New Zealand Law Society
Te Kāhui Ture o Aotearoa

Family Court (Family Court Associates) Bill 2022

14/09/2022

Submission on the Family Court (Family Court Associates) Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on the Family Court (Family Court Associates) Bill (the **Bill**). This submission has been prepared by the Law Society's Family Law Section.

1.2 The Family Law Section has previously provided comments on a draft bill and specific questions posed by the Ministry of Justice (the **Ministry**). For your convenience, we attach our letters to the Ministry dated 1 September 2021, 24 September 2021, and 1 June 2022 at **Appendix One**.

1.3 The Law Society supports the establishment of the role of Family Court Associate (**FCA**) and the object of the Bill: for FCAs to take on some work currently undertake by judges, including some decisions made at the early stage of proceedings, enabling judges to focus on progressing casework, and thereby reducing delays in Family Court Proceedings.

1.4 However, there are some proposed amendments the Law Society does not agree with, and we suggest amendments to the Bill. In addition, there are powers that are not included in the Bill, which the Law Society considers it would be appropriate for an FCA to hold. A consolidated list of recommendations can be found at **the end of this submission**.

1.5 The Law Society **wishes to be heard** on this submission.

2 General comments

Te Ao Mārama

2.1 Te Ao Mārama is a new model for the District Court, '*a judicially led kaupapa that will improve the experience for all people who participate in the court system, including victims and whānau*:'[1]

> *Te Ao Mārama will mean that all people who come to court to seek justice will be seen, heard, understood and able to meaningfully participate. Te Ao Mārama is inclusive of all people, no matter their means or abilities, regardless of their ethnicity or culture, and regardless of who they are or where they are from.*

2.2 Careful consideration is required to balance the principles of Te Ao Mārama with the powers to be given to an FCA, and to ensure those powers do not inhibit the opportunity for people to meaningfully participate in proceedings that impact them.

Family Court Rules

2.3 Amendments to the Family Court Rules 2002 (**Rules**) will be required to reflect the proposed amendments in the Bill. It will be the ability of an FCA to undertake many of the pre-hearing steps that will make the greatest difference in maximising judicial time for hearings and reducing the delays in the Family Court. Many of these steps are found in the Rules. The

[1] https://www.justice.govt.nz/justice-sector-policy/key-initiatives/te-ao-marama/

relevant rules will require amendment to specify which powers may be exercised by an FCA. Examples include:

a. Amending Rule 175 for judicial conferences, to provide that these may be presided over by an FCA.

b. Rule 170, providing for an interlocutory hearing on the admissibility of evidence, will require amendment if that is to be undertaken by an FCA. However, in some cases the hearing judge may prefer to make interim judgments about the admission of evidence.

c. Any of the general directions permitted in Rule 416P, that are not already set out by the specific legislation identified in the second part of the Bill.

2.4 In our submission of 1 September 2021, we were supportive of an FCA dealing with much of the pre-hearing work, including pre-court hearings for interlocutory matters. These types of functions are set out in the Rules. This may be a matter better considered by the Expert Reference Group established by the Minister of Justice to undertake a review of the Rules. The Rules requiring amendment will need to be identified, and consultation undertaken on the proposed amendments, prior to enactment of the Bill. The Law Society would like to be consulted on any draft amendments to the Rules.

Powers of Family Court Associates

2.5 Some clauses of the Bill enable an FCA to exercise a power *'when a judge is not available'*. Care needs to be taken to ensure that complex and substantive decisions remain with a judge, and each delegated powers needs to be carefully and consciously delegated. We comment on this further below in respect of the proposed amendments to specific legislation.

3 Part One: Amendments to Family Court Act 1980

Clause 4 – New Sections 7A to 7H inserted

New section 7A: Appointment of Family Court Associates

3.1 The Law Society raises no issues with the drafting of new section 7A. In our letter of 1 September 2021, we expressed the view that a minimum of seven years' legal experience should be required to hold the position of FCA, the same as that required of a Family Court Judge. We are pleased to see this reflected in new section 7A.

New section 7B: Term of appointment of Family Court Associates

3.2 In the Law Society's view, the tenure of an FCA should be the same as that of a District Court Judge. This will give greater status and mana to the role. We reiterate the comments made in our 1 June 2022 letter: because an FCA would need to give up practice as a lawyer, there should be some certainty of tenure rather than a fixed term of '*not more than seven years*.' The Law Society suggests this new section should mirror section 16 of the District Courts Act 2016.

3.3 In addition, new sections 7B(2) and (3) should be separated from section 7B, and should mirror section 29 of the District Court Act (regarding removal of an FCA). The Judicial Conduct Commissioner should also govern these positions. If this is accepted, the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 will require amendment.

Recommendations

New section 7B be amended to replicate section 16 of the District Court Act.

New sections 7B(2) and (3) be deleted, and a separate section inserted replicating section 29 of the District Court Act 2016.

The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 be amended to extend the functions of the Judicial Conduct Commissioner to FCAs.

New section 7C: Jurisdiction and powers of Family Court Associates

3.4 We refer to the comments provided below in respect of new Schedule 2, and our comments in respect of the proposed amendments to other legislation.

New section 7D: Transfer of proceedings to Family Court Judge

3.5 In principle, the Law Society agrees with these transfer provisions. However, we refer to our previous submissions of 1 September 2021 at paragraph 14, where we suggest there needs to be an efficient and effective review mechanism for FCA decisions.

New section 7E: Remuneration of Family Court Associates

3.6 Regarding the remuneration of FCAs, we reiterate our previous comments: the role must be adequately remunerated if high quality applicants are to be attracted to the position. The rate of remuneration must also account for the seniority of the role. We are concerned that clause 7E states that an FCA is to be paid "a salary, fee, or an allowance at the rate determined by the Remuneration Authority".

3.7 This appears to diminish the role to being on a par more with a Disputes Tribunal Referee or a Community Magistrate (who are paid a minimal daily rate). As the role of an FCA is judicial in nature, the salary should be set accordingly, and included in Part 1 of the Schedule of the Judicial Officers Salaries and Allowances (2021/22) Determination 2021.

Recommendation

That the salary for FCAs be set by the Judicial Officers Salaries and Allowances (2021/22) Determination 2021, and new section 7E amended to reflect this.

New section 7F: Remuneration of Family Court Associates must not be reduced

3.8 The Law Society agrees with new section 7F. The remuneration of an FCA should not be reduced while that person holds office.

New section 7G: Restrictions of Family Court Associates

3.9 New section 7G provides that an FCA must not undertake certain employment or hold certain offices, and specifically, must not practice as a lawyer. The role of an FCA is a judicial

role (with limitations regarding jurisdiction). Because it is a judicial role, the restrictions should instead replicate those contained in section 17 of the District Court Act 2016.

3.10 If the current drafting is to be retained, we note that a previous draft of the Bill contained a restriction on being 'an officer of the High Court or District Court.' That restriction has been removed, and it is not clear why. In the event the drafting of section 17 of the District Court Act 2016 is not adopted, consideration should be given as to whether new section 7G, as currently drafted, contains all required restrictions.

New section 7H: Immunity for Family Court Associates

3.11 The Law Society agrees with proposed new section 7H.

Clause 5 – Section 15A amended (application of Contempt of Court Act 2019)

3.12 The Law Society agrees with this proposed amendment. An FCA must be able to deal with disruptive behaviour during proceedings.

Clause 6 – New Schedule 2 inserted

3.13 The Law Society agrees with the FCA jurisdiction and powers as set out in clauses 1(a) to (k) of new Schedule 2, regarding the appointment of lawyers and obtaining reports.

3.14 The jurisdiction and powers of an FCA under specific enactments (clause 2 of new Schedule 2) is considered below.

3.15 The Law Society agrees with clauses 3 and 4(1) of new Schedule 2. However, we do not support clause 4(2) relating to powers exercised under the Care of Children Act 2004 (**CoCA**). We recommend this is deleted. Further comment on this is provided below.

4 Part Two: Amendments to other legislation

Amendments to Adoption Act 1995

4.1 Clauses 7 to 11 of the Bill propose amendments to the Adoption Act 1955 which are designed to enable an FCA to assist in the case progression of proceedings filed under this Act. We agree with the amendments proposed in clauses 7, 8, 10 and 11.

Clause 9 – Section 8 amended (Cases where consent may be dispensed with)

4.2 Clause 9 amends section 8 of the Adoption Act 1995 (the **Adoption Act**) to give an FCA jurisdiction to dispense with the consent of a parent or guardian to the adoption of a child. In the Law Society's view, this power should be exercised only by a Family Court Judge and clause 9 should be deleted. The reference to section 8 of the Adoption Act in section 2(a) of new Schedule 2 should also be removed.

4.3 The effect of an adoption order is significant – it severs any legal relationship between a child and their biological parents. Because of this significance, the Adoption Act provides a careful system where the consent of parents is required, and where steps are taken to ascertain that the correct people are providing that consent.

4.4 Likewise, the process by which applications to dispense with consent are determined is one that requires careful legal analysis and the exercise of expert judgment. Determination of

those applications, by their very nature, can lead to significant and almost irrevocable legal consequences.

Recommendation

Clause 9 and reference to section 8 of the Adoption Act in section 2(a) of new Schedule 2 be deleted.

Amendments to Care of Children Act 2004

4.5 The Law Society supports the proposed amendments in Clauses 13 to 16, which allow an FCA to make directions that will enable applications for, or about, parenting orders to progress through the court.

Clause 17 – Section 46P amended (Purpose of settlement conferences)

4.6 Clause 46P of CoCA provides that the purpose of a settlement conference is to enable a Family Court Judge to ascertain whether any or all of the issues in dispute between the parties can be settled, and to settle those issues by consent. Clause 17 of the Bill extends this power to an FCA. The Law Society supports this amendment.

