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FAMILY WORKS RESOLUTION SERVICE

FEEDBACK TO THE PANEL

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Introduction

We were impressed with the content of the Consultation Document and believe if implemented it would be a very useful improvement in services offered to families experiencing breakdown where day to day care arrangements cannot be self-resolved.

Whatever the ultimate recommendations are, we ask that the Panel recommends that FDR continues to sit as the substantive service in which parties must attempt to engage before a Judge receives an application for a parenting order, unless there are risks and safety issues attached. To move away from this approach which was introduced in 2014, would be to shift away from the model of best practice which now exists in almost every Western Family Justice jurisdiction, in one form or another.

We understand and respect the significant weight, power and mana of the Family Court, and the desire for an angry, hurting or aggrieved party to have 'their day in court'. Research and experience in Western Family Justice jurisdictions confirms that these adversarial approaches, unless there is risk or urgency involved, are fundamentally not in the best interests of children.

We are in favour of the panel's consideration of a model where an applicant would be able to file an application *lite* if they initially elected not to engage in FDR. We think that the process suggested of the application *lite*, once received by the Family Court, being triaged and sent to FDR (unless the circumstances immediately required the urgent attention of a Family Court Judge) is a good approach.

We believe this would go some way towards meeting the needs of parties who feel their entitlement to 'file papers in the Court' should be reintroduced. This would help to assist to reduce the damage done through the often vexatious path of the exchange of affidavits.

In relevant parts of the Consultation Document, we think there needs to be clarity between FDR suppliers and providers. We think that often the terms were used interchangeably in the document. We think that it is very important to continue the supplier model for a number of reasons including:

- Provision of consistent services
- Ability to monitor and manage the quality of service offered
- Movement of risk away from Government
- Ability to implement change quickly
- Innovation and prototyping is more likely in non-government/commercial organisations
- Case-management is necessary
- Currently the system is benefitting from investment from funders other than government e.g. PSN funds access to an app – Our Family Wizard™ for those undertaking family mediation with FWRS.
- From an economic perspective and an individual's right to choice perspective, optimally there should be more than one supplier in the marketplace

1. What should be included in a comprehensive safety checklist?

We think the following needs to be included in a comprehensive safety checklist:

- Essential Needs e.g. is the child warm, fed and clothed, and accessing necessary medical appointments when in the care of either parent, family member or guardian?
- Safety and Care e.g. is the child protected from abuse and other harmful behaviour of both parents and other significant adults? Do both homes provide nurturing routines and experiences?
- Belonging e.g. does the child feel a sense of belonging in both homes? Does the child identify positively with both parents and both their heritage and family background?
- Wellbeing e.g. does the child have reasonable levels of self-esteem and sense of worth and is being supported to adjust to the change, loss and separation. Is the child assisted to transition between each home?
- Parenting e.g. does the child experience responsive, appropriate parenting in both homes - whilst recognising differences?
- Learning and Achievement: is the child able to access school, and learn and achieve despite changes in their lives?

- Community e.g. is the child able to access community activities and continue to develop their interests?

2. **What information should be available to the court to assess children's safety and in what circumstances?**

   Please see our answer to 1 - information should be based on this.

   For any established psychological abuse that the child has experienced there should be information provided that indicates the duration of abuse, frequency that it occurred, the severity scaling and an indication of the impact on the child.

   The circumstances would be driven by the outcome of the above. Where the checklist is made as part of the process then we would suggest that the information is provided in all circumstances as this can be used to verify that the child's needs were being largely and reasonably met at both homes/uniquely by both parents.

3. **What role should specialist family violence workers have in the Family Court? Should there be separate support workers for adults and children?**

   We believe that there should be a role for specialist family violence workers in the Family Court. The workers should not be court employees (who are required to be neutral), instead they should be independent professionals with formal family violence training and expertise.

   Ideally, specialist family violence workers should be employed or contracted by a specialist family violence service provider.

