waves
Waitakere Anti-Violence Essential Services
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Ministry of Justice

Submission on the Family Court Review, 2011–2012

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We wish to speak with the Ministry about our submission if that is possible

WAVES Trust is an interagency family violence network organisation. The membership is primarily government and non-government service providers who work in the area of family violence. There are also members who are not specifically family violence agencies but their work complements or supports efforts to reduce violence in Waitakere.

We are committed to strengthening the work of those who support and inform victims of family violence and those who hold offenders accountable and support them to make positive changes to their behaviour. WAVES acts to support and resource all member agencies to practice to the highest standards of integrity and professional ethics.

WAVES Trust provides**:**

- A networking forum to encourage and support statutory and community services to provide integrated and collaborative services to reduce family violence
- Links to other organisations through the interagency network
- Community advocacy and representation on initiatives that target family violence
- Information about best practice in family violence intervention and support for the implementation of best practice

- Primary prevention, capacity building and education opportunities for those working to reduce family violence
- Contract management of interagency projects and contracts
- Access to current, relevant research
- Monitoring of community initiatives such as the Waitakere Family Violence Court
- An overview of information deficits and initiation of local research

WAVES Trust is a charitable trust. Governance is vested in the Board chaired by trustee Waitakere Family Court Judge David Mather. There are 5 trustees including David Mather, Penny Hulse (Auckland Council Deputy Mayor), Chris Davidson (NZ Probation Service), Steven Kehoe (NZ Police) and Tiaria Fletcher (Lifewise Family Services).

There are currently four staff members – a Manager, two part-time Coordinators, and an Administrator, as well as one contracted part-time Project Leader.

Background

WAVES Trust has had a strong relationship with the Waitakere Family Court since the Trust's beginnings as a victim advocacy service in 1993. We have continued our good relationship with the court while the Trust's role in the community has evolved into the current provision of services and information to the network comprised of over 50 family violence service providers and related agencies in Waitakere. Our submission has been developed in consultation with representatives from the following agencies and sectors:

WAVES Family Violence Network
Waitakere Community Law Service
Family violence victim counsellors
Stopping violence programme providers
Family Court counsellors
Family Court lawyers
Auckland City Council Local Board members (Henderson/Massey and Waitakere Ranges)

Summary
We thank the Ministry for giving us the opportunity to contribute to this Review. Our submission is developed out of consultation with a wide range of family violence service providers in our network including those working directly with Family Court, such as counsellors and stopping violence programme providers who take referrals from the Court, and others whose clients use the Court's services such as refuge services, social workers, counsellors and therapists, health and disability services, child protection agencies, and family support workers. Therefore, we have limited our submission to addressing two key themes in relation to the Family Court:

1. The needs of children in whose parents make applications to the Court.
2. The needs of victims and their children, and perpetrators of family violence in proceedings related to the Domestic Violence Act and the Care of Children Act.

We have structured our submission in two parts. Firstly, providing direct answers to some of the questions or propositions made in the Review document. Secondly more detailed discussion of aspects of the Review process that have not been adequately covered in Section One.

We recognise the review document represents a substantial commitment on the part of the Ministry to address pressing issues related to the current economic climate. However, **we feel the need to challenge the Ministry to focus the next phases of its review on the people who use the courts and the legal obligations of the courts to those people, and not limit the focus to shearing costs.** In our submission we outline our concerns that the structure of this Review does not represent the movement of individual cases through the court and does not offer sufficient evidence or discussion on the impact of the proposed changes. The Review document offers up complex issues to a relatively uninformed public for comment, but any changes require consultation with stakeholders to ensure the best possible outcome for court users.

Our recommendations are as follows:

1. That the Ministry of Justice include in any outcomes from this Review a plan to investigate ways to reduce discrepancies in the treatment of victims between the Family Violence/Criminal jurisdiction of the District Court and the Family Court, and to enhance the safety of victims and children across both jurisdictions.

2. Government adopt a long term plan to synthesise legislation relation to family violence and align processes across government departments and ministries to ensure safety of victims and children.

3. That Section 9 and 10 counselling should always be available for couples with children and that investment in robust research is required to examine the benefits of or improvements needed for the counselling process to produce good outcomes for children.

4. The government should consider rethinking the adversarial model of the Family Court and look for evidence of other models that produce better outcomes for children.

5. The Ministry research the outcomes for children of the current models of practice used by lawyers and the use of specialist report writers to the Family Court.

6. Further research into models of Family Court processes that identify children from high-need families and examine how to produce good outcomes for their children.

7. The Ministry investigate implementation of Family Violence Courts at District Court venues across the country using the model adopted by the Waitakere Family Violence Court.

8. That the Ministry retain the hearing of protection order applications as a Family Court function.

9. The Ministry immediately fund the changes approved by the Family Court Matters legislation.

10. The Ministry pursue the development of child-inclusive mediation, prioritising safety for children and the use of specially trained child-focused personnel provided that attention to the needs of those affected by family violence is addressed.

11. The Ministry conduct research into the cost effectiveness of funding universally available early intervention processes such as counselling and mediation services and assess their impact on the numbers of expensive judicial determinations required.

12. The Ministry explore ways to inform parents of the benefits of discussing separation arrangements with their children and educate them on how to do this.

13. The Ministry only provide in-house lawyers for children who have extensive family law and child-focused experience and who meet rigorous training and qualification standards.

14. The Ministry align criminal and family proceedings so there is no inconsistency between jurisdictions and the safety of victims is properly considered in each court regardless of whether they have a protection order in place.

15. That any changes to the principles in Section 5 of the Care of Children Act in terms of 'delay', 'no order', and 'finality' only be considered in the light of their contribution to the Court's ability to hold paramount children's welfare and best interests.

16. The Ministry give serious consideration to adopting a collaborative law model for lawyers practicing in the Family Court and develop an accreditation framework of training, qualifications, and required standards to which lawyers would have to adhere in order to work within this model.

17. That the Ministry immediately bring together a working group of Family Court counsellors to explore how counselling could be transformed into a modern Alternative Dispute Resolution service.

18. That the Ministry conduct further research into the cost/benefits of counselling including examining the flow on costs to other sectors of government funding before any attempt to limit access to or impose funding constraints onto Family Court counselling.

19. That the Ministry not consider replacing counselling with PTS but incorporate both in a coordinated plan of action to support resolutions out of court.

20. That the Ministry investigate further the nature and benefits of alternative forums before proceeding.

21. That the Ministry approach the reallocation of roles and responsibilities within the existing Family Court processes as an overall system that provides support and incentive to parents to reach agreement at every stage, rather than simply throwing up barriers to force them out of the court system.

22. That the Ministry not consider imposing fees as way of reducing access to the court.

23. That the Family Court must continue to mandate and enforce protection order respondents' participation in stopping violence programmes.

24. The Ministry should support evaluation and evidence-based research to improve the opportunities for stopping violence programme attendees to change their behaviour.

25. The Ministry undertake a comprehensive review of the issues related to family violence affecting victims, their children, and perpetrators in the Family Court and not limit the discussion to those covered by protection orders.