Clause 18 – Section 46Q amended (Settlement conferences)

4.7 Clause 18 amends section 46Q of CoCA to enable an FCA to convene a settlement conference at any time before the hearing of a proceeding. The clause retains the current provision in section 46Q(1) to enable a Family Court Judge to direct a registrar to convene a settlement conference. There is potentially a "gap" in this process if a Family Court Judge can direct the registrar to convene a settlement conference, but an FCA does not have the ability to make the same direction to the registrar.

Recommendation

That clause 18 be amended to enable an FCA to direct a registrar to convene a settlement conference.

Clauses 22 to 26 (Preventing removal of a child from New Zealand, section 77A orders, and preventing concealment of whereabouts of a child)

4.8 The Law Society is concerned about the powers proposed to enable an FCA to issue orders or warrants as identified in the circumstances set out in clauses 22 to 26 of the Bill.

4.9 Although it is acknowledged that section 77(1) of CoCA already includes in the definition of "authority" a registrar of the High Court or District Court if a judge is unavailable, we do not consider that it is common practice nor appropriate for a registrar to exercise powers as an "authority" pursuant to sections 77 or 77A of CoCA. The implementation of the national e-duty system means it is unlikely there would be a situation where a Family Court Judge is not available.[2] We do not support the extension of the definition to enable an FCA to make orders that ought to be reserved for a judge. The powers that can be exercised under sections 77 and 77A have significant ramifications for the freedom of movement and human rights of those affected by these orders.

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[2] We note the e-duty system is often at capacity, particularly during holiday periods. Consideration should be given to extending e-duty capacity.

4.10 For the same reasons, the issuing of warrants and/or making of orders under sections 117 and 118 of CoCA should be powers exercised exclusively by a Family Court Judge and should not be extended to an FCA.

Recommendations

That Clauses 22 to 26 and clause 4(2) of new Schedule 2 be deleted.

That section 77(1) of CoCA be amended to make clear that the power to make orders in the absence of a Family Court Judge can only be exercised by a High Court Judge or a District Court Judge.

Clause 27 (section 132 amended) and clause 28 (section 134 amended)

4.11 The Law Society supports the amendments proposed in clauses 27 and 28.

Amendments to Child Support Act 1991

Clauses 33 – 40, 42, 43

4.12 The Law Society supports the amendments proposed in each of these clauses.

Clause 41 – Section 117 amended (Suspension orders)

Clause 41 amends section 117(5) of the Child Support Act (**CSA**) to provide that a Family Court Judge or an FCA may make an order under that section suspending or altering the liability of any person to make payments under the Act pending the hearing and final determination of a proceeding. The Law Society supports this proposed amendment. However, we note use of the term '*ex parte'* in section 117(5). This should be replaced with the equivalent English term "without notice", to modernise the provision.

Recommendation

That section 117(5) of the CSA be amended to replace the term 'ex parte' with the term 'without notice'.

Other powers not included in the Bill

4.13 There are a number of other powers, particularly those relating to the enforcement of orders, that the Law Society considers would be appropriately held by an FCA in respect of the CSA. These include:

a. Section 189 – orders for enforcement of arrears

b. Section 190 – power to issue summons

c. Section 192(4) – power to issue a warrant for arrest

d. Section 194 – conduct of examination

e. Section 200 – restrain dispositions

f. Section 201 – set aside dispositions

4.14 Providing these powers to an FCA has the potential to free up the time of Family Court judges.

Amendments to Family Proceedings Act 1980

4.15 The Law Society supports the proposed amendments to the Family Proceedings Act.

Amendments to Family Violence Act 2018

4.16 The Law Society supports the proposed amendments to the Family Violence Act (**FVA**) and suggests an additional amendment to section 172 of this Act.

4.17 The Law Society would support an amendment to section 172 of the FVA, to give an FCA power to vary an order under the Act, where variation is sought by consent. We consider that applications by consent to discharge an order should continue to be referred to a judge.

Recommendation

That section 172 of the FVA be amended to give an FCA power to vary an order under the FVA, where that variation is sought by consent.

Amendments to Marriage Act 1955

4.18 The Law Society supports the proposed amendments to the Marriage Act 1955.

Amendments to Oranga Tamariki Act 1989

Clause 72 (Place of safety warrants) and Clause 73 (Warrant to remove child or young person)

4.19 Clause 72 amends section 39(1) of the Oranga Tamariki Act 1989 (**OT Act**) to enable an FCA to issue a warrant under this section in the event that a District Court Judge is not available. A warrant may be issued authorising the search for and, if necessary, the uplifting of a child or young person suspected to be suffering ill-treatment, neglect, deprivation, abuse, or harm.

4.20 Clause 73 amends section 40(1) of the OT Act to enable an FCA to issue a warrant under this section in the event that no District Court Judge is available. A warrant may be issued authorising the search for and, if necessary, the uplifting of a child or young person who is believed to be suffering ill-treatment, serious neglect, abuse, serious deprivation, abuse, or serious harm, or who is believed to be so seriously disturbed as to be likely to act in a manner harmful to themselves or others or to cause serious damage to property.

4.21 The implementation of the national e-duty system means it is unlikely there would be a situation where a Family Court Judge is not available. In addition, the powers in sections 39 and 40 have serious consequences and, in our view, should only be exercised by a Family Court Judge.

4.22 There are also strong policy objections to allowing without notice orders to be made without first hearing from the parties from whom it is proposed the child be removed. As a result, there is increasing use of 'Pickwick Hearings'– short hearings in which the Judge delays their decision and hears from the parties, despite the application having been made without notice. This is the court's attempt to ensure that families and whānau are involved early in decision making which can have long term and negative effects on a child and their whānau. Without notice orders, where the proposed placement is outside of whānau, and the opposing party or the child's whānau have had no opportunity to be heard, conflict with the principles underlying the OT Act such as whānau involvement and recognition of mana

tamaiti, the whakapapa of tamariki, and the whanaungatanga responsibilities of their family, whānau, hapu and iwi group.

4.23 While it may be an undesirable power to invoke, due to the serious incursions on privacy and the freedom of individuals within their homes, section 42 of the Act already enables a police constable, who believes on reasonable grounds that it is critically necessary to protect a child or young person from injury or death, to enter and search premises and uplift the child without warrant. That power is not unfettered or unchecked, as any constable who exercises such powers must furnish a written report to the Police Commissioner within three days, outlining the exercise of the power and the circumstances in which the warrantless power came to be exercised. Further, such powers are necessary when the Police are unable to find a safe solution for a young person in situations of family harm or absconding from family and/or caregivers.

4.24 The effect of these existing provisions is that if no Family Court Judge was available to issue a warrant under sections 39 or 40, a constable could still exercise warrantless powers to protect a child in circumstances where they believed it was critically necessary to protect a child from injury or death.

4.25 The Law Society does not support the extension of these powers to an FCA. These powers have significant and far-reaching consequences and are one of the most serious orders a Family Court Judge can make. We do not agree that any circumstances would warrant an FCA being permitted to issue a warrant under section 39(1) or section 40.

4.26 We acknowledge that sections 39 and 40 currently provide that if no District Court Judge is available, any issuing officer under the Search and Surveillance Act 2012 can also issue such a warrant. We do not believe that these existing powers are appropriate, and a Family Court Judge on e-duty should always be available[3]. In our view, the power to issue such warrants should rest solely with a Family Court Judge.

Recommendations

That Clauses 72 and 73 be deleted from the Bill, and clause 2(g) of new Schedule 2 amended to remove reference to section 39 and 40 of the OT Act.

That sections 39(1) and 40(1) of the OT Act be amended to provide that only a District Court Judge may issue a warrant to search premises and uplift a child at risk of harm.

Clauses 74 to 76

4.27 The Law Society supports the amendments proposed in clauses 74 to 76 of the Bill.

Clause 77

4.28 Clause 77 amends section 201(1) to give an FCA the same power as a Family Court Judge to adjourn the hearing of any proceeding before the Family Court. However, unlike a Family Court Judge, an FCA will not be able, when granting an adjournment, to make any order relating to the custody of, or access to, a child or young person.

[3] As noted above, consideration should be given to increasing capacity within the e-duty system.

4.29 The Law Society is uncertain how this power would apply in practice, as adjournments for Oranga Tamariki proceedings are generally not supported by current court practice. However, where adjournment is sought on the papers for an upcoming hearing, the Law Society would support an FCA having this power.

Amendments to Property (Relationships) Act 1976

Clause 79 – Section 25 (When court may make orders)

4.30 Clause 79 amends section 25 of the Property (Relationships) Act 1976 (**PRA**). The intention of this appears to be to give an FCA the power to make interim orders for the sale of relationship property by consent.

4.31 The Law Society supports this proposal but notes that the power to make an order for sale derives from section 25(3) of the PRA. Section 25(4) is merely a clarification of one of the orders that may be made under section 25(3). The wording of the proposed clause should be amended to reflect this.

Recommendation

That clause 79 be amended to provide that an FCA has the power to make an interim order under section 25(3) only for the sale of any relationship property, and may give any directions that the FCA thinks fit with respect to the proceeds.

Clause 80 – Section 37 amended (Persons entitled to be heard)

4.32 Clause 80 is a consequential amendment to provide that if a judge or an FCA is making an order, they must first give notice to any person having an interest in the property which would be affected by the order. The Law Society supports this proposed amendment.

Clause 81 – Section 40 replaced (Costs)

4.33 Clause 40 amends section 40 of the PRA to give an FCA the same power as a judge to make any order they think fit.

4.34 Although on the face of it this is a wide power, the Law Society considers this is appropriate provided there is a right of review by a Family Court Judge of any decision made on costs by an FCA. With this proviso the Law Society supports this proposed amendment.