   Currently, we have concerns about professionals' apparent lack of training in the dynamics of family violence or child development i.e. Lawyer for Child and psychologists. We are particularly concerned about the limited time spent speaking with the child and protective parent. Many are also working in 'lone ranger' situations with no connections to other service providers.

   Whilst specialist family violence workers should be placed within the Court system, we believe it is also essential for frontline staff, including the two new proposed roles of Senior Family Justice Co-ordinator and Senior Family Justice Registrar to be trained in the dynamics of family violence and family conflict, to ensure they are able to make pertinent and accurate assessment of cases and parties when they present at the Court building.

4. **Do you have any other suggestions for more child-responsive court processes or services?**

   It is very important for there to be an estimation of how long the process will take and that this is provided to all those involved in the case.

   We think that the court process needs to include child development as part of the standard process. A view of a child, and the views of a child, is taken at a point in time. This view is then utilised when final decisions are being made. The child, though, may have begun to think differently about their circumstances, about the change, the loss and the separation during the time that the process has been continuing. This would be most likely to occur for children between 5 and 8 years of age as they move from concrete to abstract thinking. In other words during this period children think differently about the same 'thing' as they develop the cognitive ability to do so. Therefore if the process happens over a long period of time there should be an opportunity to revisit the child's views and this should be arranged at a time closest to when the final decision is made.

   All those involved in child responsive services should have sufficient training, experience and knowledge on child trauma/development/attachment/family violence and reporting skills

5. **Should obligations be placed on the Ministry and/ or the Government to improve family justice outcomes for Māori? What would these obligations be?**

   The Ministry should fund delivery of services disbursements to support services to make them more suitable and appropriate for Maori. For example when convening an FDR with maybe 20 or 30 whanau there should be funding to allow Suppliers to charge a reasonable and appropriate disbursements for Koha, Kai and cultural protocol support services such as a Kaumātua and a Kuia to support whanau as they work for up to a day in reaching agreements.

6. **How could the Ministry of Justice or the Government partner with hapū, iwi or Māori organisations to deliver services?**

   The Ministry should allow Suppliers who are already working with Maori communities to support social workers, counsellors or other suitable individuals to achieve the competency to become FDR Providers. Often the traditional educational requirements act as barriers for many Māori and we think there needs to be more flexibility in recruiting competent individuals to deliver services which are culturally appropriate and acceptable to Māori.

7. **How would you incorporate tikanga Māori into the Family Court?**

   No comment – not our area of expertise

8. **Do you have any other suggestions to improve the Family Justice Service for Māori, including any comment on the examples provided above?**

   No comment – not our area of expertise

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

   We think that the information needs to be provided in a simple easy to follow way. It should be provided in a number of languages and videos should be used along with appealing graphics, pictures and stories of "people like them".

   It should utilise technology that has interaction with a person via "live chat" in real time for any questions that people may have. Furthermore the Ministry should consider investing in on line bot communication, which many organisations are using to answer questions from on-line users, and importantly, this is a communication medium increasingly being accessed by a younger, multi-cultural service user demographic.

   These services should allow people to register enquires, allocate the enquiry to the correct group of suppliers (this could be organised on a weekly allocation basis) and then service suppliers respond by contacting them directly. If people are interested enough to go onto a website then we should seek to capture their interest rather than asking them to navigate the next steps themselves.

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? For example, should there be counselling available to children?**

    We believe the three types of counselling provided would add to the Family Justice Services being proposed by the panel.

11. **Are Parenting through Separation/Family Dispute Resolution suppliers, Family Justice Service Coordinators and Judges best placed to refer people to counselling? Are there any other service providers who should be able to refer to counselling or should people be able to refer themselves?**

    We think it is useful for people to be encouraged to attend counselling and that the group of professionals listed are able to competently describe this. It would also be good for people to be able to self-refer.

    It will be important to create a counselling "product" to ensure consistency of message and to set boundaries around how long the session should last, what is considered in scope and out of scope and limit the number of sessions available to a party.

