Reviewing the Family Court

A public consultation paper

20 SEPTEMBER 2011

New Zealand Government

MINISTRY OF JUSTICE
Tāhū o te Ture

FOREWORD

The Family Court deals with families and children at highly stressful and sometimes risky times in their lives. It is vital that the Court operates effectively so that all involved can safely and securely move on with their lives.

The Court's workload has remained relatively stable over the past five years. However, overall costs have increased and there is little evidence of better outcomes including improvement in the time required to progress cases.

The escalating costs, for no apparent improvement in outcomes, indicate that the Family Court is not as efficient as it could be. It is timely to review the Family Court to ensure it is able to respond effectively and efficiently to the people who need to use its services.

The research is clear about the negative impact that persistent conflict has on children and we know that litigation can be damaging for families. We need to bring about a culture change so that separating parents are supported to resolve their parenting matters at the earliest opportunity and preferably without recourse to the Court.

The Family Court is run by dedicated, hard working judges and practitioners. In my engagement with them, I have been impressed with their ability to look beyond their role and think about how the whole system could work better.

I encourage everyone with an interest in the Family Court to contribute to this Review. We will all benefit from a Family Court that is more efficient and delivers better outcomes for children and families.

Hon Simon Power
Minister of Justice

September 2011

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1. AIMS OF THE REVIEW

The purpose of the Review is to ensure the Family Court is sustainable, efficient, cost effective and responsive to those children and vulnerable adults who need access to its services.

1. The Family Court plays an important role in New Zealand society, especially in protecting the interests of children and vulnerable adults.[1] The State has a responsibility to ensure that children, victims of family violence, and people who are unable to manage their own affairs due to incapacity, mental illness or disability have access to the necessary legal mechanisms to protect their welfare and safety.

2. However, the Family Court is facing a number of issues that compromise its ongoing sustainability and effectiveness, and reform is necessary. The issues include:

    - increasing expenditure on Family Court services[2] with no corresponding improvement in the time taken to resolve cases
    - clarifying the appropriate role of the State in family disputes
    - insufficient support for people to resolve matters out of court
    - complex and uncertain court processes and multiple pathways creating confusion for court users and limited incentives to resolve matters quickly
    - parties and court processes losing sight of the needs of children
    - questions about what kind of cases the Family Court should deal with and the best way to resolve disputes, for example, whether including counselling and mediation in a legal forum is helpful
    - limited responsiveness to the cultural needs of Māori, Pacific and ethnic communities
    - confusion about the roles and responsibilities of the different professionals working in the Family Court.

3. To address these issues the Government has directed the Ministry of Justice (the Ministry) to undertake a review of the Family Court (the Review). The terms of reference for the Review are set out in Appendix 1. The Review must identify changes that will reduce ongoing fiscal pressures and improve efficiency.

Care of Children Act cases are a significant driver of Family Court costs and activity. These costs must be reduced in a way that does not compromise a child-centred approach to reform.

4. Private parenting disputes make up the majority of the Family Court's workload.[3] In order to reduce the overall cost of the Court, the Review will propose specific measures to reduce the cost of these cases. However, many cases under the Care of Children Act 2004 (Care of Children Act) are associated with family violence, mental health, and alcohol and drug issues. These situations are highly risky for children. The Review must consider how to progress these cases more efficiently, manage costs, and improve outcomes for children.

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[1] 'Vulnerable adults' includes, but is not limited to, persons who fall within the ambit of the Protection of Personal and Property Rights Act 1988, the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and the Domestic Violence Act 1995.

[2] Includes, but is not limited to, counselling, lawyer for the child, provision of specialist reports, counsel to assist the court and domestic violence programmes.

[3] Even when requests for counselling under s9 of the Family Proceedings Act 1980 are excluded.

The Review is not an opportunity to simply add more layers or initiatives to the current system; rather, it asks what the core components for an effective system are.

5. The purpose of this Review is to go back to first principles and to look across the whole system in order to reconsider what is the best configuration of services we need to ensure the efficiency and effectiveness of the Family Court. We note that there are some provisions in the Care of Children Act and the Family Proceedings Act 1980 (Family Proceedings Act) that are not yet in force. These provisions relate to the introduction of counselling for children, family mediation, and a new position of Senior Family Court Registrars. These provisions are not specifically considered in this paper. Until the Review has been completed and it is clear what the core components of a new system need to be, decisions will not be made about which, if any, of these provisions should be either brought into force or repealed (see Appendix 2).

1.1 Principles guiding the review

6. This paper represents the first stage in the Review process and provides a high level overview of the key issues facing the court. The paper does not present preliminary proposals but seeks your views on the issues facing the Court and how they might be addressed. Any policy proposals considered by Government will be subject to a regulatory impact analysis. Any policy proposals will also be assessed against the following principles, that is, the proposal should:

    - provide the necessary legislative and/or operational processes to deal efficiently with family law disputes, including complex and diverse cases
    - provide a proportionate resolution of the dispute
    - ensure vulnerable adults and children are protected, and have easy access to the Family Court
    - provide for children's voices and promote their best interests
    - encourage parents to take greater responsibility for reducing the negative impact their conflict is having on their children
    - where appropriate, ensure parties can resolve their dispute outside of court, and/or to settle at the earliest opportunity
    - ensure court proceedings are understandable, simple, transparent and timely
    - be a cost-effective use of public resources
    - be informed by evidence about what works, where this is available.

7. Any final policy proposals must also be:

    - consistent with the Treaty of Waitangi and our international obligations, especially the United Nations Convention on the Rights of the Child
    - culturally responsive to the needs of Māori, Pacific and ethnic communities.

1.2 Developing this paper

8. In developing this paper, the Ministry has brought together the work of previous reviews, administrative data, evidence about the operation of the current system, data gathered from a sample of court files, and relevant national and international experiences to inform our understanding of the issues facing the Family Court. Several case summaries, based on actual cases but with names changed to protect the interests of those involved, have also been included to illustrate these issues.

9. The Ministry has also undertaken targeted, preliminary consultation with a range of stakeholders (refer Appendix 3). This initial consultation has identified a number of issues and suggestions for reform that are reflected in this paper. We know that there will be other views and we seek your ideas on how to improve the operation of the Family Court. A number of questions are asked throughout this paper. You do not need to answer them all – please choose those you wish to respond to. (Chapter 10 outlines how you can make a submission to the Review.)

1.3 Related work

10. There are a number of related policies and areas of work that are not the direct focus for this consultation paper but interact with it. In particular, the work on legal aid sustainability and the review of civil fees will impact on the Review. All policy proposals arising out of the Review will need to be assessed alongside proposed changes to legal aid and civil fees to ensure they are aligned. More information about both these areas of work can be found in Appendix 2.

Legal aid sustainability

11. Ongoing work is underway to address cost pressures in legal aid, primarily in family legal aid. The recently introduced Legal Assistance (Sustainability) Amendment Bill proposes changes to family legal aid eligibility, such as the merits test and special circumstances considerations. Existing provisions enabling the Court to require parties to contribute to the cost of lawyer for the child are also being strengthened.

Civil fees review

12. Government has recently agreed to a first principles review of civil fees to establish a consistent and equitable approach to fee setting across courts. Family Court fees will be considered in parallel as part of the Family Court Review.

13. Given the current fiscal situation, a decision concerning fees for some Family Court applications may need to be made before the Review process is complete. However, as the Review is undertaking a broad consideration of fees we welcome your comments on further changes to fees.

1.4 Out of scope

14. There are other areas of work which also interrelate with the Review. These are also described in more detail in Appendix 2, and include the:

- Child and Family Protection Legislation
- Domestic Violence Reform Bill
- Family Court Matters Legislation
- Review of Child Support
- Children's Action Plan
- Review of Trust Law.

15. The scope of the Review does not specifically include examination of individual family law Acts and the policy rationale that underpins them. However, some amendments to family law Acts may arise as a result of this Review.

16. Implementation and operational issues, as well as how to monitor or evaluate any new measures will be addressed once policy proposals are developed.

2. A COURT UNDER PRESSURE

The Family Court is facing significant challenges to its ongoing sustainability. This Review must examine current expenditure and determine where money is best invested in the system.

17. Since 2004/05, costs in the Family Court have increased by 63 percent[4] and judicial costs by 49 percent.[5] This growth cannot be sustained. In addition the overall time taken to progress certain applications is too long. For example applications for parenting orders take close to a year,[6] on average, to complete, and division of relationship property cases take just under 16 months.[7] Children need certainty and stability and this length of time to conclude an application is unacceptable.

18. Our analysis to date has not indicated that there are systemic failings in the way the Family Court manages its protective functions.[8] Stakeholder suggestions focused on how to improve existing systems and processes to ensure these cases can be finalised more efficiently.

19. In contrast, considerable change is required to effectively manage private law disputes such as parenting and relationship property cases coming before the Court. It is clear that a culture shift will be needed to support a different approach to resolving these disputes. The following case summary highlights why change is necessary.