26. That the Ministry go back to its review processes and put people at the centre of the discussion, ensuring that suggested changes promote better and safer services, observe the obligations placed on the Courts by legislation, and do not cause harm.

27. That the Ministry be guided by the original principles and structure of the Family Court and continue to support early dispute resolution services available free of charge through the Family Court.

SECTION ONE: QUESTIONS CONTAINED IN THE REVIEW DOCUMENT

A Court under Pressure

Question: Are these the main issues facing the Family Court? If not, what other issues should we look at? Do you have any evidence to support your views?

Stakeholders from the family violence sector are concerned that pressing issues relating to family violence are not specifically addressed in the review. They tell us that there is a strong need for reform to give family violence victims seamless transitions from the criminal jurisdiction of the District Court to the Family Court. This issue arises most often when Care of Children Act or Domestic Violence Act applications are made to the Family Court subsequent to or concurrent with family violence charges. In the criminal jurisdiction Government has recently introduced legislation granting victims greater protection and access to information during and after criminal proceedings. However, there is currently no direct mechanism through which the Family Court hearing protection order or parenting applications can be informed about family violence proceedings in the criminal jurisdiction. Recent legislative changes requiring the court address existing contact orders as part of the process of granting a protection order goes some way to addressing aspects of this problem. However, few family violence victims apply for protection orders, meaning that the change will not make a substantial difference for the majority who use the court.[1] We urge the Ministry to undertake a comprehensive review of Family Court processes in regard to family violence.

One option going forward is to develop a set of family violence best practice principles, such as has recently been recommended for the Family Court in Australia. These principles must emphasise that the court does not need to rely on evidence of abuse, such as pending charges or the existence of a protection order, in order to conduct court procedures with a focus on the safety of victims and their children and sets out principles for judges to follow when assessing the safety of children where family violence is alleged.[2] We also support the view that the Government should aim for greater synthesis of the various legislations relating to family violence and alignment of processes across government departments and ministries to ensure consistent focus on safety for victims and children within their engagement with a range of government agencies following the example set by the Australian Law Reform Commission.[3]

WE RECOMMEND: That the Ministry of Justice include in any outcomes from this review a plan to investigate ways to reduce discrepancies in the treatment of victims between the

[1] In Waitakere in 2009 147 final protection orders were issued but over 4,600 police callouts for family violence occurred. Statistics provided by NZ Police and Ministry of Justice, 2010.

[2] Family Court of Australia and the Federal Magistrates Court of Australia, 'Family violence best practice principles', Family Court of Australia, 2011, http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf (Accessed 16 February 2012).

[3] Australian Law Reform Commission, 'Family Violence and Commonwealth Laws — improving legal frameworks', ALRC Report 117 Summary, November 2011, http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_summary_whole_document.pdf (Accessed 16 February 2012).

Family Violence/Criminal jurisdiction of the District Court and the Family Court, and to enhance the safety of victims and children across both jurisdictions.

WE RECOMMEND: The Government adopt a long term plan to synthesise legislation relation to family violence and align processes across government departments and ministries to ensure safety of victims and children.

Question: Should the law continue to focus on reconciliation or should the duty on lawyers, counsellors and the Court be on conciliation only?
Family Court counsellors at our stakeholder meetings were concerned that the Review document asks the public to assess the value of counselling under sections 9, 10, or 19 of the Family Proceedings Act 1980, but does not provide sufficient information for this task. Section 9 referrals are for relationship counselling that might lead to reconciliation or separation depending on the wishes of the parties involved (note it would be highly unethical for a counsellor to impose a duty to reconcile on their clients). Section 10 referrals address day-to-day care and contact arrangements for children; it is presumed that formal or informal separation has already occurred or that a family relationship does not exist, and Section 19 is conducted at judicial discretion.

The counsellors were concerned that the Review does not explore the value of Section 9 counselling for children in terms of clarifying issues for couples having relationship difficulties and potentially easing conflicts within the relationship to allow its maintenance or to reduce post-separation conflicts. Nor does the Review discuss or propose to subject the counselling process to any robust research in terms of its value for child outcomes. So while counsellors agreed that the law should not impose a duty on them to promote reconciliation, they were adamant that this does not negate the value of Section 9 and 10 counselling.

WE RECOMMEND: That Section 9 and 10 counselling should always be available for couples with children and that investment in robust research is required to examine the benefits of or improvements needed for the counselling process to produce good outcomes for children.

Question: How can we better ensure that professionals working in the Family Court have adequate training? What changes are needed to the skills of people working in the Family Court?
Stakeholders with experience in supporting Family Court mediation and/or judicial determination felt that there is room for improvements in the training and skills of some personnel, in particular lawyer for the child and specialist report writers.

Stakeholders felt that lawyers appearing in the Family Court should be required to work in a collaborative model that prioritises the best outcome for the family as a whole rather than an adversarial model that seeks a winner/loser outcome. This is particularly relevant given that the legal team representing the family now includes lawyer for the child. Lawyers and other stakeholders suggested that a move towards family law specialist lawyers who are trained to emphasise the interests of children while working with their individual clients, and who work

towards outcomes that are durable and broadly accepted would provide enormous benefit to the court.

Specialist reports are another area which could be improved. Stakeholders argued that a shortage of court psychologists means that their reports take too long to prepare and may be based on too little contact with children. They felt that the court should have the discretion to appoint community-based report writers such as social workers and counsellors, particularly if they are already working with those children. This process would better suit children's needs for shorter timeframes and the Ministry's desire to reduce expenditure, whilst acknowledging that further research is required into the value or otherwise of reliance on psychologist reports and in what circumstances it would be better to use other personnel.

WE RECOMMEND: The government should consider rethinking the adversarial model of the Family Court and look for evidence of other models that produce better outcomes for children.

WE RECOMMEND: The Ministry research the outcomes for children of the current models of practice used by lawyers and the use of specialist report writers to the Family Court.

A Changing Family Court

Question: what do you consider are the most important social, economic and environmental changes that may affect the Family Court over the next five to ten years?

Concern about the wellbeing of children is uppermost in many peoples' minds these days. New Zealand has the opportunity to address the paucity of attention to the needs of children across the spectrum of government, social services, communities and families. For the Family Court, **identifying and improving processes to gain the best outcomes for children** is the most important factor for the next five to ten years.

This Review should consider the risk factors for children inherent in parenting disputes and examine the ways that the Family Court responds to these. According the analysis contained in the Review document Care of Children Act cases appearing before the court (i.e. those not disposed of through counselling) commonly exhibit complex factors such as parental mental illness and substance abuse; physical, sexual or psychological abuse; and domestic violence.[4] These factors indicate that these families are likely to have high- and complex-needs and their children will require substantially more support than their peers to thrive.[5] The worst case scenario is that the poor outcomes as a result of Family Court proceedings (or worse the denial of access to the Court) will bring these children back to the attention of the Court in the form of care and protection cases or via the youth justice system. The challenge for the Family Court is how to provide support to their families in way that produces good outcomes for the children concerned.

