in considering matters pursuant to s 16B(6)(b), advocate measures that will enhance the safety of the child.

17. Role of Counsel for the Child at hearing

17.1 At the hearing, Counsel should endeavour to:

– identify all relevant issues which need to be determined in regard to the child's welfare;
– ensure the Court has all relevant information, including the views of the child, on which to make an informed decision; and:
– call evidence where appropriate eg from psychological and/or medical professionals, teachers and others;
– ensure Counsel does not give evidence him/herself;
– cross-examine to ensure all relevant issues are fully explored;
– make submissions on behalf of the child.

18. Guardianship of the Court

18.1 Counsel should not accept appointment as agent for the Court until relinquishing his/her appointment as Counsel for the Child.

Commencement date:

This Practice Note is issued as at 17 November 2000 and comes into operation on 1 February 2001.

Signed

Judge PD Mahony

PRINCIPAL FAMILY COURT JUDGE

APPENDIX E

PN 16 Practice note – specialist report writers

1. Background

1.1 In 1999, the Principal Family Court Judge and the Department for Courts established a joint working party with representatives from the Department for Courts, the New Zealand Psychological Society, the New Zealand College of Clinical Psychologists and the Judiciary to develop the requirements for appointment of specialist report writers.

1.2 The terms of this Practice Note have been settled in consultation with the Department for Courts, the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists. It sets out the requirements and recommended procedures agreed for the appointment of Specialist Report Writers to the Family Court.

1.3 This Practice Note supersedes the previous Practice Note: Guidelines on Specialist Reports for the Family Court issued by the Principal Family Court Judge, Judge Mahony on 26 June 1995.

1.4 The following practice notes have been incorporated into this Practice Note:

- Protocol with the New Zealand Psychologists Board dealing with complaints against Psychologists, issued 11 February 1996, subsequently extended to the Health and Disability Commissioner.
- Complaints to the New Zealand Psychological Society against a member of the Society arising out of Family Court Proceedings, issued 11 February 1996.

2. Introduction and commencement

2.1 The Practice Note covers the following matters:

- Criteria for selection of specialist report writers;
- Process for selection of specialist report writers;
- Review of lists of selected specialist report writers;

– Administration of the list;
– Appointment for individual cases;
– Case management; and
– Complaints.

2.2 Matters relating to the report writer's preparation, presentation and content of specialist reports are detailed in *The Practice of Psychology and the Law: A Handbook* (2nd ed), 1996, published by the NZ Psychological Society, edited by G Maxwell, F Seymour, and P Vincent.

2.3 The Practice Note will take effect from 1 July 2001.

3. Terms and definitions

3.1 In this Practice Note:

– The term "specialist report writer" means any person from whom a psychological report has been requested under s29A of the Guardianship Act 1968 or under s 178 of the Children, Young Persons, and Their Families Act 1989 with specific provisions for Registered Psychologists.
– References to "report writers" unless otherwise stated, refer to specialist report writers. "Report" has a corresponding meaning.
– The term "child" includes both "child" and "young person" as those terms are defined in the Children, Young Persons, and their Families Act 1989.
– References to "Counsel for the Child" refer to counsel appointed by the Court, to represent a child or children, under s30(1)(b) of the Guardianship Act 1968, s162(1)(b) of the Family Proceedings Act 1980, s159 of the Children, Young Persons, and their Families Act 1989 and s81(1)(b) of the Domestic Violence Act 1995, or under any other Act or power exercisable by the Family Court.

4. Legislative requirements

4.1 Appointments of report writers for individual cases are made under s29A of the Guardianship Act 1968 and s178 of the Children, Young Persons, and Their Families Act 1989.

4.2 Any psychologist accepting an appointment under s178 of the Children, Young Persons, and Their Families Act is bound by the provisions of that section. Particular reference is made to the requirements of s179(4) as follows:

(4) Every child or young person who is examined under s178(1) of this Act is, where practicable, entitled to have present during that examination one adult –

(a) Who is nominated for that purpose by that child or young person or, if the age or level of maturity of the child or young person makes it impracticable for him or her to make such a nomination, by a Social Worker; and
(b) Who consents to be present.