> **Case summary: Ben**
>
> Ben's parents separated in 2002 when he was six years old.
>
> Their separation was not amicable and applications for custody and access (now called day-to-day care and contact) were made to the Family Court. To complicate matters, Ben's father moved to another city. A number of interim and final orders were made by the Court, but Ben's parents continued to disagree about contact arrangements. After making yet another final order, the Family Court directed that no further applications were to be made without the leave of the Court. Despite this direction, further applications were made.
>
> Litigation concerning contact arrangements for Ben continued over a period of eight years during which time there were numerous requests for specialist reports and ongoing involvement of lawyer for the child. One specialist expressed concern that, unless Ben's parents resolved matters, the impact of the continuing litigation on his life would be significant. It would negatively affect the way he viewed any close relationships and the way he parented his own children.
>
> Ben's parents finally reached an agreement about contact arrangements when Ben was 14 years old.

20. We now outline the main issues facing the Court that are considered throughout this paper.

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[4] Direct operational costs, professional services, and legal aid.

[5] Judicial costs include judges' salaries and allowances and are based on supported sitting hours in the Court only.

[6] On average 306 days.

[7] On average 478 days.

[8] For example, under the Children, Young Persons, and Their Families Act 1989, Protection of Personal and Property Rights Act 1988, and the Domestic Violence Act 1995.

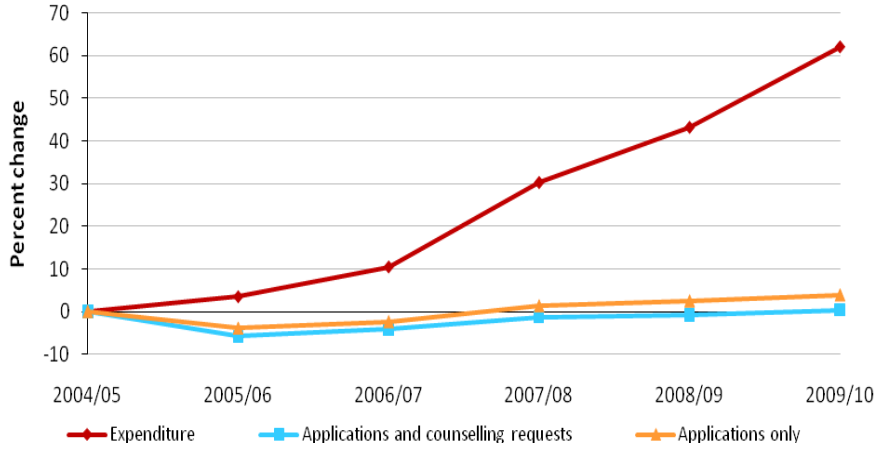
2.1 Main themes

Sustainability and delay

The Court is not financially sustainable and rising costs must be addressed.

21. There has been a rapid increase in government expenditure in the Family Court in recent years as shown in Figure 1. Family Court costs[9] have increased by 63 percent from $84 million in 2004/05 to $137 million in 2009/10.[10] The expenditure line in Figure 1 also includes judicial costs which have increased by 49 percent from $9 million to $13 million over the same period. There is little evidence that increased expenditure since 2004/05 has resulted in improved outcomes for parties, for example, by disposing cases more quickly or by reducing repeat applications. Proceedings under the Care of Children Act are driving most of the Court's activity and increasing costs.

Figure 1: Percentage change in Family Court expenditure and business: 2004/05-2009/10[11]



Delay has serious negative impacts for parties and in particular for children.

22. The Family Court is currently not able to respond as quickly and effectively to the needs of families as it should. Sometimes delay is necessary because a more durable decision may be possible if, for example, judges can be better informed by seeking a report, or by ensuring people feel they have been heard. However, stakeholders expressed concerns about delay, noting that delay can be harmful for children and vulnerable adults, and decisions should be made within a child's sense of time. We note that the Early Intervention Process[12] (EIP) was introduced in April 2010 by the judiciary to address the time taken to dispose of parenting cases and to lower costs. While the initiative has only been in place for just over a year, preliminary analysis indicates that the EIP is not sufficient to address the issues facing the court, with both costs and the time taken to dispose parenting cases still showing increases over this period. **Chapter 3 examines cost and delay issues further.**

[9] All costs are rounded to the nearest $ million.

[10] These costs include direct court operating expenditure such as staff salaries, professional service costs typically incurred by counsellors, lawyers and specialist report writers, and family legal aid expenses.

[11] Judicial costs are included in the expenditure line and this equates to an overall increase of 62 percent as per Figure 4.

[12] The EIP involves assessing applications and placing them on an urgent or standard track in the Family Court. Each track contains case management practices designed to encourage early identification and resolution of issues. Where cases do not require urgent judicial intervention, they are placed on a standard track and parties are encouraged to resolve issues through the Parenting through Separation programme and counselling. If further intervention is necessary, parties are referred to counsel-led mediation rather than putting the case before a judge as happened before EIP. Refer to Appendix 4 for a diagram of the process.

What the case file sample showed on delay:[13]

Analysis of a sample of 173 Care of Children Act cases and 88 Property (Relationships) Act cases revealed a total of 2312 and 1091 adjournments respectively.[14] Cases often required additional time to:

- obtain a brief for a specialist report and then request specialist reports to be prepared. Adjournments awaiting a brief for a specialist report or updated report accounted for 537 adjournments granted in Care of Children Act cases.
- consider the filing of new applications by both parties – 76% of Care of Children cases sampled had a cross application[15], 51% had concurrent domestic violence proceedings and 10% had care and protection proceedings. In addition, 121 cases had at least one application to vary a parenting order whilst 70 cases had two or more of these applications.
- appoint expert counsel and subsequently consider their reports and views. Of the Care of Children Act cases sampled, 165 adjournments related to the time required to appoint lawyer for the child or counsel to assist the court or for action by either.
- review and monitor judicial decisions – 150 adjournments granted in Care of Children Act cases were for the sole purpose of judicial monitoring for events such as contact arrangements, completion of reports or counselling, progress of other proceedings, timetabling directions, filing of consent memoranda and proof of service.
- seek updates to reports, consideration of reports. Awaiting information, memoranda or results of settlement conferences accounted for 63 of the adjournments granted in the relationship property cases sampled where reasons for adjournments were recorded.

The role of the State in the lives of families

The State's role in protecting children and vulnerable adults must be preserved but the role of the State in resolving private parenting disputes should now be reconsidered.

23. Determining what role government should play in family matters is one of the most important issues this Review explores. The State has an interest in protecting children and vulnerable adults, however, there is less certainty about where the boundary lies between the role of the State and the role of the individual in regard to some private law disputes (eg, care arrangements for children when parents separate, relationship property or claims against an estate).

24. Currently, the Family Court has limited ability to decline an application made to it and provides and pays for a range of conciliation services, professional services and advice. The costs of running the Family Court are almost entirely met by the taxpayer.

25. There is also a duty under the Family Proceedings Act for judges, lawyers and counsellors to promote reconciliation for separating couples and, if that is not possible, conciliation. During consultation the question was raised whether the Family Court should continue to be involved in promoting reconciliation or whether it is more appropriate for the State to focus on conciliation and assisting families to resolve their disputes, preferably out of court.

26. The appropriate role of the State in some family law matters is discussed throughout this paper and includes consideration of the following issues:

    - what the State should expect from families in the resolution of their disputes, such as whether there should be obligations on families to attempt to resolve matters themselves where appropriate, and to contribute to costs when they receive assistance from the State

[13] For more information see Chapter 3 and *Reviewing the Family Court: Case File Sample* at www.justice.govt.nz.

[14] The number of Property (Relationships) Act adjournments is an estimated figure only based on the average number of adjournments for the 88 cases sampled. This is because data was recorded in ranges ie, 1-5, 6-10, 11-15 etc.

[15] A cross application is where one party files a separate application in response to an application already filed.

- whether the State should continue to provide a range of free or subsidised services to assist families to resolve disputes, or if parties should contribute to or pay for these services
- whether services should be provided in partnership with other government agencies and non-government organisations (NGOs)

Early resolution is better

Early self-resolution out of court achieves better outcomes for children and families. We need to promote conciliation over litigation.

27. Consultation and research highlights that the current adversarial[16] court system can be harmful for families. For example, it assumes lawyers and courts are necessary for resolving disputes, it permits the lawyers representing parties to largely control the process, and can entrench conflict between parties. Research is clear that prolonged conflict is profoundly damaging to children, and highly distressed parents are not well placed to focus on the needs of their children.[17] **Chapter 4 examines issues for children further.**

28. It was almost universally considered by stakeholders that, where appropriate, the best outcome for families is for them to resolve their disputes:
    - themselves, or with the assistance of their family, friends or community. Decisions are more likely to be complied with because the parties have reached an agreement that suits their needs and is consistent with their values and culture.
    - as early as possible. If disputes are resolved quickly they will become less entrenched and harmful to the relationship.
    - by focusing on the best outcome for their children.