[4] Family Court Review, p. 23.

[5] There is substantial literature showing that parental mental illness, substance abuse, child and domestic abuse have profound impacts on adjustment and wellbeing outcomes for children. For a summary of the findings of recent literature see Joanne Richdale, 'Children and Family Violence: A Review of Recent Literature', Auckland, 2011, http://www.waves.org.nz/media/Children_and_FV_Lit_Review.pdf

WE RECOMMEND: Further research into models of Family Court processes that identify children from high-need families and examine how to produce good outcomes for their children.

Question: Should any change be made to the Family Court's current jurisdiction? If yes, in what way?
Stakeholders support the work of the Waitakere Family Violence Court and its relationship with the Community Victims' Service. We uphold the model used in Waitakere as an exemplar of how the criminal jurisdiction of the District Court should approach family violence cases across the country. However, stakeholders vehemently rejected the suggestion that all protection orders should be applied for in the District Court. The intention of the Family Court was to provide specialist judicial determinations that recognised the difference between family disputes and civil disputes. Hearing protection order applications in the District Court would remove that benefit and could potentially result in applications becoming bogged down in legal interpretations that do not promote timely responses to safety issues for victims and their children.[6]

WE RECOMMEND: The Ministry investigate implementation of Family Violence Courts at District Court venues across the country using the model adopted by the Waitakere Family Violence Court.

WE RECOMMEND: That the Ministry retain the hearing of protection order applications as a Family Court function.

Question: Should the Family Court be an open court, what would be the risks and benefits of such a proposal?
No. The Family Court deals with allegations made about parental behaviour that may compromise the wellbeing of their children if made public.

Focusing on Children
Question: What measures do you think could be used to manage and reduce conflict between parents following separation?
Stakeholders noted that the Parenting through Separation programme is considered very successful in supporting parents who take it. They felt that more effort should be put into promoting the programme to separating parents by encouraging referrals from multiple social service agencies. Others pointed out that changing the obligations on lawyers to promote conciliation in the welfare and best interests of children would also help bring children to the fore early in legal consultations relating to separation.

[6] A good example of legal interpretation overruling safety concerns is the demonstrated in the High Court ruling on the case of Surrey v. Surrey, which was later overturned by the Court of Appeal see Bill Atkin, 'Case Note: *Surrey v Surrey*', *New Zealand Family Law Journal*, 6, 7, 2009, p.219.

Question: How can we ensure that children can participate earlier in the decision-making process? What would you recommend as the crucial safeguards to make this happen?
Opportunities exist to include children in Family Court counselling. The barrier to this is the Ministry's refusal to fund the process.

WE RECOMMEND: The Ministry immediately fund the changes approved by the Family Court Matters legislation.

Question: Should participating in child-inclusive mediation be compulsory before an application is filed in Court?
Stakeholders were supportive of child-inclusive mediation provided that it was conducted in a child-friendly manner, prioritised the children's views, and put their needs and safety at the centre of the process. Stakeholders also felt that some changes may be necessary to the mediation process to ensure children's safety, such as limiting the role of lawyers or requiring specialist training for lawyers.

In terms of requiring parents to undergo such mediation before accessing court services, there are safety concerns with the blanket use of this approach. Problems could be mitigated by continuing to separate out families affected by violence. Another solution would be to explore incorporating some restorative justice approaches into mediation provided by specialist family violence mediators with rigorous assessment of the suitability of the family carried out first.

Question: To what extent should parents contribute to the costs of such a service?
The Ministry needs to provide research exploring how imposing costs on parents early in their disputes impacts outcomes down the line. Current research suggests that funding universal access to early intervention social services (which is what counselling and mediation provide in the legal context) substantially reduces the need for expensive urgent interventions later on (such as hearings before a judge).[7]

WE RECOMMMEND: The Ministry pursue the development of child-inclusive mediation, prioritising safety for children and the use of specially trained child-focused personnel provided that attention to the needs of those affected by family violence is addressed.

WE RECOMMEND: The Ministry conduct research into the cost effectiveness of funding universally available early intervention processes such as counselling and mediation services and their impact on the numbers of expensive judicial determinations required.

Question: Would an obligation in legislation for parents to consult with their children about care arrangements following parental separation be helpful?
Stakeholders generally agreed that parents should consult with their children and research shows that children adapt to difficult situations better when given the opportunity to voice their opinions and feel that they have been heard. The key issue that is unable to be

[7] Leah Bromfield, 'Minimising the Cumulative Harm for Vulnerable Children: Does the Green Paper reflect International Best Practice?', Australian Centre for Child Protection, Adelaide, 2011, p. 5.

addressed in legislation is not whether children are consulted but how they are consulted. Many parents do not have the skills (and some do not have the desire) to consult with their children in a way that is empowering. Stakeholders felt that it was more important to have a vehicle (like Family Court counselling) through which parents could be educated on how to discuss arrangements with their children and inform them of the benefits of such an approach to children's wellbeing.

WE RECOMMEND: The Ministry explore ways to inform parents of the benefits of discussing separation arrangements with their children and educate them on how to do this.

Question: What are your views on the provision of in-house lawyers for children?
In an ideal world, in-house lawyers for children would present an opportunity to build a workforce of **highly trained and skilled legal professionals with extensive experience working with children**. However, stakeholders were cynical that such a role would instead be an entry-level position for recent graduates who have little family law experience, no expertise working with children, who are poorly paid and are subject to high turnover, and will be of limited benefit to advancing the views of children in court.

WE RECOMMEND: The Ministry only provide in-house lawyers for children who have extensive family law and child-focused experience and who meet rigorous training and qualification standards.

Question: What are your views on using other professionals to obtain the views of children?
Stakeholders felt that social workers with experience working with children would in many cases be more suited to obtaining and reporting children's views than lawyers.

Question: What changes, if any, do you consider are necessary to clarify the welfare and best interests of the child principle in the Care of Children Act, for example, should principles such as the 'delay', 'no order', or 'finality' principle be introduced?
Stakeholders generally supported the view that the use of 'delay', 'no order' and 'finality' principles might place stronger emphasis on the needs of children in families where there are high levels of conflict between parents or where one parent is particularly litigious.
However, they were concerned that whilst such measures would limit the availability of court processes to parents these would not address the levels of parental conflict and division experienced by the children themselves, which would likely still take place albeit outside the purview of the Family Court.

Some stakeholders felt that if such principles were enacted there needed to be corresponding changes to the Care of Children Act to protect children from the adverse consequences when the litigation is no longer being available to their parents. These changes might include:

1. Imposing a duty on the Courts to direct parents to undertake some sort of education or conciliation process to conscientise them of the damage to children caused by such conflict. One suggestion is the development of a Parenting through Separation module for high-conflict/litigious parents.
2. Imposing a duty on parents' lawyers to include the interests of the children in their practice and advise their clients according to the children's interests.

Question: How else might more certainty be achieved in law when making care arrangements for children? What might be the risks and benefits of any of the proposals or suggestions you have made?

