

ISSUES PAPER

Section 133 Care of Children Act 2004

Prepared by Renuka Wali
Clinical Psychologist, Auckland, New Zealand

Introduction

[1] The writing of this paper arose in the context of recent discussion of and submissions to the Independent Review Panel on the 2014 Family Justice System Reforms (“Panel”). This paper was written at the suggestion of the Panel at a recent meeting with the Expert Reference Group, of which the writer is a member.¹

[2] There are several issues concerning Specialist Report Writers who provide psychological reports (SRW) that are pertinent to the rewrite of the 2014 family justice system reforms. These were outlined in a recent submission by the New Zealand Psychological Society (NZPsS).² This paper relates specifically to two issues. Firstly, s 133(14) and (15) of the Care of Children Act 2004 and provides further representation on this aspect of the legislation. This section of the Act gives Family Court judges the discretion to release the SRW’s notes to a psychologist employed by a party to assist that party to prepare for cross-examination of the SRW. Secondly, the Panel requested comment on whether provision should be made for the Court to include psychological assessments of parents/parties as part of s 133 reports.

Release of notes under s 133 (14)(15)

[3] Section 133 (14) and (15) come under the heading of “Reports from other persons” (s 133), and subheading “Second opinions” (subsections 10-15). The relevant sections of the current version of the Care of Children Act 2004³ are as follows:

Second opinions

(10) The approval of the court must be obtained before a second opinion may be prepared and presented.

(11) The court may give approval only if there are exceptional circumstances.

(12) A party who obtains the approval of the court for the preparation and presentation of a second opinion is liable for the costs of that opinion.

(13) If the court gives approval, it may permit disclosure of the materials to the psychologist preparing the second opinion subject to any terms and conditions that the court considers appropriate.

(14) If the court declines to give approval to a party, or if a party does not seek approval, the court may permit disclosure of the materials to a psychologist who is employed by the party and who is not the report writer.

¹ My thanks to the psychologists that provided comment and input into this paper

² Submission to the Independent Panel examining the 2014 Family Justice Reforms prepared by NZPsS 7 November 2018

³ Version of the Care of Children Act 2004 as at 14 November 2018

- (15) The court may—(a) permit disclosure, under subsection (14), of the psychological report prepared by the report writer only if the court is satisfied that the psychologist requires the report to assist the party to prepare the party’s cross-examination; and
- (b) permit disclosure, under subsection (14), of the report writer’s notes and other materials that the report writer used in preparing the psychological report only if the court is satisfied that—
- (i) the psychologist requires those notes and other materials to assist the party to prepare the party’s cross-examination; and
- (ii) the notes and other materials to be released comprise information solely about the party who is seeking their release; and
- (iii) there are exceptional circumstances; and
- (c) if the court permits disclosure under paragraph (a) or (b), the disclosure is subject to any terms and conditions that the court considers appropriate.

Background to inclusion of s 133(14)(15)

[4] Sections 133(14) and (15) first appeared in the 31 March 2014 amendment of the Care of Children Act 2004 in the wake of the 2014 family justice system reforms, apparently without consultation.

[5] These sections appeared under the heading “Reports from other persons” (s 133) and subheading “Second opinions”, as follows:

- (10) The approval of the court must be obtained before a second opinion may be prepared and presented.
- (11) The court may give approval only if there are exceptional circumstances.
- (12) A party who obtains the approval of the court for the preparation and presentation of a second opinion is liable for the costs of that opinion.
- (13) If the court gives approval, it may permit disclosure of the materials to the psychologist preparing the second opinion.
- (14) If the court declines to give approval to a party, or if a party does not seek approval, the court may permit disclosure of the materials to a psychologist who is employed by the party and who is not the report writer.
- (15) The court may permit disclosure under subsection (14) only if the court is satisfied that the psychologist requires the materials to assist the party to prepare the party’s cross-examination.

[6] Although there had been an extensive review and consultation process leading up to the 2014 reforms, the issue of release of notes for the purpose of assisting in cross-examination was not included in that process. The inclusion of s 133(14) and (15) came about without prior notice either in the Family Court consultation paper or without being put to the Expert Reference Group appointed by the then Minister of Justice. Furthermore, to the best of available knowledge, there was no discussion with psychologists on this issue prior to it being inserted into legislation.

