Four Jurisdictions Family Law Conference

"Family Justice: Aligning Fairness, Efficiency and Dignity"

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Introduction

In November 2011 the Family Justice Review Panel released its final report. It will be remembered that in 2010 the Secretaries of State for Justice and Education and the Welsh Assembly Government Minister for Health and Social Services commissioned a review of the family justice system in England and Wales. On page 182 of the Panel's final report, the Terms of Reference for that review are set out.

The resulting final report is an impressive document. In the 225 page report, the Panel has explored a number of themes. The report has canvassed why change is needed and noted that cases are currently taking too long, are costly and that there is confusion as to process. The report identifies a number of current issues which "show a set of arrangements in a slow building crisis. Family justice does not operate as a coherent managed system. In fact, in many ways, it is not a system at all."[1]

The report looked at how the child's voice should be heard. It suggested that a Family Justice Service be set up. The report then moved on to judicial leadership and culture and the need for clearer management and responsibility by judges. In dealing with the courts, the report noted that "a single Family Court, with a single point of entry, should replace the

[1] Family Justice Review Final Report (November 2011) at 6.

current three tiers of court."[2] The report went ahead to address a number of other important issues such as the need to develop a workforce "with an agreed set of core skills and knowledge".[3]

In Public Law cases the report suggested robust case management and imposition of time limits to reduce delay. The report also explored the different role that expert witnesses might play as well as alternatives to conventional court proceedings such as use of Family Group Conferences and mediation.

In Private Law the report suggested that current processes fall short in many ways. In a perceptive and helpful fashion the report considered what more could be done to exhort parents to be better educated, informed, and to resolve their own disputes.

The review report contains themes highly relevant not only to England and Wales but to many family law systems elsewhere. Some radical surgery is suggested and yet the recommendations are courageous and well-informed.

I thought I would analyse some of the report's major themes and at the same time discuss the New Zealand journey. The commonality of issues facing us both is simply remarkable.

The Beginning of the New Zealand Family Court

In 1978, a Royal Commission on the New Zealand courts published its report and that report led to a major restructuring of our own courts.

At that time, our court system began with the Magistrates' Courts which were serviced by experienced lawyers who had been elevated to judicial office. The Magistrates' Courts had broad jurisdiction over summary crime, civil and some family matters. The next court was the Supreme Court which undertook all jury trials, appeals from the Magistrates' Courts and

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2 Family Justice Review Final Report (November 2011) at 10.

3 Family Justice Review Final Report (November 2011) at 11.

all administrative law and supervisory work. The final New Zealand court was the Court of Appeal but there was a right of appeal to the Privy Council in London.

As a result of the Royal Commission's 1978 Report, a District Court was created with divisions and was instilled very firmly as the court of first instance for most of New Zealand's court work. An enhanced criminal jurisdiction was created so that judges with jury warrants undertook most jury trials. A civil division was created, and specialist family and youth divisions were also created with their own Heads of Bench.

To complete the picture, the Supreme Court became the High Court and the Court of Appeal retained its place in the hierarchy but was expanded in its numbers. In 2003 we concluded our relationship with the Privy Council and created our own Supreme Court as the final court of appeal.[4]

The Royal Commission's Report, although written 32 years before the Family Justice Review's Report, contains similar themes.

At paragraph 466 of its report, the Royal Commission noted that "almost one third of the submissions made to this Commission concerned the topic of family law. All were agreed on the need for reform."[5] The report noted what the central features of a Family Court should be:[6]

(a) Although set apart from the main court structure, the Family Court should remain part of that system. Its function is to deal with those cases which are in some way concerned with the family situation.

(b) It should have specialist judges who are legally trained and qualified by personality, experience, and interest to decide matters and preside over all activities of a Family Court.

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4 Supreme Court Act 2003.

5 Hon Justice Beattie and others *Report of the Royal Commission on the Courts* (1978) at [466].

6 Hon Justice Beattie and others *Report of the Royal Commission on the Courts* (1978) at [469].

(c) Support services, including social workers, counsellors, and conciliators, should be available.

(d) Physically separate from other courts, the family courtroom should have comfortable fittings, intended to put the parties at ease.

(e) Strict adversary rules should be relaxed, as should the more traditional forms of dress and address so that, when cases have to be resolved in court, the hearing can be conducted in an atmosphere of relative informality. The aim of the court should be to help resolve problems with the co-operation of the parties, wherever that is possible, and with a minimum of disruption in all cases.

(f) The Family Court requires status, a comprehensive jurisdiction, and a sound judicial philosophy with judges and ancillary personnel of high calibre.

(g) The court should be organised so that its responsibilities to the community are clearly delineated.

(h) Proper funding and best use of resources, including those already available in buildings and personnel, should be provided.

After dealing very comprehensively with what the shape of the court should be, the Royal Commission made recommendations which were largely enacted. Its prime recommendation was that:[7]

> "1. A Family Court should be established as a division of the District Courts, manned by judges specially appointed to it, sitting mainly in the centres of greater population but readily available to sit in court buildings or other suitable accommodation in smaller centres on a circuit or peripatetic basis."