Equal shared time vs pre-separation arrangements: stakeholders did not support the proposal to presume equal shared time unless it reflected pre-separation arrangements and there were no safety concerns for the child and/or parent(s).[8] They preferred to see the Court encourage care arrangements that maintain as far as possible pre-separation caregiving contributions as this provides stability for children (provided that there are no safety concerns due to other factors like family violence).

Developmental evidence: Stakeholders felt that psychological, developmental and social evidence were valuable tools supporting the Court in assessing children's needs and best interests at various life stages, provided that individual circumstances of the child and family remain at the forefront of considerations. There is no place for a 'one-size-fits-all' approach to parenting orders. It is important for the Court to recognise the fundamental benefits for young children in achieving and maintaining secure attachment to a primary caregiver, particularly if one parent has played a greater role in caregiving than another in the past. Some stakeholders felt that where the Court is aware of high levels of conflict between parents, when non-primary caregivers apply for a more substantial role in young children's care than previously undertaken the Court should also seek out and give weight to information on parenting skills and capacity as well as assessing other risk factors for children's wellbeing such as parental mental health and substance abuse.

Domestic violence and protected persons: There is some support within the family violence sector for a system where protected persons whose orders also cover their children to have sole responsibility in deciding where children live. However, stakeholders point out that only a minority of family violence victims will obtain a protection order; for example in Waitakere in 2009 there were 4,639 police callouts for family violence compared to 147 final protection orders granted.[9] Crisis services tell us that for many high-risk victims the safety concerns are so serious that these act as a disincentive to making an application. So while the suggestion to extend greater parental rights to protected persons is laudable it will only support a small number of family violence victims and their children.

A better safeguard for family violence victims and their children would be to improve the interface between the Family Court and the Family Violence or criminal jurisdiction of the District Court and expand the role of community victim advocates in two ways: to extend their coverage across the District Court sites nationally and to allow victim advocates to speak on victims' behalf within the Family Court.

Relocation Orders: Stakeholders were supportive of the view that if there is 'good reason to relocate and the proposal is well planned and realistic' then there should be grounds to approve relocation. However, they also recognised that such a proposal gives undue weight to the needs of the relocating parent (as relocations are often driven by better job

[8] For discussion on some of the issues arising from a presumption of 50/50 shared care see Julia Tolmie, Vivienne Elizabeth, and Nicola Gavey, 'Is 50:50 Shared Care a Desirable Norm following Family Separation? Raising Questions about Current Family Law Practices in New Zealand', *NZ Universities Law Review*, June 2010.

[9] See note 1.

opportunities for parents) and would like to see the child's interests in having a relationship with the other parent considered as part of the concept of being 'well planned'. They did not agree with the proposal that where the parents have a high-conflict relationship that should be sufficient to deny an application to prevent relocation.

WE RECOMMEND: The Ministry align criminal and family proceedings so there is no inconsistency between jurisdictions and the safety of victims is properly considered in each court regardless of whether they have a protection order in place.

Comment on the wording of paragraph 113: There was some disquiet among some stakeholders about the wording of this paragraph, namely 'While an inflexible rule may not be in the children's best interests, providing greater clarity in the law will assist parents to resolve matters themselves'(p.34). We do not share this view. Sections 4 and 5 of the Care of Children Act require that determinations hold as paramount children's welfare and interests. Including the principles of 'delay', 'no order', and 'finality' in section 5 of the Act should not change the fundamental obligation to hold children's welfare and interests paramount. Rather these principles should expand the options available to the court to make certain that the children are the primary focus of its dealings with litigious parents. It is inappropriate to suggest, as seems to be reflected in paragraph 113, that the Court might use Section 5 to prevent litigation in cases where there are concerns about the welfare and interests of the children involved.

WE RECOMMEND: That any changes to the principles in Section 5 of the Care of Children Act in terms of 'delay', 'no order', and 'finality' only be considered in the light of their contribution to the Court's ability to hold paramount children's welfare and best interests.

Supporting Self-Resolution

Question: How can we improve the provision and delivery of information to those who need it, including children?

Better links with the social services sector and development of referral pathways would support this.

Question: Should attendance at PTS be compulsory before making an application to the Court? What might be the risks and benefits of such an approach?

Stakeholders generally approved of this option but felt that it required considerable commitment on the part of the Ministry to ensure that sufficient courses were available to ensure that parents did not have long waiting times or find that there is no course available in their area.

Question: Should PTS be provided more widely in the community?

Yes.

Question: Should parties be required to contribute to the cost of the PTS?

No.

Question: To better balance lawyers' professional responsibilities with the needs and interests of children, should lawyers who specialise in family law:

- *Be accredited? Should accreditation be voluntary or mandatory?*

Yes, lawyers should be required to comply with mandatory accreditation and meet training and qualifications standards to act as family lawyers.

- *Be obliged to work collaboratively in the interests of children rather than their clients?*

Yes, stakeholders were keen to voice concerns that the adversarial processes which are currently part of the Family Court's functions are obstructive and not conducive to children's welfare. They supported adoption of a 'collaborative model' in the New Zealand Family Court.

- *Be encouraged to assist their clients to resolve their issues without using the court system?*

This is a qualified yes. Many lawyers already advise their clients that the court will insist on them attending counselling. It would be helpful for many of their clients if lawyers were engaged with a range of service providers who could support out of court resolution. However, stakeholders were also mindful that lawyers do not screen clients to assess whether there are safety issues and were adamant that lawyers should not be required to act as gatekeepers to the court.

- *Be required to demonstrate that they tried to get the parties to reach an agreement as a pre-requisite to filing non-urgent applications in court?*

Yes, if conducted as part of a process of holding lawyers accountable to standards of practice that emphasises collaboration in the interests of children.

Question: What would be the impact of changing lawyers' professional responsibilities on the way lawyers practice, and on their clients?
Stakeholders felt that reducing as far as possible the worst excesses of the adversarial system (e.g. tactical adjournments) would better suit the needs of children for a faster and less acrimonious process. However reducing adversarial processes must involve addressing Court litigation processes as a whole, it is insufficient to simply impose new performance expectations on lawyers whilst the Court processes remain embedded within an adversarial litigation process.

Binding agreements: stakeholders were generally supportive of the Court certifying written agreements between parents drawn up by lawyers provided that lawyers are required to be accredited to undertake such work and meet minimum standards of training and qualifications, and children must continue to have their own legal representatives to ensure the focus of such agreements is on the wellbeing of the children.

WE RECOMMEND: The Ministry give serious consideration to adopting a collaborative law model for lawyers practicing in the Family Court and develop an accreditation framework of training, qualifications, and required standards to which lawyers would have to adhere in order to work within this model.

Focusing on Alternative Dispute Resolution Services

Stakeholders challenged some of the information in this section of the Review. Many felt that the counselling process has cost/benefits that were not sufficiently identified or discussed. They also argued that there is insufficient evidence presented in the Review document to determine whether there are problems with counselling that need to be resolved.

