

12 November 2018

Independent Panel, Family Justice Reforms  
c/- Ministry of Justice  
Wellington

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## **EXAMINATION OF THE 2014 FAMILY JUSTICE REFORMS**

### **A. INTRODUCTION**

1. The New Zealand Law Society welcomes the opportunity to provide feedback to the Independent Panel (panel) examining the 2014 family justice reforms. We are pleased the impacts of the 2014 changes are being evaluated.
2. The panel's consultation paper, "Have Your Say on the family justice system – A consultation document released by the Independent Panel examining the 2014 family justice reforms"<sup>1</sup> (paper) and "Overview of the 2014 family justice reforms"<sup>2</sup> (background paper) have been considered by the Law Society's Family Law Section (FLS), and the FLS has drawn on the expertise and experience of family lawyers in providing this feedback.
3. The Family Court is a central part of our justice system, and it is vital that reform of the court delivers an effective, accessible and appropriately resourced forum for the resolution of family disputes. In our view, the 2014 changes have not delivered those outcomes. The Law Society hopes the current review will lead to carefully considered design changes that deliver sustainable access to justice for the many New Zealanders who need support in resolving their family disputes.

### **B. EXECUTIVE SUMMARY**

4. The review of the Family Court undertaken in 2012 that led to system changes in 2014 was intended to ensure the court was "sustainable, efficient, cost effective and responsive to those children and vulnerable adults who need access to its services".
5. The Law Society considers the 2012 review was hampered by a lack of data and objective information, and that many of the resulting changes to the family justice system have had a detrimental impact on the Family Court and the parents and children who seek its assistance. This is particularly so in relation to the significant increase in without notice applications, where children are at risk and matters need to be urgently addressed.
6. The Law Society encourages the panel to engage with the University of Otago researchers who are currently evaluating the 2014 changes. The extensive information the researchers have

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<sup>1</sup> Have Your Say on the family justice system – A consultation document released by the Independent Panel examining the 2014 family justice reforms, Ministry of Justice, 5 September 2018.

<sup>2</sup> Background Paper – Overview of the 2014 family justice reforms, Ministry of Justice, September 2018.

gathered from interviewing parents, lawyers, judges and other stakeholders will greatly inform the panel's report to the minister.

7. In the Law Society's view implementing the following three key changes would have an immediate positive effect on the Family Court:
  - allowing lawyers to act in all matters in respect of parenting and guardianship disputes, both pre and post-proceedings, and increasing the availability of legal aid;
  - bringing pre-court processes back under the umbrella of the Family Court, reinstating a limited number of counselling sessions and making FDR free, voluntary and more accessible; and
  - implementing a robust triage and case management system, disestablishing the tracks and reducing the number of court events.
8. Whatever changes are proposed will only be effective and achieve efficiencies if there is adequate resourcing of the family justice system as a whole. This includes adequate resourcing in terms of judicial hearing time, registry staff, social workers, legal aid providers, court-appointed counsel and mediators. Inadequate resourcing runs the risk that the pool of qualified and experienced people working in and with the Family Court will be diminished.

## **C. THE FAMILY JUSTICE SYSTEM**

### **The nature of family disputes**

9. The unique nature of the family law jurisdiction needs to be understood when considering legislative change. The Family Court deals with cases that touch on almost every aspect of New Zealanders' lives. It is very much 'the people's court'.<sup>3</sup> Parenting disputes frequently involve highly personal and emotional issues and are inherently different from disputes that come before the courts in other jurisdictions. The Family Court has a dual role embodied in most of the statutes under its jurisdiction: it is a court of law that has a judicial role to determine disputes based on the evidence before it; and when exercising that role, it also has a protective jurisdiction (in terms of the Care of Children Act 2004 (COCA) and other legislation) to ensure that children's welfare and best interests are paramount. Unlike the other courts, the Family Court also has to make predictive assessments of future behaviour rather than simply findings of fact on past events. The nature of family disputes requires the Family Court to have a maximum degree of flexibility.

### **Resourcing**

10. The state has an obligation to its citizens, including children, to provide an independent and appropriately resourced legal forum for the resolution of family disputes. To provide access to justice, the Family Court must be adequately funded. Simply amending the legislation and rules, without the proper level of resourcing to support the changes, will not result in positive change and improvement.
11. While the Law Society recognises that resources are finite, effective reform may require some up-front investment to ensure sustainability and cost savings in the future. The cost savings would be both monetary and non-monetary (in terms of reduced stress and suffering of the

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<sup>3</sup> 22<sup>nd</sup> Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, "Generations of Disadvantage: A view from the District Court Bench", Judge Jan-Marie Doogue, Chief District Court Judge, Dunedin, 15 October 2018.

parties in family disputes). Acrimonious parenting disputes have a negative and sometimes profound impact on children who are the subject of proceedings. This is particularly so when disputes are not resolved in a timely manner. If not adequately protected, those children are highly likely to appear in the Youth Court and the adult criminal jurisdiction later in life. This is a recurring theme in New Zealand, but also echoed in other Commonwealth jurisdictions.<sup>4</sup>

12. Chief District Court Judge Doogue said in her 2018 Ethel Benjamin address that:<sup>5</sup>

*People often look to the Youth Court to see the seeds of adult crime. In fact, the starting point is often the Family Court. We see a cycle of alienation, hardship, disempowerment and tragedy in the Family Court that progresses through to the Youth Court and ultimately into the adult criminal jurisdiction. ... It is the Family Court where disadvantage often presents first ... Therefore a significant proportion of the Family Court's work relates to societal breakdown at the most basic, human level.*

13. Family lawyers and judges have seen an increasing prevalence of factors including methamphetamine and other drug use, family violence, neglect of children and mental health issues, and the pressures on under-resourced non-government organisations to meet the needs of families and children at risk.
14. Such factors not only impact on the parties' ability to resolve matters themselves, it increases the time and cost required for the court to determine matters. There need to be adequately resourced services to assist these parties and children. This has the potential to reduce costs not only fiscally but also in terms of the human cost in the future.

#### **D. THE FAMILY COURT: THE 2014 CHANGES**

15. The 2012 – 2014 review of the Family Court resulted in significant amendment to the legislation and rules relating to parenting and guardianship proceedings. The review commenced with a consultation paper<sup>6</sup> that, in the Law Society's view, contained inadequate data, factual errors and unsubstantiated assumptions. In its 2012 submission to the Ministry of Justice (ministry) the Law Society recommended changes that would have achieved significant fiscal savings and improved the operation of the Family Court, via targeted rather than substantive legislative change. In our view it is unfortunate that many of the recommendations were not implemented. That submission is still very relevant and instructive and is attached at **Appendix 1**.
16. Many of the critical elements of the system changes – including details about the new 'track' system – were implemented by regulation, without the opportunity for those who work in the court to provide feedback on workability. In addition, no time was given for judges and lawyers to familiarise themselves with the changes before they were implemented. The Law Society hopes this mistake will not be repeated and that lawyers and other stakeholders are given the opportunity to consider any proposed changes and provide feedback.

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<sup>4</sup> 2018 National Family Law Conference, Brisbane, Australia, 2 to 5 October 2018 (many papers presented at the conference spoke of this risk).

<sup>5</sup> 22<sup>nd</sup> Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address, "Generations of Disadvantage: A view from the District Court Bench", Judge Jan-Marie Doogue, Chief District Court Judge, Dunedin, 15 October 2018.

<sup>6</sup> Reviewing the Family Court – A public consultation paper, Ministry of Justice, 20 September 2011.

17. There appear to be no publicly available statistics regarding the overall cost of implementing the 2014 changes and whether the changes have achieved the anticipated cost savings. This is vital information the panel will need to inform its report to the minister.

#### **E. OUT-OF-COURT PROCESSES**

18. The availability of alternatives to litigation is a vital component of effective and efficient dispute resolution. The benefits to the parties, their children and the Family Court are self-evident.
19. A significant proportion of disputes over care and guardianship issues have always been amenable to resolution without the need for court proceedings. Effective out-of-court processes need to be easily accessible and available in a timely way to promote the ability of parties to resolve their disputes early, minimising the extent to which children are caught in conflict, and reducing the risk of issues becoming entrenched. This was the philosophy behind the establishment of the Family Court in 1981, a philosophy that remains sound today.
20. It is important to note at the outset that not all issues raised in parenting disputes are capable of resolution through mediation and other pre-court processes. Access to the Family Court should still be available in a timely way, particularly to protect the interests of children, without insurmountable barriers for those who require its assistance.
21. Prior to the 2014 changes, only 15.97% of matters proceeded to a judge for determination.<sup>7</sup> While some of this was due to settlement reached post-proceedings, the experience of family lawyers was that a great many matters were settled prior to proceedings even being filed.
22. The background paper acknowledges that as a result of the 2014 changes, there has been a significant increase in without notice applications which have bypassed any pre-court process resulting in low uptake of Family Dispute Resolution (FDR).<sup>8</sup> This is a real concern.

#### **Parenting Through Separation**

23. The Law Society supported parties' mandatory attendance at Parenting Through Separation (PTS) before being able to access the Family Court, except in cases of risk or urgency.<sup>9</sup> Feedback from family lawyers indicates that most parents have found the programme helpful, which is consistent with the ministry's research.<sup>10</sup>
24. Results from the University of Otago's initial online survey of separated parents indicate that 31% ranked PTS as one of the three most helpful steps they have taken in resolving their disputes. This can be compared with: 38% – attending private or community counselling, 48% – seeking legal advice, 58% – talking with children and seeking their thoughts, feelings and views, and 48% – discussions with the other parent/party.<sup>11</sup>
25. The Law Society supports the continuation of free attendance at PTS for parties. Consideration should be given to making attendance at PTS mandatory *before* parties attend FDR. This would

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<sup>7</sup> Ministry of Justice letter, 17 May 2011 (in response to NZLS FLS Q29) 2009/10 COCA cases 5% final and 10.97% interim hearings.

<sup>8</sup> Background paper, at [50]; see also [58].

<sup>9</sup> Law Society submission on the Family Court Proceedings Reform Bill, 13 February 2013, paragraph 113.

<sup>10</sup> Evaluation of Family Dispute Resolution and Mandatory Self-representation, October 2015, paragraph 6.8.2.

<sup>11</sup> Family Law Reform in New Zealand: Research Insights, Associate Professor Nicola Taylor, NZLS CLE Ltd Conference, The Future of Family Law, 20 September 2018.

give parents useful information to encourage them to be child-focused at FDR and would enhance the prospect of agreement being reached. This may not be practical where FDR needs to be held urgently and an exemption should be provided for such situations. However, developing an online version of PTS, as discussed below, may negate the need for an exemption based on urgency.

