REFERENCE GROUP

REPORT

TO MINISTRY OF JUSTICE

ON

FAMILY COURT REVIEW

April 2012

REPORT OF REFERENCE GROUP

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MEMBERSHIP OF REFERENCE GROUP

Dr Suzanne Blackwell is a clinical psychologist in private practice, and an Honorary Research Fellow in the Psychology Department, of the University of Auckland. She has provided specialist reports for the Family Court since its inception in 1981 and has published papers and given addresses on Family Court issues. She was an editor (with Professor Fred Seymour and John Thorburn) of the recently published book *Psychology and the Law in Aotearoa New Zealand*. She and Professor Seymour wrote the revised and updated guidelines for Family Court reports contained in that volume.

Deborah Clapshaw is a barrister working exclusively as a mediator in commercial, construction and interpersonal disputes. She practiced as a barrister and solicitor in New Zealand and Hong Kong from 1981 before moving to the Bar as a mediator in 1994. Deborah is on a number of Mediation Panels including the High Court, Family Court, Domain Name Commissioner, Health and Disability Commissioner and Weathertight Homes Resolution Service Mediation Panels. She has had extensive experience as a private mediator. She lectured at Auckland University Law School in Mediation and Dispute Resolution for 10 years from 1994. She is an Invited Fellow of the International Academy of Mediators, a member of the Advanced Panel and past Chair of LEADR NZ, a current assessor and coach for LEADR NZ and a Fellow, Disciplinary Tribunal and Mediation Panel member of AMINZ.

Garry Collin is a family law barrister based in Christchurch. He is on the Lawyer for Child, PPPR Act and Hague Convention panels and regularly receives appointments as Counsel to Assist. Garry completed a post graduate diploma in Child Advocacy in 2005. He spent 20 years on the Board of Trustees of Richmond Primary School and Shirley Boys High. Garry has been a member of the Executive Committee of the Family Law Section since 2007.

Jonathan Loan is the President of the New Zealand Association of Counsellors. He has worked as a counsellor in private practice since 1995 including Family Court counselling, ACC sexual abuse counselling, work for the Rural Canterbury PHO and professional supervision. Jonathan also works part time as a School Guidance Counsellor at Kaikoura High School. Jonathan also has experience in facilitation of non violence group and individual programmes.

Antony Mahon (Chair) is a barrister practising in Auckland and has specialised in all aspects of family law for over 25 years. He has been on the Lawyer for Child panel since 1989 and is an accredited family mediator. Antony is a former Chair of the Auckland Family Courts Association and co-presented the NZLS CLE Ltd seminar on Child Development in 2004. He has co-presented the Lawyer for Child workshop for NZLS CLE since 2007 and in 2008 he chaired the Advanced Lawyer for Child seminar. Antony has been a member of the Family Law Section Executive since 2007 and has chaired the Section since April 2010.

Sharyn Otene is of Nga Puhi descent. She is a family law barrister and has worked predominantly in South Auckland since commencing practice in 1996. Sharyn's practice is predominantly in matters concerning CYPTF, COCA and PPPR Act proceedings. She was appointed to the Lawyer for Child panel in 2001 and frequently acts as Lawyer for Child and Counsel to Assist the Court. Sharyn is LEADR accredited and has been a member of the panel to conduct counsel-led mediation since the inception of the EIP scheme in 2010. Sharyn was this year appointed as a member of the Executive Committee of the Family Law Section.

Professor Fred Seymour is a Professor in Clinical Psychology at the University of Auckland, and Director of the Clinical Psychology programme. He is a former President of the New Zealand Psychological Society, and a recent (2004-2011) member of the Psychologists Board. Before joining Auckland University in 1988, he worked in and/or managed several child and family mental health agencies. He maintains a private practice that includes work in the Family Court, and criminal courts in relation to child sexual abuse allegations. His teaching and research interests include family therapy, child abuse, parental separation, and professional ethics. His research has contributed to the development of services for child abuse investigation and treatment, expert evidence in the courts, and psychoeducation programmes for parents following divorce. He has on several occasions been an advisor to the Ministry of Justice, and was a member of the group that produced the 1993 Boshier Review of the Family Court.

Judge Vivienne Ullrich QC was appointed as a District Court Judge with a Family Court warrant in 2003. She was called to the bar in 1969 and has spent time in practice as a barrister and solicitor, and as a member of the Law Faculty at Auckland and Victoria Universities. She practised as a barrister sole from 1990 and was appointed a silk in 2000. She was the Law Commissioner responsible for Report No. 82 on Dispute Resolution in the Family Court (2003). She was a foundation member of the Family Law Section Executive from 1998 to 2000.

Jo-Ann Vivian has 15 years experience with the Family Court and has held responsibility for the Family Court Counselling, Multi-location Mediation and Domestic Violence Programme policies, practice, training and supervision for Relationships Aotearoa for the past ten years. Relationships Aotearoa is New Zealand's largest provider of Family Court Counselling and marriage guidance (its original name) working in 75 communities across New Zealand and as Marriage Guidance (its original name). Jo-Ann was fundamental in establishing counselling services within the Family Court and has worked in the social service and health sector with families as a counsellor, social worker and registered nurse for 30 years.

BACKGROUND

Establishment of the Reference Group

1. The Reference Group was established by the Minister of Justice following the symposium of Family Court professionals, organised by the New Zealand Law Society's Family Law Section held at Parliament on 3 June 2011.

2. The role of the Reference Group is to advise the Ministry of Justice (Ministry) on:

   (a) the nature and direction of reforms that are necessary to ensure the Family Court is sustainable, efficient, cost-effective and responsive to those people who need access to its services, particularly children and vulnerable people and that proposed reforms ensure the processes of the Family Court are straightforward and its decisions are fair, timely and durable.

   (b) any policy proposal the Ministry raises with it and how it represents the needs of Family Court clients from each member's individual professional perspective.

   (c) any other relevant material including research which each member believes may assist policy development.

3. It was agreed between the Ministry's review team and the Reference Group that the discussions would not be confidential except to the extent that the Ministry shared any confidential information with the Reference Group during the meetings (e.g. specific policy proposals). No such information was shared.

4. Between September 2011 and February 2012, the Reference Group met with the Ministry's review team on six occasions during which every aspect of the public consultation paper *Reviewing the Family Court* released by the Ministry in June 2011 (Review) was addressed.

The Reference Group's Report

5. The Reference Group recognises the Government's current fiscal imperatives and the significant increase in the costs of funding the Court since 2006. Unfortunately insufficient data was provided to enable any reliable analysis of the cause of the cost increase in particular areas to be undertaken.

6. The Reference Group's Report (Report) principally focuses on the pre-Court and in-Court procedures for Care of Children Act 2004 proceedings as the greatest cost increases have occurred in these cases.

7. A brief commentary is provided for each part of the Report, followed by recommendations which are summarised at the end of the Report on **page 56**.

8. While many of the recommendations will accord with the views of the professional bodies to which Reference Group members belong, the members are not constrained by these bodies in the recommendations. Rather the members have reached a collective decision as individuals experienced in Family Court practice, in a similar way to the Family Court professionals who prepared the Boshier Report reviewing the Family Court in 1993.

9. The Reference Group's dilemma has been that the focus of the review is both fiscal and seeking to improve outcomes in the Court. There may be an increase in costs from some reforms recommended in the area of pre-Court processes. It is the Reference Group's view that the fewer applications resulting from these reforms and savings from the in-Court reforms recommended will at least partly fund any additional cost of these reforms proposed in parent education and Family Dispute Resolution. The extent to which there will be savings or increased costs from implementing any of the reforms the Reference Group recommend is however not possible to predict in the absence of a cost benefit analysis.

10. The Reference Group agrees with the statement in the Review of the need for a "cultural shift" in the way in which parties approach their family disputes. There is therefore a focus on pre-Court processes in the recommendations.

11. An in-depth study of structures within the whole Family Court system to achieve the "overarching strategy" intended by the reform is required. This would create a Family Court which is sustainable but also effective in case outcomes. While currently reform may need to focus principally on short term savings for the Ministry, the opportunity to fully investigate the shape of a long term overarching strategy for the Court should not be lost.

12. Short term savings can be made and result in improved practice and better outcomes in cases. The Reference Group however cautions against reform made to achieve short term savings without adequate data and analysis. There is then a risk that the unintended consequence will be to merely shift the costs from the Ministry to other areas of Government spending.

13. The Reference Group believes there will be cost savings from many of the reforms proposed. This view is based on the collective experience of the members in practice as the data is insufficient to enable more certainty in conclusions. In addition the Reference Group is a collaboration of professional volunteers without the financial resources to undertake the further analysis required.

14. The Reference Group welcomes the opportunity to further discuss any recommendation in this Report and other policy being developed by the Ministry.

1. PRE-COURT PROCESSES

Introduction

1.1 International experience and research highlight that the current adversarial Court system can be harmful for families. Families achieve better outcomes when they resolve their disputes themselves, or with the assistance of their family, friends or community. If disputes are resolved quickly they become less entrenched, result in less harm to the relationship and increase focus on the needs of children.

1.2 It is however essential to recognise those cases where for a number of reasons parties are unable to resolve their disputes outside the Court and why they require the assistance of the specialist services and Family Court Judge role available after proceedings have been filed. These individuals include the vulnerable parties and children subject to issues of domestic violence, intellectual disability, mental health, drug and alcohol abuse and dynamics of power and control.

1.3 Approximately 90% of separated parties resolve their disputes either directly, with the assistance of a family lawyer, access to programmes, or in Family Court counselling. This illustrates the importance of retaining and enhancing programmes and services that are available to parties prior to Family Court proceedings. Even a small increase in the numbers accessing these services will result in significant savings.

1.4 Self resolution and pre-Court resolution will be enhanced by improvement to parenting education and the range, availability and accessibility of information for the community, Court professionals and families.

1.5 The Review raises questions of how such information and/or services should be financially supported, and the extent to which parties should contribute to the costs of information and/or services.

Accessible Information

1.6 The Reference Group strongly supports the provision of comprehensive and accessible information to families about matters related to separation with a primary focus on education regarding parenting disputes* and the impact of them on the parties' children.

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* It is also recommended that information be available to parties regarding their relationship property and other legislation administered by the Court.

1.7 The information provided should:

1.7.1 educate parents about the needs of their children following separation (and in particular increase awareness of the need to protect children from conflict).

1.7.2 include strategies on how to effectively manage the tasks of parenting after separation and inform parties of services offered by the Family Court (in particular, Family Dispute Resolution services).

1.8 The Ministry currently provides a range of helpful information for Court users in the form of pamphlets, booklets, information packs, DVDs and through its website. This free information is provided in a number of languages represented in the wider community. The free provision of information needs to continue to be available in these forms and enhanced in its content and delivery.

1.9 The Ministry's Family Court website could be more user friendly with a particular section available for children and adolescents. It however needs to be recognised that not all users of the Family Court have access to the internet.

