

In Confidence

Minister of Justice

Chair, Cabinet

Rewrite of the 2014 family justice system reforms

Proposal

1. This paper seeks Cabinet approval to a rewrite of the 2014 family justice system reforms (the 2014 reforms). Cabinet is asked to agree the scope, structure and terms of reference for a rewrite of the 2014 reforms.

Executive summary

2. The 2014 reforms made significant changes to the way parenting disputes over care arrangements for children are made post separation.¹
3. Key changes included:
 - the introduction of family dispute resolution (FDR), an out-of-court service providing parties the opportunity, where appropriate, to make decisions with the help of a trained mediator;
 - removal of lawyers from the initial stages of proceedings under the Care of Children Act 2004 (CoCA).
4. Concerns have been raised with me about the adequacy and appropriateness of the support and advice provided to separating couples. The reforms have been in place long enough to begin to measure whether they are achieving the desired outcomes. Analysis of recent data indicates some mixed results. I consider it is timely to re-examine the key decisions and policy settings underpinning the 2014 reforms and to reconsider whether they were the right ones.

¹ These are private law disputes between parents under the Care of Children Act 2004 and not public law matters, eg, care and protection cases under the Oranga Tamariki Act 1989 where the State may intervene to remove children from their parents' care.

5. I consider a fundamental flaw in the reforms is that they assumed that separating couples are capable, without advice, of sorting out those issues at a time that is hugely emotional, for them.
6. Lawyers were removed from the initial stages of the court process in all but urgent (without notice) applications. The number of these applications has since more than doubled and are now 70 percent of applications filed under CoCA because parties want legal representation. This has caused delays, which can be damaging for the children concerned.
7. In response to concerns such as these, I propose a rewrite of the 2014 reforms by a small independent panel reporting directly to me. The rewrite will be child-centred, informed by expert advice, and proactively engage with key stakeholders and the public, particularly those who have been through the system.
8. My proposed terms of reference for the rewrite are broad including looking at: in-court and out-of-court processes; the role and use of professionals; and ensuring decisions are reached that are consistent with the welfare and best interests of the children concerned.
9. The panel will report to me no later than February 2019 with recommendations for change.
10. The costs of servicing the rewrite is in the range of \$1 – 2M and will be absorbed within Ministry baselines across two financial years.

Background

11. Prior to the 2014 reforms, the Family Court was facing several issues compromising its ongoing sustainability and effectiveness. The Court was criticised as being too often used for resolving low level parenting disputes, had complex procedures, and was experiencing considerable growth in costs with no corresponding improvement in outcomes.
12. The 2014 reforms made significant changes to the way parenting disputes over care arrangements for children are made after separation. The reforms aimed to put the interests of children first by:
 - reducing conflict between separating parents to prevent disputes from occurring or escalating;
 - reducing the adversarial nature of disputes over children;

- enabling the Family Court to focus its resources on serious and urgent cases that are not suitable for FDR.
13. The introduction of FDR was one of the most significant measures in the 2014 reforms. FDR provides parties an opportunity, where this is appropriate, to reach agreement about care arrangements for children with the help of a trained mediator.
 14. Ministry analysis has shown that those people using FDR only, are more likely to reach an enduring outcome, within a reasonable timeframe, than those who require court intervention. However, despite most FDR mediations resolving some or all matters, some people who use FDR also go on to court and these cases take longer on average.
 15. Lawyers were removed from the initial stages of the court process in all but urgent cases. These are known as “without notice” applications.² The number of these applications has increased significantly and now comprise 70 percent of applications filed under CoCA, not necessarily because of the urgency of these cases, but because parties want legal representation. This has caused delays, especially for cases regarded as non-urgent. These cases are pushed back in the queue and this is damaging for the children concerned.
 16. The reforms also coincided with a reform of legal aid. Together, these changes aimed to strike a balance between the financial viability of the legal aid scheme and access to the Family Court.