    We believe the FDR Suppliers should be another key stakeholder able to refer people to counselling at a time relevant moment. All three suppliers play an important role in triaging cases before they are allocated to an FDR Provider. The Supplier is required to assess suitability for mediation and part of that process could include an identification of benefit to a client to participate in counselling either before or during an FDR Process.

    Suppliers should be able to contact Family Court approved Counsellors from the current list at any point, and Suppliers should also be able to apply to the Ministry of Justice, as per the current MOJ Practice rules, to be able to appoint suitably qualified and experienced counsellors to be able to deliver these counselling services.

12. **Should confidentiality be waived when parties are directed by the court to therapeutic intervention, in what circumstances and about what matters?**

    We agree that court oversight of the outcomes of counselling should occur. This will provide incentive for people to attend and to make progress. We think that the total confidentiality waive is a step too far as it may hamper individuals openness and progress in the session but that a requirement to report back to the Courts around attendance, attitude and progress within a "drop down list" approach would be very useful.

13. **Do you agree that there should be an expectation on parties to attend PTS, rather than having it as a compulsory step for everyone?**

    We agree that it should be an expectation of parties to attend PTS, rather than having it as a compulsory step for everyone.

14. **If PTS is not mandatory, how should this expectation of attendance be managed and achieved?**

    The expectation of parties attending PTS will be encouraged at various check points through the FDR process. A) At the time of opening a case and information is gathered from the party and the process explained B) During the Pre Mediation assessment PTS is prompted again C) During mediation a Mediator may prompt the value of PTS.

    If one party attends PTS, the provider of the programme will gather Party B information and extend an invitation to attend a PTS Programme.

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?**

    FDR needs to be undertaken as the first step of the process by most people and the reasons for avoiding the process needs to be stipulated much more tightly.

    There should be a requirement for proof with the avoidance e.g. family violence – a report from Police or a Family Violence provider, timeliness should no longer be included as a reason for avoidance, Hague Convention case.

    There should be a consequence for those unwilling to engage – a real impact on what they are seeking to achieve in the courts i.e. a penalty "cost"

16. **Do we need stronger obligations on family justice professionals to promote FDR and conciliatory processes generally?**

    Yes this is definitely required.

17. **What could a streamlined process for court referrals to FDR look like?**

    The issue for referrals to FDR from Court at the moment is that there is not a process for referral or tracking. Courts should be able to directly refer to a supplier. This could be rotated between suppliers on a monthly basis or via another mechanism to allow for a fair allocation between suppliers.

    There should be clear expectations provided around timeframes for the completion of the mediation process and the expectation of reporting back including to whom and in what detail.

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? For example:**

    - **Should it be part of a legal aid grant, or**
    - **Could there be an enhanced role of FLAS 1 (giving a person initial information and advice on the out-of-court processes), including the creation of a solicitor-client relationship?**

    One of the issues at the moment relates to people's ability to access providers as many of those who have indicated that they will provide FLAS are unavailable when a request comes through. We think that this could be improved by implementing a supplier model for this service. Where the legal services are navigated for clients rather than expecting people to find their own suppliers. This could be coordinated as part of the responsibilities of existing suppliers (which would probably be a less complicated option for clients) or could be provided by a single supplier.

    We also think that the creation of a solicitor-client relationship could be helpful. It could encourage legal representatives to be part of the process and provide quality services if they believe that in the longer term they will have a larger part to play if the case goes to court or their presence is requested in the mediation process.

19. **How do you think we could improve the efficiency of court processes?**

    No comment – not our area of expertise

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?**

    No we think that sanctions will be required. There will need to be some consequences to sending cases through the without notice track otherwise it is likely that behaviour will not change.

    Sanctions should start at the level of providing reports showing individual's performance compared with colleagues and could include a "please explain" requirement to face a judge whose time has been wasted after a period of time where behaviour has not changed. We think having a monetary sanction would create an added level of administrative burden which is unnecessary at this point in time.