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[7] Hon Justice Beattie and others *Report of the Royal Commission on the Courts* (1978) at 183, rec 1.

It was recommended that certain specific legislation be the sole preserve of the new Family Court and the report recommended that:[8]

> "Adequate administrative services should be provided for the Family Court through the Courts Division of the Department of Justice"

and that:[9]

> "Counselling services should be established as an essential feature of the Family Court."

The court has been a success. Initially its jurisdiction was contained in eight statutes and progressively that jurisdiction has extended to 23 statutes. Accordingly, the number of judicial officers has increased and currently there are 52 Judges with Family warrants. However since it was set up, the road has been far from straightforward.

In 1992, scarcely ten years after the Court was set up, the then Government felt the Family Court was spending too much money and the Court's then Principal Judge asked me if I would chair a review committee to see if the Court could be better managed. In our report published in April 1993 we made 12 recommendations including the following:[10]

i Separating out from the court alternative dispute resolution by means of the setting up of a separate and distinct family conciliation service.

ii Pleading that only cases clearly requiring urgent attention or decision and involving family law issues should be filed in the Family Court.

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8 Hon Justice Beattie and others *Report of the Royal Commission on the Courts* (1978) at 184, rec 13.

9 Hon Justice Beattie and others *Report of the Royal Commission on the Courts* (1978) at 184, rec 14.

10 P Boshier and others *A Review of the Family Court — A Report for the Principal Family Court Judge* (1993) at 6 - 18.

iii Suggesting procedural changes so that cases had better defined issues and tighter evidence.

iv Exhorting judges to assume more responsibility for efficient disposition of cases.

v Recommending that practitioners appearing in the Family Court should be better trained and possibly able to appear through certification only.

All was quiet for a period but as the court continued to grow and as family violence took centre stage, we realised that the court was losing its grip on prompt disposition of work. This was particularly apparent after initial ex-parte orders had been made and litigants were waiting for a defended hearing. Men's groups in particular became loud and critical. Does all of this sound familiar?

Accordingly, the New Zealand Law Commission received terms of reference from the Government to undertake a review to consider what changes, if any, were necessary and desirable in the administration, management and procedure of the Family Court to facilitate the early resolution of disputes.[11] Following a discussion paper in January 2002, the Law Commission published its report titled "Dispute Resolution in the Family Court" in March 2003.

In the introduction to the report the Law Commission said:[12]

> "1. THIS GOVERNMENT REFERENCE was prompted by widespread criticism of the Family Court of New Zealand. Allegations include that: the system is biased against men; without notice applications are granted too readily; where orders are made without notice it takes too long for the other party to be heard; matters generally take too long to resolve; children suffer because of these delays; and, not all Family Court professionals are properly trained and skilled."

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11 Law Commission *Family Court Dispute Resolution* (NZLC PP47, 2002) at 1.

12 Law Commission Dispute Resolution in the Family Court (NZLC R82, 2003) at 1.

At paragraph 3 the Law Commission said:[13]

> "This report recommends new conciliation processes and court procedures that we believe would help resolve family disputes. Our strongest recommendation, however, is that the present system be resourced to perform at its most efficient, without the delays caused by lack of court time, shortage of report writers and lack of assistance from the Department of Child, Youth and Family Services."

Just as the recommendations in our 1993 Report were met with a lukewarm response, so were many of the Law Commission's recommendations. However, Parliament did introduce a new statute dealing with private law disputes concerning children. The Care of Children Act 2004 — which came into force in July 2005 — did much to dampen criticisms of the Family Court. There were four things in particular that I want to mention because they all feature in the Family Justice Review's Report of November 2011.

Changes in Terminology

Prior to the passing of the Care of Children Act, we used the terminology "custody" and "access". The new legislation abolished these labels and allowed for parenting orders to be made so that parents had either day-to-day care or contact. The Act made it clear that a parenting order giving day-to-day care could be made to more than one parent. In other words, parents could share day-to-day care according to a defined regime.

Enhanced Role of Lawyers Representing Children

The voice of children and how lawyers appointed by the court should represent them were given a major overhaul. The changes are reflected in these two sections.

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13 Law Commission Dispute Resolution in the Family Court (NZLC R82, 2003) at 1.

"**Child's views**

6 (1) This subsection applies to proceedings involving –

(a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or

(b) the administration of property belonging to, or held in trust for, a child; or

(c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies, -

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and

(b) any views the child expresses (either directly or through a representative) must be taken into account."

"**Lawyer to act for child**

7 (1) A Court may appoint, or direct the Registrar of the Court to appoint, a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

(2) However, unless it is satisfied the appointment would serve no useful purpose, the Court must make an appointment or a direction under subsection (1) if the proceedings –

(a) involve the role of providing day-to-day care for the child, or contact with the child; and

(b) appear likely to proceed to a hearing.

(3) To facilitate performance of the lawyer's duties and compliance with section 6 (child's views), the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child.

(4) The lawyer may call any person as a witness in the proceedings, and may cross-examine witnesses called by a party to the proceedings or by the Court."

Media Access to the Family Court

When the Family Court of New Zealand was set up, the empowering legislation made it clear that the court was to be informal and private. Media were banned from attending and it was not expected that anyone else other than the parties immediately involved with the case should attend either.

