

# **Child Inclusion in Dispute Resolution in the New Zealand Family Court**

**A Position Paper**



**Funded by the New Zealand Law Foundation**

**Researched and prepared by:**

Jill Goldson  
FAMILY MATTERS CENTRE  
66 Wellpark Avenue  
Auckland 1021  
09 3608868  
[jillgoldson@xtra.co.nz](mailto:jillgoldson@xtra.co.nz)

**© 2009 Jill Goldson**

## Contents

Summary.....	3
Recommendations .....	4
Introduction .....	6
New Zealand.....	9
History .....	9
Overseas Jurisdictions.....	13
Child inclusive practice in Australia .....	13
Child inclusive practice in UK.....	15
USA.....	20
Amendments to the Care of Children Act and the implications for child inclusion in dispute resolution.....	21
Perspectives on child inclusion in dispute resolution .....	23
Child inclusive pilot scheme, New Zealand.....	26
Issues for application of child inclusive practice in New Zealand .....	29
A way forward .....	31
Applications of child inclusive practice.....	34
Training.....	35
Training in Australia and UK .....	35
Training issues for New Zealand.....	36
Conclusion .....	38
References.....	39

## Acknowledgments

The following groups and individuals are gratefully acknowledged for their support of and contribution to this project:

- The Law Foundation of New Zealand (as the sponsor of this study)
- Sandi Anderson, Barrister and Solicitor, Ponsonby, Auckland
- Nicola Taylor, Children’s Issues Centre, University of Otago
- Megan Gollop, Children’s Issues Centre, University of Otago
- Greg Pringle, Research and Development Management Ltd., Auckland
- Jennifer Wademen
- Relationships Australia, Canberra,
- Relationships Australia, Melbourne
- Family Court of Australia, Melbourne
- Anthony Douglas, CEO, Cafcass, UK
- Malcolm McSporran
- All the families with whom I have the privilege of working.

## Summary

Ongoing research into less adversarial dispute resolution in the Family Court is now influencing perception about the role of children in this process. There is a tipping point occurring internationally in family law regarding this matter, and the Care of Children Amendment Act 2008, along with the Family Proceedings Amendment Act 2008 in New Zealand, is now demanding scrutiny of these issues in terms of application.

All parts of the Family Court system need to understand the other parts of the system as a whole - a functional integration of provisions must aptly reflect the same functionality we seek to achieve in this area of justice for families. The most difficult and challenging clients are often the motive for innovation and change in skills and techniques; democratic reform owes society no less.

A brief overview will be made of the evolution of these recent amendments, as well as the rationale which has informed their inception. Consideration will be given to the positions of other overseas jurisdictions and to the findings of the New Zealand empirical research model undertaken by the writer in 2006.

Attention is drawn to the distinction between dispute resolution with a therapeutic outcome, compared to that of therapy. The implications of this pivotal distinction will be made with regard to the roles of Family Court professionals who will work with children under the Family Proceedings Amendment Act 2008 and under the Care of Children Amendment Act 2008.

Finally, recommendations will be suggested for the implementation, training, and regulations around working with children in the family law context.

## **Recommendations**

Child inclusive processes in Family Court dispute resolution constitute a distinct discipline, blending the knowledge of developmental psychology, attachment theory, and family systems theory, with the skills of counselling and mediation. Together they balance rights-based justice with the ethical mandate to protect the family in transition.

After extensive research of the literature, piloting a child inclusive model in New Zealand, and investigating practice and training in other jurisdictions, the following recommendations are made:

### **Counselling Roles**

1. To distinguish counselling (under the Family Proceedings Act) from child inclusive counselling under Care of Children Act, it is recommended there be differential nomenclature: “Family Counsellor” for child inclusive practice, “Counselling” for relational counselling with adults only.

### **Counsellor Training**

2. Any counsellor (working as a Family Counsellor) who is going to work with children and their parents under S46P, S46T (3)(c), and in 46ZA should be required to complete a short competency-based training programme (as do their colleagues in Australia and the UK), with ongoing supervision. This would be expected to be provided on a base of relevant qualifications and experience.
3. The imperative to get this professional practice right cannot be overestimated. Postgraduate training in the form of a three or four day short course will safeguard a powerful intervention from well intended, but uninformed, practice. The training needs to be empirically based and presented in a carefully considered curriculum, with learning outcomes that incorporate a clear theoretical underpinning of child inclusive practice in dispute resolution. It should be tailored and developed within the New Zealand context.
4. Counsellor training would cover different models of child inclusion at S46P (dispute resolution) S46T(3) (c )(post-order counselling) and 46ZA (pre-mediation counselling). It would include empirical evidence for separate child involvement versus actual involvement in sessions with parents.

5. Training should be mandatory for all three applications of counselling practice under COCA. Trained counsellors would thus be able to undertake any of these applications.

### **Mediation Roles**

6. To distinguish mediation (under the Family Proceedings Act) from child inclusive mediation under the Care of Children Act, it is recommended there be differential nomenclature: “Family Mediation” for child inclusive practice and “Mediation” for adults-only mediation.

Section 46ZA allows the mediator to decide if the child should attend mediation. If the mediator agrees that the child should be part of parental mediation, then there is a duty for the mediator to discuss with the child whether they wish to attend counselling for the purpose of clarifying their views on the matter pre-mediation.

7. Referral to a counsellor should be mandatory for every child, unless the mediator has specific child inclusive approved training with relevant qualifications and experience.
8. A child should not be involved in the mediation sessions with his or her parents if the counsellor believes that such involvement would be damaging to the child.
9. Interviewing of the child separately from his or her parents (for the purpose of feeding back their views to the parents) should be undertaken by the Family Counsellor. It is recommended, as in Australia, that the Family Mediator can only carry out this task if he or she has completed a child inclusive training course. In this context, duplicated interviews by the Family Counsellor and the Family Mediator should not occur as this would cause unnecessary stress for the child.

### **Training for Registrars, Family Court Coordinators, Lawyers, Mediators and Psychologists**

10. These professionals should have the opportunity to attend relevant parts of training in child inclusive practice according to their respective roles and requirements. All professionals in child-inclusive mediation need to understand the other parts of the system, as well as the system as a whole. This functional integration of Family Court provisions will ensure positive outcomes for families.

## Introduction

Widespread changes in the 20th century in terms of advances in medicine and protective laws have given increased status to children and gradually made children's significance in society more prominent.

Different perspectives on children's rights have been argued for well over a century. A declaration was adopted by the Fifth Assembly of the League of Nations in 1924 which was concerned with children's rights following the devastation of the Great War and its aftermath. The 1959 Declaration of the Rights of the Child was based on the premise that "mankind owes to children the best it has to give". Since the 1960's, the discourse has moved on rapidly from an argument that children need protection, to one about their autonomy.

However, the concept of according children basic human rights has only been recognised relatively recently. The UN did not formally acknowledge the evolving reforms regarding children's social, emotional and intellectual needs in the western world until 1979<sup>1</sup>. In England, the talk of access being a child's right received statutory affirmation in the 1989 Children's Act and the 1989 Convention on the Rights of the child was a watershed (Freeman M, Veerman, P 1992).

This shift in status has been followed by an increasing concern about the legal rights of children (Saposnek, 1991). This is currently illustrated by an increasing focus on the impact of parental conflict on children's wellbeing and mental health.

The family laws of most Western countries now appear to proclaim the importance of protecting children within family disputes. In a variety of ways "best interests of the children" is presented as the current standard of protection. Inevitably, particular legal methods for implementation are a function of unique interpretations within each jurisdiction and are shaped by particular cultural values regarding children, parents and families.

Cultural variations notwithstanding, a general paradigm shift is rapidly changing the emphasis from simply working with parents and is moving towards the inclusion of children in parenting disputes.

The focus on what contributes to child adjustment to divorce and separation is now superseding the more traditional concerns of the long-term impacts of separation and divorce, such as depression, unstable adult relationships and

---

<sup>1</sup> By designating 1979 as International Year of the Child.

compromised financial circumstances (Hetherington and Kelly, 2003; Long and Forehand, 2002).

Rather than examining these latter effects, current research is increasingly centred on the ongoing distress children experience when exposed to conflict between parents at the time of separation. Such conflict is shown to seriously compromise child mental health (Kelly, 2000; McIntosh, 2000; Pryor and Rodgers, 2001).

It appears that the transmission of risk lies less in the divorce per se but more in the degree and extent of the conflict surrounding the separation (Cummings and Davies, 2002; Kelly, 2000).

It is the implication of this significant research and its potential application for practices under the COCA Amendment Act, along with the legal evolution of child inclusion, which will inform the content of this paper.

Two major propositions inform the rationale for the practice of child inclusion, the first being that children need to retain ongoing relationships with both parents, and the second being that parental conflict is now recognised as more significant than divorce or separation in causing deep distress to children.

Studies have begun to show that excluding children from dispute resolution has unintended adverse consequences, such as increasing their anxiety, as well as their sense of isolation and frustration (Pryor and Rodgers, 2001; Smart, Neale and Wade, 2001; Smith, Gollop and Taylor, 2000). These findings beg the question of whether exclusion could, ironically, create greater harm than not. Given that children have no choice but to be involved in the actual restructuring of relationships after separation, access to a voice in the process is of high significance.