21. Do you think there is value in clarifying that parenting orders made without notice can be rescinded?

No comment – not our area of expertise

22. How best should integrated assessment, screening and triaging be implemented? What other measures would you like to see implemented in order to improve the interconnection of the Family Justice Service?

The FDR Suppliers currently ensure consistency around the assessment for suitability for Mediation. The 2013 Act requires FDR providers to continue to monitor suitability for Mediation. There is currently no universal standard for measuring competency for family mediators practice or family mediators training. This is in contrast to other models of Mediation, and with another MOJ funded Justice Process – Restorative Justice; where Ministry funds substantive training, through Resolution Institute.

23. What other powers do you think might be helpful to enable judges to better manage complex cases?

It would be helpful for Judges to be able to order parties to attend some of the types of Family Court counselling and to require reports back from the Family Court Counsellor. We think Judges should be able to routinely allow Family Court Counsellors appointed to be able to talk with the Lawyer for the Child.

In addition it would be useful if Judges were able to convene a Judicial Family Group Conference where all the case practitioners were required to report back progress for the timely oversight of cases. This could be similar to the Drug and Alcohol Family Court model in the UK.

Where a Judge orders FDR it would be useful if the entitlement of legal privilege was removed, thereby allowing the FDR Provider/Supplier to report back to the Judge on the conduct and progress of the parties and circumstances in the case.

It might be helpful for the Judges to make more use of the term “Facilitator” for the Court as in the substantive Judgment delivered by Principal FCJ Boshier in ADK and KMR (FAM 2002 – 090 – 001392), where the Judge could make specific requests to Counsel to assist and other Family Justice practitioners, and to appoint a Family Court ‘Facilitator’, again to report back directly to the Judge, without the restriction of legal privilege.

24. **What types of therapeutic intervention would be useful in complex cases? For example, should a judge have the power to direct a party for psychological or psychiatric assessment or alcohol and other drug assessment?**

    Judges should have the power not only to direct parties to drug and alcohol testing but to drug and alcohol cessation counselling.

    Judges should also be able to direct parties to counselling services for parents – improving parenting skills – not in a group setting rather for individual counselling which focusses on skills.

25. **What could be done to encourage lawyers and judges to make better use of s133 cultural reports? For example, should there be a different threshold for cultural reports? If yes, what would be an appropriate threshold?**

    No comment – not our area of expertise

26. **Do you think greater use of section 136 of the Care of Children Act 2004 would prove more valuable than presenting cultural information in a report format? If so, what type of information and guidance would be needed to support parties to use section 136? What barriers are there for parties to use section 136 of the Care of Children Act 2004?**

    No comment – not our area of expertise

27. **Do you have any other proposals for improving the quantity and quality of cultural information available to the court?**

    No comment – not our area of specialty

28. **What do you think of the proposal to create a new role; the Family Justice Service Coordinator (FJSC)?**

    We think this is a positive move. It is very important to ensure that the role is provided with mechanisms to ensure than no favouritism exists when it comes to allocation of cases to Lawyer for the Child, Family Court Counsellors, Report writers and FDR Suppliers – there was a consistent criticism in the past, in some regions/courts, of the Family Court Coordinator's having 'preferred' practitioners who received a disproportionate level of referrals.

29. What do you think of the proposal to establish a Senior Family Court Registrar position?

We fully support this proposal to establish a Senior Family Court Registrar position however the role needs to have sufficient "teeth" to ensure compliance.

30. What powers do you think Senior Family Court Registrars should have in order to free up judicial time?

The proposed Senior Family Court Registrar's (SFCR) should be able to accept FDR outcomes, for conversion into consent orders. There should be a burden of responsibility on the SFCR to ensure that what parties have put their name to is likely, on a balance of probability, to be in the best interests of any children. Where doubt exists, then the SFCR should be able to consult with a judicial officer, before a decision is made to escalate the request into the Judicial Party conference system.

The proposed SFCR should be able to order parties to attend FDR, enhanced Family Court counselling, PTS, and to be able to make decisions if the parties are non-compliant in regard to their orders.