The Care of Children Act enabled media to attend Family Court hearings as of right[14] and to report proceedings provided that no identifying information of children or their parents was published.[15]

More Liberal Publication Generally

The statutory scheme limited any ability to report a Family Court case to professional law publications. The new law enabled not only professional publications and media to publish cases but anyone at all providing they observed requirements of privacy.[16]

The Result of Change

The enhanced role of lawyer for the child, as set out in sections 6 and 7 of the Care of Children Act 2004 has largely dealt with the Law Commission's criticism that lawyers representing children did not undertake their task professionally enough.

The Care of Children Act also radically changed the public perception of the court. In fact, the media hardly came into court at all and they are rarely seen these days. Once we removed the secrecy and answered the complaint that access to the court was restricted, the sting of criticism abated.

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14 Care of Children Act 2004, s 137.

15 Family Courts Act 1980, ss 11B – 11D.

16 Ibid.

Equally, men's groups who had been so vociferous in their allegations of gender bias were dealt a body blow when we published a paper last year analysing the gender of those who were granted parenting orders, and how such orders were arrived at.[17] I will come back to these statistics later on in this paper.

Changes in Formality

When I commenced as head of the Family Court in 2004, I felt that the informality which the Family Courts Act 1980 and the Royal Commission had recommended was more of a hindrance than a help. I felt that the court was not taken seriously enough because some did not see it as a real court.

We undertook a number of changes. Initially prohibited, all our judges now wear gowns except when they are in chambers. We made the courts bigger and more secure, required counsel to always stand when addressing the court and made other discreet changes such as placing our New Zealand Coat of Arms in all courts so that the true appearance of the court is more evident.

Continuing Issues

Just when I thought we had family justice being delivered in a way which had dealt with criticisms of the court, New Zealand headed into a recession and the new Government, recently re-elected, decided that the Family Court was spending too much money. In April 2011, the New Zealand Cabinet agreed to a review of the Family Court. The Cabinet paper commences:[18]

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17 See Peter Boshier and Julia Spelman "What's gender got to do with it in New Zealand family law?" NZFLJ 7 (2011) 3 at 61 – 69.

18 Cabinet Domestic Policy Committee *A Review of the Family Court Cabinet Paper*, 11 April 2011 at 1.

> "3. The focus of the review is to improve the Family Court so that it is sustainable, efficient, cost-effective, and responsive to those people who need access to its services – particularly children and vulnerable people. The aim of the review is to ensure that the processes of the Family Court are straightforward and its decisions are fair, timely, and durable.
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> 4. The most important issue currently facing the Family Court is its sustainability. Government expenditure related to Family Court proceedings has increased at a significantly higher rate than the overall number of substantive new applications received and the number of new cases. A key component of these costs relates to how some Care of Children matters are progressed. There is little evidence that the increased expenditure has resulted in improved outcomes for parties, for example, by resolving cases more quickly and reducing repeat applications."

The Cabinet paper, put forward by the then Minster of Justice, the Hon Simon Power, states:[19]

> "26. To maintain public confidence in our family justice system, it is important that the Family Court is sustainable, efficient, cost-effective, and responsive. I believe a review of the Family Court is an opportunity to ensure the Court operates within a clear and consistent framework, its processes are straightforward and its decisions, particularly for vulnerable people, are fair, timely and durable."

Accordingly, a review was initiated with the following draft Terms of Reference:[20]

- "the assumptions regarding the respective roles of the Family Court versus the roles and responsibilities of private citizens in relation to their personal affairs, that is, the areas of family life and/or family dispute that should be the subject of legal intervention in the Family Court;

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19 Cabinet Domestic Policy Committee *A Review of the Family Court Cabinet Paper*, 11 April 2011 at 5.

20 Cabinet Domestic Policy Committee *A Review of the Family Court Cabinet Paper*, 11 April 2011 at 6.

- the purpose, role and functions of the Family Court, including the extent to which the Family Court should have a therapeutic role as opposed to providing an expeditious application of the law in individual cases;
- the role of professionals (lawyers, psychologists, mediators, counsellors, and social workers) in the delivery of Family Court's services;
- the statutes best administered by the Family Court and the boundaries between the Family Court and the civil jurisdiction of the High or District Courts;
- how family law legislation and rules impact on the efficiency of the Family Court, and the delivery of professional services and costs;
- whether the current structure, approach and processes of the Family Court supports durable outcomes and are financially sustainable;
- the responsiveness and accessibility of the Family Court to people needing timely access to the Family Court, in particular vulnerable individuals, children and families;
- the incentives to encourage people to resolve their relationship issues themselves where appropriate, rather than bringing them to the Family Court; and
- the emerging issues, needs and trends within families and critical issues that may influence or even change the role of the Family Court including whether the needs of families may be better addressed through alternative models."

Family Justice Review Panel's Report

As we are in the midst of the third review of the court in 30 years, we are becoming accustomed to travelling the road of reform. I want to focus on some of the specific suggestions made in the Family Justice Review Panel's Report, bearing in mind what we have tried in New Zealand, and assessing what did and did not work. In this way, we can learn from each other in the hope of making informed decisions during these tough economic times.