5. Appointment of specialist report writers

5.1 (a) Appointments of report writers must be made by a Family Court Judge. In each case, the Court will supply a specific brief for the report writer, indicating the issues to be addressed in the report.
(b) The brief will be given by the Judge but usually will be settled by the Court in consultation with Counsel for the Child working in conjunction with counsel for the parties. Counsel for the Child will consult with any party who is unrepresented.
(c) The report writer in consultation with the Family Court Co-ordinator will ensure that the report writer's brief is sufficiently clear, detailed and specific. Should there be a need to clarify or amplify any matter it should be referred to the Judge.

5.2 In allocating the brief to a report writer, the Court will consider the following factors.

– The match of skills to case requirements;
– The equitable distribution of work among report writers on the list of report writers referred to in para 8 below;
– The availability of the report writer; and
– The current workload of the report writer.

5.3 Once the Court has settled the brief for the report writer, the Registrar will approve an estimate of time and cost for undertaking the brief. This will include payment of any disbursements.

5.4 Once an acceptable arrangement has been reached, the Judge will sign a Minute of Appointment.

5.5 Every referral should include:

– The brief;
– Interim reporting requirements (if any);

– The date for filing of the report, (reports are usually expected to take six to eight weeks to prepare); and
– An upper limit of authorised hours to complete the brief.

5.6 Extensions to the initial allocation of hours: Where, during the course of the work, it becomes clear that the initial allocation of hours is insufficient for the report writer to meet the requirements of the brief satisfactorily, the report writer may seek an extension to the initial allocation of hours from the Registrar before commencing the additional work.

5.7 Extensions to the brief: Where, during the course of the work the report writer considers that an extension or variation to the content of the brief is required, the matter must be referred to the Court in writing for approval by the Judge.

5.8 A bill of costs should be rendered with the report and should be calculated in accordance with an agreed hourly rate of remuneration.

5.9 Where a case is to proceed to a hearing, the Registrar and the report writer will settle a basis for payment for preparation and appearance at hearings. Prior to the hearing, the report writer should be given a precise time at which he/she will be called to give evidence at the hearing.

5.10 In cases that go to a defended hearing, the report writer is entitled to see a copy of the judgment.

6. Case management

6.1 In most cases, an appointment under s29A of the Guardianship Act will be made following counselling and a mediation conference or following the filing of an urgent application resulting from a perceived serious welfare issue.

6.2 An appointment under s178 of the Children, Young Persons, and Their Families Act 1989 will usually be made after the Family Group Conference has been held. Reports required for Family Group Conferences are the responsibility of the Department of Child, Youth and Family Services. Section 178 reports are reports to the Court and will require the Court's permission for release and use at a Family Group Conference.

6.3 On receipt of the engagement letter, the report writer will forward written acceptance of the referral to the Family Court Co-ordinator.

6.4 A letter will be sent to counsel for the parties, and where Counsel for the Child has been appointed, the Family Court Co-ordinator will forward a copy to Counsel for the Child. When appropriate, the letter will include reference to s29A(2) of the Guardianship Act 1968 concerning the wishes of the parties.

6.5 In addition, a letter in standard form explaining the purpose of the report and the responsibilities of the report writer will be sent to the parties by the Family Court Co-ordinator.

6.6 The report writer will not attend a mediation conference or a Family Group Conference without the written approval of a Judge.

6.7 Reports are usually expected to take six to eight weeks to prepare. The Court will allocate a date in the Registrar's list, within ten weeks of the direction appointing the report writer, to develop a timetable for further steps to be taken.

6.8 The appointment will terminate on the date the report is filed.

6.9 When the report is received, the Registrar will release copies to all Counsel on the basis that it is shown but not copied to the parties without further direction. If the Registrar has concerns about the release of any report, it will be referred to a Judge for directions.

6.10 In the interests of efficiency and effective cost control:

- The brief for the report writer should be concise and specific; and
- Timetabling direction should follow the filing of a report to avoid lengthy delays between completion of the report and the hearing, and to avoid the need for updated reports.

7. Content of referral

7.1 Under s29A of the Guardianship Act, the referral from the Court should comprise:

- The standard engagement letter;
- The brief;
- The current information sheet FP7;
- A copy of the original application;
- A copy of the notice of defence; and
- A copy of the Judge's directions if applicable.

A list of documents supplied by the Court will be attached to the engagement letter.

7.2 Under s178 of the Children, Young Persons, and Their Families Act, the referral from the Court should comprise:

- The standard engagement letter;
- The brief;
- A copy of the application commencing proceedings, including any ex parte application and affidavits in support;
- Copies of any applications filed by children's parents or caregivers'; and
- A copy of the Judge's directions if applicable.