There is a growing evidence base that there are real potential benefits to many separated parents in engaging in a forum that prioritises the experiences of their child. This has been demonstrated to have an impact on their ability to make agreements, to be more emotionally available to their children, and to demonstrate increased levels of respect for one another as parents (Kelly 2000, McIntosh, 2000, Goldson, 2006, Rae, 2006).

Finally, and significantly, there is a legal imperative to include children's voices in family decision making in the United Nations Convention on the Rights of the Child (UNCROC), ratified by New Zealand in 1993. Whilst Article 3 of UNCROC mandates that the best interests of the child be a "primary consideration" in "all actions concerning children", Article 12 goes further:

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child should in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rule of national law.

To be fully implemented, the Convention must be woven into domestic statutes and policies. Definition of these policies is important as the concept of child inclusion can generate a diverse range of concepts.



## **New Zealand**

### ***History***

Whilst strong recommendations about the inclusion of children's views in Family Court dispute resolution have been made for some time, there have nonetheless been significant gaps in New Zealand's current research field regarding the connection between family law intervention and its impact on the wellbeing for children and their families. In particular, there has been little empirical research on how and when children's voices should be heard in family law proceedings, specifically with regard to dispute resolution services outside formal proceedings.

A brief review of the evolution of Family Court conciliation processes sets a context for the development of child inclusion as a legal principle for practice.

The Royal Commission on Courts in 1978 resulted in the establishment of the Family Court in 1980. Highlighted in this Commission was the potential tension between the functions of a court and those of a social agency. This pivotal issue has given rise to a degree of ambiguity, which has remained conceptually challenging. Despite this potential conflict, the Commission recommended that the Family Court should undertake conciliation and aim, where possible, to resolve disputes before embarking on an adversarial process. This laid the ground for the court's provision of counselling to parties applying to the court<sup>2</sup> and also provision for judges to mediate where disputes did not settle with counselling.

Thus no-fault divorce was introduced, designed to decrease adversarial procedures and to strengthen reconciliation and mediation processes. Under this Act, legal advisors and courts had a duty to promote reconciliation and mediation. Counsellors were appointed to work in this context to assist with reconciliation or mediate disputes<sup>3</sup>.

Research indicated that counselling appeared to be most effective in assisting with agreements about childcare and in dealing with personal relational issues. The focus was on primarily supporting parents and thereby supporting their children, the intent being a trickle down effect.

In 1993, Justice Mahony, Principal Family Court Judge at the time, appointed Judge Boshier to chair a wide-ranging review of the Family Court. One of the findings of this review was that there were conceptual difficulties with the

---

<sup>2</sup> Family Proceedings Act, 1980.

<sup>3</sup> If couples are proceeding through divorce and separation.

function of counselling. It was recommended that it be made clearer that the counselling service was an alternative to the adversarial court hearing, rather than being merely a preliminary to it. The Committee thus suggested a separate and distinctive conciliation service.

The Law Commission Report into Dispute Resolution (2003) stressed the difference between counselling, which they perceived to be mainly therapeutic, and conciliation, which they accordingly perceived to be agreement forming.

The Law Commission, in its report 82, 1993, referred to the fact that:

“Matters generally take too long to resolve, children suffer because of those delays and not all Family Court professionals are trained and skilled”.

Following the Mahony led review, the Commission recommended that a new and expanded conciliation service should operate out of the Family Court, so that counselling and mediation were available for a wider range of issues. However, the purpose of counselling remained strictly circumscribed and was still only available to parents and not to their children.

At the level of social justice, New Zealand’s role as signatory to UNCROC (1993) mandates the right of children to present their wishes in matters which effect them, and to have those experiences carefully considered by parents and practitioners involved in dispute resolution.

The Care of Children Act 2004 (COCA) superseded The Guardianship Act, and provides for a more robust Family Law in a number of ways. In particular, this Act states a principle of respecting children’s views and for giving children a reasonable opportunity to express these views.

A Lawyer for the Child is the most common voice-of-the-child mechanism; the Court must make such an appointment when the child is subject to or party to proceedings under COCA. If these proceedings involve providing day to day care for, or contact with, the child and appear likely to proceed to a hearing.

The four broad responsibilities of Lawyer for Child are: to explain the Court process to the child, to represent the child in Court and in negotiations regarding care arrangements for the child, to put the child’s view “and all issues relevant to the child’s welfare and best interests” before the Court, and to explain the judge’s decision to the child. (Care of Children Act 2004)

New Zealand’s child inclusive models, up until the present, have been legal in focus. The Lawyer for Child role falls somewhere between traditional advocates and best interests advocates.

Section 7 of COCA states that lawyers appointed in this role are “to act for a child”, which suggests the traditional role. A practice note (Boshier 2007) observes that, as well as a duty to put the child’s wishes and views before the Court, the lawyer also has further duty to inform the court of other factors which impact on the child’s welfare, and to try to resolve any conflict between

“a child’s wishes and views and information relevant to the best interests of the child”.

Where this cannot be done, the lawyer may advocate the child’s wishes but invite the court to appoint a second lawyer to argue the best interests issue<sup>4</sup>.

Children’s rights to participation at hearings are via court appointed professionals - psychologists and lawyers. If the child is the subject of proceedings he/she is viewed as a participant in their own right. UNCROC embodies these principles and COCA adds to New Zealand’s compliance with this significant treaty.

There has been clear direction from the Court for more direct forms of eliciting children’s voices through judicial interview or lawyer for child. “Our cases must not merely be about children but must involve them...we must advance beyond the sometimes equivocal submissions of counsel for child, to children being at court and seeing the Judge and expressing a view” (Boshier, 2004)

In November 2006 another two year pilot was introduced, the Parenting Hearings Pilot. This further signifies the move of the Family Court of New Zealand from an adversarial position to one that is inquisitorial and is informed by social science research into multi-disciplinary approaches to difficult cases. The briefing paper presented by Judge Boshier in September 2006, described this more inquisitorial approach and acknowledged the importance of parent education, lack of delay, and the right of parents as well as children to have their voices heard directly by the Judge.

The new amendments in COCA, along with the Parents Hearings Pilot and non-judge led mediation, are focussing on the need for NZ families to have swift and user-friendly access to justice when there are family disputes around arrangements for children, or protection needed by the Court.

The development of legislative change that has had the best intentions has led to an ongoing irony. The attempts to reach resolution without a court hearing means that the child has not had the mandate to participate in conciliation processes. Given that only about 6% of cases proceed to judicial determination, this means that about 94% of children have had no right to be heard. This is an enigma in a country heralded for its pioneering laws of child inclusive participation (under the Children, Young Persons and their Families Act (CYPF) of 1989), which has been widely adopted in other countries.

In 2005, Judge Boshier argued for children’s inclusion in counselling: “while a number of important reforms have occurred in family law, those have not included better access to conciliation and the involvement of children. Perhaps it is time for these outstanding issues now to be addressed. Reforms we might introduce include more comprehensive access by children to counselling and this will require legislative amendment.”

---

<sup>4</sup> Counsel to assist the court.

Although trickle down benefit to children whose distressed parents are involved in dispute resolution can obviously occur, we cannot assume this happens in the majority of cases. The very recent amendments to COCA would appear, in part, to remedy this lack of opportunity for children.

A family mediation pilot has been run in four courts between March 2005 and June 2006. This initiative has been in response to submissions by the professional mediation bodies of LEADR and AMINZ, who communicated doubts about the efficacy of judge led mediation owing to the perception of the public of a judge as a mediator, and also because the judge's use of time would be more appropriately spent in adjudication in court.

This pilot of non-judge led mediation was intended to be inclusive of children, but in fact children only attended 6% of mediations for any period and the lawyer for child was the usual method of including the child perspective.

Right up to the passing of the Family Court Matters Bill in September 2008, New Zealand's child inclusive models have remained legal in focus and centred on issues of natural justice.

## **Overseas Jurisdictions**

### ***Child inclusive practice in Australia***

Since 2006, child focused and child inclusive approaches became integral to dispute resolution in the Family Court of Australia. The Australian government provided additional funding for community support services for separating families.

From July 2007, a process of Family Dispute Resolution (FDR) has been a requirement before parties can apply to the court for a Parenting Order. Since 2008, parties have needed a certificate from the Family Dispute resolution Practitioner (FDRP) before they can make an application to Court. This includes new applications and applications seeking changes to an existing parenting order. Family Relationship Centres were specifically set up in Australia to provide the resources for this practice and joined an existing consortium of agencies, including Relationships Australia and Centacare, amongst others.

Exceptions to this rule include matters of urgency, abuse, abduction, mental ill health or where a person had contravened or shown serious disregard to an order made in the preceding 12 months. These cases are referred back to lawyers as well as to appropriate services.

Before the dispute resolution commences, an assessment is made of the suitability of the clients. The intervention concentrates on resolving disputes concerning children's matters and working on a parenting plan. The aim is to expedite the parents' ability to get a consent order and to receive assistance with the strengthening of their parental alliance. This professional is not a counsellor per se and does not address the emotional side of relationships. The FDRP concentrates on resolving specific disputes and working on a parenting plan.