Recommendation

That clause 81 be amended to provide a right of review by a Family Court Judge of any decision made on costs by an FCA.

Clause 82 – Section 42 amended (Notice of interest against title)

4.35 Clause 82 amends section 42 of the PRA to give an FCA the same power as a Family Court Judge to determine whether a notice of claim of interest registered against a title should be removed or should not lapse. The Law Society supports this amendment.

Clause 83 – Section 43 amended (Dispositions may be restrained)

4.36 Clause 83 amends section 43 of the PRA to give an FCA the same power as a Family Court Judge to make an order restraining the disposition of property intended to defeat the rights of the other party. There can be complex issues of law involved in these matters, and the

making of such an order is a significant incursion on property rights, with potentially significant implications for the property owner. The Law Society considers this power is more appropriately dealt with by a Family Court Judge and does not support this proposed amendment.

Recommendation

That clause 83 of the Bill be deleted.

Other powers not included in the Bill

4.37 The Law Society considers it would also be appropriate to provide FCAs with the power to make orders relating to superannuation scheme entitlements by consent under section 31 of the PRA. This has the potential to free up the time of Family Court Judges.

Recommendation

That section 31 of the PRA be amended to give an FCA the power to make orders relating to superannuation scheme entitlements by consent.

Amendments to Protection of Personal and Property Rights Act 1988

Clause 85 – Section 15 amended (Orders by consent)

4.38 Clause 85 amends section 15 of the Protection of Personal and Property Rights Act 1988 (**PPPR Act**) to enable either a Family Court Judge or an FCA to make personal orders under sections 10, 11, 12 or 14 with the consent of all parties to the proceeding, including the person the application is about. The Law Society does not support this proposed amendment.

4.39 Although it may appear straightforward to make an order by consent, section 15 is rarely used in practice, because the subject person requires capacity to consent to an order being made. It is not straightforward to satisfy the jurisdictional requirements of the PPPR Act for the making of the order. On this point, the Court has noted that the subject person's *'very ability to do so [consent] in itself raises the issue of the need for the order.'*[4]

4.40 In fact, such assessments are likely to be more difficult than in cases where there is clearly jurisdiction and the subject person has no capacity to consent.

4.41 The jurisdictional requirements include proving that the subject person:[5]

a. lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care or welfare; or

b. has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.

4 *In the Matter of M* [1994] NZFLR 164, at 165.

5 Section 6(1) PPPR Act.

4.42 For the appointment of a welfare guardian, the following additional jurisdictional requirements must be met:[6]

a. that the person in respect of whom the application is made *wholly lacks* the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person; and

b. that the appointment of a welfare guardian is *the only satisfactory way* to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person. [emphasis added]

4.43 The court must also exercise its jurisdiction based on the primary objectives of the Act, being that of the least restrictive intervention and encouraging and enabling the person to exercise and develop their capacity to greatest extent possible, and on the basis that there is a presumption of competence[7] (and therefore a presumption of lack of jurisdiction). Section 15 itself does not establish jurisdiction to make the order – the other jurisdictional requirements of the PPPR Act must still be met.[8]

4.44 Accordingly, the making of an order by consent requires a substantive, complex decision. Due to the nature of the proceedings, the subject person is particularly vulnerable. In the Law Society's view, allowing an FCA to hold and exercise these powers is contrary to the stated policy of the Bill, that '*substantive decisions and proceedings will continue to be made by Judges because of the social significance of those decisions, the impact those decisions have on human rights, and the complexity of the decisions.'*[9]

Recommendation

That clause 85 be deleted from the Bill and clause 2(i) of new Schedule 2 amended to remove reference to section 15 of the PPPR Act.

Clause 86 – Section 48 amended (Enforcement of manager's duty to prepare and file statements)

4.45 The Law Society supports this proposed amendment.

Clauses 87 to 89

4.46 The Law Society supports the amendments proposed in clauses 87 to 89.

Clause 90 – Section 70 amended (Power of presiding Judge to make consent orders)

4.47 Clause 90 amends section 70 of the PPPR Act to enable either a Family Court Judge or an FCA to make any orders by consent, provided "that the person in respect of whom the application is made understands the nature and foresees the consequences of the order and consents to the order".

4.48 The Law Society does not support this proposed amendment. In our view, an FCA should not have the power to make an order determining the proceedings at a pre-hearing conference. Under the PPPR Act, the making of an order by consent is a substantive decision which ought to be made by a Family Court Judge. We refer to our comments under clause 85 in respect of

6 Section 12(2) PPPR Act.
7 Section 8 PPPR Act.
8 Section 5 PPPR Act.
9 Explanatory note to the Bill, page 2.

personal orders. These comments are also relevant to clause 90 which, as currently drafted, would allow an FCA to make property order by consent. For the same reasons that the Law Society does not support an FCA having power to make consent orders in respect of personal orders, we do not support this proposed amendment.

Recommendation

That clause 90 be deleted and clause 2(i) in new Schedule 2 amended to remove reference to section 70 of the PPPR Act.

Clause 91 – Section 72 amended (Privilege)

4.49 Clause 91 amends section 72 of the PPPR Act to provide that privilege does not extend to records made by an FCA under section 69 nor to consent orders made by an FCA under section 70 at a pre-hearing conference.

4.50 The Law Society supports the part of this clause that provides that privilege does not extend to records made by an FCA under section 69, but as noted above, does not support an FCA having the power to make consent orders.

Recommendation

That clause 91 be amended to reflect that privilege does not extend to consent orders made by an FCA under section 70 at a pre-hearing conference.

Other matters relation to the PPPR Act

4.51 If it appears that, following a pre-hearing conference before an FCA where the issues have been narrowed sufficiently, the FCA believes that a judge would now be able to make an order in chambers, the matter could be so referred.

4.52 Section 17 of the PPPR Act allows a District Court Judge to, on the request of the registrar, issue a summons requiring a person who fails to attend a pre-hearing conference to attend at a time and place to be specified in the summons. This power has not been extended to an FCA. The Law Society suggests this power is extended to an FCA as it will allow for more effective case management.

Recommendation

That the Bill be amended to enable an FCA to refer the matter to a judge following a pre-hearing conference.

That section 71 of the PPPR Act be amended to allow an FCA to, on the request of the registrar, issue a summons as set out above.

Referral to Māori Land Court

4.53 An FCA should be given power to refer an application to the Māori Land Court pursuant to section 31B(1), if it would be appropriate to do so.

Recommendation

That section 31B(1) of the PPPR Act be amended to make clear than an FCA is able to refer an application to the Māori Land Court if it would be appropriate to do so.

Amendments to Remuneration Authority Act 1977

Clauses 92 and 93

4.54 We refer to our comment above regarding clause 4, new section 7E – Remuneration of Family Court Associates. As the role of FCA is a judicial role, remuneration should be included in Part 1 of the Schedule of the Judicial Officers Salaries and Allowances (2021/22) Determination 2021.

Recommendation

That subpart 10 of the Bill be deleted, and replaced with an amendment to Part 1 of the Schedule of the Judicial Salaries and Allowances (2021/22) Determination 2021.

Amendments to Status of Children Act 1969

Clause 95 – section 10 amended (Declaration as to paternity)

4.55 Clause 95 amends section 10 of the Status of Children Act 1969, to enable an FCA to make:

a. A declaration of paternity in respect of a child.

b. A declaration of non-paternity if satisfied that a paternal relationship does not exist between a child and a putative father.

c. In doing so, determine any question of fact that arises on the balance of probabilities.

4.56 In the Law Society's view, these are substantive orders which can have far-reaching implications for a child or young person. If the SCA is amended as proposed, an FCA would have the power to preside over a hearing of a defended application under this section. In our view, this power should be reserved for a Family Court Judge.

4.57 If, however, an application under section 10 is unopposed or is consented to, the Law Society consider it would be appropriate for an FCA to have the power to assess the application and make orders if the FCA is satisfied that jurisdiction for the making of orders is made out.

Recommendation

That clause 95 of the Bill and clause 2(j) of new Schedule 2 be amended to enable an FCA to make a declaration of paternity, or a declaration of non-paternity, only when an application under section 10 of the SCA is unopposed or is consented to by all parties.

5 Recommendations

5.1 For the Committee's convenience, we provide below a consolidated list of the recommendations made in this submission:

a. New section 7B be amended to replicate section 16 of the District Court Act.

b. New sections 7B(2) and (3) be deleted, and a separate section inserted replicating section 29 of the District Court Act 2016.

c. The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 be amended to extend the functions of the Judicial Conduct Commissioner to FCAs.

d. The salary for FCAs be set by the Judicial Officers Salaries and Allowances (2021/22) Determination 2021, and new section 7E of the Family Court Act amended to reflect this.

e. Clause 9 and reference to section 8 of the Adoption Act in section 2(a) of new Schedule 2 be deleted.

f. Clause 18 be amended to enable an FCA to direct a registrar to convene a settlement conference.

g. Clauses 22 to 26 and clause 4(2) of new Schedule 2 be deleted.

h. Section 77(1) of CoCA be amended to make clear that the power to make orders in the absence of a Family Court Judge can only be exercised by a High Court Judge or a District Court Judge.

i. Section 117(5) of the CSA be amended to replace the term '*ex parte'* with the term 'without notice'.

j. Section 172 of the FVA be amended to give an FCA power to vary an order under the FVA, where that variation is sought by consent.

k. Clauses 72 and 73 be deleted from the Bill, and clause 2(g) of new Schedule 2 is amended to remove reference to section 39 and 40 of the OT Act.

l. Sections 39(1) and 40(1) of the OT Act be amended to provide that only a District Court Judge may issue a warrant to search premises and uplift a child at risk of harm.