A list of documents supplied by the Court will be attached to the engagement letter.

7.3 The referral will also include:

The agreed hourly rate of payment;

- An agreed allocation of hours for interviews and writing the report: (Additional expenditure incurred, except for unforeseen additional attendances where there was no opportunity to seek prior approval, will not be reimbursed);
- Standard disbursements payable; and
- Provision for application for extensions to authorised hours or changes to the brief.

7.4 Affidavits relevant to the issues outlined in the brief may be sent to the report writer to provide background information and perspectives of the parties. Such affidavits will contain untested material and they should be treated with caution, particularly in relation to contentious issues and where, as in most cases, he affidavit evidence is incomplete.

7.5 Should additional affidavits to filed after the appointment of the report writer, the Court will forward copies of these affidavits to the report writer.

7.6 If additional information is required, the report writer must make the request to the Family Court Co-ordinator in writing.

7.7 Judicial approval is required for:

- Requests for access to, or copied of, additional file material;
- Access to the Court file/s;

– Access to Child, Youth and Family Services diagnostic videos; or
– Access to Police videos (access is governed by ss11B and 11C of the Evidence (Videotaping of Child Complainants) Regulations 1990).

8. Selection of specialist report writers

8.1 In each Court there will be a list of report writers who are available to accept individual assignments from the Court as a report writer.

8.2 The Registrar will convene a panel, from time to time, to consider applications for inclusion in the list of report writers available to undertake Family Court appointments. The panel will operate as a standing rather than ad hoc panel.

8.3 The panel will consist of a Family Court Co-ordinator, two experienced report writers appointed by the Court, a Counsel for Child nominated by the Court, a Family Court Judge nominated by the Principal Family Court Judge, a representative of tangata whenua and the Registrar, as convenor.

8.4 A panel would normally have seven people, but may be convened with a quorum of four members. Any panel of four must comprise a Family Court Judge, an experienced report writer, a tangata whenua representative and the Registrar or a Family Court Co-ordinator.

8.5 Panels will be convened as required but no less than twice a year, if there are applications waiting to be considered.

8.6 The process for selection of report writers is as follows:

(a) The applicants will submit an application form to the Registrar in the Court region in which they wish to practise, nominating their area of specific expertise and the particular Court or Courts where they wish to be on the list.
(b) Each application will be referred to a panel convened by the Registrar.
(c) Panel members will make such enquiries as may be needed for them to be informed about the applicant's ability to meet the criteria. Panel members will be assisted by the requirement that each applicant provide the names of his or her supervisor and two referees who can provide confidential, professional comment.

(d) The panel will interview each applicant. If the panel has any concerns about an applicant's ability to meet the criteria, these concerns will be put to the applicant who will have the opportunity to reply.
(e) Although there is no obligation on the panel to provide reasons for non-selection onto the list, it is expected that, if an applicant is not selected, the panel will have discussed their concerns with the applicant during the selection process.
(f) It is expected that the panel's approval will be by way of a consensus decision.
(g) The Registrar will advise the applicant, the Court, and the National Office of the Department for Courts of the decision, in writing.
(h) National Office will circulate the decision to other courts and on request will make the list available to the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists.
(i) Report writers will be able to transfer their approval from one Court region to another.

9. Criteria for selection to specialist report writer list

9.1 The following criteria have been agreed for the selection of psychologists to the specialist report writer list:

(a) A registered psychologist with current practising certificate.
(b) A current financial member of the New Zealand Psychological Society or the New Zealand College of Clinical Psychologists.
(c) Five years' clinical experience or equivalent including a minimum of three years' experience in child and family work.

9.2 Psychologists will provide evidence of competency in the following areas:

(a) Assessment/diagnostic skills as follows:
- Child-parent attachment, bonding;
- Child development; and
- Physical psychological and sexual abuse.

(b) Demonstrated knowledge and understanding of the following:

- Family systems;
- Family separation and impact on children and adults;
- Parenting skills;
- Family violence and impact on children and adults;
- Child abuse and neglect;
- Alcohol and drug misuse and abuse;
- Psychopathology;
- Professional ethics;
- Local community resources for children and their families;
- Relevant family law; and
- The responsibilities of the report writer in relation to the Family Court.

