The New Zealand Psychological Society

Te Rōpū Mātai Hinengaro o Aotearoa

Submission to the Ministry of Justice

Review of the Family Court

29 February, 2012

Thank you for the opportunity to comment on issues facing the Family Court. We will be pleased to provide further comment .

About the New Zealand Psychological Society

The New Zealand Psychological Society is the largest professional association for psychologists in New Zealand. It has over 1000 members and subscribers and aims to improve individual and community wellbeing by representing, promoting and advancing the scientific discipline and practice of psychology.

Introduction

This submission is in response to the Ministry of Justice's review of the Family Court and uses as the context, the public consultation document dated 20 September, 2012. The review seeks responses to eight key themes and related sets of questions with an overall aim of making the Family Court more "sustainable, efficient, cost-effective and responsive to those vulnerable adults and children who need access to its services". We note that the review concerns parenting order applications under the Care of Children Act 2004 and not under the Children Young Persons and Their Families Act 1989. Our response focuses on the work of psychologists in the provision of s133 Specialist Reports, whilst acknowledging that some provide counselling under s9 and s10 of the Family Proceedings Act 1980 and under s46G, 46I, 46P and 46Q of the Care of Children Amendment Act 2008. We have chosen not to comment on the Family Court's administrative processes.

Purpose of the Review and the Focus of Our Submission

It is obvious from the preamble in the Ministry of Justice summary document that "fiscal pressures" are the key drivers to the review. This is perhaps not surprising because although the number of applications hasn't increased in recent years, there has been a 63% increase in expenditure by the Courts (this includes the cost of lawyers and specialist report writers) and a 49% increase in judicial costs, inclusive of Judges' salaries. Further, in another example of perceived inefficiencies, the average number of days between the filing of a parenting order application and its resolution increased to 306 days in 2009/10 from 216 days in 2006/7.

Whilst we accept the reality of these fiscal concerns and the increased pressures on the Family Court, we note that the 62% increase in costs for professional services between 2004/5 and 2009/10 (Figure 4) relates mainly if not exclusively to the increased number of appointments of Lawyers to Assist the Court. These appointments have increasingly been made when there is a tension between the best interest of the child and their wishes, and a perceived need for non Judge-led mediation. There is no evidence of a significant increase in costs for s133 reports.

The summary document suggests the need to go back to "first principles" and "reconsider the best configuration of services". The nine underlying principles of the review are given as:

- Provide the necessary legislative and / or operational processes to deal efficiently with family law disputes, including complex and diverse cases
- Provide proportionate resolution to the dispute
- Ensure vulnerable adults and children are protected, and have easy access to the Family Court
- Provide for children's voices and promote their best interests
- Encourage parents to take greater responsibility for reducing the negative impact their conflict is having on their children

- Where appropriate, ensure parties can resolve their disputes outside of court, and / or to settle at the earliest opportunity
- Ensure court proceedings are understandable, transparent and timely
- Be a cost effective use of public resources
- Be informed by evidence about what works, where this is available

We accept these principles and our submission will reflect this and in particular principles 3, 4, 5, 6 and 9.

In addition the summary document suggests that policy proposals must also be:

- Consistent with the Treaty of Waitangi and our international obligations, especially the United Nations Convention on the Rights of the Child
- Culturally responsive to the needs of Māori, Pacific and ethnic communities

We support those requirements and add that professionals who work in the Family Court must be able to demonstrate bi-cultural competence, an understanding of the Treaty of Waitangi and have knowledge about the concerns and needs of Māori, including the need to protect and promote Māori language and culture.

The eight discussion themes arising from these principles and the Ministry of Justice's data collection and consultations are:

- Sustainability and delay
- Children
- Supporting early self-regulation
- Conciliation inside and outside of the Court
- Cultural responsiveness
- The role of professionals
- Entering the Court
- Pathways and processes in the Court

Our submission focuses on the second, third, fourth, fifth and sixth of these themes.

Vulnerable Children and Adults

It is very relevant we think that of the 173 case files sampled by the Ministry and reported in the consultation document:

- 50% contained allegations of drug, alcohol or mental health issues,
- physical, sexual and psychological abuse was alleged in 72% of the files,
- care and protection issues were a feature of 10% and
- parallel domestic violence proceedings were a feature of 51% of the cases

This suggests that in at least half of the work of the Family Court involves vulnerable adults and children (principle 3 above). The basic dispute in 88% of cases was contact and the care of the children respectively whilst 55% involved guardianship issues. Each case on average had 14 adjournments and interestingly only 6% of cases required a judicial interpretation of the law, mostly in relation to domestic

violence. The nub of the problem as the Minister of Justice apparently sees it is whether or not the Family Court is unnecessarily dealing with matters which are essentially private rather than public concerns.

The United Nations Convention on the Rights of Children (1990) specifies that the signatory States have a role in ensuring that where possible, children have "the right to know and be cared for by his or her parents" (Article 7), "preserve his or her identity ... name and family relations" (Article 8) and "shall not be separated from his or her parents ... [except where] the parents are living separately and a decision must be made as to the child's place of residence" (Article 9). Further, "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests". We do not accept therefore, that applications made under the Care of Children Act are essentially private matters.