Comment

17. Concerns have been raised with me about the adequacy and appropriateness of the support and advice provided to separating couples. I am concerned about how well the 2014 reforms:
 - continue to put the best interests of children first;
 - promote family autonomy and co-operation, where appropriate;
 - ensure access to justice services;
 - meet the needs of families at all stages of the process (including the timely resolution of disputes).

² Without notice applications may only be made if making an on-notice application would or might entail serious injury or undue hardship, or risk to the personal safety of the applicant or any child of the applicant’s family, or both.

18. The reforms have been in place long enough to begin to measure whether they are achieving the desired outcomes. The Ministry has undertaken several evaluations across key areas of the reforms. Analysis of that data indicates some mixed results. I consider it is timely to re-examine the key decisions and policy settings underpinning the 2014 reforms and to reconsider whether they were the right ones.
19. I am confident that I have a clear idea of the problems of the 2014 reforms, not only from the Ministry's evaluations but from what people have told me. This provides a strong basis for the Government to consider what changes are necessary to fix the problems that have been identified.
20. I consider the fundamental flaw in the reforms was that they assumed that separating couples are capable, without advice, of sorting out their issues at a time that is hugely emotional, and sometimes traumatic for them. Couples need assistance and advice at this time.
21. I am also increasingly concerned that a gap is opening up between those who have the means to enforce or defend their legal rights and those who don't. Legal aid rules have been tightened and we are seeing in jurisdictions like the Family Court what is starting to look like inequality in representation. Access to justice is a vital component of the rule of law. Respect for the law and confidence in legal processes can only be achieved when everyone can meaningfully participate in the legal system.
22. I therefore propose that an independent panel should report directly to me on the changes that are required. It is important that there is a strong element of independence as part of this process. One of the issues I have observed is a loss of confidence in the family justice system, in part because of the impact the 2014 reforms has had on people.
23. The rewrite will be child-centred and informed by expert advice. I expect the panel to engage with key stakeholders including relevant interest groups and the public, particularly those who have been through the system. I consider it vital the panel test their thinking about how best we can make the changes necessary to improve the current situation.
24. The scope and structure of the rewrite are discussed below. The terms of reference are attached to this paper as an appendix.

Scope

25. Promoting the welfare and best interests of children following parental separation will be a central focus of the rewrite. The period following separation is a particularly vulnerable time for children. I want to ensure that both out-of-court and in-court processes (including the roles of professionals in these) enable safe and durable decisions to be made for children and to consider any differential impact on Māori children.³
26. To avoid duplicating work and to ensure a timely rewrite, aspects of the 2014 reforms which do not relate to parenting or guardianship matters are outside the scope of the rewrite. This includes the changes to:
 - 26.1. the Property (Relationships) Act 1976 – minor changes were made to rules and forms as part of the 2014 reforms and the Act is currently being reviewed by the Law Commission;
 - 26.2. the jurisdiction of the Family Court – minor changes were made to the jurisdiction of the Family Court in relationship property cases to enable easier transfer of appropriate cases to the High Court and will be considered in the Law Commission's review of the Property (Relationships) Act 1976;
 - 26.3. the Domestic Violence Act 1995 – changes were made to definition of psychological abuse and the provision of non-violence programmes. The Act has recently been reviewed and the resulting Family and Whānau Violence Legislation Bill which is currently awaiting its second reading.
27. As the rewrite is focussed on the operation of the 2014 reforms it does not include consideration of criticisms of the Family Court more generally such as system-wide lack of judicial accountability, transparency, and bias. However, concerns about children's safety in care arrangements will be captured by the rewrite.

Approach

28. The rewrite is to be undertaken by a three-person panel supported by an expert reference group. I am currently in discussion with potential members of the panel and I will announce its final membership in due course. Panel members will be expected to travel to consult with stakeholders and interest groups across New Zealand. Members will be remunerated for their time in line with the Cabinet Fees Framework and will be reimbursed for relevant travel expenses.