(c) Cultural awareness including an understanding of the following:

- Māori values and concepts;
- Implications of the Treaty of Waitangi for practice;
- Ability to refer to/make use of specialist cultural advice for families of different cultures;
- Understanding of the significance of cultural prohibitions, customs and language of other cultural groups; and
- Understanding of alternative child and human development perspectives.

9.3 Evidence of competency will be demonstrated by relevant academic and formal training, participation in relevant workshops, seminars and conferences and by maintaining knowledge with current trends in research and literature.

9.4 Psychologists will be expected to be familiar with core texts eg. G Maxwell, F Seymour, P Vincent (eds) *The Practice of Psychology and the Law*: A *Handbook*, NZ Psychological Society, 1996.

9.5 Specialised training and supervision should be undertaken by report writers. The responsibility for providing such training is that of the relevant professional bodies, but the Court will co-operate in the provision of expert input from Family Court Judges, Family Court Co-ordinators and others.

10. Review of the specialist report writer lists

10.1 The Registrar in each Court will ensure that the list of currently approved report writers is reviewed at intervals of not more than three years.

10.2 The Registrar will request all report writers who are currently on the list to indicate, within 28 days:

- Whether they wish to continue to receive report writer appointments;
- Whether they wish to withdraw from the report writer list; and
- Whether they have any matters relating to present or past appointments which they wish to draw to the attention of the Panel.

10.3 If they wish to remain on the list, report writers will provide the Court with a copy of their current practising certificate and professional membership, a report from their supervisor and a copy of their supervision contract, and a statement regarding any complaints.

10.4 The panel shall meet as soon as practicable and reconstitute the report writer list.

10.5 The panel will consider all the information provided by the report writers, as well as any other matters raised that relate to the administration of the list, and may choose to meet with individual report writers.

10.6 The Registrar will notify all report writers of the revised list and whether their names have been retained or deleted from the list.

10.7 The Registrar will send the revised list to the National Office of the Department for Court for distribution to all Courts.

11. Administration of the list

11.1 The Registrar will negotiate an hourly rate of payment with each report writer.

11.2 On an annual basis, each report writer will provide:

- Evidence of their current membership of an appropriate professional body and permission for the Court to access membership information from the professional body;
- A copy of their current practising certificate;
- The name and contact details of their supervisor and a copy of their supervision contract; and
- Details of relevant professional development undertaken in the past twelve months.

11.3 Each Court is to maintain a register listing, case by case, each report writer appointment, the date of appointment,

the estimate of fees and actual fees paid, the type of case and the date on which the appointment terminates.

11.4 The register is to be available for the regular monthly management meeting of each Family Court.

11.5 In areas such as Auckland and Wellington, where several Courts use one pool of report writers, there should be inter-Court communication to ensure that, as far as possible, there is a spread of assignments to all listed report writers.

12. Complaints

12.1 On initial appointment each report writer will:

- Complete a statement;
- Listing any past complaints and outcomes and any current complaints; or
- Confirming no complaints, past and/or present, have been made;
- Agree to advise the Court if they are at any time the subject of a complaint to their professional body and, or the Psychologists Board or the Health and Disability Commissioner, and to provide the Court with information on the outcome of any such complaint; and
- Agree to a Police check.

12.2 If, at any time, a report writer is the subject of a complaint to their professional body, the Psychologists Board or the Health and Disability Commissioner the report writer will advise the regional Administrative Judge in writing of the complaint. Once the complaint has been addressed, the report writer will advise the regional Administrative Judge in writing of the outcome of the complaint.

12.3 Many complaints against specialist report writers come from disappointed litigants and relate not to any form of professional misconduct, but to some alleged defect or omission in the way the report writer has carried out his or her assessment. Such grievances should be aired and dealt with as part of the litigation in the Family Court, rather than by complaint against a report writer to his or her professional body some time after the case has been finalised.

12.4 The Family Court does not have jurisdiction to hear any complaints against report writers when the case has concluded. Any such complaint received by the Court should be referred to the Psychologists Board.

12.5 Any complaints about a report writer received by the Court, when the case is in progress, should be referred to the presiding Judge. The complainant must put their complaint in writing.

12.6 Matters of criticism or complaint regarding the investigation, interviews, preparation and content of reports, resulting for example in lack of balance, bias in favour for or against a party, failure to give due weight to one or other factor, should be addressed to the Court. The Court will deal with this either before hearing or in the course of a hearing, for example, by way of cross-examination, submission, critique or evidence called on behalf of the complainant party.