A Family Justice Service

In paragraph 18 of its paper the Family Justice Panel suggested that a family justice service be established, sponsored by the Ministry of Justice, with strong ties at both Ministerial and official level with the Department for Education and the Welsh Government (paragraph 18). The service was further described:[21]

> "The Family Justice Service would have responsibility for court social work services, provision of mediation and out of court resolution services. It would also have a role in setting quality standards and monitoring spending in relation to expert witnesses."

The report goes on to say in paragraph 21 that:[22]

> "The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and, potentially over time, experts and solicitors for children."

I think that getting the governance right for these integrated court services is crucial. Our own experience has not been a wholly happy one. Alternative dispute resolution and integrated services to support the Family Court's work have been administered from our Ministry of Justice. How things are run, and how much money is available is the subject of political and policy decisions from time to time and there is inherent tension in this. One of the reasons our court is currently undergoing a review is because the cost of these services is felt by the Government to be too high.

I would far prefer a model akin to the Family Court of Australia wherein courts have their own budgets and administer their own services. I like the idea of a coherent and cohesive family justice service for England and Wales and I hope its governance and financial arrangements are unambiguous. I think people are entitled to guarantees for the future,

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21 Family Justice Review Final Report (November 2011) at 8.

22 Ibid.

especially those who train and become family law specialists. It is dispiriting to encounter unclear messages about the value of Family Court services.

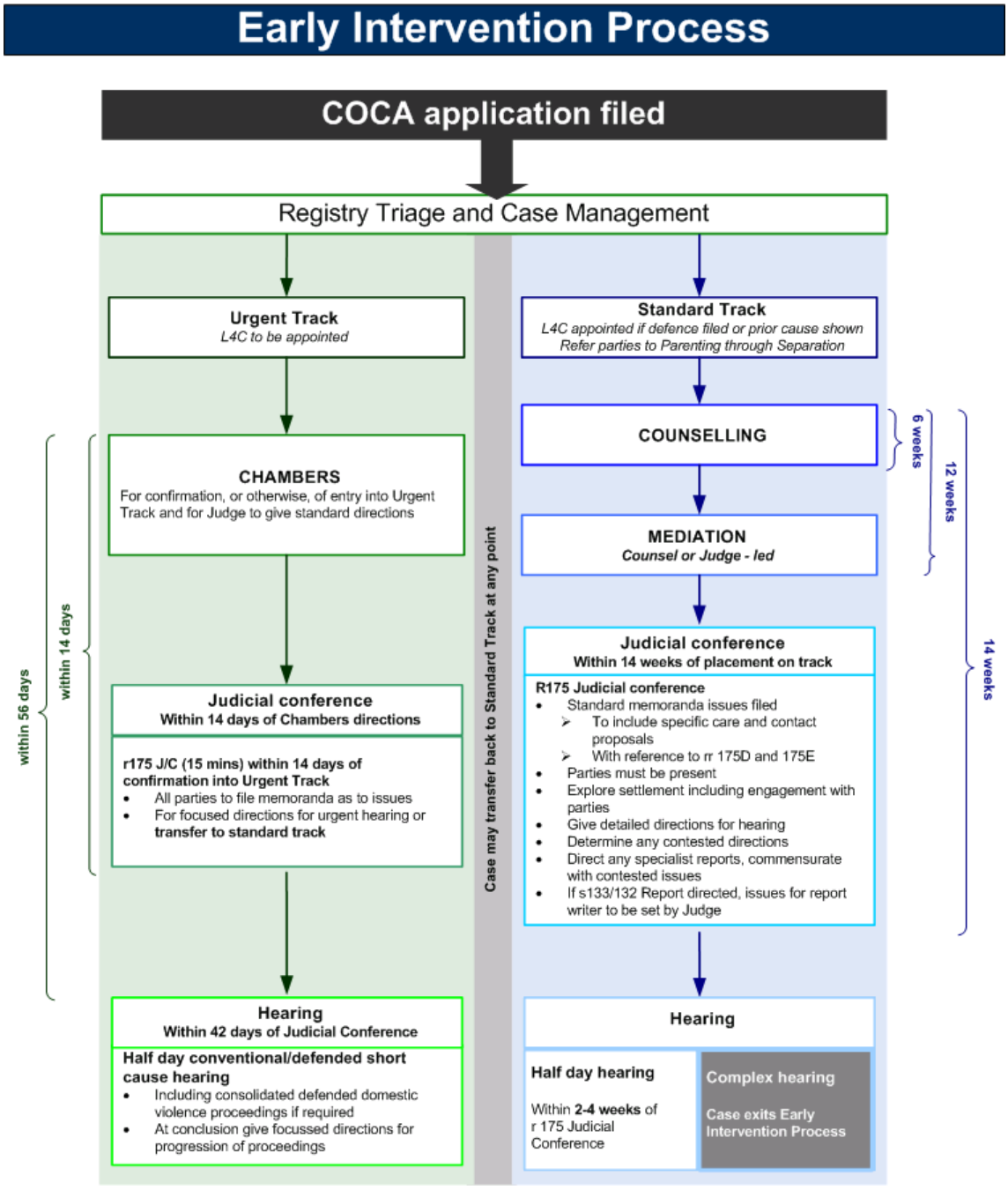
Judicial Leadership and Culture

Much is said in the Panel's report about this issue and the plea is made that "judges with leadership responsibility should have clearer management responsibilities". There is the call for sole judge management of cases and stronger case management.