[7] As Dr Blackwell pointed out in her issues paper⁴, whilst there had been consultation on the issue of second opinions or critiques and the delays associated with these, “there was

⁴ Issues Paper re Section 133 (14) Care of Children Act (August 2014), prepared by Dr Suzanne Blackwell on behalf of the NZPSS, the New Zealand Psychologists’ Board and the New Zealand College of Clinical

nothing at all about notes of psychologists being made available for the purposes of cross-examination” (p. 4). Moreover, “it was never put to the Reference Group that there might be any intention to change the legislation to provide for psychologists’ notes (raw data) to be provided to another psychologist to assist counsel for one of the parties in cross examination” (p. 5). Nor was it mentioned in the then Minister’s Cabinet paper to Parliament “Family Court Review – Proposals for Reform”. Dr Blackwell added, “It can only be surmised that someone decided to insert s 133(14) as way of obtaining some professional access to the raw data, given that the obtaining of critiques was to be made more difficult” (p. 6).⁵

[8] Since the 2014 amendment of the Care of Children Act 2004 there has been ongoing concern on the part of psychologists regarding the release of notes and materials for the purposes of assisting parties’/counsel to prepare cross-examination. There have been submissions by psychologists individually and as a group to this effect over the last four years, including Dr Blackwell’s 2014 paper, and more recently the NZPSS submission to the Panel. This paper adds to those submissions and outlines further concerns regarding the inclusion of s 133 (14) and (15)(b) (i) and (ii).

[9] There is consternation amongst psychologists that despite objections being raised during the current review process, the provision for release of notes and materials for the purposes of cross-examination preparation remains in the legislation, and with further revision that introduce additional concerns.

[10] Comment was invited from psychologists and the Expert Reference Group in August 2018 about the above, which was at that stage deemed ‘proposed changes’. The writer provided a summary of concerns to the Panel, and argued that the implications of the release of notes and materials to be ‘solely about the party’ in the new proposal was also problematic. The submission by NZPsS⁶ to the Panel covered a wide range of issues relevant to psychologists, including ethical matters regarding the release of psychologists’ notes and other materials for the purposes of assisting in cross-examination. In this regard, the NZPsS submission asserted that the s 133 psychological report alone is sufficient to support preparation for cross-examination.

[11] It emerged at my meeting with the Panel on 28 August 2018 that, to the surprise of myself and the Panel, the above proposed changes had gone through the Select Committee process and were before Parliament. I understand that the Panel sought to have the changes withdrawn from the legislation so that the matter could be addressed in the comprehensive review process. However, the changes now appear in the legislation, as of 14 November 2018.

Psychologists. Both Professor Seymour and Dr Blackwell were members of the Expert Reference Group appointed prior to the 2014 reforms.

⁵ It is relevant in this context to note that the 2014 Expert Reference Group was supportive of maintaining the provisions in the existing legislation for the conduct of second opinion/critiques of s 133 reports

⁶ Submission to the Independent Panel examining the 2014 Family Justice Reforms prepared by NZPsS 7 November 2018

[12] The 14 Nov. 2018 version of the Care of Children Act 2004 states at s133 (15)(b):
the court may - permit disclosure, under subsection (14), of the report writer's notes and other materials that the report writer used in preparing the psychological report only if the court is satisfied that—
(i) the psychologist requires those notes and other materials to assist the party to prepare the party's cross-examination; and
(ii) the notes and other materials to be released comprise information solely about the party who is seeking their release.⁷

[13] Once again premature and piecemeal changes seem to have been made without sufficient consideration of their implications or consultation with those engaged in the work. This action also undermines the current review process given that the Panel has been tasked with examining and proposing change to the 2014 family justice system reforms⁸ (as noted above, the release of notes for preparation of cross-examination was introduced with the 2014 reforms).

Notes taken by psychologists during s 133 assessments

[14] Psychologists across all areas of work are required to maintain notes and records of their sessions with clients as part of their professional practice and best practice requirements. This includes work conducted during the course of s 133 assessments.

[15] Such notes do not constitute a verbatim record of an interview or observation session, but rather form what can be considered a 'verbal sketch'. Professor Fred Seymour deposed in *Lindberg v Lindberg*⁹ that

"Notes are taken in the course of preparation of a report which are not verbatim records of all transactions, but rather serve as an aid to the production of the final report. That is, notes are taken as a prompt to memory. Detailed notes are taken of particularly significant interactions. Especially with children, excess note taking can create a barrier to rapport between the interviewer and interviewee. As such notes commonly need elaboration and/or interpretation in order to be fully understandable to another reader."