12.7 Where a complaint against a report writer who provides an assessment for the Court relates to an alleged breach of professional ethics falling outside matters described in 12.4 such a complaint should be referred to the Psychologists Board or the Health and Disability Commissioner.

12.8 Complaints which proceed to the relevant professional body must be treated in a manner appropriate to that body and according to its procedures. Applications for release of material to that body should be made in writing to the Judge.

12.9 Protocol for complaint to New Zealand Psychological Society, New Zealand Psychologists Board or the Health and Disability Commissioner. Where there is a complaint to any of the above arising out of proceedings before the Family Court in relation to a report, on the written request from the Body in receipt of the complaint, a copy of the report will be made available on the basis that the report is to be used only for the purposes of dealing with the complaint and is returned to the Court when the process is complete.

12.10 The Court will not normally release the report while the case is in progress.

Signed

Judge PD Mahony

PRINCIPAL FAMILY COURT JUDGE

APPENDIX F

Psychologists Board complaints procedure

As outlined in the Psychologists Act 1981:

- A complaint must be made in writing to the Secretary of the Board [s30(2)].
- The Secretary is then under a duty to refer the complaint immediately to the Health and Disability Commissioner [s37B].
- The Health and Disability Commissioner then assesses the complaint in accordance with the Health and Disability Code. The complaint will only be referred back to the Board where it concerns professional issues falling outside the Code [s37D].
- Where the complaint is referred back, the Secretary then refers the complaint to the Chairperson [s30(30].
- The Chairperson then appoints three registered psychologists to be a Complaints Assessment Committee [s29(1)] after consultation with three Board members.
- The Secretary writes to the practitioner advising him/her of the proposed CAC. The practitioner is given 14 days to object to the CAC's membership.
- After the 14 day objection period has expired or after any objections have been resolved, the Secretary writes to the CAC Chairperson and members confirming their appointment and supplying complainant information and a copy of the *Complaints Assessment Committee Guidelines*.
- The CAC considers whether the Board should consider the complaint by way of a formal hearing [s31(3)]. Legal advice must be sought by the Committee Chairperson to assist with the assessment of the complaint under the *Guidelines*.
- A complaint will only proceed to hearing where the CAC is of the opinion that grounds exist for the Board to exercise its disciplinary powers under section 32 of the Act ie: that the practitioner has been:
    i. Convicted before or following registration as a registered psychologist, by any Court in New Zealand of an offence punishable by imprisonment for a term of six months or more;
    ii. Guilty of professional misconduct (including professional negligence);
    iii. Guilty of conduct unbecoming of a registered psychologist.

- The complainant is advised from the outset of the membership of the CAC and how the process works. The CAC will then correspond with the complainant as they see fit, requiring further information etc.
- If the CAC recommends that a full disciplinary hearing should be heard by the Board, the Board's Solicitor must draft a Notice of Hearing setting out the charges for the practitioner [s31(4)]. The notice states the grounds of the complaint and will call for the psychologist to respond to those grounds. A date is set down for a hearing not less than 28 days after the date of service of the notice. [s33]
- The Board has no discretion in these circumstances to waive a hearing.
- If the CAC is of the opinion that the matter should **not** be heard, the Board retains the discretion to proceed to a hearing. The CAC must provide the members of the Board with a copy of he report to be discussed at the next meeting. The Board may or may not then accept the CAC's recommendations.
- The complainant is sent a letter advising him/her of the CAC's decision. Regardless of whether there is to be a hearing, the complainant will then receive a copy of the CAC's report.
- The hearings are closed [s33(7)]. The Board is required to observe the principles of natural justice throughout the proceedings, but may hear evidence not admissible in Court. [233(5)].
- Disciplinary powers of the Board under section 32: power to de-register, suspend, fine and censure.
- Decisions are made by the majority of the Board [s33(6)] and in writing giving a statement of reasons for the decision and advising of a right of appeal [s33(8)].
- Appeal to the High Court within 28 days of notice of the decision – unless the High Court directs otherwise [s35].
- Length of time from the lodging of a complaint to determination varies. The CAC has a guideline of 3 months, however this can be substantially longer in some cases.
- The CAC will not be able to investigate a complaint where a case is going through the Family Court until after the completion of proceedings.