Recommendations

Pamphlets
Current information sources are enhanced to make written information regarding pre-Court resolution and Court procedures more widely available; and the content redesigned to include more details of how to access services and their cost.

Website
The Ministry's Family Court website is substantially redesigned (there are overseas models to follow) for provision of information, in particular for children and adolescents.

0800 number
A national call centre is established (staffed by personnel with specialist training) for advice on all aspects of Family Court services.

Face to face contact
Parties continue to be able to have face to face meetings with a member of the Disputes Resolution Co-ordination Office similar to the current meetings with a Family Court Co-ordinator.

Cost
Information remains available without cost.

Parent Education

1.10 The Parenting Through Separation programme has been available for several years. A limited evaluation of the programme found a high level of satisfaction among the parents who had attended, however only a small percentage of separated parents attend the programme and even a smaller percentage prior to filing proceedings.

1.11 Since the initial evaluation of the programme, no other review has been undertaken. The programme's content and structure could be enhanced by considering the models of other programmes, for example, the earlier pilot of Children Through Separation in the North Shore Family Court and various international models. The programme content and delivery should be regularly reviewed and updated according to available research.

1.12 The current Parenting Through Separation model is not as effective as it could be in delivering the necessary education because:

1.12.1 there are several providers in each district resulting in competition for attendees and small numbers attending each session.

1.12.2 there is little incentive for parents to attend.

1.12.3 promotion of the programme is inconsistent across the country.

1.12.4 payment is made on the basis of a fee per client rather than per session which is not cost effective.

1.12.5 there are currently delays in the availability of programmes and many parents who would benefit from the programme decide not to wait to attend.

1.12.6 there is no training requirement for programme presenters nor a systematic quality assurance audit.

1.13 The Reference Group believes that if the programme is enhanced, attendance should be a mandatory pre-requisite before the filing of proceedings in the Family Court. There would be exceptions to mandatory attendance in urgent or family violence proceedings. If only one party attended, later attendance by the other party would be a condition of that party's ability to proceed with a defence to any application.

1.14 Even though attendance at a programme might be mandatory before the filing of proceedings, consideration should be given to parents making a small contribution to attend the programme. However clear guidelines setting out

exemptions to payment are required to ensure the ability to pay does not prevent parents attending a programme.

1.15 Each Family Court district should have one provider (the provider to ensure facilitators are, where possible, employed to match the culture of attendees) required to deliver the programme within a regular, flexible schedule. Programmes should be held at different times to facilitate the attendance by parents outside of normal business hours to take into account employment, childcare needs, etc. There is potential to have more than 50 attendees at one session.

1.16 Specific and on-going training for programme providers should be established together with systems to monitor programme delivery and attendance.

Recommendations

Compulsory attendance

Attendance at a parent education programme is a mandatory pre-condition of filing proceedings in the Family Court and larger groups attend each session.

Review of the structure

The current structure and content of the Parenting Through Separation programme is reviewed to take into account the models of other programmes including the earlier pilot of Children Through Separation in the North Shore Family Court and international models.

Single provider

Each Family Court District has one provider required to deliver programmes in a regular schedule at times to meet the different employment and other circumstances affecting the availability of parties to attend (and different cultural needs).

Funding

Payment to the programme providers is based per programme rather than the current model of payment per attendee and the programme designed to include a larger number of attendees than the number that currently attend.

Regular review

The programme content and delivery is regularly reviewed and updated according to available research and such a review includes the updating of guidelines for programme leaders.

Training/monitoring

Training is provided and monitoring introduced for programme providers.

Parent contribution

Consideration is given to parents making a small contribution for programme attendance with clear guidelines for exemptions to ensure the ability to pay does not prevent participation.

Family Dispute Resolution

1.17 In 1976 the Beattie Commission recommended the establishment of the Family Court on a model of a comprehensive conciliation/mediation service separate from the Court. The subsequent Boshier and Law Commission reports recommended increased emphasis on and enhancement of pre-Court dispute resolution.

1.18 Counselling for reconciliation in itself does not fit the purpose of the Family Court 30 years after its establishment. Reconciliation or other therapeutic outcomes will however continue to be a positive outcome of some Family Dispute Resolution as it is currently often a consequence of section 9 counselling and family mediation.

1.19 There is no relevant data to determine the cost effectiveness of Family Court counselling compared with other models of dispute resolution.

1.20 The phrase "counselling" is misleading as the nature of the dispute resolution undertaken by accredited counsellors for sections 9 and 10 counselling is a mix of therapeutic, reconciliation and dispute resolution processes.

1.21 The Reference Group does not know whether the cost of establishing a separate family dispute conciliation/mediation service is prohibitive in the current economic environment. Enhancement of dispute resolution prior to proceedings is nevertheless a priority and can be reasonably expected to result in considerable cost savings because more disputes are resolved without the need for Court intervention.

1.22 A new service which the Reference Group has termed "Family Dispute Resolution" (FDR) can be established by retaining the current contracting structure for providers with the link to the Court provided through an enhanced Court Co-ordinator model.

1.23 Mediated outcomes will not be appropriate in all cases and these cases need to be recognised early in the process and an alternative track provided towards a judicial determination. There will also be some families where there has been a low level of violence where mediation may be appropriate but that will depend on a consideration of all the circumstances.

1.24 Establishment of FDR to replace the current section 9 counselling (prior to filing in Court) and the Early Intervention Programme (EIP) mediation and section 10 counselling (after filing in Court) is likely to result in a decrease in applications being filed under the Care of Children Act. There will be significant savings to the Ministry. FDR must also include a requirement for improved skills and qualifications for those undertaking dispute resolution within the FDR model.

1.25 The Reference Group supports availability of FDR to *parties* who are unable to agree upon guardianship and care issues related to *dependent children* under the age of 16 years.

1.26 FDR would deal with all disputes on a facilitation model which will replace current counselling and mediation. The dispute resolution role would be undertaken by suitably skilled counsellors, mediators and psychologists.

1.27 Parties would be informed at the commencement of FDR that the practitioner will provide a brief report to the Court at the conclusion of his or her engagement. The report would be more detailed than current reports, summarise the issues on which agreement is reached and identify those issues discussed on which agreement is not reached. (The report would also provide useful information for decisions about subsequent Court based services.)

1.28 Parties would then receive a signal that early resolution of their dispute is not only encouraged but expected by the Court.

1.29 To assist in the collection of data and to assess the quality and outcomes from FDR, parties would be allocated a "FAM number" which remained the same if their case results in later Court proceedings.†

1.30 The Ministry would accredit, appoint and audit the professionals who provide FDR and parent education services.‡

1.31 Any reform must recognise the need for the Court to continue to have the ability to return parties to FDR after filing and retain the benefit of counselling under s 19 of the Family Proceedings Act 1980 for complex cases.

1.32 *Extending counselling to children as a part of a final order for their care as proposed in the yet to be enacted section 46P of the Care of Children Act is urgently required.*

Recommendations
Family Dispute Resolution Service
A FDR Service is established within the Family Court to replace the current section 9 counselling and referrals back to counselling after filing and in-Court mediation under EIP.

† Patients at all stages of the health system have a similar identification number which assist in continuity in a patient's care and provides a source for collation of data for analysis of cost and quality of outcome.

‡ An example of such audits in other areas of Government Ministries is in our schools and universities.

Eligibility
The service is available to parties with dependant children under the age of 16 years.

Name
The process is called "Family Dispute Resolution" (FDR) to avoid the confusing terminology of "counselling", "conciliation" and "mediation" with the potential that several models of family dispute resolution practice could meet the criteria.

Definition
The model is a facilitation model which replaces current counselling and mediation.

Providers
Providers who meet the new training and skill requirements will include counsellors, mediators and psychologists. The providers continue on a contracting model.

Reporting
A report is provided at the conclusion of FDR.

Identifying Reference
A party's dispute is allocated a unique identifying "FAM number" for use in any later Court proceedings and the enhancement of data collection for monitoring of cost efficiency and enduring quality of outcome of FDR.

Administration of Information and FDR Services

1.33 These recommendations are made conscious of the fiscal constraints on the Ministry in the current economic climate and that is why the Reference Group has separated the recommendations into short and long term solutions.

1.34 The Reference Group is aware that full implementation of the suggested reform involves costs although has no basis upon which to assess the level of that cost.

1.35 The Reference Group proposes a structure of FDR administration which does have resource implications for the Ministry but has done so because of a strong view that until an integrated service such as the one proposed is created, the effectiveness of any reform of pre-Court and in-Court dispute resolution will be limited.

Short Term

1.36 The Reference Group recognises the potential resource implications of a service as comprehensive as proposed for family dispute resolution administration and if once costed such proposals are beyond the current funding available, reform to the current Family Court Co-ordinator role within the existing administrative structure will result in improved outcomes and costs saving resulting from fewer in-Court applications.

1.37 A short term solution for reform is to:

1.37.1 improve the administrative support for Family Court co-ordinators.

1.37.2 establish an improved process for the development of guidelines for professionals' practice in the Court and audit of the training and effectiveness of programmes (e.g. parent education).

Long Term

1.38 A long term option for the Ministry's administration of pre-Court processes is:

1.38.1 a Family Dispute Co-ordination Office (Office) which includes professionals with similar skills to those required of the original counselling co-ordinators in the Family Court but a wider skill base to ensure that the role of the Office avoids potential conflicts of interest.

1.38.2 location of the Office within the Court building but physically separate from the Registry, in recognition of the different nature of the role of the family dispute co-ordination staff.

1.38.3 the Office co-ordinates the provision of information (manages the call centre etc), face to face meetings with parties enquiring of Family Court services and the appointment of and relationship with the FDR practitioners (the responsibility for these roles would not however be with only one person).

1.38.4 a Family Dispute Co-ordinator performs the Court Co-ordinator role in referrals to the FDR pre-filing and the commissioning of specialist reports post-filing.

1.38.5 the Office has responsibility for oversight of the accreditation, appointment and ongoing audits of the professionals delivering parenting education and FDR services. These professionals continue to provide these services to the Court on a contract basis as at present. Provided the relevant professional group meets defined criteria established by the Ministry, that group is delegated the responsibility for training and accreditation of the contracted professionals.

1.38.6 the staff of the Office have the appropriate specialist skills and training to recognise the issues arising for parties after separation and the nature of conflict between parties over the care of their children.

1.39 Entry to the Family Court process would be via a single point of entry, whether seeking information via the multiple sources (pamphlets, DVDs, website, 0800 number etc) or a visit to the Office in the Court building.

1.40 The information accessed by parties would provide a form of screening for domestic violence and risk. That screening would be enhanced by any face to face contact with a member of the Office and the professional training of the practitioners delivering parent education and family dispute resolution services.

1.41 The Reference Group is not concerned that situating the Office in the Court building may send the wrong message to parties. Most parties do not see engagement with a section 9 counsellor as involvement in "Court" even though their access to this counsellor comes through the Court. There are examples in other jurisdictions, such as the Court houses in Santa Barbara, California where this "information hub" is located within the physical Court building but seen as a separate part of the Court process.