[16] As pointed out by Professor Seymour, and by Dr Blackwell, there is potential for serious misunderstanding and interpretive errors if notes are made available without contextual detail and reference to the note taker.¹⁰ Hence in the context of second opinion/critiques, a meeting between the SRW and second opinion/critique writer is customary to minimise such risk.

⁷ My emphasis

⁸ <https://www.justice.govt.nz/assets/Documents/Publications/terms-of-reference-for-the-independent-panel.pdf>

⁹ *Lindberg v Lindberg* FAM-2012-004-003253 [2014] in which counsel for the father sought that the court-appointed psychologist's notes be released to another psychologist for the purposes of assisting with cross examination, but did not seek a critique nor the report of the court-appointed psychologist.

¹⁰ Issues Paper Re Section 133 (14) Care of Children Act (August 2014), prepared by Dr Suzanne Blackwell.

Second opinions and critiques

[17] The Family Court is different to other courts in its two-fold judicial as well as therapeutic function. It therefore balances the more traditional adversarial role that courts have with that of its protective jurisdiction which requires an inquisitorial approach. The Court's focus according to the Care of Children Act 2004 is the child, and the child's welfare and best interests are the paramount consideration. A Family Court judge can therefore seek independent evidence under s 131A and s 132 Care of Children Act from the Ministry for Children - Oranga Tamariki social workers, as well as expert evidence in the form of s 133 psychological reports from a SRW.

[18] SRWs are court-appointed, as opposed to other courts where a psychologist/expert witness is usually instructed by counsel for one or other of the parties to the proceedings.

[19] The Family Court is entrusted with decision-making on critical aspects of the child's life with far-reaching impacts on children, their parents/caregivers and whanau. Hence it is vital that there is stringent testing of evidence before the Court.¹¹ This includes s 133 psychological reports. It is important that parties to the proceedings have a right to challenge the reports provided by SRWs, and that the Court permits the admission of second opinions (also referred to as critiques).¹²

[20] A judicial ruling is required for a second opinion/critique to proceed. There have been published protocols since 1996 for the ethical conduct of the SRW as well as the critiquing psychologist during the second opinion/critique process.¹³ These guidelines were updated recently.¹⁴ Whilst these are guidelines, rather than regulations, it is common practice for judges to direct that these guidelines are complied with.

[21] The guidelines state that during the second opinion/critique process it is appropriate for the second opinion/critiquing psychologist to view the SRW's notes and any other materials¹⁵ (raw data) used in the assessment by the SRW. The guidelines outline the appropriate procedure for this, including restrictions on photocopying of the SRW's notes and

¹¹ Submission of the Judges of Te Koti a Whanau o Aotearoa – The Family Court of New Zealand to the Independent Panel Examining the 2014 Family Justice Reforms 16 November 2018

¹² In medical and psychological practice, the term "second opinion" usually refers to a situation where a second practitioner undertakes a complete reassessment including re-interview and re-examination. This does not commonly occur in the Family Court. In the Family Court the terms "second opinions" and "critiques" continue to be used interchangeably, without a clear distinction being made. The Care of Children Act 2004 s 133 (1) states that a "**second opinion** means—(a) a critique of a psychological report; and (b) a report covering the same matters as those covered by a psychological report".

¹³ Second opinion expert reports in the Family Court. In G. Maxwell, F. Seymour, & P Vincent (Eds.). *The practice of psychology and the law: A handbook*. Wellington: New Zealand Psychological Society.

¹⁴ Wali, R., Seymour, F. & Blackwell, S. (2018). Psychologists working within the Family Court in relation to care of children and child protection matters. In F. Seymour, S. Blackwell & A. Tamatea (Eds.). *Psychology and the Law in Aotearoa New Zealand*. 2nd Ed. Wellington: New Zealand Psychological Society. Guidelines at page 149-151

¹⁵ Other materials refers to additional data obtained during the assessment, such as questionnaires, test results, children's drawings or writings

materials and that these not be viewed by anyone other than the second opinion/critiquing psychologist. The second opinion/critique process states that the second opinion/critiquing psychologist meet with the SRW for clarification on aspects of the notes, methodology or other relevant matters. The guidelines state that before the second opinion/critique report is finalised it should be sent to the SRW in draft form, followed by the option of a telephone discussion between the two psychologists. The SRW should then be provided with a copy of the completed second opinion/critique report by the Court.