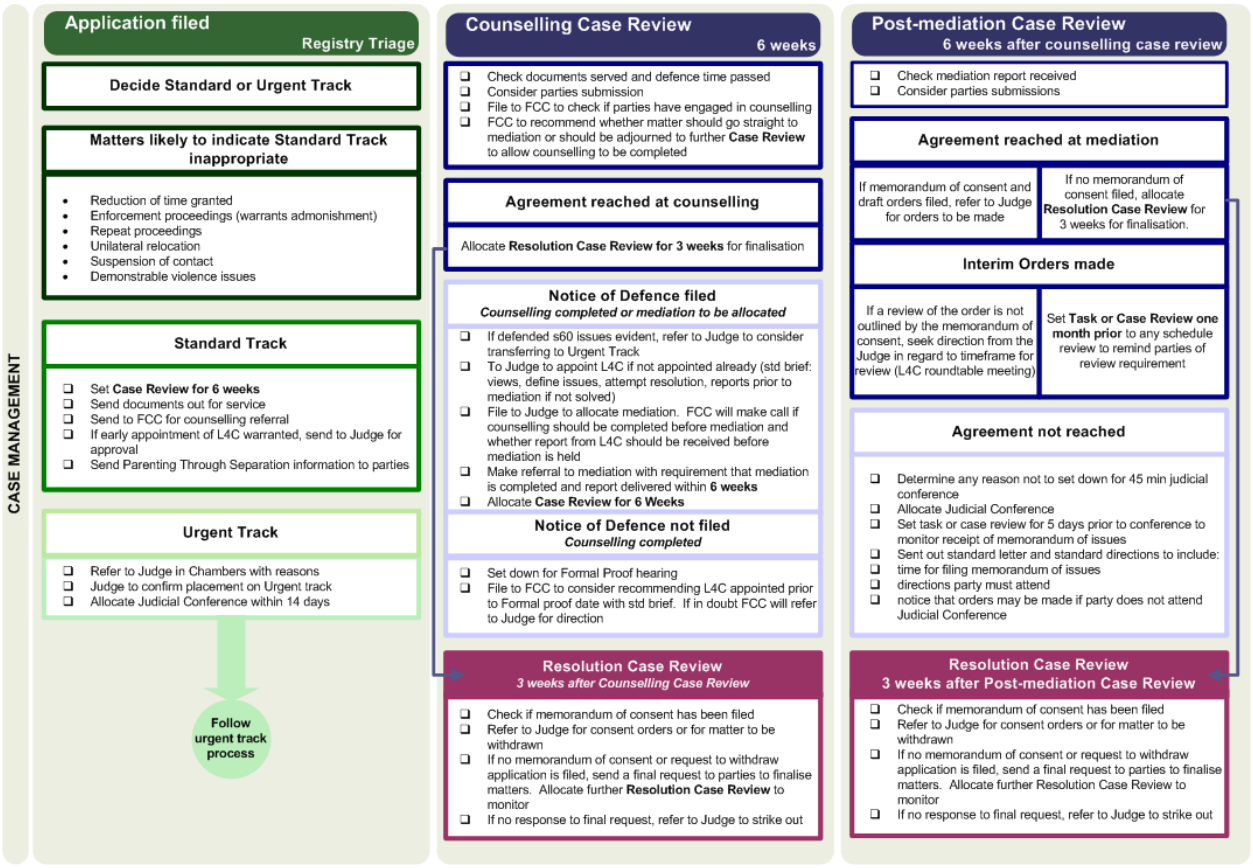
A brief comment about these two issues. Firstly, as to specialised Family Court Judges and a clear commitment to management, I wholeheartedly agree, but I have to say, I spend rather too much time managing and no longer sitting. I see enormous judge time now being consumed in management. I still think that this is primarily an administrative responsibility and I think we do it to fill a void. It is a danger, and I am in favour of strong and specialised court management including case management by a properly trained workforce.

Case management has occupied much time and caused much anxiety from my part of the world. From moving to no case management initially, we adopted caseflow management as desirable and created a Practice Note setting out all of our expectations as to how cases would run and what events should occur. Just recently, I rewrote and reissued our Caseflow Management Practice Note. But there are dangers with caseflow management, particularly when there is a culture of creating an event in order to demonstrate that the case is moving in some respect. We have experienced some of our cases moving from case management event to the next with no progress being made at all.