³ The relevant Acts are primarily the Care of Children Act 2004, the Family Dispute Resolution Act 2013 and the Family Courts Act 1980.

29. The reference group will consist of experts across a range of disciplines, including law, child psychology, kaupapa Māori research, and family violence research. Some of those members will be appointed by me and some will be representatives from professional groups. I am currently discussing potential membership with several experts, and membership of the reference group will also be announced in due course. Reference group members will not be paid but will be reimbursed for relevant expenses, such as travel and accommodation.
30. A small team of Ministry of Justice officials will be available to act as the secretariat for the panel, providing information, data and analysis as directed by the panel. They will help ensure that the project is completed within the specified timeframes. The Government Centre for Dispute Resolution is available to support the panel in its consideration of best practice dispute resolution.

Timing

31. I have asked the panel to report to me no later than February 2019. s 9(2)(f)(iv)
Note that the report-back date has been extended to May 2019.
32. There may be some concerns raised about the timeliness and value for money of the rewrite of the 2014 reforms. Some stakeholders may hold strong views that some changes, for example, restoring full legal representation in CoCA proceedings, should be made immediately. However, my preference is for the panel to consider all issues relating to the 2014 reforms at the same time and in a measured way rather than in a piecemeal fashion. My commitment to restoring full representation has not changed but I wish to consider all changes as part of a comprehensive package of possible changes. We need to take the time to ensure any changes we make are the right ones.

Consultation

33. The following Ministries have been consulted: Oranga Tamariki, the Ministry for Children, the Ministry for Business, Innovation and Employment (Government Centre for Dispute Resolution); the Ministry of Social Development, Ministry for Women, Te Puni Kōkiri, New Zealand Police, and Treasury. The Department of Prime Minister and Cabinet has been informed.
34. Public engagement will be undertaken by the panel as a part of the rewrite of the 2014 reforms.

Financial implications

35. The costs of the rewrite, based on a three-person panel with a reference group, can be absorbed within Ministry baselines as the costs fall over two financial years. The estimated cost, including both direct and indirect costs, is in the range of \$ 1 – 2M based on an indicative timeframe for the rewrite of nine months. I will seek separate funding for any proposals arising out of the rewrite. § 9(2)(f)(iv)

Human rights

36. The rewrite will consider the impact of the 2014 reforms on children. The approach to the rewrite is consistent with the United Nations Convention on the Rights of the Child.

Legislative implications

37. There are no immediate legislative implications arising from this paper. However, it is intended that the rewrite will result in a final report that will include recommendations for change.

Regulatory impact analysis

38. A regulatory impact statement is not required.

Gender implications

39. A gender implications statement is not required.

Disability perspective

40. Part of the terms of reference will consider whether the family justice system is accessible to those who need to use its services, including those with disabilities.

Publicity

41. I intend to release this paper. I also intend to announce the terms of reference for the rewrite and membership of the panel once the latter has been finalised. Communication for the rewrite will be managed through correspondence with key stakeholders such as the Chief District Court Judge (who is currently also the Acting Principal Family Court Judge) and the New Zealand Law Society, as well as a series of press releases.

Recommendations

42. The Minister of Justice recommends that the Committee:

1. **Note** that the 2014 family justice system reforms made significant changes to the way parenting disputes over care arrangements for children are made post separation;
2. **Note** that there are concerns about the 2014 family justice system reforms, in particular, the lack of legal representation in proceedings under the Care of Children Act 2004 which has led to a significant increase in without notice applications and delays in resolving disputes;
3. **Agree** to a rewrite of the 2014 reforms undertaken by an independent 3-person panel reporting directly to me;
4. **Agree** to the terms of reference attached as an appendix to this paper and proposed scope of the rewrite;
5. **Invite** the Minister of Justice to report back to the Cabinet Social Wellbeing Committee with recommendations for reform.

Authorised for lodgement

Hon Andrew Little

Minister of Justice