APPENDIX G

List of submitters

Those who assisted us with submissions and consultation

Name	Company
Raymond R Alexander	Marlborough Primary Health Nursing Care Centre
Gay Puketapu-Andrews	
Marcel Armand	
Max G Aston	
Bill (WR) Atkin	Victoria University of Wellington
Melanie Baker	Barrister and Solicitor
Dan and Barbara Bashall	
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Susan J Bennett	Lucas & Lucas
Stuart Birks	Massey University
Chris Bishop	
Marty Bowers	
Colin Brown	
David Burns	Family Law Section, New Zealand Law Society
Peter Burns	
Katharine Burrell	3D Recovery
Alan Candy	
Allyson Caseley	Parting Company
Wally Campbell	
Trevor Chadwick	
Chairperson Family Law Section	New Zealand Law Society
Anita Chan	Barrister
Bruce Cheriton	3D Recovery

Name	Company
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Ken Clearwater	The Next Step
Allan Cobham	Deaf Association of New Zealand (Inc)
Chief Executive	Legal Services Agency
	Christchurch Mums
Robin Crowe	
Wendy Davis	Powell & Davis
Robyn Davison	The New Zealand Federation of Business and Professional Women Inc
John Delany	
	Department for Child, Youth and Family Services
	Department for Courts
Mr Doi	
Bruce Doyce	
Nigel J Dunlop	Riverlands Chambers
Jane Dyne	
Esther Eady	
Ben Easton	
Erin Ebborn-Gillespie	
Norman Elliott	Penney Patel Law
Family Court Bench	Family Court
Family Court Co-ordinators	Family Court
Family Court staff at Manakau, Pukekohe, Tauranga, Whakatane, Porirua, Wellington and Christchurch	Family Court
Gregory Ian Finlay	
Moyna Fletcher	Parentline INC Hamilton
Robert Free	Father and Child Trust Otago
Susan Freeman-Greene	Mediator
Graham French	Barrister
Kevin Garner	
Stephen Gee	

Name	Company
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Kim Gotlieb	Dunedin Community Law Centre
Gillian Guptill	Mangere Community Law Centre
Tamara Guretzki	
Fiona Guy	Wellington Women Lawyers Association
Rosemary Guy	
Sheryl Hann	National Collective of Independent Women's Refuges
Elizabeth S Harris	
P and R Harris	
Geoff Harrison	Barrister
Brett Heap	Dunromin Orchard
Patricia Heyes	
Steve Hill	
Dr Edward Hitchcock	
Richard Hollingsworth	
JKV von Hooker	
Glen Innes	New Zealand Law Society
Craig C Jackson	
Kathryn Johnston	Parents and Caregivers of Sexually Abused Children
Rev Alan S Judge	Maniototo Presbyterian Parish
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Geraldine Keith	
Dave Kiriona	
Natisha Knight	
LEADR New Zealand Inc	
Don Leembruggen	
Vera Levett	
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Gair Macdonald	
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Name	Company
Stephen McCarthy	Auckland District Law Society
HIM McIntosh	
CJ Mckenzie	CMNZ Ltd
Sam McLean	Human Rights Commission
Judge PD Mahony	Principal Family Court Judge
Anne Maus	
Eric Medcalf	
Robin Millar	Department of Child, Youth and Family Services
	Ministry of Justice
Joanna Moss	
Linda Mitchell	
Glenn Mottram	
Penny Mudford	Arbitrators' and Mediators' Institute of New Zealand
Luana Murray	
Robert Murray	Child Advocacy Services (CAS)
	National Network of Stopping Violence Services
Peter Murphy	
Robb Newberry	Barrister
	National Council of Women of New Zealand Inc
	North Harbour Living Without Violence
Office of the Commissioner for Children	Office of the Commissioner for Children
Sue O'Shea	IHC
B Parker	Auckland Consulting Group Ltd
Sue Parkes	
Helen Pashley	Department of Child, Youth and Family Services
Usha Patel	New Zealand Law Society
Jane Pendleton	Family Court Co-ordinator
Patricia Perkins	Caring Communities Incorporated
Christopher Perley	

