Memorandum for Social Services Select Committee

His Honour, Principal Family Court Judge Mahony

Wednesday 16 May 2001

Introduction

I appreciate this opportunity to confer with the Select Committee about the Family Court and its work.

I have accepted your invitation to meet with you to provide information and answer questions as far as I am able against an acceptance that the Courts and the Judiciary are independent of Parliament and its processes. So I have not come in any sense as being answerable to Parliament or the Committee, but in the hope that through sharing information I can be helpful.

By the same token, it is not appropriate for me to trespass into areas as of pure policy, which are the exclusive domain of Parliament and its processes. For example where the Family Court hearings should be in private or open to the public and whether the present restrictions on publishing reports of Family Court cases should remain or be lifted is a matter for Parliament to decide.

Public confidence in the Courts is just as important as it is for the law making process through Parliament. It is in that context that I have been concerned at recent criticism of the Family Court aired in the media insofar as it has been ill informed, exaggerated and couched in terms calculated to destroy the Court's credibility, particularly when it has been directed at the personal and professional integrity of the Judges.

A resume of the Courts ethos, jurisdiction, workload, organisation and management before I refer briefly to some recent social trends may assist the committee.

Judiciary

There are 36 Family Court Judges in addition to the Principal Judge who are located in strategic Courts around the country from which circuit Courts are serviced -- over 55 Courts in all.

For each of the five regions, Northern, Waikato/Bay of Plenty, Central North Island, Wellington (including Nelson, Blenheim and the Wairarapa) and the South Island there is an Administrative Judge appointed by the Principal Judge with an additional South Island Judge to represent that area.

The Judges are located as follows:

Northern region	11 Judges
Waikato/Bay of Plenty Region	6 Judges
Central Region	4 Judges
Wellington Region	7 Judges
South Island Region	8 Judges
Total	36 Judges

Family Court Ethos

The Family Court was established in New Zealand by the Family Courts Act 1980 and began to operate on 1 October 1981. It was set up following a Royal Commission on the Courts chaired by Sir David Beattie, at that time a Supreme Court Judge. A specialist Family Court for New Zealand was one of the main recommendations of the 1978 Report of which was implemented by Parliament passed in the Family Courts Act 1980 and the Family Proceedings Act 1980 and amending other legislation.

The Royal Commission had received an overwhelming public clamour for change in the way the Court system handled family law cases, in particular divorce and disputes over children.

The Family Proceedings Act 1980 established a single ground for divorce to be called "dissolution of marriage", namely irreconcilable differences proved by two years living apart. It also set up a counselling service which is funded by the State providing relationship counselling for married couples and counselling for disputes over the post-separation care of children. Counselling was to be directed at the twin goals of reconciliation and where that could not be achieved, resolution of disputes by conciliation. In addition, there was provision for mediation conferences to be chaired by Family Court Judges.

The Family Proceedings Act placed an obligation on legal advisers to ensure that clients were aware of the counselling services available and an obligation on the Family Court to promote conciliation.

The Act could be seen as establishing a dual process, one informal and protected by statutory privilege which encouraged parties to take charge of their own cases with expert facilitation from counsellors and Judges as an alternative to the formal process where evidence from each side of the dispute is filed for eventual hearing and determination by the Family Court.

The central features of a Family Court identified in a report of the Royal Commission at paragraph 469 are characteristics of the New Zealand Family Court as it is developed. They are:

(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 direct overall activities of a Family Court.

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

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

(e) Strict adversary rules should be relaxed, as assured 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 for the personnel of high calibre.

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

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

Workload

In a year 2000 approximately 25,000 applications were filed under the Family Proceedings Act, Family Protection Act, Guardianship Act, Law Reform (Testamentary Promises) Act, and Matrimonial Property Acts.

Applications under the Domestic Violence Act has fallen steadily from 7911 for the year ending 30 June 1997 to 6581 for the year ending 30 June 2000.

In addition for the year ending 30 June 2000 there were 2054 applications under the Child Young Persons and Their Families Act. Those figures represent a significant increase over the number of applications filed in previous years.