26. The Law Society has previously suggested a number of improvements to PTS,<sup>12</sup> including:
- (a) the content and structure of PTS could be enhanced by considering and incorporating the models of other programmes and international models;
  - (b) programme content to be regularly reviewed and updated according to available research;
  - (c) each Family Court district having one provider to deliver the programme with a schedule, and that programmes could be funded on a fee per programme session rather than a fee per client basis;
  - (d) specific and on-going training for programme providers together with systems to monitor the quality of programme delivery; and
  - (e) on-line programme developed to achieve the programme objectives and to enable people to effectively participate.
27. The background paper notes that “it is not clear whether the current content of the PTS programme is useful for others in parenting roles, such as caregivers, grandparents or other extended family members”.<sup>13</sup> The paper goes on to say that the content has been slightly adapted but is not specifically tailored to the needs of this other group. This is an issue the Law Society raised with the ministry soon after the 2014 changes were implemented, as the exemptions available in section 47B do not cover these situations. In its recent submission on the Courts Matters Bill,<sup>14</sup> the Law Society recommended an amendment to section 47B to address this.
28. The Law Society supports the development of an online version of PTS as an alternative to, not a replacement of, face-to-face delivery. An online version would enhance the accessibility of the programme for those living in remote areas or who have difficulty attending due to work hours or child care commitments. An online version would ensure consistency of content and delivery. It would also present opportunities for the development of the programme in different languages and with a different cultural focus. It would be important to ensure that participants have engaged in the programme and viewed all the material. Options such as setting up video meetings via Zoom so that participants are engaging directly with a PTS provider would reduce the risk of non-engagement.
29. Consideration should also be given to adapting the programme so that it can be delivered in different languages and for different cultures with the ability for programmes to be held on marae.

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<sup>12</sup> Law Society submission on the Family Court Proceedings Reform Bill, 13 February 2013, at paragraph 120.

<sup>13</sup> Background paper, Overview of the 2014 family justice reforms, Ministry of Justice, September 2018, at paragraph 32.

<sup>14</sup> Law Society submission on the Courts Matters Bill, 16 February 2018, at paragraphs 5.3 and 5.4.

## Recommendations

30. That:
  - 30.1 Free attendance at PTS for parties continues.
  - 30.2 Attendance at PTS be made mandatory *before* parties attend FDR, with an exemption available in cases of urgency.
  - 30.3 Consideration be given to improvements to PTS as suggested above at paragraph 26(a) – (e).
  - 30.4 An online version of PTS be developed as an alternative to, not a replacement for, face-to-face delivery.
  - 30.5 Consideration be given to adapting PTS so it can be delivered in different languages and for different cultures.

## Counselling

31. The 2014 changes removed counselling under sections 9, 10 and 19 of the Family Proceedings Act 1980 and section 65 of COCA. Section 9 counselling (pre-proceeding) was replaced with FDR.
32. Counselling that was available under sections 10, 19 and 65 was replaced by the provision for counselling under section 46G of COCA which provides for a single referral for parties for the specific purposes of improving the relationship between the parties or to encourage compliance with any direction or order made by the court. It is unfortunate that only one referral is available *after* proceedings have commenced, as proceedings often further damage the relationship between the parties.
33. In the Law Society's view, section 46G should be amended to remove the limitation for only one referral and to enable the court to direct children to counselling where appropriate. There may be situations where a referral is made at an early stage in proceedings, for example to focus on communication between the parties, but additional counselling would be beneficial at the end of proceedings, for example to encourage compliance with the final order. In the Law Society's view this would not open the floodgates for referrals but would give the judge discretion to make more than one referral, which may reduce the risk of the arrangement breaking down.
34. Prior to 2014, counselling under section 9 provided an immediate and free forum for separating parents to consider reconciliation or to discuss issues in relation to their separation, including the care arrangements for their children. It is highly unfortunate that "*there was no relevant data to determine the cost effectiveness of Family Court counselling compared with other models of dispute resolution*" prior to the 2014 reforms being implemented.<sup>15</sup> The ministry should consider undertaking an analysis of those who attended section 9 counselling prior to the 2014 changes, to determine its cost-effectiveness in terms of reducing applications to the Family Court.
35. Separating parents typically experience significant stress and a range of intense emotions, including anger, jealousy and shame. Such emotions can hinder the parties' effective communication and trigger conflict which may involve physical or psychological violence. Such

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<sup>15</sup> Expert Reference Group Report to the Minister of Justice on the Family Court review, April 2012, paragraph 1.19.

emotions will also often prevent parties from engaging effectively with services (in or out of court) to resolve care arrangements for their children in a rational and child-focussed way.

36. Timely access to counselling can assist parents to manage their emotions. It assists people to become ready to negotiate a settlement or to make decisions about how to progress issues. It enhances the prospect of early resolution of issues relating to children without the need to apply to the Family Court, but also enables parents to engage more effectively in the court process if proceedings are filed. Availability of such counselling would also reduce the risk of a crisis developing which might otherwise lead to a without notice application to the court.
37. Parties and lawyers have commented on the positive value of counselling (as distinct from pre-mediation and coaching) in helping parties to reach a state of equilibrium and to be more prepared to participate in mediation.<sup>16</sup> Results from the University of Otago's recent online survey shows that 38% of parents ranked private or community counselling as one of the three most helpful steps they took in completing their parenting arrangements.<sup>17</sup> If a limited number of focussed counselling sessions was available, this may increase the number of parents engaging with FDR.
38. It is important to note that section 9 counselling was intended as a therapeutic process designed to assist parents to deal with their emotions experienced through separation, and to enable resolution in parenting disputes. Preparatory counselling for FDR or Preparation for Mediation (PFM) is narrower as it is focussed on assisting parents to take part effectively in the mediation. While each process has a different focus, many parents would benefit from the broader therapeutic counselling before participating in FDR. Such counselling could be combined with PFM (with the same counsellor) in appropriate cases. This may achieve savings as parties would be more likely to engage in the FDR process having reached a more balanced emotional state. This could increase the prospect of parents reaching more durable agreements. The time allocated for FDR could then be targeted purely at mediating the dispute rather than preparing the parties for that process.
39. The Law Society has previously advocated for the extension of counselling to include children. Counselling for children following a final order was provided for in the Care of Children Amendment Act 2008 (which inserted section 46P in COCA) but that section has since been repealed, without ever being brought into force.<sup>18</sup> The Law Society recommends that legislative provision along the lines of section 46P be reintroduced as soon as possible.

#### *Recommendations*

40. That consideration be given to:
  - 40.1 Re-introducing a limited number of free, targeted pre-proceedings counselling sessions.
  - 40.2 Reintroducing section 46P, to enable counselling for children.
  - 40.3 Amending section 46G to remove the limitation of one referral, and to give the court power to refer a child to counselling (if section 46P of COCA is not brought into force).
  - 40.4 Including "preparation for mediation" in counselling sessions but still have preparation for mediation available for those who have not attended counselling.

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<sup>16</sup> Without Notice Applications in the Family Court, Ministry of Justice, July 2017 at paragraph 21.

<sup>17</sup> Family Law Reform in New Zealand Research Insights – The Future of Family Law, Nicola Taylor, September 2018.

<sup>18</sup> See: [http://www.nzlii.org/nz/legis/repealed\\_act/cocaa2008208.pdf](http://www.nzlii.org/nz/legis/repealed_act/cocaa2008208.pdf).

## Family Legal Advice Service

41. The Family Legal Advice Service (FLAS) was introduced following the decision to remove legal aid for pre-proceeding advice and legal representation in the early stages of proceedings in respect of parenting or guardianship disputes.
42. FLAS provides an opportunity for parties to obtain very limited legal advice and assistance. This is better than no advice at all. However, the Law Society considers that FLAS is too limited, is overly prescriptive and should be disestablished. Parties should have the option of obtaining legal advice and representation both prior to proceedings, before attending FDR and throughout the court process. Legal aid should be available for those who meet the income threshold criteria, to cover initial advice and representation pre-proceedings, drafting initial court documents and representation during the court proceeding.
43. Reinstating legal aid as it was prior to March 2014 would enable more opportunity for settlement of issues (consistent with lawyers' obligation pursuant to section 9A of the Family Court Act 1980 to promote conciliation). In the Law Society's view, the low income eligibility threshold for legal aid needs to be urgently addressed. If not, consideration should be given to raising the income threshold for legal aid to that of FLAS. (Based on the current income eligibility threshold, more people qualify for FLAS than legal aid.)
44. There seems to be little sense in administering two different systems – FLAS and legal aid – both of which have different income eligibility thresholds, tasks to be completed, administrative systems (a Resolution Management System (RMS) is used for FLAS) and remuneration rates.
45. The FLAS fee schedule<sup>19</sup> includes the limited tasks required for FLAS providers under FLAS stage one and two. Specifically, FLAS providers are *not* required to:<sup>20</sup>
  - (a) facilitate resolution;
  - (b) attend counselling or mediation sessions, including FDR;
  - (c) review agreements made during FDR;
  - (d) assist their client to complete an application for legal aid;
  - (e) undertake work that is covered by a grant of legal aid;
  - (f) file court applications or serve documents;
  - (g) represent the client.
46. The limitations on lawyers' role under FLAS has led to fragmentation and lack of continuity of legal representation and is a source of confusion and stress for parties. As an example: a parent sees a lawyer for FLAS stages 1 and 2, then files an application for a parenting order. After the court has directed that counsel may act (perhaps months later) the party returns to the FLAS lawyer, or another legal aid provider, and makes an application for legal aid. The lawyer must then find out what has happened in the intervening period and obtain all court documents if the client is unable to provide them.
47. In some areas there is a shortage of lawyers undertaking FLAS work. This is due in part to the lower remuneration and the administrative burden associated with RMS. It is also linked to

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<sup>19</sup> Family Legal Advice Service Operational Policy, Ministry of Justice, at Appendix 5.

<sup>20</sup> Family Legal Advice Service Operational Policy, Ministry of Justice, at page 7.

wider issues of the decreasing availability of family lawyers who are prepared to undertake legal aid work. (Only those who are already approved legal aid providers can be appointed as FLAS providers. It is important to note that not all legal aid providers have chosen to be appointed as FLAS providers so the number of FLAS providers is smaller than the pool of legal aid providers.)

48. As discussed below, lawyers add value and have an important role in advising and representing clients both before and throughout court proceedings. Prior to the 2014 changes, many matters were settled with the assistance of lawyers, resulting in no court proceedings being commenced. This is reflected in the statistics that show that two thirds of people who started out-of-court and accessed FLAS stayed out of court.<sup>21</sup>
49. The Law Society has previously raised concerns about the remuneration rate for FLAS, which is lower than the legal aid rate and does not allow for any up-lift for additional factors, such as the client having English as a second language or having mental health problems. If FLAS is to be retained, those issues should be urgently addressed.

#### *Recommendations*

50. That:
  - 50.1 FLAS should be disestablished and legal aid reinstated for those who meet the income threshold, to cover initial advice and representation pre-proceedings, drafting initial court documents and representation during the initial stage of the court proceeding.
  - 50.2 Consideration should be given to raising the income eligibility threshold for legal aid to that of FLAS.
  - 50.3 Section 7B of COCA is unnecessary and should be repealed.
  - 50.4 If FLAS is to be retained, increasing the remuneration rate for FLAS providers should be considered, including an up-lift for additional factors such as English as a second language and mental health issues.

#### **Family Dispute Resolution**

51. When an agreement is mediated with skill it can result in an outcome parties can claim as their own, therefore having a higher chance of durability. It can incorporate interests and outcomes beyond the strictly legal and can be broader than a court-imposed solution. For that reason, it sits more comfortably outside (pre-filing) rather than inside (post-filing) the court process. However, the ability for the court to refer parties back to mediation post-filing must be retained.
52. The Law Society is concerned about the under-utilisation of FDR and the high number of exemptions granted, as mediation has significant benefits for parties, children and the Family Court. This has led to a number of experienced and qualified family mediators deciding to discontinue providing this service as there is not the volume of work to sustain the cost of maintaining their accreditation status and professional supervision requirements. There is a significant risk that if there is not a greater uptake of FDR, the pool of qualified and experienced mediators will continue to decrease.