[22] If the matter goes to a hearing, typically both psychologists will appear to give evidence and may be cross-examined as per normal procedure with expert witnesses. Common practice in such instances is for the second opinion/critiquing psychologist to give evidence first, followed by the SRW, and for the SRW to sit in on the evidence given by the second opinion/critiquing psychologist.

Delays associated with critiques and second opinions

[23] As will be apparent from the discussions amongst those associated with the Family Court as well as submissions to the Panel from psychology and legal professionals, there has been a steady and significant decrease in the number of SRWs available to the Court in recent years. This has contributed to lengthy delays in s 133 reports being commissioned and obtained by the Court. Consequently, there has been a considerable flow-on effect on second opinion/critiques, rendering second opinions/critiques harder to access. All of which adds further to delays in the court process.

Assistance with preparation of cross examination

[24] Another role performed by psychologists is assisting a party's lawyer prepare his/her cross-examination of the SRW. It appears from informal discussion with others that psychologists are called upon more and more in this capacity. As per the current legislation, this requires directions and authorisation by the Court. In practice, and based on the agreed position taken by most psychologists, such assistance is most commonly based solely on reading of the s 133 report.

[25] Counsel enlisting such assistance to cross-examine the SRW potentially serves an important and valuable function, reasons for which include the following:

- i) Psychological reports may contain complex technical information that requires appraisal from a qualified expert from the same field to assist in guiding questions to be put to the SRW.
- ii) Skilled cross-examination of an expert (psychologist in this case) is important for rigorous testing of expert evidence, and reports need to be open to challenge and criticism.¹⁶ Assistance from another expert on aspects such as methodology, conclusions and research evidence can provide a better-informed cross-examination process.

¹⁶ Submission of the Judges of Te Koti a Whanau o Aotearoa – The Family Court of New Zealand to the Independent Panel Examining the 2014 Family Justice Reforms 16 November 2018

- iii) The process is usually more timely than a second opinion/critique, and it is easier to access a psychologist to assist in this capacity.

[26] The problematic inclusions in the legislation allowing release of notes for assistance with cross-examination appear to arise from an insufficient distinction being made between the provisions of a second opinion/critique with that of assistance with preparation of cross-examination. The purpose of a second opinion/critique is to provide an opinion *to the Court* on the issues set out in the brief of the SRW, and the primary reason for release of the SRW's notes and materials is to mitigate the need for repeat interviews of children. The purpose of the role of assisting a party's counsel prepare cross-examination is not to provide another opinion to the Court on the issues in the SRW's brief, but rather, to identify issues with the SRW's report and provide relevant questions that may be put to the SRW in the course of cross-examination at a hearing.

[27] The second opinion/critique writer is provided a brief by the Court at the outset establishing the parameters for the second opinion/critique. There is no specific brief for the psychologist assisting with preparation of cross-examination. Furthermore, the psychologist assisting with cross-examination does not provide a written report or opinion to the Court. Nor does the assistance with cross-examination role lead to this psychologist giving evidence in Court. All of which results in the psychologist providing assistance with cross-examination having much less accountability to the Court and there being much less transparency in their actions than in the second opinion/critique process.

[28] Just as for second opinions/critiques, there are now guidelines for psychologists involved with the process of providing assistance with preparation of cross-examination.¹⁷ These guidelines address the differences in roles between providing second opinion/critiques and providing assistance with cross-examination. These guidelines adopt the position that it is not appropriate for the SRW's notes and materials to be released, and that assistance with cross-examination should be provided on the basis of the s 133 report alone. The guidelines also state that the assisting psychologist notify the SRW of having accepted the role.

Implications of the release of notes and other materials in the absence of discussion between the SRW and psychologist giving assistance

[29] The provisions in the legislation do not require that there be consultation between the SRW and the psychologist providing assistance with cross-examination. A major concern for psychologists relates to the situation where notes and materials are released without discussion between the SRW and psychologist providing assistance with cross-examination. As noted previously, there is a risk of misunderstanding of notes and materials in the absence of discussion between the two psychologists.