Most applications under the Mental Health Act are dealt with by Family Court Judges (although the jurisdiction is common with the District Court) who attend hospitals and clinics to conduct hearings, generally on a weekly, fortnightly or monthly basis. For the year ending 30 June 2000 there were 2118 new applications, 1159 for extension of existing orders and 757 applications for review. These are applications made by patients for review during the preliminary assessment stage requiring the Judge to attend on the patient promptly. Together these applications would have involved approximately 4000 hearings.

Applications under the Hague Convention On International Child Abduction are a significant item in the work of the Court each year. For the year ending 31 December 2000 there were 41 applications with respect to children brought to New Zealand. The Central Authority also dealt with 57 applications during that time for children taken from New Zealand. This is an important category of work and New Zealand has a good international reputation for the way in which cases are dealt with here.

It is likely that New Zealand will become a member of the Hague Conference and that will give us better standing with the Permanent Secretariat at The Hague and voting rights when new Conventions are being settled.

Workload Management

The Family Court was the first New Zealand Court to develop a Caseflow Management Practice Note which includes timelines and performance standards for the various classes of cases coming before the Court. Responsibility for caseflow management is shared between the Judges and the Courts' administration. The Registrar holds a key position in caseflow management.

In most Courts, management meetings are held monthly (some bi-monthly). They are chaired by a Judge responsible for the particular Court and attended by the Court Manager, the Family Court Co-coordinator, with representatives from the legal profession and the Department for Child Youth and Family Services. These meetings monitor the workload, performance standards and statutory time limits and deal with local problems as they arise.

The Administrative Judges meet with me every two months in Wellington as a national monitoring group and to address issues and developments of regional and national significance and to take appropriate initiatives.

The Family Court Judicial Education Committee meets at least four times each year and arranges seminars and the briefings for Family Court Judges.

Family Court Jurisdiction

The Family Court was set up as a division of the District Court but with its own identity, a Principal Family Court Judge and Judges with permanent appointment by the Governor General. No one is to be appointed to the Court unless that person is by reason of training, experience, and personality, a suitable person to deal with matters of family law (s5 Family Courts Act 1980). The Family Courts Act also requires that Family Court proceedings are to be conducted in such a way as to avoid unnecessary formality (s10).

In 1981 the Family Court took over the High Court jurisdiction relating to the status of marriage including dissolution of marriage. It also has jurisdiction under that Act to deal with paternity, spousal and child maintenance.

The Court is responsible for adoptions under the Adoption Act 1955 and disputes between guardians including applications for custody and access under the Guardianship Act 1968. That Act was amended when the Court was set up to provide for specialist (in the main psychological) assessments in disputed cases and for the appointment of counsel to represent children, a requirement in every case likely to go to a defended hearing.

The jurisdiction of the Court has been broadened since 1980 to include the following legislation:

a) Domestic Violence

The Domestic Protection Act 1982 provided for non-molestation orders as the main form of protection against domestic violence. That Act was replaced in 1995 by the Domestic Violence Act which almost certainly is the most far-reaching piece of legislation in the common law world to address violence within families. It has a wide definition of domestic violence which requires the Court to take into account patterns of behaviour, the perception of the victim and children of the victim's family as to the nature and seriousness of behaviour complained of and the impact of that behaviour.

There is also a wide definition of "domestic relationship" which governs the group of persons protected by the Act. They include partners, family members, persons who share a household and those in a close personal relationship. Family members include those within whanau or other culturally recognised family group.

The Act provides for compulsory stopping violence programs for respondents against whom a protection order is made. Attendance at these programs is a condition of the protection order. A breach of the order attracts criminal sanctions. These programs are funded by the State. In addition, State funded programs are available for victims and children.

The Domestic Violence Act has a significant impact on the law of custody and access. A parent who has been violent to an applicant or child of the family is restricted to supervised access until the Family Court makes an order granting more liberal contact against criteria set out in an amendment to the Guardianship Act made as part of the domestic violence legislative package. It is noted that violence in the presence or hearing of a child is violence against that child.