29. **Chapter 5 examines early self-resolution further.**

A focus on individual rights rather than on the needs of children

The current Family Court system is not meeting the needs of children effectively.

"The Court should promote children's welfare, not parents' rights."
(Stakeholder)

30. In providing a forum for people to resolve private disputes, the current approach in the Family Court has focused on the parties' natural justice rights to pursue their case rather than protecting children from the damaging consequences of conflict.

31. Stakeholders were also concerned that the current focus on individual rights ignores children's needs, and provides too many opportunities to delay and protracts litigation unnecessarily. As we consider the ways in which the Court can improve, the Review will take a child-centric perspective and focus on the needs of children first and foremost. **Chapter 4 examines these issues further.**

[16] An adversarial system requires the disputing parties to gather and submit evidence, develop and present their arguments, and call and question witnesses consistent with procedural and evidential rules before an independent and neutral judge who decides the case. Judges decide a case by applying the law as determined by Parliament or by common law to the matter in dispute.

[17] Hunt and Trinder (2011); Tolmie, Elizabeth and Gavey (2010); McIntosh and Chisholm (2008); McIntosh (2003); Cummings and Davies (1994).

Confusing processes

The lack of clear processes has compromised the Court's efficiency and cost effectiveness and has contributed to delay. Currently the Court cannot tell people how long their case will take, and what to expect along the way.

32. There are a large number of potential processes in the Court. Each application type follows its own procedures set out in legislation or the Family Courts Rules 2002 (Family Courts Rules) and augmented by judicial practice notes. To enable the parties to understand the processes and to encourage greater efficiency in the Family Court the processes need to be simplified and clarified. Diagram 1 on the next page is a simplified representation of the current court system, illustrating the various pathways a case might follow.

33. To settle their dispute early and quickly, parties must understand the court processes available for resolution. To develop such an understanding, parties need information on the relevant law, what the procedures are, what the likely outcome of their case is, what is expected of them, how long the matters will take and what it will all cost.

34. In the current environment parties seldom have access to such complete information, and they often are confused by what is happening in court. Court hearings are formal and, even though the Family Court tries to keep its processes straightforward, for many parties court processes seem needlessly complicated, drawn out and costly.

35. A significant contributing factor to the complexity of Family Court procedures is the number of substantive and interlocutory applications which the Court may be required to consider in any type of case. Currently, there are in excess of 600 different substantive or interlocutory application types across the Acts administered by the Court. Some stakeholders suggested a more standardised approach such as that taken in the District Court Rules 2009 (District Court Rules) might usefully be applied in the Family Court. **This is discussed further in Chapters 7 and 8.**

The Court's conciliation function

Counselling and mediation are likely to be more effective outside of the Court.

36. An important feature of the Family Court at its inception was its therapeutic function (see Appendix 5 for a summary of the history of the Family Court). Conciliation processes, such as counselling and judge-led mediation, were considered to be essential in a modern Family Court. However, the usefulness of in-court conciliation processes has been questioned with recent research noting that:

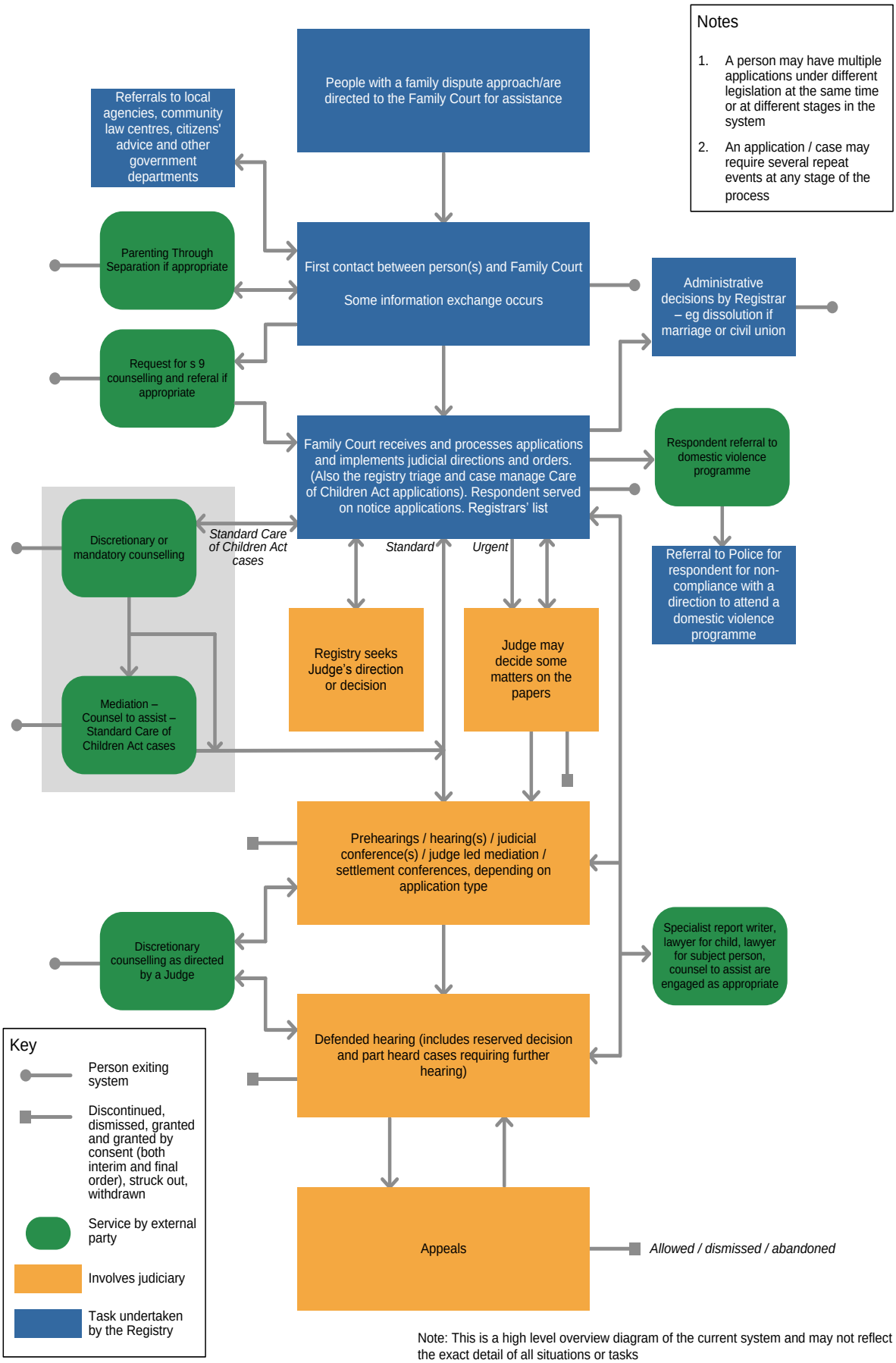
    - Court procedures are designed to determine facts and enforce the law. A court setting is not well suited to resolving non-legal, personal and emotional issues as well as legal ones. Asking a court system to provide a holistic service detracts from the court's fundamental role as a forum for fair and authoritative dispute resolution. Providing such services also requires scarce resources to be spread thinly and the court may have difficulty meeting both a conflict resolution function and a broader social role.[18]
    - In the United Kingdom, court-based conciliation has been found to have only a short-term effect, it is often followed by further litigation, and it has very limited impact on making arrangements actually work for children.[19]

37. **Chapters 6 and 8 examine the role of counselling and mediation and other alternative dispute resolution (ADR) processes.**

[18] Murphy (2009).

[19] Trinder and Kellet (2007).

Diagram 1: Simplified Family Court process.



Note: This is a high level overview diagram of the current system and may not reflect the exact detail of all situations or tasks

Need to be culturally responsive

The Family Court is based on the adversarial system and is not responsive to Māori and other cultures.

38. Other cultures have different values and different ways of resolving disputes and the assumption that one model works equally well for all irrespective of cultural or ethnic backgrounds was challenged by stakeholders.

39. The adversarial system's focus on individuals can be alienating for Māori, and Pacific families, and families from other cultures who often want to resolve their disputes by involving the wider family. Māori, Pacific and Asian people will represent a greater proportion of New Zealand society in the future, and a 'one size fits all' approach is likely to mean Family Court processes are inappropriate for an increasingly large sector of society. **Some further cultural considerations are outlined in Chapters 5 and 6.**

The roles of professionals and their training

The roles of professionals in the Court overlap and lack clarity. Current professional training on social, cultural and child development issues is often inadequate.

40. There are a number of professionals involved in the delivery of the Family Court's services, including: lawyers for parties, counsellors, mediators, lawyers for children, lawyers appointed to assist the court, specialist report writers and programme providers. Most are involved in cases concerning the well-being of children.[20]

41. During consultation, issues were raised about the overlap between the functions performed by some professionals, and whether current practices associated with the various professionals are the best means of ensuring the welfare and best interests of children and arriving at a timely and robust outcome. The concerns include:

    - a lack of role clarity, and professionals undertaking tasks that they may not be adequately trained for
    - an inability to conclude binding agreements out of court
    - different professional obligations and behaviour
    - whether the involvement of professionals in children's cases has added to the delay in resolving disputes
    - whether children see too many professionals – this is both confusing and damaging to children.