¹⁷ Wali, R., Seymour, F. & Blackwell, S. (2018). Guidelines at page 152

Implications of “the notes and other materials to be released comprise information solely about the party who is seeking their release”¹⁸

[30] The amendment in the November 2018 version of the Care of Children Act limits the release of notes and materials to those “solely about the party”, thereby addressing at least in part the concerns raised by psychologists. It is possible that the principle of “natural justice” was invoked in retaining access to notes and materials about the party on the assumption that parties’ were entitled to information about themselves. However, this provision overlooks the sensitive content and complexity of what is typically contained in notes of interviews and observations, and carries some of the same risks as the wider release provisions in the previous legislation.

[31] A significant problem arises from ambiguity in the meaning of notes and materials *solely about the party* as to whether this refers only to those notes that were taken in interview with that party, or whether it also includes statements made by others in respect of that party; such as a child or former partner’s opinions expressed about that party, or their account of interactions with that person. Such matters are commonly traversed in interviews with children and other parties and witnesses to proceedings. It is the latter meaning that is of particular concern, as outlined in the following.

[32] The reason for not releasing notes and materials from other parties to the assessment in their entirety, or those notes of statements specific to the party requesting release of information, is that such practice could expose children in particular, but also others, to considerable risk. Risks include consequences for the quality of the child’s relationships with one or both parents, and in more contentious cases, heightened risk to the child’s psychological, and even physical, safety.

[33] A second problem concerns a practical matter. If notes from others are to be released but confined to statements about that party, then notes would need to be redacted. This is an unrealistic and onerous task and strongly opposed by psychologists. Redaction of documents is time-consuming, has significant cost implications, risks the notes being rendered unreadable, and requires specialist skill. Rather than be of help and improve the family justice system, these changes are likely to add to the delays in s 133 reports being obtained and make court proceedings more drawn out. None of this is conducive to the provision of quality and timely intervention for vulnerable children and families.

[34] A third issue concerns the protection of notes and materials. In the second opinion/critique situation, only the second opinion/critique writer, who is a psychologist, views the s 133 report writer’s notes. It is unclear in the recent amendments to the Act whether notes and other materials are restricted to the psychologist’s viewing, and in particular whether there is adequate protection from these being shared with counsel that the psychologist is assisting, or indeed the party. It is difficult to see how the notes can be put to use without the contents being made known to counsel. This adds to the risk of misinterpretation of material. Furthermore, given that notes often contain sensitive and personal information, and parties are caught amidst an emotionally charged dispute

¹⁸ My underlining

regarding their children, it also risks heightening conflict and further compromising children's welfare. Furthermore, the Act does not stipulate how the release of notes and materials is applied in the case of self-represented parties, which adds further to concerns.

[35] A fourth issue arising from the amendments concerns the potential impact on parties' willingness to co-operate openly with the assessment process. Psychologists are obliged under our Code of Ethics to seek informed consent from parties participating in the assessment, which includes full disclosure about the limits of confidentiality. An implication of the amendments is that psychologist must now inform parties at the outset that in addition to a second opinion situation, notes and materials could also be released for the purpose of assistance with cross-examination. Whilst there are safeguards under a critique process of who would have access to the raw data and notes, the same clarity cannot be accorded in the assistance with cross-examination situation. A predictable consequence is that some parties might be more guarded and less forthcoming with information, which in turn potentially compromises the depth and integrity of the assessment.

The s 133 report is sufficient to inform and prepare cross-examination

[36] The position of psychologists that is reflected in our guidelines is that the s 133 report is sufficient to assist with preparation of cross-examination. This position is based on the following:

- a. Providing assistance in the preparation of cross-examination is exactly that. It is not intended to furnish a second opinion or critique – for which there is an alternative designated pathway, with appropriate safeguards built in.
- b. The notes are a portion of what informs the s133 report writer's opinion. The notes are not the opinion, which is in the form of the s 133 report. This report is what is filed in Court as evidence, and is viewed by the parties and counsel, and in some cases by older children. Hence the focus of the cross-examination is and should be the report and its contents.
- c. Psychologists' notes contain sensitive information, not all of which is reported in its raw form in the final report. These raw data are synthesised and integrated into a comprehensive report that provides the necessary information to answer the questions in the s 133 report brief. Some information may be deliberately excluded in the report, such as a parent having divulged private information about his/her early life that is not relevant to the child that is the subject of the report, but if obtained by the other party could compromise one party's privacy and/or worsen the co-parenting relationship.