After successive attempts to reform this aspect of our work, we introduced a major reform in April 2010 called the Early Intervention Process. We said that every private law case under the Care of Children Act that came into court would undergo triage and enter one of two tracks according to time prescribed events. It was my attempt to cut down on drift. The Early Intervention Process looks like this:


Early Intervention Process
COCA application filed
Registry Triage and Case Management
Urgent Track
L4C to be appointed
CHAMBERS
For confirmation, or otherwise, of entry into Urgent Track and for Judge to give standard directions
Judicial conference
Within 14 days of Chambers directions
r175 J/C (15 mins) within 14 days of confirmation into Urgent Track
All parties to file memoranda as to issues
For focused directions for urgent hearing or transfer to standard track
Hearing
Within 42 days of Judicial Conference
Half day conventional/defended short cause hearing
Including consolidated defended domestic violence proceedings if required
At conclusion give focussed directions for progression of proceedings
Case may transfer back to Standard Track at any point
Standard Track
L4C appointed if defence filed or prior cause shown
Refer parties to Parenting through Separation
COUNSELLING
MEDIATION
Counsel or Judge - led
Judicial conference
Within 14 weeks of placement on track
R175 Judicial conference
Standard memoranda issues filed
To include specific care and contact proposals
With reference to rr 175D and 175E
Parties must be present
Explore settlement including engagement with parties
Give detailed directions for hearing
Determine any contested directions
Direct any specialist reports, commensurate with contested issues
If s133/132 Report directed, issues for report writer to be set by Judge
Hearing
Half day hearing
Within 2-4 weeks of r 175 Judicial Conference
Complex hearing
Case exits Early Intervention Process
within 56 days
within 14 days
6 weeks
12 weeks
14 weeks

Supporting the flowchart are directions for registry staff that look like this:



In the current review of the New Zealand Family Court, I am urging our Government to adopt this judicially led reform by introducing rules to ensure its compliance and survival. Having designated time limits is crucial, a theme that is reflected in the Family Justice Review Report.

The Courts

One of the major suggested reforms in the Panel's report is the creation of a single Family Court with a single point of entry. We have that and it has worked. Our close colleagues in Australia have two tiers, the Family Court of Australia and the Federal Magistrates Court. That there are two points of entry in Australia has been a cause of concern and I know that efforts continue to try and make the position clearer.

The New Zealand Family Court now has very broad jurisdiction and the picture, including the amount of work we do in each area, is reflected in the following table:

Workload of the Family Court January 2011 – December 2011

Case Type	Number of substantive applications filed January 2011 – December 2011	Percentage of Family Court Workload
Alcohol & Drugs	87	0.1%
Adoption	400	0.6%
Child Support	267	0.4%
Children Young Persons & Their Families Act	10, 864	16.8%
Dissolution/Marriage	8,698	13.5%
Domestic Violence	7, 143	11.1%
Estates	191	0.3%
Family Proceedings	832	1.3%
Guardianship	25, 150	38.9%
Hague Convention on the Civil Aspects of International Child Abduction	160	0.3%
Mental Health	5, 961	9.2%
Miscellaneous	206	0.4%
PPPR Act	2, 866	4.4%
Property	1, 751	2.7%
TOTAL	64, 576	100%

I think it pays to keep the court formal. The Royal Commission's 1978 Report made several suggestions regarding informality and suggested that in the right setting, most people would be able to solve their own problems. However, the level of informality did not prove helpful. I should indicate that from the outset our counselling and mediation services were part of the court itself and Parliament legislated so that judges presided at mediations. I think this confused litigants who felt that even when they were before a judge, they could behave however they wished and did not particularly have to accept the result.

The increased formality brought about by the Care of Children Act, including the creation of the imprisonable offence of contravening a parenting order, has led to much more respect for the Court. At the end of the day, a court should be just that. I think a clear differentiation needs to be emphasised between the Court's conciliation and mediation arm; in other words its alternative dispute resolution part, and its judicial arm. In this respect I agree with the Family Justice Review Panel's statement in paragraph 62 that:[23]

> "We recommend that courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or be removed to the care of the local authority."

I think it is quite right to make judicial responsibility clear and to make equally clear that once the court has undertaken its decision making task, it is for others to put the decision into force and apply to the Court for an enforcement remedy if required. I do not think we should be fuzzy in our resolve to get things right.

Finally, on the topic of the role and look of the Court, I note that in paragraph 54 the Panel when addressing transparency and public confidence said:[24]

> "We briefly discussed in the interim report the question of media access to family courts though this was not within our terms of reference. This is a complex area, which requires further consideration by government. We welcome the Justice Select Committee's recommendation that the scheme to increase media access to the

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[23] Family Justice Review Final Report (November 2011) at 14.

[24] Family Justice Review Final Report (November 2011) at 13.

> courts contained in Part 2 of the Children, Schools and Families Act 2010 should not be implemented."

I wish to be very circumspect here because I think that the presence of media in courts is such a sensitive issue that it must depend on the attitude and requirements of individual countries. I just want to make the point that we seem to have defused volatility by permitting media access, which in fact almost never occurs.

Public Law Cases

Jurisdictions vary in how they undertake the care of children. I need to briefly explain our statutory framework. There is one system in New Zealand, a country of four million people, and all cases are dealt with nationally, but of course, by our Family Court and our Department of Child, Youth and Family services on a regional basis. In other words, local authorities in New Zealand have no part in the care of children.

