NEW ZEALAND LAW SOCIETY

NZLS EST 1869

# REVIEW OF THE FAMILY COURT

***March 2012***

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## REVIEWING THE FAMILY COURT

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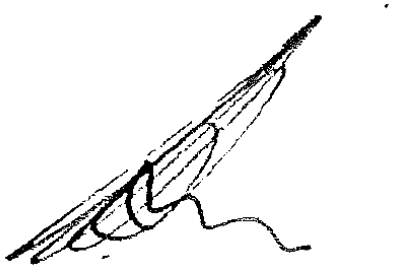
**Preface**

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Public Consultation Paper "*Reviewing the Family Court*" (the review). It is noted that the purpose of the review is to ensure the Family Court is "*sustainable, efficient, cost effective and responsive to those children and vulnerable adults who need access to its services".*

The Law Society's Family Law Section (Section) has prepared this submission on behalf of the Law Society. The Section has existed as a group with voluntary membership since 1997 and represents 975 lawyers who identify themselves as practising in the area of family law.[1]

At a symposium organised by the Section held at Parliament in June 2011 (the symposium), the Section presented papers and participated in a discussion about effective operation of the Family Court. The symposium involved representatives of all professionals working with and in the Family Court, and Ministry of Justice (Ministry) officials. The symposium papers are very relevant and should inform the review.[2]



Jonathan Temm
**President**

Antony Mahon
**Chair, Family Law Section**

1 Family Law Section membership as at 28 February 2012.
2 The symposium papers are available on request from the Family Law Section.

## PART 1

## EXECUTIVE SUMMARY OF RECOMMENDATIONS

### 1. Pre-commencement requirements

1.1 The completion of a parent education course (via an enhanced version of the current *Parenting Through Separation* programme, based on successful models overseas and the North Shore pilot) should be encouraged as the first step prior to any Family Court proceedings (except urgent and risk applications) being commenced.

1.2 A review of the Family Court Co-ordinator role needs to be undertaken. There needs to be adequate support for the role, and for the effective first stage triage of cases. The Family Court-Co-ordinator becomes a gatekeeper ensuring proceedings are not commenced before the prerequisite steps of parent education and alternative dispute resolution (ADR)/mediation are completed.

### 2. Pre-Court Alternative Dispute Resolution/Mediation

2.1 A comprehensive review of counselling, mediation and EIP mediation is needed.[3]

2.2 Engagement in some form of ADR should be a compulsory first step prior to filing an application in Court (except in cases of risk or urgency). The different forms of ADR, whether counselling, conciliation or mediation, should be capable of adapting to a new ADR framework which is clearly defined by statute and rules.

2.3 Parties should be permitted to choose the form of ADR most appropriate for their needs.

2.4 The Law Society does not currently support children being involved in mediation/counselling regarding their care arrangements as involvement carries particular risks and further research is needed before such involvement is considered.

### 3. Jurisdiction of the Family Court

3.1 All of the current jurisdiction of the Family Court should be retained. The Family Court should be given a limited jurisdiction to deal with relationship property matters involving family trusts.

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[3] While there are several international models, there is no agreement amongst professionals on a model which could be part of the ADR process in New Zealand. Nor are there sufficient suitably qualified professionals to undertake such a role.

3.2 Consideration should be given to reintroducing the concurrent jurisdiction of the High and Family Courts for relationship property proceedings. There should be a lower threshold required to transfer proceedings from the Family to the High Court, especially when the case involves a complex family trust.

3.3 The Law Society recommends that the current level of openness and access to the Family Court is retained.

**4. Statutory amendments**

4.1 Targeted legislative amendments are recommended to the following sections in the:

- Care of Children Act 2004 (COCA):
  - s 7 – *Lawyer for the Child*

    The current process whereby the role of Lawyer for the Child is a combination of statutory provisions (s 7 of COCA), practice notes, best practice guidelines and different local procedures is unsatisfactory. The recommendation is that s 7 of COCA should be amended to clarify that the role is to advocate for a "welfare and best interests" outcome for a child, informed by the views expressed by that child.
  - s 31 – *Guardianship of Court*

    To ensure protection of children the Court needs the power to appoint a guardian of its own motion where appropriate.
  - *Care of Children Amendment Act 2008 – provisions dealing with counselling and mediation to resolve disputes*

    The Care of Children Amendment Act 2008 has been enacted but the provisions that provide for counselling for children (limited to the most vulnerable children) after the making of a final order are yet to be brought into force. It is essential these provisions are brought into force.
  - s 57 – *Interim orders*

    Interim orders under s 57 should automatically become final after 12 months if the parties take no further steps.
  - s 60 – *Violence hearings*

    A review of s 60 and its related sections is required.
  - ss 132 and 133 – *Specialist Reports*

    The Court's discretion to seek a specialist report is a valuable tool in the identification of vulnerable children and the steps required to protect them. A statutory amendment to ss 132 and 133 of COCA is recommended to ensure the

discretion is exercised more consistently, and only when a report is *necessary* for the proper determination of a case.

- ss 140 and 141 – *Interlocutory issues*

  The Court needs a greater ability to dismiss applications and to require a higher threshold for repeat applications. Sections 140 and 141 of COCA should be amended accordingly.

- Family Proceedings Act 1980:
  - ss 9 to 12B – *Pre-Court and Court counselling*

    Sections 9 to 12B need to be reviewed as part of an overall review of ADR processes. Retention of a counselling option is favoured but on a discretionary rather than a mandatory government-funded basis.

## 5. Family Courts Rules 2002

5.1 Targeted amendments would ensure that Rule 175[4] conferences follow a more prescribed and more regionally consistent procedure, particularly in COCA cases. The recommendation is that there is proper application of Rule 175 to provide the Court with essential evaluative and dispute resolution tools to:

- identify the nature of the case and the extent to which its complexity requires case management;
- identify the substantive evidence available to the Court and the further evidence required to enable a proper determination to be made;
- in cases involving allegations of violence, assist in screening allegations relevant to the on-going parenting of children and those that can be managed in ways other than the restriction of contact between a parent and the child;
- identify the need for specialist reports;
- consider the appointment of a Lawyer for the Child (if an appointment has not already been made);
- require the parties to be present;
- require the filing of a memorandum three working days prior to the conference; and
- clarify that interim orders may be made by the Court at the conference and if a party is not present, final orders can be made on a formal proof basis.

[4] Rule 175 of the Family Courts Rules 2002.

*(a) Court Processes*

5.2 The Law Society recommends that the Evidence Act 2006 should apply unless the interests of justice make it appropriate to receive what would otherwise be inadmissible evidence.

*(b) Contents and form of Applications/Affidavits*

5.3 Rules 48 and 49 need to be reinforced so that there is a greater obligation on the parties to identify the nature of their dispute, the remedies sought and the reasons for seeking such remedies both in applications and supporting affidavits.

5.4 Rules regarding the filing of affidavits should be strengthened to ensure that evidence is introduced by affidavit in chief, affidavit in response and affidavit in reply.

5.5 The use of more targeted applications and questionnaire-type affidavits should be given careful consideration.

5.6 A clearer pathway for applications from entry into the Court to exit is needed. The potential model at paragraph 220 (diagram 4) of the review, together with addition of a well-defined urgent track similar to the EIP urgent track model is supported in principle.

*(c) Screening/Triage*

5.7 All applications should be defined (*triaged*) into categories of "simple", "standard" or "urgent" by a Family Court Judge following the filing of a Notice of Defence. This will ensure that the correct track for proceedings is identified early in the process, with options for resolution of "simple" cases in a more limited hearing process.

*(d) Conferencing/Case Management*

5.8 There need to be fewer *events* for cases. Each event costs the parties and the Court without always achieving progress on the substantive issues. The Law Society recommends the reduction of several events as set out in detail in the submission (see Rules/Procedural Proposals).

(*e) Modernising the Court*

5.9 A review of the uses of modern technology in the court system should be undertaken as technological advances may have fiscal benefits.

## 6. Practice Notes

6.1 Practice Notes should be limited where possible to the relationship between the Court and the professionals engaging with it. Court procedure should be regulated by the Family Courts Rules 2002 (Rules).

## 7. Filing Fees and Court Costs

7.1 In principle the Law Society supports the introduction of appropriately set filing, setting down and hearing fees in some proceedings. Such fees may be appropriate in relationship property, estate and testamentary promises claims.

7.2 The Law Society does not support fees in matters related to children and vulnerable adults.

7.3 If an applicant would suffer undue financial hardship if required to pay a fee there could be a provision for deferment of the payment in relationship property proceedings until funds were available to the applicant from a decision in the proceedings.

7.4 No fees should be required when urgent orders are sought.

7.5 Where it would be inequitable for payment to fall onto one party the Court should have a discretion to direct a contribution to fees by the other party.

7.6 The Court must retain sufficient discretion to ensure that parties' contributions towards the costs of Court-appointed professionals does not undermine the Court's ability to carry out the purpose of the statute, particularly in cases involving children.

## 8. Lawyer for the Child

8.1 Lawyers, rather than other professionals, should continue to represent the views of children as part of the role of advocating for the welfare and best interests of the child. As a protective factor for children, it is essential that the Court retains the discretion to appoint a Lawyer for the Child at an appropriate stage in some proceedings.

8.2 Appointment prior to the filing of a Notice of Defence or any preliminary conference in a case should not normally be required but discretion for an earlier appointment in appropriate cases must be retained.

8.3 The Law Society recommends that s 7 of COCA be amended to more precisely define the role of Lawyer for the Child.

8.4 The Law Society does not support amendments to s4 of COCA to reduce the ability of the Court to address the needs of the particular child and his particular circumstances in a case.

8.5 The enacted provisions of COCA which provide for counselling for children after the making of a final order are yet to be brought into force. This counselling is limited to the most vulnerable children and it is essential the provisions are brought into force.

## 9. Professional Standards

9.1 An improvement in the training and standards of all professionals involved in the Family Court is required, whether those professionals are judges, lawyers, psychologists, counsellors, mediators or social workers.

## 10. Legal Aid

10.1 In a separate process, the government is addressing cost pressures in legal aid, particularly family legal aid.[5] This is manifested, in part, in the Legal Assistance (Sustainability) Amendment Bill 2011 which brings into sharp focus the issue of the role of the state in family disputes. The Law Society cautions against over-optimistic claims for the fiscal benefits of cutting legal aid costs.[6]

10.2 It is likely that restrictions on the availability of legal aid will increase the number of self-represented litigants. Early indications from the Ministry's Legal Services Unit show that many family lawyers who were legal aid providers as at 31 December 2011 have not reapplied for legal aid provider status in accordance with the Legal Services Act 2011. As a result the pool of family legal aid lawyers available to provide legal representation and advice has markedly reduced.[7] That will have consequences (difficult to quantify in advance) for the efficient and cost-effective operation of the Family Court.

10.3 The Law Society recommends that the proposed amendments in the Legal Assistance (Sustainability) Amendment Bill 2011 are deferred until the recommendations of this submission are costed.

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5 See paragraph 11 of the review.

6 See *Unintended Consequences: The Cost of the Government's Legal Aid Reforms*, a paper by Dr Graham Cookson of Kings College, London, on the comparable UK reforms.

7 From 2,070 at 31 June 2010 and 2,095 at 30 June 2011 to 1,610 at 31 December 2011 - a drop of approximately 20%.

## PART 2
## INTRODUCTION

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### 1. Current Position

1.1 The Law Society acknowledges the fiscal imperatives at the heart of this review.[8] Funding reductions must be exercised in a way that maintains a functional and effective Family Court. The Law Society has identified changes which will achieve both significant fiscal savings and improve the practice of all professionals working in and with the Family Court. These changes can be made with targeted rather than substantive legislative change.

1.2 The review is an opportunity for all those working in the Family Court, including judges, lawyers, psychologists, social workers and other specialists, to critically assess the existing processes, and their roles, and to identify areas for improvement. The exercise of greater discipline, refinements to existing systems and procedures, and an adequately resourced Registry, would enable the Family Court to serve the purpose for which it was established, in a fiscally sustainable manner. In this way the concern of the government about the cost of sustaining the Family Court can be addressed.

### 2. Background

2.1 Family law in New Zealand has lacked a coherent and easily discernible policy framework. Other than the initial creation of the Family Court as a consequence of the 1978 Report of the Royal Commission on the Courts (the Beattie Commission), subsequent reforms have tended to be ad hoc.

2.2 The Law Society has strong concerns about the adequacy of the review and its ability to inform substantive change of the Family Court.

2.3 The present review creates a risk of continued piecemeal changes and reforms without proper consideration of the consequences, including unintended consequences. Family law reform is not straightforward and social realities often complicate the fulfilment of reform objectives.

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[8] The self-same issue prompted the review which produced the Boshier Report in 1993 – regrettably few of its recommendations were adopted.

2.4 The experience of 30 years of jurisprudence, which has emerged from the Family Court since its creation, has shown it to be a jurisdiction that has provided certainty in process and outcomes. The Family Court is a repository of specialist expertise and care needs to be taken that this is not lost. Consideration is needed before changes are introduced.

2.5 Some cases which come before the Family Court are complex and time-consuming. It is important to understand the nature of Family Court disputes, many of which are infused with non-legal, personal and emotional issues which are not comparable to other civil disputes. The review does not give adequate weight to the vulnerability of *all* children who are caught up in family disputes (not just those children whose parents are involved in domestic violence proceedings) and the vulnerability of many adults. "Vulnerable children", as well as *"vulnerable adults"*,[9] must have access to the necessary legal mechanisms to protect their welfare and safety.

2.6 Reform cannot be at the expense of the state's obligation to its citizens to provide an independent and appropriately resourced legal forum for the resolution of family disputes. It is important to remember that around 40% of New Zealanders will be affected in one way or another by family law.[10] Equally important is that only 15.97% of parenting cases require a decision to be made by a judge. This demonstrates that the funding of counsellors, psychologists, mediators and lawyers is money well spent in the other 84% of cases.

## 3. What is the Purpose of the Court?

3.1 One of the primary purposes of government is the maintenance of peace and order within the community by settling disputes between citizens or citizens and the state according to law. In New Zealand the responsibility of this purpose is vested in the courts.

3.2 To carry out this role the courts must be independent of the Executive and Parliament, be sufficiently resourced, and have an appropriate organisation and structure. The courts must, according to the judicial oath of allegiance, "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". The same concepts are inherent in the principle of the rule of law to which this country subscribes.[11]

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9 Defined in footnote 1 of the review, page 7.

10 Based on estimates in *The Australian Family Law System: Better Access to Justice*, The Inaugural Family Law System Conference, 19 to 20 February 2009, Canberra.

11 See paragraph 243 of the Beattie Commission.

## 4. Social Agency or Court of Law?

4.1 The Family Court as created in 1980 was very much a creature of its time, reflecting clear social anxieties and concerns. What is not quite clear with hindsight is what function it was designed to perform. Was the Family Court to be a court of law or a social agency?

4.2 Legislation enacted at the time (the Family Court Act 1980, the Family Proceedings Act 1980 and the Guardianship Amendment Act 1980) clearly reinforced the view that the Family Court had a dual role. Subsequent legislation, including the Children, Young Persons and their Families Act 1989 (the CYPTF Act) and COCA, has been to the same effect.

4.3 To a large extent this debate and fundamental ambiguity remains unresolved today.[12] The Beattie Commission adopted the view of the Ontario Law Reform Commission that:[13]

> *"By their very nature Family Courts have a twofold function, judicial and therapeutic, and there is room for both to operate."*

4.4 This dual function exasperates some. The late Roger Kerr of the Business Round Table articulated that exasperation in July 1998 in the following terms:[14]

> *"Perhaps the most astonishing thing about the legal system is that there seems to be no consensus about what it is for. Indeed there is not just lack of agreement but two radically opposed views. One is that the role of the Courts is to decide disputes brought before them by parties in accordance with principle and precedent from the pre-existing body of law. The other view is that the role of the Courts is to make social policy decisions which create fair outcomes and balance competing interests."*

4.5 While those comments were specifically directed to the courts whose decisions have commercial ramifications, they are of equal relevance to the Family Court.

4.6 Attached at Appendix 1 is Chapter 1 of an *Introduction to New Zealand Family Law in the 21st Century*,[15] which provides a useful overview of the dual role of the Family Court and the nature of family law. The Law Society considers this deserves careful reading in the context of the present review.

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12 As reflected in paragraph 208 of the review.
13 See paragraph 479 of the Beattie Commission.
14 As quoted in The Independent on 8 July 1989.
15 Above, no 11 – reproduced with the kind permission of the publishers.

4.7 The underlying question posed by the review is: what is the function of the Family Court? Can it perform the dual function favoured by the Beattie Commission? And, if so, should it perform both functions? In short, is the Family Court an elaborate and expensive apparatus for resolving human dilemmas inappropriately grafted onto the legal system? The Law Society does not consider this to be the case. Nor does it accept the proposition that the Family Court is inappropriately *"trying to deal with issues best addressed by other agencies"*.[16] There is no evidence to support this proposition. In fact, s 19 of the CYPTF Act provides an avenue for the Family Court to channel care and protection maters into the Children and Young Persons Service where the resources of that agency might be seen as a more appropriate means of addressing issues, but there is no evidence that this has either moved work away from the Family Court or produced more effective outcomes.

4.8 Existing systems and procedures can, with the exercise of greater discipline, serve the purpose for which the Family Court was established. The existing Family Court legislation and its procedures can, with some targeted and non-substantive amendments, establish a greater discipline amongst its professionals (judges, lawyers, psychologists, mediators or social workers). This, together with a properly resourced Registry, would mean the Family Court can serve the purpose for which it was established, in a fiscally sustainable manner.[17]

4.9 To some extent the Family Court has become part of what has been described as a "new generation of problem-solving courts",[18] addressing problems as much social and psychological in nature as legal. Therapeutic jurisprudence has taken over from the more traditional function of a court. The principal task of therapeutic jurisprudence is to identify and empirically examine relationships between legal arrangements and therapeutic outcomes.[19] It leads to "involved judging" with judges and courts assuming a stronger administrative, protective or rehabilitative role towards those appearing before them.[20] It involves a collaborative, interdisciplinary approach to problem solving in which the judge plays a leading role. The Special Circumstances Court being trialled by Judge Tony Fitzgerald in Auckland is a manifestation of such a court, as is the Alcohol and Other Drug Treatment Court pilot to be established in Auckland. The Family Court also reflects that trend.