1.42 By retaining the provision of information, parent education and Family Dispute Resolution within the Court structure:

1.42.1 there will be a greater incentive for parties to make a real attempt to resolve their dispute.

1.42.2 the standards of the practitioners and effectiveness of outcomes will be more easily monitored.

1.42.3 the essential link between pre and post-filing procedures will be maintained so that the overarching strategy of better identification of cases which can be resolved without judicial intervention can be developed and enhanced without placing vulnerable parties and children more at risk.

Recommendations

Short Term - FDR Co-ordinator

The Current Co-ordinator Role
Greater support is provided to the role of Family Court Co-ordinator.

Guidelines and Audit
The Ministry develops structures for the development of guidelines for auditing of training programmes and the delivery of parent education.

Long Term – FDR Co-ordination Office

Administration of Services
The Family Disputes Resolution services and information is administered by a Family Dispute Co-ordination Office as set out in paragraph 1.38 above.

Family Dispute Co-ordination Office
The Family Dispute Co-ordination Office is recognised as the hub of an overarching strategy of integration of pre and post-filing procedures in the Family Court to achieve, without the need for establishment of a separate Family Court dispute resolution service, the goal of comprehensive delivery of education and family dispute resolution services.

Location of Service
The Family Dispute Co-ordination Office is located in the same building as the Family Court.

Family Dispute Co-ordination
The current Family Court Co-ordinator role includes functions which will continue to be carried out by the Family Dispute Co-ordinator. The role will be expanded to encompass other tasks that are currently carried out by case officers (e.g. processing requests for counselling and reports received from counsellors).

2. COURT PROCESS

Introduction

2.1 Based on similar conclusions in the Boshier and Law Commission Reports it is expected that the currently high rate of resolution of disputes without the need for Court intervention will increase substantially under the proposed pre-Court Family Dispute Resolution procedure.

2.2 The cases which may need determination by the Family Court include the more difficult cases including:

2.2.1 cases involving domestic violence where a judicial determination is required.

2.2.2 consolidated proceedings involving issues under both COCA and the Domestic Violence Act 1995.

2.2.3 cases involving difficult parties including those with mental health problems and litigants representing themselves in proceedings.

2.2.4 issues on which a compromise cannot be achieved.

2.3 The Family Court will always be required to deal with some more minor matters. The extent to which these cases are currently part of the Court process is not known because there are no statistics analysing the nature of cases filed (in particular there are no statistics recording which cases involve allegations of violence). The dog custody and hair cut cases referred to in the media in the past 12 months and other minor cases are rare. The great proportion of the current Family Court work involves genuine disputes on parenting issues and asset division. More minor matters need a Judge's decision in cases where the major issues have been resolved on the basis that the few issues still in dispute are determined by a short hearing.

2.4 A more effective reform, than restricting access to the Court itself, is establishment of the pre-Court parent education and family dispute resolution procedure recommended by the Reference Group. This procedure should be a mandatory condition of filing[§] with exceptions to address:

2.4.1 cases involving domestic violence.

[§] If a party does not meet the above exceptions and chooses not to complete a parent education course then they would not be permitted to progress any defence or cross-application until such a course had been completed.

2.4.2 urgent applications.

2.4.3 cases where there are practical difficulties in accessing the FDR services in a timely fashion (e.g. services are not available within reasonable geographical distance).

2.4.4 repeat applications where FDR has already previously been used.

2.5 The following are the recommendations for in-Court reform.

Improved Procedure

2.6 The Reference Group recommends that a more defined procedure is established for the content of documents required as part of any case under the Care of Children Act.

2.7 The Reference Group cautions against reading too much into the apparent increase in the number of "events" in Care of Children Act proceedings, based on the statistics available in the Review. A number of the steps in the process are administrative only and reflect changes in administrative procedures in recent years as a direct consequence of case reviews under the case management system.

2.8 In the absence of more data as to the nature of the procedural steps, it is difficult to determine a particular cause for the increase in events or whether they represent delay, or progress by agreement.

2.9 The Reference Group does not favour the introduction of a District Court Rules model for Family Court cases. The greater flexibility required to tailor interventions to the particular circumstances of the case requires an adaptation of the relevant current High Court model.

2.10 A clearer "event" procedure is required for parenting cases to better ensure fewer, more defined and focused judicial intervention in cases. The Reference Group supports the proposals of the Law Society for reform of in-Court procedures and in particular the proposals to establish better case management and retention of the discretion of Family Court Judges to address the dynamics which permeate these cases including:

2.9.1 the power imbalances between parties.

2.9.2 the frequent imbalance between parties in gaining access to information (particularly in relationship property cases).

2.9.3 the complexity of many family law cases where predictive assessments are required that take into account the particular child and relevant circumstances, precluding a one size fits all process.

2.11 The Reference Group has emphasised the desirability of case management of files. This is a world wide recommendation in Family Court cases because of the different nature of cases in the jurisdiction to those in the civil and criminal jurisdictions. The emphasis in the latter cases is on findings of fact in respect of past events and not predictive assessments.

2.12 Replacement of the current judicial practice notes with Family Court Rules which define the procedure is recommended.

On Filing

2.13 Parties would be required to address specific issues in a form of questionnaire similar to that used in Australia and Canada. There would be a limit to the ability to file affidavit evidence except in urgent cases.

2.14 On filing the cases would be categorised as follows to provide appropriate intervention:

2.14.1 **urgent cases** – immediate judicial intervention.

2.14.2 **simple cases** – a brief hearing either "by submissions on the papers" or minimum judicial time.

2.14.3 **standard cases** –to proceed via conferencing towards a substantive hearing.

2.15 Standard cases would proceed in accordance with the procedure set out in the model proposed in the Review [**diagram 4 page 56 of the Review**].

2.16 Urgent cases would proceed in a manner similar to that currently used in EIP – urgent track with an option to return cases to FDR in some circumstances. Once the urgent issue is resolved, all or part of the remaining issues are best addressed in FDR. [**appendix page 78 of the Review**].

Judicial Conferences

2.17 The Reference Group recommends:

2.17.1 Enhancement of the Rule 175D conference under the Family Courts Rules to provide a more mandatory procedure for filing of memoranda prior to the conference.

2.17.2 The Judge having the ability to ask direct questions of parties at the conference to "reality test" the evidence in the case, assesses the need for specialist reports or other pathways for the case.

2.17.3 The Judge being able to make interim orders.

2.17.4 If there is consent, the Judge being able to make final orders at the conference.

Repeat Applications

2.18 Section 141 of Care of Children Act would be amended to prevent filing of any further applications within two years of a Final Order being made without leave. Leave is only given if there is a material change in circumstances since the Final Order.

2.19 The Court would be able to dismiss proceedings or require security for the costs of Lawyer for the Child and/or costs of the other party in the case where:

2.19.1 a repeat application is made within a two year period; or

2.19.2 an application is filed which the Court deems to be minor in nature or without merit.

Interim Orders

2.20 Interim orders serve a useful and essential purpose in Family Court proceedings and must be retained.

2.21 An interim order provides the clarity of a holding pattern and reduces conflict while the longer term circumstances for the family are identified and addressed.

2.22 When urgent orders are made on a without notice basis, they are interim orders. The other party must be given the chance to respond.

2.23 Where there is violence, interim orders are often necessary for safety reasons. Interim orders allow parties to take steps to address concerns raised e.g. attend anger management or a parenting course.

2.24 If both parties want an interim order to allow a trial period for a new arrangement, the order is reviewed once the implications of that new arrangement are apparent.

2.25 Although all families are subject to fluctuating circumstances, the changes brought about by a separation often require a crisis response and an interim order serves that purpose.

2.26 The fact that interim orders currently expire after 12 months is often a hindrance to resolution of disputes because a further step is required to secure a final arrangement.

2.27 If an arrangement is working well for children, further Court intervention can result in more conflict and the Reference Group supports a change to provide that interim orders become final after 12 months in most cases.

Predictive Orders

2.28 The Review considered the merit of predictive orders.

2.29 Predictive orders which deal with substantial changes in care arrangements more than 12 months ahead are risky. The circumstances which will prevail at that time cannot be predicted with any certainty.

2.30 Predictive orders which deal with future schooling, holidays, pre-conditions such as clear drug screens, are sensible and avoid unnecessary returns to the Court.

2.31 Courts sometimes timetable progressive changes in child care arrangements in orders to avoid repeated returns to Court. The risk to the welfare of the child may be greater if the family keeps engaging in the Court process, rather than the Court ordering in advance a stepped progression to increased time with one parent.

Presumptions

2.32 The Reference Group strongly opposes the development of presumptions for care arrangements for children.

2.33 Examples in other jurisdictions are the Australian presumption of shared parental responsibility and the policy development in the United Kingdom to impose presumptions of shared care in parenting. Neither of these options should be considered.

Variation of Final Orders

2.34 Where parents agree to vary a parenting order, the Court should retain discretion as to whether it is necessary to appoint a lawyer for the children. If there is no information to alert the Court as to a problem, there should be no requirement to appoint a lawyer for the child.

2.35 Over time the circumstances of families will change and care arrangements for the children will also change.

2.36 Some parties agree on changes between them and do not address the existence of a Court order on different terms.

2.37 If the original order is not changed, there will only be a difficulty if one party seeks to enforce an original order which no longer reflects the actual situation. If the Court is made aware that the arrangements have been changed, the Court will not enforce the original order.

2.38 Where parties seek to file a pro forma application with a consent memorandum so that an order can be varied by agreement, it has been suggested that the Court should not proceed unless it has independent evidence as to the views of and the situation for the child and that to do otherwise may be in breach of the United Nations Convention on the Rights of the Child (UNCROC).

2.39 The Court does not intervene in situations where parents or caregivers in the community generally agree without any engagement with the Court unless there are care and protection concerns which are sufficiently serious to involve the Ministry of Social Development.

2.40 Most applications for variation of final orders will not involve care and protection issues and will be dealing with changes in the number of days in a fortnight that the child is with one parent or the other; or changes in holiday times; contact arrangements or particular guardianship issues such as schooling.

2.41 There should be no impediment to parents filing a memorandum of agreement which can be made into a final order.

2.42 Such agreement should not need to be certified by a family lawyer or by a lawyer for the children.

2.43 In situations where the Court is aware of a history of violence or dysfunction and it receives a consent memorandum, it would sometimes appoint a lawyer for the children to give a report to the Court before making an order.

Recommendations

Urgent Applications
Urgent applications proceed on EIP model (appendix page 78 of Review).

Pre-condition of Filing Documents
Completion of parent education and engagement in Family Dispute Resolution is mandatory except in urgent cases.

Documents filed
Applications identify the nature of and basis for orders sought and supporting

evidence is in a questionnaire style affidavit (cf Australia, Ontario).

Limited Affidavits
Unless the matter is urgent or a party successfully seeks leave to file other affidavit evidence at the commencement of proceedings, no affidavits are filed without leave/Court direction.