m. Clause 79 be amended to provide that an FCA has the power to make an interim order under section 25(3) only for the sale of any relationship property, and may give any directions that the FCA thinks fit with respect to the proceeds.

n. Clause 81 be amended to provide a right of review by a Family Court Judge of any decision made on costs by an FCA.

o. Clause 83 of the Bill be deleted.

p. Section 31 of the PRA be amended to give an FCA the power to make orders relating to superannuation scheme entitlements by consent.

q. Clause 85 be deleted from the Bill and clause 2(i) of new Schedule 2 amended to remove reference to section 15 of the PPPR Act.

r. Clause 90 be deleted and clause 2(i) in new Schedule 2 amended to remove reference to section 70 of the PPPR Act.

s. Clause 91 be amended to reflect that privilege does not extend to consent orders made by an FCA under section 70 of the PPPR Act at a pre-hearing conference.

t. The Bill be amended to enable an FCA to refer matters under the PPPR Act to a judge following a pre-hearing conference.

u. Section 71 of the PPPR Act be amended to allow an FCA to, on the request of the registrar, issue a summons as set out above.

v. Section 31B(1) of the PPPR Act be amended to make clear than an FCA is able to refer an application to the Māori Land Court if it would be appropriate to do so.

w. Subpart 10 of the Bill be deleted and replaced with an amendment to Part 1 of the Schedule of the Judicial Salaries and Allowances (2021/22) Determination 2021.

x. Clause 95 of the Bill and clause 2(j) of new Schedule 2 be amended to enable an FCA to make a declaration of paternity, or a declaration of non-paternity, only when an application under section 10 of the SCA is unopposed or is consented to by all parties.

5.2 The Law Society looks forward to appearing before the Committee on this Bill.

Ataga'i Esera
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1 September 2021

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Dear Dinarie

Thank you for the opportunity to respond to the proposals to define the role of the Family Court Associate (FCA).

It is unfortunate that the Ministry has not clarified whether the FCA role will be that of a judicial officer role rather than an administrative role akin to a senior Registrar. While many of the proposed decision-making powers appear to be prima facie administrative and involve interlocutory decisions, the ambit of such decisions can be far-reaching. In our view, the role should be a low-level judicial role and our comments are premised on that basis. Should it be decided that the role of FCA is one of a Senior Court Registrar then our views would be quite different, and we would appreciate the opportunity to provide a further response to the proposed powers.

We have assumed that:

- All the powers that a FCA holds will also be able to be exercised by a Family Court Judge.
- An FCA should also have discretion to refer any matter to a Family Court Judge for consideration if the FCA considers the matter complex. An example of this may be an interlocutory hearing for discovery.
- If the matter is to be set down for a settlement conference, we consider that a judge should determine whether the FCA or a judge will preside over any settlement conference.

We have been unable to review in detail the specific powers proposed statute by statute, in the timeframe set by the Ministry for this feedback. However, we provide comments of a general nature below.

Clarity of seniority of role and function – qualifications of FCAs

1. The proposed powers that the FCAs will hold are akin to the powers held by a High Court Associate.

2. We agree with the submission of the Principal Family Court Judge that: "The extent of the powers exercised by Family Court Associates are, of necessity, directly linked to the quality of those who are appointed to the role."

3. The Family Court jurisdiction is a broad one. Because the role will involve significant decision-making power, such as admission of evidence, adjournment of proceedings or interlocutory applications, which can have far-reaching consequences, our view is that a minimum of seven years legal experience is required to hold the position of FCA which is the same experience required to be appointed as a District Court Judge. That seven years' experience should include a lawyer who has actively practised across the broad jurisdiction of family law and can demonstrate the breadth of that knowledge and experience.

4. The powers being proposed for FCAs will require judicial rather than administrative skills, for example, running matters such as settlement conferences as well as reading and interpreting rules relating to procedural steps under the various family law statutes. FCAs will need to have confidence, strength of character and sound judgement. In addition, those who are appointed to the role will need to be highly respected by both the judiciary and the family law bar.

5. In our view the current processes in terms of judicial appointment, on-going training and judicial conduct should be the same processes in terms of the FCAs.

Scope of decision-making and judicial rather than administrative role

6. There are issues in relation to applications to dispense with consent or service, for example, in the Adoption Act 1955 and the Protection of Personal and Property Rights Act 1988 (PPPR Act). Decisions about these applications again can have far ranging consequences and these decisions are judicial in nature.

7. Settlement conferences for many cases including relationship property cases could be appropriately dealt with by a FCA if they have judicial status as in our experience the mana of a judge is sometimes needed to help particular parties agree to a settlement, notwithstanding the skilful attributes of another decision-maker or facilitator who is assisting the parties.

8. Counsel-led mediation was successful particularly at settlement and mediation conferences. FCAs, provided they are appropriately qualified, trained, and experienced would be able to undertake this function. If the matter is overly complex, the FCA should always have the ability to refer the matter to a judge for mediation/settlement.

9. Based on the role being low level judicial, we agree that FCAs could undertake formal proof hearings provided that these are adjourned for a judge to deal with if the matter becomes contested.

10. Pre-hearing conferences, which are solely for the issuing of timetabling directions, bundles and time estimates are a role for a FCA to undertake so long as a final pre-hearing conference in front of the hearing judge is retained.

11. We have read and agree with the submissions of the Principal Family Court Judge.

12. However, we have concerns about the extent of the proposed delegations under the Oranga Tamariki Act 1989. Most of these powers should be retained by judges, including approving uncontested reviews of plans. It has become standard practice in many Family Courts for all review of plans to be set down in court to allow parties and whānau the opportunity to be heard. This is part of the move towards Te Ao Marama and ensuring accessibility to courts, so should not be a step undertaken on the papers without the opportunity of whānau involvement. These powers should ideally therefore remain with a judge.

13. It is unclear how the proposed delegation of powers generally will fit with Te Ao Marama, as the operation of a court with that model may require more opportunities of court hui kanohi ki a kanohi whenever a decision of any consequence is to be made.

Right to appeal/review FCA decision

14. There needs to be an efficient and effective mechanism for the decisions of a FCA to be reviewed or appealed. Rather than requiring a judicial review in the High Court, there should be the ability to have a decision made by a FCA reviewed by a Family Court Judge, with the right to appeal the judge's decision to the High Court.

High-level matters consolidated (paragraph 13)

15. We agree with the consolidations in paragraphs 13.1 and 13.3.

16. We note our reservations about uncontested applications (paragraph 13.4) and matters consented to by all parties (paragraph 13.6), discussed further below, which may still warrant further information, such as a report from lawyer for child or a cultural report before the court confirms the consent or makes the uncontested order.

17. We note that the list of potential powers of a FCA is not a comprehensive list and there are other instances where a FCA could appropriately be delegated powers.

Approach to determining specific powers

18. Paragraph 14.2 sets out significant judicial discretion where FCAs would *not* be involved, i.e. situations where a judge would be solely responsible for decision-making. The examples in paragraphs 14.2.1 to 14.2.3 are examples of most cases before the Family Court. We agree that judges should always make the final decisions in these matters, but many of the delegated powers involving preliminary decisions made by FCAs will likely have significant impact on the final decision. Decisions about an interlocutory application regarding admission of evidence is one such example.

19. We agree with the categorisation of levels of power set out in paragraphs 15.1, 15.2 and 15.3.

Examples of potential specific powers under the high-level matters – interlocutory powers

20. *Low-level powers:* We have no difficulty with the low-level powers being delegated to an FCA.

21. *Medium level powers:* We note the following:

(a) Child Support Act 1991

We are unsure how a FCA could *"…check that making an order would be in the best interests of the children involved"* without requiring further evidence about this. The FCA, like a judge, would only be able to operate on the basis of properly admitted evidence before them, not by making their own inquiries. The FCA would need the power to direct further evidence to be filed about this.

(b) Care of Children Act 2004

(i) Direction to counselling (section 46G) and FDR (section 46F) is an appropriate power to be delegated to a FCA.

(ii) The power to call a witness – section 129 in our view should only be exercised by the judge appraised of the matter having read the file and determined what deficiencies of evidence there may be.

(iii) The power of the court to call for reports (COCA and other Acts) – such powers could be exercised by FCAs. Those reports are generally the subject of counsel's submissions, so the decision to direct such reports is generally made with the input of counsel. If the obtaining of a report (such as a section 133 report) is going to significantly delay proceedings, the FCA should refer the decision to the judge.

(iv) COCA – track determination – this could be determined by an FCA.

(c) Family Proceedings Act 1980

(i) The power to make an interim maintenance order – *"because it is temporary in effect"* is unrealistic. It would be helpful for the impoverished party to have a readier course to early determinations of decisions, but it is disingenuous to call such decisions "temporary" when they may last upwards of six or 12 months until the court can determine the matter. This may cause undue hardship if the order was improperly made in the first instance as any maintenance improperly paid pursuant to an interim order is unlikely to be readily recovered. We consider this power should be retained by a judge.

(d) Family Courts Rules 2002

(i) Directions about next steps in a case – these are often able to be made by a FCA, such as directions about release of reports, however determining whether other information is required or whether other reports should be obtained should be determined by the hearing judge.

(ii) Determinations about Proper Court (rule 30) and transferring proceedings – this could be determined by an FCA.

22. *High level powers* - Section 77 – Determination about whether a child is not to be removed from a particular area can be a substantive not an interlocutory type of determination. This is very much a judicial decision and, in our view, this power should remain with a judge.

Applications made without notice

23. We agree that most of the powers set out as medium and high-level powers on pages 12 to 13 could appropriately be dealt with by an FCA. However, we are concerned about the delegation of power to an FCA to defer the expiry of a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. In our view this power should continue to be held by a judge because it involves fundamental human rights issues and the liberty of an individual.