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16 See paragraph 208 of the review.

17 See Rule 3 of the Family Courts Rules 2002 which sets out the purpose of the rules to make it possible for proceedings to be dealt with as fairly, inexpensively, simply and speedily as is consistent with justice and in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.

18 Warren Brookbanks, *Therapeutic Jurisprudence: Implications for Judging* (2003) NZLJ 463.

19 Ibid.

20 Ibid.

4.10 With hindsight, the Family Court is not quite what the Beattie Commission envisaged. Fundamental to the vision of the Beattie Commission was the incorporation of well-coordinated counselling services designed to highlight and strengthen the therapeutic aspect of the Family Court's function.[21] A National Director of Support Services was envisaged as was a "reception centre" carrying out functions comparable to that of an accident and emergency centre at a public hospital. This reception centre was envisaged as being a place of first resort when advice and help were needed to cope with serious family problems (in contemporary terms a "triage" centre). The function of the reception centre would be to define the problem, classify the problem and make appropriate referrals. Such referrals were not necessarily or primarily to be made to lawyers. The overriding goal was to avoid litigation and to encourage discussion and resolution of the problem by the parties themselves.

4.11 The role of the lawyer was envisaged to be very much a secondary role because of this comprehensive pre-court intervention.[22] The provision by the Family Court of Australia to enable free, voluntary and confidential mediation services reflects this model. So does the recommendation of the Boshier Report[23] that a separate and distinct Family Conciliation Service, in which the primary dispute resolution method was to be mediation, be established in New Zealand. The recent Family Justice Review in the United Kingdom (the UK review) recommends the creation of something very similar to what was envisaged by the Beattie Commission – a stand-alone executive agency labelled "The Family Justice Service".

4.12 A feature of these proposals is an effective "triage" system designed to divert away from the formal Court process those matters amenable to resolution in some other way, thereby enabling meritorious and genuine claims to be heard more quickly and resolved earlier.

***Recommendation***

The Law Society believes there is considerable merit in establishing an effective "triage" system as a means of confronting some of the issues identified in the review.

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21 See paragraph 484 of the Beattie Commission.

22 The failure to embrace this model was the subject of trenchant criticism by Judge Inglis QC in the 1995 FW Guest Memorial Lecture (1995) 8 Otago Law Review 301.

23 A review of the Family Court, April 1993 – referred to as the Boshier Report, page 52.

## 5. United Kingdom

5.1 As mentioned, the United Kingdom has initiated a Family Justice Review (the UK review).[24] The interim report, published in March 2011, was generally well received as it was comprehensive, considered and took into account evidence from research.

5.2 The UK review embraces what it calls "the Family Justice System" as a whole and extends its reach more widely than the New Zealand review. (It is important to remember that while the United Kingdom family law system has many similarities to New Zealand it is not in all areas directly comparable).[25]

5.3 The Law Society considers that the New Zealand review would have benefited from the wider approach taken by the United Kingdom. With hindsight, limiting matters to a review of the Family Court is dealing with only part of a broader picture.

5.4 The UK review identifies and addresses many of the same issues involved in the New Zealand review – delay, cost, complexity of organisational structure – and emphasises, as a general proposition, that non-litigation options, such as ADR, are likely to be more effective than litigation. It also emphasises training and professional development of lawyers.

5.5 Insofar as there is common ground between the UK review and the New Zealand review, delay is highlighted in both as a central, if not necessarily the central concern. Both reviews stress that a child-centred approach be adopted and, in particular, identify a need to make effective and appropriate provision for children's views to be considered. There is also strong emphasis on parental education. Both the New Zealand and the United Kingdom reviews suggest a simplification of court processes using some form of "track" system. The Law Society agrees and believes that this is desirable.

5.6 The UK review draws a clear distinction between "public law" and "private law" issues. It may have been helpful if the New Zealand review had done likewise.

5.7 The UK review, and its interim and final reports, was enhanced by the fact that the review was not undertaken by the UK Ministry of Justice alone but by an independent, representative group of relevant professionals, with practical experience of court processes.

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[24] Whose deliberations extended over a significantly longer period than that provided for the current review. The final report was issued on 3 November 2011.

[25] The proposal for a "Family Justice Service" as a stand-alone executive agency in addition to the Courts and Tribunals services is something particular to the United Kingdom system. The UK review also focussed on proposals for judicial education, leadership and culture and places considerable emphasis on the efficiency and effectiveness of pre-Court parenting agreements.

5.8 Importantly, drawn from the UK review are the following principles:

- The desirability of judicial continuity.
- The desirability of judicial specialisation.
- The desirability of a single Family Court with a single point of entry.
- The greater use of technology.
- The value of parenting agreements.
- The value of parental education.

5.9 The model promoted by the UK review reflects, in many aspects, a model not dissimilar to the current New Zealand Family Court. It would be ironic if, at a time when the admirable qualities of the New Zealand Family Court structure were being adopted and adapted by comparable jurisdictions, changes as a consequence of this review substantially diminished those qualities here in New Zealand.

**6. Private Law – Public Law**

6.1 Returning to New Zealand, the review makes a clear distinction from the outset[26] between the need to protect the interests of children and *"vulnerable adults"* and the use of the Family Court for resolution of private disputes (primarily under COCA and the Property (Relationships) Act 1976 (PRA)). In particular it identifies COCA matters as a *"significant driver of Family Court costs and activity"*[27] and correctly identifies private parenting disputes as making up the bulk of the Family Court's workload.[28]

6.2 Another way of viewing this is to separate out the Court's "protective" jurisdiction (care of children and vulnerable adults, as defined, and CYPTF Act proceedings) (public law) from the balance of the existing jurisdiction (private law). Drawn from Table 1 from Appendix 6 of the review, the distinction is almost even at approximately 50% private law and 50% public law.

6.3 Proceedings under the Domestic Violence Act 1995 (DVA) frequently (but not always) are accompanied by proceedings under COCA. Where domestic violence is involved the line between public and private law becomes blurred. Many COCA proceedings could be seen (as can DVA proceedings) as constituting "care and protection" matters which if removed from the

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[26] See paragraph 1 of the review.
[27] See paragraph 3 of the review.
[28] See paragraph 4 of the review.

"private law" forum could well find themselves manifesting in the more rigorous "public law" forum.[29] Simplistic distinctions are not a sound basis for reform.

**7. Nature of Dispute**

7.1 In designing and sustaining a process for the resolution of disputes between people it is necessary first to identify the nature of the dispute. As noted already, disputes which fall under the umbrella of family law are frequently infused with many non-legal personal and emotional issues.[30] It is altogether too simplistic to endeavour to address this by seeking to shear such characteristics from the dispute and then devise a forum to address the shorn beast.

7.2 Disputes that arise from family breakdown and/or dysfunction are inherently different from disputes that come before the courts in other jurisdictions. Disputes between creditors and debtors are necessarily different in nature from disputes between employers and employees. The essential relationship between the parties in each of these disputes is different. The relationship between the manufacturer of a contaminated soft drink and the eventual consumer *(Donoghue v Stevenson)*[31] is vastly different from the relationship between a couple who once committed themselves emotionally to a long-term relationship in the nature of marriage and had children together.

7.3 Unlike other jurisdictions, in cases concerning violence and the parenting of children, the Family Court is required to make predictive assessments of future behaviour rather than simply findings of fact on past events. This is a fundamental distinction between the Family Court and any other jurisdiction.

7.4 By treating relationship property disputes as comparable to debt collection (and thus amenable to resolution within the general jurisdiction of the District Court) there is a risk of overlooking the central nature of the dispute.

7.5 While research shows ADR undertaken by professionals with appropriate specialist training and experience can be effective, not all Family Court issues are capable of resolution at mediation or other modes of ADR.[32] The Law Society does not accept that an application to the Court *"should be the very last resort"*.[33] The ability to apply to the Court for relief and

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29 For example, see s 19 of the CYPTF Act.
30 See paragraphs 36 and 151 of the review.
31 *Donoghue v Stevenson* [1932] All ER Rep 1.
32 J.H Wade "New and Recycled Services by Family Lawyers - Responding to a World of Change." (1997) 11 Australian Journal of Family Law at line 66.
33 See page 40 of the review.

determination should be governed by the nature of the dispute and type of issues to be resolved.

## 8. Openness in the Family Court

8.1 The review questions whether "opening" up the Family Court would increase transparency and accountability and encourage resolution of disputes outside court.[34] The question is asked in the context of concerns expressed about the continuing "sustainability" of the Family Court.[35]

8.2 A useful outline of the reasons why proceedings in the Family Court are restricted in terms of openness to the population at large and in respect of reporting of proceedings is given by Judge McCormick in *A v R [2003] NZFLR 1105.* Although that case was decided under the Guardianship Act 1968, it remains relevant given what is aptly described by Judge Inglis QC as the Family Court's "protective jurisdiction".[36] In summary, the reasons are:

- many family matters involve highly personal or embarrassing information;
- there is a public interest in ensuring that such matters remain in the private domain as opposed to the public;
- children are especially vulnerable and publicity can be especially harmful to them;
- there may be a reluctance for parties (and witnesses) to give evidence if proceedings can be reported (and identification results); and
- family matters are best conducted in an informal setting (without the public wandering in and out).

8.3 The question of openness in the Family Court was carefully considered by the Commission in its report *"Delivering Justice for All"*.[37] The Commission, in its opening lines (chapter 8.1), proceeded on the premise that the "principle of open justice is a long-standing buttress of legitimate Court systems, and is fundamental to New Zealand's system of justice". That principle underpins the ability of the public to go into a court and view the proceedings, and the right of the news media to report the proceedings and to have access to court documents.

8.4 The Commission then notes the four primary reasons for limiting the openness of Court proceedings.[38] These are:

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[34] See paragraphs 82 to 85 of the review.
[35] See paragraph 85 of the review.
[36] See above, footnote 11.
[37] *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals*, Law Commission Report 85, March 2004.
[38] See paragraph 5 in Part 8 of *Delivering Justice for All*, ibid.

- protection of the vulnerable, including children and victims (thus including both the Family Court and the District and High Courts in their respective criminal jurisdictions);
- the administration of justice (for example the need to ensure the fact of a fair trial);
- commercial secrecy; and
- overriding privacy interests (which could include cases involving children should the interests of children be seen as deserving privacy, and cases involving families if there was perceived to be a public interest in providing families with privacy when disputes arise which require resolution by a court).

8.5 The Commission observed that most restrictions on openness occur in the Family and Youth Courts.[39] The Commission noted that most proceedings in the Family Court involve children and that proceedings in that court (whether they involve children or not) are more intimate and emotionally charged than most others in the court system.[40] Proceedings are often therefore "very contentious".[41] Given that society places a "high value" on protecting children, that is the "starting point" for keeping family disputes private.[42]

8.6 This, in the Commission's opinion, constituted a valid ground for limiting the principle of openness in respect of court proceedings.[43] It also reflects international conventions that accept that there may be limits on the extent to which Courts are open to the public.[44]

8.7 The Commission found the observations of the English Law Commission on the impact on children of having details of the dispute involving their parents made public as "instructive":[45]

> *"What is more serious is that the parties and, more especially their innocent children whose identity is frequently revealed as a result if the details which can be published, suffer the disturbing experience of having the most intimate details of family life exposed. While it may be said that that the parties have only themselves to blame, no such argument can apply to the children whose privacy the law takes pain to protect in other cases."*

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39 See paragraph 7 in Part 8 of *Delivering Justice for All*.
40 Another reminder that Family Court matters are different in nature from other matters which come before the courts.
41 See paragraph 11 in Part 8 of *Delivering Justice for All*.
42 See paragraph 16in Part 8 of *Delivering Justice for All*.
43 See paragraph 18 in Part 8 of *Delivering Justice for All*.
44 Article 14 of the International Covenant on Civil and Political Rights 1966 and Article 16 of the United Nations Convention on the Rights of the Child 1989, "the right to privacy".
45 See paragraph 23 in Part 8 of *Delivering Justice for All*.

8.8 The Commission concluded that "most exceptions" to the principle of openness are justified[46] but nonetheless went on to recommend changes where the balance between openness and other competing interests required adjustment.

8.9 In respect of the Family Court, the Commission recommended that those proceedings which are currently closed should remain closed. However, it recommended that support persons should be allowed to be present in a family proceeding and that accredited news media should be permitted to attend. Further, there should be no restriction on the reporting of proceedings other than in cases involving children or of domestic violence and, in respect of those two categories of cases, reporting of the case could occur but details that would allow identification of those involved should not occur unless leave of the Court is obtained.[47]

8.10 There was considerable concern expressed in the years immediately preceding the introduction of COCA as to the closed nature[48] of the Court. That led to the enactment of s 137(1) of COCA which has opened up the Court to an extent not previously seen but which was designed to ensure that the assumed inherent private nature of the court was maintained. The amendments reflected the Commission's recommendations. For example, if a person (other than a party to the proceedings) has attended either counselling or a mediation they are able to give notice of their intention to be present at any subsequent hearing, subject to the parties being given reasonable notice of that expressed intention and to the overall discretion of the judge to exclude a person from the court. Section 137(1)(i) enables any other persons whom the Court permits to be present. This statutory power is not exercised regularly in relation to members of the general public.

8.11 Accredited news reporters may also attend hearings. Other than the well-known (at the time) "Pumpkin" case and the on-going Skelton litigation, this too seems to be an opportunity that is not utilised.

8.12 Amendments brought about by s 17 of the Care of Children Amendment Act 2008 came into force on 18 May 2009. They established a general rule that any person may publish a report of proceedings in the Family Court and included exceptions to that rule. The provisions of ss11B to 11D of the Family Courts Act 1980 set out the exceptions. The amendments expressly recognise the right of children under the age of 16, as set out in the United Nations

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46 See paragraph 6 in Part 8 of *Delivering Justice for All*.
47 See Recommendations R146 to150 in *Delivering Justice for All.*
48 Seen as "private" to some and "secret" to others.

Convention of the Rights of the Child (UNCROC), to have their privacy respected and the right, in Article 3, for their welfare and best interests to be respected.[49]

8.13 Section 11D of the Family Courts Act 1980 defines a "vulnerable person" as including:

- Subject Persons under the PPPR Act;
- proposed patients, patients, and restricted patients under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
- proposed and actual care recipients under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
- those who have applied for or obtained a protection order under the DVA;
- those with a Police Safety Order under Part 6A of the DVA – if they have applied for or obtained a protection order; and
- persons whom the Court thinks are particularly susceptible to any adverse consequences associated with the publication of a report of proceedings.

8.14 As to publication of Family Court proceedings, the decision of Judge Ullrich QC in *K v M* [2005] NZFLR 346 is instructive. Her Honour outlined relevant factors that would be taken into account when it came to publication:

- the welfare of the children is to be balanced against the freedom of the press;
- what is the public interest in the subject matter of the case as opposed to it being a matter that the public might be interested in;
- have the details of the case already been published in the media; and
- any restriction on publication should not be wider than is necessary to protect the child.

8.15 The media infrequently attend hearings because the restrictions mean that there is rarely a story that can be published which will attract the public interest.[50]

8.16 The review notes the view of the Law Commission in its report *Delivering Justice for All*[51] on public access, referring to the Commission's observation that the public access to the Family Court in Australia has not contributed in any meaningful way to greater openness of proceedings.[52]

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[49] Only with leave of the Court, a person under the age of 18 years can be named. See s 11B(3)(a) of the Family Courts Act 1980.

[50] See *Hosking v Runting* [2005] 1 NZLR 1 (High Court – full court) at paragraph 147 where the vulnerability of children was acknowledged and "must be accorded real weight and their private lives will seldom be of concern to the public".

[51] See above, footnote 37.

[52] Set out in Part 8 of *Delivering Justice for All*: paragraphs 12-15 relate to the Australian system.

8.17 The Law Society does not believe permitting greater access to the Family Court (as the Family Court currently operates) or liberalising the way in which cases may be publicised will achieve any useful purpose. It will not bring about any greater transparency about how the Court operates, nor make parties more accountable for what they may say in court and for how they conduct their cases. The Law Society believes that the current level of openness represents an appropriate balance between the competing interests – the need for there to be open justice and the need to protect the vulnerable.

***Recommendation***

The Law Society recommends that the current levels of openness and access to the Family Court be retained.

## 9. Identifying the Problem

9.1 Ignoring for a moment increased costs, the Law Society considers that overall the Family Court has met the challenges that have arisen and that it is important that the Family Court operates effectively in addressing its jurisdiction. This is a challenge that can successfully be met by careful and modest change to the existing legislative framework and by enhanced discipline (procedural and administrative) on the part of those who work with and for the Family Court.

9.2 Most of those involved in family separations resolve their post-separation issues themselves without the intervention of the Family Court[53] and with minimal use of lawyers and other services. Many rely heavily on family relationship services.

9.3 The major consideration for the government in this review is the cost of the Family Court.[54] Reforms designed to improve the focus on protecting the vulnerable (particularly children), budgetary restraint, and more "out-of-court" activity are clearly desirable.

9.4 The Law Society notes the commitment of the government to ensure that reform is consistent with the Treaty of Waitangi and New Zealand's international obligations, especially those under UNCROC. It must also be culturally responsive to the needs of Māori, Pacific and ethnic communities.[55]

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53 See paragraph 117 of the review.

54 The self-same issue prompted the review which produced the Boshier Report in 1993 – regrettably few of its recommendations were adopted.

55 Paragraph 7 of the review.

9.5 The Law Society is concerned that the review's singular focus on cutting expenditure of public funds on family law cases (the fiscal question) fails to recognise New Zealanders' legal rights and access to justice – except to the extent necessary to protect the "vulnerable" (defined in a particularly narrow way). There is an unfortunate theme of failing to recognise the significant, and important, role played by the Family Court and those working within it (including lawyers) in managing serious and socially debilitating family conflict and achieving settlement in a substantial number of disputes. Eliminating or significantly reducing the opportunities to resolve family-based disputes is likely to be counter-productive. Cost-cutting can be detrimental to the efficient and effective resolution of disputes. Effective reform may require some up-front investment to ensure durable cost-saving in the future. The desire to achieve a prompt, efficient and effective resolution to Court cases should not operate to the detriment of a fair and just outcome.