"Counsellors should counsel, mediators should mediate, lawyers should advise, and judges should judge."
(Stakeholder)

42. Stakeholders raised particular concerns about the adequacy of training of all professionals (judges, lawyers, psychologists, counsellors and mediators) working in the Family Court. In particular, it was suggested that harm was caused to families when there is an inadequate understanding of issues such as the impact of family violence, disability issues, mental health issues, child development, family dynamics and cultural competency and safety. It also may be timely to consider whether, given the complex and sensitive nature of issues involved in family law, family lawyers, in particular, should be accredited to practice in the Family Court. **Chapters 5, 7 and 8 cover these issues further.**

[20] That is, cases under the Care of Children Act 2004; the Children, Young Persons, and Their Families Act 1989; and the Domestic Violence Act 1995.

What do you think?

Are these the main issues facing the Family Court? If not, what other issues should we look at? Do you have any evidence that supports your view?

Should the law continue to focus on reconciliation or should the duty on lawyers, counsellors and the Court be on conciliation only?

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?

3. THE CHANGING FAMILY COURT

Expenditure has increased rapidly but without any commensurate improvement in the timeliness of the Court and the number of events and hearings required for certain cases.

43. This chapter sets out the context for this Review including how over time the Court's jurisdiction has expanded and the volume of its workload has increased. It also asks what future pressures on the Court should be taken into account by the Review and whether there should be any changes to the jurisdiction of the Court.

3.1 Workload, expenditure and outcomes

44. This section draws out key facts and figures about the Family Court. More detailed figures are included in tables in Appendix 6.

Court users

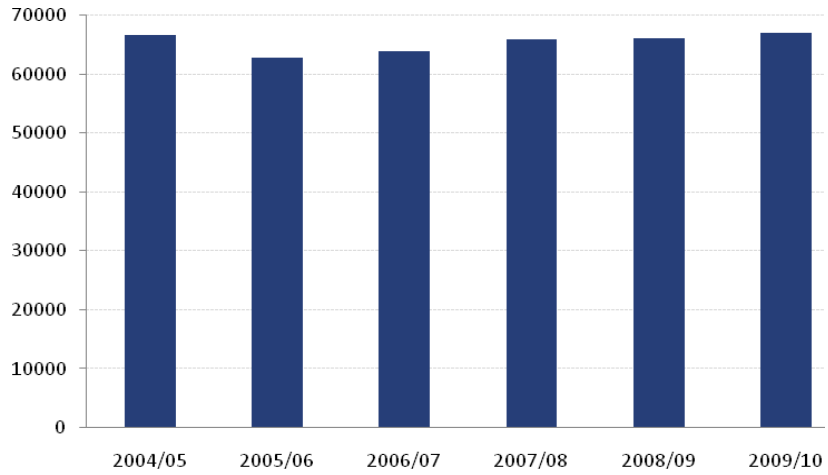
45. The applications filed in 2009/10 involved approximately 58,000 families. Although the number of men and women using the Court is about even, differences in ages and ethnicity are apparent. For example, most Care of Children Act applicants are in their thirties and forties, while persons subject to the Protection of Personal and Property Rights Act 1988 are older.

46. Māori are over-represented as applicants or respondents in protection order applications (27% and 29% respectively in 2009/10). Similarly, 37 percent of applicants or respondents involved in applications under the Children, Young Persons, and Their Families Act 1989 (Children, Young Persons, and Their Families Act) are Māori. Pākehā/Europeans are also over-represented in relationship property cases, comprising 85 percent of all applicants or respondents.

Workload

47. Currently there are 51 Family Court judges and 59 Family Courts. The Family Court has a large workload. Figure 2 shows the number of substantive applications[21] made to the Family Court each year. In 2009/10, approximately 67,000 substantive applications were filed. The graph shows only relatively small variations occurring between 2004/05 and 2009/10.

Figure 2: Total substantive applications to the Family Court each year

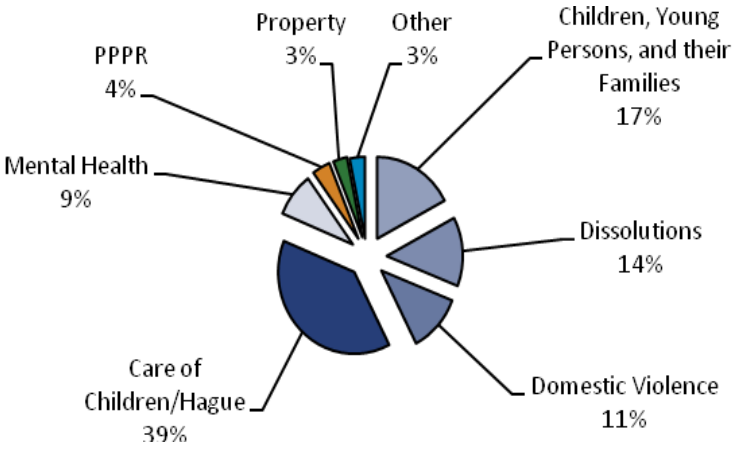


[21] Substantive applications where referred to throughout the paper do not include requests for counselling under s9 Family Proceedings Act 1980.

Types of applications

48. Figure 3 shows that 97 percent of substantive applications were made under just seven major case types. It can be seen that Care of Children Act cases are the single largest category and account for 39 percent of all applications.

Figure 3: Share of substantive applications made by case type: 2009/10



49. Figure 3 does not reflect the fact that cases may include multiple applications made under more than one case type. Cases involving concurrent applications (ie, both before the Court at the same time) are not uncommon. In 2009/10, there were 2042 applicants who had made overlapping applications under both the Care of Children Act and the Domestic Violence Act 1995 (Domestic Violence Act). These cases increase the complexity of proceedings and the likelihood of more delay and expense.

50. Repeat applications by the same parties, and often under the same Act, also add to complexity and cost. For example, of 173 defended Care of Children Act cases sampled, 121 cases had at least one application to vary a parenting order. Repeat applications may indicate that parties have not accepted court decisions or are unable to agree to new arrangements between themselves when circumstances change.

51. Analysis shows that 33.5 percent of Care of Children Act applicants in 2010 had filed an earlier application under the Care of Children Act or the Guardianship Act 1968[22] in the previous six years. Applications to vary parenting orders have increased by 62 percent between 2005/06, when the Act came into force, and 2009/10.

Exiting the Court

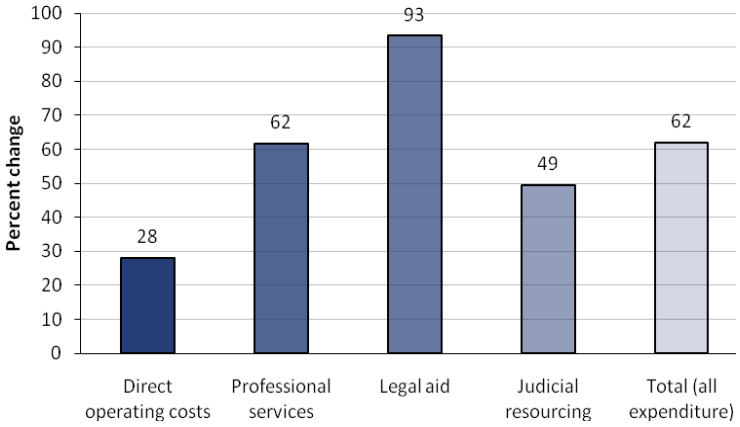
52. Sometimes parties may reconcile or settle their dispute at different points along the process. In 2009/10, 24 percent of Care of Children Act applications finished at or immediately after judicially ordered counselling took place, while 11 percent did so at mediation. The largest share of applications (33%) was concluded during the later pre-hearing phases, while 12 percent of applications carried on to a hearing. The full set of figures is contained in Appendix 6.

Expenditure

53. As stated previously, there has been a rapid increase in government expenditure on the Family Court in recent years. The rate of increase is of considerable concern given the fiscal climate within which the Government must manage services. The percentage growth in the Court's major cost categories is shown in Figure 4.

[22] The Care of Children Act 2004 replaced the Guardianship Act 1968 on 1 July 2005.