In 2009/10, 22935 children were subject to applications under the Care of Children Act and we believe that the State must maintain its involvement in expediting a resolution to these disputes. In this context we also note that there is a hidden cost to matters not being expeditiously resolved in Court or to the decision of the Court not being accepted by one or both parties. Whilst the review might result in a cost-cutting and less direct work for specialist report writers, in the end that work (or work which is a direct outcome of parents not settling their differences or having the benefit of a mandated intervention by the Court), will still need to be done and financed from elsewhere within the public purse.

Mediation and Other Processes

There have been attempts over the years to streamline or rationalise Family Court processes and to enhance the mediation processes (principles 3 and 4). Non-Judge led mediation (inclusive of children, extended families and Counsel) which was piloted in four Courts from March 2005 to 2006 (Barwick and Gray, 2007), involved 380 of 540 possible cases. Two hundred and eighty four went to mediation and of the 257 completed mediations, agreement on all matters was reached in 59% of cases and on some matters agreement was reached on a further 30% of cases. Consent Orders were sought on 68% of cases in which all or some agreement was reached. No agreement was reached on only 5% of cases which went to mediation. Of the 109 respondents to a follow-up survey, 87% felt that they were able to say what they wanted and two thirds were either satisfied or very satisfied with the outcome. It can therefore be concluded that the family mediation pilot was a very successful initiative, whilst acknowledging the relatively low number of referrals.

Other initiatives include the well-intentioned 'Parenting Hearings Programme' (Knaggs and Harland, 2009) which was intended to triage and address urgent applications (e.g. those where abuse allegations have been made) and was trialled in six Courts, and the significantly more successful 'Parenting Through Separation' programme (Robertson and Pryor, 2009). The outcome of the equally laudable Waitakere and Manukau Family Violence Courts processes (Knaggs, Leahy and Soboleva, 2008; Knaggs, Leahy, Soboleva and Ong, 2008), have been less

successful particularly in respect of reconvictions. There are few other remedies available to the Court other than referring parents to a parenting or anger management programme, or children and parents to specialist counselling which as we understand, there is no current authority to fund.

If the Family Court is to remain involved in family decision making post-separation, then the Specialist Report Writers processes we suggest should perhaps better reflect an educative role. We note that under s46D of the Care of Children Amendment Act, counsellors and lawyers representing parties already have a duty of promoting reconciliation and conciliation. We will argue that this should be extended to specialist report writers and that psychologists could have a role in mediation, simply because they are the best qualified of all those professionals working within the Family Court (including Judges), to provide this.

The K and K High Court decision (2004) which clarified the role and function of lawyer for children and specialist report writers we accept, accurately reflects the current legal situation. It has clarified that the report writer is the Court's witness but this has led to some practical but presumably not insurmountable problems. (It is not clear for example who now has the role of negotiating the specialist report writer's availability for Hearings or for briefing them prior to cross examination). In providing s133 reports to the court, specialist report writers are clearly in a forensic role (i.e. little different from Environmental Science and Research scientists in criminal matters) but as the Court's witness, psychologists in particular lose an opportunity for their assessment processes to be educative.

Recommendation

If the Court would really like parents to step up (principles 4, 5 and 6) and make "best interests" decisions about their children's care, then psychologists need to be able to reflect back to them the meaning of the data that is collected throughout the assessment process. In other words specialist report writers would have a dialogue with parents rather than simply collect interview and observational data and write a report. Although it could be argued that parents are informed when they receive s133 and lawyer for child reports (e.g. wishes of the children), this is not the way that psychologists engage in other kinds of non-forensic work and it encourages an adversarial response.

The most appropriate way for specialist report writers gaining valid data it can be argued is through an 'applied conciliation' in which the psychologist (either through a direct referral issue or through a legislative change (e.g. to s46D of Care Of Children Amendment Act), has a duty of conciliation. This would entail feeding back to each parent (and by agreement whanau) information gained from other interviews and observations (e.g. the impact of the separation on their children and their children's needs), which might assist them in resolving the dispute. The psychologist would also be able to record each parent's and whanau participation and contribution towards conciliation, which surely would be of interest to the Court. For example factors that the Court considers in establishing the best interest of the child (D and W, 1995) include:

- parenting attitudes and abilities
- support for continued relationship with the other spouse.

Data from the proposed 'applied conciliation' could help unravel these issues.

This additional role recommended for specialist report writers is described as 'Model 2' behaviour or 'double loop' learning in the pioneering work of Argyris and Schon (1974), and has at its core a feedback loop in which all data is shared. The obverse is 'Model 1' behaviour or 'single loop' learning in which faulty inferences, assumptions, values, choices and predictions of outcome are not detected and corrected. 'Model 2' behaviour maximises the validity of the factual information available to parents so that they can make an informed choice about their children's future care arrangements. This would promote their generating acceptable child-focussed solutions and help reduce the hostility and bitterness between the parents. Commitment to the choice is more likely to follow if both parents feel that they have been heard and contributed to the final outcome. The preferred custodial parent (assuming other factors to be equal) should be the one who is the most child-focussed in the acceptance of this additional information. Not all cases will lend itself to this as many parents may remain intractable in their views but nothing in terms of the psychologist's neutrality and objectivity would be lost.

References

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