If this process is not successful in resolving the matter, a certificate is issued which says the parties were unable to make an agreement. Non-attendance of one party at dispute resolution can effect the courts decision in the awarding of costs.

Child focussed and child inclusive practice is a feature of this dispute resolution and joint parental consent is essential. The process consists of a professional specifically trained in child inclusive practice (a child consultant or FDRP) seeing the children on their own. The goal of this intervention is to provide the parents with feedback via a "snapshot" of how their children are

dealing with their parent's separation. This feedback is made in order to help the parents to make better decisions which are in their children's best interests. This intervention of approximately six hours in total targets an early intervention, which is inclusive of children where appropriate, and offers resources and information on parenting through separation.

## **Dispute resolution in the Court**

As a result of the new provision described above and its focus on resolution, it was anticipated that cases that did end up proceeding into court would predictably be more complex, and as a result the Child Response Programme was rolled out as part of the application process.

Australia has focussed on two programmes to reinforce the centrality of children's rights and needs in the Family Court of Australia, its front end Child Responsive Programme (CRP) and the less adversarial trial (LAT). Key features of LAT include the adoption of inquisitorial techniques, including direct consultation with children (through CRP). Modified application of rules of evidence and strong judicial management prevent the case being driven by disputing parties.

These processes derive from the empirical evidence of the results of an active focus on the child's needs and views to modify and influence parental intransigence in conflict.

To ensure a logical progression of services to families from the community sector to the courts, the Child Responsive Programme is not privileged and thus avoids duplication of the privileged services in the community.

The model includes expert assessment and opinion provided to families, legal practitioners and the courts in a way that is not available in the community model. It is intensive and responsive. One family consultant is assigned to each case and works with the family until the matter is settled or adjudicated. This provides the family with continuity and consistency of approach and allows for a comprehensive family report for the trial. The expert advice from a social science specialist in child and family matters (a social worker, counsellor, or psychologist) assists the court to determine the issues and a further report is provided if asked for by the judge.

Children can be involved early in this process; where appropriate the family consultant will find out the children's views and feelings and feed these back to the parents to assist them in focussing on the impact of their conflict on the children. This intervention also supports the children in their right to be included and to give their views. Screening, assessment and inclusion of children's views, expert opinion, and a Preliminary Report are features of different stages of this model and provide the family with different opportunities for settlement in response to the different interventions. Further feedback loops take place to parents, their legal representatives, and the

child's independent lawyer, thus maximising opportunities to really test the positions taken in the dispute.

In an integrated approach to dispute resolution, families can be referred back to the community when opportunities for alternative resolution are identified or referred out to other services.

The Issues Assessment report that is provided at the time of the feedback meeting with the family and legal representatives is useful for negotiating settlements, and in the same way a subsequent Family Report made available can maximise settlement opportunities.

Where cases proceed to LAT and a full family report is needed, the report prepared underscores the family's confidence that the family worker has understood the dynamics, knows the family, and is working in the child's best interests.

A post determination stage is attached to this new model where families are assisted to understand and implement orders. Also, appropriate referrals to counselling services in the community to work with the terms of the order can be made at this time.

Less funding is now available for lawyers for children. The beginning of the intervention is child focussed, with the children filling out a questionnaire. The children are then brought in for the feedback. No psychologist report is called for as the Family Consultant covers work with the family and children in this intensive scheme. 30-40% of cases settle at this stage (McIntosh, Bryant & Murray 2008).

### ***Child inclusive practice in UK***

Children and Family Court Advisory Service (CAFCASS) is the major organization in Britain supporting and representing the children going through the family courts. The organisation deals with public law cases<sup>5</sup>, adoption cases, and private law where parents are separating. Small but growing minorities of parental separations involve court proceedings to make residence and contact arrangements.

Residence and contact orders are made under Section Eight of the Children Act 1989, where the court considers this necessary to promote and safeguard the welfare of a child (usually where there is a dispute between parents about arrangements). Section Seven of the act gives provision for a report to be written for the court by a CAFCASS Family Court Adviser (FCA).

---

<sup>5</sup> Where social services are involved and children may need to be removed for their own safety.

Practitioners working with children and families have, since 2001, a duty to give due weight to the wishes and feelings of the child concerned. The importance of hearing the views of children is strengthened by rule 9.5<sup>6</sup>, which allows the court to make a child a party to Section Eight proceedings.

The requirement to ascertain the children's wishes and to provide them with representation is laid out in UNCROC.

Many of the service and practice developments in CAFCASS are new child inclusive practice tools of wider international relevance. For example, the Needs, Wishes and Feelings Resource pack, a Court Life Record for children, use of impact statements, and the current development of online services, such as facilitated dispute resolution for children, young people, and their families. Also in place is a peer mentoring service for children provided by trained mentors who are young people themselves.

Intervention in dispute resolution in the UK takes place at the time of a First Directions Hearing in Court, where the parties to the dispute and their legal representatives are present. Dispute resolution as an early intervention measure is becoming more successful and is leading to a decline in the number of welfare reports requested by the courts at the time of the first hearing. At this hearing, the Court will make a decision about how to move ahead with the application that has been made about the children. Aspects being considered might be issues of child safety and the route to agreement being reached between the parties.

There are essentially two types of family conflict resolution: in- court conciliation and dispute resolution, and the latter is usually undertaken by CAFCASS. This is directive, non-privileged, and non-voluntary. In certain circumstances it can be developed into extended dispute resolution. It is the intent of CAFCASS to continue to divert resources from report writing to more dispute resolution interventions. The research, pilot, and implementation of the ways of best accessing the views of the child have been prioritised.

In the words of the President of the UK Family Law Division, Sir Mark Potter, "we have become too hypnotized by adversarial proceedings".

Work is also underway between mediation services to better understand each other's skills and to work in partnership.

In Court, FCA's are asked to help families to try to agree on arrangements for their children. Sometimes an agreement can be reached immediately and no further intervention is necessary. As in many cases, when agreement on some (or all) of the issues is reached during a meeting at the First Directions Hearing, the court may then allow some time to see if the agreement works. If no agreement is reached, the FCA may be asked to continue to work with the family on resolving the outstanding issues. As there are diverse regional

---

<sup>6</sup> Of the Family Proceedings Rules, 1991.



variations both within mediating bodies and within CAFCASS, the local dispute resolution scheme will determine how this is done. Variables will include the age of the child and the nature of the application.

If matters are still not agreed via dispute resolution or in some Courts mediation, the Court will usually ask the FCA to carry out further work and report back<sup>7</sup> with a positive recommendation about the best way forward. This may include further work with the family and will involve an interview with the children to access their needs, wishes, and feelings. It usually takes about ten weeks to complete.

To allow the court information about the children's wishes and feelings, they are also talked to on their own by the FCA. Police, social services, child protection registers, and information already held by CAFCASS can all be accessed when appropriate. Children's Guardians represent the interests of a child during cases in which social services have become involved and in contested adoptions.

In cases when divorcing or separating parents have not been able to reach agreement, and which are quite extreme in terms of high conflict and hostility, the child is made party to the proceedings and a solicitor is appointed for that child. The Children's Guardian meets with the child and ascertains the views and wishes of the child as well as meeting with other involved parties, including parents. A report is then written for the court, which reports the views of all concerned parties and makes recommendations. This report is available for all those involved in the case to read. The child has the right to attend the court hearings and to meet with the Judge or Magistrate.

All these roles, in both public and private law, are about prioritising the best interests of the child and advocating for those interests.

One pilot scheme in London is using Family Group Conferences in private law case. As in New Zealand, the conference is child inclusive.

An FCA makes a referral to a conference coordinator following the First Directions Hearing. Upon receipt of the referral, the coordinator identifies, with the parties and their children, others who should be invited to the meeting. The coordinator discusses the process with the participants.

In the three distinct phases of the conference, the coordinator will clarify for all attendees, inclusive of children, the purpose of the conference, any welfare concerns which may affect what can be agreed to in the plan, information about resources and support, and what action will be taken if the family cannot make a plan or the plan is not agreed.

The second phase is private family time, during which the family is left on their own to come up with a plan and to identify resources from agencies to help

---

<sup>7</sup> Section seven report.

them with the implementation of that plan. Advocates for the child and family are available outside the meeting room if needed during this process.

In the third phase, the Family Court Advisor and other information givers, as well as the coordinator, meet with the family to discuss and agree the plan and negotiate resources.

Contingency plans, monitoring arrangements, and how to review the plan, also need to be discussed and agreed. Copies of the plan are distributed to all participants and all sign it.

Where a plan is not agreed by the FCA, the reasons for not accepting it must be made clear immediately and the family given the opportunity to respond to the concerns and to modify it. Dates for implementation and review are set.

Some of the pluses include the speed of the process, the involvement of the wider family, its cost-effective nature, and an inbuilt review system. This new intervention is yielding a high success rate of agreements, 95%, but is a new initiative and is yet to achieve follow up data.

