FURTHER SUBMISSION OF PAUL von DADELSZEN QSO, RETIRED DISTRICT, YOUTH AND FAMILY COURT JUDGE, TO THE INDEPENDENT PANEL EXAMINING THE 2014 FAMILY JUSTICE REFORMS

Introduction

1. I have read the Submissions Summary and the further Consultation Document, each released on 23 January 2019, and wish to make another submission on the Family Justice Reforms, in addition to that dated 6 October 2018.

2. In my earlier submission I highlighted five areas of concern and, in my meeting with Panel member, Mr Chris Dellabarca, I added a sixth; they were:

- The voice of the child;
- Legal representation;
- The Early Intervention Process (EIP);
- Cases involving violence;
- Senior Family Court Registrars; and
- The reinstatement of free counselling (known as s.9 counselling).

In this further submission, I wish to address briefly an additional topic, that of the integrated court; see paragraphs 61 and 62 below.

3. I propose to address those of the questions posed in the further Consultation Document upon which I have view and, in doing so, refer to those six areas where relevant. The questions and page numbers I use are those in that Document.

Strengthening family justice services

4. The impression I gathered from reading pages 7 to 10 of the Document is that the Panel's intention is to bring all services relevant to the family justice under the one umbrella (or korowai). At the foot of page 8 and the top of page 9 are 16 bullet pointed statements which cover matters clearly intended to be the proposed korowai for the Family Justice Service; they include Family Dispute Resolution (FDR). I am therefore puzzled why it is not made clear on pages 20 and 21 that FDR is to be brought under that umbrella; it should not be independent.

5. Further, in my view, there should be one nationwide provider. That will promote consistency of service delivery and easier monitoring of that delivery. In addition, the FDR service should be answerable to the Ministry of Justice and the Family Court; such would be appropriate if it is truly to be a part of that strengthened Family Justice Service.

Focus on children

6. Q1: Section 61 of the Care of Children Act 2004 (COCA) should be re-enacted. In my experience, it encapsulated those matters which are relevant to the safety of the child, particularly as it includes s.61(i).

7. Q2: There should be automatic (computerised) sharing of information between the District Court and the Family Court. In addition, it should be a statutory requirement for the police to provide (electronically) the Family Court with copies of their files on those occasions when there is a family violence call out and the alleged perpetrator and victim have the joint or single responsibility for the care of a child.

8. Q3: The presiding judge[1] should be mandated to exercise his/her discretion on a case by case basis as to whether to appoint a family violence and/or support worker. The role of that family violence worker will be to provide the Court with expert evidence relevant to the facts of the particular case.

9. Q4: There should be an automatic appointment of lawyer for the child as soon as an application for care or contact is filed, with the standing brief to investigate the issue of child safety and report to the court with any recommendations as to further investigation. That report should also include any recommendations as to the appointment of a family violence and/or support worker. If it is decided that there are no issues of safety, that appointment can be vacated. Any re-appointment (of the same lawyer) can be made later if the need arises.

Te Ao Maori in the Family Court

10. The examples given on page 12 are good ways in which the Family Justice Service would respond better to tamariki and Maori whanau.

11. However, it will be important to avoid tokenism and, in this connection (for example), to ensure that if more Maori judges and Maori Land Court judges are appointed to hear proceedings involving tamariki, they are not appointed just because they are Maori and, further, that they are properly trained and are suitable persons to act as Family Court judges.

12. In order to incorporate tikanga Maori, it will be important and necessary for all Family Court judges to have in depth training.

Quality, accessible information

13. The proposed information strategy should include a continuous seminar programme delivered for and targeted at those parts of our country in greatest need. That programme could be delivered by Family Court lawyers and judges. If judges are involved, that will help demystify the Family Justice System.

[1] This discretion could be exercised by the proposed Senior Family Court Registrar.

Counselling and therapeutic intervention

14. I strongly support:

14.1 The reinstatement of free s.9 counselling; and

14.2 Free counselling for children.

15. Q10: The three types of counselling are appropriate.

16. Q11: Counselling referrals should be able to be made by lawyers, doctors, hospitals and any other person or agency interacting with the public in the social service sector. And self referred counselling should be available.

