Examining the Review of the Family Court

10 October 2012

9.10 – 10.00 am

Stamford Plaza, Auckland

Ko te piko o te māhuri, tērā te tupu o te rākau.

The way the sapling is shaped determines how the tree grows.

Introduction

As many of you know, I am nearing the end of my term as Principal Family Court Judge and will be stepping down in December to take up a position as a Law Commissioner. I welcome the opportunity to speak to you all today about the Family Court Review as reform of the Family Court has been a matter close to my heart throughout my judicial career. Today I will touch on some particular aspects of the Review: the background and what led to it, the implications of the proposed changes for various groups, and I will end with some hopes for the future of the Family Court.

Background to the Review

The former Minister of Justice, Simon Power, had hinted that the Family Court as well as the Criminal Court would be within his sights for review as far back as 2010. I think this all started with asking Dame Margaret Bazley to comment on Legal Services and a feeling from that that the State was investing unwisely in the Courts.

Despite this background and comments in Ministerial speeches during 2010, the Cabinet Paper which announced the terms of reference for a review of the Family Court in April 2011 took me by surprise.[1] There had been no consultation with the judiciary over ways in which the Court could be reformed and how we might do that in partnership.

[1] Cabinet Domestic Policy Committee "A Review of the Family Court" 19 April 2011.

In terms of background as to why the Government considered a review of the Family Court was necessary, the starting point has to be the Care of Children Act and why that was passed in 2004. It was to deal with criticisms made in the Law Commission's 2003 report on Dispute Resolution in the Family Court.[2] These criticisms had been troubling the Government and the Care of Children Act 2004 brought about significant changes in how we dealt with cases. In particular, the COCA empowered use of lawyer for the child to ensure that we were fulfilling our international obligations under article 12 of the United Nations Convention on the Rights of the Child.

When I was appointed Principal Family Court Judge I was deeply concerned about delays in the court and in particular, the negative impacts these delays had on the children involved in proceedings. Further reform the court came in the Family Courts Matters Bill which was passed in 2008 but unfortunately, counselling for children and Senior Family Court Registrars were never implemented. The concerns of the judges of the Family Court remained and we felt we could not simply wait, sitting on our hands, for the implementation of key reforms which looked increasingly uncertain.

Court led reforms

Under my watch, we reformed the Court in a number of ways but principally through the development of the Early Intervention Process. We had earlier tried the Parenting Hearings Programme without a great deal of success. It was inevitable that expenditure would increase given the Care of Children Act and the wish of Parliament to provide Family Court services of much better quality. All the same I was aware that better control of our Court was needed. The Early Intervention Process was an attempt to do that.

Analysis undertaken by the Ministry of Justice showed that the Early Intervention Process has resulted Family Courts being able to dispose of their work much quicker. I acknowledge the present issues in Auckland with the Auckland Service Delivery Project but beyond that, I think the core way the Family Court was functioning was in fact, very efficient.

However it is clear that a couple of paragraphs of the Cabinet Paper of April 2011 paper fairly and squarely say that the drivers of the review were increasing professional costs and the perception of an unsustainable court.[3]

What changes have been announced?

The changes announced by the Government in August with regard to reform of the Family Court will be familiar to many by now. In brief, the main elements of the proposed reform are:

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2 Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003).

3 Cabinet Domestic Policy Committee "A Review of the Family Court" 19 April 2011 at [3] – [4].

- Removing all counselling and mediation services from the Family Court;
- With the exception of urgent cases, a new requirement that all parties applying under the Care of Children Act must attend Parenting through Separation (free of charge) and the new "Family Dispute Resolution" Service (at a cost of $896 (inc GST)) before an application can be filed in the Family Court;
- Creating three tracks for when cases enter the Family Court (without, simple and standard) and limiting the use of lawyers in the simple and standard track; and
- Restricting the use of lawyer of the child to represent children in proceedings.

Cost implications for judiciary

For the judiciary, I am not sure there will be major cost implications but it is unclear at this stage who will be undertaking the triage assessment at the beginning of the process. I cannot see the sense in having Judges involved with this work for two reasons: they do not have the time, using judges to undertake this quasi-administrative role would be a poor use of judicial resource.

However, the importance of having those initial processes set up and operating adequately is clear from looking at the way Auckland is currently operating.

Implications for litigants

With both the reduction in legal aid and the restriction of lawyers from the simple track and the early stages of the standard track, we will be seeing far more litigants in person.

Experience overseas indicates that litigants in person are often unfocussed and take up too much time and "use up more of the court's resources than represented litigants."[4] My experience is that having skilled lawyers at the beginning of the process is incredibly helpful as lawyers can identify the issues and provide focus. It was therefore surprising to read in the latest Cabinet Paper a statement that people who act for themselves usually can put the issues better. That is not my experience.