Question: if counselling is to remain, how could it be targeted, for example, to people with children and who cannot afford to pay for it?

Question: What role should counselling play in a broader ADR system ahead of Court?

Stakeholders want more in-depth research into the cost/benefits of counselling and research on the possible implications of any move to restrict families' access to it. Without this information stakeholders felt that such a question was prematurely advanced. They also argued that family court counselling fits the category of 'early self-resolution', which has a relatively short timeframe and is delivered at low cost to the Government, so asked why it was not framed as such in the Review document? Others noted that successful counselling is more likely to mean that couples resolve parenting and property disputes quickly, in ways that ensure their new lifestyles as separated individuals are sustainable, are focused on the needs of their children, and will likely flow on to reduce the burden on welfare and other government services. When children receive good support from non-resident parents this:

- Improves their health and wellbeing and reduces the likelihood that they will live in poverty and bring extra costs to the education, health, and legal sectors as a result.
- Gives greater stability and certainty of care arrangements increasing the likelihood that custodial parents will be able to enter or remain in the workforce.
- Reduces the likelihood that liable parents may attempt to hide income or refuse to pay child support, again reducing custodial parents' dependence on welfare benefits and also increasing the government's recoupment of benefit payments.
- Reduces the numbers of parents presenting to the courts already locked into high levels of conflict.

Many stakeholders pointed out that counselling is a major contributor to the 95% of disputes that are currently resolved without litigation.[10] They felt that this should be acknowledged in the Review as one of the successes of the Family Court system. Family Court counsellors at stakeholder meetings would like the opportunity to engage with the Ministry about how to improve counselling, clarify the issues around their role, and bring children into the process.[11] They were saddened that the Review document did not identify the value in exploring these ideas as part of its discussion on Alternative Disputes Resolution services.

WE RECOMMEND: That the Ministry immediately bring together a working group of Family Court counsellors to explore how counselling could be transformed into an Alternative Dispute Resolution service.

[10] Berry Zondag, 'Procedural Innovation in New Zealand Family Court: The Parenting Hearings Programme', PhD Thesis, University of Auckland, 2009, pp. iii, 38, n. 234.

[11] We note that Jill Goldson has promoted forms of counselling involving children which have been well received. See Jill Goldson, 'Hello, I'm a voice, let me talk: Child-inclusive Mediation in Family Separation', Auckland, 2006, http://www.nzfamilies.org.nz/sites/default/files/downloads/IP-hello-im-a-voice.pdf

WE RECOMMEND: That the Ministry conduct further research into the cost/benefits of counselling including examining the flow on costs to other sectors of government funding before any attempt to limit access to or impose funding constraints onto Family Court counselling.

Question: Is it appropriate to access counselling via the Court?
Yes. Ultimately relationship separation is a legal issue and the separation of assets and care and contact with children have safeguards embedded in legislation.

Question: Should counselling focus more clearly on conciliation?
Yes. Stakeholders agreed with the comments in the Review document that 'counselling' was not an adequate reflection of the processes undertaken within this practice. 'Conciliation' processes or even ADR better describe the practice of Family Court counselling.

Parenting through Separation: Some stakeholders felt that improving access and uptake of this programme might reduce the numbers of people who go on to counselling. However they did not support the suggestion in the Review document that 'a better investment [than counselling] for government may be to support the PTS programme'. They felt that PTS and counselling should be parts of an integrated approach to separation because counselling offers greater flexibility for some families than PTS's one-size-fits-all approach. There was some support for PTS to be used as the first port of call for families seeking help.

WE RECOMMEND: That the Ministry not consider replacing counselling with PTS but incorporate both in a coordinated plan of action to support resolutions out of court.

Question: Do you agree some form of ADR should be mandatory before an application can be filed in the Family Court in certain circumstances?
Yes, stakeholders viewed ADR as one component essential to allow the court to move towards less adversarial processes. They felt that the current counselling and PTS programmes must be acknowledged by the Ministry as components of an ADR system.

Question: Who would pay for the parties to attend ADR?
Question: What is the best way to ensure both parties engage in ADR?
Question: How could modes of ADR be developed that are responsive to the cultural needs of Maori, Pacific, and ethnic communities?
The Ministry should consult with the specific communities on their needs.

Possible structure for resolving disputes: Stakeholders were generally supportive of the structures outlined in the diagram on pages 43 and 44 of the Review document in particular where there is support provided by a coordinator role.

Question: Do you think a separate forum for resolving low level disputes would be useful? If yes, what types of matters should it deal with?
Recent research has suggested that restorative justice processes might be usefully employed for couples in relation to family violence, provided that robust processes around safety are

implemented.[12] Some stakeholders thought that aspects of restorative justice processes might be usefully integrated into parenting dispute forums but must be subject to robust safeguards to ensure that the process is only used when the victimised parent requests it and it must be able to address the violence and its effect on children. Greater alignment of the Family Court processes and District Court processes around care and protection of the children of victims and perpetrators would support this process.

In general stakeholders felt that the Review document gives insufficient information on alternative forums insufficient to assess their value over the existing counselling option. It seemed to many stakeholders that these forums are aimed at limiting the numbers of people accessing the court.[13] It is questionable how much better than counselling and PTS these alternative forums would be for resolving parenting disputes. Some were concerned that a move away from counselling to less accessible forums would simply make parental conflicts more entrenched and lead to greater numbers of applications to the court.

WE RECOMMEND: That the Ministry investigate further the nature and benefits of alternative forums before proceeding.

Entering the Court

Question: Do you have any views about limiting access to the Family Court? What might be the impacts associated with restricting access to the Court? What are the risks and benefits.

Stakeholders did not object to the notion that other interventions should occur to ensure that the Court only conducts hearings for those who cannot reach agreement any other way. However, they felt that the gatekeeping mechanisms must primarily exist to produce good outcomes for those who have the capacity to reach agreement rather than simply act as a barrier or disincentive. Some stakeholders pointed out that counselling already serves this function and thought that the Ministry should be paying more attention to modifying counselling to suit the needs of a reformed court.

WE RECOMMEND: That the Ministry approach the reallocation of roles and responsibilities within the existing Family Court processes as an overall system that provides support and incentive to parents to reach agreement at every stage, rather than simply throwing up barriers to force them out of the court system.

Australian approach: Stakeholders had no objection to the NZ Family Court adopting similar processes to the Australian Family Court with regard to care of children cases.

Question: Should all Family Court applications be screened to determine their appropriate pathway? What kind of skills and training should the person carrying out the screening have?

Yes. Stakeholders felt a screening and referral process should take place when people apply to the Family Court. Screening should be undertaken by staff with the relevant skills to

[12] Ann Hayden, 'Why Rock the Boat?: Non-Reporting of Intimate Partner Violence', PhD Thesis, Institute of Public Policy, AUT, 2010.
[13] Para. 164, p. 44.

identify safety concerns. They felt that qualifications for this role would be better suited to people with social science or social work backgrounds, but that an understanding of the legal systems would be an added advantage. Stakeholders thought that screening should be one facet of a broader interface with applicants that ensures access to information about ADR processes and referrals to relevant providers.