Figure 4: Percent change in expenditure by major cost category: 2004/05-2009/10



54. It should be noted that the increases in all cost categories have considerably exceeded the change in total applications over the same period. There are a variety of reasons that are likely to account for the increases including:

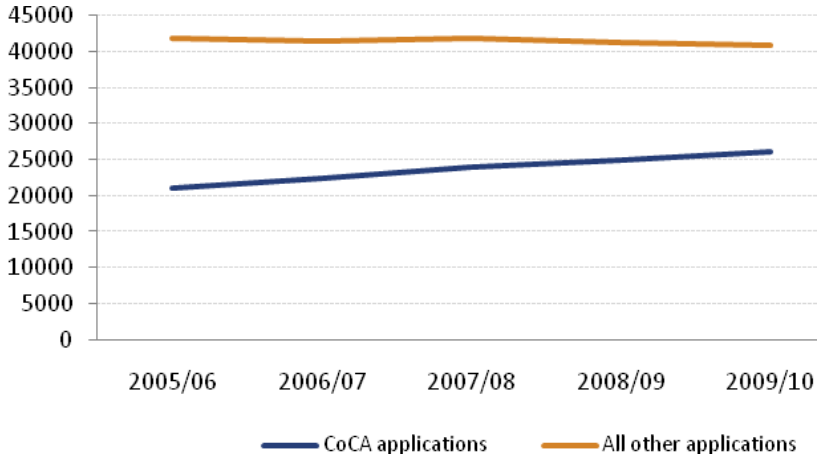
- growth in professional services payment rates
- changes to legal aid payment rates and eligibility
- increases in remuneration for court staff and the judiciary
- increases in requests for counselling
- more appointments of professionals by the Court
- a widening in the scope of work undertaken
- an increasing number of events to dispose of similar applications over time.[23]

Impact of Care of Children Act cases

55. Two other factors relating to Care of Children Act cases appear to be impacting on costs in the Court.

56. The first factor concerns changes in the mix of application types. The total number of all substantive applications has been relatively unchanged in recent years. However, Figure 5 shows that Care of Children Act applications have increased by 24 percent, while the number of all other applications has dipped slightly between 2005/06 and 2009/10.

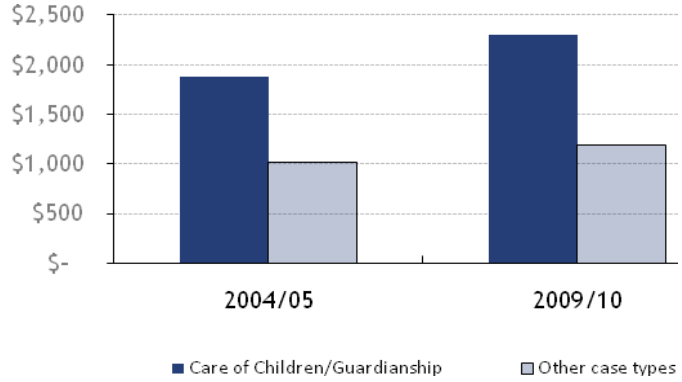
Figure 5: Change in number of Care of Children Act (CoCA) applications versus all other applications[24]



[23] The average number of events per case has increased 7 percent from 2006/07 to 2009/10.
[24] 2005/06 is used as the base year because this is when the Care of Children Act 2004 came into force. 2004/05 is commonly used in other figures in the paper.

57. The second factor involves the change in costs associated with Care of Children Act cases. Figure 6 shows the increase in the average cost of professional services for Care of Children Act cases and, separately, for all other case types from 2004/05 to 2009/10. Costs for Care of Children Act cases increased 22 percent while all other case type costs went up by 18 percent in the same period.

Figure 6: Change in average professional services cost per Care of Children / Guardianship Act cases and all other case types



58. Figures 5 and 6 show that the trend in Care of Children Act applications and their associated costs is important for the sustainability of the Family Court because:

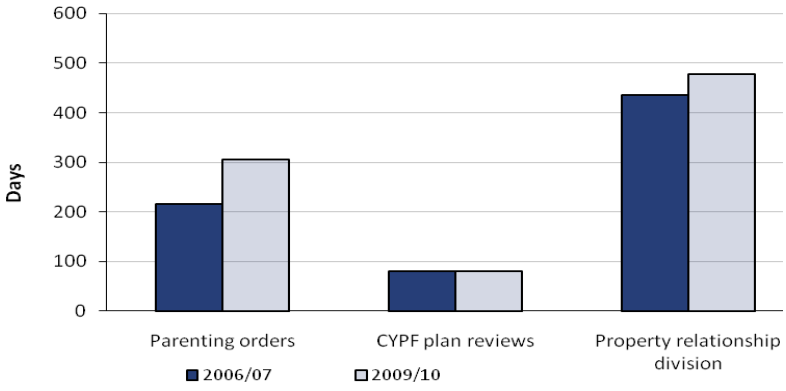
- Care of Children Act applications make up a large proportion of Court activity, therefore changes in their volume can significantly influence expenditure trends.
- Increases in Care of Children Act case volumes impact disproportionately on professional services expenditure because they incur the highest average professional service costs of any case type.

Court outcomes

59. There is little evidence that the increase in expenditure has improved the efficiency or effectiveness of the Court, or has resulted in better outcomes for court users.

60. We have outlined the growth in repeat applications, and the increase in events required to dispose of applications. Both of these measures indicate that the Family Court is getting less efficient over time and needs to find ways to help parties avoid expensive and prolonged engagement with the Court. The length of time it takes to dispose of an application suggests that affected parties are not getting their disputes satisfactorily resolved. Figure 7 shows increasing disposal times for three application types that are particularly relevant to this Review because of their volume, duration and relevance to children.

Figure 7: Change in average time to dispose of three major application types in days: 2006/07 to 2009/10[25]



[25] 2006/07 has been chosen as the base year because using 2005/06 produces a deceptively low average disposal time. This is because it was only possible to make parenting orders applications from 1 July 2005 when the Care of Children Act came into force.

61. The data shown in Figure 7 not only reveals deterioration in the time to resolve a dispute about parenting and relationship property matters and the attendant costs that brings, but also raises questions about how much delay is appropriate for matters considered by the Court. This is one of the major issues the Review must address as it considers the negative impact lengthy case times have on vulnerable parties, particularly for the children involved in the Court processes.

Adjournments

62. Adjournments are a significant cause of delay, particularly in Care of Children Act cases. When examining a sample of Care of Children Act case files, the Ministry found multiple examples of cases (47 from a sample of 176 files) that had been adjourned, that is, postponed, at least 20 times or more. One case had 35 adjournments. This reflected a cycle of multiple applications, serving of notices to respondents and subsequent notices of defence in response, in addition to multiple events related to the requesting and consideration of specialist reports.

Case file sample

A sample of case files highlights the Court's current inability to consistently deliver an effective and efficient service to families.

63. The Ministry reviewed a sample of closed cases under the Care of Children Act and the Property (Relationships) Act 1976 (Property (Relationships) Act) to help inform the Review. The cases selected for the sample were not intended to be representative of all cases involving applications made under these Acts but, instead, provide insights into the nature of more complex cases.

64. The cases sampled were drawn from a larger pool of similarly complex cases. The sample comprised 261 cases, while the pool contained close to 500 cases, all of which had at least several underlying markers of complexity, for example, self-represented litigants or multiple parties.

65. An overview of the details associated with the case file sample is available in a separate document entitled *Reviewing the Family Court: Case File Sample*. This document can be found on the Ministry's website www.justice.govt.nz.

Property (Relationships) Act case files

66. These cases were selected for close examination because court data indicates that in 2009/10 division of property relationship cases were taking on average 478 days to dispose. Questions have also been raised about whether such cases should continue to be heard in the Family Court (see section 3.3 'The Family Court jurisdiction').

Key findings from the Property (Relationships) Act case file sample

The property relationship cases sampled would typically be considered as serious cases because they required decisions about complex legal issues such as trusts, economic disparity, the nature of the relationship, and the appropriate jurisdiction the case should be heard in.

Type of property

The range of property in dispute in the sample required judges to make decisions about the ownership and split of one or multiple asset types including residential property, chattels, investment property, shares, trusts, cash and superannuation proceeds. Disputes over residential property featured in 65 of the 88 cases sampled.

Value of property

The value of property in the sample was substantial. Of the 88 cases sampled, 39 related to property valued in excess of $500,000, with 18 of these relating to property valued in excess of $1 million. Property was valued at under $100,000 in less that 10 percent of cases where a value was identified.

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Delays and adjournments

Delay in proceedings, as indicated by the frequency of adjournments, was evident. While some adjournments are necessary, the estimated average number of adjournments per case was 12, which appears high. Every case was adjourned at least once, with 82 percent being adjourned more than six times. At the extreme end, 13 of the 88 cases sampled had in excess of 20 adjournments with two cases having in excess of 30 adjournments. Adjournments most often occurred in order to obtain information, reports and await the outcome of settlement discussions. Delay caused by either a party or their lawyer was also evident in 55 of the 88 cases[26].

67. The length of time to resolve relationship property disputes has significant financial and emotional implications for parties. The current legislation places the onus on the applicant to take action when the other party (the respondent) has failed to comply with the Family Courts Rules, or will not engage in pre-hearing settlement negotiations. This means that often the applicant is in a vulnerable position, as they may not be in control of the property in dispute yet are forced to undertake expensive and lengthy litigation.