Temporary orders may be made on the sworn statement of an applicant without notice to a respondent if the Court is satisfied that the delay caused by proceeding on notice:

"Would or might entail:
(a) a risk of harm; or
(b) undue hardship-
to the applicant or a child of the applicant's family, or both"

A temporary order converts automatically to a permanent order at the end of three months unless a respondent in the meantime intervenes. In that event the Court is required to hold a defended hearing within 42 days. That hearing will either discharged the temporary order or make a permanent order. The Court has no jurisdiction to make time limited orders.

Parliament consciously departed from the procedures followed under the Domestic Protection Act 1982 which the present legislation repealed. Under that Act, interim orders obtained without notice were made for a short finite period at the end of which, subject to a limited power of adjournment, the Court had to discharge the order or make a final order.

How to secure safety for children together with ongoing contact with a parent is a challenge to the Family Court I referred to this in an address to a Canterbury District Law Society Seminar on 27 February of this year saying:

"In making protection orders for the safety of a parent, which also cover children of the family, the Judges at the same time are very concerned that a child's relationship with a parent is maintained or restored as the interests of the child dictate. They are particularly concerned at the hiatus which can occur between the making of a protection order under the Domestic Violence Act and a subsequent s16B custody/access hearing..... Supervised access is sometimes the best, sometimes the only option available and I take the opportunity to express the Court's appreciation to be Agencies which provide this very genuine community service. Nevertheless it is restrictive and it is a relatively short term measure and many are unable to take advantage of the service in any event.

Last year the Family Court Judges had a one-day conference to discuss the competing interests of safety and continued or resumed parental contact with a child after a protection order has been made.

In some Courts at least, regular hearing time has been set aside for urgent applications relating to children arising out of these orders. This is a difficult issue involving complex competing considerations which differ from one case to another. The Court is particularly conscious of those cases where children are grieving for their father when there is no access and where the parent has lost contact because of the order is also experiencing strong feelings of loss..... The challenge for us is to find ways of managing cases and helping families move forward so that we can be accountable for the safety of children, but not at the expense of a relationship with a parent.

But Court is concerned with fairness between parents and what they see as their rights. Our Family Court Judges also take the Domestic Violence Act seriously in all its aspects including its impact on the Guardianship Act where the Court's discretion to depart from access with supervision does not arise until it has assessed the factors set out in s16B"

A table of statistics for applications under the Domestic Violence Act for the years 1997 -- 2000 is attached.

b) Protection for the Incapacitated: Personal Welfare/Property Management

The Protection of Personal and Property Rights Act (PPPR Act) was passed in 1998 providing for protective orders to be made for persons who do not have the capacity to provide for their own personal care. A welfare guardian may be appointed to make decisions for the protected person in the area of personal welfare.

The Court may also appoint a property manager to manage property e.g. a farm or business for someone who has lost the capacity to look after his or her own property affairs.

Applications under this Act are made a frequently on behalf of persons suffering from Alzheimer's disease, those seriously and headed by injury e.g. motor vehicle accidents or from drug/alcohol abuse.

c) Care and Protection of Children

The Children Young Persons and Their Families Act 1989 vested jurisdiction in the Family Court to deal with cases of abuse or neglect of children where the State intervenes. This is a comprehensive code for dealing with cases where children have been abused or neglected within their own families. It includes a strong and extensive statement of principles relating to the central role of family, the role of the State in providing services, supervision, and more intrusive intervention through custody or guardianship, and the way in which the Family Court is to approach these cases with a range of options available to the Court. (This youth offending is dealt with in a separate part of the Act and those within the jurisdiction of the Youth Court).

d) International Child Abduction

The Guardianship Amendment Act 1991 incorporated into New Zealand law, the Hague Convention on Civil Aspects of International Child Abduction 1980. As a party to this Convention, New Zealand has international contractual obligations with a number of countries around the world. The Family Court deals with about 40 cases each year of children abducted to New Zealand from other member states.