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<sup>21</sup> Family Justice Reforms: An Initial Cohort Analysis, Ministry of Justice, March 2016, pages 17 and 18.

## **Exemptions**

53. Prior to the 2014 changes there were approximately 25,872 parenting and/or guardianship applications made to the Family Court.<sup>22</sup> Between July 2016 and June 2017 there were 1,561 disputes with a completed mediation and in the same period 1,542 exemptions granted. The number of disputes and exemptions together only total 3,103, suggesting that FDR is woefully under-utilised.
54. Of the exemptions, 83% were because one of the parties would not participate.<sup>23</sup> The statistics show that:
- 40% refused to engage with the FDR supplier because they simply did not want to do FDR;
  - 23% did not respond to the supplier even after multiple attempts to contact them; and
  - 14% said that cost was the reason for non-participation.<sup>24</sup>

## **Improving the uptake of FDR**

55. To improve the uptake of FDR, the Law Society suggests that:
- (i) FDR, along with other pre-proceeding services, should be brought under the 'umbrella' of the Family Court with dedicated court staff to manage pre-proceeding processes;
  - (ii) parents should have limited and targeted access to free counselling prior to FDR;
  - (iii) FDR is free and voluntary;
  - (iv) there is one supplier to provide FDR on a nationwide basis;
  - (v) the voice of the child is obtained through a lawyer for child who is on the ministry's list;
  - (vi) legal aid is available for legal advice prior to FDR and for lawyers to attend FDR where parties request legal representation; and
  - (vii) an easy way to obtain consent orders in respect of mediation agreements is established where no filing fee is necessary.

These suggestions are discussed below.

### **(i) FDR under the umbrella of the Family Court**

56. It remains the Law Society's view that there should be a 'one-stop shop' where parents are able to access counselling and enrol for PTS and mediation pre-proceedings.<sup>25</sup> If agreement has not been reached after using the pre-proceeding resources, parents should be able to return to the same 'shop' to access the court process.
57. Feedback from the ministry's evaluation<sup>26</sup> indicates that parties do wish to have the Family Court involved in settling their disputes. Bringing FDR within the umbrella of the court is likely

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<sup>22</sup> Reviewing the Family Court: A public consultation paper, Appendix 6.

<sup>23</sup> Exemptions from Family Dispute Resolution, Ministry of Justice, September 2017, at page 1.

<sup>24</sup> Exemptions from Family Dispute Resolution, Ministry of Justice, September 2017, at page 5.

<sup>25</sup> The minister's reference group expressed the same view: see Reference Group Report: Family Court Review, April 2012 at page 12.

<sup>26</sup> Without Notice Applications in the Family Court, Ministry of Justice, July 2017, paragraphs 67 and 78.

to increase the mana of the FDR process. For many parents, FDR appears to be disconnected or distant from the court process and therefore less important.

58. There should be specialist registry staff allocated solely to managing FDR and other pre-court processes. If managed through the court there would be one clear entry and exit point, making FDR more accessible and timelier. It would also be significantly easier for referrals to FDR to be made by a judge during the court process, as the referral would be dealt with 'on-site' perhaps on a same-day basis. Reporting back to court about the success or otherwise of the process would also be much simpler.
59. Having pre-court processes under the umbrella of the Family Court would remove the need for RMS as details about pre-court processes could be entered into the case management system. This would result in cost saving to the ministry in terms of the need to run two management systems.

#### *Recommendations*

60. That:

- 60.1 All pre-court processes be brought under the umbrella of the Family Court; and
- 60.2 Specialist registry staff are allocated to only manage FDR and other pre-court processes.

#### **(ii) Counselling prior to FDR**

61. As noted above, counselling can assist parents to manage their emotions and to enable them to become ready to negotiate a settlement or to make decisions about how to progress issues. A limited number of free, focussed counselling sessions should be available to parents before they attend FDR. This would enhance the level of engagement in FDR and provide more opportunity for settlement of disputes.

#### *Recommendation*

62. That a limited number of free counselling sessions should be available to parents before attendance at FDR.

#### **(iii) FDR should be free and voluntary**

63. Mediation is fundamentally a voluntary process. The changes in 2014 made that process mandatory unless an exemption is granted. Making FDR mandatory has not incentivised parents to engage in the process. This is illustrated by the large number of exemptions. Making the process mandatory with a fee attached has resulted in a high number of exemptions, resulting in under-utilisation of a process that offers significant benefits.
64. Comments from parties included in the ministry's research<sup>27</sup> concluded that attendance at mediation needs to be mandatory with a consequence for non-attendance. We are concerned about the introduction for a consequence for non-attendance and how this would be administered.
65. A preferable option would be to require both parties to include in their application and notice of response the steps they have taken to attempt to resolve the dispute prior to entering the court system. This would send a message to parties that a judge will want to be satisfied that the parties have attempted some process of resolution. This expectation could be set prior to

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<sup>27</sup> Without Notice Applications in the Family Court, Ministry of Justice, July 2017, paragraph 20.

the commencement of proceedings and reiterated immediately after resolution of an urgent situation with a referral by the court to FDR. Targeted education and information for parties would be required.

66. The FDR process should be voluntary, unless directed by a judge during proceedings. Making the process voluntary would remove the need to apply for an exemption and result in cost savings.
67. Cost is a real barrier for many parents and is a disincentive to engaging in the process, even though the ministry's statistics state that only 14% of parties gave this reason as a basis for an exemption. The experience of many FDR providers suggests that 14% is low, based on their interactions with parties. It is not known how many of the 63% who "would not participate" or "could not be contacted" did not take part in FDR because of cost. The parties may not have indicated that cost was a barrier, since cost on its own is not a ground for exemption. Making FDR free, and therefore more accessible, would give parents greater opportunity to resolve parenting issues before they reach crisis point. This would in turn reduce the number of without-notice applications.
68. Some may suggest that if FDR is a free process, it will not be accorded any value. However, the reality is that parents will still be investing their time (and in some cases their children's time) and they would also avoid court and the related cost and stress. Establishing a process that makes it easier to obtain consent orders based on a mediated agreement (as discussed below) would also increase the value of FDR.

#### *Recommendations*

69. That:
  - 69.1 FDR is voluntary (unless directed by a judge post-proceedings) and free to the parties; and
  - 69.2 Both parties are required to include in their application/affidavit and notice of response the steps they have taken to attempt to resolve the dispute.

#### **(iv) A single FDR supplier**

70. In the experience of family lawyers, placing the administration of FDR outside the Family Court and the ministry has led to fragmentation and confusion about the process. Even with advice, it is difficult for many parents to understand the difference between the numerous suppliers. Many parents appear daunted or disillusioned by the process of contacting a supplier and providing the information that is required. The number of FDR suppliers and the competition between them makes what should be a simple process confusing. Some suppliers are fully funded while others were until recently only partially funded.
71. In our view there should be only one supplier who is able to deliver FDR on a nationwide basis. This would result in one model being used to provide consistent service nationwide and would reduce the cost to the ministry of contracting with and administering numerous suppliers. Parties would be able to contact one supplier who would refer them to an FDR provider.

#### *Recommendation*

72. That there be one supplier to deliver FDR on a nationwide basis.

**(v) The voice of the child**

73. Article 12 of the United Nations Convention on the Rights of the Child (UNCROC), to which New Zealand is a signatory, requires that children are able to “have a voice” in any judicial and administrative proceedings affecting them. This requires the child’s voice be heard in FDR, as it is an administrative proceeding affecting the child. In the Law Society’s view, New Zealand is in breach of Article 12 in relation to FDR because there is no formal mechanism by which the child’s views can be ascertained. The United Nations Committee on the Rights of the Child (UN committee) has recommended that the Family Dispute Resolution Act 2013 (FDR Act) be amended to ensure the right of the child to be heard.<sup>28</sup>
74. The ministry issued guidelines to FDR suppliers in December 2016 (and recently updated in July 2018),<sup>29</sup> presumably to address this issue. In the Law Society’s view, the practice of obtaining a child’s views is not universal and nor is it done in all cases where the child is old enough and mature enough to express a view. Listening to what parents might say about their children’s views in disputed child care cases can be unreliable.
75. The guidelines acknowledge that there are different models of incorporating a child’s view, including interviewing the child separately, having the child’s thoughts communicated back to the parents or having the child’s representative present during the mediation. The guidelines suggest that if the FDR supplier “*does seek direct input from the child, the Supplier must ensure they have suitably qualified and experienced FDR Providers, or some other qualified professional, competent in capturing the child’s voice, to deliver their model.*”<sup>30</sup>
76. Children’s views should be ascertained independently from the FDR provider. The guidelines are unclear in terms of reference to “*some other qualified professional*”.<sup>31</sup> Does this mean a counsellor already engaged in working with the child or some other professional who is qualified and experienced in working with children?
77. We understand that some FDR processes are using a child-inclusive model whereby the child attends the mediation. While in limited circumstances attendance might be appropriate and beneficial for older children, for younger children we consider it unwise, as it directly involves the child in the dispute. The safer way is to not have any children attending FDR.
78. If FDR does not resolve matters and the parties require the court’s assistance, it is highly likely the court will appoint a lawyer for child. Over-involving children in adult disputes and over-exposing them to multiple professionals runs the risk of potentially traumatising children. The current practice used to obtain a child’s views for FDR is not a practice mandated by the legislation as the UN committee made clear it should be.
79. One suggestion might be to direct the FDR supplier to contract with a lawyer for child currently on the ministry’s approved list, to obtain the child’s views. These lawyers are qualified and experienced at seeking children’s views which could be provided to the FDR provider by way of a report. One benefit would be that if matters are not resolved at FDR and the matter progresses to court, the court can appoint the same lawyer to represent the child, which would provide continuity of representation. This would save time and cost, as the

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<sup>28</sup> United Nations Committee on the Rights of the Child, concluding observations, fifth periodic report of New Zealand, 30 September 2016, paragraph 18.

<sup>29</sup> Family Dispute Resolution *Operating Guidelines*, 1 July 2018.

<https://www.justice.govt.nz/assets/Documents/Publications/FDR-Operating-Guidelines-201807.pdf>

<sup>30</sup> Ibid, at p 13.

<sup>31</sup> Ibid.

lawyer is already familiar with the case and has met the child, and would also protect the child from being over-exposed to multiple professionals.

#### *Recommendations*

80. That:

80.1 Children do not attend FDR;

80.2 The Family Dispute Resolution Act 2013 be amended to include the process by which a child's views are heard;

80.3 An FDR supplier must contract with a lawyer for child currently on the ministry's list to ascertain a child's views; and

80.4 If the matter is not settled and an application for a parenting order is made, the same lawyer for child is appointed to represent the child in the proceedings.

#### **(vi) Legal advice before FDR and representation in FDR**

81. Legal aid should be available for legal advice (for those eligible for legal aid), prior to FDR mediation as part of a pre-proceeding grant. It should also be available for lawyers to attend the mediation, if parents choose to be legally represented. This could facilitate greater prospects of settlement (as parties would have a better understanding of what is legally achievable) as well as enforcement of agreements for parents who want consent orders following the FDR process.

#### *Recommendation*

82. That legal aid is made available prior to FDR for (a) initial advice and (b) legal representation at FDR if parties choose to be legally represented.

#### **(vii) Enforcement of agreements**

83. A strong and consistent message from parties about FDR is that they did not realise that a mediated agreement was not enforceable and to make it so, an application for a consent order has to be made to the Family Court.