Summary

[37] The inclusion of s 133(14) allowing SRWs' notes and other materials to be released to another psychologist engaged by a party to assist the party's preparation for cross-examination came into existence with the 2014 reforms. Psychologists' have formally submitted their concerns regarding this provision since then. Further changes were made recently in November 2018, without consultation and despite a review of the 2014 reforms being underway. The change includes the stipulation that the notes and other materials to be

released comprise information solely about the party who is seeking their release. Whilst this might have been aimed to address the concerns raised, it appears to risk adding further to protracted litigation, increased delays and costs, and places the safety of children’s parenting relationships at risk. It is submitted that assistance with preparation of cross-examination be based solely on the s 133 report and that the SRW’s notes and other material not be required for this purpose. Hence, ss 133 (10)-(13) and (15a) should be retained and s 133 (14) and (15b) should be removed.

Whether s 133 reports should include psychological assessments of parents

Background

[38] There has been debate over recent years regarding the extent to which s 133 psychological reports incorporate assessments of parents. There is provision under s 178(2) of the Oranga Tamariki Act 1989¹⁹ for the Court to seek a medical, psychiatric or psychological report on a parent or guardian with their consent. However, there is no such provision for reports on a parent or guardian under the Care of Children Act 2004.

[39] It is stated in the Family Court Practice Note for SRWs (Principal Family Court Judge, 2018, para 8.4) that

“report writers are thus to avoid making a parent or guardian the subject of the report. If, in the opinion of the report writer, it would be valuable to provide the Court with further information on a parent or guardian, this should be drawn to the attention of the Court. The Court will then decide how to proceed.”

[40] The Care of Children Act defines a **psychological report** at s 133(1) as, a report that is about the child who is the subject of an application and that covers any or all of the following matters:

- (a) how current arrangements for the child’s care are working for the child;
- (b) the child’s relationship with each party, including, if appropriate, the child’s attachment to each party;
- (c) the child’s relationship with other significant persons in the child’s life;
- (d) the effect or likely effect on the child of each party’s parenting skills:

¹⁹ Section 178(2) “Subject to subsection (3) if, at any stage of any proceedings under Part 2 or Part 3A, it appears to the court to be expedient that a medical, psychiatric, or psychological report should be available to the court in respect of any parent or guardian or other person having the care of any child or young person to whom the proceedings relate or any person who it is proposed should have the care of the child or young person, the court may, on application by any party to the proceedings, or of its own motion, if it thinks fit, order the parent or guardian or other person having the care of the child or young person, or other person, to attend for a medical, psychiatric, or psychological examination.

(3) The court shall not make an order under subsection (2) requiring any person to undergo any medical, psychiatric, or psychological examination unless that person consents to the making of that order.”

- (e) the effect or likely effect on the child of the parties' ability or otherwise to co-operate in the parenting of the child;
- (f) the advantages and disadvantages for the child of the options for the care of the child;
- (g) any matter that the court specifies under subsection (5)(b)(ii).

Relevant considerations

The child as the primary focus of a s133 report

[41] Most s 133 reports are directed in the context of parenting disputes between parents and/or caregivers over care and contact arrangements for children. The purpose of the Care of Children Act 2004 is to –

- (a) promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and
- (b) recognise certain rights of children.

[42] Children are usually the most vulnerable and powerless individuals during family breakdown and parenting disputes. The Care of Children Act holds that the welfare and best interests of a child must be the first and paramount consideration. It is therefore important that the primary focus of s 133 psychological reports remain on the child.

[43] The primary goal of a s 133 specialist report is to provide independent, comprehensive and expert appraisal of the family and the needs of the child from a social science perspective, as well as expert opinion when there are allegations of physical or psychological harm to the child. Specialist reports contribute to informing judges, lawyers and families regarding the needs of the child, and assist towards informed and child-centred decisions being made regarding what care arrangements are likely to best serve the needs of the child.^{20 21} An additional value of s 133 reports is to influence parents and/or litigating parties to have greater awareness of their child's needs and be less invested in their adversarial positions.²² In order for the ethical and effective provision of s 133 psychological reports the child needs to be maintained as the central focus.