68. The high value of property involved, combined with the likelihood of other financial obligations, further highlights the benefit of earlier resolution for the parties. More timely outcomes may reduce the psychological impact of uncertainty by enabling the parties to make financial decisions that allow them to move on with their lives rather than having funds tied up.

Care of Children Act case files

69. The Care of Children Act cases were selected because they demonstrated complexity both in the nature of the proceedings and the characteristics of the parties involved. There were 310 children involved in the 173 case files sampled: 112 children were aged five or under, 84 children were between the ages of 5–9 years. Half of the cases involved one child, 29 percent involved two children, and 21 percent of cases involved 3 or more children.

Key findings from Care of Children Act case file sample

Case characteristics

In the sample, day-to-day care and contact issues were the major disputes that the Court was asked to resolve (88% of cases). Legal issues were recorded in only 10 of the 173 cases sampled.

The kinds of complex factors evident in the sample included evidence or allegations of: mental illness and/or alcohol and drug issues (51%); physical, sexual, psychological abuse (72%); litigants being self-represented at some stage of proceedings (47%); cross applications (76%); and domestic violence proceedings involving the same parties (51%).

Of the cases sampled mothers accounted for 56 percent of applicants compared to 31 percent of fathers. Grandparents and other family members made up 11 percent of applicants. However, 18 percent of cases sampled also involved multiple parties (additional applicants or respondents), who were not the natural parent of the child or children concerned.

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[26] The Family Court Caseflow Management Practice Note relating to the Property (Relationships) Act 1976 permits adjournments by the Registrar to enable monitoring of service and filing of affidavits as to assets and liabilities. The practice note specifies that where cases are being monitored in the Registrar's List, they will be allocated a judicial conference if the Registrar considers that delay warrants judicial intervention, or at the request of counsel or parties. Ordinarily the Registrar will allocate a judicial conference after two adjournments in the Registrar's List.

Delays and adjournments

Delay, as indicated by the frequency of adjournments, was also evident in the sample with an average of 14 adjournments across all cases. While some adjournments are necessary, of the 173 cases sampled, 79 percent had more than six adjournments and, at the most extreme, 41 cases had more than 20 adjournments. Ten of these cases had more than 30 adjournments.

By far the most common reason for delay related to the completion of briefs for psychologists reports, or updating reports. These specialist report delays account for 23 percent of total adjournments. Other significant contributing factors to adjournments included the need to:

- await further action by counsel or receipt of instructions from a client/s
- await the outcome of settlement negotiations
- await the outcome of other proceedings
- monitor cases and appointments or actions by the lawyer for the child.

Individually these factors contributed less that 10 percent of adjournments but overall accounted for 40 percent of all reasons for adjournments in the sample.

Adjournments were initiated by a judge in 57 percent of cases, and by counsel for the applicant or respondent and lawyer for the child in 41 percent of cases. Nearly half of all adjournments (48 percent) occurred while the case was scheduled to be progressed at a Registrar's list.[27]

Changing legal representation

Adding to the time cases took to resolve were issues with changes in legal representation during the life of the cases sampled. There was at least one change of counsel for either of the applicant/respondent or lawyer for the child occurring in 27 percent of cases, while 35 percent of cases had two or more changes.

Repeat litigation

The sample also revealed a pattern of re-litigation with 49 percent of cases recording two or more applications to vary orders, and 8 percent recorded five or more applications. Extending a period of contact was the primary reason in 59 percent of applications for varying an existing order. Other significant reasons included allegations of abuse, a wish to reduce the period of contact, and relocation issues.

70. The Care of Children Act case file sample demonstrated that while the main issue in dispute often related to achieving a pragmatic resolution to day-to-day care and contact issues, there were complex features to the cases which impacted on the ability of the Court to achieve a timely/durable resolution of the proceedings. While the factors were not present in every case, this information does illustrate some of the issues the Family Court faces when dealing with some Care of Children Act applications. Additional cost and delay also occurs as a result of specialists being engaged to assist the Court in resolving disputes and providing expert evidence. Furthermore, certain allegations/application types commonly require additional hearings.

71. The extent of delay in the cases sampled, together with the amount and nature of re-litigation, raises concerns about the Court's ability to effectively resolve disputes in a timely manner.

[27] The Registrar's List is the means of ensuring that applications have been served, that steps are being taken to further the proceedings, and to ensure ongoing progress towards resolution.

3.2 Impact of social changes

New Zealand is in an extended period of social change which will affect the Court's ability to provide an effective response.

72. While it is impossible to be certain about the future profile of work that will be dealt with by the Family Court, it is sensible for the Review to take into account some of the social changes that are currently occurring within New Zealand's families and how these may affect the Family Court in the future. Appendix 7 outlines some of these social trends. They include:

    - increasing diversity of family forms
    - increasing mobility
    - an aging population.

"The way and how we live has significantly altered. The Court has struggled to keep pace with the change."

(Stakeholder)

73. Other features of our society such as the success of our economy may influence the pace of change, nevertheless, the social and demographic trends discussed in Appendix 7 may mean that the Family Court could face:

    - changes in some of the issues brought before the Court
    - changes in the profile of people accessing the Court
    - divergent views as to what the role of the Family Court is
    - increased complexity in the matters brought before the Family Court
    - increased demand for culturally appropriate dispute resolution methods and court services
    - increased requirements from a wider range of people for information and support.

> **What do you think?**
>
> 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?

3.3 The Family Court jurisdiction

It is critical that the range of cases coming to court can be progressed efficiently, effectively and in a timely manner.

74. In 1981 the Family Court had jurisdiction under eight Acts which dealt with such matters as marriage, separation, and divorce. Today, the Family Court has jurisdiction under 23 Acts covering a diversity of family issues, for example, mental health, human assisted reproductive technology, and the protection of personal property rights. (Refer to Appendix 8 for a list of Acts comprising the Court's jurisdiction.)

75. The Family Court has concurrent jurisdiction with the High Court in regard to:

    - applications to place children under the guardianship of the Court (wardship) under the Care of Children Act 2004
    - claims against estates under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949
    - determining property disputes arising out of an agreement to marry under the Domestic Actions Act 1970.

76. There is a question about whether the Family Court is best placed to deal with all applications currently within its jurisdiction. For example, relationship property disputes and claims against a deceased's estate are not so much about personal relationships as they are about property. These cases may be best dealt with in the District or High Courts given some of the issues involved.

For example, the Family Court has limited powers to deal with matters concerning trusts which currently have to be determined in the High Court and referred to the Family Court. This can result in delay.

77. Some stakeholders suggested a more integrated court process between the Family Violence Courts[28] in the criminal jurisdiction and family violence matters in the Family Court. We note that amendments to the Sentencing Act 2002 that came into force on 1 July 2010 improved such integration by enabling the criminal courts to issue protection orders when a defendant has been found guilty of a family violence offence. Other stakeholders asked whether it was time to consider whether Domestic Violence Act matters should continue to be split over two jurisdictions and whether protection orders should be applied for in the District Court.

78. It was also suggested that matters relating to education might benefit from the expertise of the Family Court. It was proposed that the Court's jurisdiction be broadened to include truancy which is currently dealt with in the criminal jurisdiction of the District Court, and exclusion of a child from school, which is currently dealt with by way of judicial review in the High Court.

79. Hague child abduction proceedings might be better dealt with in the High Court. In these cases the Court is not being asked to consider the welfare and best interests of the child but to make a determination about forum. In many other countries party to the Hague Convention on the Civil Aspects of Child Abduction, proceedings are filed in the High Court.

80. In summary, the suggestions concerning the appropriate jurisdiction of the Family Court include:

- Relationship property, testamentary promises and family protection claims should be dealt with only in the High Court.
- Relationship property cases should be dealt with in the District Court rather than the Family Court.
- Relationship property cases should be dealt with in both the Family Court and the High Court.
- Hague child abduction applications should be filed in the High Court.
- The Family Court should have the same jurisdiction in relation to trusts as the High Court.
- All family violence cases should be heard in the District Court as part of its criminal jurisdiction.
- The Family Court should have jurisdiction for education matters, for example, truancy and exclusion of a child from school.

81. Any assessment of such proposals would need to focus on the effectiveness of the change and if it would deliver a better service and outcomes for families. For example, splitting jurisdiction in relationship property matters may result in people attempting to use the system for tactical advantage.

What do you think?

Should any changes be made to the Family Court's current jurisdiction? If yes, in what way?

What would be the impact of changing the jurisdiction of the Court in the manner you suggest? What might its risks and benefits be?

[28] In eight District Courts a Family Violence Court has been established to deal with criminal cases relating to family violence. Family Violence Courts are a judicial initiative that aims to hold offenders to account, encourages them to take responsibility for their actions, and to think about how their behaviour affects other people.

3.4 An open Family Court?

Opening the court may increase the transparency of court processes and decisions.