Triage on filing
Cases are categorised into:

- Urgent cases – requiring immediate judicial intervention; or
- Simple cases – only requiring a brief hearing either by "submissions on the papers" or minimum judicial time (e.g. Christmas contact); or
- Standard cases – proceed with defined judicial events to substantive hearing.

Telephone conferencing
The High Court Rules procedure of telephone conferences on appeals is adapted to apply on completion of filing of notice of defence.

Evaluation conference
The current Rule 175D conference procedure is enhanced to become more of an *Evaluation Conference* as suggested by the Law Society's Family Law Section to include:

- obligatory filing of memoranda prior to conference.
- specific role of Judge in addressing parties directly.
- identification of need for specialist reports or other pathways for case.
- ability to make interim orders.
- ability to make final orders by consent.

Resolution Toolkit
There is an ability to transfer matters between Court and FDR processes (e.g. after initial urgent hearing referral back to FDR).

Lawyer for Child
The role is defined in legislation (refer later part of report).

New Family Courts Rules
Practice Notes for pre-Court and in-Court processes are replaced by rules to apply nationally.

Complex Cases
It is recognised that most complex cases are unlikely to be resolved by pre-Court processes and need to progress to hearing as soon as possible.

Expiry of Interim Orders
Interim parenting orders become final after 12 months unless one party takes a step

within that time or the Court directs an interim order is to apply for a longer period.

Power to dismiss Proceedings
Section 140 is amended to increase the discretion available to Court to dismiss proceedings or require security for costs before proceedings are able to continue.

Repeat Applications
Leave is required before further application can be made within two years of a final order and leave is only granted on grounds of material change in circumstances.

Predictive Orders
There is a limited use of predictive orders.

No Presumptions
The current enquiry into the particular child's circumstances continues without presumptions for care arrangements of children generally.

Variation of Final Orders
Parties can vary a Court Order by agreement without the need for appointment of lawyer for child unless the Court is alerted to welfare concerns.

3. CASES INVOLVING VIOLENCE

Introduction

3.1 Section 60 and the related sections of the Care of Children Act mandate a procedure the Court must follow in any proceedings where a parenting order (or variation or discharge) for unsupervised care or contact is sought where it is alleged one party has caused physical or sexual abuse against the other party, or against a child subject to the proceedings, or a child of the family (or any other case where a protection order is in force).

3.2 The provision is based on the classification of violence within the power and control model and has its origin in the report of Chief Justice Sir Ronald Davidson following his enquiry of the Bristol case. Section 60 does not distinguish between the various types of violence that come before the Court. It is been described as a blunt instrument in that it prescribes the same procedure regardless of the nature, seriousness, frequency or context of the violence. There is currently some dispute amongst Judges about the impact of the mere making of allegations of qualifying violence. The legislation itself however only mandates supervised contact upon a finding of violence, not upon an allegation being made.

3.3 If there are allegations of physical or sexual abuse or a protection order in force then the Court must as soon as practicable:

3.3.1 consider whether to appoint a lawyer to act for the child under s 7(1).

3.3.2 determine on the evidence presented whether or not the allegations are proven.

3.4 If the allegations are proven the Court must not order the violent party to have the role of day-to-day care or unsupervised contact unless satisfied that the child will be safe with the violent party. In undertaking that safety inquiry the Court must have regard to the matters in s 61. Prior to such findings, the enquiry is an unlimited/open section 5(e) safety assessment.

3.5 The Reference Group is concerned that the current interpretation of s 60 is depriving children of contact with a parent that would be beneficial to them because of the following factors:

3.5.1 Section 60 and the related provisions are being applied so that immediately upon the making of allegations of physical or sexual abuse there is a presumption that there can only be supervised contact until section 60 determinations are made.

3.5.2 the all encompassing nature of the legislation is such that allegations of historic and minor abuses can operate to prevent unsupervised contact pending completion of the s 60 enquiry.

3.5.3 the primary focus is on whether the child will be safe with the violent party rather that whether unsupervised contact is in the child's welfare and best interests.

3.5.4 the delay in obtaining hearing time.

3.5.5 the unavailability of approved supervised contact providers.

3.5.6 the cost to parents of supervised contact.[**]

A New Approach

3.6 There is a need for caution in considering any amendment to these provisions. The starting point for any reform is improving the *screening* of cases to identify issues of violence. The issue of screening is addressed separately in this report.

3.7 Where violence is alleged the applicant would be required to identify whether the violence is:

3.7.1 isolated (i.e. a one off historical event or an incident at the time of separation);

3.7.2 repeat;

3.7.3 escalating; or

3.7.4 dangerous.[††]

3.8 The applicant would be required to specify in any application and supporting affidavit(s):

3.8.1 whether there is an ongoing risk of violence now that the parties are no longer living together.

3.8.2 whether the children have been a victim or witness to violence during the relationship and if so whether there is risk, and the extent of the risk, to the children being in the care of the other party.

[**] The factors noted at paragraphs 3.5.4, 3.5.5 and 3.5.6 are primarily issues of resourcing.

[††] These definitions are taken from the categorisation of violence for the court's response in the Family Violence Court.

3.9 It needs to be clarified that there is *no presumption* contact ceases or is supervised on the basis of an untested *allegation* of violence and if such restriction is sought the appropriate urgent application must be filed.

3.10 If a party has concerns about another party having any contact with a child because of physical/sexual violence, the preferred procedure should be to seek an immediate cessation of contact rather than raising the issue in affidavit evidence in a standard application, without also seeking urgent interim relief. The Court needs to be required to urgently make a finding of safety for a child in such cases but this determination may be made:

3.10.1 upon consideration of a consent memorandum setting out an agreed statement of facts of the alleged violence and the basis on which it is contended that there is no risk to the child as a result of unsupervised contact with the respondent; or

3.10.2 at a Rule 175D Conference at which the Judge may make inquiries directly of the parties about the allegations of violence and the nature of any supervision requirement for contact between the violent party and the child. The parties will be made aware of an expectation that they may be questioned by the Judge and that determinations can be made; or

3.10.3 at a hearing at which evidence is tested in the usual manner, if the Court cannot be satisfied as to the safety of unsupervised contact from the above processes.

Recommendations – Cases involving violence

Focused Application and Affidavit

There is a requirement to identify the nature of the violence and reason why a child is at risk of ongoing contact after parents have separated.

No Presumption

It is clarified that there is no presumption that untested allegations of violence should lead to immediate cessation of or supervision of contact in the absence of an interim application for and granting of such urgent relief.

Agreed Statement of Facts

That the current procedure allowing findings of safety for contact to be made on the basis of consent memorandum submitted to the Court for consideration applies nationally.

Evaluation Conference

Rule 175D is amended to specifically enable the Judge to "test" allegations of violence and risk at a judicial conference in some cases.

Supervised Contact Centres

There is improved resourcing of these centres.

4. SCREENING

Introduction

4.1 An effective screening process for applications is required to:

4.1.1 identify how the Court's response to cases can be improved.

4.1.2 enhance safety by identification of family violence issues, drug and alcohol abuse, mental health difficulties, dynamics of psychological and physical abuse of children.

Improved Court Response

4.2 The Reference Group identified the importance of an effective triage process for applications at the time of filing.

4.3 The Reference Group considered the extent to which a triage process could identify complex cases at the date of filing. The Review equates complex cases "where issues are very entrenched" with serious cases. However different cases require different responses. Urgent cases may not require a complex hearing. A simple case on its face may not appear to be serious (e.g. a standard application for parenting order) but issues of safety and serious welfare and care and protection issues for children may become apparent upon fuller enquiry.

4.4 The Reference Group recommends an integrated structure of reporting from Family Dispute Resolution to:

4.4.1 address potential issues of risk in the form of application and affidavit evidence required in Court documents.

4.4.2 provide consistent assessment on filing and case management.

4.5 The true nature of a case often emerges at the first judicial conference which provides an important screening of cases. The Judge can then tailor the appropriate path for a case including:

4.5.1 a referral back to FDR which can be successful after filing even if it did not succeed earlier.

4.5.2 requesting a specialist report from a social worker, psychologist, psychiatrist or cultural expert.

4.5.3 directing an urgent interim hearing.

4.5.4 in cases where there are allegations of violence, testing the basis of the allegations and to the extent possible in a particular case, exploring the issues of risk for a child to avoid the need for a section 60 hearing.

4.5.5 establishing conditions that require parties to take certain steps to address issues of concern (e.g. parenting programme; anger management programme, drug and alcohol testing).

4.5.6 identifying whether it is necessary that an application is case managed by one Judge.

4.5.7 identifying the issues for final hearing and the evidence to be filed for that hearing.

4.6 On the issue of whether there should be a form of systematic screening in addition to the above processes, it is the Reference Group's view that:

4.6.1 international research has established that many practitioners in the Family Court system (whether counsellors, mediators, lawyers or Judges) do not screen for inter-personal violence in couple relationships or, if they do, their methods are not adequate to reliably detect violence.

4.6.2 counsellors or mediators in the pre-Court process need to have the skills to screen for violence, drug and alcohol abuse, or child maltreatment. Currently there are no screening instruments appropriate for the New Zealand context. However it is acknowledged that the professional groups practising in the Court screen to some extent.

4.6.3 research to develop and/or adapt screening protocols for interpersonal violence, drug and alcohol abuse, and abuse of children is recommended at the following stages:

(a) first contact with the Family Dispute Co-ordination Office whether in person, by phone or on-line.
(b) engagement with FDR practitioner (best practice requiring separate preliminary meetings with each party).
(c) engagement with a family lawyer.
(d) by triage on filing of application.
(e) at judicial conferences.

4.7 The screening process is best enhanced by a consistent model of training of all Family Court professionals. The Reference Group recommends that the skills essential to practise in the Court are identified and a qualification established that recognises such skills. This qualification is a requirement of continued practise in this jurisdiction.

Recommendations

Pre-Court
A form of reporting by family dispute practitioners to identify a defined list of the issues in dispute between the parties is developed.

Specialist Skills
Training and certification of family dispute practitioners to identify violence, drug, alcohol abuse, mental health difficulties and child abuse issues is improved.

Family Court Staff
Family Dispute Co-ordination Office service staff (phone and face to face) receive specialist training to screen for risk factors.

On Filing
A more focused form of application and affidavit evidence to identify issues of risk is required.

Training
Registry staff are trained to screen for risk factors.

Assessment
- New triage procedure on filing.
- Fuller evaluation conference.
- Greater use of case management tools.
- Management of a case by one Judge.

5. PARTICIPATION OF CHILDREN

Introduction

5.1 The following section addresses children's involvement in decisions about living arrangements following their parents' separation. This section does not apply to children's participation in decisions concerning allegations of child maltreatment/child protection.

5.2 The following issues are relevant to children's involvement in decisions about their living arrangements:

5.2.1 most parents do not tell children the reasons for their separation or how the separation will affect the children.

5.2.2 parents often do not keep children informed or involve them when making care arrangements.