e) Child Support

The Child Support Act 1991 replaced in the main provisions for children's maintenance under the Family Proceedings Act 1980. The 1991 Act provides for child support to be calculated on income returned for tax purposes, declining a formula set out in the Act. The Court originally had jurisdiction to deal with cases where departure from a formula was sought and settled the principles to be used through case law developed over to or so years before the jurisdiction was transferred. Review officers now hear departure applications and a relatively small number of appeals from their decisions come to the Family Court.

f) Claims against Deceased Estates

In 1991 the Family Protection Act 1955 was amended to give the Family Court, concurrent jurisdiction with the High Court to hear applications from family members who make a claim against the estate of a deceased person to compensate for an inadequate provision for them in the estate. This usually occurs where there is a will and a family member claims there has been a breach of moral duty to make adequate provision for them.

The Law Reform (Testamentary Promises) Act 1949 was amended in the same year to give the Family Court concurrent jurisdiction with the High Court to hear claims for enforcement of promises to make testamentary provision in return for services rendered.

g) Mental Health

The Mental Health (Compulsory Assessment and Treatment) Act 1991 vested jurisdiction in the District Court to make compulsory treatment orders (inpatient and community-based) under this Act but provided that where practicable, these cases should be dealt with by Family Court Judges. In the main that has happened and this has become a specialist area of Family Court jurisdiction. Family Court Judges attend hospitals and clinics around the country regularly, weekly or fortnightly in many cases, and deal with about 4000 applications each year.

h) Intercountry Adoption

The Adoption (Intercountry) Act 1997 incorporated into New Zealand the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993. As the titles to the Act suggests, it sets out a code for dealing with adoption of children from one country to another. It has some limited application but it is anticipated that it will become more important in the future.

i) Wardship Jurisdiction

In 1998 the Guardianship Act was amended to give the Family Court concurrent jurisdiction with the High Court to make children wards of the Court. This is a very ancient form of protective jurisdiction under which children can be made wards of the Court with the effect that the Court steps into the shoes of the parents for specific or general purposes.

This jurisdiction is sometimes invoked in the case of medical emergencies e.g. where a blood transfusion is needed and parents will not consent.

j) Property Relationships Legislation

The Property Relationships Act 2001 comes into force in February 2002. It invests sole originating jurisdiction in the Family Court and as a code for the division of property which formerly came under the Matrimonial Property Act 1976 extended to property of de facto couples including those in same-sex relationships of three years or more. This legislation broadens of the discretionary authority of the Court to divide property in a way which achieves equity between the parties.

It amends existing legislation dealing with spousal maintenance which is extended to include partnership maintenance, and claims against deceased estates.

Disputes Involving Children

There is a very strong emphasis in cases involving children in particular, on conciliation and mediation as primary means for resolving disputes and securing quality outcomes.

Under the Family Proceedings Act 1980, a party to the marriage may apply for counselling without filing any formal application to the Court. There is a growing demand for counselling in this way and last year there were 10,000 applications. 450 counsellors provide counselling services under contract to the Family Court around the country.

There is a statutory duty on the Court and legal advisers to promote reconciliation and where that is not achievable, conciliation as a means of resolving disputes over children.

When all or some issues are not settled through counselling. A second league of the Court's conciliation service is the mediation conference chaired by a Family Court Judge who is trained in mediation techniques.

Counselling and mediation are protected by a statutory privilege and parties can and do speak freely and openly in working through differences. This as an empowering process helping parents settled by agreement their future parenting plans for their children which Judges can turn into consent Court Orders.

Having Judges as mediators is a very strong indicator of the central place of conciliation in the Family Court system and of the time and resources which the Court devotes to assisting parents themselves make decisions for the future care of their children following separation.

Where cases are likely to proceed to a hearing, the Court must appoint counsel to represent the child or children. This as a special role and of the selection and appointment of counsel is governed by a Court Practice Note which includes a Code of Practice for counsel who must be people with experience and skill. One of the functions of counsel for the child is to negotiate a settlement where appropriate and in the interests of children.