Pre-hearing, judicial and directions conferences

24. Low/medium powers - the request for a registrar to convene a pre-hearing conference could be delegated to a FCA.

High level powers

25. Pre-hearing conferences can be high-level but within the capabilities of a FCA, however often pre-hearing conferences in PPPR Act and COCA matters are substantive and involve a high degree of judicial discretion and judgement. They will involve more discretion and judgement when parties are unrepresented. If the FCA role is a judicial one, this power could sit with an FCA.

Uncontested applications

26. *Low level powers* - We agree that these powers could sit with a FCA.

27. *Medium level powers*
We consider hearing a formal proof is a High-level power as important decisions can be made. Unless parties and the child/children are represented then a formal proof may not be straightforward. In addition, a formal proof should not determine the matter unless lawyer for child has been appointed and reported to the court. Provided lawyer for the child has reported, a FCA could hear a formal proof matter.

28. We do not consider the appointment of a stepfather as a guardian, nor the appointment of a father as a guardian under section 20 are medium-level powers, but these could

appropriately be dealt with by a FCA if uncontested provided lawyer for child had reported to the court.

Applications for leave

29. *Low level powers*
Adoption Act 1955 – we agreed these could be delegated to a FCA apart from section 23(3)(b)(iii) which should remain with a judge.

30. *Medium level powers*
Leave to commence proceedings – we agree this could be dealt with by a FCA.
Application for leave to apply for parenting order or to withdraw from proceedings – these are often tied to the substantive part of the proceeding so would need to be determined by the judge hearing the case, and rarely in isolation.

Matter that are consented to by all parties

31. We have some concern about all consent matters going straight to FCA's for decision as if this is a rubber-stamping exercise. There would need to be sufficient independent and extrinsic evidence before the court to ensure that issues of safety relating to family violence, substance abuse and mental health are sufficiently addressed. Such information could be provided by the earlier appointment of lawyer for child, a social work report, a cultural report or a section 133 report.

32. As earlier indicated, a FCA should only be able to deal with these matters when it is clear that all of the evidence is before the court that the orders are in the best interests of the child under COCA and that lawyer for child has reported to the court.

33. The FCA would need the ability to refer the matter to the judge if it appeared that there may be deficiencies in the evidence before the court on which all parties consented. These decisions will sometimes be medium level but most often high level. Again, if self-represented parties are involved and there is an inadequate evidential foundation, the decision may involve a high level of judicial discretion.

34. A judgement will always be required as to whether the desired decision is in the best interests of a child (in a COCA matter). If this is not the case, then there is a risk that sections 4, 5 and 6 of COCA are not being applied.

The enforcement of orders and directions

35. We consider that the enforcement of orders and directions, the variation of orders and orders for compensation are high-level powers. If the role of the FCA is a judicial role, then it is appropriate that the FCA has some of these powers (for example, admonishment, requiring a bond or ordering compensation) provided there is machinery in place to review the decision of a FCA as discussed above.

36. *Medium level powers – page 20*

We agree that some of the sanctions could be dealt with by FCAs but not the enforcement of parenting orders or pressing criminal charges. We consider that enforcing care or contact, varying such orders or pressing criminal charges are judicial powers that should remain with a judge and should not be undertaken by a FCA.

37. *High level powers – page 22*
We agree with the high-level powers under the Child Support Act 1991 being included as proposed.

Mediation and settlement conferences

38. *Low/medium level powers* – we agree with what is proposed (page 22).

39. *Medium/high Level Powers*
We agree with what is proposed but consider these mostly high-level powers. FCAs would need to be appropriately trained and have ongoing training as mediation is a particular skill. Mediations pursuant to section 170 of the Oranga Tamariki Act 1989 and pre-hearing conferences (which often operate like mediation conferences) pursuant to section 66 of the PPPR Act 1988 could also be included.

Post-proceeding matters

40. Low level powers – we agree with what is proposed (page 23). However, there needs to be a right of appeal or review as discussed above.

Other matters and next steps

41. The Family Law Section wish to be consulted on other matters and next steps. As lawyers practising in these areas, we have a wealth of practical expertise and examples that may assist the Ministry to consider what areas are appropriate for delegation to a FCA.

42. We reiterate that there is considerable scope for this FCA role beyond that of the previously contemplated Senior Court Registrar, however much will depend on the status of the role (low-level judicial or administrative), remuneration and role requirements in order to attract high quality applicants as to what tasks can be delegated.

Submission of the Principal Family Court Judge

43. We make the following comments on the content of Principal Family Court Judge's memorandum on the proposed powers:

General powers

(a) *All interlocutory applications* – We agree that most interlocutory applications would be appropriate, however we note that some interlocutory matters, such as injunctive relief under the Property (Relationships) Act 1976 (for example an interim order to restrain a disposition under section 43 or admissibility decisions under the Evidence Act 2006) require a decision maker with a high level of skill, experience, and knowledge as discussed above

(b) *Pre-hearing conferences* – Agreed.

(c) *Fixture call overs* – Agreed.

(d) *Settlement conferences*

(e) We note our comments above, that presiding over settlement conferences is a judicial role. It would be appropriate for a FCA to preside over these, only if the FCA is suitably qualified and has judicial status. As noted above, it is our experience that it is often the mana of a judge that will assist a matter to finally resolve. Parties will often respond to and accept any guidance and/or reality testing by a judge. Therefore, (as noted above) it will be important for a FCA to hold the same level of respect and mana as members of the judiciary hold. Case management and directions on proceedings under the Property (Relationships) Act, Family Protection Act, Law Reform (Testamentary Promises) Act, Protection of Personal and Property Rights Act – Agreed.

(f) *Confirmation of orders made overseas* – Agreed.

(g) *Consent and uncontested orders*
As noted above, even with consent orders and uncontested orders, it may not be appropriate for a FCA to decide about these unless there is sufficient extrinsic evidence to support a decision (such as a report from lawyer for the child, a section 132 report, or a psychologist or cultural report writer).

Nāku noa, nā

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24 September 2021

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Dear Dinarie

Thank you for the opportunity to respond further on the role of the Family Court Associate (FCA).

In your email of 13.9.21, you have described two potential models for the role: a judicial officer and an officer of the court (administrative). The independent panel (panel) recommended that the role is established to *"speed up court processes and reduce the judicial administrative workload, thereby increasing judicial hearing time"*. In its submission, the Law Society supported the establishment of this role.

Our response of 1.9.21 made it clear that in our view the role should be a judicial officer role rather than an officer of the court. In our view, the benefits to be gained from establishing the role will not be realised if the role is administrative rather than judicial.

While many of the proposed decision-making powers appear to be prima facie administrative and involve interlocutory decisions, the ambit of such decisions can be far-reaching. Family lawyers work hard to mediate safe outcomes and to resolve cases through negotiation, when doing so is safe and child focused. Many cases that require judicial intervention and determination involve family violence, substance abuse, mental health concerns and safety issues as the cases dealing with lower risk have already been resolved. In our view, these decisions are judicial rather than administrative in nature.

If the role was a judicial one, this would reflect the mana of the position and the power it holds. This accords with the feedback received by the ministry from parents that they want their matter determined by a judge.[1] If the role was an administrative one, with far limited powers than a judicial role, the lack of status may limit the credibility of the decision maker. This will likely result in additional delays in the Family Court when their decisions are challenged and a review is sought, by a judge.

As stated in our letter of 1.9.21, those who are appointed to the role will need to be highly respected by both the judiciary and the family law bar. In our view it is more likely that respect will be accorded if the role is judicial in nature.

[1] Without Notice Applications in the Family Court, Ministry of Justice, July 2017, paragraphs 67 and 68.

We agree with the submission of the Principal Family Court Judge that: "the extent of the powers exercised by FCAs are, of necessity, directly linked to the quality of those who are appointed to the role." If the role is administrative in nature and poorly remunerated, it is unlikely to attract the quality of applicant who will be responsible for making often difficult decisions which have real impact on families' wellbeing and safety. It may also not free up the amount of judicial time desired due to the necessarily restrictive powers of the new role, if it is purely administrative.

Under-utilisation of current Registrars

The Family Court Rules 2002 (rules) already provide registrars significant administrative powers, many of which are under-utilised. The Law Society notes the panel's comment that *"Registrars in the Family Court already have a wide range of powers available to them……..although many are not used in practice"*.[2] We question why this is the case and assume that currently these powers are being exercised by judges.

While we do not wish to criticise the important work that registrars undertake in the Family Court, reasons why current registrars are not using the range of powers available to them need to be identified. It may be for a number of reasons, for example, that registries are under-resourced, registrars are less experienced so are unaware of the available powers, or registrars require more ongoing training so they are aware of powers they are able to exercise. Assisting registrars to exercise their current powers, would go some way to freeing up limited judicial resource.

We believe that a combination of current registrars utilising the range of powers they already hold as well as providing FCAs with judicial powers will achieve the aim sought from the establishment of the role: to reduce the judicial administrative workload, thereby increasing judicial hearing time.

Specific comment

Part A: Judicial Officer

Paragraph 14, Table 1

1. We do not agree that all interlocutory matters and preliminary decisions are the same and that all should be "high-level" matters rather than exclusions.

2. (a) There are certain interlocutory decisions which should be "exclusions" as the outcome of that decision could have a far-reaching impact. For example, decisions on whether parts of affidavits should be struck out as they are argued to be hearsay can be a significant decision, when the evidence is directly relevant to a child or party's safety. A decision as to whether an interim hearing should be delayed because one party says they are unwell, pregnant, out of town, is important. If matters are adjourned, the determination of a case can be delayed for many months. With safety issues present, this can have significant consequences. Where it is alleged that a parent is negatively influencing the child against the other parent, any delay may result in a total destruction of the child's relationship with their other parent, which may result in life-long emotional damage. These are just three examples.