In the Norfolk branch of CAFCASS, the Extended Dispute Resolution pilot has been running for approximately four years, since June 2005, covering two county courts. Inclusive of children, this model operates on the empirical evidence that families are best assisted to find their own solutions. Following an assessment by a CAFCASS FCA, the matter is adjourned by the Judge for six weeks to allow the meetings to take place in the hope that this would supplant the need for a Section Seven Report and subsequent hearing.

Regardless of animosity, (and with domestic violence and mental health issues screened out) the majority of parents who are helped in the initial stages of litigation to focus on their children can devise a viable child focussed co-parenting plan, without recourse to a court hearing. A central plank in this intervention is that children are both informed and listened to and that cooperative parenting is promoted.

As in the Australian model of Dispute Resolution, parents each have an individual session, and then are seen together. An emphasis on 'no blame' is encouraged, along with the focus of the impact of conflict on children. The children are invited to attend the third session with both parents in attendance and are helped by their parents to draw a family tree and talk about their lives. The parents withdraw at this point and the children are encouraged to talk about how they are feeling using art, puppets, and other resources. Feedback and file notes are later shared with the parents and they are encouraged to find a solution. The children are invited into the last session with their parents if the children are comfortable with the process.

A short report is then prepared summarising the sessions and any agreements reached, and the parents receive this before the date of the next Directions Hearing.

TA pilot demonstrated a 78% agreement rate, (cancelling out the need for a section 7 report). Overwhelmingly positive comments from the participants about their sense of empowerment in working out satisfactory solutions were received. The professionals working on this pilot believe that the children involved had their needs more extensively canvassed as a result of participating in this model.

In 2004, Judiciary in Leeds, enthused by a similar practice at the Principal Registry in London, indicated that they wished to involve children, nine years and over, in the First Hearing Dispute Resolutions meetings with CAF/CASS. They were concerned that children were not being given the opportunity to make their views known at the time decisions were being made about them and that there were long waiting lists for the Section seven reports

The scheme commenced in 2005, with children attending in the CAF/CASS office whilst their parents/other parties were in the Court. The FCA reported to the Judge and the parents on the children's views. After a decision had eventually been made, the FCA reported back to the children. Research into this scheme demonstrated a very positive response from children and parents alike. The comments from the children indicated that they welcomed the opportunity to receive information and to be heard and involved. The age of involvement was subsequently reduced to eight years to open up the scheme to more children.

A further intervention in the UK is the use of Family Support workers. These professionals are vocationally qualified and usually have over three years of prior regular experience. When making an order, a judge can make a Family Assistance Order. Within ten days a Family Support Worker meets with all parties including children, who also have the right to meet individually with the worker. Written plans and goals are prepared and the worker can meet with the parties for up to a year. At the end of the order period, a short written review is given to everyone named in the order.

As in New Zealand, separating parents in the UK are encouraged to remain the primary decision makers for their children. The court will only intervene when the dispute is such that the parents are unable to agree. Although in-court resolution has undoubtedly proven successful for many families in that country (and this has been further assisted by willingness of District Judges to order reviews to monitor progress), it is nonetheless subject to many time pressures and children are not included in the process. Furthermore, agreement at the door of the court for many parents is simply not possible. Research backs up the fact that reaching an agreement about contact does not necessarily help parents collaborate effectively. UK studies suggest new working methods that move towards active problem solving and support of agreements achieve better outcomes for all involved (Trinder 2007).

## **USA**

An in-depth survey of child inclusive provisions in the USA is beyond the scope of this paper.

Nonetheless, it is important to note that in California, Joan Kelly, as well as Janet Johnston and the Centre for Family in Transition (CFFT) in Marin County, significantly pioneered and piloted work on the child inclusive mediation model. A separate representation model was created: a child psychologist or mediator feeding back the views of children to family mediation sessions. The parents were assessed for their capability to hear their children and longer-term counselling was considered as the next step. Joan Kelly has written a vast range of books and articles on her mediation work with parents and with their children, and is an acknowledged expert in her field.

Another innovation in children's cases from USA is the use of a Parenting Coordinator. This idea was conceived by a group of lawyers and psychologists working in Denver, Colorado in the 1990's as a response to high conflict families. Parent coordination is a relatively new and growing field, and currently only a few states in the USA have parenting coordinator statutes. However, the model has been implemented in many states as an important intervention for dealing with high conflict families who regularly appear before the courts (AFCC Task Force on Parenting Coordination).

Typically, Parenting Coordinators are mental health professionals, for example social workers, psychologists, psychiatrists, or counsellors. Some states also permit the appointment of family lawyers or family mediators.

Frequently they work with parents who are entrenched in conflict, particularly about the implementation of orders. Parenting coordination may be used proactively, along with a final order being made, but more frequently parents are referred to parent coordinators because of chronic litigation.

The tasks of these coordinators may be divided into four areas: assessment, education, resolution of minor conflicts, and recommendations to the Court. To meet these requirements they meet with the children involved.

## **Amendments to the Care of Children Act and the implications for child inclusion in dispute resolution**

After extensive submissions at Select Committee level, the Family Court Matters Bill received Royal Assent in September 2008 and has created amendments to the Care of Children Act, which further involves children in the counselling and mediation process.

Although submissions to the Bill urged counselling for children at the earlier stage of counselling (Family Proceedings Act), the amendments made are nonetheless a welcome response to the burgeoning research which indicates the needs of families in transition.

The Bill separated out the functions of conciliation and adjudication very clearly. Drawing on the Family Mediation pilot of 2005-2006, the Act provides for a two-tier mediation service, one judge led and the other privately mediated. Counselling services have been extended to parents and to children who are central to the dispute.

With 43 Family Court judges sitting in New Zealand, the theme of deploying scarce judicial resources with care is apparent in these reforms.

Counselling under the Family Proceedings Act will continue to be available for issues of relational work, leading to either reconciliation in relationships, or conciliation about the way forward. Those wanting resolution on day to day care, contact, or post order help for their family, are now to be referred under the provisions of COCA amendments to counselling, mediation, or a mediation conference with a judge.

Counselling and mediation are to be available for children in the following circumstances:

**S46T (3) c Care of Children Amendment Act 2008.** This provision allows for children to be part of their parents counselling process when parents or caregivers are undergoing counselling relating to a dispute over the day to day care, contact, or guardianship of the child.

**S46ZA Care of Children Amendment Act 2008.** Where a mediator has agreed that a child may attend mediation, this provides an obligation for the mediator to discuss with the child whether the child wishes to attend counselling for the purpose of clarifying his or her views on the matter in issue.

**S46P (1)&(2) Care of Children Amendment Act 2008.** If the Court considers a child has a need of therapeutic counselling to accept an order, counselling must be arranged for that purpose.

In all of these incidences, counselling may, or may not, be inclusive of the child's parents, depending on the circumstances. This central issue will be examined a little later in this paper.

With regard to the mediation focus, the amended legislation has endorsed mediation as the significant option for self-determination of family conflict by alternative dispute resolution.

Non judge-led mediation will be available for disputes under the Family Proceedings Act 1980 and for care arrangements under COCA Amendment Act 2008. The areas that can be privately mediated under this amendment are: disputes between guardians, guardianship matters, parenting orders, alleged breaches of a parenting order, and applications by a party to marriage, civil union or de facto relationship for mediation in respect of that relationship.

Children whose parents seek mediation under Ss46F(3), 46J(3) or 46R(2), if it is considered appropriate, may be part of the mediation process. The mediator has a duty to discuss with the child whether they wish to attend counselling, as above, for the purpose of clarifying his/her views on the matter, pre-mediation. If the child agrees to this, then the child is referred to counselling s46ZA.

## Perspectives on child inclusion in dispute resolution

Policy implementation of child inclusion in the COCA amendments is shaped by empirical research. This research is moving processes of child involvement in parental dispute away from rights based empowerment and neutrality which accord the child “a voice”. Instead they have begun to embrace a process that prioritises the developmental health of children affected by the dispute.

Although this provision to children is as yet relatively limited, and does not allow children access to the earlier counselling processes of section 9 of the Family Proceedings Act, it nonetheless sets a context for very significant work for the rearranged family.

“Literature in the area of attachment theory is replete with research which indicates that maladaptive attachment are implicated in almost every mental disorder. Both the *Diagnostic And Statistical Manual of Mental Disorders* (1994) and the *International Classification of Disease* (1992), include attachment disorders in their classifications. Child rearing practice, research, childcare policy and professional practice worldwide have been influenced by this empirical knowledge” (Owusu-Bempah, 2007, p14).

Social change, with its demographic of divorce and separation, are features of current society. However, it is at our own peril that we ignore the implications of robust research for resolution practices which involve the children in our communities.

Thus the position of other than simply a rights based perspective is moving to the opportunity for a subtle and complex intervention, which draws together psychology, human rights and family law. This pivotal position demands that the socio-legal context of family law be fully embraced. *Child inclusion is not therapy per se but, delivered professionally by trained practitioners, is dispute resolution with a therapeutic outcome for the rearranged family.*

There can be no better outcome for the clients of family law than this. The ability of one parent to understand the position of the other parent and their children far outweighs in efficacy, or justice, any legal solution.

