

+ *Appointment*

## Expert Group not consulted on Family Court proposals

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**Members of the Expert Reference Group established by the former Minister of Justice, Simon Power, to advise of Family Court reform have issued a statement saying they were not consulted on key proposals put forward by the Government to change the Family Court.**

The Chair of the Reference Group, Antony Mahon, says the Ministry of Justice has stated that proposals for reform of cases under the *Care of Children Act* (COCA) in the Family Court largely aligned with the proposals set by the group in its report to current Minister Judith Collins.

"We do not agree with this statement. We were not consulted on four key proposals in our discussions with the Ministry which, if implemented, will

potentially place adults and children at risk," says Mr Mahon.

"In cases where children are living in situations of violence and abuse, this will be harder to recognise. Hidden power and control dynamics in relationships will mean parents are intimidated into agreeing to settlements which disadvantage them or their children," Mr Mahon says. "Also there will be delays as the Court will not have the proper information needed for making decisions with the result that the conflict between parties will intensify and those cases where a parent is consciously alienating a child from the other parent will be harder to resolve."

"These are real risks for vulnerable parents and children whom the Minister wants to protect."

Mr Mahon said the group recommended a simplified court process with clearer documentation and simplified steps.

"These recommendations were made on the presumption that parents and children would continue to have access to legal assistance and those who were eligible for legal aid would receive it."

The Reference Group identified significant cost savings which could be made without putting children at risk, he said.

# Statement from Family Court Expert Reference Group

The following is the full text of a statement received from The Chair of the Expert Reference Group, Antony Mahon on behalf of members of the group who were:

Mr Mahon,  
Auckland,  
Barrister

Garry Collin,  
Christchurch,  
Barrister

Judge Vivienne Ullrich QC,  
Wellington,  
Family Court Judge

Professor Fred Seymour,  
Professor in Clinical Psychology,  
University of Auckland

Dr Suzanne Blackwell,  
Auckland,  
Clinical Psychologist

Jo Ann Vivian, Wellington,  
National Practice Manager,  
Relationship Services

Deborah Clapshaw, Auckland,  
Dispute Resolution Mediator

Jonathan Loan, Kaikoura,  
Chair of the New Zealand  
Association of Counsellors

Sharyn Otene,  
South Auckland,  
Barrister

## 1. Introduction

- 1.1 We constituted the membership of the Expert Reference Group established by the former Minister of Justice to advise the Ministry of Justice on reform of the Family Court.
- 1.2 We wish to comment on the statement in the Executive Summary of the Cabinet Social Policy Committee report that the proposals for reform of cases under the *Care of Children Act (COCA)* in the Family Court *largely align with the proposals in (our) report to the Minister of 27 April 2012*.
- 1.3 We do not agree with this statement. We were not consulted on four key proposals in our discussions with the Ministry of Justice.
- 1.4 The following four proposed reforms on which we were not consulted, will, if implemented, potentially place adults and children at risk:

- funding of family dispute resolution;
- restriction on the right of parties to legal representation;
- restriction in the ability of a judge to appoint a lawyer for child other than in serious cases; and
- limits on the ability of a judge to make interim orders.

## 2. Family Dispute Resolution (FDR)

### Our Recommendations

- 2.1 We recommended a form of FDR which included:
  - (a) A first step of compulsory parent education.
  - (b) Practice by professionals with specialist experience and subject to Ministry appointment and audit.
  - (c) Completion of FDR be a pre condition to filing in the Court except in cases of urgency and risk.

### The Proposed Model

- 2.2 Parent education will continue to be available to parties and parent education will be a compulsory first step in any dispute.

- 2.3 A model of FDR will be compulsory for parties who will be expected to fully fund the \$897 cost for each case. Those on lower incomes who would be eligible for legal aid will be exempted. We were not consulted on the proposal that parties meet the full cost of FDR. Our recommendations were made on the presumption that parties would make a contribution to costs of professional services but on the basis FDR would be predominantly funded by the Ministry.

### Risks

- 2.4 Parties will be unable or unwilling to access FDR due to the cost involved.
- 2.5 Disputes will not be resolved and/or become more entrenched and children will then be at greater risk.

## 3. Representation of parties in *Care of Children Act* cases

### Our Recommendations

- 3.1 We recommended that Court processes were simplified by the use of clearer documentation and simplified steps in the Court process.
- 3.2 We made our recommendations in respect of the in-Court processes on a presumption that parties would have access to legal advice and legal representation with the consequence that those parties eligible for legal aid would be eligible for this professional service in a grant of legal aid.
- 3.3 That presumption is supported by a submission from law schools throughout the country. The submission identified research which has established the essential role family lawyers play in cases, especially those involving the more vulnerable.

### The Proposed Model

- 3.4 It is proposed that cases under the act are categorised as:
  - (a) Without notice – this track to be used for urgent cases and in which parties are entitled to legal representation;
  - (b) Simple – to deal with simple or single issue matters on which the parties are required to attend in Court without lawyers and where the Judge will have a

broad discretion as to the way in which evidence is heard and decisions are made;

- (c) Standard – this is described as a track for cases with multiple or more serious issues. In these cases parties will only be entitled to legal representation if a settlement hearing has not resolve the issues in the case and the matter proceeds to hearing.