Relevant focus on parents and caregivers

[44] Given the dependent nature of children's relationships with their parents and caregivers, the key adults inevitably need to and do feature in s 133 reports. All aspects of the standard brief to some extent require appraisal and referencing to adult parties, who although not exclusively, are most commonly the parents. Within the current standard brief, this is most strongly and directly relevant to the assessment of the child's relationships and attachment, each party's parenting skills, and each party's ability to cooperate in the parenting of the child.

²⁰ Australian Standards of Practice for Family Assessments and Reporting – February 2015.

²¹ Wali, R., Seymour, F. & Blackwell, S. (2018).

²² Lund, M.E. (2015). The place for custody evaluations in family peacemaking. *Family Court Review*, 53, 407–417.

[45] The assessment of parenting and an individual's parenting ability and skills are inextricably linked to the individual's personal psychological history and current functioning, as well as the impact of relevant sociocultural factors. Hence, while psychologists do not conduct detailed psychological assessments on the parents per se, it is accepted practice for s 133 assessments to include inquiry into parties'/parents' personal history (e.g., history and experience of being parented, history of adversity and trauma), relationship history, cultural factors, and their general psychological functioning.

[46] It is implicit in a psychologist's role and ethical practice for issues of risk to children to be attended to even if not specifically referred to in the s 133 brief. This is no different to safety screens required of psychologists in other practice settings regarding self-harm, harm to others, or substance use issues. Assessment of parenting skills, parental/caregiver's history of violence (as perpetrator and/or victim), alcohol or other substance abuse, and mental health issues are relevant to the safety of the child and screened for as part of s133 reports.

[47] Moreover, assessment of concerns such as parental insightfulness, parenting capacity and psychological flexibility are highly relevant to the attachment needs of the child being met, the parties' parenting skills, and the parties'/parents' ability to cooperate in the parenting of the child. A thorough assessment of the above factors is likely to provide the most informed appraisal of what care/parenting arrangements are likely to serve the child's best interests and what interventions are likely to be successful. It is appropriate and accepted practice for these issues to be covered within the scope of the existing standard brief for s 133 reports.

[48] Current practice by psychologists and professional guidelines for s 133 reports advise that enquiry on the above matters is appropriate in so far as it is relevant to parenting issues. "It is generally understood that as part of a s 133 report the psychologist will not conduct a psychological assessment of the parents per se. They should not make mental health diagnoses of parents or guardians".²³ Hence, the structure of the standard brief as it presently stands provides some latitude for s 133 assessments to include enquiry into certain psychological issues regarding the parents/parties. The focus however remains on parenting and parenting behaviours, and it is not intended to be a comprehensive psychological assessment of a parent/party.

[49] The distinctions between focus on the child, the care of the child, and the parent/s is not necessarily clear-cut and the extent to which parents become the direct focus of enquiry depends considerably on the psychologist's clinical judgment. As it currently stands, the 2018 Family Court Practice Note is sometimes misinterpreted by parents and/or counsel as being prohibitive of any appraisal of the parent/s, even when it is relevant to the parenting issues in the psychologist's brief. It would therefore be helpful for the Practice Note to reflect that aspects of parental behaviour relevant to the care of the child are within the scope of the s 133 report standard brief. This may be sufficient in place of any amendment to the legislation.

²³ Wali, R., Seymour, F. & Blackwell, S. (2018); at p.113.

Cautions and limitations of individually focused psychological assessments of adult parties being undertaken as part of s133 reports

[50] The inclusion of detailed and focused psychological assessments of one or other parent/party in s 133 reports, as provided for under s 178 reports of the Oranga Tamariki Act as part of care and protection proceedings, is potentially problematic.

[51] In adherence to professional standards of practice including Code of Conduct for Expert Witnesses,²⁴ psychological assessments of parents/parties should only be provided by psychologists with expertise in the relevant areas. Not all psychologists currently engaged in provision of specialist reports are qualified to provide detailed assessments of adults. This warrants further caution regarding the suggestion that psychological assessments of parties be included in s 133 reports.

[52] The inclusion of individual assessments of adult parties risks heightening dysfunctional inter-parental dynamics and shifting the focus away from the needs of the child to adult psychopathology.