## 10. A Closer Look

10.1 The population of New Zealand has increased during the past 30 years. It follows that the number of potential litigants in the Family Court, in absolute terms, has increased significantly since the Family Court was established 30 years ago. The number of potential litigants as a proportion of the population has also increased significantly over the same period: there are more single parent families, the jurisdiction of the Court has increased dramatically and legal and societal responses to domestic violence (in particular) and child abuse have become more sophisticated. The fact that this has not led to a proportional increase in the number of applications to the Family Court reflects, amongst other things, the work of the family law profession in successfully resolving matters out of Court and thereby limiting the number of matters requiring the Court's involvement.

10.2 The evolution over 30 years of Family Court jurisprudence has, contrary to assertions throughout the review, created a significant degree of certainty as to process and outcomes. The Law Society does not accept the proposition that Family Court processes are unpredictable and inconsistent. The unique nature of family disputes requires the Court to have a maximum degree of flexibility.

10.3 To imply that much family litigation is unnecessary and unprincipled and to state that *"the Court considers every matter filed regardless of its merits"*[56] is unsupportable.

[56] See paragraph 171 of the review.

10.4 The Family Court is not wholly comparable with other courts. It blends its more traditional adversarial role with an inquisitorial role.[57] In many cases, judges are charged with determining applications in light of an assessment of the best interests and welfare of children (COCA) or for other purposes specified in the legislation (for example see the purpose and principles outlined in ss 1M and 1N of the PRA). The no-fault basis of many proceedings dilutes the "win-lose" dichotomy present in the traditional adversarial dispute. There is no parallel to this in the general jurisdiction. As Judge B D Inglis has observed:[58]

> *"A feature of situations which fall into the area of family law is their infinite variety. That requires flexibility of response. Another feature, as part of the human condition, is the entirely different perceptions each party to a family relationship may have of events and the other party's intentions and motives, particularly where the relationship is in trouble. That may lead to some difficulty in discovering what the true probabilities are, but it is the normal function of any Family Court to confront that kind of problem. These features mean that no two apparently similar cases are ever quite the same. Family law cases are not at all like civil or criminal cases which are ordinarily focused on relatively clear-cut single issues."*

**11. Some concerns about the scope of the review**

11.1 While there are legitimate concerns about both the cost-effectiveness and the efficiency of the Family Court, the Law Society considers that the premise which appears to underline the review is flawed. The review suggests that while costs are increasing in the Family Court there is "*little evidence that the increase in expenditure has improved the efficiency or effectiveness of the Court, or has resulted in better outcomes for court users.*"[59] The Law Society questions the validity of this statement, in the absence of a thorough evaluation of the Court's efficiency and effectiveness and the measurement of outcomes.

11.2 The Ministry's memorandum dated 16 December 2011 given to the Ministry's Advisory Group identifies the issues that it believes compromise the on-going sustainability and effectiveness of the Family Court as including:

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57 B.D Inglis QC, *New Zealand Family Law in the 21st Century*, Thomson Brookers, 2007, p3.
58 Ibid.
59 See paragraph 59 of the review.

- increasing expenditure on Family Court services with no corresponding improvement in the time taken to resolve cases;
- insufficient support for people to resolve matters out of Court; and
- parties and court processes losing sight of the needs of the children.

11.3 This summary is disappointingly simplistic. It fails to recognise the complexity of many Family Court cases. It is not simply a matter of 'one size fits all'. As the Australian experience has shown,[60] family law reform is not straightforward and social realities often complicate the fulfilment of reform objectives. Good intentions are no substitute for measured consideration of proposed reform.

11.4 In the review, paragraphs 14 and 15 identify "*examination of individual family law Acts and the policy rationale that underpins them"* as being beyond the scope of the review, but go on to indicate the possibility of some amendments to those Acts *"as a result of this review."* In light of this contradiction, it is difficult to have confidence that the review will have a coherent outcome. It is also difficult to focus submissions given the obvious relationship between the policy rationale and the various family law statutes.

11.5 Although said to be a review of the Family Court, it is plain (and desirable) that the review extends beyond that. For example, *"the needs and interests of children following parental separation"*[61] are identified as an important focus of the review. This goes far beyond a review of the Family Court per se.

11.6 The review questions whether consideration should be given *"to a greater legislative emphasis on parental responsibilities and obligations for parents to cooperate and use their best endeavours to resolve their disagreements outside of the Court."*[62] This raises the important issue of the impact and significance of *"legislative emphasis"* as a means of influencing behaviour. Little is said about whether or not research supports the notion that "legislative emphasis" does, in fact, demonstrably and measurably influence behaviour. An obvious place to start may well be COCA which not only changed the traditional terminology from "custody/access" to "parenting" but also introduced a list of principles deemed to be relevant to the child's welfare and best interests, to buttress the long-established paramountcy principle.[63] Designed to emphasise parental responsibility, continuity for the child and co-

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60 See Kaspiew, Gray, Qu and Western, *Legislative Aspirations and Social Realities* (2011) 33 Journal of Social Welfare and Family Law.
61 See paragraph 86 of the review.
62 See paragraph 90 of the review.
63 Section 5 of the Care of Children Act 2004.

operative/consensual parenting, these legislative changes have not been analysed to determine whether they have brought about any significant attitudinal changes.

11.7 The role of lawyers in assisting parties to resolve matters themselves should not be overlooked. It is important to ensure the Family Court is structured to encourage the development and retention of experienced family lawyers as a vital component of an effective system. The Law Society agrees with the review[64] that experienced family lawyers will advise their clients of the relative advantages and disadvantages of the options available to them, including resolving matters themselves, negotiating an agreement with or without their lawyer's help, seeking the services of counsellors or mediators or proceeding with litigation (generally as a last resort).

11.8 Legal advice is still valuable where the disputes are complex, even if the "black letter" legal issues are not. The role of the lawyer – which may not always be visible – should not be discounted. Lawyers can, and do, promote early resolution of cases by providing information to their clients on "the relevant law, procedures, the likely outcome of the case, what is expected of them, how long matters will take and what it will all cost".[65] Any suggestion that as a rule lawyers unnecessarily fuel or prolong conflict is rejected.[66] On the contrary, only 15.97% of parenting applications require a decision to be made by a judge.[67]

11.9 The review asserts that *"most people resolve post-separation arrangements themselves"*.[68] There is some evidence to support this assertion (which the Law Society anecdotally confirms): 77% of the 130,685 applications for counselling (as opposed to Court-directed counselling) in the period 1999-2009/10 did *not* lead to subsequent Court applications.[69] Parental education and the promotion of ADR are important options for influencing attitudinal and behavioural changes.

11.10 Matters coming before the Family Court tend to be more complex in nature and consume a disproportionate amount of time (and cost) compared to other civil cases, but complex cases do not provide a sound basis for a review of the entire Family Court system. As the Ministry

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64 See paragraph 128 of the review.
65 See paragraph 33 of the review.
66 Davis "Partisans and Mediators" (1988); Ingleley "Solicitors and Divorce" (1992); Davis, Cremey and Collins "Simple Quarrels" (1994); Eeckelaar, Maclean, Beinhart, "Family Lawyers: the Divorce Work of Solicitors" (2000); Hewieson (2011) 25 International Journal of Law, Policy and the Family, 71. There is some overseas research suggesting that family lawyers have tended to become absorbed into a "pervasive… settlement culture", participating in a process of rationing access to the Courts and actively steering clients away from the Court.
67 Ministry of Justice letter of 17 May 2011 (in response to NZLS Family Law Section, question 29): 2009/10 COCA cases 5% final hearings and 10.97% interim hearings.
68 See paragraph 117 of the review.
69 See paragraph 149 of the review.

acknowledges, an unusual case can skew results for small volume case types.[70] The relatively limited available data justifies all case types being classified as "small volume" and thus susceptible to distortions. The nature and causes of difficult and complex cases need to be fully understood before they can be used to justify change.

11.11 Difficult (and by implication costly) cases make bad examples for the basis of a review of the entire Family Court system. The nature and causes of such difficult and complex cases need to be fully understood before they can be used to justify change. Having a court of law to appropriately resolve such cases underpins society's confidence in its justice system and represents an essential component of the responsibility of the state to its citizens.

## 12. Statistical data

12.1 The review contains factual errors, unsubstantiated assumptions, and inadequate data. In many parts it demonstrates a fundamental lack of understanding of the system it purports to review. Much of the "selected Family Court data" in Appendix 6 lacks context and explanation. If the data is to be relied on in assessing future options, it must be credible and accurate. It appears to be neither.

### *(a) Further data requested*

12.2 Following the publication of the review the Law Society requested further information under the Official Information Act 1982 (OIA). The information sought was extensive and was provided in two responses of 17 January 2012 and 15 February 2012.

12.3 The Law Society has considered all of the data provided by the Ministry in relation to the Family Court review – namely the data provided prior to the June 2011 symposium, contained in the September 2011 review document, and the OIA disclosures in early 2012. The data has proven to be incomplete and confusing, and there is no thorough analysis that explains the increase in costs of the Court. Specific examples of the data limitations are given below.

### *(b) The data*

12.4 The use of "purposive"[71] case sampling (173 defended COCA cases)[72] used to support some analyses is flawed. This process is cited[73] as supporting various assumptions and assertions. It is difficult to respond to comments that some of these cases reflected an absence of *"legal*

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70 Ministry of Justice memorandum dated 16 December 2011, paragraph 4.
71 Ministry of Justice memorandum dated 16 December 2011, paragraph 29. This is not to be confused with a "representative sample."
72 See paragraph 50 of the review.
73 See paragraphs 50 and 69 of the review, for example.

*issues"*. It is self-evident that as all matters are brought to the Court within a statutory framework they necessarily involve "legal issues", including issues of jurisdiction and the application of legal principles (for example the paramountcy principle[74] or the duties, powers, rights and responsibilities of guardians).[75] There is well-established jurisprudence in such areas. That most matters are centred on a unique set of facts does not diminish the importance of the fundamental "legal issues".

12.5 It is misleading to use variable baseline dates in the review.[76] A proper and principled comparison requires the use of consistent baseline dates.

12.6 There is no evidential foundation to support the assertion at paragraph 49 that overlapping applications under the COCA and the Domestic Violence Act 1995 (DVA) *"increase the complexity of proceedings and the likelihood of more delay and expense"*.

12.7 Paragraph 50 identifies 121 of 173 (70%) defended COCA cases as having *"at least one application to vary a parenting order."* Having already indicated concerns at the methodology attaching to the "sampling" it is difficult to attach any weight to the proposition that this "*may indicate that parties have not accepted Court decisions or are unable to agree to new arrangements between themselves when circumstances change"*. This is mere speculation and does not enhance the credibility of the review.

12.8 Figure 4 in paragraph 53 includes legal aid expenditure which substantially distorts the conclusion (percentage change in expenditure by major cost category). Legal aid is the subject of a separate review. If this graph was redrawn removing legal aid costs then the percentage change in expenditure by major cost category would be substantially less (and be probably less than 50%). It is disingenuous to assert, on one hand, that *"legal aid is not a focus for the review"* whilst, on the other hand, arguing that because *"changes in court processes will have a flow on effect for legal aid"* it is appropriate to report legal aid data in this context.[77]

12.9 Paragraph 86 asserts that in 2009/2010 22,935 children were the subject of disputes under COCA. This is less than the number of COCA applications for the same period (25,872)

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74 Sections 4 and 5 of the Care of Children Act 2004.
75 Sections 15 and 16 of the Care of Children Act 2004.
76 For example, paragraph 51 of the review uses 2005/2006 as a baseline date for COCA applicants but in paragraph 60, figure 7, 2006/2007 is used as a baseline date because of the impact of the then newly-introduced COCA.
77 Ministry of Justice memorandum dated 16 December 2011, paragraph 12.

which, given the fact that most applications would deal with more than one child, seems unlikely.

12.10 Data relating to relationship property cases states that the average number of adjournments per case (12) "appears high".[78] The reasons given for such adjournments (the need to "obtain information, reports and await the outcome of settlement discussions") remain valid and have the secondary benefit of removing (at least for the time being) the matter from the Court for consideration. At paragraph 69,[79] reference is made to adjournments being initiated by the judge in 57% of the cases. It is difficult without more information to analyse this figure.

12.11 Paragraph 52 (Appendix 6, Table 2) shows that 15% of the cases under consideration were dealt with by way of "*formal proof*". This is a non-participatory process and inclusion of the figure (but omission from analysis in paragraph 52) creates a misleading impression.

12.12 Figure 6 in paragraph 57 refers to the increase in costs associated with COCA cases between 2004/2005 and 2009/2010. A 22% cost increase for COCA cases over the five years is compared with 18% in the same period for "all other case types" (average 4.4% annually compared to 3.6%). The other case types are not defined and, for example, the extent to which they include the role of counsel for children in CYPTF Act cases would be relevant. The comparison in figure 6 is meaningless without further context.

12.13 At the symposium, data was provided to show that the costs of Lawyer for the Child appointments under COCA between 2005/2006 and 2009/2010 had risen from a stated $7.36m to $23.17m (a purported $15.81m increase in five years). The Ministry's OIA response of 15 February 2012 includes the total number of Lawyer for the Child appointments during that same period and the average costs of these appointments.[80] From an analysis of this information, costs of Lawyer for the Child appointments for the relevant five years have in fact increased from $15.06m in 2005/2006 to $20.75m in 2009/2010 – an actual increase of $5.69m (not $15.81m).[81]

12.14 To be meaningful, the statistics of appointment costs under COCA need to be compared with the same statistical information in the previous few years under the Guardianship Act 1968.

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78 See paragraph 66 of the review.

79 In the box on page 24 of the review.

80 The February disclosure includes the 2010/2011 year and multiplying the average number of appointments by the total sum for the appointments it would appear that the cost of lawyer for child last year are very similar to those in the 2008/2009 year.

81 The Ministry is however unable to confirm why this discrepancy exists (there is also a discrepancy in the number of appointments in the information disclosed for the symposium in May 2011 and the OIA response of 15 February 2012).

The Ministry had advised prior to the June 2011 symposium and in its OIA responses of 17 January and 15 February 2012 that this information was not readily available and the manual task of collating it was too great. However the 15 February 2012 OIA response includes statistics for 2004/2005 (the last year of the Guardianship Act 1968) and costs for some of the services during that same year. Prior to the symposium, the Ministry was able to provide the total number of appointments for counsel under the Guardianship Act 1968 in 2004/2005 (4,890) but not the cost of these appointments. Yet the 15 February 2012 response includes the total costs of Lawyer for the Child services (including appointments under the CYPTF Act) for the 2004/2005 year. There is a discrepancy between the statistics provided for the June 2011 symposium and the OIA response of 17 January 2012 on the number of appointments of lawyers for children under COCA/Guardianship Act and the number of these appointments in the OIA response of 15 February 2012.

12.15 The costs of resourcing the Family Court judiciary and Registry are included in the statistical information but no analysis of those costs is provided. One of the main reasons for the introduction of the Early Intervention Process (EIP) in April 2010 was to free judges from the hundreds of hours they spend presiding over mediation conferences, to enable them to hear more disputed cases. The February 2012 OIA response shows that the judges' sitting hours have in fact reduced in that period. Page 19 of the January 2012 OIA response contains a table titled "Average days from Filing to Outcome under the COCA 2004 by Cluster On Notice s 47 Parenting Applications". The information in this table covers all Family Courts during the period 2005/2006 to 2010/2011 and demonstrates an average disposition time for s 47 COCA applications of 121.2 days in 2005/2006 increasing to an average disposition time of 287.6 days in 2010/2011 – i.e. an increase in disposal time. Table 4 on page 82 of the review contains a table headed "Table 4: Average days to disposal for application by case". The information in this table covers all types of applications (as opposed to the regional figures in the January 2012 OIA response) and demonstrates that COCA/Hague applications (which include predominantly s 47 parenting applications) were disposed of in an average of 246 days in 2005/2006 and 230 days in 2009/2010 – i.e. a decrease of 16 days on average.

12.16 In relation to all application types, the average for disposal of applications is shown to have been 151 days in 2005/2006 and 148 days in 2009/2010 – i.e. a decrease of three days.

12.17 While there is a different breakdown of the information, s 47 applications are still COCA applications. COCA applications represent a large proportion of the total applications to the Family Court per year (approximately 24,000 to 27,000 of the 67,000 applications per year).

12.18 There are significant discrepancies in these statistics that require clarification. One set of statistics demonstrates an improvement in the time taken for disposing of all applications within the Family Court, while the other demonstrates the reverse on a regional basis. Both cannot be accurate.

*(c) The Ministry's data collection systems*

12.19 On 16 December 2011, the Ministry provided an explanatory memorandum relating to the data used in the review. It advises that the official data source is the Case Management System (CMS) which is an administrative data tool. Importantly it confirms that the small volume of some case types can "skew" average results for small volume case types and that the data is vulnerable to data input errors. Financial data is drawn from another source, the Financial Management Information System (FMIS) which is separate from the CMS. The two systems are not linked and do not use the same coding. As a result, CMS data and FMIS data cannot be easily read together to provide a coherent statistical picture.[82]

12.20 The statistics on which the review is based do not withstand scrutiny. There may be some material from CMS which if properly analysed could have informed the review.

[82] Reference should be had to the final report on the UK Family Court Review. In that review, the review panel acknowledged the same limitations as a result of the same problem with the equivalent CMS in UK and the need to create a data collection computer process for family cases.

## PART 3
## RECOMMENDATIONS IN DETAIL

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### 1. Pre-Commencement Requirements

*(a) Counselling and Education*

1.1 For most people separation and the practical consequences of that (making care arrangements for children, dividing property, seeking and making financial provisions) is a new and daunting experience, frequently overlaid by powerful emotional issues. It is self-evident, and sensible, that there be provision of readily available and digestible information to assist people to adjust to their situation. Programmes such as *Parenting Through Separation* have proved to be invaluable and should be sustained but assessed to achieve the most effective and cost-efficient model.