Name	Company
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Jocelyn Potter	
Beverley Poulton	
Alan Clifford Price	
The Hon Justice Priestley	High Court
Rhonda Pritchard	
Dr Jan Pryor	Victoria University of Wellington
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Kathryn Redhead	Presbyterian Support Services – Central
Dr Llewelyn Richards-Ward	
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Geoff Sinclair	
Karen Anne Singleton-Ryan	
Hilary Smith	Relationship Services Whakawhanaungatanga
John and Puti Snowden	Te Whanau o Te Maungarongo
Kit Sutherland	
	The Christchurch Family Court Working Party
Assoc Professor Pauline Tapp	University of Auckland
Nicola Taylor	University of Otago Auckland Centre
Jackie Te Kani	Māori Women's Welfare League
Beverley Telfar	Catholic Women's League of New Zealand
Chris Temple	
Pauline Templeman	New Zealand Association of Counsellors
Max Thomas	

Name	Company
Bruce Tichbon	Families Apart Require Equality (FARE)
Janis Todd	
Sharon Toi	Ministry of Women's Affairs
Flora Tuhaka	
Prue Vincent	
Dr P James Watt	
	Union of Fathers
Daryl Ward	
Mike Wignall	
Peter AD Williams	
Wyn Williams	
Alan and Dale Withy	
Jim Yates	New Zealand Father and Child Society
Peter Zohrab	New Zealand Equality Party
Necia Zimmermann-Prior	
Steven Zindel	Zindels

GLOSSARY
(to terms used in this paper)

Access order	An order allowing a person time with a child, usually the parent who does not have custody
Administration	The management of money and property of a person who has died
Administrative review	Under the Child Support Act 1991 – an assessment by the Review Officer contracted to the Child Support Agency as to whether a formula assessment should be changed
Affidavit	Written evidence that the writer swears is true
Affirmation	Written evidence that the writer declares is true
Associated respondent	Under the Domestic Violence Act 1995, a person who has assisted the respondent in harassing or hurting the applicant
Beneficiary	A person who receives money or property from a trust or under a will
Caseflow management	The management of applications filed in court towards a final hearing, including all preliminary matters
Chambers hearing	An informal hearing before a judge, held in private
Civil jurisdiction	That part of the work of a court which relates to non-criminal matters
Concurrent jurisdiction	Circumstances in which there is a choice as to the court in which an application can be filed, that is, both the District Court and the High Court may have jurisdiction to hear certain matters

Consent orders	Orders where the terms have been agreed by the parties
Counsel for the child	Lawyer appointed by the Family Court to act for the child
Court decisions	Rulings made by a court
Cross-applications	Where two parties make applications against each other, for example, a mother and a father of the same child both applying for custody
Custody	Under the Guardianship Act 1968, the right to possession and care of a child
De facto relationship	A relationship similar to a marriage which is not confirmed by a legal ceremony
Decree	An order by a court
Defend	To respond to or oppose an application
Defended hearing	A full hearing where the judge hears all the evidence of the applicant and their respondent and any other party
Departure order	Under the Child Support Act 1991, an order which alters the formula assessment
Deponent	The person who makes an affidavit
Disclosure	Giving information or documents to the other party that are relevant to the court proceedings
Estate	The money and property of a dead person
Family group conference	Under the Children, Young Persons, and Their Families Act 1989, a meeting of family members to discuss a child
Final order	The ruling of a court which is made to end the matters raised in an application
Fixture	The time set down for the hearing of a matter by a court
Fono	Meeting
Guardianship	The rights and responsibilities over the upbringing of a child, usually exercised by a parent or another person appointed by a court as a guardian of a child

Hague Convention	There are a number of International Conventions that were adopted in the Hague. The common one in the context of the Family Court is the Hague Convention on the civil aspects of International Child Abduction, which was incorporated into our Guardianship Act by sections 22A–22K
Hearing	The time when a matter is argued before a judge
Hui	Meeting
Inquisitorial	A style of hearing where the judge requests information, asks questions, and exercises control over the information brought before the Court
Inspection	The viewing of documents relevant to a case before the Court, which have been disclosed by the other side
Interim order	A temporary order made and enforced until a final order is made
Iwi	Tribal group
Judge's list	A list of matters to be heard by a judge on a certain day
Judicial conference	A meeting chaired by a judge
Jurisdiction	The range of matters that can be dealt with by a particular court
Justice of the Peace	A person appointed by the Governor-General under a warrant who can witness documents, take oaths and affirmations, and issue warrants.
Karakia	Prayer
Kaumātua	Elder
Kawa	Protocol
Kōrero	Speech
Legitimacy	Lawfulness
Liable parent	Under the Child Support Act 1991, the parent who pays child support