- 3.5 The Cabinet Committee notes that cases which are not resolved pre-Court through the FDR processes will be the most intractable and the proposal to restrict the right of legal representation is *a significant change to the operation of the Family Court*.

- 3.6 We were not consulted on a proposal to restrict the right of legal representation.

### Risks

- 3.7 Most Family Court cases involve high stress to parties and for a wide variety of reasons parties struggle to advocate for themselves in the legal process. The risk to vulnerable adults and children from a limited right to legal representation will be significant because in the absence of legal representation:
  - (a) it will be more difficult to identify the “hidden” risks in what may appear to otherwise be a straightforward case;
  - (b) cases will be more, rather than less, adversarial;
  - (c) it will be more difficult to focus on the relevant factual and legal issues in cases and where there is risk for adults and children; and
  - (d) the power imbalance between parties which permeate cases under this act is more entrenched if parties do not have legal representation.
- 3.8 There will be great direct and indirect costs to the public purse and also to society generally, if there is a restriction on the right of a party to legal representation (and with it to a grant of legal aid for that representation) because:
  - (a) There will be additional administrative resource required in Court registries to deal with enquiries by parties by phone and in person.
  - (b) Family Court Judges will need to spend longer on each case to identify the issues, risks and optimum outcomes.
  - (c) There will be more final hearings because parties will not have had the assistance of a lawyer to assist in negotiation of a resolution.
  - (d) Hearings will be longer as by then the conflict will be more entrenched and the options for positive outcomes more limited.

#### 4. Reduction in Children's Representation

##### *Our Recommendations*

- 4.1 We made the following recommendations regarding representation of children:
- (a) Representation of children continue to be by a specialist lawyer for child.
  - (b) The role of lawyer for child be clearly defined as a role to advocate for an outcome in cases for children in their welfare and best interests informed by their views.
  - (c) A lawyer for child be appointed later in most cases, preferably after completion of a judicial or settlement conference presided over by a judge unless in the view of the judge, it was necessary that a lawyer be appointed for a child at any earlier stage.

##### *The Proposed Model*

- 4.2 It is proposed that the Court will **only** be able to appoint a lawyer for child where a child needs legal representation because of serious issues, such as violence and only after a defence has been filed. (There will be guidance on what constitutes a "serious" issue to include allegations of child abuse, alienation of a parent, mental health issues or drug or alcohol abuse).
- 4.3 We were not consulted on the proposal to restrict the ability of a judge to appoint Lawyer for the Child to only serious cases.

##### *Risks*

- 4.4 The proposal will place children at risk because:
- (a) The Court will not have independent information on the views of that child nor importantly on the contextual issues

relevant to those views and options for resolution of the case.

- (b) In our experience it is often only after a lawyer has been appointed for a child that the underlying issues in the Court are properly identified so that the Court resource can be most effectively focused.
- (c) Cases will become more entrenched, especially when this restriction on representation is added to the lack of representation of parents in cases compounded by the intended restriction on the ability of a Judge to seek a report from a child psychologist. Entrenched conflict poses the greatest risk to children.

#### 5. Interim Orders

##### *Our Recommendations*

- 5.1 We recommended that the ability of a judge to make Interim Orders serves a usual and essential purpose in Family Court proceedings and must be retained.
- 5.2 We saw Interim Orders as essential for safety reasons alone as they provide an ability to intervene on a temporary basis in cases and thereby reduce the conflict between the parties while long term circumstances of the family are identified and addressed.
- 5.3 We recommended that unless a further step was taken or the Court directed otherwise when making an Interim Order that all Interim Orders become final after a 12 month period.

##### *The Proposed Model*

- 5.4 Cabinet has recommended that all Orders are Final Orders.
- 5.5 We were not consulted on this proposal.

##### *Risks*

- 5.6 Such a restriction on the ability of a Family Court Judge to make an Interim Order has the potential to:
- (a) Entrench arrangements for children which may have been appropriate for a short period which become inappropriate and in some cases place the children at risk (especially where the order entrenches the conflict between their parents).
  - (b) Make Final Orders less durable and more necessary to revisit.
  - (c) Result in outcomes inconsistent with the welfare and best interests of children.

#### 6. Conclusion

- 6.1 In our consultation with the Ministry of Justice and preparation of our report we recognised the overriding fiscal imperative driving the reform of the Family Court and identified changes in the pre and in Court processes which in our view would lead to a noticeable decrease in costs of funding the Family Court.
- 6.2 We noted that the case management data collected by the Court identifies the areas where costs have increased but not the cause of these costs increases. For this reason we saw significant risk of adverse unintended consequences if substantial reform is introduced to achieve short term savings without adequate data or analysis.
- 6.3 In each of the four above areas it is our view that the substantial reform proposed will result in adverse unintended consequences placing the children and vulnerable adults who are involved in the family justice system at risk.