1.2 Assistance with coming to terms with the emotions involved is also important. Amongst other things, it assists people to become ready to negotiate a settlement or to make decisions about how to progress and resolve disputes. Counsellors are best equipped to provide that assistance.[83] The cost benefit of this should not be under-estimated.

1.3 It is generally desirable that both parties be encouraged to access educational and counselling resources before they enter the Family Court system, but not via the existing compulsory s 9 counselling provisions. This s 9 counselling is publicly funded and costs approximately $9m per year and could be directed to other more permanent outcomes (ADR/mediation).

1.4 At present the Court, using the provisions of the Family Proceedings Act 1980, operates a very basic "triage" system by diverting inappropriately filed applications to counselling or (in some cases) to a parenting programme. This somewhat unsophisticated process was a function once carried out by the Counselling Co-ordinators attached to every Family Court Registry. The role of the Counselling Co-ordinator (renamed Family Court Co-ordinator) has, regrettably, diminished. The Law Society regards this as a retrograde step and supports re-consideration and reinstatement of the role.

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[83] The emphasis on reconciliation to be found in s 8, s 11(2) and s 12 (a) of the Family Proceedings Act 1980 is not helpful and should be removed.

1.5 The model recommended by the Beattie Commission and subsequently by the Boshier Report[84] was the establishment of a separate conciliation service to operate alongside the Family Court. The current fiscal constraints seriously limit the ability to establish such a structure. Funding and enhancement of the crucial Family Court Co-ordinator role could be made for relatively small cost and achieve significant savings.

1.6 The place and funding of counselling (with a consideration of the state role in this provision as a public good, particularly in light of ss 8 and 19 of the Family Proceedings Act 1980) needs to be addressed. There are a range of views with questions around the quality and the purpose of the counselling service that is presently being provided and funded. Counselling is not a panacea, and unless focussed and purposeful, it is an unnecessary extra step and a significant public expense.

***Recommendations***

- The Law Society recommends a review of the Family Court-Coordinator role be undertaken. There needs to be adequate support for the role and for the first stage triage of cases.
- The Law Society recommends that ss 9 to 12B of the Family Proceedings Act 1980 (providing counselling in both pre- and post-filing situations) be amended. A discretionary rather than mandatory government-funded counselling scheme is favoured.

*(b) Self-Resolution*

1.7 The Law Society supports the principle of a comprehensive information strategy to ensure that families are provided with sufficient appropriate information to assist them in solving post-separation disputes. Such a strategy should also embrace other "out of Court" services including parenting programmes, counselling and mediation.

1.8 The Law Society supports the notion that in certain circumstances the parties could enter into binding parenting agreements.[85]

***Recommendation***

The Law Society recommends that a parent education programme (based on an enhanced version of the current *Parenting Through Separation Programme)* be encouraged as a first step prior to any Family Court proceedings. The Law Society supports an improved provision of the programmes in a unified assessed structure (rather than the current competitive model). It could then be a requirement of judges that parties had engaged in such a programme if they wished to progress their case.

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[84] A Review of the Family Court, April 1993 – A Report for the Principal Family Court Judge. (Judge Boshier was the Chair of the committee which prepared the report for the then Principal Family Court Judge Patrick Mahony).

[85] See paragraph 140 of the review.

**2. Pre-Court Alternative Dispute Resolution (ADR)/Mediation**

2.1 The Law Society believes that the availability of alternatives to litigation (counselling, negotiation, collaborative law or mediation in its many guises) is a vital and important component of an effective and efficient dispute resolution process. The benefits to both the Family Court and parties (in terms of cost saving and efficiency) of an effective non-litigated agreement are self-evident.

2.2 The Law Society notes the enthusiasm with which the "collaborative law" model is commented upon in the review. It stresses that "collaborative law" is but one model available and whilst it is not to be discouraged the Law Society opposes any proposition that would make any one model mandatory.

2.3 Mediation, in particular, is a process which has many advantages. Where an agreement is mediated with skill, it can result in an outcome that parties can claim as their own (and which is therefore likely to be durable). A mediated agreement can incorporate interests and outcomes beyond the strictly legal and can be broader than a Court-imposed solution. For that reason it sits more comfortably outside, rather than within, the Court process.

2.4 Arbitration is another semi-formal but pragmatic alternative to litigation particularly in clearly delineated relationship property disputes. Arbitration allows parties to select the timing, procedure and arbitrator. This gives parties a measure of input and control over the process. It has the advantages of getting a dispute to a point of decision-making promptly and cost efficiently. The appointed arbitrator becomes, in effect, the case manager, readily accessible to the parties and able to deal with interlocutory matters quickly. The process can be tailor-made to the dispute. There is no reason why this process cannot be used more regularly than it has been to date.

***Recommendation***

The Law Society recommends that engagement in some form of alternative dispute resolution should be a compulsory step prior to any Court filing (except in cases of risk/urgency).

2.5 There should be no presumption that family law disputes can, or should be, settled within the milieu of negotiation. Further, issues arising from significant power imbalances and psychological control permeate many cases that come before the Family Court and due and appropriate regard must be had to this dynamic and its implications, which include the difficulty of identifying the very presence of the dynamic. Legal rights cannot be trumped by

a solution at any costs. Violence within a relationship or other severe social problems such as alcoholism, drug abuse, intellectual disability or mental health issues may preclude meaningful negotiation.

2.6 Judicial settlement conferences are available under the Rules for all matters. This is a valuable intervention and preferable to the misnamed (and misunderstood) Mediation Conference.

2.7 It would be useful to consider the place of judicial mediation, together with a review of ss 13 to 18 of the Family Proceedings Act 1980, the provisions in the Care of Children Amendment Act 2008 (yet to be brought into force), and the EIP counsel-led mediation.

2.8 Judicial mediation should continue to be available as part of the post-filing armoury aimed at resolution. The value of a judicial presence and indication should not be underestimated within dispute resolution processes. However counsel-led mediation as a post-filing process is not in the same category.

2.9 One of the main reasons for introducing EIP was to free judges from the considerable hours they spend presiding over mediation conferences, to enable them to hear more cases. Anecdotally, EIP has been successful in reducing delays in the Family Court. However there has been no structured evaluation of EIP. The statistics available appear to show that while there has not been an increase in the settlement of cases overall, there has been a considerable increase in costs, including the appointment of Counsel to Assist to mediate cases.

2.10 While it is accepted that the volume of cases means that not all of the High Court Case Management system could comfortably be imposed in the Family Court, the Law Society believes that consideration should be given to importing the relevant and useful Case Management processes from the High Court.

2.11 Issues raised are:

(a) To what extent should the state provide and/or fund these issues?

(b) Whether or not these alternatives should be mandatory.

2.12 A separate issue relates to the involvement of the child in mediation – should it be child-inclusive or child-focussed?[86] In 2007, the Law Society provided submissions on the Family

[86] See paragraph 94 of the review.

Courts Matters Bill identifying the structural deficiencies in this part of the Family Court. That Bill was divided into 12 amendment Acts of which the Care of Children Amendment Act 2008 included provisions for children's involvement in mediation. Those provisions are yet to be brought into force. There is currently insufficient research, data or suitably qualified professionals to justify consideration of the involvement of children in mediation or pre-Court counselling at this stage. Enactment of the amendment to enable counselling for children after the making of a final order is however strongly supported.

2.13 The Law Society does not consider that mediators in the family law context should necessarily be qualified as lawyers. The qualities and qualifications of a good mediator transcend legal training.

2.14 The Law Society adopts a cautious approach to the claims advanced as to the benefits of mediation and notes that the issues outlined in paragraphs 159 to 161 of the review all appear to be relevant.

***Recommendations***

- The Law Society recommends that alternatives to litigation (counselling, negotiation, collaborative law or mediation in its many guises) should be available.
- Judicial mediation should continue to be available as part of the post-filing armoury aimed at resolution.
- Consideration should be given to importing the relevant and useful Case Management processes from the High Court.
- The provisions enabling counselling of children after the making of final orders must be brought into force.

## 3. Jurisdiction of the Family Court

*(a) Fragmentation of Jurisdiction*

3.1 The review questions whether the Family Court is best placed to deal with all applications now coming within its jurisdiction,[87] and suggests options for reducing or fragmenting the Court's jurisdiction.[88] It is hard to discern what the cost benefits may be in such fragmentation.

3.2 A feature of the Family Court as created in 1981 was the bringing of all family-related disputes within a single jurisdiction. This was seen as important, indeed vital.[89] Amongst other things, specially designated (warranted) Family Court judges were to be appointed on the basis of "training, experience and personality" and therefore suitable to deal with matters of family law.[90]

3.3 The question as to whether the Family Court is best placed to deal with all applications now coming within its jurisdiction[91] directly contradicts 30 years of policy expanding the jurisdiction from eight to 23 statutes.

3.4 We also note the recent review of the Family Court in the United Kingdom[92] mentioned above strongly recommended a "single Family Court with a single point of entry" to replace the existing several tiers of jurisdiction which exist in the UK.

3.5 It is legitimate to reconsider the scope of the Family Court's jurisdiction and whether some matters might better be handled by other courts. It is however important to remember that the Family Court has specialist expertise in dealing with complex matters that, in many cases, involve vulnerable children and adults. Relevant examples are given below.

*(b) Relationship property*

3.6 The Law Society does not accept the assertion that *"relationship property disputes and claims against a deceased's estate are not so much about personal relationships as they are about property."*[93] Under the PRA the Court is expressly enjoined to consider the interests of

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87 See paragraphs 74-81 of the review.
88 See paragraph 76 of the review. In contrast, it is noted that the review also suggests that the Court should expand its role to incorporate "educational" matters including truancy (currently dealt with in the criminal jurisdiction of the District Court, although within the jurisdiction of the Children and Young Persons Court until that was disestablished in 1989) and exclusion of a child from school (which is currently dealt with, if at all, by way of judicial review in the High Court).
89 See paragraph 463 of the Beattie Commission.
90 See s 5 of the Family Courts Act 1980.
91 See paragraph 76 of the review.
92 Family Justice Review – Final report, 3 November 2011.
93 See paragraph 76 of the review.

children[94] and the Family Protection Act 1955 focuses on the moral duty of the deceased in relation to "proper maintenance and support".

3.7 In 2002 the High Court's concurrent jurisdiction in relation to relationship property matters was removed and the criteria for removal of relationship property matters from the Family Court to the High Court were tightened. It has been difficult to determine why that was undertaken. Hansard is silent on the point. It is equally difficult to determine what changes have happened in practice and whether the expected benefits have eventuated. There are an increasing number of cases where there is an interaction between relationship property and trusts (over which the Family Court has no jurisdiction).

3.8 The Law Society acknowledges that there are procedural inefficiencies that can arise where relationship property disputes involve trust disputes. The Law Society's submission on the 4th issues paper in the Law Commission's review of trust law in New Zealand[95] made recommendations to address these issues.[96] The recommendations are attached in Appendix 2.

3.9 In its 5th issues paper[97] in the trust law review the Law Commission has called for views about whether there would be benefits in expanding the jurisdiction of the District Courts or Family Court to consider trust matters. The Commission has suggested that the High Court may not be the best place for the resolution of some trust disputes. Sir Grant Hammond, President of the Law Commission, comments that:

> *"High Court cases can be costly, and may exacerbate damage to family relationships. On the other hand trust law issues can be complex and the High Court may continue to be the best option."*

***Recommendations***

- The Law Society believes the Family Court is best placed to deal with all applications now coming within its jurisdiction.
- The Law Society recommends a return to the concurrent jurisdiction of the High Court and to relax the criteria for transferring applications under the PRA from the Family Court to the High Court.

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94 Section 26 of the Property (Relationships) Act 1976.

95 *The Duties, Office and Powers of a Trustee*, Review of the Law of Trusts 4th Issues Paper, Law Commission, NZLC IP26, 30 June 2011.

96 New Zealand Law Society submission dated 9 November 2011.

97 *Court Jurisdiction, Trading Trusts and Other Issues*, Review of the Law of Trusts 5th Issues Paper, Law Commission, NZLC IP28, December 2011.

3.10 The Commission is also undertaking an extensive review of the Judicature Act 1908. Its 2nd issues paper[98] released on 23 February 2012 contains a number of proposals for restructuring New Zealand's court system. The Law Society believes it is important for any proposed changes to the Family Court jurisdiction to be considered within the context of this review as well.

3.11 Relationship property cases are further discussed in detail below.

*(c) Estate cases*

3.12 In terms of the number of applications at least (the amount of time devoted to such cases is not available) the Family Court undertakes relatively limited work in the case of estate litigation.[99] Either there is very little estate litigation or very limited use of the Family Court for such litigation. This may indicate that the High Court which holds concurrent jurisdiction, is still generally perceived by litigants and their advisors as the preferred forum for such matters.

3.13 Family protection claims are almost exclusively about personal relationships. The claimant seldom has real financial need in an absolute sense nor are most claims based upon contributions to property. They are about the claimants' personal disappointment about the deceased's treatment of them as a member of the family. Property is merely the means through which the dispute in the family is resolved.

*(d) Guardianship matters*

3.14 The review also questions whether the Family Court should retain its jurisdiction to place children under the guardianship of the Court[100] (a jurisdiction held concurrently with the High Court). The Law Society believes that the Family Court should retain this jurisdiction as it has proven to be a useful tool for the Court. The range of circumstances in which this might arise is very considerable and cannot be readily summarised. There is however extensive jurisprudence to guide the Court.

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98 *Review of the Judicature Act 1908 – Towards a Consolidated Courts Act*, Law Commission, NZLC IP29, 23 February 2012.

99 Table 1, Appendix 6 of the review.

100 Section 31 of the Care of Children Act 2004.

***Recommendation***

The Law Society recommends that, to ensure the protection of very vulnerable children in Family Court proceedings, the guardianship provisions in s 31 of COCA should be amended to enable a judge to place a child under the guardianship of the Court on his or her own motion.

*(e) Family violence*

3.15 Paragraph 80 of the review suggests that *"all family violence cases should be heard in the criminal jurisdiction"*. As expressed this is a difficult suggestion to respond to. The criminal jurisdiction deals with offending with the state prosecuting individuals for breaches of the criminal law. Proof beyond a reasonable doubt is generally required and a conviction and punishment often follows a successful prosecution. "Family violence" in the Family Court jurisdiction involves the Court in its protective role and in particular requires an assessment and balancing of risk within a family unit. There is also a need to look ahead in the relationship of the parties in deciding outcomes of family violence cases. That there may be an overlap is recognised not only by the provisions of s 123B of the Sentencing Act 2002 that enables the Court to make a protection order against an offender as part of the sentence, but also in the creation of a Family Violence Court on a trial basis in some areas (for example Manukau).

3.16 The impetus for the Family Violence Court was the need to respond more effectively to the challenges of domestic violence. It is a court of criminal jurisdiction. Categorising "family violence" into four groups (isolated, repeat, escalating and dangerous) and early disposition of the charges is seen as key to the court's response (intervening whilst the incident is still real to the parties). Some judges[101] see the Family Violence Court as effecting both therapeutic and punitive aspects. Affected children and adults (apart from the offender) appear to have a limited role to play in the Family Violence Court. It is not clear if any evaluation of the Family Violence Court has been carried out. The creation of the Auckland Family Violence Court led to a ballooning caseload described as "*outrageous*" by one judge, delays and inadequate monitoring of defendants attending the anger management programmes *"to which they are routinely referred"*.[102] The number of Protection Orders issued by the Family Violence Court or under the Sentencing Act 2002 in the 2010/2011 year was considerably less than anticipated.[103] This may be another example of an ad hoc response to a social issue

[101] See interview with Judge J Adams, ADLS Law News, 17 June 2005.
[102] Judge de Jong quoted in New Zealand Lawyer, 18 April 2008.
[103] 239, compared to an expected 1500 (16%) – Family Violence Court Annual Report, 1 July 2010 to 30 June 2011, Ministry of Justice. We also note this figure of 239 differs from the Ministry's OIA response of 15 February 2012

which has failed to meet the goals set for it. There is no evidence to suggest that the Family Court is defunct in its dealing with these matters or that the Family Violence Court is an improvement on what already exists.

***Recommendation***

The Law Society recommends that the Family Courts retains jurisdiction over estate cases, guardianship matters and family violence proceedings.

*(f) Disability Issues*

3.17 The Law Society believes the Family Court should retain its jurisdiction in relation to applications under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the PPPR Act and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Proceedings under these Acts differ significantly from most proceedings District Court judges deal with on a day to day basis. These Acts involve essentially inquisitorial processes, as distinct from the more traditional adversarial process operating in the District Court.

3.18 The Family Court exercises a protective jurisdiction in relation to applications under the three Acts noted above. This is in line with international models – in most comparable overseas jurisdictions there are specialist Courts to deal with the protective/disability role.

*(g) Mental Health (Compulsory Assessment and Treatment) Act 1992*

3.19 Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, a person subject to assessment and treatment can seek a judicial review of their condition as of right during the various assessment periods (five days or 14 days). If they are not fit to be released from compulsory status, or if a compulsory treatment order is sought, they will appear before a judge. In either event, the patient is allocated a lawyer from a roster comprised of lawyers appointed by the Law Society,[104] the vast majority of whom practise in the Family Court jurisdiction.

3.20 The Family Court judges in their specialised jurisdiction have a wide understanding of the issues involved in the mental health jurisdiction, such as family dynamics, domestic violence and related issues. It is not uncommon for these and other issues to arise during these hearings, for example around the care of children (COCA and the CYPTF Act) and other

(which indicated that Family Violence Courts issued 80 protection orders in the 2010/11 financial year and that criminal courts issued 207 protection orders in the same period).

[104] These lawyers are paid through the legal aid budget not by the Court itself.

incapacity issues (PPPR Act), all being issues that the Family Court deals with on a daily basis.

*(h) Protection of Personal and Property Rights Act 1988*

3.21 Since its inception, the Protection of Personal and Property Rights Act 1988 (PPPR Act) has been within the Family Court's jurisdiction. On application made to the Court for the appointment of a welfare guardian or property manager or administrator under the appropriate sections, a lawyer is appointed to represent the Subject Person. In its determination of the applications under the Act, the Court is asked to assess many aspects of the Subject Person's life including his or her relationships, money management and decision making as part of its overall assessment of incapacity.