5.2.3 some children want to be involved although there is insufficient research to establish the extent.

5.2.4 appropriate participation is linked to better mental health outcomes. Children are more likely to be satisfied with final arrangements if they have been consulted.

5.2.5 appropriate earlier engagement with children outside of court may deter parents from pursuing unnecessary litigation. Parents gain a better understanding of the impact on their children and their needs to be informed.

5.2.6 appropriate earlier engagement with children could be achieved by a legislative requirement for parents to consult with their children about important matters that affect them, as in the Children (Scotland) Act 1995.

5.3 In addition, children have a legal right of participation in administrative and judicial procedures affecting them under New Zealand legislation and UNCROC (Article 12).

5.4 There is evidence that with greater appropriate participation – particularly with parents – children are more likely to be satisfied with the arrangements for their care.

5.5 After separation, the majority of children who are involved in decisions about their care are not subject to Court proceedings. Therefore when discussing children's involvement, it is important to increase the parents' role in keeping

children informed about decisions regarding their care and welfare. Enhanced parent education and easy availability of comprehensive information are useful tools for assisting parents.

5.6 For the minority of families involved in Family Court processes and in particular for their children, a potential consequence of early participation in decisions regarding their care and welfare is exposure to multiple interviews with a number of different practitioners (e.g. mediator, counsellor, lawyer for child, specialist report writer, social worker and Judge). Multiple interviews risk harmful consequences for such children arising from confusion about the purpose of the interviews, disillusionment and the children becoming directly embroiled in their parents' dispute.

Nature of Participation

5.7 The following safeguards are required:

5.7.1 practitioners who work with children are competent and qualified with the requisite skills and knowledge, prepared for the specific role, and have adequate ongoing assessment and supervision.

5.7.2 the number of potential interviews by different practitioners is minimised by providing for adequate exchange of information that reduces the need for repeat interviews (e.g. lawyer for the child working more closely with a specialist report writer, Judges relying on reports of views expressed to lawyer for the child or specialist report writer).

5.7.3 proper informed consent is obtained for interviews with children, particularly to children's involvement in FDR processes (see below).

5.7.4 clear and comprehensive guidelines are developed for the participation of children with practitioners, whether in child inclusive FDR (where appropriate guidelines do not currently exist), or interviews with lawyer for the child, specialist report writers, and Judges.

5.7.5 children need to be properly informed of the reasons for interview, what will happen with their information and consent to what is communicated to whom. Emphasis is placed on children's views about the impacts on them of their family circumstances, and perhaps their desired outcomes but they are not given the expectation that they will make the decisions, or carry responsibility for the decisions which are subsequently reached.

Recommendations

Role of Parents
Recognition of the primary role of parents when involving children in decisions made about the children.

Education
Parents are assisted to gain the skills to inform children, consider their views, and protect children from parental conflict.

Role of Professionals
Over-interviewing is avoided and appropriate standards of qualification, training and competence required to work with children are developed.

Consent
There is an adequate process to ensure children give fully informed consent to participate in interviews with practitioners and to sharing of information with others.

Children in counselling/mediation

5.8 For the purposes of this report it is important to distinguish between three types of mediation:

5.8.1 *Child focused mediation*: the child is not directly involved. The focus on children's needs is presented by the mediator through information about children's developmental, psychological and other needs, in relation to the circumstances of parents' separating.

5.8.2 *Child inclusive mediation*: children's views are elicited through interview of the child either by the mediator, or by another person, who reports with the child's consent to the parents in the presence of the mediator. Child inclusive mediation could also refer to the direct involvement of the children in session with parents. However this practice is rare and has not been subjected to systematic evaluation.

5.8.3 *Parent focused mediation*: the mediator defines the issues for resolution with the parents, works toward resolution on the basis of those issues and does not provide what may be considered educational input about children's needs in relation to separated parents.

5.9 Subject to the Reference Group's concern about children being present in decision-making sessions with any parent and mediator/counsellor, the Reference Group considers all three types of mediation above are appropriate, further subject to:

5.9.1 the particular needs of the family concerned.

5.9.2 the skills and knowledge of the mediator/counsellor.

5.9.3 the willingness of family members to participate.

5.10 In the following circumstances it is appropriate to include children in mediation/counselling:

5.10.1 the children consistently express a preference for a particular time-sharing arrangement and one parent disagrees.

5.10.2 the children give informed consent to speak to the mediator.

5.10.3 it is beneficial for both parents to hear the negative impact their dispute is having on the child.

5.10.4 the children have the cognitive ability to relate their views to a mediator (i.e. 6 to 16 years of age).

5.11 In the following circumstances it is not appropriate for children to be involved in mediation:

5.11.1 the parents agree on the needs of their child and can develop a mutual parenting plan that meets the child's needs.

5.11.2 children are too young or lack the cognitive ability to reliably communicate their views.

5.11.3 children do not want to meet with the mediator.

5.11.4 children are manipulated by one parent or the other.

Recommendations

Qualified Practitioners
Guidelines for standards of practice for eligibility as a Family Court FDR practitioner are considered.

Pilot Evaluation
A properly funded and evaluated pilot programme is required before children are involved in pre-Court FDR.

6. REPRESENTATION OF CHILDREN

Introduction

6.1 The Review identifies the significantly increasing costs associated with appointment of lawyers for children in Care of Children Act cases. The reasons for this increased cost are difficult to determine. The Reference Group believes the increase arises from the following factors:

6.1.1 the increasing complexity of cases.

6.1.2 an increase in the extent to which parties' positions are entrenched in parenting disputes.

6.1.3 the increase in cases involving violence where early appointments are required.

6.1.4 the earlier appointment of lawyers for children generally.

6.1.5 the practice, in some regions, of dual appointments of a lawyer to represent the views of a child and counsel appointed by the Court to represent the child's welfare and best interests.

6.1.6 the 2007 Practice Note requiring the lawyer to principally advocate for the views of the child has imposed constraints that have reduced the ability of a lawyer for child to be effective in resolving the dispute between the parents by independently advocating the relevant issues of welfare and best interests for the child.

6.2 The focus of the Review is the need to improve outcomes for children following parental separation. It is not the separation itself which necessarily results in poor outcomes for children but the prolonged exposure of children to frequent, intense and poorly resolved conflict.

6.3 The range of potentially negative outcomes for children from prolonged conflict is described in the Review as including anxiety, depression, aggression, hostility and low social confidence.

6.4 Any reform which involves children in the dispute between their parents must be carefully considered in the context of adequate research. The Reference Group is concerned about children's involvement before proceedings are filed. The Reference Group has an even greater concern for children's involvement when a dispute has become entrenched to the stage where proceedings are required.

6.5 The benefit in consulting with children on care and guardianship arrangements is recognised however prolonged conflict increases the risk of poor outcomes for a child. If at the stage of filing proceedings this conflict has escalated, the involvement of the child is problematic and any views of that child need to be understood in the context of the effect of that conflict on the child. Seldom can such views of a child assist the Court without this context.

Nature of Advocacy

6.6 The Care of Children Act requires the Court to give children reasonable opportunities to express their *views*, either directly or indirectly. Their views are taken into account in proceedings affecting them. This requirement implements the obligations New Zealand has under Article 12 of UNCROC and the *rights* of children generally have been included in the principles in section 3 of the Act. Under Article 3 of UNCROC these rights include the right to an outcome in the child's *welfare*.

6.7 In jurisdictions such as Australia and the United Kingdom once proceedings have been filed the involvement of children in disputes regarding them, is potentially undertaken by at least two professionals. In the United Kingdom a social worker from the Children and Family Court Advisory and Support Service consults with parents and the child at the commencement of parenting disputes. The social worker provides a report to the Court not only on the views of the child, but also on the contextual issues relating to the parenting of that child. The social worker often has a future role in the case.

6.8 In Australia a similar type of report is prepared by more highly qualified child experts than in the United Kingdom and these experts are within the Court. The report, called the Child Responsive Programme Memorandum, addresses the child's views and the parents' understanding of the child's needs. The report is prepared for all parenting cases and also includes options for progression of the case and recommendations for outcome.

6.9 In each of these Commonwealth jurisdictions children are also represented by lawyers however as the Court has the benefit of the above reports, legal representation does not occur as early or as often as in New Zealand.

6.10 The pragmatic solution adopted in New Zealand for the representation of children in proceedings should continue. There would be significant cost in establishing a service similar to the United Kingdom and Australia. While the Reference Group agrees that there needs to be ongoing training obligations on lawyers for children, this is being addressed and there are not sufficient social workers with the required skills in parenting cases, nor an appropriate independent source of such professionals.

6.11 The Family Court is obliged to appoint a lawyer for child in Care of Children Act cases unless it is satisfied that such an appointment would serve no *useful*

purpose, in circumstances where it appears likely a case is to proceed to hearing.

6.12 The current Practice Note of the Principal Family Court Judge issued in March 2007 to take into account the changes in practice required by the Care of Children Act, states at paragraph 6.1(c) and (d), that unless risks to a child are identified earlier, appointment of lawyer for child is generally required to be after a Judge at a mediation conference has identified the matters in issue and the case is likely to proceed to a hearing.

6.13 In recent years the practice has been to appoint lawyer for child after filing of a notice of defence and, in many cases, prior to filing a notice of defence (cf EIP practice). While early appointment of lawyer for child is usually essential in urgent cases, appointment at the stage of a mediation conference or judicial conference is appropriate in most cases as by then the likelihood of the parties resolving the dispute themselves is more likely to be known.

Definition of Role

6.14 If the Reference Group's recommendations as to the role of lawyer for the child (addressed at paragraph 6.18) are adopted thereby effectively returning the role to the position prior to 2007, it is anticipated that lawyer for the child will again play a significant role in resolution of disputes prior to a hearing with consequent cost savings for the Court.

6.15 The important role of lawyer for child in dispute resolution is in most cases enhanced if the lawyer can engage with parties from a position of direct knowledge and understanding of their child rather than through information obtained from another party. This can be particularly relevant in the cases of Maori, Pasifika and ethnic families where there has been an appropriate "match" of lawyer for the child to the case.

6.16 Problems have developed from the unintended consequences of the Practice Note: *Lawyer for the Child: Code of Conduct* issued by the Principal Family Court Judge in 2007. Under the Practice Note, subject to certain exceptions, a lawyer for child is obliged to advocate for the views of the child, a requirement in direct conflict with the Law Society's Guidelines for the role which require the lawyer to advocate for the welfare and best interests of the child informed by the views of that child.

6.17 The role mandated by the Practice Note has resulted in an abusive process for children and in the Reference Group's view has resulted in significant additional cost to the Court.

6.18 The Reference Group recommends an amendment to section 7 of the Care of Children Act to define the role as in the Law Society's Guidelines of advocacy

for the welfare and best interests of a child informed by the child's views. The Reference Group recommends adaption of the definition of the role of a child's lawyer in section 68LA of the Australian Family Law Act which essentially:

6.18.1 requires the lawyer for child to form an independent view, based on the child's views and other evidence available of what is in the welfare and best interests of the child and act in accordance with that view.