[53] Principles that guide psychologists' practice within the Family Court,²⁵ include working within a scientist-practitioner model. Assessment techniques and psychological reports are required to be based on scientific methods and knowledge. Assessment procedures, including for example, personality tests, whilst commonly used in certain settings and in some countries in family proceedings, were not designed for use in parenting disputes and for the complexities that accompany such disputes. Moreover, the validity of many psychometric instruments in ethnically diverse families is open to challenge.²⁶ Caution should therefore be exercised in the application of assessment techniques and psychometric instruments developed for use in mental health services in assessing parents/caregivers under Care of Children Act proceedings. There are no psychometric instruments with published validity and reliability on a New Zealand population for the purpose of child custody disputes.

[54] A further potential implication is for informed consent. In keeping with ethical practice, appropriate informed consent would need to be obtained from the party/parties that will be the focus of the psychological assessment. As with the issue of release of notes and materials (see para 35 of this paper), this poses a similar risk of parties becoming less forthcoming and more guarded, and the integrity of the assessment being compromised as a result.

[55] It is however recognised in this submission that in some instances the Court is likely to be assisted by a comprehensive psychological assessment of one or both parents. This is most likely in the more intractable cases in which one/both parents' presentation and/or

²⁴ High Court Rules 2016 Schedule 4 Code of Conduct for Expert Witnesses under 3(c) states that in any evidence given by an expert witness, the expert witness must "state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise"

²⁵ Wali, R., Seymour, F. & Blackwell, S. (2018); at page 120.

²⁶ Chiu, E.Y. (2014). Psychological testing in child custody evaluations with ethnically diverse families: ethical concerns and practice recommendations. *Journal of Child Custody*, 11, 107-127

behaviour raises concern about their mental health impacting on the child.²⁷ At present, SRWs are constrained in providing opinion in this regard within their s 133 report. Although, the SRW can draw to the Court's attention if further information on a parent or guardian would be considered valuable, there is no provision for the Court currently to obtain a psychological assessment of a parent. This can become a significant barrier to addressing the needs and safety of the child, and effective interventions being directed.

[56] One option to remedy this issue could be a separate provision under its own section to allow the Court to obtain a psychological assessment by a psychologist. This could be by a second psychologist with specialist skills in adult assessment. This of course will require further discussion and consideration to determine the appropriate process and parameters if this were to be implemented.

Summary

[57] Section 133 reports are directed in the context of parenting disputes between parents and/or other caregivers or guardians to assist the Court in determining the child's needs and the care arrangements most likely to be in the child's best interests. The primary focus of s 133 reports needs to remain on the child. Given the inextricable link between the adults' personal factors and the parenting role, parents and significant adults are assessed during s 133 reports, in so far as it relates to their ability to parent, their parenting skills and the ability to meet the child's needs. Issues of risk to children are also attended to and screened for in s 133 reports assessments in keeping with ethical psychological practice. This includes safety screens with parents/caregivers/parties regarding issues of self-harm, harm to others, substance abuse and mental health issues.

[58] If it is contemplated that assessment of an adult as part of s 133 reports is in the nature of a focused individual assessment of the type conducted in mental health settings, then a number of ethical and methodological concerns arise from this. It is submitted that the present standard brief for s 133 psychological reports provides sufficient scope to assess and comment on parents/parties and matters relevant to their parenting capacity and a child's needs. The 2018 Family Court Practice Note, however, is sometimes misinterpreted by parties and/or counsel as being prohibitive of any appraisal of the parents, and it would be helpful for the Practice Note to be amended to reflect that aspects of parental behaviour relevant to the care of the child are indeed within the scope of the s 133 report standard brief. This would assist further in the effective provision of most s 133 reports.

[59] There are however situations, most often in the intractable cases, where one or other parent's presentation is suggestive of significant mental health difficulties. Although there is provision for the s 133 report writer to draw to the Court's attention any concerns that might arise regarding the mental health of a parent/party, there is currently no provision for the Court to direct a comprehensive psychological assessment of a parent under s 133. A

²⁷ Walters, M.G. & Friedlander, S. (2016). When a child rejects a parent: Working with the intractable resist/refuse dynamic. *Family Court Review*, 54, 424–445.

suggested remedy to this is that provision be made specifically for this purpose under a separate section for a psychological assessment of the relevant parent to be directed and obtained by a separate psychologist. There would of course be need for further discussion and consideration on defining criteria, scope and practice guidelines if this were to occur.