84. While an application for a consent order is available, it does require an application to the court and there needs to be an evidential basis for the judge to make the order. Such evidence is not included in a mediated agreement. It may be that while the involvement of a lawyer for child to represent the voice of the child in FDR assists the judge, it does not satisfy the evidential threshold.

85. Consideration should be given to introducing a simple process for parties to apply for a consent order in terms of their FDR agreement. This would involve completing a straightforward joint application and affidavit confirming that the parties have agreed to a parenting order on the terms set out in the FDR agreement. If such an application is filed, the registrar should have the ability to waive the \$220 filing fee. If the recommendation above is accepted and legal aid is made available for pre-proceedings advice and legal representation at FDR (for parties who choose to be represented), lawyers could draft the necessary documentation for a consent order to be obtained.

## *Recommendations*

86. That:

- 86.1 A simple process is introduced for parties to apply for a consent order in terms of their FDR agreement; and
- 86.2 The filing fee can be waived for consent orders applications for agreements reached at FDR.

## **F. IN COURT PROCESSES**

### **Self-represented parties**

87. Prior to the 2014 changes, some people chose to represent themselves in the Family Court. Most did not. The changes removed the right of people to choose to have legal advice and representation and removed legal aid for those who would have otherwise been eligible for it. There appeared to have been no analysis or forecasting undertaken about the likely increase in self-represented litigants and the resulting costs. The Law Society's 2012 submission to the ministry noted the costs and difficulties associated with self-represented litigants:

- While self-representation allows access to the court it does not necessarily allow access to justice because it does not give the ability to get the necessary resources or advice to understand the legal system.<sup>32</sup>
- The effects of self-representation on the efficiency of the Family Court cannot be underestimated. A fundamental lack of understanding of court processes and procedure leads to the filing and presentation of irrelevant, excessive and disordered material and a failure to properly identify the legal issues in dispute. Self-represented litigants frequently struggle to distinguish between evidence, submissions and commentary.
- This lack of understanding impacts adversely on hearing times and case progression. This is particularly pronounced in the Family Court because of the more complex and personal nature of the disputes. The impact on other parties to the dispute, and to children affected by the dispute, is also marked and is reflected in increased costs, delays and stress.
- Although self-represented litigants frequently seek advice and information from a wide variety of sources, their inability to process this advice and information often remains an impediment to their efficient and effective participation in the court system.
- Where self-represented litigants are involved in the Family Court it significantly increases the time for an application to reach an outcome. It also increases cost and stress to the other party.
- Court staff spend more time explaining procedure and terminology to self-represented litigants, dealing with applications that are incorrectly filed or filled in, and fielding queries. It poses difficulty for court staff in having to draw the line between providing information without giving legal advice.

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<sup>32</sup> "Going to Law without a lawyer: Keeping up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person", Bridgette Toy-Cronin, July 2015.

88. Following the 2014 changes, the ministry undertook an evaluation of mandatory self-representation,<sup>33</sup> and the results bear out the concerns voiced by the Law Society in 2012. In the Law Society's view, the mandatory self-representation of parents in parenting and guardianship applications has had a significant and detrimental impact on the functioning of the Family Court.
89. Similarly, a very recent study on the impact of self-represented litigants in parenting disputes in the Family Court in Ontario, Canada<sup>34</sup> found that:
- the majority of cases with at least one self-represented party took on average 66% longer than cases where both parties are represented;
  - 87% of judges believed that cases with self-represented litigants significantly increased court time to resolve the case and that settlement is less likely (70%) compared to when both sides are represented;
  - the main reasons for parents self-representing were not being able to afford a lawyer and not being eligible for legal aid;
  - self-represented parents usually turn to the lawyer for child or the lawyer for the other party for information and advice; and
  - it would often fall to lawyer for child to negotiate settlements that the lawyer for a party would do if they were represented.
90. In the 2014 Law Foundation Ethel Benjamin address,<sup>35</sup> Chief High Court Judge Justice Helen Winkelman suggested that self-representation was a false economy, instead resulting in "efficiency deficit". She said that "the fundamental aspects of our system of justice are built upon the assumption that parties will be legally represented".
91. In the Law Society's view, parties in parenting and guardianship disputes should be able to have access to legal advice (including pre-proceedings) and representation in all stages of the court process. The efficiencies and cost savings to be gained are self-evident.
92. Prior to the 2014 changes, there were a number of parties who represented themselves in the Family Court because they did not qualify for legal aid (due to the low-income eligibility threshold) but could not afford to engage a lawyer. This was the main reason given for parents self-representing in the Ontario Family Court 2018 study discussed above.
93. Even if lawyers are able to act in all proceedings involving parenting and guardianship disputes, there will still be those who cannot afford legal representation and do not meet the income eligibility threshold for legal aid. Provision of sufficient legal aid for parties to obtain legal advice and representation would be one way to enhance the efficiency of the Family Court. In our view the income eligibility threshold for legal aid needs to be urgently addressed.

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<sup>33</sup> Evaluation of Family Dispute Resolution Service and Mandatory Self-representation – Qualitative Research Findings, Ministry of Justice, October 2015.

<sup>34</sup> Growing Concerns about the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children's Lawyers and Clinicians, Canadian Family Law Quarterly, 2018, 37 CFLQ 121.

<sup>35</sup> "Access to justice – who needs lawyers? Chief High Court Judge Justice Winkelman, 7 November 2014.

## *Recommendations*

94. That:

- 94.1 Parties in parenting and guardianship disputes should be able to have access to legal advice (including pre-proceedings) and representation in all stages of the court process, and legal aid should be available (for those who are eligible); and
- 94.2 The income eligibility threshold for legal aid is too low and needs to be urgently addressed.

## **Lawyers**

- 95. As already noted, the Law Society considers that parties in parenting and guardianship disputes should be able to have access to legal advice (including pre-proceedings) and representation in all stages of the court process. The Law Society recommends that section 7A of COCA is repealed, enabling lawyers to provide advice and representation.
- 96. The role lawyers play in assisting parties to resolve matters is not always visible but should not be underestimated. Experienced family lawyers will advise their clients of the relative advantages and disadvantages of the options available to them, including resolving matters themselves, negotiating an agreement, seeking the services of counsellors, mediators or proceeding with litigation (generally as a last resort). Lawyers can and do promote early resolution of cases by providing information to their clients on the relevant law, procedures, the likely outcome of the case, what is expected of them, how long matters may take and what it will all cost. Prior to the 2014 reforms, only 15.97% of parenting applications required a decision to be made by a judge.<sup>36</sup>
- 97. The removal of lawyers from pre-proceeding and post-filing matters in on notice applications has had a significant and detrimental impact on the Family Court's ability to progress matters and determine disputes.
- 98. When lawyers have been directed to provide legal representation in proceedings that have been filed by parents, they often discover that the information and evidence is incomplete. As noted in the ministry's evaluation, this means that new evidence (or evidence that should have been filed in the first instance) is not able to be filed before a hearing.<sup>37</sup> Matters often have to be adjourned to await section 132 reports due to the inadequacy of the information filed by a self-represented litigant, creating more delay.
- 99. In our view section 7B of COCA, which sets out the duties of a lawyer when giving advice on parenting and guardianship issues, should also be repealed. The duties require a lawyer to provide far more advice at an initial meeting than may be appropriate.<sup>38</sup> This adds cost and

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<sup>36</sup> Ministry of Justice letter of 17 May 2011 – 2009/2010 COCA cases 5% final hearings and 10.9% interim hearings.

<sup>37</sup> Evaluation of Family Dispute Resolution Service and Mandatory Self-representation – Qualitative Research Findings, Ministry of Justice, October 2015, paragraph 7.1.2

<sup>38</sup> Section 7B states: "A lawyer providing legal advice to a person about arrangements for the guardianship or care of a child, or both, must ensure that the person is aware of— (a) the need for the child's welfare and best interests to be the first and paramount consideration when settling arrangements; and (b) the mechanisms for assisting resolution of family disputes; and (c) the steps for commencing a proceeding under this Act and subsequently pursuing the proceeding through the court process to obtain a resolution; and (d) the types of directions and orders that the court may make if a proceeding is commenced."

unnecessary complexity for the client. Lawyers are already under professional obligations to properly advise clients. Other legislation does not stipulate what lawyers must advise their clients and there is no need for this prescriptive approach in respect of parenting or guardianship matters.

100. The requirement set out in section 9A of the Family Court Act 1980 for lawyers to promote conciliation should however remain.

#### *Recommendations*

101. That:

101.1 As noted in recommendation 94.1 above, section 7A of COCA should be repealed (enabling lawyers to provide legal advice and representation to parties in parenting and guardianship disputes in all stages of the court process); and

101.2 Section 7B of COCA, which sets out the duties of a lawyer when giving advice on parenting and guardianship issues, should also be repealed.

#### **Lawyer for child**

102. The relevant and extensive literature makes it clear that:

- prolonged court disputes are unlikely to be in the best interests of children,
- children cope better with the effects of separation if they have been consulted and involved in decision-making, and
- children's adaptation to their parents' separation may be determined more by the level of conflict between parents before, during and after the break-up than the actual separation itself.

103. It is well recognised internationally that New Zealand is a leader in providing for the independent representation of its children by lawyer for child, in compliance with obligations under the UNCROC. Reporting on children's views early in the process can assist parents to resolve matters and achieve better outcomes for children.

104. The 2014 changes to the role of lawyer for child were supported by the Law Society.

105. The first change was the inclusion of the role in section 9B of the Family Court Act 1980 – this avoided the need for dual appointments of lawyer for child (to advocate for a child's welfare and best interests) and counsel to assist (to advocate for a child's views), resulting in significant cost savings. Importantly, it also gave greater clarity to the role.

106. The second change was to legislate that the appointment of lawyer for child is made where the court has concerns for the safety or well-being of the child and the court considers the appointment necessary. In the Law Society's view this has resulted in the right balance being achieved in terms of the timing of appointment, while maintaining the appropriate level of the court's flexibility to enable an appointment when necessary. We agree with the panel's comment that this ensures the use of lawyer for child is targeted to cases where they are needed and limits children's exposure to court-appointed professionals.<sup>39</sup>

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<sup>39</sup> Background paper, Overview of the 2014 family justice reforms, Ministry of Justice, September 2018, paragraph 75.

107. The paper asks whether a lawyer for the child is the best person to understand and advocate for a child's views when parents separate. In our view it is the quickest way for the judge to get reliable information on the child and its parents, including a child's views independent of the parties. While others, such as qualified social workers, are able to obtain children's views, without legal training they may not be able to give logical submissions, challenge evidence brought before the court or cross-examine witnesses as lawyers for children can.
108. In addition, if others were used to seek children's views, it is likely the court would still appoint a lawyer for child at some point in the process. This could result in more exposure of a child to court-appointed professionals, duplication of work and greater cost to the system overall.
109. The Family Court judiciary's submission in 2012 stated (at paragraph 52) that:
- "... judges do not have confidence in the ability of a social worker from Child, Youth and Family Services to provide information promptly and, in some cases, competently. The child's lawyer is able to provide information about the child and the family far more quickly than a social worker who is asked to provide a report under section 132 even when such a report is limited to a specific issue. The point needs to be made that the task of the lawyer for child is to be the advocate for the child, a very different task than that of a social worker."*
110. Lawyers for children can also assist in negotiating between the parties and provide reality testing in terms of potential agreements. Because of this, more matters are likely to settle with fewer cases coming to court for a final hearing.
111. Since the 2014 changes, more reliance has been placed on lawyer for child because of self-represented litigants. Self-represented litigants have an increased expectation on lawyer for child to guide them or act as a "go between" throughout the legal process. Lawyer for child is also expected to provide more information, due to the lack of information provided by self-represented litigants and to play a greater role in case managing matters.
112. It is not helpful that the ministry's research reports completed to date have not considered the impacts of the 2014 changes to lawyer for child.<sup>40</sup> The background paper only cites the Backbone Collective's 2017 survey.<sup>41</sup> The Law Society's comments on this survey are attached in **Appendix 3**.
113. The remuneration rate for lawyer for child has remained the same for over 25 years. The Law Society is aware that in some regions, lawyers for children are reducing the number of matters they take on as part of their overall legal practice. Matters are now more complex. Judges are relying more heavily on lawyers for children to provide more information and "case manage" both the proceedings and self-represented litigants. Consideration should be given to reviewing the remuneration rate for lawyers for children. Unless it is addressed, there is a risk that the most experienced lawyers will reduce this aspect of their practice. This in turn will have a detrimental impact on access to justice for children.