Question: Do the criteria for urgent (without notice) applications need to be made clearer? If yes, in what way?
Should lawyers be required to certify that all urgent applications are appropriate in the circumstances? If not, why not?
Should there be any penalties for making unmeritorious without notice applications? What might be the risks and benefits associated with imposing penalties?
Stakeholders were generally supportive of the view that lawyers should be held to account for efforts to circumvent legal processes to the benefit of their clients. However, they argued that any certification processes and corresponding penalties should be fair and reasonable on the one hand, and have 'teeth' on the other hand. One stakeholder suggested that accreditation rules to practice family law need to include a rule that to remain accredited lawyers must not exceed a certain number of penalties.

Question: Does the 'any evidence' rule in proceedings need to be clarified?
Should there be an obligation/time limit on the filing of direct evidence after hearsay evidence is used in support of an application?
Stakeholders expressed mixed views about these questions. Some wondered whether moving to a less adversarial court process which is inclusive of children's views would reduce the problems caused by the 'any evidence' rule. Others were concerned that removing the 'any evidence' rule was a fundamental challenge to the original intention of the Family Court, which was meant to accommodate the special nature of family disputes by allowing hearsay and uncorroborated evidence and other evidence which contributed to understanding the nature of the relationships under discussion. Ultimately, we were of the opinion that any such changes needed to be justified in terms of producing better outcomes and carefully monitored to ensure that their effect was not counterproductive.

Question: What are your views on a standard questionnaire form of affidavit and what information do you think it should include?
Stakeholders felt that standardised questionnaires were too limiting and did not allow for the provision of sufficient diversity of information to the Court. Standardised forms do not work well for Maori, Pasifika, and ethnic communities. There was qualified agreement to the idea of a **standardised form with additional space for non-standard evidence.**

Question: Should applications be focused on the issues to be determined and the outcomes sought? Should filing joint memoranda be mandatory?
Stakeholders had no objections to the introduction of Case Management Conferences.

Question: In what further circumstances should the Family Court impose application, setting down and hearing fees? What would be the impact of imposing such fees, and what might be the risks and benefits?
Stakeholders did not support the introduction of fees. They were concerned that many of the changes proposed in the Family Court Review would render support for separating families less accessible and leave many families foundering at the margins. Introducing fees has the potential to limit access to the Court to those eligible for legal aid (thereby increasing the burden to the State) and allowing the very wealthy to 'buy out'. Fees would fail to address the fundamental need as expressed in the Review document to encourage all families to seek early resolution.

WE RECOMMEND: That the Ministry not consider imposing fees as way of reducing access to the court.

Pathways and Processes in the Court
Stakeholders agreed that the pathways and process of the court are difficult to understand, unwieldy and need to be simplified and applicants need to have access to information about processes.

Question: If the Court is only dealing with serious cases should counselling or mediation be part of court processes?
Yes, counselling and mediation or relevant ADR processes should remain part of an integrated approach to addressing family separation and disputes. Marital separation, care of and contact with children, and property distribution are primarily legal issues albeit with a social component. If the Ministry were to cut out counselling and mediation and not provide clear and appropriate pathways for families to resolve their disputes there is potential for considerable harm and greater long term costs.

Question: Should lawyers appointed to assist the Court be used as mediators?
Stakeholders preferred to see the court move towards less adversarial processes and therefore thought that lawyers who act as mediators should be subject to the same measures as discussed earlier in this submission such as be accredited, be required to focus on the interests of children, and be subject to penalties for using adversarial tactics.

Question: How can we help people with complex social needs? Are proceedings in the Family Court the right response or should social agencies be involved?
We were concerned about the way that Ashleigh's case story was presented as a 'social' problem in the lead up to the above question. There are significant care and protection issues for Ashleigh presented by her parents' addictions and mental illness that cannot be minimised to the category of parental conflict. Ashleigh requires a legal response to ensure her safety. Although it is obvious that this family needs a great deal of social support the two sectors, social and legal, are not mutually exclusive. This family is a prime example of the need for greater coordination between the Family Court and the social services sector. The court can help minimise the number of legal interventions by making use of community advocates, providing information about community services and making referrals (as was discussed in

Mel Smith's report on 9 year old 'M' the court psychologist can make recommendations and referrals for counselling) and by supporting early intervention by social agencies.

Question: do you agree that a standard process for hearing Family Court proceedings should be introduced? Could all non-urgent cases be dealt with this way? Should the number of steps in any process be restricted?
Stakeholders agreed that simplifying and standardising court proceedings would be of benefit.

Question: Is there any merit in introducing penalties to reflect a party's or lawyer's behaviour during proceedings? If so what sanctions would be useful, and how could we ensure the sanctions are applied where appropriate?
Do you believe that breaches of orders should be subject to greater sanctions or penalties? If yes what type of sanctions or penalties would be appropriate?
Stakeholders were generally supportive of the Court having discretion to impose penalties and making greater use of sanctions to ensure compliance with Court orders.

Question: do you consider that the process to be followed in situations where there are allegations of physical and sexual abuse have been made in Care of Children Act matters needs to be amended? If so how? What would be the impact of your suggestions?
Stakeholders do not support the suggestion that allegations of violence should be proven before the court must address care and contact arrangements. They felt that section 60 reviews should always be undertaken as soon as practicable after allegations of violence are brought to the attention of the Court.

Stakeholders rejected the suggestion contained in paragraph 233 of the Review document that in some circumstances section 60 reviews of care and contact arrangements 'may not be an efficient use of court resources.'[14] The welfare and best interests of children are the paramount concerns under the Care of Children Act. Section 60 requires the court to have processes in place to examine the care and contact orders to ensure children's safety, and it is to these processes that parents might contribute useful information about existing arrangements and how successful/unsuccessful they are. It is up to the court to determine whether this evidence supports the view that contact arrangements are safe for the children. **The Act does not (and should never) allow the Court to pick and choose which children will be the beneficiaries of these processes on the basis of its own internal efficiencies.**

Question: How might specialist information for the Court be more targeted, focused and timely? What criteria could be used to decide whether to request a specialist report? Should a broader range of people provide information to the Court?
Stakeholders felt that the range of providers of specialist information should be expanded and that the court should look into using less expensive but no less valuable providers. Some felt that there are too few psychologists available to the courts and many argued that in their experience similar or better reports could be obtained from other specialists such as social workers and counsellors.

[14] para. 233, p. 60.

Question: Would there be any benefit to allowing some cases involving children in State or organisational care to be reviewed on the papers rather than by way of a court hearing. For children who are not in State or organisational care, should reviews of cases only be at the direction of the court rather than the norm?

Stakeholders were supportive of the Family Court's role in monitoring the progress of children in care. These children are already at high risk both because of their family history and because they are in care. We are concerned that a review on papers may not be sufficiently sensitive to identify care and protection issues and does not allow the Judge to ask questions that might elicit information of concern to the child's safety. Therefore children's best interests would be served by maintaining the status quo.