3.22 To understand the nature of this specialist jurisdiction, it is important to have regard to the main principles of the PPPR Act. It is to provide for "the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs". The emphasis in the title is on "rights of the person" rather than upon the person's protection. The Act states that a person's rights are to be protected and promoted. The aim of the Act is to ensure that people with disabilities are treated the same as those without disabilities as much as possible. The Act was specifically designed to provide a framework in which assistance and alternative decision making are balanced by the positive promotion of the integrity of the individual.

3.23 The important principles of the Act are:

- the presumption of competence;
- the least restrictive intervention;
- encouraging self-reliance and normalisation;
- community integration; and
- best interests.

3.24 The key issue in establishing jurisdiction is determining whether a person has partial or total incapacity. The issue of determining incapacity can at times be a complex and vexed one. To establish the Court's jurisdiction for the making of, for example, a welfare guardian order, it must be established that the Subject Person has total incapacity. On the face of it, establishing incapacity appears to be a simple notion but in practice there are often many shades of grey. For example some people are competent to execute a testamentary disposition but are otherwise incapable of managing their own affairs or making day to day decisions.

3.25 In the exercise of its jurisdiction the Court has to consider that person's capacity to understand, for example, a personal decision about living in supported accommodation or a retirement home, or undergoing surgery. The Court is regularly asked to assess an expert's opinion regarding the conditions and abilities of the person in question to manage their own affairs, particularly where incapacity is disputed either by the Subject Person or members of his or her family. The Court has to assess the degree of the disability before making decisions about whether orders under the PPPR Act can be made, given the over-arching principle that any orders must be the least restrictive available and encourage self-reliance and normalisation.

3.26 The Family Court is well-placed to exercise this inquisitorial and protective jurisdiction as it is familiar with the language of incapacity and its nuances. It is also used to dealing with specialists regularly.

*(i) Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*

3.27 The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 is another example of the Family Court having jurisdiction in respect of those who can be classified as "vulnerable". It covers individuals who have been charged with or convicted of a criminal offence who have an intellectual disability as defined by s 7 of the Act.[105] The Act is an essential part of the legislative framework[106] covering society's response to individuals who may have an intellectual disability or a mental impairment.[107]

3.28 The Act establishes a scheme which authorises the provision of civil law based compulsory care and rehabilitation to individuals with an intellectual disability who have been charged with or convicted of an offence. The Act provides an alternative to those who come within its jurisdiction of sending them to prison or discharging them into the community. The essence

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[105] A person has an intellectual disability if that person has a permanent impairment that results in a significantly sub-average general intelligence and which in turn results in significant deficits and adaptive functioning in at least two of the following skills: communication, self-care, home living, social skills, use of community services, self-direction, health and safety, reading, writing, and arithmetic, and leisure and work: those deficits must have become apparent during the developmental period which is said to be generally finished when the person turns 18 years of age.

[106] See the Protection of Personal and Property Rights Act 1988 and the Mental Health (Compulsory Assessment and Treatment) Act1992.

[107] The Mental Health (Compulsory Assessment and Treatment) Act 1992 introduced a new definition of the term "mental disorder" which excluded from its ambit individuals who had an intellectual disability unless they also had a mental illness. (Prior to the enactment of the Mental Health (Compulsory Assessment and Treatment) Act those who had an intellectual disability per se came within the scope of the Mental Health Act 1969 and therefore could be made subject to orders under that Act. The Mental Health Act 1969 was linked to the Criminal Justice Act 1985. This authorised courts to make orders placing those with an intellectual disability under the Mental Health Act as an alternative to either sending them to prison or discharging them into the community.

of the Act is that it creates a civil form of compulsory detention for those who come within its ambit.

3.29 The stated purposes of the Act are prescribed in s 3. They provide the courts with appropriate compulsory care and rehabilitation options to people who have an intellectual disability and who are charged with or convicted of an offence. It provides a system for the appropriate use of different levels of care for individuals who, while no longer subject to the criminal justice system, are nonetheless able to be detained pursuant to the provisions of the Act.[108]

3.30 Those subject to the Act are referred to as "care recipients". There are two categories of care recipient. The first are special care recipients who must always receive care and rehabilitation in a secure facility. This category of care recipient is analogous to the special patient category under the Mental Health (Compulsory Assessment and Treatment) Act 1992. The second category will, depending on individual circumstances, receive care and rehabilitation in either a secure facility or in a supervised setting.

***Recommendation***

The Family Court should retain its jurisdiction under the Mental Health (Compulsory Assessment and Treatment) Act, Protection of Personal and Property Rights Act and the Intellectual Disability (Compulsory Care and Rehabilitation) Act.

**4. Jurisdiction - Relationship Property Cases/District Court**

4.1 It has been suggested that the District Court could assume the work of the Family Court in the relationship property jurisdiction. However, the Law Society believes there are no cost efficiencies to be made from moving property disputes to the District Court. It simply shifts the cost from one court to another of equal standing.

4.2 The main difference in the District Court is to be found in the procedure. The forms used in the District Court appear to have no advantage in the relationship property area. They have been designed for civil disputes between non-related parties and primarily involve somewhat less complex disputes. They offer no advantage to domestically related parties having dispute over their property. They seem to be a step backwards from the specific Rules and forms provided for in the Family Courts Rules.

[108] See the Guide to the Intellectual Disability (Compulsory Care and Rehabilitation Act 2003, Ministry of Health, (2004).

*(a) Applying the District Court procedure to relationship property disputes*

4.3 It is suggested that having relationship property proceedings dealt with in the District Court would result in negative outcomes.

4.4 One of the justifications for moving relationship property disputes and claims against a deceased estate out of the Family Court is that these *disputes "are not so much about personal relationship as they are about property"*.[109] This misconceives the nature and much of the focus of these disputes. The reason that these disputes arise and end up in court is precisely because they are about personal relationships rather than arm's length dealings.

4.5 The PRA is premised on contributions to the relationship, not contributions to property, and many of the disputes centre on matters relating to the relationship, rather than the property as such. Examples include the many and lengthy disputes about existence, commencement and duration of de facto relationships, economic disparity claims, contribution-based provisions, and the extraordinary circumstances exception. Arguments about the validity of s 21 agreements often also focus principally on non-property matters relating to the agreement. The issues extend beyond the parameters of contract law. Even disputes about classification of assets are often about non-property related matters, such as the purpose and use of the property.

*(b) Existing Family Courts Rules*

4.6 Family lawyers are familiar with the Family Courts Rules. These came into force on 21 October 2002 and although regularly amended are essentially in their original form. Rules 388 to 404 deal specifically with proceedings under the PRA and there are six special forms in Schedule 8 to the Rules for those proceedings.

4.7 The only consistent criticism of the procedural framework appears to be that specific pleadings are not required but this is mitigated through affidavits and case management, which sort out the issues to be tried well before any hearing. Discovery, although not in the traditional civil litigation way, is available and exercised routinely.

4.8 There is a specialised set of Rules and documents to deal with relationship property disputes, and the process works satisfactorily although like all processes it could be improved. For

[109] See paragraph 76 of the review.

example, when changes are made to the District Court or High Court Rules, the flow-on impact on the Family Courts Rules needs to be considered.

*(c) District Courts Rules*

4.9 The civil procedure in the District Court is now governed by the District Courts Rules 2009. These recent Rules instituted a radical departure from what had previously been familiar to civil litigation. The new District Court process can be summarised as follows:

- Proceedings are commenced with a "Notice of Claim", which is a printed form, but available electronically, with extensive instructions, and panels to complete. It does not provide for pleadings as such, and does not separate out causes of action.
- A Defendant serves a "Response" to the Notice of Claim.
- If the Plaintiff still wishes to proceed, then the Plaintiff prepares and serves an "Information Capsule". This identifies relevant documents and what identified witnesses are likely to say in respect of the dispute.
- The Defendant then has an opportunity to prepare and serve a similar Information Capsule.
- The remaining process (Rule 2.16) is composed of a flow chart, reflecting the complexity of the process. Barring interlocutory applications, a judge or Registrar makes a determination as to whether the claim is to go to the Disputes Tribunal, to a short trial, or a Judicial Settlement Conference, with the bias being towards the first if it involves less than $15,000 and towards the last if it involves more than $15,000.
- Once the parties have been through a Judicial Settlement Conference (and if there is no resolution), the Court will make a decision which may include allocating the matter to a full trial, a summary judgment procedure or a simplified trial. The procedural rules for a full trial are the High Court Rules so the parties are placed back in the conventional environment of civil litigation.

4.10 A defendant in the above procedure facing a claim of more than $50,000 is entitled as of right to have the proceeding removed to the High Court. In that case, the plaintiff loses the benefit of the District Court filing fee, and has to pay the filing fee in the High Court.

4.11 Enquiries of experienced civil litigators suggest that the new procedure is not generally popular and does not produce any greater efficiency. Some regular litigants, such as insurance companies, appear to be routinely filing in the High Court even when claims are within the jurisdiction of the District Court. It is also common that defendants facing a claim of more than $50,000 will use their right to require a transfer to the High Court.

4.12 For plaintiffs the frustration is about going through a set of steps right up to the conclusion of the Judicial Settlement Conference, which become largely irrelevant and redundant should settlement not be reached. That is, having gone through all of that process, they are then required to produce a conventional Statement of Claim and go to trial in the "normal" way (i.e. for civil cases).

4.13 Defendants also complain that the panels to be filled in on the Notice of Claim do not require the claim against the defendants to be pleaded with the specificity and particularisation of the traditional Statement of Claim.

4.14 An area in which the District Court procedure is quite deficient is that Court assisted discovery is not available for months into the procedure i.e. when the parties have finally got to a Judicial Settlement Conference which has failed to produce a result and the "real" case starts. Prior to that disclosure is voluntary and really based on what suits each party's case. Effective disclosure rules, such as those available in the Family Court, are essential to speedy and just resolution of relationship property disputes.

4.15 The possibility that litigants in the relationship property area are required, after an unsuccessful Judicial Settlement Conference, to then litigate their dispute under the High Court Rules likewise seems to hold no advantage. For a significant period after the (then) Matrimonial Property Act 1976 became law, both the lower Court and the higher Court (although for part of that time by different names than they are now) had concurrent jurisdiction. There was a deliberate step away from this when the Family Court was given the sole jurisdiction. In doing so, the traditional procedure of the higher Court was abandoned in favour of the specialised procedure of the Family Court.

4.16 Family Court judges' specialist knowledge and expertise assists in the efficient and effective resolution of relationship property disputes.[110] If the proposal to remove relationship property litigation from the Family Court went ahead there would be issues around where to draw the jurisdictional line. If it was simply to do with applications under the Act itself then this would involve District Court judges dealing with adjustments for economic disparity[111] and also having consideration for the interests of children.[112]

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[110] See s 15 of the Property (Relationships) Act 1976.
[111] See s 15 of the Property (Relationships) Act 1976.
[112] See ss 26 and 26A of the Property (Relationships) Act 1976.

4.17 Relationship property applications are sometimes brought with applications for spousal maintenance under the Family Proceedings Act 1980. It would be unfortunate if litigants had to have one dispute heard in one court and the other dispute heard in another court. Not only would it be inefficient and increase costs, it would also prevent a holistic approach to post-separation property issues, particularly where the PRA claim includes an application under s 15 or s 15A. The same holds for applications to vary trusts under s 182 of the Family Proceedings Act 1980.

4.18 In relationship property proceedings, Family Court judges have unlimited jurisdiction as to value. Presumably that unlimited jurisdiction as to value would have to be transferred to District Court judges who would otherwise be limited to $200,000. But if a related claim, such as one involving transactions with a family trust or a tort between spouses/partners, was coupled with a claim under the Act then that would presumably be limited to $200,000.

***Recommendation***

The Law Society recommends, for the reasons set out above, that the Family Court should retain jurisdiction in relationship property matters and should have a limited jurisdiction in relationship property matters involving trusts (as outlined in Appendix 2).

## 5. Jurisdiction of the Family Court – Other Considerations

*(a) Workload of the Family Court*

5.1 If the statistical information provided in the review[113] can be relied on (the Law Society is uncertain about the data provided), the number of "substantive applications"[114] has remained relatively constant since 2004/2005, the year COCA was introduced.

5.2 Figure 3 in paragraph 48 of the review is misleading. In particular, it includes dissolutions as a substantive application although in fact these are matters that are mostly dealt with administratively by the Registry. Defended dissolutions are rare. If the figures are recalculated to remove dissolutions then the ratios would be as follows:

- PPPR 4.65%
- Relationship property 3.5%
- Other 3.5%

[113] Specifically Figures 2 and 3 and paragraphs 47 and 48 of the review.
[114] Loosely defined in footnote 21 of the review.

- Mental Health 10.5%
- COCA/Hague 45.35%
- Domestic Violence 12.8%
- CYPTF 19.8%

5.3 Of those PPPR, mental health and domestic violence fall within the definition of "vulnerable adults"[115] and matters under the CYPTF Act fall within the definition of vulnerable children. Therefore matters dealing with vulnerable adults and vulnerable children on the re-constituted figures total 47.75% – nearly *half* – of all substantive applications.

5.4 The "other" category is not explained in the review but presumably embraces a range of matters – alcohol and drug addiction, adoption, paternity, spousal maintenance and estate litigation – that also typically involve vulnerable adults and children.

5.5 The Law Society is unable to ascertain whether or not the data relating to "exiting the court" under COCA can be extrapolated to other matters. If (for the sake of argument) only 12% of applications under the PRA carry onto a hearing then it would appear that there would be fewer than 200 cases per annum to be heard over the whole country.

5.6 There is some overlap between COCA and CYPTF Act proceedings. Sometimes CYPTF Act proceedings morph into COCA proceedings, sometimes the other way. In practical terms, the Children & Young Persons Service will often express reluctance to become involved in cases even if there is a "care and protection" issue where it is understood that there are current COCA proceedings in the Family Court.

5.7 It is difficult to see how the number of applications can be measured against the number of parties who separate and sort out their arrangements without outside assistance (see paragraph 117 of the review). What is clear is that 88% of COCA applications will resolve *prior to* a hearing. Fifty per cent of those applications were resolved at or prior to mediation.[116] The Law Society notes that only 12% of the substantive applications under COCA – amounting to approximately 3,100 hearings[117] – carried onto a hearing.

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[115] See footnote 8 of the review.
[116] See paragraph 52 of the review.
[117] Using the figures in Appendix 6, Table 1 of the review.

5.8 The fact that there are "overlapping" applications under COCA and the DVA is not surprising. The assertion that these cases *"increase the complexity of the proceedings and the likelihood of more delay and expense"*[118] warrants more careful analysis.

5.9 The review states *"applications to vary parenting orders have increased by 62% between 2005/06 and 2009/10"*.[119] The review provides no analysis of possible reasons for the increase.

*(b) Self-represented Litigants*

5.10 Any changes that increase the numbers of self-represented litigants will inevitably impact on the efficiency and, by implication, the cost-effectiveness of the Court. There is no substitute, both in terms of access to justice and the efficient operation of the Court, for legal representation by experienced lawyers.

5.11 In July 2009, the Ministry of Justice published a discussion document on self-represented litigants.[120] A shortage of research data limited the conclusions able to be drawn in relation to the family jurisdiction.[121] The perception was that the number of self-represented litigants was increasing. The reasons why litigants elected to represent themselves were varied, although the cost of legal services was commonly cited.[122] Other reasons included a lack of trust in lawyers.

5.12 The effects of self-representation on the efficiency of the Court cannot be underestimated. A fundamental lack of understanding of court process and procedure leads (amongst other things) to the filing and presentation of irrelevant, excessive and disordered material and a failure to properly grasp just what is in issue. Self-represented litigants frequently struggle to distinguish between evidence, submissions and commentary.

5.13 The lack of understanding of the law and court processes impacts adversely on hearing times and case progression. This is particularly pronounced in the Family Court, partly because of the more complex and personal nature of the disputes. The impact on other parties to the dispute (and to children affected by the dispute) is also marked and reflected in increased costs, delays and stress.

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[118] See paragraph 49 of the review.
[119] See paragraph 51 of the review.
[120] M Smith, E Bonburn, SW Ong: "Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions" (July 2009).
[121] The lack of empirical research has been noted by the Law Commission "Delivering Justice for All" March 2004. There is research now under way on the topic at the University of Otago, supported by the NZ Law Foundation (reported NZ Lawyer, 27 January 2012).
[122] Provision of affordable legal advice is a significant challenge for the legal profession to address.

5.14 Although self-represented litigants frequently seek advice and information from a wide variety of sources (including court staff, Community Law Centres, Citizens' Advice Bureaux and internet sites), their inability to process this advice and information often remains an impediment to their efficient and effective participation in the Court system. The Law Society is not persuaded that improving the accessibility, currency and context of information will necessarily ameliorate matters.

5.15 It is a source of some frustration to many lawyers that the Court (in an administrative sense) and judges (when managing and presiding over cases) adopt a more liberal and generous approach to self-represented litigants than to those who are legally represented. The creation of an informal two-tier approach of this sort is detrimental to the efficient working of the Court and is unfair to those parties who have funded their own legal representation. The possibility of an alternative procedure where a party is self-represented[123] is not favoured. If a litigant chooses, for whatever reason, to dispense with the services and expertise of a lawyer that should not come at the cost of the efficient operation of the Court.

*(c) Section 60 of the Care of Children Act 2004*

5.16 The Law Society identifies the provisions, and operation, of s 60 of COCA as problematic even having regard to the amendments which came into force in November 2011. It is an area in which public and private law intersect insofar as they impact upon vulnerable children and/or adults.

5.17 However laudable the intention behind the legislative amendments, it is abundantly clear that it has, in practice, proved cumbersome, costly and an impediment in many cases to a timely resolution of disputes. The first issue is to identify the purpose of s 60.

5.18 Section 60 provides a process for an inquiry into the actual and prospective safety of children in the face of allegations of violence (as defined in s 58 of COCA). Its effectiveness as a protective measure is by no means uniformly accepted.