The fact that this focus has major implications for the psychological adjustment of the rearranged family, as well as the facilitation of the resolution of parenting disputes, makes its careful adoption an issue of urgency. In line with other countries, NZ is now facing the challenge of moving beyond “the restrictions of a purely legal legacy and adopting an ethical mandate to influence the psychology of family restructure” (Maloney and McIntosh, 2004).

As referred to earlier in this paper, research indicates that the significant variable which influences child adjustment to the transition of their parent's separation is the degree of conflict between their parents. Data which provides evidence of serious compromise to child mental health (Kelly, 2000; McIntosh, 2000; Pryor and Rodgers, 2001) has led researchers to the view that the degree and extent of the conflict surrounding the separation needs to be taken very seriously in proposed models for dispute resolution.

The ability of parents to nurture and protect their children diminishes markedly over separation, and in the year or two following (Amato 1994; Lamb, Sternberg and Thompson, 1997; Wallerstein and Kelly, 1980, cited in Wallerstein, 1991). This diminished parenting capacity is caused in part by such factors as a higher incidence of physical and psychological problems, task overload, economic distress, and unresolved relationship issues. Hence, parents get out of touch with their children's emotional needs and parent-child communication declines. Consequently, far from being able to help their children over this time, parents often inadvertently add to the stress of their children.

Furthermore, there is a growing body of evidence that children suffer ongoing distress when they are not told what is happening and when adults do not take their feelings and views into account (Pryor and Rodgers, 2000; Smith, Gollop and Taylor, 2000). Given that children have no choice but to be involved in the actual restructuring of relationships after reparation, access to a voice in the process is of high significance (Jensen and McKee, 2003; McIntosh and Maloney, 2002; Smart, Neale, and Wade, 2001).

The child's need to have a voice and to be informed is equally urgent outside legal processes.

If a key determinant of child wellbeing is the extent to which parents are able to cooperate and manage conflict post-separation, then an intervention which encourages parents to think of their children, rather than focus on their own hostility and grief, is positively implicated in the ongoing mental health of that child (Cummings and Davies, 2002; Emery, 2004; Kelly, 2000; McIntosh 2005).

Strong evidence exists (Buchanan, Maccoby and Dornbush, 1991; Katz and Gottman, 1997) that the ability of each parent to provide the child with supportive parenting buffers the child from the more destructive aspects of parental conflict. Such conflict is likely to have been in place for some time. Parents who settle outside court determination, whilst avoiding the strain of a defended hearing, are not provided with the means to protect their ability to parent from the stresses and trauma of separation and, significantly, neither are their children.

The move in family law policy across jurisdictions for involvement or inclusion of children dovetails congruently with what children are telling researchers:

For example, they want to be consulted and informed (Parkinson, Cashmore and Single, 2005; Goldson, 2006; Rae, 2006). The inclusion of the child in the



negotiations about rearrangement of the family structure correlates positively with that child's ability to adapt to the rearranged family situation (Pryor and Rodgers, 2001; Robinson, et al. 2003; Saposnek, 1991; Smart, Neale and Wade, 2001; Smith, Gollop and Taylor, 2000).

In terms of to whom children wish to speak and receive information from, researchers are told by children that they want to talk to one or two "special" people (such as a grandparent or a trusted family friend) other than their parents (Hughes 2001; Goldson, 2006). However, they do not like talking to strangers and experts (Smart 2003) as it feels disloyal to them to air family matters in this way. They go on to tell researchers that they primarily want to be given a voice in the family rather than in legal proceedings, which are very much an adult arrangement. An emphasis on the issues as determined by legal process, whilst necessarily enshrined in law, nonetheless has the potential to silence the particular child's ability to talk about what is important to him (Henaghan, 2004).

Historically it has been assumed that the experience of inclusion could be traumatic for children. However, the children themselves tell us they yearn for a chance to make sense of their situation by being part of the negotiations. It would appear that to be merely a witness to hostility and silence is a far more traumatizing prospect for a child.

"Although it is important that those in the Court system hear what children have to say, it is perhaps even more important that parents hear what children have to say within the family" (Law Commission Report 82,2003, p27).

*"It (the meeting) did more than I thought it would; it was easier to talk with both mum and dad there 'cos they had been there lots of times before it's stink talking to people who don't even know your family".*

(Girl, 15)

(Goldson,2006 p12)

From a legal rights point of view, the involvement of the child can facilitate the decision of the judge and this reality can, and must, coexist with Article 12 of UNCROC in its imperative to afford the child dignity and agency in matters which are significant to that child. Canvassing a child's views in a thorough manner recognises a child's rights and agency *as well as the contextual need of that child and family's need for skilled help through transition.*

The policies are not mutually exclusive, although the degree of privilege will vary contextually. A different policy rationale may govern at different points in the process.

Thus an ideal rationale for policy may be the examination of the utilisation of resources at the front end of the system. For example, child inclusion in the early stage of their parents' separation, child-friendly information about divorce and separation, children's groups, and children's education programmes. If the focus is to provide judges with objective and complete

information for decisions about residency and contact, this could suggest that further resources need to be directed to the completion of more expert assessments or specialised training for judge and lawyers for child, with respect to child development, family systems, and attachment theory.

In the meantime we have an amended Act that allows for alternative dispute resolution and which is legislated to include children in parts of that process.

## **Child inclusive pilot scheme, New Zealand**

I want to look briefly at the findings of a research study undertaken in New Zealand in 2006. With a grant from the Families Commission Innovative Practice Fund, a child inclusive pilot, the first of its kind in New Zealand, was run by the writer (Goldson, 2006).

Entitled, '*Hello, I'm a voice, let me talk. Child inclusive mediation in family separation*', the pilot was a solution-focussed model, predicated on family collaboration and grounded in research.

Seventeen families at different stages of parental separation were interviewed following attendance at a counselling process. The parent cohort represented very diverse positions on the political spectrum. Children attended parts of this counselling with their parents. The families were recruited from Family Court counselling referrals under The Family Proceedings Act 1980. The 26 children involved ranged from six to eighteen years.

Findings were universal and significant; parents registered a heightened awareness of the effects of their conflict on children, a resultant recognition of their child's need for parental cooperation, and a significantly enhanced ability to make agreements about co-parenting with their former partner. Children in the study reported that their strong need for a voice, and for information from within the familial context, was satisfied by this involvement. They reported a decrease in anxiety about the emotional and practical issues facing them as their family life was rearranged. Parents reported better communication with their children along with their child's lowered anxiety. Parents also reported a higher degree of respect for one another as parents.

This model can be implemented early in the process of separation and thereby be capable of picking up conflict before it is polarised into intransigent parental positions, with the attendant harmful impact on children; it can also be applied to a later stage of parental separation, either close to court application or post order.

The necessity of appointment of Lawyer for Child is dramatically reduced owing to the enhanced conciliatory outcomes achieved by working with the whole family as the architects of their own family generated solutions.

There are incalculable fiscal benefits owing to early intervention, which deserve further analysis beyond the scope of this paper. A cursory calculation indicates a major reduction in the country's legal aid bill, as recourse to more complex legal processes are potentially dramatically reduced. For example, the cost of appointing Lawyer for Child was \$16.1 million (Ministry of Justice 2007). The likelihood of reduction of the overwhelming resources needed to attend to child distress (education failure, mental health, truanting, youth crime) is self-evident.

Positive divorce education outcomes accrue from tailor-made delivery to both parents who have the opportunity to hear their children's views, and important role modelling to children takes place with regard to the value of a counselling intervention.

The model cuts across gender, cultural, and socioeconomic divides and is embraced by a diverse range of political positions.

*"You know, I think the kids are aware of the reasons why we separated and they've got an understanding or acceptance of that and moved on 'cos they can see the working relationship now...even though I don't really feel like doing it, it is an opportunity for the children to see us still as a cohesive unit"*

*(Resident mother of two children)*

*"Well, it helped me and it helped (my ex wife)...and if we make an agreement in front of (our daughter) we are bound to it otherwise we are modelling something very flaky to our child, who will blame us...it's tempting to hurt the other person, bargaining with the children...but my mum's still venomous about my father and that is the last thing I want for my children.*

*(Non-resident father of three children)*

*"This has helped mum and dad to borrow us from each other."*

*(Girl, 10)*

The participant children reported back that talking to someone who had already worked with their parents and were familiar with their family situation made it much easier to talk about how they were feeling.

*"I really liked that the counsellor knew mum and dad. It meant she understood the parents' positions".*

*(Boy, 15)*

*"I'm a very satisfied customer, it's sort of obvious really that this is the way to go, isn't it?"*

*(Non-resident father of three)*

*(Goldson, 2006 pp 11-14)*

The application of a model such as this can do much to minimise delay and bring about rapid access to justice. Conflict at separation can, and does, take place outside legal processes. Symptoms expressed by children and young people may be the only signs to schools, youth justice, mental health services, and the community at large, that the ensuing psychological damage is a public health issue. To leave children's perspectives outside the conciliation process is at odds with a system which puts children's needs as paramount. There is a growing acknowledgement that children whose parents are in conflict suffer in silence (Mantle and Critchely, 2004). The psychology of family transition is embraced at this point with a chance for the parents to be helped to refocus on the child.

