

Friday, 1 March 2019

Family Justice Reforms
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By email: FamilyJusticeReforms@justice.govt.nz

Attention: Rosslyn Noonan (Chairperson)

Dear Committee Members

RE: FAMILY JUSTICE REFORMS REVIEW

Thank you for the opportunities to date to participate in the review. The Principal Lawyer from Portia, Erin Ebborn, was invited to meet with the panel in person and Portia submitted a written submission for the first part of the review.

1. ABOUT THE SUBMITTER - PORTIA

Ebborn Law Ltd trades as 'Portia'. Portia is the 4th largest provider of legal aid services in New Zealand¹ and the largest provider by volume of family legal aid services in New Zealand. In the 2017-2018 year Portia averaged 6 FTE lawyers. Recently our capacity has increased to 10.5 FTE lawyers. Two of those lawyers have 20 years of experience each in litigation.

Over the last 6 years Portia has grown from 3 staff to 18 staff. There are three physical offices – Christchurch, Blenheim and Timaru – though we operate through AV Link from other sites primarily in the South Island. Our work is predominantly in Canterbury, West Coast and Marlborough, though we often field enquiries from other parts of the country and attempt to meet need as best we can.

Portia has a close working relationship with many Women's Refuge services, social service providers and Fairway.

Portia is a major provider of not just legal aid but also the Family Legal Advice Service. The Principal Lawyer is approved as a Lawyer for Child. Of the 11 lawyers employed by Portia only two practised prior to the 2014 reforms. Therefore operating within the post-reform Family Justice System is the norm for many of our staff.

2. THEMES FROM THE REVIEW

Generally the issues identified across the various submissions by the Committee and the values the Committee has expressed as aspirational goals for the Family Justice System are supported by Portia. The imagery of the Family Justice System as a korowai of many strands is apt. And each strand needs to be strong to support the connecting strands.

¹ Based on data released to Portia from the Ministry of Justice under Official Information Act request and as supported by the Payments to Firms data 1 July to 30 June released each year by the Ministry of Justice.

3. PROPOSALS FROM THE COMMITTEE

Many of the questions raised have been traversed in the Portia's early submissions. This submission only addresses matters that are new from the Committee's report.

Question 8: Do you have any other suggestions to improve the Family Justice System for Maori, including any comment on the examples provided?

It is not out of the ordinary for whanau involved in the Family Court to be engaged with external agencies. There might be a role for whanau ora navigators to be a connection for the whanau with FDR mediation services and in court support.

Portia is concerned about the proposal to dual warrant some Maori Land Court judges. This concern might be alleviated if there was additional detail to the proposal. The Family Court is an expert jurisdiction. The Maori Land Court is also an expert jurisdiction. But that doesn't make the knowledge inter-changeable and could be an overly simplistic solution which doesn't give full credit to the complexity of Family Court jurisdiction.

Question 9: What information do you think would help service providers, community organisations, lawyers and family justice professional to achieve a joined-up approach to the Family Justice Service?

The Ministry of Justice website lists lawyers who hold contracts to provide legal aid. But it does not adequately reflect who is more likely to provide legal aid. Not all contract holders offer a legal aid service even though they are permitted to do so. Service delivery is concentrated and new clients often complain that they have rung lawyers listed as being legal aid providers only to find they no longer offer the service. The system needs to be more user friendly to consumers.

Question 10: Would the three proposed types of counselling meet parties' needs or are there other gaps in the counselling services that need to be filled?

In terms of achieving the best outcomes for children, counselling for children with their parents would be of assistance. For example:

- When a child is upset that their parent issued a warrant to enforce a care/contact arrangement and intervention is needed to repair the relationship.
- When a child holds a view/wish that the parent cannot accept.
- When a child's perspective of a parent has been negatively affected by the other parent.
- When a child's relationship with a parent has been affected by the parent's behaviour.

The proposed three types of counselling still focuses on the adults. It is unclear from the proposal whether the "behavioural family therapy-type counselling" could be used for children.

Question 13: Parenting Through Separation

Is it possible to have the caregiver training run by the Ministry for Children – Oranga Tamariki approved under the regulations as a "Parenting Information Programme"? Therefore people

who have completed that course will also fit the criteria under the mandatory provision in the Care of Children Act for a parenting programme?

Question 15: Do you agree with the idea of a rebuttable presumption? If so, how might it be worded to make sure that parties take part in Family Dispute Resolution unless there are compelling reasons not to?

The current wording in s46E is that a party does not have to participate in FDR if one of the parties is “unable to participate effectively” or where there has been family violence. Similar wording could be retained even if there was a rebuttable presumption in favour of FDR. Not all persons who have experienced family violence decline mediation and so including it as an exception to the rebuttable presumption places the decision-making in the hands of the vulnerable party to choose.

“Effective participation” is a broad enough test that cases could be appropriate triaged.

Whatever wording is chosen, it would be helpful if it was consistent across different sections referencing participation in FDR so that there are not different tests/wording.

Where the without notice process has been used without merit the e-duty judge could consider a referral to FDR. This is a natural triaging point. S46F could be used to make the referral. This could be coupled with the appointment of Lawyer for Child whose existing brief under s9B(1)(c) of the Family Courts Act already extends to “assist the parties to reach agreement”. S9B(1)(c) is currently being used to require Lawyers for Children to hold round-table meetings. Using FDR enables the Lawyer for Child to purely be an advocate for the child and not facilitator.