17. Q12: I would be reluctant to see confidentiality waived, especially as that may deter people from undertaking counselling.

Parenting Through Separation

18. Q13: There should be the expectation that Parenting Through Separation (PTS) is attended.

19. Q14: The court should have the discretion to decline to hear an application in circumstances where it appears that attendance at PTS would be of assistance in either resolving the dispute or at least lessening the conflict.

20. In response to some criticism of the name of the programme – "Parenting Through Separation" – consideration might be given to re-naming it as, say, "Pathway Through Separation".

Family Dispute Resolution

21. I have already referred to the need to have one national provider and to bring FDR under the korowai (umbrella) of the Court; see paragraphs 4 and 5 above.

22. Q15: I agree with the idea of a rebuttable presumption.

23. Q16: The New Zealand Law Society and other professional bodies associated with Family Court proceedings should be mandated to ensure that their members are required to promote FDR and counselling processes generally.

24. Q17: Family Court Coordinators, Senior Family Court Registrars and Family Justice Service Coordinators should be mandated to refer to FDR if it appears that the process has not been engaged prior to or at the time an application is filed.

25. I refer to paragraphs 4 to 6 of my earlier submission to the Panel; they read as follows:

> "4. Article 12 of the United Nations Convention on the Rights of the Child (UNCROC) requires New Zealand to enable the child to "have a voice" in any judicial and administrative proceedings affecting him or her.
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> 5. A particular area where I consider that New Zealand is in breach of Article 12 is in the operation of the Family Dispute Resolution process under its 2013 Act (FDR). In FDR there is no formal mechanism whereby the child's views can be ascertained. That process is an "administrative [proceeding] affecting the child" (see Article 12.2); the child must therefore be given the opportunity to be heard. The United Nations Committee on the Rights of the Child in its concluding observations on the fifth periodic report of New Zealand, dated 30 September 2016, included the recommendation in paragraph 18 that the FDR Act be amended to ensure the right of the child to be heard in cases affecting him or her.
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> 6. The issue of guidelines to FDR suppliers by the Ministry of Justice in December 2016 (no doubt to answer the UN criticism) does not cure this ill. First, it should be mandated by the legislation and, secondly, there is no proper oversight of who the providers employ to speak for the child."

26. The second point (the issue of oversight) made at the end of this last paragraph is important; whoever is employed should be approved by the Court.

Legal advice and representation

27. Q18: There is no doubt in my mind that access to competent legal advice has to be of benefit to the Family Justice System. My experience tells me that parties who receive such advice prior to the issue of proceedings will be less likely to require the assistance of that system. And even if they do, there is a very good chance that the areas of dispute will be narrowed. In this context, it is important that parties are faced with a reality check and are dissuaded from having unrealistic expectations.

28. Q18: It is important that legal aid is made available for legal advice received out of court. It will be unfortunate if the opportunity to settle a dispute is lost just because one or both parties cannot afford a lawyer.

29. I suggest that a by product of this availability of legal aid will see an increase in the numbers of lawyers prepared to undertake this work.

Case tracks and conferences

30. I agree with the proposals noted in the three bullet points on page 24. It is perhaps worth noting that when I was the sole Family Court judge in Hawke's Bay, I encouraged the use of telephone conferences to avoid the need for counsel to travel between Napier, Hastings, Dannevirke and Waipukurau. I believe that this was successful. Apart from anything else, it reduced expense, either to the client or the legal aid fund.

Without notice applications

31. Q20: The mere fact that the number of without notice application has increased to about 70% since the 2014 reforms, due to applicants wanting legal representation, indicates that reinstating that representation will reduce the number of such applications.

32. Q20: I do not recall from my time as a Family Court judge there being very many, if any, without notice applications which were so without merit as to require the ability to impose sanctions.

33. Q21: There must be value in clarifying that parenting orders made without notice can be rescinded.

Triaging

34. Q22: As proposed on page 32, the initial triaging should be in the hands of the Family Justice Service Coordinator. Relevant to this topic are paragraphs 17 to 21 of my submission dated 6 October 2018 addressing the Early Intervention Process.