This is a negotiation model that promotes the psychological adjustment of the rearranged family. Whilst the normative nature of conflict is accepted by professionals in the field (King and Heard, 1999), persistent conflict between spouses undermines the quality of parenting and parent's affective responses to children. The inevitable spill over to the child-parent relationship has been identified and it is demonstrated that the parental ability to nurture and protect their children diminishes markedly over separation and the year or two following (Amato, 1994; Lamb, Sternberg and Thompson, 1997; Wallerstein and Kelly, 1980; cited in Wallerstein, 1991). This increases association with negative outcomes for children. Parents' diminished parenting capacity is caused in part by such factors as a higher incidence of physical and psychological problems, task overload, economic distress and unresolved relationship problems (Hetherington and Kelly, 2003; Wallerstein, 1991). As a consequence, far from being able to help their children over this time, parents inadvertently add to their children's stress.

The multiple strains in the population of separating parents, along with the stress of protracted conflict and legal processes, compromises the emotional availability of parents. Epidemiological data about the mental health of the children embroiled in this level of conflict has lead researchers to establish this failure to navigate family change as a serious public health issue (McIntosh et al, 2004).

Examination will now be made of child inclusive practice specifically in Australia and the UK; more extensive research into other jurisdictions is beyond the scope of this paper but comparisons and contrasts are possible in the viewing of child inclusion in these two countries.

## **Issues for application of child inclusive practice in New Zealand**

Submissions to the Select Committee on the Family Court Matters Bill from Family Court professionals, whilst united in their professional aim to see an effective dispute resolution context in the New Zealand Family Court, are nonetheless at odds in some areas.

What is reflected in these areas of disagreement is a lack of familiarity with the discipline of child inclusive practice in dispute resolution.

The Specialist Report Writers Group (Northern Region) express concern over the lack of distinction between family based conciliation counselling ('with safety provided by the skills of the counsellor') and mediation ('attempts at resolving parental conflict about arrangement for children facilitated by a mediator').

Their submission goes on to highlight the importance of contextualising the child's views, which are often formed in a climate of conflict and concern. Parties who have failed to reach consensus despite earlier interventions may reach the mediation stage. "A child's presence in such a forum would not be in that child's interests" (submission of specialist writers).

The Family Law Society was adamant that they were opposed to mediators being able to decide whether children should be part of mediation.

The major concerns were that the mediator is not qualified to make a decision on whether a child should participate, and secondly, the child, if participating, should be legally represented and their views ascertained, which means lawyer for the child must participate. If the mediation occurs before [the] lawyer for the child is appointed it would create an impossible situation for the child. (The view of the Family Law Society that it would not be appropriate for a child to participate in this adult process without some form of resolution counselling to assist with obtaining their views has now been dealt with via s 46ZA of the COCA Amendment Act).

Whilst not expressing a view on child participation in mediation, his Honour, Judge Boshier, did indicate a clear wish for consultation on this major project. "I would hope that there's good consultation with the important players such as the Family Law Section and LEADR." This is echoed by the FLS also.

Maskell commented, “The courts, judges, and the Section work in tandem. We have a good working relationship, even when there are the inevitable differences” (New Zealand Lawyer 2007 pp2-3).

Meanwhile, the submission from AMINZ and LEADR NZ mention the involvement of children in their submission only in regard to their need to have access to counselling; it does not suggest the form of involvement that children might have in the process of mediation.

Their submission further suggests that “counselling” is a process where an individual client is assisted to consider their internal and emotional responses to the external world, with a view to improving their own emotional and psychological health, whilst ‘mediation’ is a process where parties are helped to identify issues between the parties, explore options, and try to agree outcomes.” Whilst this may be a very broad definition of the two disciplines in other contexts, *it is vital to understand that the emergence of child inclusive dispute resolution is an empirically proven practice which is neither counselling nor mediation.* Significant and powerful as a practice, this application cannot afford to be obfuscated by assumptions.

The Family Law Society (FLS) and judiciary have been unanimous in their joint support for counselling for children. Judge Boshier signalled the need for child counselling to be part of this Bill: “I think this is a golden opportunity... for the Bill to enhance child-inclusive processes. FLS Chair Paul Maskell expressed acute concern that counselling for children was not part of the Bill in its original draft. When interviewed, he stated, “Counselling for children is essential, and needs to be part of the Family Matters Bill. It just cannot be right that the most important people in a family breakdown, the children, are left right outside the process.... Children should be able to obtain both ‘therapeutic’ and ‘resolution’ counselling” (New Zealand Lawyer, 2007, pp2-3).

In their submissions, the Child Law section of the Law Society recommended there be “further investigation carried out on Jill Goldson’s model to ensure the appropriate legislative structure and guidelines are developed to allow children to participate directly in the resolution stage of cases”.

With regard to mediation, judiciary and FLS welcomed the extended use of mediation in the Family Court. The FLS felt strongly in their submission that there were benefits for both non-judge led mediation and judge led mediation to be available. They felt that judge led mediation would be appropriate where there had been counseling, non judge led mediation, and where it was not appropriate to hold non judge led mediation, or at any point prior to a hearing to offset the polarising effects of a defended hearing.”

The submissions uniformly suggest definitions of the amendments be written so that differentiation can be achieved and families are thus referred to the most appropriate part of the system at any given time. This will allow practitioners to be recognised for their different skills, experience, and training and pave way for accreditation procedures to be put in place for the various parts of the system.

## **A Way Forward**

The applications of the reforms in COCA which relate to child inclusive practice are now imminent.

The Ministry of Justice is asking for consultations from professionals in the field to work out the way forward.

In an interview with NZ Lawyer, Judge Boshier stated: “I think that we should have a very deliberate transparent approach to dispute resolution. We should be clear on what people’s options are and when they’re best deployed... I have always been an enormous fan for a better gate keeping exercise in the Family Court. My ideal Family Court is one that operates in having every single applicant in the Family Court screened in terms of what they’re actually saying, and what the best course or remedy for them might be. It’s a model that applies in the health sector and everywhere else, and so I think that by undergoing that we will end up with cases ending up in the right place. At the moment, it’s less exact than that” (NZ Lawyer, 2007, pp 2-3).

This rational approach acknowledges that it will not be appropriate for the same people to necessarily find resolve via the same processes; obviously some will find resolve at counselling under the family Proceedings Act, some with counselling following an application, some with non judge led mediation, some with judge led mediation, mediation conference, or a court hearing.

Of the utmost importance though, is that child inclusive practice is fully understood as distinct from a rights based practice as discussed earlier in this paper.

Although, regrettably, children still do not under law have access to the earlier counselling process with their parents, they do however, under S46T(3), have the right to resolution counselling and, under S45P(3), the right to therapeutic counselling when in “exceptional need of assistance in accepting the terms of an order” and under S46ZA, counselling for a child needing to clarify their views before mediation processes.

It is at these junctures that clarity is needed about what will actually take place in child inclusive counselling.

I have outlined the results of the child inclusive intervention I piloted in 2006.

Drawing on child development, family systems theory, attachment theory and counselling and mediation skills, it differs from other models for practice insofar as it actively involves the children with their parents in the same room.

It is an application for practice that continues to meet with overwhelmingly positive results; it is also an application, which requires skill and training.

I have recently been approached by a lawyer with grave concerns about a nine year old boy's alienation from his mother. A court order requires fortnightly weekends for this child with his mother. The child has been witness to intense parental acrimony and has made the painful choice to side with his father and to refuse any contact at all with his mother or her parents. One year ago this same child travelled to a theme park in Brisbane with his maternal grandparents and mother.

Asked to "help" this child to accept the order to spend alternate weekends with his mother, when he refuses to get out of the car, screams abuse at her when she tries to phone him, and ran away on the only occasion she has had him post order, one has to acknowledge is not a matter of "counselling" per se which will help this little boy. It is an application of child inclusive dispute resolution with a therapeutic goal for the whole family. Without this intervention this little boy has a very high chance of becoming mentally unwell with no way of resolving his perception of a double bind.

To try and engage a child in this level of pain by simply applying child counselling techniques is most unlikely to work, given his resolve to remain polarized, and encouraged by the unremitting parental conflict into which the entire extended family is now a part.

Unless a child is escaping a violent or abusive parent, a case such as this is one of parental alienation. This is a serious form of psycho social pathology most frequently identified in divorce.

Waiting for over nine months to be heard in court, this parental conflict has been intensified by the mother's anguish, rage, and powerlessness associated with the loss of her child. His toddler sister (in his mother's care) only ever sees her big brother when she has visits with her father. Thus the children are no longer having the joint experience of being mothered as siblings. This single dynamic on its own is a harbinger of disturbed attachment issues for both children.

Investigators and practitioners argue that the prolonged involvement of lawyers and courts contributes to the development of parental alienation syndrome as well as its protraction and severity (Cartwright 1993, Gardner 2001, King 2002). They claim that the adversarial solution is easily manipulated by the parent who has sole custody of the child, and a deadlock is often created with the custodial parent retaining sole control of the child.