#### *Recommendation*

114. That consideration is given to reviewing the remuneration rate for lawyers for children.

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<sup>40</sup> Background paper, at [78].

<sup>41</sup> Ibid.

## **G. EFFICIENCY IMPROVEMENTS**

### **COCA form**

115. The 2014 changes introduced a mandatory standardised COCA form for parenting and guardianship applications, regardless of whether the applicant (or respondent) was legally represented. This form replaced the requirements in schedule 10 of the Family Court Rules 2002 (rules) as to the format and content of the applications.
116. The Law Society understands the need to ensure that self-represented parties are able to provide adequate and legally compliant documentation. It therefore makes sense that a standardised form is available to self-represented parties. In the absence of legal representation, this is the most likely method of the court obtaining adequate information and documentation. The use of the form may also send a useful 'signal' to the registry that a person is self-represented and this may help to ensure sufficient court time is allocated for hearings involving self-represented litigants, which are invariably more time-consuming (as discussed earlier).
117. However, because of their professional training, qualifications and experience lawyers do not need standardised forms and should be able to file an application and affidavit in the format previously provided for in schedule 10 of the rules. This format remains superior to the COCA form because it succinctly:
- identifies the orders sought;
  - identifies the relevant statutory grounds for those orders;
  - clearly identifies who has filed the application and the date of filing;
  - presents the relevant evidence (in compliance with the Evidence Act 2006); and
  - provides relevant information regarding the parties and children in a format that is easier to visually assimilate.
118. Since 2014, the FLS has provided considerable feedback to the ministry in an effort to improve the form and ensure it not only complies with the rules but also contains the salient information required by a judge to determine a matter. Despite this engagement, the form continues to create significant problems for judges, court staff, lawyers, applicants and respondents, and in many respects the form still does not comply with the rules. Recently lawyers have reported experiencing technological problems with the form generator, with no meaningful response received from the ministry to rectify these. This has meant that lawyers, in some cases, need to handwrite applications and affidavits.
119. There are numerous problems with the COCA form, which we do not propose to repeat in extensive detail here. In June 2018 the FLS provided documentation to the ministry – an application and affidavit that a lawyer would typically file, and the same application/affidavit using the standardised form – to illustrate the problems with the COCA form. We will provide that documentation separately to the panel, for its information also.
120. The main issues with the COCA form are summarised below.
121. One document containing an application, affidavit and information sheet is problematic because:

- it is contrary to rule 416F which requires all applications and notices of response to be accompanied by, rather than comprised within, an affidavit and information sheet;
  - information that is “evidence” is contained in the application part of the document - importantly, all evidence must be in the affidavit, not in a combination of the application and affidavit, so that the deponent can be appropriately held to the truth of their statements; and
  - it presents difficulties in defended hearings with compiling bundles of documents when affidavits and registry information will need to be separated from other documents.
122. The forms are time-consuming, unnecessarily long to prepare and difficult to read. For example, a consent memorandum that used to be completed in one page now extends to several pages. The cost of the additional time is passed on to parties. For legal aid providers, the fixed fees for legal aid do not reflect the additional time required, so the cost is borne by the legal aid provider.
123. The length of the COCA form increases the costs for the applicant in compiling several copies of the bundle of documents (a paginated booklet with an index of all documents and reports) required to be provided to the court, one for the witness box and one for each party involved. This cost is able to be passed on to Legal Aid Services, if the client is legally aided. Lines and paragraphs are not numbered, making it difficult to refer to particular parts of evidence during a hearing which results in longer hearing time.
124. The ministry has commented in respect of lengthy without notice applications that *“they can’t be urgent if the lawyer has time to draft a lengthy application and affidavit”*. With respect, this view is simplistic and shows a fundamental misunderstanding of the rules of evidence. Lawyers have an obligation to place all relevant evidence before the court. When this is not done not only does it breach that obligation, it has the potential to prevent additional evidence being introduced in terms of matters pre-dating the application date. Not all without notice applications are straightforward. Some are complex. A judge needs to have all the relevant evidence in support of the application, especially if an order is made without hearing from a respondent.
125. Making the documentation more succinct would reduce the time required to complete the forms; this would provide considerable cost-savings and enable judges, court staff and lawyers to operate more efficiently. We understand the ministry is currently working on improving the form. It is essential that the next version complies with the rules and addresses the issues identified above.

#### *Recommendations*

126. That:
- 126.1 Schedule 10 of the rules is amended, enabling lawyers to file documentation in relation to parenting and guardianship orders under COCA as provided for prior to the 2014 changes;
  - 126.2 The standardised COCA form is used by self-represented litigants only; and
  - 126.3 An improved version of the standardised form is introduced that complies with the rules and addresses the issues identified above.

## Children’s safety assessments

127. Prior to the 2014 changes, sections 60 and 61 of COCA provided the framework around which the “safety principle” in the then section 5(e) of COCA<sup>42</sup> was determined. Those sections provided a process for the court to ensure all relevant factors in determining a child’s safety were weighed and balanced before any order was made that had the potential to place a child at risk.
128. Although the repeal of sections 59 – 61 of COCA in 2014 was contentious, the Law Society supported repeal, because it believed that the safety principle (now contained in section 5(a) of COCA) provided the necessary protection for children and that repeal of sections 59 – 61 would give the court more flexibility to tailor an appropriate response having regard to the individual circumstances of the family and reduce the significant delays associated with section 60 hearings that were increasing costs of legal aid and lawyer for child. The current section 5(a) safety principle will be strengthened by the amendments to COCA contained in the Family and Whānau Violence Legislation Bill (currently before the House, awaiting third reading).<sup>43</sup>
129. The issue of assessing and ensuring children’s safety is a fraught one. Family lawyers report that parents are exhibiting an increasing prevalence of factors impacting on children’s physical and emotional safety, including methamphetamine and other drug use, family violence, neglect and mental health problems. These factors impact heavily on the Family Court in terms of assessing children’s safety.
130. In the Law Society’s view, the current processes properly consider children’s views when they are at risk. Where there are safety concerns raised or allegations of family violence, the court appoints a lawyer for child who obtains information, generally through a section 132 report. In the most serious cases a section 133 report may be necessary.
131. While sections 5(a) and 5A have given the court more scope and flexibility in terms of assessing children’s safety, hindering this process is the delay in receiving section 132 reports from social workers (see comments under specialist reports) and the lack of judicial time to quickly hear matters to determine interim contact and safety concerns. This under-resourcing has the potential to undermine the reasons sections 60 and 61 of COCA were repealed in the first place.
132. In terms of judicial resource, the decision to redistribute judicial resources to address the backlog in Family Courts throughout the country has meant that in some regions, resident Family Court judges are sitting elsewhere. That combined with the general rostering regime mean there is often no opportunity to get an interim hearing in a timely manner. Until such a hearing takes place (often months away), one parent may not have any contact with their child until allegations of violence are determined.

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<sup>42</sup> Section 5(e) of the Care of Children Act 2004 – that a child’s safety must be protected, and in particular, he or she must be protected from all forms of violence (now current section 5(a)).

<sup>43</sup> Those amendments will set out additional matters in section 5A that the court must take into account when considering a child’s safety under section 5(a), amend section 51 to include psychological violence, and insert a new section 57A giving the court the power to make incidental temporary protection orders.

## Information requests

133. The Law Society recommends a change in relation to information requests to create efficiencies.
134. Often the Police and the ministry receive multiple requests for the same information in respect of criminal histories and family violence information from lawyer for child, lawyers representing parties (where able to) and parties themselves. Rule 143 of the rules could be amended to enable the court to apply for this information once an application for a parenting or guardianship order is filed, rather than multiple requests being made. This would result in:
- the information being available earlier and therefore reducing delay;
  - reducing the work (and cost) of legal aid providers and lawyer for child; and
  - reducing the time and cost to police and ministry staff.
135. It would also address the issue of lawyer for child filing evidence by attaching this information to their reports. While this would mean a change to registry practice, we believe it would create overall efficiencies.

### *Recommendation*

136. That rule 143 be amended to enable the court to apply for this information when an application for a parenting or guardianship order is filed.

## Senior Family Court Registrars

137. The Law Society also recommends that a potential reform option – the introduction of Senior Family Court Registrars – identified in 2008 but subsequently shelved, be reconsidered. This is a reform that could introduce significant efficiencies in the Family Court.
138. In April 2008, a Supplementary Order Paper proposed amendment to the Family Courts Matters Bill to provide for the appointment of Senior Family Court Registrars (SFCRs). This was to address the significant time judges were spending on ‘box’ work due to the expanding jurisdiction of the Family Court since its establishment and the increase in applications coming before it. Later that year the ministry issued a consultation paper<sup>44</sup> about the proposed role. The purpose for establishing the role was to:
- reduce the amount of time judges spend on routine ‘box’ work;
  - reduce delays in cases by freeing up judges for judicial work;
  - ensure cases are ready to proceed when judges are available; and
  - ensure timeframes and directions are complied with.
139. It was intended that SFCRs would address the gap between registrars and judges (they would have all the powers of a registrar and some concurrent powers with judges). The paper asked for feedback on appropriate powers extensively listed in the paper for SFCRs to hold. The FLS submission supported the establishment of the role and many of the identified powers that a SFCR would hold. It believed that the role would have a positive and significant impact on reducing delay in the Family Court by enabling judges more time to hear and determine matters. Unfortunately, the proposed amendment was not enacted.

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<sup>44</sup> Senior Family Court Registrars: Consultation Paper, Ministry of Justice (undated).

140. Ten years on, it is likely that there is an even greater delay in the Family Court and an increase in the time that judges are spending on box work. In the Law Society's view, serious consideration should be given to the proposal for SFCRs to be established. A significant amount of work has already been done by the ministry to identify the appropriate powers necessary for a SFCR to free up judicial resources.
141. There would not necessarily be the need for such a position to be established in every registry. In the larger registries, there could be a SFCR on site, together with a number available via an electronic platform, just as e-duty is, or a SFCR could travel to other registries as demand necessitates.
142. By way of example, if 15 positions were established nationally, it may be divided by:
- Auckland – 2 – servicing the North Shore, Waitakere and central Auckland
  - Manukau – 2
  - Wellington – 2
  - Dunedin – 1
  - Christchurch – 2
  - Floating resource – 6
143. In the Law Society's view, the proposal has merit and should be reconsidered by the ministry as one way to maximise judicial resource to reduce delay in the Family Court. Such positions might enable judges to deal with the significant number of without notice applications until the usual equilibrium is reached.