35. Q22: One of the original tasks of the Family Court Coordinator (originally called a Counselling Coordinator) was to maintain links with relevant services in the community, including the provision of training and advice. This should be reinstated. Such will also ensure that community services generally are alert to the appropriate services and the assistance which the Family Justice Service has to offer.

Complex cases

36. As the sole Family Court judge in Hawke's Bay at the time I was in the fortunate position of being able to manage all the cases that came before the four courts (Napier, Hastings, Waipukurau and Dannevirke). On those occasions I sat in “multi judge” courts, I was able to see the very great advantage that I and the Family Court had in Hawke’s Bay. Apart from the ability to closely manage cases, it avoided the inevitable multi handling of files by different judges, a great waste of time and resources.

37. Q23: It will be seen that I am in favour of triaging all applications (and this should not be limited to just those under COCA). Judges should be able to call parties and the counsel before the Court early in the process to enable identification and clarification of the issues and set an appropriate pathway ahead.

38. Q24: I agree that judges should have the discretion to direct a party to undertake a psychological or psychiatric assessment or an alcohol/other drug assessment. And it should be possible to draw an adverse inference should a party so directed decline to attend for such an assessment.

Cultural information in court

39. If cultural reports are to be better used it will be essential to increase the pool of those available to provide them. This is an issue which the Ministry of Justice must address urgently.

40. I would favour a relaxation of the threshold to be crossed before a cultural report can be obtained. And having the ability of the person reporting to speak in court will add value to the process; greater use of s.136 is to be proactively encouraged.

41. I suggest that both judges and lawyers will need training around the need and value of the use of ss.133 and 136.

A "new" role – Family Justice Service Coordinator

42. In what I might describe as "the good old days", the position of the Family Justice Service Coordinator was in effect filled by senior and experienced Family Court staff, many of whom had spent much of their time in the Family Court registry, particularly following the ability of staff to remain in one case area of the court's activities.

43. Giving this role a formal title will not only provide a good career option, it will also ensure that high quality is maintained, especially as I envisage that appropriate training will be provided.

44. Q. 28: It follows that I support the proposals noted at the foot of page 32 and the top of page 33.

45. However, I would envisage that to be fully effective, the Family Justice Service Coordinator will require support staff.

46. It may well be that there are a number of Family Court Coordinators around the country who could step into this role without difficulty.

A "new" role – senior Family Court Registrar

47. Q29: In my submission dated 6 October 2018 I supported the re-enactment of s.7B(1) of the Family Court Act 1980; see paragraphs 23 to 26.

48. Q30: In appendix 2 of that submission I attempted to identify those matters which were the kind of orders and directions I believed that the Senior Family Court Registrar should be able to make.

49. Q31: Again, in the past, senior Family Court staff would have been capable of fulfilling the role of the Senior Family Court Registrar. I am concerned that, with the passage of time and changes in employment policy, much of the expertise which such staff had has been lost. If the salary offered for such Registrars is realistic, it may be possible to recruit lawyers to fill the position. There would be a cost benefit in that, given the obvious saving of judicial time. Certainly, in-depth training will be required; such could be delivered by the judiciary and senior Family Court counsel.

Lawyer for child

50. Q32: I agree with the proposed new criteria, namely, that such be the same as that used in s.159 of the Oranga Tamariki Act 1989.

51. Q33: Training for lawyers for children has been offered by the New Zealand Law Society for many years. It should be compulsory for anyone wishing to be appointed to the panel of such lawyers to undertake the training and undergo ongoing professional development. It would be useful to explore the possibility of judges being involved in that training.

52. Q33. In my experience, it was not difficult as the presiding judge to decide who would and who would not be suitable to act as a lawyer for the child. A judge in each court should be responsible for ensuring compliance with the Practice Note and introducing the review each three years of those appointed to the role; I understand that this is (or had been) the usual practice.

53. I have no doubt that the drop in the number of lawyers who are prepared to do this work has had a great deal to do with the inadequate remuneration rates. While a case can be made for the rates to be higher than those for legal aid (given the responsibility of the task), I consider that it would be appropriate for the lawyer for child rate to be the same as the top legal aid rate as fixed from time to time. There is certainly no justification for it being any less.