(b)Uncontested applications and matters consented to by all parties are sometimes straightforward and without risk but can often also be complex. For example, parents could consent to a parenting order that records a week-about parenting arrangement, yet their history of family violence or

[2] See page 34 of the panel's consultation paper.

substance abuse makes the proposed arrangement unsafe and requiring further investigation by Oranga Tamariki and the appointment of lawyer for the child. The arrangement may be unsafe, it may be averse to a child's views or wishes, it may have been "agreed upon" as a result of control and manipulation by one party directed toward the other. Each child before the Family Court needs to be treated with care, and when orders are sought, the responsibility of the safety and wellbeing of that child, lies with the Family Court in deciding whether the orders sought, are in that child's welfare and best interests. Children are vulnerable and deserve to have the utmost of care taken, when the most important things for them, their living arrangements and relationships with parents and special people in their lives, are being "determined".

The outcomes can be serious, and sections 4, 5 and 6 of the Care of Children Act 2004 are mandatory considerations. If the FCA is an administrative role, that person may not have sufficient appreciation of the seriousness and need for further inquiry.

(c) Some pre-hearing matters, such as the witnesses to be called and order of witnesses needs to be dealt with by the hearing judge as these decisions may significantly affect the outcome. These decisions should remain with a judge, ideally the presiding judge. A FCA could monitor any pre-hearing directions, however registrars already do that monitoring and they refer matters to a judge or allocate a case review if directions have not been complied with.

Questions on page 5

1. We do not understand specifically how this question applies to the Family Court, but all coercive powers should be retained by a Family Court Judge.

2. Provided the officer is judicial, we agree with the exclusions but consider any interim parenting or guardianship matters need to be determined by a judge and kept as exclusions. Interim orders can remain for an extended time (sometimes years) and can have a significant impact on parents and children. They are as important a decision as the making of a final order. Our same arguments apply as set out in paragraph 2(b) above.

3. We do not see benefit in including the concept of "excluded child orders" as discussed above.

Paragraph 15 – excluded child

a. We do not agree with the inclusion of the "excluded child" concept imported from Australia. It does not fit with our legislation and concepts contained within our legislation.

b. Orders: "until further order". The order "until further order" has no equivalent in New Zealand unless the ministry is referring to an interim order? In New Zealand, interim orders continue to remain before the court until they are discharged or made into final orders. We do not consider FCAs should be able to make "interim parenting orders" as these often have a long-lasting effect due to court delay and the decision needs to be made by a judge.

c. Undefended and consent orders also require a judge's oversight as the court is charged with the responsibility of deciding whether the child is safe with the proposed arrangement.

4. Family Violence Act: we consider that sections 103 to 106 should also be exclusions. Making safety assessments when family violence is alleged, requires specialist training and significant judgement, due to the issues involved and the dire consequences if adults and children are not kept safe. Sections 90 to 102 are largely provisions that relate to the content and powers of a protection order so do not appear to be sections that warrant consideration when considering the proposed "powers" of the FCA.

- Paragraphs 112 to 152 are adjunctive to the main powers regarding the making of a protection order so would also need to be exclusions, as they are made when the judge evaluates the application for a protection order. It does not make sense to keep these out of the exclusions list.
- Sections 158 to 160 should also be exclusions as they are essentially the central component of the level of protection available and every care needs to be taken when making decisions that will directly impact upon victims of family violence in our country.
- Sections 169 to 173 should also be exclusions for the same reason as above, and in part relate to procedure relevant to the court hearing.
- Section 174 need not be an exclusion as the section relates to steps the Registrar can already take and the provision of information to the Police. Those processes have been occurring already.
- There are likely to be other sections which should be exclusions.

5. We agree that FCAs could undertake:

- formal proof hearings with the ability to refer these to a judge if the FCA considers the matter complex;
- judicial settlement conferences (for PRA and COCA);
- mediation conferences under the Oranga Tamariki Act;
- pre-hearing conferences under the PPPR Act or FPA.

Questions on page 7

6. Our comments on the powers under specific statutes follow and are on the basis that the FCA is a judicial officer and not an officer of the court. If the role is to be an officer of the court, the exclusions would need to be reconsidered and significantly restricted. We also ask for the opportunity to comment further if the decision is made to make the role an officer of the court.

Adoption Act 1955

h. Application to dispense with consent – needs to stay with a judge.

i. Directing social worker to report pursuant to section 10 – agreed.

j. Applications for inspection of adoption records - agreed except for section 23(3).

k. Direction for report by social worker on application for inspection – agreed.

Adoption (Intercountry) Act 1997

a. The direction for the provision of reports – agreed.

b. Consideration of the appointment of counsel to assist the court – agreed.

c. Directions for filing of evidence and for service – agreed.

d. Directions to set the matter down for hearing - not agreed.

We consider a judge needs to make a final decision to set these matters down for hearing. The evidential issues are usually complex. For example, sometimes consideration needs to be given to whether Oranga Tamariki should be joined as a party, sometimes more evidence is needed from the country of origin or another country. The presiding judge should assess whether the matter is ready to be determined, or whether further steps need to be taken.

Adult Adoption Information Act 1985

All matters under this Act are agreed as they are procedural.

Care of Children Act 2004

On the filing of applications

• Orders for substituted service or to dispense with service. (rule 186/187 Family Court Rules) – agreed.

• Directions to the appropriate track – agreed.

• Transfers between tracks – agreed.

• Direction to family dispute resolution or counselling (sections 46E, 46G, 46M, 46O) – agreed.

• Appointment of lawyer for child (section130) – agreed.

• Timetabling directions for the filing of further evidence by applicant or respondent – agreed.

• Allocation of appropriate conferences and timetabling directions at the request of the Registrar – agreed.

• Consider requests for adjournment or to vacate conferences – agreed.

• Approve supervised agency contact and identification of the number of sessions to be made available from the Consolidated Fund. (section 60) – agreed.

Following filing of a response

- Conduct conferences or make directions in Chambers to address – agreed.
• Timetabling directions for the filing of affidavits – agreed.

• Directions pursuant to the Evidence Regulations for the provision of evidential video interviews to the Court and to parties/counsel – agreed.

• Direct and conduct settlement conferences (section 46Q) – we agree in cases where the FCA has mediation training and experience.

• Make consent orders for approval of supervisors – agreed.

• Direct reports - cultural (section 136), social work (section 132), psychological/medical (section 133).

We do not agree that a section 133 report could be directed by a FCA and consider this power should remain with a judge. It is always a fine balance to determine if such an application meets the statutory criteria or whether it will cause so much delay that the directing of the report will cause detriment to the child. Obtaining these reports can sometimes be a delay tactic by parties. In some cases this may mean a one or two year delay before matters are able to be determined by the court.

Preparation for hearing

Preside over pre-hearing conferences

• Mode of the evidence applications – agreed.

• Issues of interpreters and related directions – agreed.

• Filing of updating evidence including expert reports – agreed.

• Directing a judicial interview of the child.

We consider only a judge should determine this. Every child's needs are different and the presiding judge will want to determine whether such an interview should occur having regard to the extent of the child's involvement with other professionals, the child's age and needs and other individualised considerations.

• Directions for the filing of submissions – agreed.

• Directing the provision of a bundle of documents – agreed.

• Identification of witnesses required and order of witnesses.

We consider only a judge should determine this (as discussed above).

Post hearing

Consider Cost Contribution submissions and determine orders to be made (sections 135A and 135B) – agreed.

- Leave to commence proceedings (section 139A and 141(2) COCA) – agreed.
- Any application for leave to apply for a parenting order (if not part of substantive application), section 47 COCA – agreed.
- Father who was not mother's spouse, civil union partner, or de facto partner may apply to be appointed as guardian, (if uncontested and lawyer for child provides advice) Section 19 and 20, COCA.

We consider this needs to remain with a judge. Safety considerations will be very relevant and the long-term impact upon the child needs to be considered carefully in every instance. In our view a judge is best placed to determine these applications.

Child Support Act 1991

a. Section 99 declaration in respect of step-parents – agreed if uncontested.
b. Section 117 suspension orders – agreed.

c. Charging orders pursuant to sections 184 and 185 – agreed.

d. Order for enforcement of arrears pursuant to section 189 - agreed.

e. Restraining of dispositions and setting aside of dispositions pursuant to sections 200 and 201 - agreed.

However we consider only a judge should determine matters relating to the issuing of a warrant to arrest a liable person who appears to be about to leave New Zealand with the intent to avoid payment of any liability under section 199 Child Support Act is this impacts directly upon a person's liberty.

Civil Union Act 2004

a. The appointment of a lawyer to act for 16 or 17-year-old applicants under 22 19 and 20 – agreed.

b. The direction of a cultural report under section 20A – agreed.

c. Directions for the filing of evidence and for service if there is a substantive application (for example an application under section 21 declaring a civil union void) – agreed.

d. Directions to set the matter down for hearing – agreed.

Evidence Act 2006

a. The appointment of counsel to assist under section 95 of the Act (to cross examine an applicant on behalf of a self-represented party) – agreed.

b. The making of consented mode of evidence applications – agreed.

c. Directions for the filing of evidence/submissions in relation to any interlocutory applications around admissibility issues – agreed.

d. Directions to set any interlocutory matters down for hearing – agreed.

e. The making of directions in relation to the filing of evidence by consent under section 9 – agreed.

Family Court Rules 2002

Lawyer no longer acting (rule 88) – agreed.

Transfer proceedings to the proper office of the court (rule 30) – agreed.

Hearing formal proofs (rule 416ZH) – agreed.