Question: What is your view on removing the mandatory requirement for respondents to attend stopping violence programmes and focus on the justice system on swift and effective enforcement of protection orders?

We interpreted this question as asking if it was okay to use monies currently allocated to respondents' stopping violence programmes to fund extra police and court activity to police breaches of protection orders. This proposal **astonished** many stakeholders in the family violence sector who vehemently opposed it for the following reasons:

1. The justice system has a duty to provide swift and effective enforcement of protection orders regardless of cost.
2. Family violence perpetrators have a high recidivism rate because family violence is characterised by a pattern of abusive behaviours and those whose violence is most entrenched (i.e. offenders referred by probation services) have the highest rate of reoffending. Early intervention through delivery of programmes to respondents of protection orders will be more effective than waiting until they are arrested for breaching those orders, which infers that they have perpetrated further physical, sexual, or psychological harm to applicants and their children.
3. Claims that stopping violence programmes are not effective ignore the importance of the wider context in which they delivered.

Expanding on points 2. and 3. above, many researchers argue there is a need to evaluate the effectiveness of wider intervention systems supporting stopping violence programmes as well as programmes themselves.[15] This position is supported by the World Health Organisation, which states 'that any intervention … is most effective in reducing recidivism when it is part of a coordinated community and criminal justice system response that monitors perpetrator compliance with terms of probation and batterer intervention programme attendance.'[16] WHO also recommend that a coordinated response should include 'civil remedies and system-wide responses to domestic violence',[17] supporting the view that respondents to protection orders should be included in responses to perpetrators/batterers.

[15] See discussion of programme evaluations in Anna Walters, 'Questioning Accountability: A Statistical Description of Programme Effectiveness as an Intervention through the Waitakere Family Violence Court', BHlthSc(Hons) Thesis, Massey University, 2010, pp.17–22, quote from p.21.
[16] World Health Organization, *Policy Approaches to Engaging Men and Boys in Achieving Gender Equality and Health Equality*, Geneva, 2010, p.26.
[17] WHO.

It is important to note that family violence is a defined by the Domestic Violence Act as a pattern of behaviours including physical sexual and emotional/psychological violence, meaning that recidivism is the norm not the exception. Programmes aim to reduce the likelihood of recidivism but its existence should not be read as evidence of programme ineffectiveness. New Zealand research suggests that mandating programme attendance or completion may be an important component in reducing recidivism: for example 52% of participants who completed Man Alive programmes did not reoffend during or after the programme compared to 45% of those who did not complete.[18] Furthermore, analysis of recidivism by referral pathway suggests that early intervention with mandated referral and enforced participation may be more effective than referrals through the Probation Service.[19]

WE RECOMMEND: That the Family Court must continue to mandate and enforce protection order respondents' participation in stopping violence programmes.

WE RECOMMEND: The Ministry should support evaluation and evidence-based research to improve the opportunities for programme attendees to change their behaviour.

Question: Should government investment be refocused on supporting families including providing protection order applicants and respondents with access to social services?
Stakeholders support the current use of the Community Victims' Service at the Waitakere Family Violence Court and uphold this as a model of how the courts can benefit from closer relationships with social services. We would like to see an extension of this service into the Family Court nationally to provide specialist support to victims/applicants, perpetrators/respondents and their children at hearings related to the care of children. As discussed earlier in this submission, focusing solely on protection order applicants will not sufficiently reach the range of people affected by family violence.

WE RECOMMEND: The Ministry undertake a comprehensive review of the issues related to family violence affecting victims, their children, and perpetrators in the Family Court and not limit the discussion to those covered by protection orders.

[18] Walters, p.56.
[19] Walters, pp.70–1.

SECTION TWO: DISCUSSION

Introduction

This section of our submission addresses aspects of the Review that concern the family violence sector but have not been adequately covered in our answers in Section One. Here we wish to convey our concerns about the structure of the Review as presented in the documentation and highlight on-going issues affecting the Family Court that need attention.

Too much emphasis on the 'problem' of cost not enough on people or the law

We were disappointed to find that the Review document is primarily structured to identify areas of expanding cost and pays too little attention to the implications of proposed changes on families or the Court's observance of its duties under the law. Instead much of what we read in the Review implies that it is simply aimed at reframing expensive aspects of the court system into non-essential services or impediments to early self-resolution.

The Review document presents aspects of court processes in terms of their cost trends giving evidence that these are 'unsustainable' but offering little or no discussion as to whether this growth is likely to continue or abate with the easing of the current economic crisis. There is no discussion weighing up the benefits to court users of the processes targeted in the Review document or exploration of the potential impact of proposed changes on families and children. Using cost as the identifier of problems within the Family Court system obscures the important role that some functions play in promoting early self-resolution. For example, the discussion about the costs of universal free counselling is situated in the same chapter as suggestions that ADR processes might be necessary to support early self-resolution. As stakeholders point out: counselling is an ADR process but within the Review it is more often than not discussed as if ADR is fundamentally different.[20] Reading between the lines our interpretation is that the Ministry proposes to remove the public's right to universal and free access to counselling and replace it with targeted, user-pays access to some other form of ADR service, the form and processes of which have yet to be specified. **We disagree with proposals to remove access to counselling and replace it with limited access to ADR processes on the basis that this will leave many families without easily accessible support.**

Too many areas of the Review fail to address the harms that might follow from the proposed changes, or deny or minimise the Court's obligations under legislation. Consider the example given of no longer mandating protection order respondents' attendance at stopping violence programmes. Is the Ministry really so callous as to suggest that it is okay to shelve legitimate, internationally recognised responses to allegations of family violence and wait for further harm to be inflicted before the Court should become involved? **Family violence service providers are astounded and appalled by the suggestion in the Review document that the legal system need only bother following up respondents when they have re-victimised their families by breaching the order**.

[20] pp. 40–4.

In other areas the circumstances around applications to the Court are presented as social issues not legal ones. We remind the Ministry of our earlier criticism of the presentation Ashleigh's case story, which clearly presents substantial care and protection issues. Arguably those issues had a social and medical origin, but that does not absolve the Court from its legal duty to ensure Ashleigh's living arrangements are safe and in her interests.

Worryingly, we also read in the Review the occasional suggestion that limiting Court costs is more important to the Ministry than observing the Court's obligations in legislation. Our discussion on paragraphs 113 and 233 earlier in this submission explores this issue in relation to the Review questions. But we must add that **many stakeholders were shocked that the Ministry of Justice appears to be advocating the Family Court should be selective in observing the paramountcy principle under the Care of Children Act.** Our network members often work with children who are profoundly affected by living with high levels of conflict between their parents. These children are more likely than their peers to be failing at school, abusing drugs and alcohol as teens, and coming to the attention of the youth justice system.[21] Therefore they are most in need of a supportive Family Court.

Ultimately, any changes to the Family Court system must have the primary goal of offering a safer and better service to families.