31. What sorts of competencies should Senior Family Court Registrars have?

The proposed Senior Family Court Registrar's should have a qualification in Family Law, or Family ADR or Family Court counselling. They should also be able to demonstrate significant knowledge of COCA and all subsequent Family Justice Legislation.

Furthermore, these professionals should have excellent communication skills, highly developed influencing capability and resiliency.

32. Do you agree with the proposal to introduce new criteria for appointment of lawyer for the child to make sure of the best fit?

No comment - not our area of expertise

33. What are the core skills for the role of lawyer for the child, and what training and ongoing professional development do you see as necessary to develop those skills?

No comment - not our area of expertise

34 Do you see a role for an additional advocate with child development expertise to work together with the lawyer for the child, to support the child to express their views and make sure they're communicated to the judge?

Care is needed to make sure that there are not too many professionals interviewing a child. We do think there is value having an advocate with child development expertise involved as any trauma experienced by the child will manifest differently according partly to age, understanding and cognitive ability.

Under question 4 we detailed our concerns about finding views from children at a point in time and that being relied upon over time when particularly in the young views change. This will be an important aspect to consider in the use of child development experts.

35. Does the definition of 'second opinion' reports need clarifying?

No comment - not our area of expertise

36. What improvement do you think could be made to the process for obtaining critique reports?

No comment - not our area of expertise

37. At what stage in the court process would psychological reports be most helpful?

No comment - not our area of expertise

38. Do you have any other comments about section 133, for example the threshold test for obtaining a report?

No comment - not our area of expertise

39. Do you agree with the Panel's proposal that cost contribution orders are modified? For example, do you think a judge should order a party to contribute to the cost of professionals when making final orders based on the party's behaviour during proceedings?

Absolutely yes.

40. Should FDR be fully funded by the government for everybody, or should FDR be free for both parties where one party is eligible for government funding? Should the eligibility threshold be raised?

Based on our experience we believe, ideally, FDR should be free for both parties. We support the idea of piloting a trial of FDR being free for all parties to ascertain if this increases uptake of and engagement in the FDR process. By doing this it would remove the barrier of non-attendance due to cost, it would also speed up the FDR process as currently we will not progress a case until payment has been made. This is used by some parties as a way of creating delay and frustration for the other party in the process.

As a less favoured option, but where we still see merit, is in offering free FDR where one party is eligible for government funding. By doing this it would remove the barrier of nonattendance due to cost, but the time saving aspect to get a case to FDR would be less effective than a free for all approach. This also makes the service more complex to explain and manage.

The eligibility levels are an issue for those who sit marginally above the cut off. Their issue is likely to be solved by FDR being free for all or free for all if one party is required to pay.

Generally those who sit far above the cut off do not have an underlying issue with paying for the service (if their ex partner also has to pay for the service) particularly if the requirement to attempt mediation is strengthened.

If consumer/user pays continues, the eligibility threshold should be consistent with legal aid levels and should be raised in line with wage growth as measured by the CPI annually.

Summary

- We believe the Independent panel have sensitively and enquiringly worked to bring together an excellent set of draft ideas
- We believe Family Dispute Resolution should sit at the heart of Family Justice services
- We believe that families should have the opportunity at any point to file an application *lite* into the Family Court
- We believe that lawyers should not be funded to attend Family Dispute Resolution – their attendance would fundamentally change the definition of family mediation away from the understanding in practically every other Western jurisdiction

- We believe FDR should be free to all parties or to all parties where one party is eligible for public funding and one is not
- We believe that targeted Family Court counselling should be introduced on an as needs basis
- We believe that FDR should not be automatically disregarded where there is a history of Family Violence. Instead, we urge the Panel to review the mounting body of researched evidence from Western Family Justice jurisdictions (particularly Australia and the USA) which increasingly point to the effective and appropriate use of Family Mediation where there is a history of Family Violence, and where both parties are able to make an informed choice individually to engage in a FDR process.