Family Proceedings Act 1981

a. Recommendation for parentage testing to be carried out pursuant to section 54 – agreed.

b. Applications for interim maintenance pursuant to section 82 – not agreed. It is our strong view that this should remain with a judge. As noted above, interim orders can be extended numerous times and have enormous impact.

c. Approving registration of overseas maintenance orders in Commonwealth or designated countries pursuant to section 136 – agreed.

d. Dealing with uncontested overseas maintenance applications under Part 8 – agreed.

Family Protection Act 1955

a. The making of directions for service upon filing – agreed.

b. The appointment of counsel to represent minor children/grandchildren – agreed.

c. Directions for the filing of evidence – agreed.

d. Directions to set the matter down for hearing – agreed.

e. Conduct judicial settlement conferences – we only agree if the FCA has mediation training and experience.

Family Violence Act 2019

a. Appointing counsel to assist (section 95 Evidence Act) when a party is self-represented (box work) – agreed.

b. Hearing objections to attend programmes pursuant to section 190.

We consider a FCA could undertake these hearings provided it is an interim decision pending determination of protection order. However, we note that a registrar often determines these already.

c. Re-referring /confirming decision respondent to attend programmes when summoned for failing to attend or issuing a warrant for failing to appear (FV summons) – agreed.

d. Determining applications to adjourn hearings.

This is an interlocutory matter that can have significant consequences where family violence is alleged. In our view, this should remain with a judge, unless the adjournment is consented to by all parties and counsel.

e. Directing transfer for information for the criminal court under Criminal Procedure (transfer of information) Regulations 2013 – agreed.

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

a. All interlocutory matters.

This is broadly described as there could be numerous issues involved. Orders under this legislation concern a significant loss of liberty for the recipient. Interlocutory matters could include dispensing with service, excusing attendance, and more. These powers should remain with a judge.

b. Appointment of lawyer for care recipient – agreed.

c. Short-term extension of orders pending the making of further order.

It is common for expiry of orders to be deferred if there is an extension sought. This can effectively amount to a de facto extension. These orders relate to a fundamental deprivation of liberty for the recipient and for this reason, this power should remain with a judge.

d. Reviews both on the papers and in-court.

For reasons set out above, these powers should remain with a judge.

Law Reform (Testamentary Promises) Act 1949

• Directions as to service of proceedings – agreed.

• Appointment of representatives for minor beneficiaries – agreed.

• Timetabling directions for the filing of response – agreed.

• Allocation of a conference with directions for the filing of conference memoranda – agreed.

Once the proceedings are pleaded, interlocutory applications may be required for:

• Discovery and inspection. (rule 140 to 155)

• Interrogatories. (rule 137 to 139)

• Directions to mediation or settlement conference

- Convene over mediation settlement conferences

We consider this should only be undertaken by a FCA who is trained and experienced as a mediator.

As a preliminary to a hearing, a settlement conference may be convened and if no resolution is achieved a pre-hearing conference will be required at which the matters listed below may be addressed.

a. Mode of evidence applications – agreed.

b. Directions for the provision of a bundle of documents – agreed.

c. Witnesses required for cross-examination and order of witnesses - we consider this power should be retained by a judge and ideally the hearing judge.

d. The filing of submissions - agreed.

Marriage Act 1955

a. Appointment of lawyers in proceedings under section 18 – agreed.

b. Direction for cultural report under section 20 – agreed.

c. Caveat proceedings under sections 25 to 27.

These provisions impact significantly upon the parties seeking to marry and require significant care and judgment. In our view these decisions should remain with a judge.

Oranga Tamariki Act 1989

a. All interlocutory matters.
We disagree and consider that many interlocutory matters need to stay with a judge. If interlocutory matters are consented to and are of a procedural nature only, they could be dealt with by an FCA.

b. Mediations.
We consider these could only be undertaken by a FCA who is a trained and experienced mediator.

c. Formal proofs on Permanency.
In our view, these must remain with a judge.

d. Reviews of plans.
We consider a FCA could undertake these judicial conferences to review plans provided they are uncontested. If contested they must remain with a judge.

e. Settlement conferences.
We consider these could only be undertaken by a FCA who is a trained and experienced mediator.

Property (Relationships) Act 1976

a. Determine interlocutory matters:

i. Discovery – agreed.

ii. Interrogatories – agreed.

iii. Section 37 notice to interested parties – agreed.

iv. Interim consent orders (e.g. interim distribution by consent, order for sale by consent) – agreed.

v. Determine applications to restrain dispositions of property pursuant to section 43.

We consider this power needs to remain with a judge.

vi. Determine whether a notice of interest/caveat should lapse under section 42 – agreed.

vii. Interim costs decisions – agreed.

b. Preside over rule 175 conferences – agreed.

c. Conduct judicial settlement conferences.

We consider these could only be undertaken by a FCA who is a trained and experienced mediator.

d. Make orders relating to superannuation scheme entitlements by consent under section 31 – agreed.

e. Case manage/monitoring applications from filing to hearing – agreed.

f. Restraint on dispositions of property s 43.

This power should be retained by a judge.

Protection of Personal and Property Rights Act 1988

The following tasks may be appropriate for an FCA:

a. Direct the appointment of lawyer for subject person (section 65A).

b. Consider the initial report of lawyer for the subject person and:

• Make directions as to service of the applications and supporting material on interested parties.

• Dispense with or require service of the documents on the subject person.

• Consider whether a transfer to the Maori Land Court is required (section 31).

c. Direct a pre-hearing conference (section 66 to 71).

d. Direct further reports (section 76).

e. Conduct the pre-hearing conference and if consent is not achieved then to make directions to hearing (section 74 to 79).

We consider these could only be undertaken by a FCA who is a trained and experienced mediator.

f. If a Property Manager does not file statements as required by the Act to make enforcement directions at the request of the Registrar (section 48).

Other matters from Ministry Discussion document

Security for costs for appeals to High Court – section 20 of COCA, section 120 of the Child Support Act, section 177(5) of the Family Violence Act, section 174 of the Family Proceedings Act and section 15 of the Family Protection Act.

We consider these matters could be undertaken by a FCA.

Questions on page 7 continued:

7. Our comments on the additional powers outlined in Appendix A are above.

8. *Do you have any comments on the proposed terms and conditions in Table 2 above?*

- We agree that an FCA requires at least seven years' experience.
- We are unsure why the FCA would not be based at a Family Court the same way that Family Court judges are. There are advantages to having an FCA based at court having regard to access to files, the confidential nature of information held by the ministry, the need to refer matters to a judge, liaising with registry staff and other such considerations.
- We agree with the high-level appointment criteria and appointment terms.

9. We do not agree that a FCA could take a role on appointment panels such as the lawyer for child panel. This role needs to be undertaken by those who have had significant experience in observing counsel over many years, and an in-depth understanding of the challenges and judgements involved in being entrusted with these roles within the Family Court system. However, we would be further guided by the views of the judiciary on this.

Part A: Officer of the Court

Paragraph 20

3. We do not agree that the high level and exclusion list would remain the same if the FCA was an officer of the court only. We consider there are many more and significant exclusions that would need to apply including reducing interlocutory matters to defined and restricted areas, removing settlement conferences and mediations and a significant number of other powers. If the position is non-judicial, the powers would need to be narrowed to those held historically by a "senior court registrar". In our view, the family law profession would prefer to have fewer FCAs who are judicial officers with greater powers, than more FCAs who are officers of the court with much more restrictive powers. The benefits of the role being a judicial officer are set out herein.

Paragraph 22

4. We do not agree with the matters highlighted in green for the FCA to achieve, even if only an officer of the court.

Paragraphs 23 and 24

5. We have indicated the types of matters which we would consider to be out of scope for an officer of the court, however we have had insufficient time to consider this more fully given the short time frame provided for comment. Our interim view is that:
    - We agree with the matters set out in 24.1 to 24.7.
    - We note your comments in paragraph 25 and do not agree with 24.8 being included for a non-judicial FCA. This is a specialist judicial and mediation task that requires someone with considerable experience and training as well as mana in order for parties to respect the outcome. This is not a task for an officer of the court.

- The list of types of interlocutory applications which should be excluded would be increased significantly if the role is as an officer of the court rather than as a judicial officer.
- We agree with your comments in paragraph 27, however we do not consider that putting measures in place to assist the FCA to know when they should refer a matter to the judge will reflect that the role is a judicial one in nature.

Other provisions for the FCA – paragraph 27

6. We do not understand how the role would assist anyone nor operate, if the judge is meant to "supervise the FCA in their judicial function". That would seem to consume yet more of the Judges' time and availability and defeat the purpose to free up judicial administrative and hearing time.

7. We are concerned that the remuneration rate will not attract strong applicants and unless the FCA is a person with a high degree of training, knowledge and skill, then the benefits of the role to relieve judicial workload will not be fully realised. We refer the ministry back to the view of the Principal Family Court Judge: "the extent of the powers exercised by FCAs are, of necessity, directly linked to the quality of those who are appointed to the role." A fair remuneration rate that equates to the high degree of skill required is necessary if the aim behind the establishment of the role is to be achieved.

Questions on page 10

8. We agree that the list of exclusions would need to be significantly increased if the FCA was an officer of the court rather than a judicial officer. The powers under each Act would need to be carefully analysed, to provide for specific exclusions to be made. The FCA role as an officer of the court would then need to be limited to the powers similar to a senior registrar: decision of a procedural nature only rather than substantive decisions. We refer the ministry to our comments above in this respect. If this role is to be an officer of the court, rather than a judicial role, we ask for a further opportunity to consider any defined extended exclusions.