82. Family Court hearings are held in private and are not open to the public[29]. This is largely to protect the interests of children and vulnerable parties. During consultation some stakeholders suggested that opening the Court to the public might make the Court's decision making more transparent, parties more accountable for what they say in Court, and encourage people to resolve their private matters outside of Court. Stakeholders noted that most other courts in New Zealand are open and that judges have the power to close the Court in certain circumstances which could be provided for in the Family Court also.

83. Other stakeholders suggested that given the Court is reasonably open to the media an appropriate balance between the principle of open justice and the protection of the vulnerable has been reached. The Law Commission's report *Delivering Justice for All*, noted that the public access to the Family Court in Australia has not contributed in any meaningful way to greater openness of proceedings. Of the very few members of the public who have attended the Court, most have an association with one of the parties, or are observing the court procedures prior to their own case being called. Neither does it appear to have allayed the concerns of disaffected litigants, nor educated the public about the issues that face modern families and the Court[30].

84. An alternative approach that could be considered to improve the transparency and accountability of the Family Court to the New Zealand public is for it to provide more information about its activities and decisions. Currently some information about the Family Court is available on the Ministry of Justice's website: www.justice.govt.nz. However, more information about the Court could be made available.

> **What do you think?**
>
> Should the Family Court be an open court, what would be the risks and benefits of such a proposal?
>
> How can we further promote the Family Court's transparency and accountability? What sort of information could the Family Court provide that would achieve these outcomes?

85. This chapter illustrates why concerns have been expressed about the Court's continuing sustainability. We now turn to consider the needs of children caught up in Family Court parenting disputes and how the system could better address their needs.

[29] Since 2005 the Court has been more open to the media. Judges may permit news media representatives and other persons, including support persons, to attend hearings. Decisions may be published, although there are restrictions about publication of identifying information for cases involving children or vulnerable people. Penalties are in place for breaching the reporting restrictions.
[30] NZLC (2004) 304–305.

4. FOCUSING ON CHILDREN

Parental separation does not necessarily mean poor outcomes for children but research shows that prolonged exposure to frequent, intense, and poorly resolved conflict is associated with a range of psychological risks for children.

86. As noted earlier, private parenting disputes are driving a significant amount of the Family Court's current costs and activity. In 2009/10 22,935 children were the subject of disputes under the Care of Children Act. The needs and interests of children following parental separation is an important focus of the Review. Research indicates that the period following separation is a particularly vulnerable time for children. Parents generally want what is best for their children but may have different ideas about what this means.

87. This chapter looks at the evidence that indicates what is best for children when their parents separate.

4.1 Parental conflict is damaging for children

Persistent conflict damages parenting quality, styles of discipline and the affective response of parents to children – all of which influence child outcomes.[31] Prolonged court disputes are unlikely to be in the best interests of children.

88. Poor outcomes for children from prolonged conflict can include anxiety, depression, aggression, hostility and low social competence.[32] These findings have also been highlighted in a recent report from the Prime Minister's Chief Science Advisor, *Improving the Transition - Reducing Social and Psychological Morbidity During Adolescence*.[33]

89. It is important to give children an opportunity to make their views known and to understand what is happening. Evidence shows that giving children an opportunity to be heard, but not putting them in the position of having to decide or choose between parents, has a positive impact on children and can reduce conflict between the disputing parents.[34] Research also indicates that:

- There is no one arrangement that works best for children.[35]
- Children do better if they have continuing and frequent contact with both parents who can communicate and have low levels of conflict[36].
- Where there are high and continuing levels of conflict or domestic violence or abuse, contact may be highly inappropriate and have serious long-lasting effects on children.[37]
- It is the quality of the parent-child relationship that most affects good outcomes for children, not the quantum of time they spend with each parent.[38]

"Children's adaption to marital transition may be determined more by the level of conflict that occurs between parents before, during and after the break-up of the marital relationship than the actual break up itself"
(Gluckman, P 2011).

90. Given the evidence of poor outcomes for children when parents are embroiled in conflict, consideration may need to be given to a greater legislative emphasis on parental responsibilities and obligations for parents to co-operate and use their best endeavours to resolve their disagreements outside of the Court.

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[31] Hunt and Trinder (2011); Tolmie, Elizabeth and Gavey (2010); McIntosh and Chisholm (2008); Cummings and Davies (1994); McIntosh (2003).

[32] Hunt and Trinder (2011).

[33] A report from the Prime Minister's Science Advisor, May 2011.

[34] Wallerstein and Kelly (1980); Graham and Fitzgerald (2010); Blackwell and Doogue (2000).

[35] Wallerstein and Blakeslee (2003).

[36] Pryor and Rodgers (2001).

[37] Cummings and Davies (1994); Jaffe, Lemon and Poisson (2003); Reynolds (2001).

[38] Amato and Gilbreth (1999); Pryor and Rodgers (2001).

What do you think?

What measures do you think could be used to manage and reduce conflict between parents following separation?

How might these be achieved?

4.2 Providing for children's voices

It is important that children are involved in decisions that affect them.[39] Children's participation is linked to better outcomes.

91. Studies show that when asked, children want to participate in any decision about their future care arrangements, but that most children are not told about the reasons for their parents' separation or how the separation will affect them.[40] These studies also show parents often do not keep children informed or involve them when making care arrangements.

92. Children say they want to:

- be involved in decisions rather than be the decision maker
- be consulted
- have an opportunity to make known their feelings about parental conflict
- ensure that any decisions made will work for them.

93. There is growing evidence to suggest that children cope better with the effects of separation if they have been consulted, and that children's involvement in decision making is linked to better mental health outcomes.[41] Children also want participation to be voluntary and to have family rather than professional support.[42]

Children's participation at an early stage helps parents recognise what their children need.

94. Hearing children's voices early may focus parents on the decisions that need to be made for their children. The benefits for children in resolving matters early are supported by studies. One Australian study[43] has shown that four years after mediation, outcomes for children were better for those who had been involved in child-inclusive mediation.[44] A small qualitative study looking at children's participation in family mediation in New Zealand echoes these findings.[45]

95. A child-inclusive approach avoids any burden of decision making on the child. The statistically significant outcomes from the Australian study on child-inclusive mediation include:

- greater stability of care and contact arrangements
- less legal action over care and living arrangements[46]
- higher satisfaction with living arrangements (fathers and children)

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[39] Smart and Neale (2000); Smith and Gollop (2001); Smith, Taylor and Tapp (2003).

[40] Kelly (2006); Dunn, Davies, O'Connor and Sturgess (2001); Gollop, Smith and Taylor (2000); Parkinson, Cashmore and Single (2005).

[41] Lauman-Billings and Emery (2000); Smith and Gollop (2001); Kelly (2002).

[42] Smart and Neale (2000).

[43] In child-focused mediation, children are not consulted, but generic research-based information on separation and children is presented to parents, rather than information specifically about their child. In child-inclusive practice, children are consulted in a supportive developmentally appropriate manner about their experiences of the family separation and dispute.

[44] McIntosh, Long and Wells (2009).

[45] Goldson (2000).

[46] There was no further legal action in approximately 70% of child-inclusive mediation cases compared with 49% of child-focused mediations.

- greater reduction in parent acrimony, for both mother and father
- lower conflict between parents as perceived by children
- children feeling less caught in the middle between their parents
- children feeling less distressed about their parents' conflict
- lower levels of conduct disturbance in children.

96. In contrast to this recommended approach, children participate relatively late in the New Zealand system, usually after proceedings have been filed and parental attitudes are more likely to be entrenched.[47] Stakeholders have queried whether earlier engagement with their children would deter parents from pursuing unnecessary litigation.

97. It has been suggested that a family facilitative approach should be promoted, with compulsory attendance in child-inclusive mediation services a prerequisite before court can be accessed. This approach would require parties to attend mediation with a specialist facilitator. Then, depending on what was appropriate, the facilitator would meet the children, discuss the impact of the situation with them, and then safely communicate this back to the parents. Consideration would need to focus on how such a service should be supported, and the extent to which parties should contribute to or pay for this service.

> **What do you think?**
>
> How can we ensure children can participate earlier in the decision making process? What would you recommend as the crucial safeguards to enable this to happen?
>
> Should participating in child-inclusive mediation be compulsory before an application is filed in the Court?
>
> To what extent should parents contribute to the costs of such a service?

4.3 Obligations to consult with children

There is currently no obligation for parents and guardians to consult with children about important matters affecting them post-separation.

98. While children have some opportunities to have a say in Family Court proceedings, there is no corresponding obligation for parents or guardians to consult them. Section 16 of the Care of Children Act provides that a guardian's duties, powers, rights and responsibilities include "determining for, or with, the child, or helping the child to determine, questions about important matters affecting the child." The provision is consistent with the principle in *Gillick*[48] and is intended to encourage parents, guardians and the courts to see children as having an active role in decision making.