5.19 Section 60 can be a valuable and important protective tool if properly case managed from the outset together with an early appointment of Lawyer for the Child. It is the Law Society's strong view that s 60 needs to be reviewed and amended to achieve its statutory purpose in a

[123] Recommended for consideration by a report of the United Kingdom Civil Justice Council issued in November 2011 (Access to Justice for Litigants in Person).

case efficient way. We believe a significant financial benefit can be obtained by restricting s 60 cases to those that warrant the Court's attention.

*(d) Achieving finality*

5.20 Amendment to s 141 could be considered authorising the Court to restrict repeat applications by requiring leave of the court to file unless there has been a material change of circumstances impacting on the welfare of the child, where:

- any application is made to vary or discharge a final order within a two year period of the final order;
- the applicant has failed to pay any costs award or direction to contribute to the costs of Lawyer for the Child or specialist reports.

5.21 The Court could be given a power to require security for the costs of Lawyer for the Child in any case where:

- a repeat application is made within a two year period; or
- in any case the court considers minor in nature or without merit.

5.22 The frivolous or vexatious test in s 140 needs to be amended to provide the Court greater discretion to dismiss unmeritorious proceedings.

5.23 Under s 57 interim orders lapse after 12 months unless the Court directs otherwise. An amendment to provide that interim orders become final after 12 months by operation of law unless the Court orders otherwise, would result in considerable savings in Court administration and Lawyer for the Child costs.

***Summary of recommendations – jurisdiction***

The Law Society makes the following recommendations regarding the Family Court jurisdiction:

A. In relation to relationship property and family trust matters, preliminary recommendations (subject to the outcome of the Law Commission's current reviews of trust law in New Zealand and the Judicature Act):
   - The Family Court should retain its jurisdiction in relationship property matters.
   - The Family Court should have a limited jurisdiction in relationship property matters involving trusts (as outlined in Appendix 2).

- The concurrent jurisdiction of the High Court in relationship property matters should be restored.
- There should be a lower threshold required to transfer proceedings from the Family Court to the High Court, especially when the case involves a family trust.

B. In relation to other matters:

- The Family Court should retain its concurrent jurisdiction in respect of estate litigation matters under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.
- Reconsideration of the forms in the Family Courts Rules and more use of Rule 175 could improve efficiency in this area.
- To ensure the protection of very vulnerable children in Family Court proceedings, the guardianship provisions in s 31 of COCA should be amended to enable a judge to place a child under the guardianship of the Court on his or her own motion.
- The Family Court should retain its jurisdiction in relation to the Mental Health (Compulsory Assessment and Treatment) Act, Protection of Personal and Property Rights Act and the Intellectual Disability (Compulsory Care and Rehabilitation) Act.
- There should be a simple legislative change to s 57 of COCA, whereby Interim Parenting Orders (which currently lapse if not confirmed as Final Orders) could be converted into Final Orders if no steps are taken.
- A review of s 60 is required to better deal with cases involving violence.
- Amendment to the power in s 140 to dismiss proceedings should be considered to encourage finality.
- Amendments to restrict the ability to commence proceedings in s 141 are required to reduce repeat applications.

## 6. Court Process, Rules and Procedural Proposals

*(a) Procedure*

6.1 A major concern identified in the review is that "*the overall time to progress certain applications is too long*".[124] The review identifies private law disputes such as applications for Parenting Orders under COCA and the division of relationship property under the PRA.

[124] See paragraph 17 of the review.

6.2 The Law Society believes that a more rigorous adherence to the Rules (for example, restraining the exchanges of affidavits to the affidavit – response – reply paradigm rather than permitting affidavits to be filed indiscriminately) and to the laws of evidence (particular ss 7 and 8 of the Evidence Act 2006) would have an immediate and discernible improvement on the operation of the Court. Responsibility for this lies initially with judges who should be encouraged to take a more active and directive role in enforcing the Rules.

6.3 A case summary is given as an example, at paragraph 19, to illustrate why change to the Family Court is needed. The case summary fails however to address some critical questions:

- Why was it considered "necessary" for there to be numerous specialist reports (reverting to the statutory criteria set in s 133)?
- Why were ss 140 or 141 not considered as a viable means of bringing these proceedings to an end?
- Was this, in fact, a case that should have been considered in the public law arena under s 14(1)(h) of the CYPTF Act?

6.4 All of these provisions may (or may not – the case sample is inevitably limited in its analysis) have served to address the fundamental issue – the fact that it took eight years for Ben's parents to finally reach agreement about his care arrangements. The point is that no law or practical changes would be required to address the issues identified. A more rigorous use of Rule 175 relating to judicial conferences (and in particular Rules 175D and E) can, and should, be utilised to effectively case manage matters.

6.5 The Law Society supports greater judicial input early in a case. A model was discussed at the symposium for what has been termed an "*Evaluation Conference*". The process is an enhanced Rule 175 conference at which the parties may have direct communication with the judge, enabling an early intervention to occur in a less formulaic way than the current EIP model.

6.6 In a symposium paper titled *Managing the High Court's Civil Case Load: A Forum for Judges and the Profession*, Justice Miller identified "two critical aspects to case management that can contribute to the efficient disposition of proceedings: management of the discovery processes and identification of issues". Discovery plays a lesser role in most Family Court disputes but identification of issues is crucial. Justice Miller's recommendation was that the Initial Case Management Conference should be moved "to a later date" to enable the parties

to make "meaningful progress" so that the Case Management Conference achieves something more than timetabling ("which should not be the focus of judicial conferences").

6.7 Identification of the issues should be a key focus at the judicial conference. This must of course go further in COCA cases than a bland assertion that the proposals by the mother/father are patently "in the best interests of the child". An obligation should be imposed on counsel to confer and file joint Memoranda for Conferences (recognising that this may be problematic in cases involving self-represented litigants). The obligatory filing of an Issues Memorandum at the time of filing of any application may be of assistance.

6.8 Two simple steps have the potential to shift the costs from the state to the participants:

- There appears to be no reason why in private law disputes service of documents should not be the responsibility of (and therefore at the cost of) the parties. The common practice of having the Court bailiff to undertake the task is unnecessary.[125]
- The drafting of Orders should always devolve to counsel and not be the responsibility of the Court. An exception may be required for self-represented litigants where there are no counsel involved.

6.9 Robust case management to reduce the number of "events" is also called for. The Law Society notes the steady increase in the average number of events in COCA matters (from 3.5% in 2005/2006 to 7.4% in 2010/2011) particularly in the Auckland and Manukau Family Courts. More rigorous judicial management of matters which are in the hands of judges is called for.

*(b) Without Notice Applications*

6.10 Resort to "without notice" applications of a substantive nature[126] is more common in the Family Court than in any other jurisdiction. The Rules prescribe the circumstances in which such applications can be made. More rigorous adherence to the relevant criteria is advocated.

6.11 The cases where parties can resort to applications "without notice" should be exceptional.

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[125] See Rule 101 of the Family Courts Rules 2002.

[126] As distinct from procedural matters such as applications for substituted service, abridgement of time, removing oneself from the record.

*(c) Entering the Court (Pre-Filing and Post-Filing Processes)*

6.12 The Law Society regards the (unsubstantiated) suggestion made by some *"that the Family Court has been too accessible"*[127] as uninformed. While there may be strong grounds for holding that formal legal mechanisms are often inappropriate for regulating, in detail, how people interact after separation, the demarcation between proper occasions for legal intervention and non-intervention is itself a matter of law.[128] Ready access to the Family Court may, indeed, be seen as one of its strengths. Nevertheless, if correct, the issue can be readily addressed in respect of substantive matters (as opposed to strictly procedural matters).

6.13 It has been suggested that the Family Court could adopt an approach similar to the Australian screening process for children's cases.[129] Anecdotal feedback to the Law Society from Australian family lawyers suggests that this process, if not adequately resourced, is not without its flaws. Its success depends upon parties (and often children's) access to well-qualified professionals at the early stages. Furthermore, if there is intractable conflict and no settlement, then a family can wait 12 to 18 months for a final determination by the Court if it is not backed up with adequate resources to progress the case to hearing.[130]

6.14 The Law Society supports the suggestion of an effective triage/case management process. This triage process should be conducted by a judge (which will require some consideration of the current powers and jurisdiction of the Registrar).

6.15 The starting point should be that a Court system is to ensure the orderly determination of disputes between parties. At the same time encouragement should be given to the consensual resolution of private disputes (as opposed to matters of public law).

6.16 Appropriate filtering mechanisms are required to ensure that only disputes requiring determination by a judge come before the Court.

6.17 As recommended above, it should be a pre-requisite to utilise ADR/mediation before proceedings are filed, but not to the extent of making such services absolutely mandatory. Some grounds for waiver must exist. The following suggestions might be considered to encourage the constructive use of such pre-Court services:

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127 See paragraph 171 of the review.

128 Eeckelaar "Not the Highest Importance: Family Justice under Threat" (2011) 33 Journal of Social Welfare and Family Law, 311.

129 See paragraph 77 of the review.

130 Correction to paragraph 77 of the review: Family violence cases in Australia are not streamed to the Magellan Program unless they are cases where allegations of sexual or physical abuse of a child are made, as distinct from domestic violence (including psychological) among adults only).

- Availability at free or nominal charge.
- Timely provision of appropriate, accessible services.
- As a general proposition, the parties being required to satisfy the Court, before an application is accepted for filing, that reasonable efforts have been made to resolve the dispute outside the court system. If that is to be a requirement, the options for resolving disputes need to be adequately funded to avoid becoming an impediment to accessing the Court.
- Agreements reached must be capable of being registered with the Court and enforceable as if they were a court order. Enforceable mechanisms need to be improved.

6.18 In the UK, the Court may decline to make an order where it is not satisfied that intervention is necessary.[131] While experience in the United Kingdom may suggest such a provision is nothing more than symbolic, the "no order" situation provided by their legislation does statutorily require judicial consideration to be given to whether an order is necessary. A greater brake on the making of parenting orders in New Zealand could be provided by such a consideration being introduced here. The fact that, after a hearing, such an outcome is possible may serve to inform intending litigants and deflect them away from the Court.

6.19 Issues of dysfunction, including domestic violence, the effect of abuse of drugs and alcohol and mental health as discrete issues may require immediate Court intervention irrespective of any pre-filing processes.

6.20 The Law Society recommends practical interventions designed to limit the number of court events, for example:

(a) Proceedings should be assigned to a track –assignment should be made on the basis of published criteria. The Law Society supports the model set out at diagram 4, paragraph 220 of the review provided that there is the addition of a clearly defined "urgent" track model as shown in the EIP model in appendix 4 of the review.

(b) Rules should set out precisely what steps must be taken under each track unless otherwise directed by the Court.

(c) Dispense with Registrar's lists/reviews.

(d) Conferences should be by telephone or video with memoranda filed in advance except for pre-hearing conference to be conducted on a Rule 175 basis, on both urgent and standard track matters.

(e) Non-contentious matters should be removed from the courtroom.

[131] See s 1(5) of the Children Act 1989 (UK).

(f) Formal proof hearings should be dealt with on the papers, unless expressly required by the Court.

(g) Consent orders dealt with by the Registrar on the papers unless the Registrar seeks to refer to a judge.

(h) Conferences dispensed with where joint memoranda filed.

6.21 The Law Society believes there need to be clear Rules specifying steps to be taken in relation to each track. The Law Society would not support any process akin to the new District Court Rules and commends the High Court Case Management model, in particular the following features:

(a) Initial Case Management Conferences are allocated at the time of filing.

(b) Depending on the nature of the application the Rules specify matters which are to be addressed at the initial Case Management Conference.

(c) Memoranda are required to be filed prior to Case Management Conferences.

(d) The subjects which must be addressed in the Memoranda are prescribed.

(e) Initial Case Conferences and almost all subsequent Conferences are conducted by way of teleconference.

(f) There is the ability to have one Judicial Officer assigned to a case for its duration.

***Recommendations***

The Law Society recommends:

- a more rigorous use of Rule 175 relating to judicial conferences is required [paragraph 6.4];
- an obligation on counsel to confer and file joint Memoranda for Conferences [paragraph 6.7];
- the service of documents should be the responsibility and cost of the parties [paragraph 6.8];
- the drafting of orders should be the responsibility of counsel and not the Court [paragraph 6.8];
- "without notice" applications should be exceptional [paragraph 6.11];
- an effective triage/case management process to be conducted by a judge [paragraph 6.14];
- the practical interventions outlined in paragraph 6.20, to limit the number of court events; and
- clear rules specifying the steps to be taken for each track are essential; relevant parts of the High Court case management model could be adapted for the Family Court.

*(d) Evidence in the Family Court*

6.22 The review states that "*the standard of evidence filed in the Court is often poor and the 'any evidence' rule should be amended*".[132] However, it is requirement that all evidence before the Court must comply with the Evidence Act 2006 and be both relevant and admissible.

[132] Section 7.2, p48.

6.23 Pursuant to Rule 48 of the Family Courts Rules 2002 (Rules), evidence given in support of a party's case at any hearing of an application must be given by affidavit. This marks a departure from the traditional adversarial model in which evidence is given orally and without prior notification of the full extent of the evidence to other parties.

6.24 The affidavit approach is replicated now in the District Court and the High Court and eliminates both "trial by ambush" and the need for lengthy evidence in chief followed by equally lengthy cross-examination. To that extent the traditional adversarial model has been appropriately modified.

6.25 The Law Society supports a strengthening of the Rules so that evidence is exchanged along the following lines:[133]

- Evidence in chief by way of affidavit.
- Evidence in response.
- Evidence thereafter "strictly in reply".

***Recommendation***

The Law Society recommends that an amendment to the so-called "any evidence" provisions to be found in many family law statutes[134] is warranted. A preferred approach is to require the Evidence Act 2006 to apply and to exclude all evidence that would ordinarily be inadmissible unless a Court otherwise directs.

6.26 Rule 52D limits steps that can be taken in a matter once notice of a hearing date has been given. This Rule is frequently disregarded and accordingly the efficiencies it was designed to achieve are not fulfilled. This is an example of where more rigorous application of existing procedures will serve to address the concerns expressed in the review.

6.27 One of the identified causes of delay is the delay in obtaining reports under ss 132 or 133 of COCA. The Law Society considers that a more disciplined application of the existing law (with perhaps a minor amendment to s 133 of COCA) could have a positive fiscal impact for the Family Court. Section 133 requires the Court to be satisfied "that the report is *necessary* for the proper disposition of any application". However judges and lawyers are not always disciplined about the need to identify why a report is "necessary" in any particular case. It may be helpful to have some principles identifying what is "necessary" from a psychological

[133] Rule 158 of the Family Courts Rules 2002.
[134] For example, s 128 of the Care of Children Act, 2004 and s 36 of the Property (Relationships) Act 1976.

perspective, to assist in a more disciplined application of these sections. There is insufficient data to determine why there has been an increase in the cost of specialist reports and, in particular, whether the complexity of cases in themselves may account for a significant part of this increase.[135]

***Recommendation***

The Law Society recommends a statutory amendment to ss 132 and 133 of COCA to ensure that the discretion to obtain a specialist report is exercised more consistently; and only when a report is necessary for the proper determination of the case.

6.28 It has been suggested that overseas practices of filing "a standard questionnaire" should be adopted.[136] The purpose of such questionnaires needs to be identified. The Law Society has considered models used in the United Kingdom, Australia and Ontario. The Law Society believes the use of a standard questionnaire should be explored fully.

6.29 Whilst these documents may have merit (if fully and properly completed), there is a concern that if overly prescriptive they may serve to obscure important issues. Whilst useful to identify essential factual information (and possibly as a valuable aid in the "triage" process), the value of such questionnaires will be significantly affected by the design. It is difficult to see what benefits such questionnaires would have over properly drafted affidavits reflecting existing evidential requirements (relevance and admissibility). For example, the model property agreement to be found in the Rules has been little used in practice and, regrettably, the prescribed affidavit of assets and liabilities[137] in relationship property matters is not always completed with appropriate diligence. Rule 244 sets out the information which is required to be contained within an affidavit supporting an application for an Adoption Order under the Adoption Act 1955 as does Rule 392 in relationship property matters. This may be the preferable approach.

*(e) Delay*

6.30 Where matters do need to be determined by a judge it is incumbent on the Family Court to attend to such matters without unnecessary delay.[138] As the review identifies,[139] however,

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[135] There is also anecdotal evidence that on occasions judges seek a report because it will be "helpful" for the judge rather than "necessary" but again in the absence of proper data the causes of this increase are not known and the ability of a judge to request a report where the judge deems a report to be necessary to ensure that the welfare and best interests of the child are properly addressed, must not be reduced.

[136] Paragraph 186 of the review.

[137] See PR1 of the Family Courts Rules 2002.

[138] This, of course, begs the very important question of how "matters (which) need to be determined by a judge" are defined and identified.

[139] See paragraph 22 of the review.

sometimes delay can result in more durable decisions, because it allows better information to be provided to the Court or for parties to feel they have been heard. It may also be because the parties themselves need time to process their own sense of grief and loss and to come to terms with their circumstances following the breakdown of the relationship.

6.31 The desire to avoid delay is implicit in paragraph 66 of the review in regards to relationship property applications. Questions arise as to the extent to which the Court should control case management in non-protective matters. For example, there is discussion about the *Family Court Caseflow Management Practice Note*. It is asserted that *"ordinarily the Registrar will allocate a Judicial Conference after two adjournments in the Registrar's List"*[140] in respect of relationship property matters. It is not clear what the criteria are for the Registrar to allocate a Judicial Conference. There are serious questions as to the extent to which the Court should be managing these non-public law matters. Less regulated management of such matters may serve to reduce the number of "events".

6.32 Overly rigorous case management (to ensure that the timeframes within which cases are deemed to have been disposed of are reduced) may not necessarily achieve the desired outcome if decisions prove less durable and increase costs as an unintended consequence. The Law Society accepts that there must be a balancing of both the cost to the state of maintaining the Family Court and most importantly, the need to reach decisions within a timeframe appropriate to any child who is the subject of or affected by proceedings.[141]

6.33 Paragraph 69 of the review is instructive. Delays are considered to be a function of waiting for the *"completion of briefs for psychologists' reports, or updating reports"*. The settling of a brief for a psychologist's report is a judicial role (albeit with the assistance of counsel where appropriate) and there is no reason why there should be any delays at that point.