9. We do not agree an officer of the court should be able to do in-court mediation. Mediation is already undertaken by lawyers and non-lawyers. Mediation is a specialist skill and if parties have not resolved matters at out of court mediation, it is likely that they will need the authority/mana and skill of a properly trained judicial officer who is a trained and experienced mediator in order to reach resolution. Many cases are resolved without resorting to the court by mediation. Those cases who do not settle at mediation and generally the more entrenched and complex disputes so in-court mediation would need a trained and experienced judicial officer to conduct those.

10. Regarding Table 3 appearing at page 9 we comment as follows:

a. The suggestion that managers would be hired to manage the FCAs would lead to a false economy. In our view, funds should be applied to appropriately remunerating a judicial officer for the experience required for the role, rather than using those funds to hire an additional manger.

b. With respect to restrictions, it would be a conflict if the person in this role was also able to perform other roles within the legal profession.
c. Our concerns regarding location away from the court have already been outlined above.

We hope you find the comments above of assistance. Please feel free to contact me through the FLS Manager Kath Moran at kath.moran@lawsociety.org.nz or on 021 605 932 if you have any questions.

Yours sincerely

Caroline Hickman
FLS Chair

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1 June 2022

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Draft Family Court (Family Court Associates) Legislation Bill

Thank you for the opportunity to comment on the draft Family Court (Family Court Associates) Legislation Bill.

We provide below our very initial thoughts and responses to the questions in your email of 24.5.22.

General comments

The FLS questions whether there are any draft amendments to the Family Court Rules 2002 (rules) required in terms of the legislation being amended to establish the role of the Family Court Associate (FCA).

It is the ability of an FCA to be able to undertake many of the pre-proceeding steps that will make the biggest difference in maximising judge time for hearings and reducing the delays in the Family Court. Many of these steps are found in the rules so drafters will need to go through all the rules to identify what powers may be able to be undertaken by an FCA. Examples include:

- Amending rule 175 for judicial conferences to provide that these may be presided over by an FCA.
- Rule 170 providing for an interlocutory hearing about the admissibility of evidence which will need amending if that is to be undertaken by an FCA. However, in some cases the hearing judge may prefer to make interim judgments about the admission of evidence.
- Any of the general directions permitted in rule 416P that are not already set out by the specific legislation already identified in the second part of this bill.

In our previous submission (1.9.22) we were supportive of an FCA dealing with much of the pre-hearing work including pre-court hearings for interlocutory matters. These types of functions are set out in the rules.

Our comment from 1.9.21:

> (d) Family Courts Rules 2002
> (i) Directions about next steps in a case – these are often able to be made by a FCA, such as directions about release of reports, however determining whether other information is required or whether other reports should be obtained should be determined by the hearing judge.

(ii)Determinations about Proper Court (rule 30) and transferring proceedings this could be determined by an FCA.

Part 1 – Amendments to Family Court Act 1980

Clause 4 – New sections 7A to 7G inserted

7A - Appointment of Family Court Associates

We have no issues with the drafting of new section 7A and we are pleased that our view in our letter of 1.9.22 (that a minimum of seven years' legal experience is required to hold the position of an FCA which is the same experience required to be appointed a Family Court Judge) has been accepted.

7B – Term of appointment of Family Court Associates

The tenure of an FCA should be the same as a District Court Judge which will give status and mana to the role.

We do not believe it is appropriate for an FCA to be a lawyer at the same time. Because an FCA would need to give up practice as a lawyer (see what we have suggested under new section 7F) there should be some certainty in terms of tenure rather than a fixed term. This new section should mirror section 16 of the District Court Act 2016.

In addition, new section 7B(2) and (3) should be a separate section and mirror section 29 of the District Court Act (regarding removal of an FCA).

The Judicial Conduct Commission should also govern these positions and if this is the case, there will need to be an amendment to the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

7C – Jurisdiction and powers of Family Court Associates

This needs careful consideration and adequate time to go through each power. We will address this in our further written submissions once the bill is introduced.

7D – Transfer of proceeding to Family Court Judge

New section 7D enables an FCA, either on application of a party to a proceeding before the FCA or on the FCA's own initiative, to transfer the proceeding, or a matter in the proceeding, to a Family Court Judge because of its complexity. A Family Court Judge may also, on application of a party to a proceeding before an FCA if the judge thinks it desirable to do so, order that the proceeding, or part of it, be transferred to a Family Court Judge.

We agree with this in principle; however, we would need to carefully consider whether it is desirable that interlocutory decisions can be reviewed and/or appealed. We can address this in our written submission once the bill is introduced.

7E – Remuneration of Family Court Associates

New section 7E provides for the remuneration of FCAs. We repeat our earlier comments: that the role needs to be adequately remunerated if high quality applicants are to be attracted to the position of an FCA. The remuneration also needs to have due regard to the seniority of the role.

7F – Restrictions for Family Court Associates

New section 7F provides that an FCA must not undertake certain employment or hold certain offices, and specifically, must not practice as a lawyer in family law. The role of an FCA is a judicial role (with

limitations regarding jurisdiction). Because it is a judicial role, the restrictions should mirror those contained in section 17 of the District Court Act 2016. That includes that an FCA must not practice as a lawyer (not just an exclusion for family law).

7G – Immunity for Family Court Associates

We have no issues with the wording of new section 7G.

Questions from email of 24 May 2022

Other matters not in the draft bill

1. *Whether the Family Court Associate has a fixed term or tenure.*

   The FCA should have a tenure rather than a fixed term (see our comments above under new section 7B).

2. *Whether an amendment to section 15A of the Family Court Act 1980 is required (specifically whether section 10 of the Contempt of Court Act 2019 may be relevant).*

   Section 15A(2)(b) should be amended to include a reference to an FCA.

3. *Whether a Family Court Associate should have the power to witness a document under section 7(8)(a) of the Adoption Act 1955.*

   Yes, an FCA should have power to witness a document that consents to an adoption so section 7(8)(a) will need to be amended.

4. *Whether section 134 of CoCA should be amended to afford to Family Court Associates the power to order that a report not be copied to a party.*

   Yes section 134 of COCA should be amended.

5. *Whether any further amendment is required to section 137 of the OT Act to ensure the FCA can approve fully consented plans where the legal orders aren't changing – we will be discussing this with Oranga Tamariki.*

   We have some reservations about this and initially considered that these powers should remain with a judge but would need to consider this further once you have heard from Oranga Tamariki. The issues are much wider than just this proposed amendment.

   If the decision is made to amend section 137 to provide that an FCA can approve a fully consented plan where the legal orders are not changing, section 138 will also need to be amended so that an FCA has power to set a date for a further review of the plan.

   Our submission from 1.9.21 is that the FCA should not have this power (excerpt below):

   > *12. However, we have concerns about the extent of the proposed delegations under the Oranga Tamariki Act 1989. Most of these powers should be retained by judges, including approving uncontested reviews of plans. It has become standard practice in many Family Courts for all review of plans to be set down in court to allow parties and whānau the opportunity to be heard. This is part of the move towards Te Ao Marama and ensuring accessibility to courts, so should not be a step undertaken on the papers without the opportunity of whānau involvement. These powers should ideally therefore remain with a judge.*

6. *Whether section 162(4) of the OTA should be amended in line with the other Acts (eg ss 131 and 135 of CoCA; ss162B and 162C of the FPA; ss 226B and 226C of the CSA; ss 65 and 65B of the PPPRA) to afford to Family Court Associates the power to order a party to reimbursement the Crown for the fees and expenses of a lawyer appointed to represent a child or young person, or to assist the court.*

   Yes, an FCA should have this power (although we do not know of any occasion where it has been used or any occasion where it may be appropriate to use it).

7. *Whether any special provision is required on review or appeal from decisions of Family Court Associates.*

   Our subs below from 1.9.21:

   > **Right to appeal/review FCA decision**
   > 14. There needs to be an efficient and effective mechanism for the decisions of a FCA to be reviewed or appealed. Rather than requiring a judicial review in the High Court, there should be the ability to have a decision made by a FCA reviewed by a Family Court Judge, with the right to appeal the judge's decision to the High Court.

   We would need more time to carefully consider this and will address this in our submission one the bill has been introduced. A decision of an FCA should be reviewable by a judge but the issue needs further consideration. We refer the ministry to recent Court of Appeal case of *Newton v Family Court Auckland* [2022] NZCA 207, 24 May 22.

   If there is a provision for a review or appeal from decisions of an FCA, care needs to be taken with setting out clear criteria for review or appeal to avoid the provision being used as a delay tactic or to subvert the very purpose of establishing the position of an FCA in the first place.

8. *Whether section 49A(3) of CoCA should be amended to include the FCA, so that they can set matters down for hearing.*

   Yes, section 49A(3) should be amended so that an FCA can set matters down for a hearing.

On the Bill we would appreciate your feedback on:

1. *Whether the drafting of proposed new section 59 of the CoCA enables the FCA to look at consented supervised contact orders.*

   The proposed drafted wording enables an FCA to vary an interim parenting order on application by the relevant parents/guardians jointly (and therefore by consent) or otherwise by lawyer for child to impose supervised contact. This would be consistent with the proposed ability for an FCA to make a consent order at a settlement conference, which ought to encompass a wide range of outcomes (including supervised contact).

   However, it does appear to go further than that, in that the proposed wording of section 59 would allow the FCA to make an order as to supervised contact if sought by lawyer for child against the wishes of the parents.

2. *Noting section 10(5)(a) of the Status of Children Act, whether the FCA should also be empowered to make paternity orders under the Family Proceedings Act?*

Yes, an FCA should have the power to make a paternity order under the Family Proceedings Act, given that this appears consistent with the proposed amendments as to the operation of sections 10(2) and 10(5)(a) of the Status of Children Act.

Yours sincerely

Caroline Hickman
FLS Chair