The position is quite different in Australia where the Federal Court takes responsibility for private law disputes between parents as to care of their children, but when it comes to care and protection issues — that is, cases where it is suggested there is abuse and neglect and where there ought to be official intervention — the various states assume responsibility. I acknowledge that in England and Wales local authorities play a major part and that the position is accordingly quite different to that which I face.

The Family Justice Review Report puts particular focus on the need for robust judicial case management and the imposition of timelines. For instance, at paragraph 70, the report says:[25]

> "Cases take far too long and previous attempts to tackle it have not succeeded. A firm approach is needed. Government should legislate to provide a power to set a time limit on care proceedings."

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[25] Family Justice Review Final Report (November 2011) at 16.

I agree that a robust approach is required and we are the better for having had statutes passed with clear expectations as to when cases will be heard. When courts are under pressure, and that is often so, it is of enormous assistance for the judicial arm to be able to convey to the administrative arm that the law requires cases to be dealt with according to a certain timeframe. For example, in our Domestic Violence Act 1995 an applicant may obtain a protection order on an ex-parte or without notice basis.[26] When this is served on the respondent, if the respondent wishes to defend a final order, the court must hear the case within 42 days of a defence being filed. We do not always do so but the time limit is vital in trying to maintain standards.

Where litigants' rights have been affected by the making of an order, I think it is vital that we are able to return to cases promptly. I know that the seeds of discontent concerning the New Zealand Family Court grew because we did not stick to our guns in ensuring that some cases were dealt with speedily.

Expert Witnesses

At paragraph 87 the Panel's report notes that:[27]

> "The court should seek material from an expert witness only when that information is not available and cannot properly be made available, from parties already involved in proceedings. Independent social workers should be employed only exceptionally as, when instructed, they are the third trained social worker to provide their input to the court."

It seems to me that getting good clinical information before the court as soon as possible is vital so that judges and parties themselves can make properly informed decisions. Sometimes, in the scramble to assemble the best expert information available, weeks grow into months and by the time we are ready to hear a case, the reports are out of date.

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[26] Domestic Violence Act 1995, s 13.

[27] Family Justice Review Final Report (November 2011) at 18.

Under our Early Intervention Process, I have urged our judges to only seek expert reports when it seems there is no option and instead to rely on social work data that is often readily available and that can be accessed in presentable form quite quickly.

Representation of Children

As we have had quite some experience in representation of children in both our public and private law cases, I thought I would say a word or two about this.

I have already set out for you the sections of our Care of Children Act which require appointment of lawyers in cases which are actually proceeding to a hearing and I have set out the nature of the required consultation with children.

We have used specially trained lawyers to act for children because our legislation requires it. In addition, the United Nations Convention on the Rights of the Child has the requirement that children are properly represented in any judicial and administrative proceedings affecting the child.[28]

The cost of providing such representation can be enormous and as our private law Care of Children Act has grown, so has the cost. The expenditure for court appointed lawyer for the child in private law Care of Children Act cases looks like this:

Expenditure: Lawyer for the Child in Care of Children Act cases**

$000				
2006/07	2007/08	2008/09	2009/10	2010/11
15,000	18,218	20,603	23,689	25,671

** The Care of Children Act 2004 came into force in July 2005.

[28] United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 6 April 1993), art 12.

When our Care of Children Act was passed we decided to particularise what the role of court appointed lawyers for children should be. The Practice Note covers the process for selection and appointment, and also includes a Code of Conduct. However, as it presently stands, the Government is unhappy with the expenditure and is looking for ways to peg that back. Enabling children to be properly represented within a fiscally acceptable context can be a real challenge. In New Zealand, what was fiscally acceptable five years ago is no longer so. A structure that therefore accommodates sufficient representation but which is thought to be financially sustainable is vital.

Private Law

Quite a large section of the Family Justice Review Panel's report deals with private law and why change is needed. Perceived problems with the present system reflect how litigants feel about private law cases in many of the common law jurisdictions. The Panel reported that:[29]

- Many parents do not know where to get the information and support they need to resolve their issues without recourse to court.

- There is limited awareness of alternatives to court, and a good deal of misunderstanding.

- Too many cases end up in court, and court determination is a blunt instrument.

- The court system is hard to navigate, a problem that is likely to become even more important as proposed reductions in legal aid mean more people represent themselves.

[29] Family Justice Review Final Report (November 2011) at 20.

- There is a feeling (which may or may not be right) that lawyers generally take an adversarial approach that inflames rather than reduces conflict.

- Cases are expensive and take a long time.

Much is said about alternative dispute resolution, how arrangements should be expressed and the enforcement of orders. I offer a view on these three aspects, as they may well be the most important aspects to this report.

Alternative Dispute Resolution

I predict that the part alternative dispute resolution will play in our own review will be to the fore. You will see from our Early Intervention Process that there is the expectation that unless a case is designated as urgent, litigants coming to our Family Court must first attend counselling and mediation. But for the most part they have to file in court before the State provides those services.