6.34 The timing of such reports should also impact upon whether or not there is a need for *"updated reports"*.[142] The need for updated reports largely reflects the delay in having cases heard. Judges are reluctant to allocate hearings before all the evidence is available and has been considered by the parties. It is difficult for lawyers to certify that matters are ready for hearing and estimate the likely duration of such a hearing until then. There is also a residual optimism that a report will provide the basis for an out-of-court resolution (or at least meaningful negotiations directed to that end). This effectively builds in a systemic delay.

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[140] See footnote 26 of the review.
[141] Section 4(5)(a) of the Care of Children Act 2004 and s 5(f) of the Children, Young Persons and their Families Act 1989.
[142] There is no statistical data provided as to the number of "updated" reports that have been sought.

Most "updated reports" will be in cases that are heading towards litigation – which account for only 12% of the total applications filed.[143]

6.35 Many of the delays are systemic. The Law Society is concerned about the delays that occur once a case is ready for hearing. Observations show that this is the period when there is the greatest delay that has no logical explanation for the participants in the process. A major cause of delay is the inability to obtain fixtures within a reasonable timeframe. This is compounded by inaccurate time estimates for hearings.

6.36 Operational factors, whilst stated to be beyond the scope of the review, must be considered in tandem with this review. The Family Court must be resourced to respond quickly to situations which, because of their human component and the potential effect on vulnerable adults and children, are by nature frequently more fluid (and requiring urgent intervention) than other civil or commercial disputes.

6.37 From a fiscal and best practice perspective, the resourcing of the Registry and the efficient use of judicial sitting time are both important when considering reform of the Court. These issues are not addressed in the review.

6.38 Addressing Registry and judicial resourcing and practice should be an essential part of the review. For example, a principal goal of EIP and its use of counsel-led mediation was to free judges from presiding at mediation conferences to enable them to hear and determine more cases. The statistics show that the sitting hours of judges have not increased but have in fact declined since EIP was introduced. This has implications for both cost and delay. In addition, the Court now has the additional cost of EIP mediations and the resulting increase in the costs of Counsel to Assist, Lawyer for the Child and the cost of legal aid because of the need of lawyers to attend these mediations. An EIP mediation can take between three to five hours whereas a mediation conference takes approximately one and a half hours.

*(f) Modernising the Court*

6.39 The Law Society acknowledges that technological advances can improve traditional systems and courthouse-based processes and may result in financial savings and a more efficient delivery of services. It considers that a thorough review of such processes to take advantage of technology should form part of the overall review of the Family Court. Simple changes

[143] Paragraph 52 of the review.

such as requiring documents to be filed by email and greater use of video and teleconferences are obvious starting points.

6.40 The Law Society does not, however, consider that the changes made in order to maintain the delivery of justice services in Christchurch following the February earthquake (changes necessitated by a sudden and unexpected crisis) should form the template for a new model.

6.41 The effectiveness of the new centralisation of court services introduced in Auckland on 1 February 2012 remains to be seen. Early evidence suggests a number of problems which are countering the intended benefits but it is too early for this to be assessed. A formal review of the new processes may have implications for an overall review of systems.

***Recommendation***

The Law Society recommends a review of Court processes to identify potential financial savings resulting from new technology.

## 7. Costs of the Family Court

7.1 The review's main consideration is "sustainability", a term which translates into the cost of the Family Court to the state. Figure 4 in the review shows that between 2004/2005 and 2009/10 the total of all expenditure by major cost category (including direct operating costs, professional services, legal aid and judicial resourcing) has increased by 62%. However, included in this calculation is a 93% increase in legal aid expenditure.

7.2 As already noted, legal aid is the subject of a separate review process. If the legal aid percentage increase was deducted from the total (all expenditure) increase, it would still show the cost of the Court has increased, but by considerably less than 62%.

7.3 To be effective the Family Court must be adequately funded. Without adequate funding, access to the Court for those who require it is inhibited. The government has a responsibility to its citizens to provide access to a proper forum for the resolution of family disputes.

7.4 If these disputes are not to be resolved within the Family Court, what forum is available to resolve them? The disputes will still exist – they will not go away or resolve on their own.

7.5 Paragraph 54 of the review identifies some reasons said to be *"likely to account"* for the increases in costs, including:

- Increases in remuneration for Family Court staff and judges (contributing to a 49% increase in judicial resourcing cost). However these increases are not within the scope of the review.
- Changes to legal aid payment rates and eligibility as a result of government policy (contributing to a 93% increase in legal costs). As discussed above, legal aid is being separately reviewed, but not all work in the Family Court is legally aided.

7.6 Other identified factors were:

- Growth in professional services payment rates, and more appointments of professionals by the Court. The Law Society notes that there has been an increase in appointments of professionals but that there has, in effect, been no increase in the rate paid to Court-appointed counsel for two decades. Payment rates to other Court-appointed professionals have increased.
- The widening scope of the work undertaken. The question is, if this work is not undertaken in the Family Court then where should it be undertaken (if at all) and if it is moved to another jurisdiction will this in fact save costs?
- The increasing number of "events".[144] The Law Society has identified options for reducing the number of "events" and these are outlined in the submission.

## 8. Court Filing and Setting Down Fees

*(a) General*

8.1 The Law Society is not opposed in principle to the introduction of appropriately set court fees (filing, setting down and hearing fees) for some types of Family Court proceedings such as relationship property, estate, family protection and testamentary promises claims. The Law Society does not support the introduction of fees for cases involving children and vulnerable adults.

8.2 The review proposes that court fees be introduced to generate some revenue to offset the costs of running the Family Court.[145] In setting fees, the review states that consideration would be given to preserving access to justice and balancing the benefit court users gain from accessing the Court with the public benefit that the government and society achieve from resolving the issues brought before the Court. To achieve these objectives it is essential that the Court retains sufficient discretion to address the needs of each case, particularly when children are involved.

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[144] Defined as a hearing or case review to advance the progress of a case or application. It includes appearances before a judge or Registrar and also matters dealt with administratively by phone, email or "on the papers" such as a Registrar's Review - see the definition of "event" contained in the glossary at page 88 of the review.

[145] See paragraphs 190-198 of the review.

8.3 The review refers to concerns not to disadvantage vulnerable adults and children. Again the Law Society draws attention to the limited definition of "vulnerable children and adults" affected by Family Court proceedings, especially in COCA proceedings where family violence or mental health issues are not present.

8.4 The Law Society urges caution in setting fees, particularly in cases involving children, vulnerable adults or risk and urgency. Access to the Courts in appropriate cases should not be obstructed by Court fees.

*(b) Impact on particular types of proceedings*

8.5 While adult parties undoubtedly benefit from resolution of parenting and guardianship disputes through the Family Court, the persons COCA is most designed to benefit are the children who are involved (unwittingly and involuntarily). All children are vulnerable and dependant on either their parents or the state to care for and protect them.

8.6 The social science research on the negative impact on children of exposure to conflict is compelling. The appropriate resolution of disputes involving children, by agreement, conciliation or (if necessary) the Family Court is the goal. There is need for caution in regard to the introduction of court fees for those who seek to have recourse to the Court in cases involving violence and children.

8.7 The purpose of Hague Convention cases, as well, may be compromised by inappropriate provision for filing fees. These cases require urgent response and an applicant will often have the added cost of international travel, accommodation and loss of income.

8.8 Applications for spousal maintenance, particularly interim applications, by their very nature may be compromised if filing fees are required in every case.

*(c) Discretion to waive fees*

8.9 The current discretion of Registrars to waive or reduce fees may not always safeguard access to justice for vulnerable parties.[146] There are many instances where an applicant is not on a benefit or in receipt of legal aid but does not have immediate access to funds to pay a filing fee or where the payment of fees will impact on children in their care. This is often because the other partner has complete control of, and is withholding access to, relationship assets, or

[146] See paragraph 195 of the review.

one party has the primary responsibility for care of the children or where the financial responsibility for care is no longer shared.

8.10 Reference to the financial hardship of the individual party may be too narrow where the impact transfers to the welfare of children or financial hardship directly related to the dispute itself. These scenarios are only given by way of example and are not exhaustive.

8.11 Consideration also needs to be given to circumstances where urgent orders are sought and the applicant does not have ready access to funds to pay the requisite filing fees but may do so later.

8.12 It may be appropriate to waive payment of fees where COCA applications are made for orders by grandparents or other caregivers where otherwise the state would have to intervene.

8.13 One of the benefits of the introduction of court fees in relationship property and estate-related litigation will be that the parties are further encouraged to settle. However, settlement by the parties in COCA cases is not a guarantee to orders being made, as the Court still has to be satisfied that the settlement is in the welfare and best interests of the child. The risk of having a costs award made against a party and the party also being required to make a significant contribution to the costs of Lawyer for the Child and Court-appointed specialists, is a better incentive not to pursue an unmeritorious case.

8.14 Imposition of setting down and hearing fees will focus the minds of parties on settlement and more accurate hearing time estimates, which is positive. However, this will not be achieved without improvements to case management, identification of issues and better control of affidavit evidence.

8.15 The increased number of unrepresented litigants in recent times has resulted in prolonged proceedings and longer hearing times. The number of these litigants is likely to increase with changes to legal aid and difficult economic times. The introduction of fees may encourage this increase. Unlike many civil disputes, for many parties there is no choice about accessing the legal process where the welfare of their children is involved. Effective and affordable pre-trial dispute resolution will go a long way to address the less complicated of these cases.

8.16 Some of the most complex cases in COCA and sometimes PRA proceedings are brought because of one party's lack of ability to resolve issues rather than an inherent difficulty with the substantive subject matter. These parties (commonly referred to as "difficult" parties)

may not have been diagnosed with a mental illnesses or may present with sub-clinical conditions which affect their ability to engage in court proceedings. It would be unfair in such cases to burden the party with capacity with the payment of extensive court fees incurred primarily as a result of the other party's conduct. Such inequities could be addressed through costs awards, but this may not be appropriate where the difficult party has limited financial resources or such an award would impact negatively on the welfare of children.

8.17 As in all litigation conducted through our courts, the parties themselves incur direct costs of lawyers and other professionals, as well as indirect costs due to loss of income and travel. These costs are significant for Family Court users on low to average incomes.

8.18 If only the wealthy are able to afford to use the Family Court (and they are likely to access private dispute resolution services which are cheaper), this has serious on-going implications for the justice system.\

8.19 Some Family Court hearings, especially those involving violence (under both the DVA and COCA) and sexual abuse allegations are more akin to criminal than civil proceedings. The respondent defending these allegations should not be required to also pay for the right to do so, particularly when decisions made in such cases can have such long-term consequences.

8.20 Unless the matters raised in this submission are adequately considered, inappropriate imposition of court fees will impact on users' access to justice, creating flow-on consequences for increased costs and difficulties in the administration of the Family Court or other government agencies.

*(d) Which party bears the burden of court fees?*

8.21 Because of the no-fault nature of most Family Court proceedings, it will often be inequitable to place full responsibility for payment of initial application, setting down and hearing fees on one party. It is recommended that there be provision for subsequent contribution to these fees by the other party. As with the award of inter party costs, this could be determined by the Court, and parties would include such considerations in settlement negotiations.

8.22 In general civil proceedings, redistribution of payment of disbursements, including filing fees, according to which party is successful is usually achieved as a matter of course though awards of costs. Costs are not awarded in Family Court proceedings as often, particularly in COCA cases, due to the more inquisitorial and no-fault basis of the proceedings. Costs are not always awarded in relationship property proceedings or in relation to the whole of the

proceeding where the initiation of proceedings and initial discovery processes needed to occur in order to identify property or define the issues.

*(e) Contribution to costs of education, counselling and other professional services*

8.23 Section 187 of the Family Proceedings Act 1980 already enables the making of regulations for prescription of fees for counselling pre- and post-filing of proceedings. Any fees prescribed for s 9 and s 10 counselling, or other early dispute resolution facilitation or conciliation services, should not deter participants from engaging in a process which may quickly resolve a dispute and need to be considered as part of the overall review of ADR/mediation. A balance between contribution and access to services needs to be carefully managed with clear guidelines. A case-by-case assessment to determine equity would be costly in itself.

8.24 The provision for contribution by the parties already exists. Often there is a tangible benefit to children when the parties improve their communication or functioning as parents, which the state has a vested interest in promoting and ensuring takes place. The effectiveness, efficiency and endurance of a parenting order may depend on the parents' engagement in such counselling.

8.25 Often the parties have limited resources to fund on-going therapeutic intervention after payment of legal fees and other costs of litigation.

8.26 Respondents in domestic violence proceedings should not be required to contribute to the costs of attendance at stopping violence programmes. Attendance is a requirement of law in much the same way as attendance might be required as part of a sentence of supervision in a criminal case.

8.27 Currently parties can be ordered to contribute to the costs of lawyers appointed by the court as Lawyer for the Child or Counsel to Assist, and to the costs of professional report writers under COCA and s 38 enquiries under the PRA. These provisions have been underutilised by the Court. The Legal Assistance (Sustainability) Bill addresses the issue of contribution and while it is accepted that Family Court judges should have exercised their discretion more to require contribution to professional costs, the extent to which the contribution to these costs is compulsory in the Bill is cause for concern. The Bill severely reduces judicial discretion to deal with contributions on a case by case basis.

8.28 The issue of Counsel to Assist to conduct mediation is referred to above. Again a contribution by the parties to this cost will be appropriate in cases where the cost to the parties is manageable, promotes participation, and does not impact in other ways on the care of children.

*(f) Setting levels of fees*

8.29 Given the no-fault nature of most Family Court proceedings, if applications continue to be filed in the current manner, there seems little justification for any difference in the fee for filing either the substantive application or the notice of defence, where both should set out adequate grounds for the positions taken, and where both usually require the concurrent filing of affidavit evidence. The same principle should apply for setting down and hearing fees unless justice requires otherwise as directed by the Court.

8.30 If the process for filing and progression of applications is to change, then the same principle should apply. Adoption of the current District Court procedures would involve a further and substantially higher filing fee to be paid if the proceedings progressed to the notice of pursuit of claim stage. The impact of this together with the cumulative cost of the setting down and hearing fees will need to be considered on access to justice grounds.

8.31 If the District Court Rules are adopted and the respondent has the option of removing proceedings to the High Court for a claim of more than $50,000, this will require the applicant to pay fees at the High Court level. There is the risk that could be used unfairly as a strategy to disadvantage a former partner. Many relationship property matters exceed the current jurisdictional cap of $200,000 and agreement to extend the Family Court's jurisdiction may not be given for strategic reasons.

***Recommendation***

- The Law Society is not opposed in principle to the introduction of fees in some cases but does not support fees being introduced in cases involving children and vulnerable adults.
- Fees should not be imposed where the applicant is unable to pay them and would suffer undue financial hardship if required to do so.
- Fees should not be required for urgent applications.
- Deferment of payment of fees in relationship property cases could be considered if payment would result in financial hardship.
- Where it would be inequitable for payment of initial application, setting down and hearing fees to fall on only one party, the Court should have discretion to order a contribution by the other party.

## 9. Participation of Children

*(a) Focussing on Children and Providing for Children's Voices*

9.1 The Law Society notes from the extensive literature that:

- Children's adaptation to marital transition may be determined more by the level of conflict that occurs between parents before, during and after the break-up of the marital relationship than the actual break-up itself.
- Prolonged court disputes are unlikely to be in the best interests of children and are therefore contrary to the paramountcy provision.
- Children cope better with the effects of separation if they have been consulted and involved in decision-making – this is linked to better mental health outcomes.[147]

9.2 The review reflects on both child-focussed and child-inclusive methodologies. They are of course different[148] and, as in all matters of this nature, no single arrangement will work best for all children. A flexible but principled approach is called for.

9.3 The Law Society cautiously supports amendment to s 16 of COCA imposing an obligation on guardians to consult with children about important matters so long as that does not imply that a child's views might be considered to be determinative. Framing such an obligation in terms of the *Gillick*[149] judgment[150] would be consistent with s 6 of COCA. The corollary is how to give a child a voice where, after consultation, a decision is taken that is contrary to the child's expressed views. Should the Court be empowered, as it is where guardians are in dispute, to "give directions" (and to, in effect, act as an outside arbiter)? Does this over-empower children?

*(b) Obtaining Children's Views – Lawyer for Child*

9.4 The role of Lawyer for the Child is an area which requires thoughtful consideration. The symposium paper by Garry Collin, *The role of Lawyer for Child*, will inform this discussion.

9.5 The Law Society recognises that there has been a continuing, significant yearly increase in the costs of Lawyer for the Child, as set out in the statistics provided. Unfortunately there is no data as to the breakdown of the type of appointments made and whether there are particular tasks undertaken in the role which are driving these cost increases.

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147 See paragraph 93 of the review.
148 See footnote 43 of the review.
149 *Gillick v West, Norfolk and Wisbech AHA* (1986) AC112.
150 See footnote 48 of the review.

9.6 The Law Society does not accept that *"different considerations apply"*[151] to the role of lawyers appointed for children under the CYPTF Act. There is no basis for this distinction in the respective statutory provisions.[152] The role, quite simply, is to give the child a voice and to advocate for (and promote in the context of Court proceedings) the child's welfare and best interests informed by the child's expressed views. It is doubtful that more prescriptive guidelines will be of assistance.

9.7 New Zealand recognises the right of a child to be heard in any judicial and administrative proceedings affecting that child.[153] In the family law context this has generally been by way of appointing lawyers to represent children.[154] An independent "right to be heard" avoids conflicts of interest between the child and their most obvious representatives (parents) and will enable the child's voice to be heard over the babble of adult voices.

9.8 What has happened in New Zealand is the devising of a pragmatic solution to the participation of children taking into account New Zealand's particular circumstances (small population, limited expertise, non-availability of agencies to provide advocacy and/or representation). There are dangers in following overseas models too strictly as there are material differences between the New Zealand Family Court and other jurisdictions, for example Australia and the United Kingdom. What is clear is that there is confusion about the role amongst the judiciary and lawyers and, in addition, the parties frequently have unrealistic expectations based on a misapprehension of the scope of the role.