WE RECOMMEND: That the Ministry go back to its review processes and put people at the centre of the discussion, ensuring that suggested changes promote better and safer services, observe the obligations placed on the Courts by legislation, and do not cause harm.

Understanding the existing processes

Because the Review document did not discuss the implications of many of its proposals, we reviewed the history of the Family Court. The New Zealand Family Court was created out of the jurisdiction of the District Court in 1981, founded on the understanding that '[p]arties to a family dispute should determine their own dispute [resolution] if at all possible' and 'an ordinary Court hearing is only available to the parties to most family disputes when all other approaches have been exhausted.'[22] By 1988 the Court was recognised 'an informal but effective mechanism for resolving family conflict' receiving wide support from lawyers and judges.[23] It functioned on a three-stage process:

1. Counselling, provided to users free of charge by the Marriage Guidance Council on contract to the Ministry of Justice, and if unsuccessful then
2. Mediation conference, a confidential conference chaired by a Family Court Judge aimed at making orders by consent, and if unsuccessful then
3. Litigation within a less formal environment but still observing the rules of evidence.[24]

[21] Richdale, p. 1-2.
[22] S.R. Cartwright, 'The New Zealand Family Court – An Overview', *Conciliation Courts Review*, 25, 1, 1987, 29–35; Bill Atkin, 'New Zealand: The Family Court – Ten Years' Experience', *University of Louisville Journal of Family Law*, 31, 2, 1993, 397–410.
[23] William Atkin, 'New Zealand: An Expanding Role for the Family Court', *Journal of Family Law*, 26, 1, 1988, 149.
[24] Cartwright, 32–3.

The Family Court processes are generally considered successful at meeting its objective of promoting family conciliation over litigation.[25] Recent research confirms that 95% of applications received at the Family Court relating to parenting disputes are resolved without litigation and only 5-6% of applications require judicial determination.[26] Essentially the **model we have today is still grounded on the principles that guided the development of the original Family Court and meets the original intention that Family Court counselling is part of the process of 'early self-resolution' of parenting disputes**. Many stakeholders were concerned that the Review unfairly undermines that view of the counselling process and seeks to 'remake the wheel' through the adoption of new ADR processes without exploring whether counselling has the potential to be transformed into a more suitable model.

It is the view of many of the stakeholders we consulted that aspects of the Family Court could function better and that some of the cost of Care of Children Act cases may be able to be shorn without adverse outcomes for children. But they supported the three-stage process of the Family Court as sound and effective, and worth developing further to produce better outcomes.

WE RECOMMEND: That the Ministry be guided by the original principles and structure of the Family Court and continue to support early dispute resolution services available free of charge through the Family Court.

Family Violence

There is insufficient discussion in the Review document about how court processes could be improved for those families affected by family violence. Stakeholders would like to see more emphasis within the Review on addressing the longstanding issues around family violence such as the safety of victims and their children. Stakeholders also point to a worrying trend within the Review document discussing responses to family violence in a very limited way that only applies to protection order applicants. This section discusses these two concerns together.

There are longstanding concerns within community social services that the Family Court is insufficiently resourced to maintain focus on safety for family violence victims and their children. Within the Family Violence or District Court victims can be supported by the Community Victims' Service or other advocacy services and are now entitled to a number of considerations aimed at preserving their safety. However, they are not afforded these protections in the Family Court, even if both jurisdictions are examining issues related to the same violent event. We propose two measures to address this issue:

1. the introduction to the Family Court of a set of best practice principles in relation to family violence.
2. the expansion of the role of community advocates in supporting victims, children, and perpetrators in the Family Court.

[25] Cartwright, 35.
[26] Zondag, pp. iii, 38, n. 234.

Best Practice Principles

The Family and Federal Magistrates Courts of Australia have recently published Family Violence Best Practice Principles for use by the judiciary, court staff, and stakeholders in cases where family violence is alleged or proven. Key features of these principles are the emphasis on ensuring consistency of process across different court jurisdictions and commitment to the definition of family violence contained in the Family Law Act, 1975 (the equivalent of our Domestic Violence Act).[27]

In our view the need for a set of best practice principles for family cases is reinforced by the worrying trend within the Review document limiting responses to family violence to victims holding protection orders.[28] As has already been discussed elsewhere, only a minority of victims obtain protection orders and in some cases the risk of violence is so extreme that this acts as a disincentive to making an application to the court. So the lack of a protection order cannot be read as a lack of family violence. The Australian principles address this issue by ensuring that:

> *The victims of family violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted* [by the Family Court].[29]

In New Zealand, a set of Family Violence Best Practice Principles would help to avoid problems associated with differing interpretations of the law between judges within jurisdictions and across jurisdictions. It is unfair to rely on case law to clarify the meaning and intention of legislation in relation to family violence as its generation is far too slow and expensive to be a realistic option for most applicants and their children. For example, the Court of Appeal decision *Surrey v Surrey* (2009), which overturned a successful appeal to the High Court by a protection order respondent meant that the applicant and her children waited nearly two years to have a final protection order granted.[30]

Community Advocates

Existing information of relevance to the Family Court is currently not easily transferred there from the Family Violence or District Courts. As has been suggested earlier in this submission extension of community advocacy services into the Family Court would allow information about family violence interventions to flow more freely into the Court and also across jurisdictions from the Family Violence/District Court — particularly if the Community Victims' Service was extended across the country.

[27] 'Family Violence Best Practice Principles', p.5.
[28] See for example Family Court Review pp. 34, 64.
[29] 'Family Violence Best Practice Principles', p.5.
[30] Bill Atkin, 'Case Note: *Surrey v Surrey*', *New Zealand Family Law Journal*, 6, 7, 2009, p.219.

Solving the problem of litigious parents

The question remains, will this Review solve the problem of litigious parents?

Litigious parents' too free access to the court is frequently mobilised in the Review and in the media as the driver of the Review. Research shows that litigious parents exist within only a small proportion of all parenting disputes presenting to court: some 5-10% of applications contain identified 'levels of conflict that hinder conciliatory resolution'.[31] At stakeholder meetings this problem was well canvassed, because family violence perpetrators are often highly litigious and are known to take advantage of adversarial court processes to continue to victimise their families.[32] That fact is reflected in the statistics presented in the Review document stating that 51% of Care of Children Act cases sampled were also the subject of family violence proceedings.

In stakeholders' minds reducing public access to the Family Court by targeting services and charging fees is insufficient to address the problem of litigious parents and will do little to change access to the courts by those eligible for legal aid or with substantial means. Stakeholders preferred to see investment in identifying what factors in the existing court system that promote litigious parents' use of the court (we suspect the adversarial system is a primary driver) and develop alternative systems that promote the safety and wellbeing of children and family violence victims, and which reduce the disjuncture between perpetrators' experience of the criminal courts and the family court in terms of recognising the impact of abuse and holding them accountable.

[31] Zondag, p. 57.

[32] See for example Lundy Bancroft, 'Understanding the Batterer in Custody and Visitation Disputes', http://www.lundybancroft.com/?page_id=279