*Recommendation*

144. That the ministry considers establishing a Senior Family Court Registrar role.

**Triage – the first port of call**

145. The Family Court should be a 'one-stop-shop' in terms of parents accessing its services to resolve parenting disputes. It should be a place of first resort when advice and help are needed. Avoiding litigation and encouraging discussion and resolution of the problem by the parties themselves is the ultimate goal. Akin to a hospital's accident and emergency 'triage', the Family Court registry should:
- define the problem
  - classify the problem
  - make appropriate referrals
146. Depending on the triage assessment, the referrals would be to mediation, counselling or to obtain legal advice. It is important to note that prior to 2014 many cases settled without parties needing to apply to the Family Court. An effective triage system should divert matters amenable to out-of-court resolution, enabling entrenched and complex matters to be heard and resolved more quickly by the court.

### **Triage and case management post-filing**

147. If an application is filed, there needs to be an efficient and effective triage and case management system in place. This is essential to ensure that only disputes requiring the determination of a judge come before the court.
148. Prior to the 2014 changes, triage of cases operated in two ways:
- Lawyers were able to act from the outset and advised clients whether to apply on notice, without notice or try to resolve the dispute with the assistance of counselling or mediation.
  - Family Court Coordinators, using the then provisions of the Family Proceedings Act 1980, diverted inappropriately filed applications to counselling or a parenting programme.
149. If lawyers were allowed to act in all matters (including pre-proceedings), the 'tracks' and filing on notice/without notice could be disestablished, and the system could revert back to the registrar or court manager triaging matters when the application is filed. An individual case manager should be allocated to each application to ensure that matters progress in a timely way throughout the system. This can also identify which cases are 'complex' that may require closer case management from a judge.

### **Tracks/court events**

150. The Law Society's submissions in 2012 and 2013 recommended a streamlined court process with fewer court events and a clearer pathway to enable matters to be dealt with more efficiently and effectively. Each court event was to have a clear process and purpose, advance matters towards resolution and provide consistency and certainty for parties.
151. In contrast, the 2014 changes have resulted in far more court events than under the previous system. This has significantly increased delay. Removing lawyers from representing parties in most court processes has left judges and court staff to manage parties who are forced to represent themselves with little or no legal advice or assistance.
152. We have carefully considered our previous submissions and consider many of the suggestions remain relevant to the current review; if adopted, they would provide a clear pathway, while allowing the court sufficient flexibility to provide a tailored response to each family's circumstances. It is imperative that judges have flexibility to manage the process, as fixed rules and timeframes will not work in every case.

### **Timeframes for court events**

153. Currently many of the timeframes specified in the rules and legislation are unachievable. Reasons include the lack of available judicial resource, delay in receiving section 132 and 133 reports, and other actions that may be necessary before a judicial conference or substantive hearing is held. Having unrealistic timeframes leads to prospective litigants having false expectations of what the court is able to achieve, when they are considering options prior to filing.
154. While it is important that timeframes are included, they need to be realistic in terms of the Family Court's resource, reflect the level of urgency in some matters, and recognise that matters may need to be adjourned to enable all the relevant information to be available before a determination is made.

155. Timeframes need to be flexible to enable an outcome that is in the welfare and best interests of children. It is important that judges retain the ability to control the process and matters are assigned to an individual case manager to enable a matter to be progressed.
156. The length of time it takes to dispose of a case is not necessarily a bad thing. A judge needs to make a decision that is in the welfare and best interests of the child. Delay may in fact be in the welfare and best interests of children. For example, a judge may refer the parties back to FDR to enable settlement on all or some issues, or matters may be adjourned for a parent to attend treatment for alcohol and drug abuse, a family violence programme or counselling. Having a parent attend FDR or undergo such programmes may result in a better outcome overall for that family which will be in the welfare and best interest of the child.

#### **H. A NEW MODEL FOR THE COURT**

157. A comprehensive redesign of the family justice system is needed, rather than continuing the pattern of periodic, piecemeal reforms.
158. Set out below are our suggestions for a sensible and efficient forum for resolving family disputes. Lawyers should be able to act in all matters, the track system should be disestablished, and applications should be filed either on notice or without notice. The attached diagram (**Appendix 2**) provides a helpful illustration of the proposed key steps for on notice and without notice applications.
159. Cases should be limited to the following four key court events unless circumstances require otherwise:
  - i. Judicial conference
  - ii. Settlement conference
  - iii. Setting down/pre-hearing conference (to be conducted by teleconference)
  - iv. Substantive hearing
160. A greater use of teleconferencing in between events should be utilised to progress matters. Settlement of issues is an option throughout all stages of the process, including the ability of the judge to refer parties back to FDR if that would settle any, or all, of the issues in dispute.

##### **(i) Judicial conference**

161. Parties, their lawyers and lawyer for child attend the judicial conference in person and may have direct communication with the judge. Identification of the issues is crucial and should be a key focus of the judicial conference. An obligation should be imposed on counsel to confer and file joint memoranda (recognising that this may be problematic in cases involving self-represented litigants). The judge can determine any of the matters contained in rules 175D and E. Issues of objectionable and/or irrelevant evidence can be determined without the need for an application to have the evidence struck out. This would remove the need for an interlocutory hearing to take place and save significant time in any final hearing that may take place. The ability to have a decision judicially reviewed provides a safeguard, although it might be only rarely required. Any necessary directions as to further evidence can be made.

##### **(ii) Settlement conference**

162. This conference should only take place if the judge considers the case is amenable to any form of settlement. If there is no prospect of settlement, the conference should be dispensed with.

**(iii) Setting down conference (or pre-hearing conference)**

163. These can be conducted by teleconference with the judge and counsel as currently occurs in Auckland in relation to centralised fixtures. Parties are not required to attend. A checklist of matters to be agreed is utilised and would include the following:

- Dates and time for the hearing, including the availability of parties, counsel and witnesses
- Evidence to be tested
- Cross-examination
- Likely duration of the hearing
- Disqualification of judges
- Whether or not the matter is suitable to be put into a list for a backup hearing

164. If new evidence comes to light, a joint memorandum of counsel could be filed so the judge can determine on the papers whether the evidence is to be included. If the evidence is disputed the judge can convene a brief teleconference to make a direction on the issue. Once notice of a hearing date is given, strict adherence to rule 52D should be enforced. This rule is frequently disregarded and accordingly the efficiencies it was designed to achieve are not fulfilled.

**(iv) Substantive hearing**

165. Such hearings would only take place if matters are still unresolved and need the determination of a judge and a matter is on the “ready list” for a hearing.

**Without notice applications**

166. It is imperative that the ability to file an application without notice is retained. These applications should be in exceptional cases only, if meaningful reduction of time is available to address semi-urgent cases (see comments at paragraphs 179 – 181 below). Lawyers who file and certify such applications should be held to account where a judge considers the application falls well short of the legal threshold for filing. Without notice applications filed by self-represented litigants should also be scrutinised at the filing stage to ensure they meet the legal threshold.

167. Caution should be exercised if consideration is to be given to amending rule 416H in respect of the threshold to file without notice for parenting and guardianship order applications under COCA. In the Law Society’s view, the significant number of without notice applications being filed is due to the inability to apply for meaningful reduction of time to speed up the first call of a proceeding in semi-urgent cases (see comments at paragraphs 179 – 181 below) and the mandatory self-representation of parties for on notice matters. These two factors have led to the significant delay (several months) in on-notice matters being heard. If these two matters were addressed, there would be no need to amend the legal threshold for filing on a without notice basis.

168. Rule 416H states:

*“An application without notice may be made only if:*

*(b) the delay caused by making the application on notice would or might entail serious injury or undue hardship, or risk to the personal safety of the applicant, or any child of the applicant's family, or both"*

169. Due to the significant delays being experienced in the Family Court, the Law Society believes that lawyers are entitled to file without notice as the premise of the test is that the *delay* caused by filing on notice *would or might entail* the types of harm set out in rule 416H.

#### **Process for without notice matters**

170. Because of its urgent nature, without notice applications require a tailored process in terms of key court events (as suggested above) and timeframes. On the filing of a without notice application, the matter is placed on the e-duty platform. A judge either makes an interim order (or not), appoints lawyer for child and sets a date for a judicial conference or places the matter on notice and may appoint a lawyer for child.

#### **Interim parenting orders**

171. The Court Matters Bill has amended section 49A of COCA and specifies the time within which a hearing date must be set down if a respondent, who is not granted care or contact on a without notice application for an interim parenting order, seeks a hearing. We note that it is highly unlikely within the current system that the mandated timeframe will be met, and that adequate resources will be needed to enable compliance with such timeframes.
172. At the hearing, the court may replace the interim order with a further interim order or a final parenting order. However the amended section 49A(4) does not allow for the interim order to be rescinded. Applications to rescind an order are necessary to provide a remedy where the application contains false allegations or insufficient or incomplete evidence.
173. Rule 34 of the rules provides a mechanism for orders to be rescinded but it is not available for Part 2 (guardianship and care of children) COCA applications, including section 49A applications.<sup>45</sup>
174. The Law Society recommends that a new section 49A(4)(c) be inserted, enabling the court to rescind interim orders. (Alternatively, rule 416A should be amended to enable rule 34 to apply to Part 2 of COCA applications). It is necessary for the court to be able to rescind an interim order, to provide a remedy where the application contained false allegations or full disclosure was not made.

#### **Judicial conference**

175. Within 14 days of the date of the order, an urgent judicial conference (enhanced rule 175) is held. There is no reason why the date for the conference cannot be included in the documents served on the respondent. Counsel will file memoranda prior to the conference and a lawyer for child report will be available if an appointment was made at the time of the interim order. The conference will address matters contained in rule 175, including:
- Appointment of lawyer for child if not previously appointed
  - Consideration of lawyer for child report if appointed
  - Identification of issues

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<sup>45</sup> See R416A(2), Family Court Rules 2002.

- Degree of urgency determined
- Timetabling directions
- If an interim hearing is required
- Any need for an assessment of children’s safety
- Directions as to the consolidation of proceedings

### **Interim hearing**

176. If necessary, an interim hearing is held where the judge can make further directions in order to progress the matter. Following this a pre-hearing conference is held via teleconference and then the substantive hearing follows ideally within 42 days of the first judicial conference.

### **On-notice applications**

177. Once proceedings are filed on notice, lawyer for child is appointed if a defence is filed or a judge directs such an appointment at an earlier stage. The key court events are held. A judge can direct parties back to FDR at any stage if this would settle any or all of the issues in dispute.

### **Complex matters**

178. Currently, complex matters are triaged as a subset of the standard track. Complex matters should be ideally managed by one judge assisted by a case manager. The same court events will apply, but more than one judicial conference may be required.

### **Reduction of time**

179. Prior to the 2014 changes, applications for reduction of time for filing a defence were made in “semi-urgent” cases where the circumstances of a case did not reach the threshold for a without notice application but needed to be put before a judge so the matter could be heard in a timely way. If a reduction of time was granted, this only reduced the time for a respondent to file a response – it did not reduce the time for the first court event to take place. In practice, such applications made the court aware that the “semi-urgent” issues present in the application required a judge to hear the matter sooner rather than later in respect of other on notice applications.

180. The background paper states that *“there is a misconception that since the reforms it is no longer possible to make an application on notice in conjunction with an application reducing time”*.<sup>46</sup> Lawyers understand that reduction of time is still available. The real problem is that due to the current significant delay in the Family Court, the next court event is so far away (sometimes months) that applying for a reduction of time for the filing of a defence is futile.