9.9 The confusion has been compounded by the existence of the *Practice Note: Lawyer for the Child: Code of Conduct* issued by the Principal Family Court Judge in March 2007 (now incorporated into the *Family Court Caseflow Management Practice Note* re-issued on 24 March 2011).

9.10 The role of Lawyer for the Child prescribed under the Practice Note[155] creates a tension with the statutory provisions because the Practice Note requires the lawyer to advocate principally for the views of the child. This has:

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[151] See paragraph 106 of the review.
[152] Although the mandatory appointment of a lawyer under the CYPTF Act 1989 (s 159) and the obligations imposed under that Act (s 10 and 11) are noted.
[153] Article 12(2) of the United Nations Convention on the Rights of the Child.
[154] See, for example, s 7 of the Care of Children Act 2004. There is similar provision in other family law statutes.
[155] *Lawyer for the Child: Code of Conduct,* Appendix 3 of the *Family Court Caseflow Management Practice Note,* paragraph 5.3.

- resulted in significant costs, with (on occasions) the appointment of two Lawyers for the Child (in cases involving siblings of varying ages) or of Counsel to Assist the Court;
- limited the ability of a Lawyer for the Child to explore and advance realistic settlement options for a case; and
- resulted in the over-interviewing of children and led to inappropriate involvement of children in the conflict between their parents.

9.11 The Practice Note includes a paragraph directing a lawyer how to carry out the role.[156] This Practice Note is, in places, at odds with the Law Society's Guidelines (*Lawyer for Child: Best Practice Guidelines* 30 November 2006). The most telling difference relates to the extent to which the lawyer is obliged to advocate for the welfare and best interests of the child or simply advocate the child's views. The existence of what appears to be competing interpretations of what is required has been unhelpful. In particular it has led to a number of dual appointments of Lawyer for the Child ("views") and Counsel to Assist the Court ("welfare and best interests"), with obvious cost ramifications.

9.12 Even in the absence of a dual appointment there are additional attendances and cost in the way in which the lawyer carries out the role of primarily advocating for children's views. There has been an expectation of multiple interviews of children and rather than advocating assertively for a welfare/best interest outcome, often merely promoting the views of the child out of context to realistic options for outcomes in the case.

9.13 The Law Society does not accept that there is a tension between a lawyer's ethical obligations and the best interests of the child under COCA.[157] The paramountcy principle in s 4 of COCA directs that the welfare and best interests of the child must be the first and paramount consideration "in the administration and application of this Act."

9.14 The Law Society maintains that the correct legal position is:

(a) It is for the Law Society to regulate the practice of lawyers (in all areas of their practice) and therefore where appropriate to issue guidelines as to "best practice" for the practice of Lawyer for the Child.

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[156] *Lawyer for the Child: Code of Conduct,* Appendix 3 of the *Family Court Caseflow Management Practice Note,* paragraph 5.3.

[157] See paragraph 130 of the review.

(b) Other aspects of the role of a lawyer (in these circumstances as a lawyer representing a child) that directly relate to the relationship between the lawyer and the Court are the only matter properly subject of a Practice Note.

(c) In the Law Society's view, the correct legal and professional role for Lawyer for the Child is to advocate an outcome in the welfare and best interests of the child informed by the child's views.

9.15 The confusion over the role can be resolved by an amendment to s 7 of COCA to make it clear that the role of Lawyer for the Child is to advocate an outcome in the welfare and best interests of the child informed by the child's views. Best practice for lawyers for children does not diminish a child's rights of participation but rather enhances that right because the lawyer develops a relationship of trust with the child. This enables not only the views of the child to be ascertained but also for the child to have the Court process and any outcomes explained in an age-appropriate manner by one professional in the case. The definition of the role in the Australian legislation has achieved the right balance.[158]

*(c) Dual Appointments*

9.16 Dual appointments where views are seen as being in conflict with welfare considerations[159] are generally unnecessary if the role is more carefully defined as being a role to advocate the child's best interest informed by their views. It is also likely that the significant increases in the appointments of Counsel to Assist the Court between 2005 and 2011 (almost 600%) have been a result of unnecessary dual appointments. (The same comment applies to the appointment of Counsel to Assist as Court-appointed mediators under the EIP; there were 2,777 of these in 2010/2011, a massive increase from 473 in 2009/2010 with concomitant cost ramifications ($2.7 million between 2009 and 2011)).

9.17 The Law Society understands that consideration is being given to the possibility of social workers being designated to obtain the views of children for the purpose of Court proceedings. Whilst this reflects a (perhaps understandable) concern that lawyers are both too costly a resource to fulfil this task and inadequately trained for the role, the suggestion that the task be delegated to social workers raises a number of important issues including:

- The definition of "social worker" (see for example s 2 of CYPTF Act).
- The resource implications for Child Youth and Family (and the potential for delay).
- The evidential status of the views obtained (is s 132 of COCA to be adapted to enable the information to be introduced into evidence?).

[158] See s 68LA of the Family Law Act 1975.
[159] See paragraph 103 of the review.

- Cost ramifications (will use of s 132 have any reasonable impact on the cost of "professional services"?).[160]
- Whether communications between the social worker, the child and/or any other person are privileged.
- The need for the social worker to continue in the appointment and update the views of the child as required during the Court process (i.e. there will be a need for on-going involvement of that social worker with the child and in the Court process which can only involve further cost).

9.18 The Law Society is aware that there are different models for participation of children in proceedings in Australia and the United Kingdom. In the United Kingdom in particular, social workers are retained to obtain views of children and to contextualise these views within the ambit of parenting competence and resolution options. In Australia, an expert child professional carries out this role in every case, providing a comprehensive initial report and remaining involved in the case to assist the Court and in particular to work with the parents to explore dispute resolution options. In addition, children are represented by a lawyer in some of those cases. Another layer of intervention is therefore created in private law cases involving children in jurisdictions which have other significant differences to the New Zealand Family Court system. There are dangers in the adoption of any overseas model from a best practice and fiscal perspective without a thorough research base.

9.19 In order to be properly briefed to carry out the functions set out above, it is considered that Lawyer for the Child will continue to meet with the child and where the lawyer deems it appropriate, obtain the views of the child. Lawyer for the Child however may be of the view that the circumstances of the case require the views of the children to be placed before the Court in some other way. This could include the obtaining of a s 133 report. In other words, regardless of who places the views of the child before the Court (and in most cases this will be the lawyer) the lawyer appointed to represent the child must have some relationship and contact with the child in order to properly represent the child in the Court proceedings.[161]

9.20 The argument that Lawyer for the Child is being appointed *"too early"* is problematic.[162] There is ample evidence that early appointment of Lawyer for the Child may serve to alter the focus from the adult issues to the child.[163] This could just as readily be achieved by other

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[160] See definition in the Ministry of Justice memorandum of 16 December 2011 at paragraph 21.
[161] *How Do We Best Serve Children In Proceedings In The Family Court*, Judge Jan Doogue and Suzanne Blackwell, presented to the Australasian Family Courts Conference, Auckland, October 1999. Attached as Appendix 3.
[162] See paragraph 104 of the review.
[163] "The Role of Counsel for the Child: Research Report" Alison Gray and Paul Martin, Department of Courts, May 1998.

mechanisms including early judicial intervention. Conversely, there are occasions where an early appointment is unnecessary.

9.21 The timing of the appointment can only realistically be approached on a case-by-case basis. For that to be an effective approach there must be both a clear understanding of the role and what, in any given case, is sought to be achieved by the appointment. Responsibility for such appointments rests with the judge who is entitled to require appropriate and adequate information from counsel and/or the parties to assist in making a decision.

9.22 If the appointment of Lawyer for the Child is to be later in the process, it is essential that a Family Court judge retains the discretion to make an earlier appointment if required in a particular case.[164] Prior to the enactment of COCA, Lawyer for the Child was appointed after a mediation conference unless the Court determined an earlier appointment was required. The *Practice Note: Lawyer for the Child: Section, Appointment and Other Matters* is still in force (re-issued on 24 March 2011 in the *Family Court Caseflow Management Practice Note*) but not followed as it conflicts with the Practice Note setting out the requirements of the EIP procedure (see chapter 6 of the *Family Court Caseflow Management Practice Note*).

9.23 There is already an obligation on the Court not to appoint a lawyer for a particular case if that appointment serves "*no useful purpose*" (s 7(2) of COCA). However, there are no statistics on the extent to which this screening is undertaken before an appointment is made.

9.24 In many cases the views of a child are readily obtained and are self-evident; in some they are not. Again the need for maximum flexibility is obvious. The views of children can come before the Court from a number of different sources including parents, their lawyers or a psychologist. The source and manner for obtaining views of a child will differ from case to case according to the child's particular circumstances.

9.25 The Law Society considers that the current process whereby the role of Lawyer for the Child is a combination of statutory provision (s 7 of COCA), practice notes, best practice guidelines and differing local procedures is unsatisfactory. A codification of the role can and should be achieved, making that part of the Practice Note redundant as the Court's requirements of a Lawyer for the Child should be addressed on a case-by-case basis. The attempt in the current Practice Note to direct the way the legislation is to be interpreted is a driver of cost, a cause of

[164] The current Practice Note for selection and appointment of Lawyer for Child records that Lawyer for Child should be appointed after a mediation conference unless the Court deems an earlier appointment is appropriate.

uncertainty and tension, and also usurps the fundamental role of the Court in its interpretation of statutes.

9.26 An amendment to s 7 of COCA would confirm that the role of Lawyer for the Child is to advocate for an outcome in the welfare and best interests of the child "informed by the views of the child". The definition of the role in s 68LA of the Family Law Act 1975 is the equivalent Australian provision and is attached at Appendix 4.

9.27 The Law Society considers that the legislation covering the appointment and role of lawyers appointed to represent children under COCA should have the following salient features:

- The question of when a lawyer is appointed to represent a child should be made by a judge at the time of the first triage assessment, i.e. at the time when the judge determines the path that the case will follow.
- There would be a rebuttable presumption that Lawyer for the Child will not be appointed at that stage. This has regard to the issues presented by the case as identified by the pleadings and will ensure that the response of the Court addresses the particular child and his or her particular circumstances.[165] It will not prevent a party from seeking the appointment of Lawyer for the Child at that time. This will preserve the discretion of the judge as to whether an appointment is then necessary or not.
- Lawyer for the Child should not be appointed prior to filing of a notice of defence.
- Should the case not be resolved at counselling and/or mediation, Lawyer for the Child would be appointed at the next "event", the enhanced Rule 175 conference.
- Lawyer for the Child would be appointed to represent the child at the first triage event when a case is placed on the "urgent track".
- The role of Lawyer for the Child is to ensure that:
  (a) The views of the child (where the child is able and/or wants to place views before the Court) are placed before the Court. This does not mean that it is necessarily the Lawyer for the Child who does this, but in the ordinary course of things, it is likely to be.[166]
  (b) The Lawyer for the Child has the task of addressing the child's situation by reference to welfare and best interests, informed by the views expressed by the child.

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[165] As required by s 4(2) of the Care of Children Act 2004.

[166] "How Do We Best Serve Children In Proceedings In The Family Court", Judge Jan Doogue and Suzanne Blackwell, presented to the Australasian Family Courts Conference, Auckland, October 1999.

9.28 The Law Society has recognised that the training afforded to lawyers for children has created its own problems. The sole objective criterion has been attendance at the Law Society's Continuing Legal Education three-day course available to those who have practised in the Family Court for five years.[167] A more thorough on-going training for lawyers for children will be delivered from this year.

9.29 Any suggestion that appointment of Lawyer for the Child to a particular case be on a "cab rank" principle is not supported by the Law Society. There is much to be said for judges and/or Registrars ensuring that the right lawyer is chosen for the right case and this is achieved by continuing the significant role Family Court Coordinators have in the appointment of Lawyer for the Child. This ensures that the particular issues that are identified in the case in question will be matched by the skills of the lawyer who is appointed. This is consistent with the provisions of s 4 of COCA with its reference to the particular child and his or her particular circumstances.

9.30 The Law Society notes the likely impact of the Legal Assistance (Sustainability) Amendment Bill 2011 upon appointments and attaches its submission at Appendix 5.

*(d) Best Interests Test*

9.31 The Law Society does not support any amendment to the legislation which would have the actual, or perceived, effect of compromising the paramountcy principle. The importance of the flexibility of this test to meet the particular circumstances of a particular child at a particular point in time cannot be overstated.

9.32 The Law Society does not support standardised orders or care presumptions.[168] A formulaic approach is an unacceptable way of resolving issues. There is a significant body of international research which establishes that a formulaic approach does not necessarily reduce litigation and risks unintended and adverse consequences for the welfare and best interests of children.

9.33 However the Law Society does consider that there is merit in the suggestions made in paragraph 110 of the review that stronger legislative statements may be required as part of the paramountcy principle.

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[167] Until it was announced last year that there would be a new legal aid framework for the qualifications required and appointment process for Lawyer for Child, appointment to the Lawyer for Child panel required five years' post-admission experience, an interview by a selection panel comprising a judge, senior counsel and a Family Court Coordinator with the final decision being that of the Family Court judge presiding on the panel. Reviews after initial appointment were limited.

[168] See paragraph 112 of the review.

9.34 There is an important ancillary issue, relating to children's appeals. The Law Society is concerned about the rights of appeal vested in a child arising from COCA and CYPTF Act applications (it is understood that no appeals have been brought under the latter Act even though it has been in force since 1989). As identified in *M and D v S* (2008) NZFLR 120 the process is fraught with practical and procedural difficulties. The Law Society considers that these provisions may need some review. This is however a matter beyond the scope of the current review.

***Recommendations***

- The Law Society does not recommend compulsory child-inclusive mediation. Children's involvement in mediation/counselling regarding their care arrangements carries particular risks and needs to be considered carefully.[169] The Law Society however supports enhanced relationship and child-focussed education and mediation being offered to parents at an early stage.
- The Law Society cautiously supports amendment to s 16 to impose an obligation on parents and guardians to consult with their children.
- The Law Society supports retention of s 6 of COCA in its current form and the continued representation of children by Lawyer for the Child.
- The timing of the appointment of Lawyer for the Child should be on a case-by-case basis (the later appointment of a Lawyer for the Child may be appropriate, but the Court must retain its discretion to make an earlier appointment if required).
- The Law Society recommends amendment of s 7 of COCA to confirm that the role of Lawyer for the Child is to advocate for an outcome in the welfare and best interests of the child "informed by the views of the child".
- The Law Society recommends amendment of COCA, as outlined in paragraph 9.27, in relation to the appointment and role of the Lawyer for the Child.
- The Law Society does not support the suggestion that appointment of Lawyer for the Child to a particular case be on a "cab rank" basis.
- The Law Society does <u>not</u> recommend any amendment to the legislation which would have the actual, or perceived, effect of compromising the paramountcy principle.
- The Law Society does not support standardised orders or care presumptions.

[169] As discussed earlier in the submission: see Part 2 paragraph 2.12.

## 10. Professional Standards

10.1 The Law Society continues to provide valuable and focussed education for lawyers. There is always scope for further and specialised education of lawyers. The Law Society is currently proposing a mandatory continuing professional development programme for the profession, and, as discussed above, will be delivering additional Lawyer for the Child training for more experienced lawyers from this year. These steps are part of the development of comprehensive, regular and compulsory on-going training requirements for lawyers appointed to represent children.

10.2 The Law Society and other professional standards bodies are best placed to identify the required training and practice standards for all professionals involved in the Family Court. International models exist for a permanent representative group of family law professionals to monitor training, practice standards and research, and the Ministry could consider establishing a group of this kind in New Zealand.

## 11. Conclusion

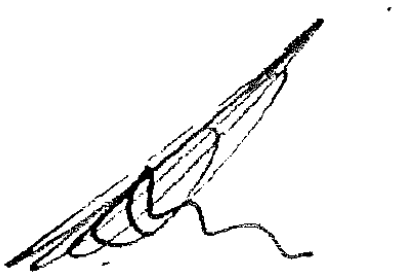
11.1 It is easier to be critical than to be correct and it is important in considering the undoubted challenges confronted by this review not to make changes merely to be seen to be "doing something".

11.2 Family law is still law. It embraces legal rights and legal responsibilities. It sets boundaries. It is the product of statutes created by Parliament. Citizens are entitled to pursue available remedies and to be brought to account for perceived breaches and shortcomings. Care needs to be taken not to trivialise this by closing the door to the Family Court's expertise and specialties.

11.3 Access to justice and the associated issue of equality of arms should not be lightly put aside. Claims that if parties too readily resort to the Family Court, they are discouraged from finding their own solutions are both overblown and unsubstantiated, although they fit the model of confronting the fiscal emergency.

11.4 Care needs to be taken to ensure that changes, however well-intentioned, do not have unintended consequences. Simplistic solutions are likely to create more difficulties than they resolve. In the Law Society's view, the data provided in support of the review do not justify substantial changes to the Family Court. With some targeted legislative amendments to reduce fiscal costs, the Family Court should remain significantly unchanged at this point in time. The Law Society reiterates that the exercise of greater discipline, refinements to

existing systems and procedures, and a properly resourced Registry, would enable the Family Court to serve the purpose for which it was established, in a fiscally sustainable manner.



Jonathan Temm
**President**

Antony Mahon
**Chair, Family Law Section**

5 March 2012

*Appendices*

Appendix 1: Chapter 1, *Introduction to New Zealand Family Law in the 21st Century*

Appendix 2: Extract from New Zealand Law Society submission dated 9 November 2011, on *The Duties, Office and Powers of a Trustee*, Review of the Law of Trusts 4th Issues Paper, Law Commission, NZLC IP26

Appendix 3: *How Do We Best Serve Children In Proceedings In The Family Court*, Judge Jan Doogue and Suzanne Blackwell, presented to the Australasian Family Courts Conference, Auckland, October 1999.

Appendix 4: Section 68LA of the Family Law Act 1975 (Australia)

Appendix 5: New Zealand Law Society submission dated 30 September 2011 on the Legal Assistance (Sustainability) Amendment Bill 2011