My work with this case has been to intervene with the actively hostile parents, to hear their respective grievances, and to facilitate their ability to understand



the danger their child is in.

After this intervention, I was able to utilise their resultant commitment to bringing their child to a session. The child came, albeit reluctantly, with a relative, and on entering the room saw both parents sitting quietly together looking at photographs. By prior agreement with me, they took very little notice initially, apart from greeting him, and I was able to sit with the child and have him show me a map of Australia and where he had travelled. His mother then said she had some more photos of the theme park trip he hadn't seen and I suggested she take my place next to the child and show him the photos. Very quickly the child was immersed back in a world of happier memories and motioned his dad to come and look. For quite some time, the parents and child sat talking and remembering.

The session was kept quite short and the little boy agreed that it had been 'ok' and he would be willing to do it again.

With incremental increases, this little boy now is able to comply with the court order, his parents have learned to communicate about their children, and the conflict between them has decreased.

The results of this intervention have allowed this child to resume a part of his life with the mother he loved. This intervention could have been used earlier; nine months is a long time and has major implications for the healthy psychological development of the young child.

Qualitative retrospective studies of adults who experienced parental alienation as children demonstrated several areas of impact, including low self-esteem, depression, addiction, employment difficulties, divorce and alienation from their own children (Cartwright, 1993; Baker, 2006).

However, with the requisite skills and knowledge about this discipline, the results can work for families whose children are getting hurt. The child finds resolution in the family context and the culture is thus familial rather than "professional". For the child in my cited case, the sight of his parents sitting quietly and using terms like "we" and "mum and I" and "dad and I", was productive of a relief that counselling alone could not facilitate. The parental alliance allowed this boy to drop his exhausting attempt to manage the shattering impact of parental conflict, and to become a child with two parents once more.

Gardner (2001), in a study of 99 cases sees traditional 'therapy', per se, as of no value to the vast majority of alienating families, and sees the bonding of the child with the alienating parent as the powerful antidote.

This work is focused, intense and short term. Parental agreement increases, conflict reduces, the child's relationship with both parents improves, and he loses his child adverse symptoms. The child experiences successful conflict resolution, as do his parents. Follow up can be economically provided; the issues are known and the parents have had success demonstrated as a result

of their efforts. To be acknowledged as getting it “right” as parents, after such a maelstrom of anger and blame, does much to dampen down the desire to maintain the conflict. Further more, the positive experience of healthy resolution provides the likelihood that the parties will look again for negotiated resolution rather than court applications.

Researchers argue for a participatory partnership between legal professionals, mental health professionals, and the ultimate victims of parental alienation - the children themselves (Ward & Harvey, 1993, Kaltenborn & Lempp, 1998). A professionally constructed and carefully negotiated intervention is required to counter the impact of a seriously harmful syndrome (Johnston, 2003).

## **Applications of child inclusive practice**

This paper has examined the inclusion of the child’s views in New Zealand judicial processes (lawyer for child, interviews with a judge, and psychologists’ reports). Reflection has been made on the differences between a rights based role, and that of child inclusion as a practice to assist families to navigate separation transition.

The amendments to COCA have opened up the potential in mediation and counselling for a number of child inclusive models;

- In mediation at: Ss 46F (3) 46J(3) or 46R(2) the mediator may agree the child attends mediation.
- In counselling at: Ss 46T (3), S45P (3) and S46ZA

In mediation there are the following possibilities:

- Children could attend the final mediation session where the agreement is presented to them.
- Children could be interviewed away from their parents and their views reported to the parents in a mediation session either by the mediator or a third party, such as a child representative or child specialist.
- Children attend the mediation session and present their interests directly, either with the assistance with a support person or alone.
- Children attend parts of their parents’ session.

The **child inclusive counselling application**, on the other hand, is one which works to influence the psychology of family restructure and transition. This demands a case-by-case determination in terms of its format for the individual situation involved.

## **Training**

### ***Training in Australia and UK***

Practitioners (also known as mediators) in the Family Dispute Resolution Scheme must have a social science background such as psychology, social work, or family therapy, along with five to ten years of experience.

The requirements, called Regulation 83 requirements, are necessary for registration as a Family Dispute Resolution Practitioner (FDRP). In that role, the FDRP is to be able to issue Certificates demonstrating that parties have attempted mediation before applying to Court. These practitioners are required to have an appropriate degree/diploma or equivalent, or be admitted as a legal practitioner, have 10 hours of on site supervision by an experienced FDRP and a five day training course in family mediation or dispute resolution.

After June 31<sup>st</sup> 2009, the requirements are being increased to include (for those who met the earlier requirements in 2007), a 5-day intensive course on family law, domestic violence, and working with vulnerable clients, along with meeting a specific set of competencies.

For those entering the field, a Vocational Graduate Diploma in FDR is required.

To become qualified to practise child inclusive work as a child consultant, it is mandatory for the professional (FDRP or a counsellor) to attend a specific training, run by a professional approved in the discipline. The course is currently a minimum of four days.

Likewise, the practitioners in Child Responsive Practice (CRP) are social science graduates with between five and ten years of supervised practice experience and a training in child inclusive practice.

## **UK Training Requirements**

CAFCASS practitioners in the UK, known as Family Court Advisors (FCA), are all social work qualified and are almost exclusively recruited from local social services authorities. Typically the FCA's have between three and ten years post qualifying experience before joining CAFCASS. All receive induction training on joining. This is a five-day course covering all the roles they will be asked to act in that is in public law, private law and adoption work. This is a national programme with no variations.

Further to this, there are mandatory training programmes in domestic violence which every practitioner and administrator has to attend. Other national programmes include training on National Standards and dispute resolution casework.

From April 2008, each member of staff will have their own continuous professional development budget in which training or books can be purchased directly. On average, CAFCASS practitioners will receive between 10 and 15 days training per year.

In the Parent coordinator role in the USA, the professional is a clinician trained in advanced relational therapy with a systems perspective. It has been found (Gaulier, Margerum, Price, Windell, 2007) that this professional is typically sought out by legal professionals as someone who seems to be able to succeed with referrals of high conflict couples and is providing a service almost identical to that of court ordered parent coordinators. The court then starts to make formal appointments to this therapist, and thus a parent coordinator is born.

## ***Training issues for New Zealand***

Research about the inclusion of children in dispute resolution tends to offer a provocative sketch over the years; there is an apparent lack of a linear relationship between cultural values regarding children and the practice of including children in constructive dispute resolution.

Whether a child is interviewed independently, as in the Australian model, or with parents, adequate training is crucial. This requires knowledge of child development, attachment theory, systemic family dynamics, family law, a comprehensive knowledge of the effects of separation on children, and child interview skills.

Practitioners who are inexperienced, lacking in knowledge, or insensitive to the needs and ways of children can cause deep damage. *Practice standards need to reflect the complexity of the work.* Children caught in the middle of their parents' divorce are profoundly sensitive, and we can offer them only the very best practice if we are not to compound their struggle.

Our counselling practitioners need a core child inclusive training of at least 3 days, along with a tertiary qualification, a minimum of two years of supervised practice, and ongoing supervision.

Mediators, judges, and lawyers, all with different skills and experience, would benefit from a core understanding of this new discipline: we need various accreditation procedures to be put in place for the various parts of the system.

The cost of such an intervention is small and with appropriate training, practitioners will be able to practice within existing budgets. The more complex cases, which could take up more than the original 6 sessions under the Family Proceedings Act format, would still reduce costs currently associated with complex legal proceedings, legal aid for Lawyer for Child, and specialist reports.

The cost to our communities of unresolved conflict for children is incalculable.

The amendments, which have allowed this practice to come into law, albeit in a relatively limited way, represent a very significant reform. They also allow the development of a targeted training at a strategic time. It is predictable that this child inclusive work, with its outstanding results when practised professionally, will catalyse further reform.

It will behove us to have a functional system of training in place.

---

## Conclusion

New Zealand, in line with overseas jurisdictions, has enacted legal processes which signal responsiveness to a move away from adversarial processes in Family Court matters. There is little doubt that this is the arena into which family law dispute resolution is moving internationally.

Overwhelmingly positive research findings into child inclusive practice strongly suggest the means with which to substantially reduce the risk to children that is associated with their parents' separation.

As with reforms in other jurisdictions overseas, New Zealand is now ready to enact these significant amendments which allow the wider inclusion of children in dispute resolution in the context of their families.

The mandate of child inclusion, as an integral aspect of social justice, has fused with an urgent imperative to respond to the psychology of the rearranged family.

This fusion has produced a distinct discipline which now needs to be applied.

Professional practice in child inclusion is perceived by participants in numerous research studies to be both effective and just, and is now imminently accessible.

An understanding of the essence of the work, via carefully constructed training for its practitioners, along with informed dissemination, will ensure the safe promulgation of a legislation that is pivotal for the health and wellbeing of our communities.