It is also a big ask for parties to represent themselves. While we can do our best to make the processes and court space as user-friendly as possible, much family law work will still be formidably complicated, intimidating and overwhelming for litigants.

Impact on the legal profession

The impact on the legal profession will be enormous. It is unclear whether lawyers will be involved in the Family Dispute Resolution Service but it seems likely that current lawyers trained as mediators

[4] Family Court of Australia "Self Represented Litigants ~ A Challenge: Project Report" (2003).

for counsel led mediation may be called upon to provide mediation services in the new Family Dispute Resolution Service.

The role of lawyers in the Family Court has long been valued by the judiciary, even going as far back as when the Family Court began. In 1981 the first Principal Family Court Judge gave an interview and was asked a number of questions about the shape of the new court. With regard to the use of lawyers, he said:[5]

> This is not to say that lawyers are unwanted. On the contrary they have a valuable function. In cases where they appear I believe they will perform this function best by recognising that the needs of parties for assistance will vary, that an important objective of mediation is to enable the parties to reach agreement themselves if at all possible, and that they will help best by taking a less prominent part in the proceedings that would be the case in other Courts, and leaving matters as much as possible to the parties.

I think the impact of restricting lawyers from the simple and part of the standard track, coupled with the introduction of the fixed fee framework will see many lawyers abandoning family law work. This is unfortunate because the family law profession has a high level of skill, expertise, and experience which will be sorely missed if family law falls to be practised by non-specialists.

In my experience, skilled lawyers are able to identify the issues early on and provide focus in proceedings. This makes the proceedings much more efficient. The simple track has been described as being for "simple or single-issue"[6] cases. The people who enter this track will have already been through the compulsory Parenting through Separation programme and the compulsory Family Dispute Resolution Service. To expect parties to come to agreement at this stage, without the assistance of a lawyer, may be overly optimistic. When parties are not legally represented there is an increased danger of power imbalance and the potential for intimidation which might not be apparent from the papers.

Consequences for the welfare of children

As to consequences to welfare of children, it seems less likely that children's voices will be heard in the new processes. The proposed reforms plan to amend the Care of Children Act "so that the Court can appoint lawyer for child where a child needs legal representation because of serious issues, such as violence and only after a defence has been filed."[7] There have been no announcements thus far as to how children's views are to be put before the court which means we are in danger of being in breach of our international obligations under the United Nations Convention on the Rights of the Child.

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5 Tony Black "Family Courts – An Interview with the Judge Trapski" (1981) NZLJ 12 at 384.

6 Cabinet Social Policy Committee "Family Court Review – Proposals for Reform" 2 August 2012 at 22.

7 Cabinet Social Policy Committee "Family Court Review – Proposals for Reform" 2 August 2012 at 29.

One point I would like to make with regard to reform in this area is that giving children the opportunity to be heard in judicial and administrative proceedings that affect them is not an optional approach that we can choose to include or not. It is an obligation New Zealand has signed up to and we have a duty to ensure that these changes do not jeopardise that commitment.

That aside, obtaining children's views early, particularly with older children, is often hugely helpful to defining what issues really matter. This focus can simplify proceedings and speed the whole process up quite dramatically.

Conclusion: Quo Vadis?

All of us want a Family Court of excellence. We have not had that to the extent that we might have liked and we all have cause to worry as to whether proposed reforms will help.

Where I think we have been too burdened is in those intractable cases where parental conflict has been too difficult for us to manage given our overall heavy workload. The administrative and judicial arms of the court have not kept pace with the demand. As well as the burden of the workload, the rules and processes we have make it very difficult for us to move robustly and easily through cases of conflict where the real interests and welfare of children are evident early on.

I would like to see a family justice system which enables us to put in real and meaningful resource at the outset. Litigants coming to the Family Court need to make decisions with the benefit of legal advice and issues for children need to be framed at the outset by skilled and experienced lawyers for children. This point in the process is not the place to be mean with expenditure of money.

I do think that as the issues are refined and become clear, state resources should be less available for parents to litigate. However, requiring contributions from litigants is often far too difficult as a number of our Family Court litigants have little money. Costs contribution and orders do not often produce the disincentive intended.

And so, I would like to see us have real advice and resource available at the outset but decreasingly available as litigation looms. Very few of our cases should proceed to trial. And when they do, there must be investment by the parties in a personal respect.

As I conclude my term, I reflect on a Court which is transparent, open, accountable and which has the confidence of the public. They are attributes I value and we must never lose them from our grasp. Some reforms to our system are timely, but let us end up with a Family Court which delivers even more to the children it serves, and to their parents, in that we positively promote early resolution and discourage self indulgent litigation.