54. Q34: A judge[2] should be given the discretion to direct an additional advocate with child development expertise to work together with the lawyer for the child in appropriate cases. I favour the child's lawyer being able to make an application to the court for that to be done.

Psychological reports

55. In view of the scarcity of report writers, it is clearly incumbent on the Ministry of Justice to do what it can to attract more. One way of doing this may be to have any complaints about the writer considered and ruled upon first by the presiding judge before it is able to be addressed further; the judge's findings are likely to influence the future of the complaint. Presumably a law change will be required if this proposal is implemented.

56. Qs35 & 36: Natural justice would seem to require that the report writer's notes etc be made available to anyone who is critiquing. Certainly, anyone providing a critique report should be approved under s.133. And a party obtaining a second opinion would be unwise to engage someone who is not s.133 approved.

57. Q37: I doubt if it is possible to lay down any hard and fast rules about when a report should be sought; this needs to be decided on a case by case basis. It could be a function exercisable by a Senior Family Court Registrar.

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[2] Again, this discretion could be exercised by the proposed Senior Family Court Registrar.

58. Q38: The threshold test should revert to what it was prior to the 2014 reforms; see s.133(6)).

59. Consideration should be given to the court being able to require a party to be the subject of a psychological or psychiatric assessment; see paragraph 38 above.

Costs

60. I agree with all the proposals noted at the foot of page 39 and FDR should be free to all parties (Qs 39 & 40).

The Integrated Court

61. Although this topic may not strictly be within the Panel's Terms of Reference, no review of the Family Justice System will be complete without considering it.

62. The Panel is referred to the paper attached to my email titled "One Court, One Judge, An Integrated Court System for New Zealand Families Affected by Violence" written by Zoë Lawton. This was funded by the New Zealand Law Foundation under a partnership agreement with the Ministry of Justice. And included as an Appendix is a short submission which I made to the Ministry of Justice in July 2017.

s 9(2)(a)

Telephone: s 9(2)(a)

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5 February 2019

APPENDIX

RESPONSE OF PAUL von DADELSZEN QSO TO THE DISCUSSION PAPER "ONE COURT ONE JUDGE: AN INTEGRATED COURT SYSTEM FOR NEW ZEALAND FAMILIES AFFECTED BY VIOLENCE"

1. I support the introduction into New Zealand's judicial system of the "One Judge One Court" integrated court.

2. An integrated court will simplify process, reduce duplication and increase efficiency. Most importantly, it will also reduce re-victimisation; the victim will not have give the same evidence twice - when the alleged perpetrator defends the criminal prosecution in the District Court and opposes the making of a protection order in the Family Court.

3. The integrated court should be presided over by specialist judges with the appropriate knowledge and awareness of the nature and dynamics of family violence.

4. Firm judicial management is required, with the one judge presiding throughout (including, where possible, future applications), as far as is possible. That one judge should manage all related issues between parties - domestic violence applications under the Domestic Violence Act 1995, any associated criminal prosecution, child care (day-to-day care and contact, care and protection), separation, property, maintenance and child support.

5. There are of course different standards of proof in the two jurisdictions, civil (family) and criminal – on the balance of probabilities in the former and beyond reasonable doubt in the latter. Experience establishes that the one judge will have no difficulty in applying those different standards to the separate components of the same hearing.

6. Management of cases will be assisted by ensuring that the court has dedicated and knowledgeable court staff.

7. An further advantage of an integrated court will be the ability to share information between jurisdictions. That must be automated via an appropriate computerised system.

8. In undertaking any research to establish what would be the “best practice” model for New Zealand, it will be important to ensure that any cost/benefit study is not limited solely to a financial one.

9. Pending any introduction of the “integrated court” or in the absence of such a court, all courts should operate a Family Violence Court. Such should be presided over by a Family Court Judge or a District Court Judge who has been specifically identified as having the necessary understanding and awareness of the nature and dynamics of family violence.

10. This response has been informed by my experience as a former District, Family and Youth Court Judge.

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