Question 18: Is there a place for more accessible provision of funded legal advice for resolution of parenting disputes outside of court proceedings? What would the key elements of this service be and how could it be achieved?

Portia takes no issue with the current fee for FLAS 1 (in stark contrast to FLAS 2) but it has to be said it is likely that more lawyers would provide the Family Legal Advice Service if remuneration was higher. Portia would oppose a move to an hourly rate model because an hourly rate only rewards inefficiency.

The two services under the Family Legal Advice Services are quite distinct. It would be possible to retain “FLAS 1 – Initial Advice” but cease “FLAS 2 – Document Preparation”. Our clients tend to access FLAS 1 far more than they access FLAS 2. It is submitted the greater need lies with the availability of initial advice. This distinguishes the funding for advice from on-going representation.

The broader eligibility that attaches to FLAS 1 has importance in respect of the access to legal advice such as rights and responsibilities and the s5 principles relating to children’s welfare and best interests. This also acts as a ‘triaging point’ from which further services can be accessed e.g. a recommendation to obtain a protection order.

The gap in service provision arises from the restrictions under s7A of the Care of Children Act and the requirement in the Legal Services Act 2011 (“LSA”) for there to be jurisdiction to act under s7A before legal aid is available². It is here that the funding lacuna arises.

² S7(3A) Legal Services Act 2011

If s7A COCA and s7A(3A) LSA were both amended then eligibility for on-going representation would revert back to being assessed under the Legal Services Act. It should be noted that even prior to 2014 reforms there wasn't general eligibility for 'legal representation' in an on-going or unrestricted manner. The representation has to connect to existing or anticipated court proceedings. Sometimes our clients' expectations of the breadth of our communication on their behalf (as opposed to representation) is not realistic particularly when tax payer funds are being used to meet their wants as opposed to needs.

The limited funding under FLAS means it should not be used as an advocacy service. The legal aid system is more appropriate for representation because the LSA already has appropriate checks and balances to ensure tax payer funded representation is being used efficiently. It is under the legal aid granting that the creation of an on-going solicitor-client relationship is important.

If FLAS was to be enhanced it could be to switch the FLAS 2 funding to be a second advice session. This might be a generic information session (FLAS 1) and a second session that is more tailored e.g. about the specific issues to be addressed in mediation or where more questions have arisen after the initial consultation.

There needs to be caution against accidentally creating a duplicate system of funding. FLAS, at present, is clearly stand alone and niche.

If s7A is removed as is being considered by the Committee then the legal aid fixed fee schedule for Care of Children Act matters needs to be reviewed simultaneously. The fee schedule for "on notice" proceedings is inadequate because:

- a. it does not include the drafting time (anticipated to be provided under FLAS 2)
- b. it does not provide for subsequent proceedings (in contrast to the fees providing for under the without notice aspect of the schedule which anticipates there might be multiple proceedings e.g. a guardianship dispute as well as a parenting matter).
- c. it has no fixed fee available for 'pre-hearing matters' (again, in contrast to the without notice fee schedule which has a fixed fee of \$620.00 available).

Question 20: Will reinstating legal representation be enough to reduce the number of without notice applications? Or would other interventions be required? For example, are sanctions required for unnecessary without notice applications? If so, what sanctions would be appropriate?

It is unlikely that only reinstating legal representation would be enough to reduce the without notice applications. Applying without notice is not solely being used to gain representation. It is also being used to by-pass the mandatory prerequisites. So an initial gate-keeper is the duty judge. Again, we refer to the ability of the judge at that point to use s46F COCA to refer parties to FDR.

It is rare for Portia to see judicial minutes where the initial application was clearly erroneous. Even if the application was placed on notice there is often an element of immediate concern. This does not mean that FDR is not an appropriate course of action.

For lawyers, there are already sanctions for unnecessary without notice applications. Such consequences arise from falsely certifying the application.

The remedy to a falsely made application from a party is a swift enquiry into the issues alleged and intervention to reinstate any previous arrangements that were affected by the application.

Question 21: Do you think there is value in clarifying that Parenting Orders made without notice can be rescinded?

Yes, because of the contradiction between r34(c) being in Part 2 of the Family Court Rules and the wording of r416A(2) under Part 5A.

Question 24: Should a judge have the power to direct a party for psychological or psychiatric assessment or alcohol or drug assessment?

Yes. The provisions of the Care of Children Act should be extended to match the ability to seek assessments about the parties as it can under the Oranga Tamariki Act.

Question 40: Should FDR be fully funded by the government for everybody?

Yes. The existing hours of FDR/preparation coaching should be available to anyone. There should not be a financial barrier to accessing FDR if it is to continue as a mandatory prerequisite or where it has been judge directed. FDR can be a speedy and cost-effective dispute resolution method. Not all clients wish to proceed to court and are fearful of “amping” up a dispute by issuing court proceedings.

4. CONCLUDING COMMENTS

While many of the propositions the Committee is considering appear sound there is, naturally, a lack of detail at stage. As the old saying goes “the devil is in the detail.” Until the plans are decided and more fleshed out it is difficult to provide substantial comment and the practicalities of implementation.

Kind Regards
EBBORN LAW LTD



Erin Ebborn
Principal Lawyer

s 9(2)(a)

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