I think that unless cases are classified as urgent or having a demonstrable welfare issue, there must be disincentives for litigants to come to court. Otherwise, notwithstanding best efforts, the quest for litigation seems insatiable. I presently favour rigorous gate keeping so that entry to the Family Court can only occur once alternative dispute resolution has been attempted. I also favour more of a user pays approach than we have adopted in the past because I see little accountability for some of our litigants and the State money that is spent.

I should indicate that I also presently favour offering a menu of options to those who apply to court so that parties can choose to subscribe to an issues defined, evidence limited, inquisitorial style of resolution by a Judge, with a strictly limited right of appeal.

How Care Arrangements are Expressed

I agree with the Family Justice Review Panel's report that how one expresses care arrangements for children can be vital so far as empowering the parents to cooperate and care is concerned. For instance, our previous labels of custody and access denoted a winner and a loser, and men's groups complained bitterly that they were, for the most part, on the receiving end of access orders only.

Simply put, the scathing criticisms from men's groups that the Family Court is gender biased have largely dried up. We can demonstrate that this claim is not supported by the statistics, which we continue to make publically available.[30]

By digging beneath the surface and examining parenting orders that were made from 2006 – 2010, some very interesting observations can be made.

During the 2006 – 2010 period, mothers applied for parenting orders far more than fathers. Mothers were the applicant in 53% of cases, fathers in 29% and some other party in the remaining 18%.

Just looking at cases where mothers applied for parenting orders, an order was made for the mother to have sole day-to-day care in 82% of the cases. At first blush, this seems to be a very high figure but when you look at how these orders were made, a different picture emerges:

i. By consent, 60%

ii. Uncontested, 31%

iii. Order by Judge, 9%

So for the 82% of cases where a mother applied and was granted sole day-to-day care, only 9% of the time was this actually contested.

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[30] See Peter Boshier and Julia Spelman "What's gender got to do with it in New Zealand family law?" NZFLJ 7 (2011) 3 at 61 – 69.

Turning to cases where the application for a parenting order was made by the father, the father was granted sole day-to-day care in 30% of cases, the mother sole care in 45% and in 21% of cases, there was a shared arrangement. One might question why sole day-to-day care so often went to the mother in cases where the father was the applicant, but again, of the 45% of cases where the father applied yet the mother came away with day-to-day care, the orders were arrived at in this way:

i. By consent, 84%

ii. Uncontested, 4%

iii. Order by Judge, 12%

When looking specifically at orders made after a defended hearing, the picture is less clear. Women did obtain sole day-to-day care following a defended hearing in many more cases than men. Exploring why this is so and digging down another level requires further careful analysis. Who has been the prime caregiver prior to separation and what ongoing care will best serve the welfare and best interests of the child are important contextual considerations.

Many parents share day-to-day care by prescribed days in the week. They feel more empowered in this fashion. Those parents who have an order that defines contact only may have only been seeking contact or it may be that only contact is appropriate because they lack the commitment or are not able to provide any degree of constant care.

Enforcement

Our Court, and I suspect courts overseas, has been criticised for lacking teeth when it comes to enforcing orders. I think that unless we do so, we risk our credibility being eroded. Our judges have been much more willing to invoke contempt, issue warrants and refer breaches for prosecution and I believe there has been a sea change in how the Court is perceived. The Care of Children Act contains a number of enforcement options for Judges including the power to make orders for a bond, costs, and the power to issue a warrant to enforce an order. The orders made under these sections over the last six financial years:

Order_Type	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11
S70 Bond Order	11	3	11	9	6	8
S70(6) Revocation of Bond not Forfeited to the Crown	1		1	1	1	4
S71 Costs of Contravention Order	1	2	2	7	2	5
S71 Costs of Contravention with Bond Reimbursement Order			1	1		
S72 Warrant to Enforce Role of Providing Day to Day Care	182	176	220	258	211	235
S73 Warrant to Enforce Order for Contact with Child	59	68	68	88	80	64

Beyond such orders, section 78 of our Care of Children Act reads as follows:

> (1) Every person commits an offence and is liable on summary conviction to the penalty stated in subsection (2) who, without reasonable excuse and with intent to prevent a parenting order from being complied with, contravenes, or prevents compliance with, the parenting order.
>
> (2) The penalty is imprisonment for a term not exceeding 3 months, or a fine not exceeding $2,500.
>
> (3) Nothing in this section limits the power of a court to punish a person for contempt of court.

To conclude this section on private law, every emphasis must be given to alternative dispute resolution but I think that when cases come into court, the business should be clear and unequivocal. As our own Court has increased in its formality, I have seen a better acceptance by the community of its work.

Conclusion

Just as we face very interesting times ahead, so does the family justice system in England and Wales. And I know that in Ireland, similar discussions are occurring on the delivery of family justice.

I titled my paper to you Family Justice: Aligning Fairness, Efficiency and Dignity deliberately, because family justice must never, ever be just a business. It is the delivery of justice which is so fundamental as to require constant attention. Every person who comes to our Court is entitled to justice, and to be treated with dignity and fairness. Efficiency, if undertaken properly can in fact enhance those qualities, but we should never strive for efficiency alone. Recognising the dignity of all people, and especially those whose lives are in turmoil and who need justice, demands of us all a high calling.

[Ends]