Maintenance order	An order by a court that one person provide financial support for another
Māoritanga	Māori culture/perspective
Marriage dissolution	The order ending a marriage – a divorce
Judge-led mediation	A meeting where the judge acts as mediator to attempt to resolve a dispute
Memorandum of issues	A document setting out matters that need to be resolved
Mihi	Welcome
MP1 affidavit	Under the Matrimonial Property Act 1976 – an affidavit of assets and liabilities
Narrative affidavit	An affidavit setting out the background to a matter
Non-molestation order	Under the Domestic Protection Act 1982, an order forbidding harassment of the applicant
Non-violence order	Under the Domestic Protection Act 1982, an order forbidding violence against the applicant
Notice of intention to appear	A notice to the Court that a person has an interest in a matter but does not wish to oppose or defend it
On-notice application	An application where the respondent is given notice of the hearing and no order is made until the respondent has received the application and been given the opportunity to reply
Party	A person who is joined into a court action
Paternity order	An order that establishes the father of a child
Personal representative	A person who stands in for, and conducts the affairs of, a person who has died
Plan	Under the Children, Young Persons, and Their Families Act 1989, a statement prepared by a social worker setting out what is to happen for a particular child

Practice note	A note, usually about a procedural matter, published by judges, requiring matters to be dealt with in a certain way
Preliminary hearing	A hearing about a matter that needs to be decided before the main issue is decided
Pre-trial conference	A conference with a judge to discuss how matters are to proceed at a hearing
Privileged document (or information)	A document (or information) which must be kept confidential and cannot therefore be disclosed in court
Qualifying custodian	Under the Child Support Act 1991, the person to whom child support is paid
Ready list	A list of the matters which are ready to be set down for a hearing time
Registrar's list	A list of matters to be heard by a registrar on a certain day
Respondent	The person who opposes or responds to an application filed in the court
Restraining order	An order by the court preventing a person from doing certain specified things. Under the Matrimonial Property Act 1976 it may relate to disposing of certain property. Under the Children, Young Persons, and Their Families Act 1989, it may prevent a person contacting a child
Revocation of order	Cancellation or retraction of an order that has previously been made
Rules	Procedures that persons approaching the Court are to follow
Service	Delivery of Court documents to a party to the Court proceeding
Services order	Under the Children, Young Persons, and Their Families Act 1989, an order that certain social work services or other services will be provided to a child or a family
Setting down	Deciding the date on which a matter will have a hearing

Settlement	Finalising a legal arrangement
Settlement conference	A meeting with a judge to discuss whether the matter can be finalised by agreement rather than go to a hearing or be determined by a judge
Short cause	A matter that requires only a brief hearing time of 15 minutes or 30 minutes
Specialist report	Especially under the Guardianship Act 1968 and the Children, Young Persons, and Their Families Act 1989, a report obtained from a psychiatrist or a psychologist or other professional
Spousal maintenance	Financial support for a husband or wife or de facto partner
Standard directions	The Family Court Caseflow Management Practice Note sets out the matters that will normally need to be completed before an application can be brought to a hearing. The standard directions set out the steps that usually should be taken and the time in which they should be completed
Statute law	The law contained in Acts passed by Parliament
Submissions	Arguments by lawyers on behalf of their clients
Supervised access	Contact between an adult, usually a parent, and a child, which is overseen by another responsible adult. Usually ordered where there is some risk to the child if the access is not supervised
Support order	Under the Children, Young Persons, and Their Families Act 1989, an order for financial support for a child in care
Tangata whenua	People of the land, Māori
Testamentary	To do with a will, for example, testamentary capacity – whether a person has sufficient mental capacity to sign a will
Tikanga	Customs

Trust	A form of ownership of assets whereby the trustees of the trust own assets but hold those assets for the benefit of other persons known as beneficiaries
Waiata	Song
Whānau	Family
Whanaungatanga	Covers all relationships on the basis of descent from a common ancestor, and marriage (that is, blood relatives, spouses and affines). The term denotes the fact that in traditional Māori thinking, relationships are everything
Whakapapa	Genealogy
Whenua	Land
Without-notice application	An application heard by a judge, where the respondent has not been given notice of the hearing. Such applications are rare and are only used in emergency situations where there is risk to an applicant or a child if the respondent was told about the application before it was heard. Used under the Domestic Violence Act 1995 and sometimes for an urgent custody application or to prevent one party applicationdisposing of property

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