6.18.2 states that the lawyer is not obliged to act on the child's instructions in proceedings but is required to act impartially in the role and in particular ensure that any views expressed by the child are fully before the Court.

Recommendations

Professional in Role
Lawyers continue to represent children in proceedings.

Role
Section 7 of the Care of Children Act is amended to define the role of lawyer for the child as an advocate for the welfare and best interests of a child informed by the child's views.

Timing of Appointment
Appointment of a lawyer for the child is made at the stage of a judicial conference subject to a broad discretion for a Judge to make an earlier appointment if required in a particular case.

Discretion
The detailed definition of welfare and best interests adopted in some Commonwealth jurisdictions is not applied in New Zealand. Rather the current definition in section 4 remains as it best enables an outcome to be tailored to the individual circumstances of a child.

7. SPECIALIST REPORTS

Introduction

7.1 The specialist jurisdiction of the Family Court at times requires specialist evidence from a social worker, psychologist, psychiatrist and cultural expert, to ensure the proper disposition of applications before the Court. This specialist evidence is not only required for parenting disputes but also for cases involving care and protection and mental health and disability.

7.2 Any request for a report from a social worker is addressed to the Chief Executive of the Ministry of Social Development and issues related to these reports involve broader enquiry than the current review which is within the Ministry of Justice.

7.3 Reports from other specialists in Care of Children Act cases are only requested if in the opinion of the Court it is necessary for the proper disposition of an application that the suitably qualified person (whether cultural, medical, psychiatric or psychological) report on the child who is the subject of the application.

7.4 Strict protocols have developed in respect of the way in which a specialist (particularly psychologists) is briefed for the report and the relationship between the specialist and lawyer for child. A number of psychologists have expressed the view that the relationship with lawyer for the child has become less helpful since the introduction of the 2007 Practice Note obliging lawyer for child to advocate for the views of the child rather than the welfare and best interests of the child informed by the views of that child. This problem can be addressed if the recommendations as to the role of lawyer for the child (addressed at paragraph 6.18) are adopted thereby effectively returning the role to the position prior to 2007.

7.5 Very often disputes between the separated parents regarding the care of their children generate great stress and deep passions. While each parent perceives their behaviour as motivated solely by the need to promote and protect the best interests of the children, the very nature of these cases makes the potential for selective memory and self deception so much greater than in other litigation. It is in that context that the independent assessment on the child is required as that assessment is made in the context of the child's family and parenting relationships.

7.6 The cases which involve the complexity of issues requiring a report often include one or more of the following factors:

7.6.1 a child has special needs (psychological, educational, medical or other).

7.6.2 there are concerns as to the effects on the child of influence by one or both parents.

7.6.3 the views of the child are pivotal to the outcome of the case and need to be ascertained independently with that professional able to give evidence in the case (a lawyer for child cannot give evidence) .

7.6.4 the child has previously been involved in Family Court litigation. The fact of the ongoing dispute requires an assessment of the psychological effect upon the child.

7.6.5 no list of criteria can be exhaustive when considering whether or not it is necessary to obtain specialist evidence under s 133 of the Care of Children Act.

Clearer Criteria

7.7 The Reference Group is concerned that it is becoming more difficult to retain psychologists prepared to undertake work for the Family Court. While there have been increases in the costs of psychological reports in the period since commencement of the Care of Children Act in 2004, there are no statistics as to the average cost of reports prior to 2005 and it is therefore difficult to make a comparison between the use of this resource in the period since 2000.

7.8 Given the increasing complexity of cases it is the view of the Reference Group that the current annual cost of specialist reports is not excessive when taking into account the number of applications before the Court but greater discipline in the exercise of discretion to seek a report would be beneficial.

7.9 Criteria for deciding whether it is "necessary" to seek a specialist report could be included in section 133, including some of the suggested areas referred to in paragraph 7.6 above.

7.10 The enhanced Rule 175D evaluation conference suggested in this report gives an opportunity for the Court to require counsel to more specifically identify the reason why a report is required on the basis of the criteria. This process should assist in finalisation of a more focused brief for the areas the specialist is to address.

7.11 A report under s 133 is only an assessment of the child although contextual issues related to the parties' parenting can be part of the dispute. This restriction on undertaking an assessment of the parents is often disadvantageous to the child as evidence relevant to the welfare and best interests of the child can often only be referred to obliquely and not specifically addressed.

7.12 The Reference Group recommends a new section be included in the Care of Children Act to also enable assessments to be made of parents in appropriate cases similar to the ability to make such assessments under the Children Young Persons and Their Families Act.

Recommendations

Need for Reports Better Defined
The circumstances when a specialist report is "necessary" under section 133 are defined recognising that such a definition cannot be exhaustive.

Report on Child and Parents
A new section be included in the Care of Children Act to enable the Court to direct a report on the parent, guardian or any other persons having the care of the child and not only the child, in appropriate cases.

8. REVIEW DATA

Introduction

8.1 Ministry staff confirmed to the Reference Group that the purpose of the Case Management System (CMS) in the Family Court is case management and not for data collection. While some useful data is collected from CMS, the Review has shown that it is not of a nature to adequately inform this review of the Court process.

8.2 The CMS data available has established that the cost increases in the Court have been significant. The data does not however adequately establish the cause of those increases.

8.3 Data entry into CMS is variable. Information required to assess the effectiveness of case processes is not entered and cannot be retrieved. The Reference Group acknowledges that this problem is not unique to the New Zealand Family Court as a similar computer management tool is used in the United Kingdom Family Courts. The independent review of the United Kingdom Family Courts in 2011 noted the same concerns about the inadequacy of data for the purposes of their review.

8.4 Examples of the use of inaccurate and misleading data in reaching conclusions in the Review are:

8.4.1 Statistics provided which compare the costs of children's cases between 2005 and 2010 are not accurate as there is no differentiation between those commenced under the Guardianship Act and those under the Care of Children Act.

8.4.2 Appendix 6, Table 7, p84. This table does not represent the average cost per case type for professional services appointed by the Court. It represents the average cost per case where professional services were utilised. The figure of $2,305 for all professional services in guardianship seems very reasonable. Between 2004/2005 and 2009/2010 that figure has only increased by $420.

8.4.3 Appendix 6, Table 2, p84. Only 12% of cases required a hearing to settle. That means that 88% of cases were settled short of a hearing, and in response to other interventions such as counselling, mediation conference, undefended formal proof hearing, or after reports had been obtained or a negotiated outcome.

8.4.4 Appendix 6, Table 3. This purports to show the number of Court events required to dispose of a case. This is misleading as the number of events are taken from CMS. It includes all Registrar List calls many

of which are administrative call ups to monitor actions required by Registry staff, or counsel, or professional services. This is part of the requirements of the Court management systems whereby the Court directs the management of a case rather than counsel or the parties.

8.4.5 Appendix 6, Table 4. This shows the average number of days to disposal for applications by case type. The data was matched with the incorrect categories in the Review. An amended table has been provided. This table shows that the time to dispose of a case has barely changed between 2005/06 and 2009/10. In all but two minor categories of case the time to disposal has reduced. This confirms that the number of events per case (Table 3) has not prolonged the life of the case.

8.4.6 Case File Sampling. The response to questions raised stated the cases used were a purposive sample not a representative sample. Nevertheless the information contained in the tables produced could not have been ascertained from the sources referred to on the Table headings. The data cannot be relied on as a basis for recommending any changes.

Data Collection

8.5 The Reference Group recommends the use of more focused forms of documentation in both pre-Court and Court procedures. Together with the identifying number used for a family's dispute throughout the process these forms will facilitate the availability of relevant data on the cost and effectiveness of outcome of interventions.

8.6 In the absence of further data there is still merit in proceeding with the reform identified by the Reference Group in this report as most proposals focus on best practice of Family Court professionals. Subject to costing of the suggested pre-Court management structure and processes, it is the Reference Group's view that the reforms will produce cost savings, in particular the proposals to:

8.6.1 clarify section 60 processes of the Care of Children Act to reduce unnecessary hearings.

8.6.2 redefine the role of lawyer for child to one of advocacy for the welfare and best interests of the child, informed by the views of the child.

8.6.3 appoint qualified FDR practitioners to undertake Family Court FDR rather than appoint lawyers in the role of counsel to assist.

8.7 Before consideration can properly be given to long term changes in the Family Court system there needs to be an in-depth analysis of the causes of the cost increases in the Court since 2004.

8.8 The Reference Group is concerned about the unintended consequences of any reform undertaken on the basis of the current available data. The necessary cost benefit analysis of any changes cannot be completed unless there is sufficient base data.

Recommendations

Current data collection in the Family Court is improved to enable data to be collected for improvement of FDR and in-Court processes.

9. CULTURAL DIVERSITY

Introduction

9.1 All professionals practising in the Family Court need to be aware of the cultural needs of the Maori, Pacific and ethnic communities represented in the Court.

9.2 The Family Group Conference process used under the Children Young Persons and Their Families Act involves whanau and extended family. This model could be appropriate for FDR in Care of Children Act cases involving parties and children of different cultures.

9.3 A facilitator of FDR requires specialist skills including awareness of cultural diversity.

9.4 In Court mediations under EIP have included extended family members but the limited time available for these mediations restricts the ability to carry out the process on a Family Group Conference model. A key requirement of an effective Family Group Conference is not only the skill of the facilitator but also the ability of the facilitator to meet with and prepare the parties and extended family for the Family Group Conference process prior to its commencement. There will however be resource implications for the Ministry funding a similar process for mediations under the Care of Children Act.

9.5 If consideration is to be given to a pilot mediation process in children's cases similar to the Family Group Conference model it should be after filing of proceedings and care needs to be taken to ensure that the welfare and best interests of the children remains paramount and is not subordinated to the interests of the wider family attending the mediation. This is one reason that representation of children at a Family Group Conference is mandatory and the Reference Group recommends such an appointment as essential for a similar mediation model under the Care of Children Act.

9.6 A lawyer for child whether appointed for a mediation or for the proceedings themselves, must be an appropriate "match" for the cultural needs of the child and the family.

9.7 A theme of this Report is the need for more consistent case management in children's cases. The Reference Group supports the Law Society's submissions on the procedural reforms required to improve outcomes in these cases, particularly the evaluation conference, an enhanced Rule 175D conference. This structure is well suited for involvement by extended family members of non-European families.

9.8 If extended family are allowed to participate in judicial conferences or evaluation conferences a request will need to be included in the original application, identifying the reasons why such attendance will assist the Court in resolution of the dispute.

Recommendations

Training
Training for cultural awareness for all professionals involved in the Family Court is improved and is delivered at the cost of each professional group.

Mediation
A pilot programme is established for a mediation process similar to the Family Group Conference process under the Children Young Persons and Their Families Act, after filing of proceedings for Care of Children Act cases.

On Filing
It is a requirement in any originating application to notify the Court of the assistance an extended family member may give to resolution of the dispute between parties.