## References

- Amato, P. (1994). 'Lifespan adjustment of children to their parents' divorce'. *Future Child*, 4: 143-164.
- AMINZ & LEADR 'Submission to the Social Services Select Committee on Family Court Matters Bill.'
- Baker, A. J. L. (2006). 'Patterns of parental alienation syndrome: a qualitative study of adults who were alienated from a parent as a child.' *American Journal of Family Therapy*, 34, 63-78.
- Boshier, P. (2008). Principal Family Court Judge of New Zealand. 'Lawyers have role enhancing Family Court efficiency' lecture sponsored by New Zealand Centre for Public Law, Accessed January 09 from [http://www.lawsociety.org.nz/publications\\_and\\_submissions/lawtalk/2008\\_articles/19\\_may/lawyers\\_have\\_role\\_in\\_enhancing\\_family\\_court](http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2008_articles/19_may/lawyers_have_role_in_enhancing_family_court)
- Boshier, P. (2006). Principal Family Court Judge of New Zealand 'A vision for the future: dispute resolution in the new era of child law' Speech given for Lexis Nexus Child Law Conference, Auckland. Accessed 3 February 2009 <http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=vision-for-future-dispute-resolution-child-law-may-2006.asp>
- Boshier, P. (2004). Principal Family Court Judge of New Zealand. 'The Family Court and the future' Speech given to University of Otago, Accessed February 09 from <http://www.justice.govt.nz/family/publications/speeches-papers/speach-otago-university-july-2004.asp>
- Boshier, P, "A review of the Family Court: a report for the Principal Family Court Judge" (Auckland 1993) para 1
- Buchanan, C.M., Maccoby, E.E., & Dornbush, S.M. (1991). 'Caught between parents: adolescent's experience in divorced homes'. *Child Development*, 62: 1008-1029.
- Cartright, G.F (1993). 'Expanding the parameters of parental alienation syndrome.' *American Journal of Family Therapy*, 21, 205-215.
- Cummings, E.M., & Davies, P. (2002). 'Effects of marital conflicts on children: recent advances and emerging themes in process oriented research'. *Journal of Child Psychology and Psychiatry*, 43(1): 31- 63.
- Emery, R. (2004). *The Truth About Children and Divorce*. Viking, New York.
- Freeman, M., Veerman, P (1992). *The Ideologies of Children's Rights*. Nijhoff, The Netherlands
- Gaulier, B., Margerum, J., Price, J., Windell, J., (2007). *Defusing the High-Conflict Divorce. A Treatment Guide For Working With Angry Couples*. Impact publishers, California.
- Goldson, J. (2006). 'Hello, I'm a voice, let me talk. Child-inclusive mediation in family separation.' Families Commission, innovative practice report No.1/06
- Goldson, J. (2008) Child inclusive practice in UK.Report for Winston Churchill Memorial Trust Department of Internal Affairs
- Gardner R, (2001). 'Should courts order PAS children to visit the alienated parent? A follow up study'. *American Journal of Forensic Psychology*, 19, (3), 61-106

- Greenwood, G (2005). 'Transforming parental conflict stories into one collaborative parenting story: the welfare interests and views of the child'. AMINZ presented at AMINZ Seminar, Wellington
- Henaghan, M. (2004). *Children and Lawyers Acting for Children in Legal Proceedings – What Does a Child's Right to Be Heard Really Mean?* Faculty of Law, University of Otago.
- Hetherington, E., & Kelly, J. (2003). *For Better or For Worse: Divorce Reconsidered*. Norton, New York.
- Irving, H., & Benjamin, M. (2002). *Therapeutic Family Mediation. Helping Families Resolve Conflict*. Sage Publications, California.
- Jensen, A., & McKee, L. (Eds.). (2003). *Children and the Changing Family. Between Transformation and Negotiation*. Routledge Falmer, London.
- Johnston, J (2003), 'Parental alignment and rejection: An empirical study of alienation in children of divorce.' *Journal of the American Academy of the Law and Psychiatry*, 31, 158-170
- Owusu-Bempah, K (2007). *Children and separation. Socio-genealogical connectedness perspective*. Routledge, Sussex.
- Katz, L. P., & Gottman, J.M. (1997). 'Buffering children from marital conflict and dissolution.' *Journal of Clinical Child Psychology*, 20, 434-438.
- Kaltenborn, K and Lempp R (1998). 'The welfare of children in custody disputes after parental separation or divorce.' *International Journal of Law, Policy and the Family*, 12, 74-106.
- King, M (2002). 'An antipoetic approach to parental alienation syndrome.' *Journal of Forensic Psychiatry*, 13, 609-635.
- Kazmierow, M. (2008). 'Family files – reforming family matters.' *NZ Lawyer Magazine*, Issue 99. LexisNexis.
- Kazmierow, M. (2007). 'Building the ideal Family Court.' *NZ Lawyer Magazine*, Issue 77. LexisNexis.
- King, V., & Heard, E. (1999). 'Nonresident father visitation, parental conflict, and mother's satisfaction: What's best for child well being?' *Journal of Marriage and the Family*, 61(2), 385-396.
- Kelly, J.B. (2000). 'Children's adjustment in conflicted marriage and divorce: A decade review of research.' *Journal of American Academy of Child and Adolescent Psychiatry*, 39: 963-983.
- Lamb, M., Sternberg, K., & Thompson, A. (1997). 'The effects of divorce and custody arrangements on children's behaviour, development and adjustment'. *Expert Evidence*, 5(3): September.
- Law Commission. (2003). 'Dispute resolution in the Family Court'. Report 82. Wellington.
- Long, N., & Forehand, R. (2002). *Making Divorce Easier on Your Child: Fifty Effective Ways To Help Your Child Adjust*. Contemporary Books, New York.
- McIntosh, J. (2007). 'Child inclusion as a principle and evidence-based practice; applications to family law services and related sectors.' *Australian Institute of family studies*, 1/07.
- McIntosh, J. (2005). 'Current findings on Australian children in post-separation disputes, outer conflict: inner discord'. *Journal of Family Studies*, 3, 1 April: 99-109.
- McIntosh, J. (2000). 'Child inclusive divorce mediation: report on a qualitative research study'. *Mediation Quarterly*, 18(1): 55-69.



- McIntosh, J.E Long, C.M & Moloney, L. (2004). 'Child-focused and child-inclusive mediation: a comparative study of outcomes'. *Journal of Family Studies*, 10(1): 87-96.
- McIntosh, J. & Moloney, L. (2002). 'Child-responsive practices in Australian family law: past problems and future directions'. *Journal of Family Studies*, 10/1.
- Mantle, G. & Critchley, A. (2004). 'Social work and child-centered Family Court mediation.' *The British Journal of Social Work*, 38(4), 1161-1172.
- Mantle, G., Moules, T., Johnson, K., Leslie, J., Parsons, S., & Shaffer, R. (2007) 'Whose wishes and feelings? Children's autonomy and parental influence in Family Court enquiries.' *British Journal of Social Work*, 37: 785-805.
- Moloney, L. (2005). 'Children's voices: reflections on the telling and the listening.' *Journal of Family Studies*, 11(2): 216-226.
- Owusu-Bempah, K., (2007). *Children and Separation: Socio-genealogical Connectedness Perspective*. Routledge, London and New York.
- Parkinson, P., Cashmore, J., & Single, J. (2005). 'Adolescents' views of parenting and financial arrangements after separation'. *Family Court Review*, 43(3): 429-444. Faculty of Law, University of Sydney.
- Potter, M. (2005). 'Voice of the child conference.' President of the Family Division. London.
- Pryor, J., & Rodgers, B. (2001). *Children in Changing Families: Life After Parental Separation*. Blackwell, Oxford.
- Rae, Y. (2006). Report into Child Inclusive Dispute Resolution. CAFCASS, Norfolk, UK.
- Robinson, M., Butler, I., Scanlan, L., Douglas, G., & Murch, M. (2003). 'Children's experience of their parents' divorce.' In A. Jensen, & L. McKee (2003), *Children and the Changing Family: Between Transformation and Negotiation*. Routledge Falmer, London.
- Saposnek, D. (1991). 'The voice of children in mediation: a cross-cultural perspective'. *Mediation Quarterly*, 8(4): 325-342.
- Smart, C., Neale, B., & Wade, A. (2001). *The Changing Experience of Childhood. Families and Divorce*. Polity, Cambridge.
- Smith, A., Gollop, M., & Taylor, N. (2000). 'Children's perspectives of their parents' separation'. *Child and Family Law Quarterly*, 12(4): 34-38.
- Smith, L. & Calvert, S. 'Submission on the Family Court Matters Bill.' on behalf of The Specialist Report Writers Group, Northern region, New Zealand.
- Taylor, N. Smith, A. and Tapp, P. (2001). 'Childhood and family law: the rights and views of children' Children's Issues Centre, Dunedin, 47.
- Trinder L., Beek M., Connolly J (2002). '*Children and parents experience of contact after divorce*'. Joseph Rowntree Foundation. UK.
- Wallerstein, J. (1991). 'Tailoring the intervention to the child in the separating and divorced family'. *Family and Conciliation Courts Review*, 29(4): 448-459.
- Ward. and Harvey, J (1993). "Family wars: the alienation of children". *New Hampshire Bar Journal*, (34)(1).