181. Meaningful reduction of time is necessary to address semi-urgent matters that do not reach the without notice threshold, to ensure they come before a judge in a timely manner after the deadline for filing a defence has elapsed. If no defence has been filed, the application can be dealt with on a formal proof basis as provided for in rule 416ZH. If a defence has been filed, it can be directed to an interim hearing as a matter of urgency if appropriate.

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<sup>46</sup> Background paper – Overview of the 2014 family justice reforms, Ministry of Justice, September 2018, paragraph 58.

## I. OTHER ISSUES

182. The background paper discusses a number of issues on which the panel has sought feedback. The Law Society's comments are provided below.

### Specialist reports

#### **Section 131A and 132 reports**

183. A section 131A report is automatically generated once a parenting or guardianship application is made to the court. It reports on the nature and extent of the involvement that Oranga Tamariki has had with the parties and is usually provided within a 48-hour period.
184. The court can also direct a report from a social worker under section 132 where there are safety concerns. The section 132 report elaborates on information contained in the section 131A report and presents the social worker's opinion on the issues directed to be covered in the report including the parents' living arrangements and parenting ability, within a number of criteria, using past incidents where relevant.
185. It is essential the ability to direct a section 132 report remains, as it provides information to the court to enable it to assess a child's safety in terms of that child's day-to-day care and/or contact with a parent.
186. There is currently significant delay in receiving a section 132 report. Since the 2014 changes, the number of section 132 reports requested has risen. In the Law Society's view this is for two reasons:
- First, cases where these reports are sought are often more challenging and complex in terms of the parties' prevalent use of drugs and alcohol, mental health issues and other concerns.
  - Second, the increased number of self-represented parties and their inability to file appropriate and relevant evidence results in the court directing a section 132 report to ensure that safety concerns for children are independently assessed. Allowing parties to choose to be legally represented may reduce the demand for these reports.
187. Because of the increase in requests, it is taking longer for Oranga Tamariki to provide them, presumably due to the under-resourcing of social workers. This is outside the Family Court's control, but urgently needs to be addressed in terms of the timely assessment of children's safety and reducing delay in the Family Court.

#### *Recommendation*

188. That urgent consideration is given to addressing the resourcing of section 132 reports.

#### **Section 133 reports**

189. These reports provide crucial evidence in respect of a child's welfare and best interests which cannot be provided by any other means. In our experience, these reports are sought in a small percentage of cases that are the most complex. It is crucial that the ability for the court to direct such reports is retained.
190. In practice, psychological reports are often sought because of a concern about the psychological functioning of a party and the impact of that on their parenting capability. While judges in some cases have added to the standard brief under section 133(5)(b)(ii), there is no specific power for a judge to direct that a report include a psychological assessment of a party,

even with consent of that party. This power is available to the court when seeking such reports under section 178(2) of the Oranga Tamariki Act 1989 and a similar power should be available under section 133. The definition of “psychological report” under section 133(1) should be amended in this respect.

191. There are situations where an updated report is required as the original report is out of date by the time of the defended hearing due to the delay in having matters heard. Such situations should be avoided as this causes ongoing delay and increased costs. In matters where a section 133 report is directed, those cases should be carefully case-managed, ideally, if possible, by the judge who directed the report. If the track system is to remain, cases where a psychological report has been directed should be on the complex track.
192. To cater for those situations where an updated report is required when new evidence comes to light, section 133 should be amended to specifically provide that an updated report is able to be directed in appropriate cases.

#### *Recommendations*

193. That:
  - 193.1 The definition of “psychological report” in section 133(1) is amended to enable the court to direct a report to include a psychological assessment of a party;
  - 193.2 Where a section 133 report is directed, the case is defined as complex and case-managed by the judge who directed the report; and
  - 193.3 Section 133 should be amended to specifically provide that an updated report is able to be directed in appropriate cases.

#### **Recent amendment to section 133: Courts Matters Bill**

194. The Courts Matters Bill (cl 95), which completed its final reading on 7 November 2018, amends section 133(15), relating to the disclosure of a court-appointed psychologist’s report and the report-writer’s notes and other materials used in preparing the report.
195. New section 133(15)(a) will enable the court to permit disclosure of the report where it is satisfied that disclosure is required to assist a party to prepare for cross-examination (as was the case under the previous section 133(15)). Section 133(15) previously also allowed the disclosure of *notes and materials* on the same basis. However, the new section 133(15)(b) will only allow access to the notes and materials where the court is satisfied that disclosure is required to assist a party to prepare for cross-examination *and* there are “exceptional circumstances”.
196. The Law Society does not support this amendment, as set out in its recent submission to the select committee.<sup>47</sup> It is a principle of natural justice to allow evidence to be appropriately tested in court, and that right is affirmed by section 27(1) of the New Zealand Bill of Rights Act 1990. In appropriate circumstances, this may necessitate the disclosure of the report and the related notes and materials where a judge is satisfied that it is necessary to assist a party to prepare their cross-examination. A party cannot fairly and properly respond either to the

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<sup>47</sup> NZLS submission 16.2.18 on the Courts Matters Bill, at [5.7] – [5.10]. It appears that a higher threshold for disclosure of the notes and materials relating to reports written by court-appointed psychologists was proposed because of a perception that parties attempt to use the current disclosure provision as a “fishing expedition” and that this prolongs proceedings. It is not, however, the experience of the Law Society’s Family Law Section that parties attempt to use the provision as a “fishing expedition”.

issues raised or the conclusions reached by the psychologist without having an opportunity to review the psychologist's notes and materials in their totality. This is particularly so where a psychologist has obtained triangulating data from those who have not given evidence and whose statements to the psychologist cannot be tested.

197. For these reasons, the Law Society recommends that the previous wording of section 133(15) should be reinstated.
198. In addition, the Law Society does not agree with the select committee's recommendation that further changes should be considered in the Committee of the Whole House stage to *prohibit* the release of psychologists' notes and materials. As noted in the background paper, the Associate Minister in his speech in the Bill's second reading said that he and the Minister of Justice agreed that this issue would be better dealt with in the panel's review of the 2014 family justice changes. For the reasons given above, the Law Society does not agree with the suggestion that there should be a total prohibition on the release of psychologists' notes and materials.

#### *Recommendation*

199. That section 133(15) should not be amended and should remain as previously worded.

#### **Cost Contribution Orders**

200. Prior to the 2014 changes, a court could order a party or parties to contribute to the fees and expenses for lawyer for the child, lawyer to assist the court and specialist reports. Such orders were rare, presumably because the majority of parties were unable to afford to contribute to these costs, particularly those who were legally aided.
201. Cost contributions orders (CCOs) were introduced to require parties to contribute to these costs. This is now mandatory under section 135A unless it can be established that payment of the CCO will result in serious hardship to a party or a dependent child of a party. Contributions were set at a third for each party with the state contributing the remaining third. The court has power to substitute a different amount if the court is satisfied it would be inappropriate to require a party to pay the prescribed proportion.
202. The Law Society has, under the Official Information Act, obtained figures showing the costs arising from the appointment of lawyers for children, specialist report writers and counsel to assist the court for the years 2014/15; 2015/16; 2016/17.
203. While those statistics show that the cost of appointments of those professionals has remained reasonably static, the CCOs made over the same period make up only 4% of the overall costs (approximately \$3.3m over that 3-year period). The money received from those orders is 39% (approximately 1.3m over the same 3-year period). The amount of revenue collected, split over the three-year period, equates to \$433,333 per year.
204. The low number of orders made and money recovered is likely to reflect the high number of parties being legally-aided and the hardship criteria being satisfied. It is also likely that the same reasons explain why the orders were rarely made prior to 2014.
205. What is not known is the cost associated with the making of CCOs, including:
  - judicial resources to hear submissions on the making or not of a CCO;
  - the cost to Legal Aid Services when parties are legally aided; and

- administrative costs of court staff.

206. The Law Society questions whether the costs associated to the court, legal aid, the ministry and parties (compared with the revenue collected) could be better utilised in providing additional resources in other areas of the family justice system. The Law Society suggests that a cost-benefit analysis of the CCO regime is undertaken to determine whether it is cost-effective.

*Recommendation*

207. That a cost-benefit analysis of the CCO regime is undertaken to determine its cost-effectiveness.

**Family Court Rules**

208. The Family Court Rules 2002 (rules) contain specific and detailed procedures in relation to most Family Court processes. Since 2002, the rules have been amended, largely on an ad-hoc basis, and in some cases with no consultation with the legal profession, which has resulted in numerous anomalies.

209. In the Law Society's view, a critical and detailed examination of the rules as a whole is essential. This has the potential to create numerous efficiencies and to streamline processes within the Family Court, which in turn will save time and cost.

210. A formal rules committee should be established for this purpose, akin to the District and High Court rules committees. Membership of a Family Court rules committee should comprise members of the Family Court judiciary, senior family lawyers and ministry officials.

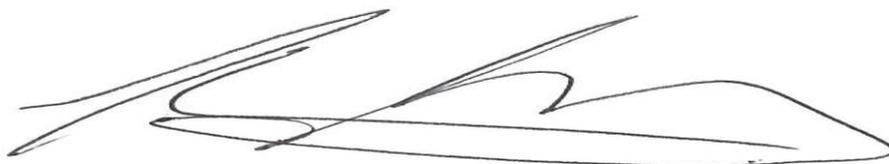
*Recommendation*

211. That a formal rules committee be established to undertake a comprehensive review of the Family Court Rules.

**J. CONCLUSION**

212. The Law Society hopes these comments are helpful to the panel and would be very happy to discuss or provide further information if that would assist. Please feel free to contact the FLS Manager Kath Moran ([kath.moran@lawsociety.org.nz](mailto:kath.moran@lawsociety.org.nz)) in the first instance.