Evaluation Conference
Consideration is given to allowing extended family members to participate in evaluation and judicial conferences, provided the reason for their participation and manner in which they can be of assistance in resolution of the dispute between parties has been identified to the Court.

10. BINDING AGREEMENTS

Introduction

10.1 The Review has considered the merits of the Court making private agreements enforceable. The following factors are relevant to this discussion:

10.1.1 most people reach agreement on post separation parenting arrangements without a written agreement.

10.1.2 some reach agreement with assistance of a lawyer and confirm their agreement in writing, often as part of a relationship property agreement.

10.1.3 others apply to the Court but settle through counselling or negotiation.

10.1.4 others reach agreement after filing proceedings and apply to confirm their settlement in a consent order. In cases involving children the Court must ensure these settlements are in the welfare and best interests of the child and be alerted to issues of violence.

10.2 The Court will usually give significant weight to arrangements for children which work well for a significant period even though those arrangements are not recorded in writing, unless there has been a material change in circumstances involving risk to a child.

10.3 In practice there is therefore little difference between an informally established arrangement and one sanctioned in a Court order, except that the latter can be enforced by warrant.

10.4 Parties who fear that arrangements will break down usually seek a Court order rather than rely on an unwritten agreement. It will therefore achieve little to establish a procedure for registration and enforceability of written agreements. In either case the Court must still make a fresh enquiry of current circumstances.

10.5 Neither should parties who resolve their disputes themselves be expected to obtain Court orders. Where parties do not ask for an order or go through the process to get an order, it should not be imposed on or expected of them.

Recommendations

Private written agreements between parties are not made capable of registration or given the status of enforceable orders.

11. JURISDICTION

Introduction

11.1 The Review queries whether it may be more efficient for aspects of the current jurisdiction of the Family Court to be administered by the District Court or High Court and for a new minor case disputes tribunal to be established.

11.2 The Family Court Judges and to some extent the Family Court administration, have built up a body of expertise in the matters currently within the Family Court jurisdiction. There are however resourcing issues within the Family Court Registry which have resulted in an increasing inability to offer a career path for Registry staff with the result of a decline in the skill and experience of the Registry, particularly in Auckland.

Transferring Jurisdiction

11.3 There would be no cost saving in moving any of the jurisdiction of the Family Court to other jurisdictions. District Court Judges without Family Court warrants do not have the expertise to deal with selected areas of the current Family Court jurisdiction such as relationship property.

11.4 Relationship property matters are different from other areas of civil jurisdiction and require different expertise. The dynamics between the parties in these cases are much more akin to other issues dealt with by the Family Court than to issues dealt with in the civil jurisdiction. The lack of expertise of District Court Judges without Family Court warrants is likely to delay and complicate matters and costs will be increased not reduced.

11.5 There may be an argument for permitting a choice of jurisdiction between the High Court and the Family Court in relationship property matters over a certain value or where there are associated trust or company issues which are not within the jurisdiction of the Family Court. The Reference Group is not referring here to the usual issues which arise, such as determining shareholdings in companies and the value of shareholdings.

11.6 A return to the concurrent jurisdiction of the Family and High Courts in relationship property proceedings as applied before the 2002 amendment to the Property (Relationships) Act could be considered.

11.7 It may also be beneficial to extend the jurisdiction of the Family Court to deal with trust issues which arise in relationship property cases so there is no necessity for separate proceedings in the High Court where overlapping trust issues arise.

Minor Disputes Tribunal

11.8 There is a suggestion that many simpler, straightforward issues could be decided by a lower level Tribunal similar to the Disputes Tribunal in the District Court. The parties would not be represented and there would be no lawyer appointed for the children.

11.9 In such a model the qualifications and experience and specialist skills of the Referee will be crucial. It will fall on the Referee to be the arbiter of the best interests of the children in a situation where he or she may not have full information.

11.10 If such a process is to be introduced, a very full standard form affidavit would need to be completed so that the parties and the Referee are alerted to the issues and information which would need to be canvassed. The skills of the Referees will have to be high to ensure they could assess the underlying dynamic in a case which may appear simple but which in fact involves issues of risk beyond the jurisdiction of such a forum.

11.11 It is doubtful that setting up a disputes tribunal for family law matters will result in cost savings. Such a tribunal will require a new administrative structure including tribunal staff and the appointment of appropriate Referees, office administration space and hearing rooms. A tribunal will not be able to be accommodated within the current Family Court spaces.

11.12 There will have to be a right of appeal from any Tribunal decision and given the nature of the applications, appeals on issues of fact will also need to be possible. This will consequently create yet another step in the hierarchy of possible forums to carry on a family dispute from the Dispute Tribunal to the Family Court to the High Court, to the Court of Appeal and in very limited circumstances, to the Supreme Court.

11.13 The cases which take a lot of Family Court time tend to involve people with rigid personalities who are acting on "principle". They are also the very people who are liable to take relatively minor matters before the Court and will end up using such a Tribunal as an extra step in the hierarchy of possible forums.

11.14 It is also likely that those who do not wish to use the Tribunal will by-pass its jurisdiction by inflating the nature of the application so as to avoid the Tribunal and obtain direct access to the Family Court.

Recommendations

Jurisdiction Retained
The current jurisdiction of the Family Court is retained.

Relationship Property Cases
The concurrent jurisdiction of High Court which applied pre-2002 is reintroduced in relationship property proceedings.

Trusts
Family Court is given greater powers for trust issues in relationship property cases.

Tribunal
Recommend against establishment of a minor dispute Tribunal.

12. COURT FEES

Introduction

12.1 The professional services employed by the Family Court fulfil two separate functions:

12.1.1 to provide assistance and information so that the parties are able to settle their dispute and withdraw from the Court process.

12.1.2 to provide information to the Court necessary for the Court's determination.

12.2 Counselling is usually a first step although sometimes it can be utilised in a Court process for a specific purpose. Counselling has a useful role in assisting people to become ready to negotiate a settlement or alternatively, to become ready to participate appropriately in Court proceedings.

12.3 The appointment of a lawyer for the children is necessary to focus the parents on the interests of the children and how they may be separate from their own personal interests. It is the role of lawyer for children to keep the children's interests as a part of any negotiated or mediated settlement. If the matter goes to hearing it is the role of lawyer for the children to ensure that all relevant evidence to enable a best interest decision is put before the Court. That evidence may well not be put before the Court by one of the parties.

12.4 FDR carried out by properly qualified practitioners provides an opportunity for a sustainable agreed resolution of conflict without the necessity for a Court hearing and the full cost of assembling evidence for such a hearing.

12.5 Reports from social workers and psychologists provide crucial evidence to inform the Court as to the best interests of the children. The evidence provided by a social worker and more especially by a psychologist, cannot be provided by anyone else.

12.6 Consequently in order for there to be quality decision making within the Family Court, these professional services need to be available.

12.7 The next question is whether those services should be fully or partly funded by the parties.

12.8 Clearly there will be a number of parties who are unable to afford to contribute to these costs. There will be another group who are unwilling to contribute to

such costs and will therefore submit to the Court that a psychologist's report or appointment of lawyer for the child is not necessary.

12.9 The Court has relied on the ability to direct a section 133 report funded by the Court, to ensure that except in very exceptional cases there is not competing psychological evidence before the Court and the child is not subjected to repeat interviewing.

12.10 The Court should maintain control over this aspect of any Court proceeding involving children. If the Court did not retain that control, there would be a blow-out in hearing time and delays in assembling evidence and the possibility of subjecting children to unnecessary interventions.

Appropriate Funding of Services

12.11 If parties are required to pay for counselling, any new FDR service, lawyer for the child and professional reports, there is a risk that there will be one type of justice through the Family Court for those who are wealthy enough to pay for these services, and a different level of justice for those who are not able or willing to contribute to such costs.

12.12 This is not to say that there could not be some more stringent criteria for requiring parties to contribute to such professional costs in certain circumstances. There however needs to be sufficient discretion retained for Judges to take into account the nature of the case and financial circumstances of the parties.

12.13 The exercise of Court discretion requires submissions from each of the parties on the issue of contribution towards such costs. The Judge time required to make decisions on these issues whether on the papers or after a short hearing, also needs to be considered.

12.14 The Legal Services (Sustainability) Amendment Bill 2011 does not meet this criteria as it does not give the Judge sufficient discretion to address the issue of contribution to costs in the context of the welfare and best interests of the child in each case.

Recommendations

Fees

Fees are considered in some cases but not those involving children.

Contribution to Court Costs

There is a greater contribution required to the costs of certain Family Court services.

13. PERMANENT ADVISORY GROUP

Introduction

13.1 The Review has highlighted the need for an overarching strategy for the qualifications and training of Family Court professionals whether those retained by the Court in pre-Court processes (counsellors, mediators, educators) or the lawyers for children and professionals under section 132 and section 133 of the Care of Children Act who undertake their work in this and other areas of the Family Court jurisdiction.

13.2 The lack of an overarching strategy in changes made in recent years has meant inconsistency with training and qualification requirements with negative impacts for both best practice and costs for the Court.

13.3 There are broad issues to be considered in this context including:

13.3.1 the extent to which the Ministry and/or the Court should set criteria for qualifications and training (as opposed to the power the Court has for appointment of professionals to a particular role which needs to be retained by the Court).

13.3.2 whether lawyers and other professionals who appear in this jurisdiction are required to be accredited.

13.4 None of these issues can be simply addressed but it is essential that consideration of these areas of best practice have input from those in practice.

A Permanent Group

13.5 The Reference Group recommends a group made up of a similar membership is established on a permanent basis to advise the Ministry on the above areas and also to be available for consultation on this Review and policy development generally.

13.6 There are models for such a group within other Ministries, for example in areas of education, health and tax policy.

13.7 If a permanent group is established, it is imperative that the Ministry share all relevant information to the fullest extent possible in order to receive the most value from such a group.

13.8 The review of the Family Court is a mammoth task. The constitution of the Reference Group subsequent to the release of the Review has of necessity meant that the Reference Group's work has been reactive and occurred in the context of other major changes affecting the operation of the Family Court

including changes to the legal aid system and in the Auckland region the introduction of a centralised administration process.

13.9 It is the Reference Group's view that a permanent group, immediately available for consultation with the Ministry at the beginning of development of policy and practice initiatives, will be more effective than a group established on an ad hoc basis.

Recommendations

A permanent group of Family Court professionals is established to advise the Ministry on policy and practice issues in the Family Court.

14. EXECUTIVE SUMMARY OF RECOMMENDATIONS

1.	**PRE-COURT PROCESSES**	**Pages 8, 10, 12 & 16**

Accessible Information

(a) Pamphlets

Current information sources are enhanced to make written information regarding pre-Court resolution and Court procedures more widely available; and the content is redesigned to include more details of how to access services and their cost.

(b) Website

The Ministry's Family Court website is substantially redesigned (there are overseas models to follow) for provision of information, in particular for children and adolescents.