Further, where a case is unresolved and is heading for a defended hearing, the Court may also order an assessment by a registered psychologist on the basis of a brief prepared by the Court in consultation with the parties through their lawyers. This assessment will consider family dynamics, the attachment of children to each parent, their needs and wishes and the options for ongoing care having regard to the circumstances of the particular family. These assessments act as a further aid to settlement of cases when each parent is able to reconsider his or her position in the light of what the reports says.

A relatively few number of cases proceed to a hearing. They include ongoing high conflict cases where parties are unable themselves to resolve their differences. In some of them domestic violence has been a feature in the relationship.

In defended cases the Judge becomes of the decision-maker and must decide on an outcome which will best serve the child's interests. While the attention of the parents may be caught up with a view of their respective rights and conflicted relationship, the Court must focus on the children. The gender of the parents does not count (s23(1A)), but their personal commitment and quality of parenting does; so does the relationship of the child with each and the child's wishes which must be taken into account and are sometimes determinative of the outcome.

In a number of cases the Court is faced with choosing the least detrimental alternative for the child. In each case the Court takes account of the circumstances of the particular family, namely this mother and this father and these children. The myriad of the different family circumstances are referred to in the reasons for Judgment where they are analysed and weighed so that the parties know how and why a particular outcome was reached.

All Judgments are sent to the legal publishers through my office. They have the editorial freedom to choose cases for reporting in the two series of Family Law Reports published in New Zealand. Unreported Judgments are also available through the legal publishers and are frequently referred to in the Family Court manuals published by both Butterworths and Brookers. They are unavailable to legal academics and the Universities who teach family law and are free to scrutinise and comment on Judgments of the Court.

Social Changes

The Royal Commission on the Courts in 1978 referred to accelerating social changes impacting on family, and social norms and values. Those changes have continued. Dissolutions of marriage number approximately 10,000 each year but the rate of marriage has declined and approximately one in four men and woman between the ages of 15 and 44 live in de facto relationships (1996 Census).

There is more flexibility in family forms and the way in which families are reconstituted after separation and dissolution of marriage.

Mitchell, Chapman and McIntosh writing in "Inclusion or Exclusion: Family Strategy and Policy" Issues Paper No 9 from the Centre for Public Policy Evaluation Massy University published in 2000 say:

*"**The traditional roles of men and families are changing.** Between the years 1986 and 1996 the number of solo parent families where a male is the sole parent grew by around 49 percent from 19,083 to 28,491 with 17 percent of solo parent families headed by men. (Statistics New Zealand, 1998, as cited in Julian, 1998). Put another way, there are around 349,000 men engaged in child rearing in New Zealand. Of this number, around 28,000 are the principal care giver (ibid).*

P. Callister (1998 in his analysis of the changing lives of New Zealand fathers, noted that changes in the labour markets and family type over last two decades meant that in New Zealand:

* *There has been a dramatic decline in the' traditional' two parent family, where the father is the sole income provider and the mother stays at home and looks after the children.*
* *A significant number of men have actively chosen to spend more time with their children.*
* *A further group of men have had the opportunity to spend more time with their children thrust upon them through growth in male unemployment.*

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Overall, it was concluded that these changes have resulted in some dads having a lot more involvement in the day-to-day care of their children. Alongside these changes there have been other changes that affect the manner in which our society is coming to view parenting and the contribution of people to this task".

Statistics Concerning Two-Parent and Sole Parent Families

Statistics concerning two-parent and sole parent families are referred to in the 1998 publication "New Zealand Now: Children" by Statistics New Zealand. This study at page 37 states that in 1996 76.4% (as 613,900) children under the age of 15 were living and two-parent families. 23.6% (189,900) children lived in sole parent families.

Pacific Island children (29%) and Maori children (two in five) were more likely to live in sole parent families but they were also more likely to be part of shared households including those involving extended families.

The statistics for sole parent families are derived from Census returns and to do not take account of the numerous arrangements for the shared residential care of children by two parents. They do not count as two-parent families. They are buried undisclosed in the statistics which shows the number of children living and sole parent families. Those statistics therefore need to be treated with caution and not given a significance which they do not have.

Judge P.D. Mahony
Principal Family Court Judge