Yours sincerely



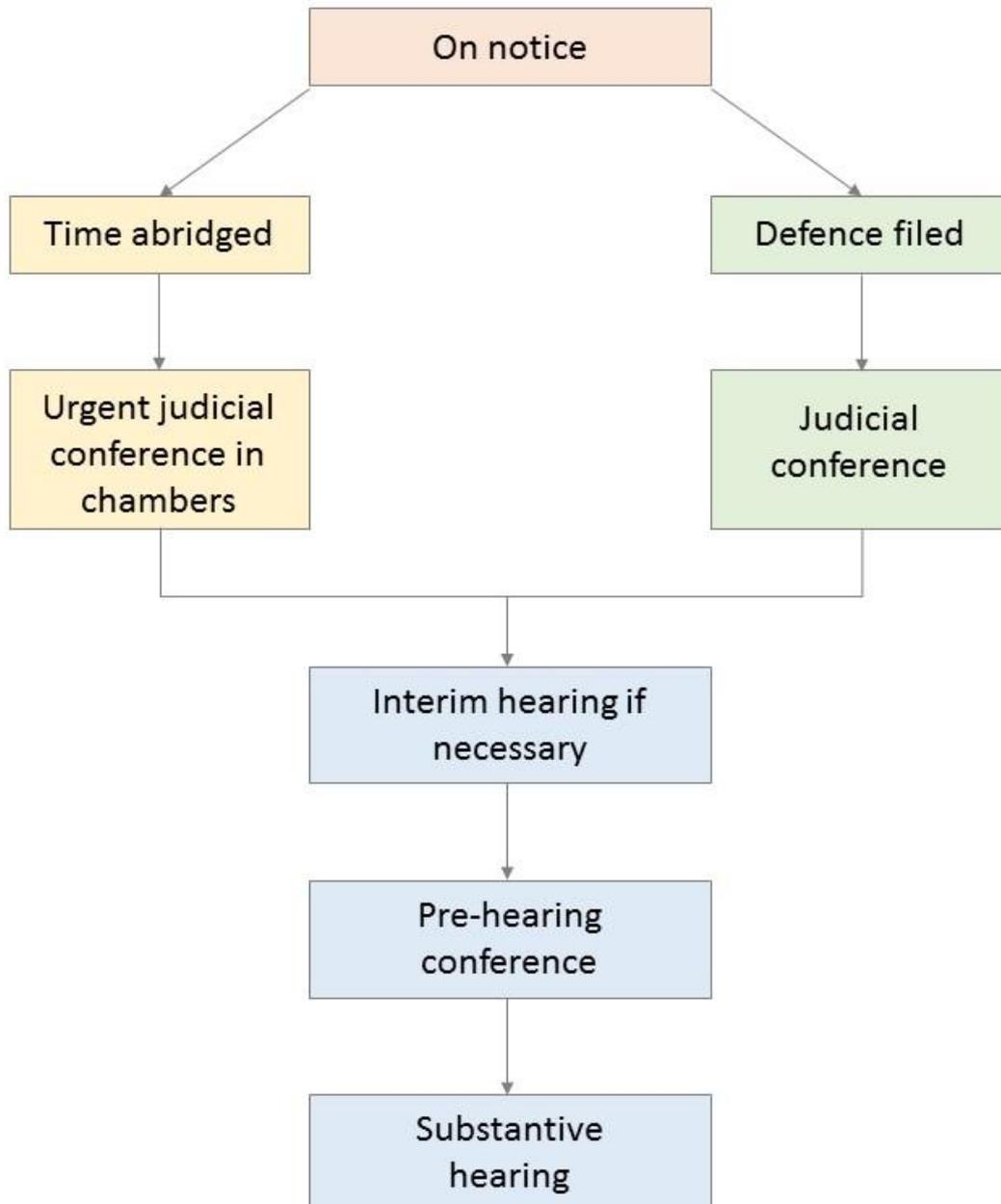
Kathryn Beck  
**President**

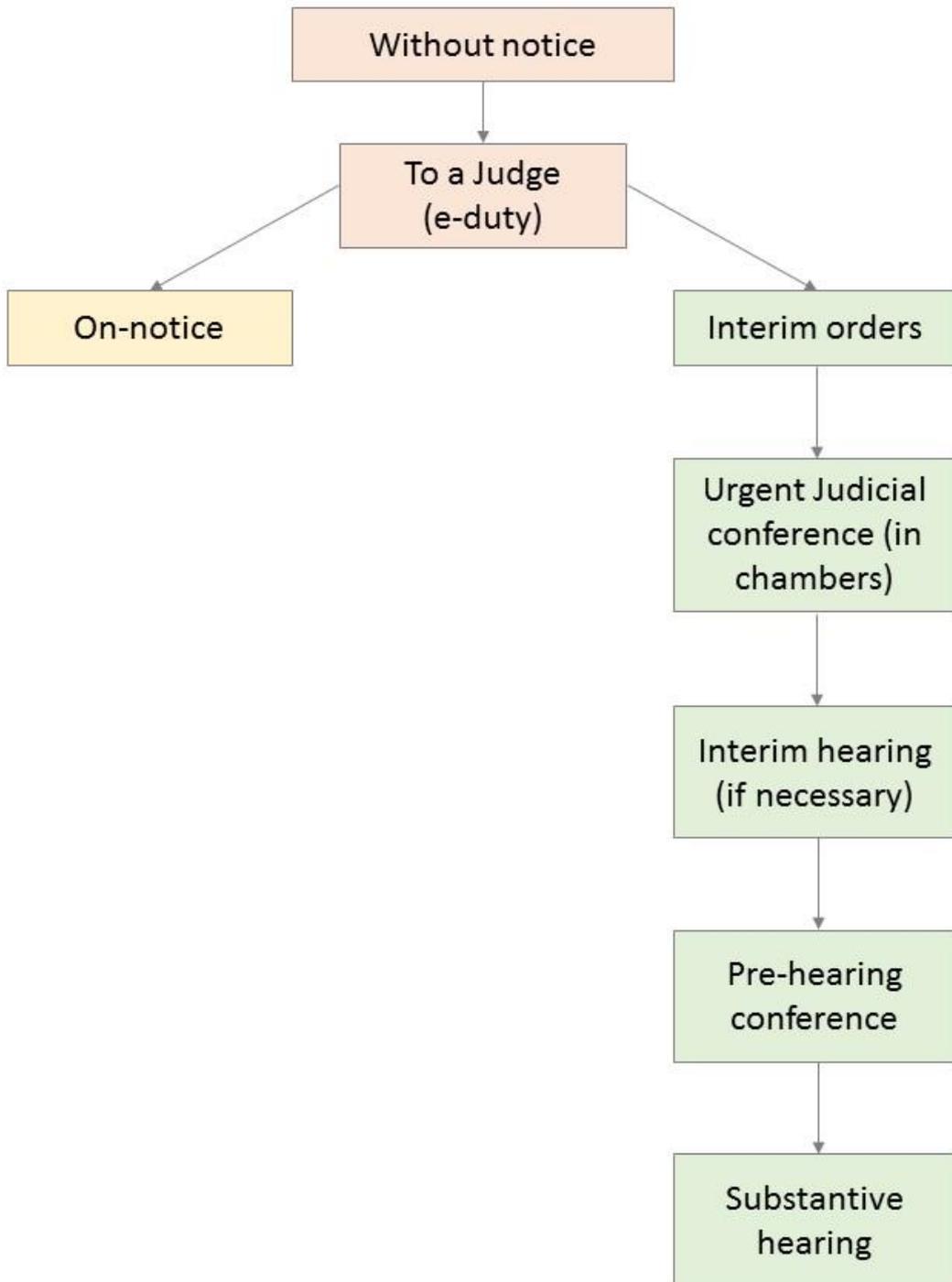
**Appendix 1** – 2012 submission

**Appendix 2** – diagram illustrating recommended family justice system steps

**Appendix 3** – comments on Backbone Collective survey

Appendix 2 – diagram illustrating recommended family justice system steps





### Appendix 3 – Backbone Collective survey

The FLS notes the issues raised in the Backbone Collective’s report (report),<sup>48</sup> published in May 2018, and responds below to the main concerns raised in the report. While we have respect and empathy for the women who were interviewed as the basis of that report, it only tells one side of the story. It is unlikely the report’s authors would have had access to the full information available to the court in those proceedings. In some respects, the report illustrates a fundamental misunderstanding of the role of lawyer for child and the associated legislation and guidelines. (It is also unfortunate that certain information on the ministry’s website in respect of the role of lawyer for child is incorrect.) The FLS is currently working on detailed information on the role that will be made available to the public.

#### *Assessment of children’s safety*

The Family Court appoints a lawyer for child and sets the brief that the lawyer for child carries out pursuant to section 9B of the Family Court Act 1980. Safety assessments of children are not part of the lawyer for child’s role. That assessment is undertaken by a judge based on the evidence before the court, which may include a section 132 report prepared by a social worker in addition to other information. The FLS Best Practice Guidelines make this clear by stating that lawyer for child should not accept any brief that requires an assessment of the safety of the child.<sup>49</sup> Part of the lawyer for child’s role is to ensure that necessary evidence is put before the court that is relevant to the child’s safety. The guidelines do not “*expressly state the safety of children is to be actively ignored by the lawyer for child*” as asserted in the report.<sup>50</sup>

#### *Meeting with the child and obtaining views*

One of the concerns raised in the report is the failure of the lawyer to meet with the child. This is based on interviews of 267 women who had a lawyer for child appointed in their proceedings. The report states that in 11% of cases (29 individual proceedings) the lawyer never met with the child.

A lawyer must meet with the child and, if it is appropriate to do so, ascertain the child’s views on matters affecting the child relevant to the proceedings.<sup>51</sup> The obligation to meet the child does not apply if “because of exceptional circumstances, a judge directs that it is inappropriate for the lawyer to meet with the child.”<sup>52</sup>

This section was enacted as part of the 2014 changes which *removed* a lawyer’s discretion in terms of whether or not they met with the child. The report incorrectly reads section 9B(2) as offering more discretion to lawyers on whether or not they meet the child. Even when a lawyer meets with the child, there may be situations where it is not appropriate to ascertain a child’s views.

There are no reasons set out in the report as to why, in the 29 specific instances cited, the lawyer never met with the child. There may have been a direction from the judge not to meet with the child; the child may have been unwell; unable to be located at an address – there may be many reasons. In the absence of such a direction, it is to be expected that a judge would require an explanation as to why the lawyer did not meet with the child as is statutorily required.

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<sup>48</sup> The Backbone Collective, *Seen and not Heard – Children in the New Zealand Family Court, Part Two – Lawyer for Child*, Herbert and Mackenzie (2018).

<sup>49</sup> Family Law Section Best Practice Guidelines – Lawyer for Child at paragraph 9.3.

<sup>50</sup> Above n 44, at p 2.

<sup>51</sup> Section 9B(2) of the Family Court Act 1980.

<sup>52</sup> Section 9B(3) of the Family Court Act 1980.

### *Training*

The report states that “all a lawyer needs in order to be appointed as Lawyer for Child is five years practicing [sic] as a Family Court lawyer and attendance at a two-day training workshop”,<sup>53</sup> and footnotes the registration page for the entry level workshop which contains a general summary of the content of the course.<sup>54</sup> This statement is factually incorrect, for the following reasons:

- The entry level workshop that needs to be completed is a three-day workshop – not all those who complete the workshop apply to be lawyers for children.
- There is no automatic appointment to the ministry’s lawyer for child list following attendance at the course.
- There are a number of other criteria contained in the ministry’s application form for consideration to be appointed to the panel, including the applicant’s experience with working with children and the training courses and qualifications they have in respect of this.
- Candidates applying to the ministry’s list are interviewed by a panel prescribed by the practice note. The FLS has developed guidelines for its representatives that sit on that panel to ensure that candidates are asked relevant questions about their knowledge and experience in relation to dealing with children.
- Only candidates who the panel are satisfied meet the requisite criteria are appointed – not all those who apply are appointed.

Aside from the entry-level workshop, there are many other programmes and seminars lawyers for child attend that count towards their continuing professional development.

### *Complaints mechanism*

The report asserts that the complaints mechanisms in relation to lawyers for children do not work. The Law Society does not accept this is the case. Lawyers for children are in fact subject to double regulation – by the Family Court *and* by the New Zealand Law Society. Because lawyer for child is appointed by the court, any complaint is dealt with (whether proceedings are before the court or completed) in the first instance by the Family Court. The process is regulated through the *Family Court Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters*.<sup>55</sup> The Law Society refers the panel to that process rather than setting it out in this submission.

Complaints are also able to be referred by the court to the New Zealand Law Society’s Lawyers Complaints Service.<sup>56</sup>

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<sup>53</sup> Above n 44, at p 57.

<sup>54</sup> *Ibid*, at p 15.

<sup>55</sup> Practice Note: Lawyer for the Child: Selection, Appointment, and Other Matters, paragraph 12 and 13.

<sup>56</sup> <https://www.lawsociety.org.nz/for-the-community/lawyers-complaints-service>