(c) 0800 number

A national call centre is established (staffed by personnel with specialist training) for advice on all aspects of Family Court services.

(d) Face to face contact

Parties continue to be able to have a face to face meeting with a member of the Dispute Resolution Co-ordination Office similar to the current ability to meet with a Family Court Co-ordinator.

(e) Cost

Information remains available without cost.

(f) Resource implications

The additional cost will be offset by overall savings from earlier resolution of disputes.

Parent Education

(a) Compulsory attendance

Attendance at a parent education programme is a mandatory pre-condition of filing proceedings in the Family Court.

(b) Review of the structure

The current structure and content of the Parenting Through Separation programme is reviewed to take into account the models of other programmes both the earlier pilot of Children Through Separation in the North Shore Family Court and international models.

(c) Single provider

Each Family Court District have one provider required to deliver programmes in a regular schedule at times to meet the different employment and other circumstances affecting the availability of parties to attend (and different cultural needs).

(d) Funding

Payment to the programme providers is based per programme rather than the current model of payment per attendee and the programme designed to include a larger number of attendees than the number that currently attend.

(e) Regular review

The programme content and delivery is regularly reviewed and updated according to available research and such a review includes the updating of guidelines for programme leaders.

(f) Training/monitoring

Training is provided for programme providers and procedures to monitor programme delivery are introduced.

(g) Parent contribution

Consideration be given to parents making a small contribution for programme attendance with clear guidelines for exemptions to ensure the ability to pay does not prevent participation.

(h) Resource implications

Compulsory attendance will increase the cost of provision of parent education but the one provider and greater attendance at sessions (sessions could include more than 50 participants whereas the current practice is often to have less than 10) will provide a cost efficient quality education programme which will assist parties in earlier resolution of disputes.

Family Dispute Resolution

(a) Family Dispute Resolution Service

An FDR Service is established within the Family Court to replace the current section 9 counselling and EIP mediation and section 10 counselling after filing.

(b) Eligibility

The service is available to parties with dependant children under the age of 16 years.

(c) Name

The process is called "Family Dispute Resolution" to avoid the confusing terminology of "counselling", "conciliation" and "mediation" with the

potential that several models of family dispute resolution practice could meet the criteria.

(d) Definition
The model is a facilitation model which replaces current counselling and mediation.

(e) Providers
Providers who meet the new training and skill requirements will include counsellors, mediators and psychologists. The providers continue on a contracting model.

(f) Reporting
A report is provided at the conclusion of FDR.

(g) Identifying Reference
A party's dispute is allocated a unique identifying "FAM number" for use in any later Court proceedings and to enhance data collection to monitor cost efficiency and enduring quality of outcome of FDR.

Administration of Information FDR Services

Short Term

Family Dispute Co-ordinator
(a) Greater support for the role of Court Co-ordinator.

Training and audit
(b) Improvement of Ministry structures for development of guidelines for auditing of training programmes and delivery of parent education.

Long Term

(a) Administration of Services
The FDR services and information be administered by a Family Dispute Co-ordination Office.

(b) Location of Service
The Family Disputes Co-ordination Office is located in the same building as the Family Court.

(c) Family Dispute Co-ordination Office
The Family Dispute Co-ordination Office is recognised as the hub of an overarching strategy of integration of pre and post-filing procedures in the Family Court to achieve, without the need for establishment of a separate Family Court dispute resolution service, the goal of

comprehensive delivery of education and family disputes resolution services.

(d) Family Dispute Co-ordination

The current Family Court Co-ordinator role includes functions which will continue to be carried out by the Family Dispute Co-ordinator. The role is expanded to encompass and other tasks that are currently carried out by case officers (e.g. processing requests for counselling and reports received from counsellors).

2. COURT PROCESSES Page 22

Court procedures

(a) Urgent Applications

Urgent applications proceed on EIP model (appendix page 78 of Review).

(b) Pre-condition of Filing Documents

Completion of parent education and engagement in Family Dispute Resolution is mandatory before an application can be filed except in urgent cases.

(c) Documents filed

Applications must identify the nature of and basis for orders sought and supporting evidence in a questionnaire style affidavit (cf Australia, Ontario).

(d) Limited Affidavits

Unless the matter is urgent or a party successfully seeks leave to file other affidavit evidence at the commencement of proceedings, no affidavits are filed without leave/Court direction.

(e) Triage on filing

Cases be categorised into:

- Urgent cases – requiring immediate judicial intervention
- Simple cases – only requiring a brief hearing either by "submissions on the papers" or minimum judicial time (e.g. Christmas contact).
- Standard cases – to proceed with defined judicial events to substantive hearing.

(f) Telephone conferencing

The High Court Rules procedure of telephone conferences on appeals is adapted to apply on completion of filing of notice of defence.

(g) Evaluation conference

That current Rule 175D conference procedure is enhanced as suggested by the Law Society's Family Law Section to include:

- obligatory filing of memoranda prior to conference.
- specific role of the Judge in addressing parties directly.
- identification of need for specialist reports or other pathways for case.
- ability to make interim orders.
- ability to make final orders by consent.

(h) Resolution Toolkit

There is an ability to transfer matters between Court and FDR processes (e.g. after initial urgent hearing referral back to FDR).

(i) Lawyer for Child

The role is defined in legislation.

(j) New Family Courts Rules

Practice Notes for pre Court and in-Court processes are replaced by rules to apply nationally.

(k) Complex Cases

It is recognised that most complex cases are unlikely to be resolved by pre-Court processes and need to progress to hearing as soon as possible.

(l) Expiry of Interim Orders

Interim parenting orders become final after 12 months unless one party takes a step within that time or the Court directs an interim order is to apply for a longer period.

(m) Power to Dismiss Proceedings

Section 140 is amended to increase the discretion available to Court to dismiss proceedings or require security for costs before proceedings are able to be continued.

(n) Repeat Applications

Leave is required before further application can be made within two years of a final order and leave is only granted on grounds of material change in circumstances.

(o) Predictive Orders

There is a limited use of predictive orders.

(p) No Presumptions

The current enquiry into the particular child's circumstances continues without presumptions for care arrangements for children generally.

(q) Variation of Final Orders

Parties can vary a Court Order by agreement without the need for appointment of lawyer for child unless the Court is alerted to welfare concerns.

3. CASES INVOLVING VIOLENCE Page 27

(a) Focused Application and Affidavit

There is a requirement to identify the nature of the violence and reason why a child is at risk of ongoing contact after parents have separated.

(b) No Presumption

It is clarified that there is no presumption that untested allegations of violence should lead to immediate cessation of or supervision of contact in the absence of an interim application for and granting of such urgent relief.

(c) Agreed Statement of Facts

That the current procedure allowing findings of safety on the basis of consent memorandum submitted to the Court for consideration applies nationally.

(d) Evaluation Conference

Rule 175D is amended to specifically enable the Judge to "test" allegations of violence and risk at a judicial conference in some cases.

(e) Supervised Contact Centres

There is improved resourcing of these centres.

4. SCREENING Page 30

(a) Pre-Court

- A form of reporting by family dispute practitioners to identify a defined list of the issues in dispute between the parties is developed.
- Improved training and certification of family dispute practitioners to identify violence, drug, alcohol, abuse and child abuse issues.
- Training of Family Dispute Co-ordination Office service staff (phone and face to face) to screen for risk factors.

(b) On Filing

A more focused form of application and affidavit evidence to identify issues of risk is required.

(c) Training

Registry staff are trained to screen for risk factors.

(d) Assessment

- New triage procedure on filing.
- Fuller evaluation conference.
- Greater use of case management tools and management of a case by one Judge.

5. PARTICIPATION OF CHILDREN Pages 33 and 34

(a) Role of Parents

Recognition of the primary role of parents when involving children in decisions made about the children.

(b) Education

Parents are assisted to gain the skills to inform children, consider their views, and protect children from parental conflict.

(c) Role of Professionals

Over-interviewing of children is avoided and appropriate standards of qualification, training and competence to work with children are developed.

(d) Consent

There is an adequate process to ensure children give fully informed consent to participate in interviews with practitioners and to sharing of information with others.

(e) Children in Mediation

- Guidelines for standards of practice for eligibility as a Family Court FDR practitioner are considered.
- A properly funded and evaluated pilot programme is required before children are involved in pre-Court FDR.

6. REPRESENTATION OF CHILDREN Page 38

(a) Professional in Role

Lawyers continue to represent children in proceedings.

(b) Role

Section 7 of the Care of Children Act is amended to define the role of lawyer for the child as an advocate for the welfare and best interests of a child informed by the child's views.

(c) Timing of Appointment

Appointment of lawyer for the child occurs later in a case subject to a broad discretion for a Judge to appoint a lawyer for the child earlier if required in a particular case.

(d) Discretion

The detailed definition of welfare and best interests adopted in some Commonwealth jurisdictions is not applied in New Zealand. Rather the current definition in section 4 (developed in case law) remains as it best enables an outcome to be tailored to the individual circumstances of a child.

7. SPECIALIST REPORTS Page 41

(a) Need for Reports Better Defined

The circumstances when a specialist report is "necessary" under section 133 is defined recognising that such a definition cannot be exhaustive.

(b) Report on Child and Parents

A new section is included in the Care of Children Act to enable the Court to direct a report on the parent, guardian or any other persons having the care of the child and not only the child, in appropriate cases.

8. REVIEW DATA Page 44

Current data collection in the Family Court is improved to enable date to be collected for improvement of FDR and in-Court processes**.**

9. CULTURAL DIVERSITY Page 46

(a) Training

Training for cultural awareness for all professionals involved in the Family Court is improved and is delivered at the cost of each professional group.

(b) Mediation

A pilot programme is established for a family dispute resolution model similar to the Family Group Conference process under the Children Young Persons and Their Families Act, after filing of proceedings in Care of Children Act cases.

(c) On Filing

It is a requirement of an originating application to notify the Court of the assistance an extended family member may give to resolution of the dispute between parties.

(d) Evaluation Conference

Consideration is given to allowing extended family members to participate in Evaluation and Judicial Conferences provided the reason for their participation and manner in which they can be of assistance in resolution of the dispute between parties has been identified to the Court.

10. BINDING AGREEMENTS Page 47

Private written agreements between parties are not capable of registration or given the status of enforceable orders.

11. JURISDICTION Page 50

(a) Jurisdiction
The current jurisdiction of the Family Court is retained.

(b) Relationship Property Cases
The concurrent jurisdiction of the High Court which applied pre 2002 is reintroduced in relationship property proceedings.

(c) Trusts
The Family Court is given greater powers for trust issues in relationship property cases.

(d) Tribunal
Minor dispute Tribunal is not established**.**

12. COURT FEES Page 53

(a) Fees
Fees are considered in some cases but not in those involving children.

(b) Contribution to Court costs
A greater contribution by parties required towards the costs of certain Family Court services.

13. PERMANENT ADVISORY GROUP Page 55

A permanent group of Family Court professionals is established to advise the Ministry on policy and practice issues in the Family Court.

Reference Group
26 April 2012