99. This provision stops short of creating a positive obligation on parents or guardians to consult with children. In contrast, the Children (Scotland) Act 1995 places a positive obligation on parents to consult with their children about important matters. This provision is significant because of its ability to influence parental behaviour and attitudes in shifting the focus from their own dispute to thinking about the best interests of their children.[49]

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[47] Children's participation is generally by them expressing their views to lawyer for the child or speaking directly to the judge. In limited situations a child may be a party to proceedings but this is rare, for example, a child of any age may make an application to be placed under the guardianship of the Family Court or High Court (s31); or appeal a decision of the Family Court (s142). A child, 16 years of age or older, may make an application to review a guardian's decision or refusal to give consent (s46).

[48] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1989] 3 All ER 402 (HL). The House of Lords held that children are able to make decisions on matters which affect them when they have attained an age and understanding which gives them the capacity to weigh the risks and benefits of the decision in question.

[49] Fortin (2003).

What do you think?

Would an obligation in legislation for parents to consult with their children about care arrangements following parental separation be helpful?

What might be the risks and benefits?

4.4 Obtaining children's views in proceedings

Children's views should be obtained by trained professionals who have experience in interviewing and talking with children.

100. The Care of Children Act provides that children must be given reasonable opportunities to express their views, either directly or indirectly, and their views should be taken into account in proceedings before the Family Court.[50] This provision gives effect to Article 12 of the United Nations Convention on the Rights of the Child.[51]

101. Lawyers are generally appointed for children involved in proceedings under the Act. Currently this is the mechanism used to ensure children's voices are heard when there are proceedings, although some children, especially older children, ask to speak to a judge directly. However, not all judges agree to speak with children.

102. A number of stakeholders queried whether it should be part of the role of lawyer for the child to obtain children's views or whether this role was best undertaken by other professionals such as counsellors, or social workers who have specific training and expertise in interviewing children. The adequacy of the training of lawyer for the child was often raised during preliminary consultation.

There is ongoing and unnecessary confusion about whether a lawyer for the child should advocate for the child's views, their best interests, or a combination of the two.

103. In situations where the child's views are contrary to the lawyer for the child's assessment of their welfare and best interests, a lawyer to assist the court is appointed to advocate for the child's welfare while lawyer for the child advocates a position based on their views. While it may be desirable to separate the child's views apart from the welfare and best interests of the child, dual appointments are a costly way to address the issue. Some stakeholders also consider this practice is both confusing and damaging for children as it tends to bring them more into the adult conflict.

Lawyers for children are being appointed too early and are driving increasing costs.

104. Since the introduction of the Early Intervention Process appointments of lawyer for the child are now being made earlier in the process than previously. Spending on appointing lawyer for the child under the Care of Children Act was $23.2 million in 2009/10, up from the $7.4 million spent in 2005/06.[52] This rate of increasing expenditure is unsustainable.

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[50] Care of Children Act 2004, s6.

[51] http://www.unicef.org/crc

[52] All costs rounded to the nearest $100,000. These figures do not include $8.96 million spent in 2005/06 on lawyer for the child appointed under the now superseded Guardianship Act 1968. 2005/06 is used as the base year because it was during this period that the Care of Children Act 2004 came into force. 2004/05 is used as the base year in other figures in the paper.

105. Many of these appointments may not have been necessary unless a defence had been filed, nor were they necessary in situations where the parties had reached their own agreement and orders were being sought by consent (although in this situation the child's right to participate in the decision may still be relevant). If a different role for lawyer for the child is adopted or if we restrict the number of events in a case (see discussion in 8.2 Certainty of process) then it may be appropriate only to appoint lawyer for the child at the time of a defended hearing, but with another person providing the children's views.

106. With all the issues raised about the appropriate role for lawyer for the child it may be preferable to clarify the role in legislation. A further way to improve consistency and clarity to the role may be to introduce in-house lawyers for children, or other professionals, such as social workers to obtain children's views. All of these issues concern the role of lawyer for the child in proceedings under the Care of Children Act. Different considerations apply to their role in relation to care and protection cases.

Lawyers for the child have a responsibility to advise children of their right to appeal. Current appeal processes for children are difficult to navigate.

107. Children have limited opportunities to be parties to Family Court proceedings. However, a child of any age may appeal a decision under the Care of Children Act and the Children, Young Persons, and Their Families Act. It is a departure from the usual principle that only parties to proceedings may appeal.

108. Although children may exercise this right to appeal, stakeholders raised the following issues:

- Assisting the child making an appeal – There is no guidance in legislation about the role of lawyer for the child if a child says they wish to appeal or to extend their appointment to assist the child. It is not clear what counsel's obligations are, especially if they consider it is not in the best interests of the child to appeal.
- Procedural obstacles – Children require a litigation guardian as their representative in the proceedings unless they can satisfy the Court that they are capable of conducting the proceedings in their own name. A litigation guardian must be appointed, agreed to by the Court, before an appeal can be filed. It may be difficult for a child to find someone who does not have an interest in the proceedings that is not adverse to their own (a parent would usually have a conflict of interest) and willing to be liable for any potential award of costs in the proceedings.
- Role confusion and conflict – Who should represent the child at the appeal hearing is a source of confusion. Currently, the High Court will appoint a litigation guardian on behalf of the child. The litigation guardian will instruct counsel to conduct the appeal. The High Court will also appoint a lawyer for the child.[53] This results in two people representing the child and causes confusion about the relative roles and responsibilities of each lawyer.

What do you think?

Who should be responsible for obtaining a child's views on the Court's behalf? Should children be offered a choice about how their views are obtained?

What criteria should be used to decide whether and when to appoint lawyer for the child?

What are the main tasks that lawyer for the child should undertake in proceedings?

What are your views on the provision of in-house lawyers for children?

What are your views on using other professionals to obtain the views of children?

If lawyers are appointed to act for children on an appeal is there a need for a separate litigation guardian?

[53] The role of litigation guardian existed prior to that of lawyer for the child.

4.6 Promoting children's best interests

The open-ended nature of the welfare and best interests test creates uncertainty and can encourage unnecessary litigation.

109. In proceedings under the Care of Children Act the welfare and best interests of the child is the paramount consideration.[54] This consideration takes precedence over other considerations such as the wishes of the parents. Decisions must be made within a child's sense of time and having regard to the non-exhaustive list of principles in s5 of the Act.[55] A child's welfare and best interests are assessed according to a child's individual circumstances.

110. Other jurisdictions have similar provisions to those in the Care of Children Act but with stronger statements than New Zealand's legislation. In England and Wales, for example, the Children Act 1989 has as part of its paramountcy principle:

- the principle that delay in determining proceedings in respect of a child is likely to prejudice the child's welfare,[56] and also
- the 'no order' principle, that is, a court order should only be made if it positively promotes the welfare of a child.

111. The breadth and flexibility of the welfare and best interests test in the Care of Children Act is part of its strength because it means that decisions can be tailored to an individual child's circumstances. However, the discretion may mean there is little certainty for parties in how it might be applied in their case. This lack of certainty may encourage parties to litigate rather than settle out of court or to re-litigate decisions they are unhappy about. Given the evidence of harm caused to children by ongoing conflict between their parents it may be timely to consider whether to introduce a principle that finality in litigation is in a child's best interests.

A way of creating more certainty in decision making may be to provide better guidance in the law.

112. Some stakeholders suggested a number of different ways to achieve greater certainty when the Court decides care arrangements for children, such as including provisions in the law to act as a starting point for decision making. These could include:

- A child spending equal shared time between parents should be the starting point for decisions about care arrangements.[57]
- Care arrangements for children should reflect pre-separation arrangements as a starting point.
- There should be standard parenting orders based on psychological, developmental and social evidence about what care arrangements work best for children at a particular age that may be modified to a child's particular circumstances. Standard orders could be made for three groups: preschool, school and secondary school children and tailored to the individual child's and family's circumstances.

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[54] Care of Children Act 2004, s4.

[55] Care of Children Act 2004, s5.

[56] Section 4(5) of the Care of Children Act 2004 says that in determining what is in the child's best interests, a Court or person must take into account the principle that decisions affecting a child should be made and implemented within a time frame that is appropriate to the child's sense of time.

[57] Research literature emerging from Australia and elsewhere advise against presuming equal shared care after separation is best for children as, depending on the circumstances, it can increase the mental health risks for children, particularly when parents are in conflict or when children are very young. See Tolmie, Elizabeth and Gavey (2010); McIntosh and Chilshom (2008).

- Where there is domestic violence, a protected person should have sole responsibility for some guardianship matters, in particular, deciding where the child lives.[58]
- Where relocation with a child, either nationally or internationally, is proposed and the applicant is the primary caregiver, then provided a number of criteria are met (eg, there is good reason to relocate and the proposal is well planned and realistic) then weight should be given to the proposal. If there is shared care of the child but the relationship between the parents is conflicted and that conflict unlikely to reduce then weight should also be given to the proposal to relocate.[59]

113. An assessment of any of these proposals must include whether and to what extent they may be inconsistent with the principle that the welfare and best interests of the child is the paramount consideration in decision making. Decisions about children are currently made according to an assessment of an individual child's circumstances and a wide range of considerations come into play. While an inflexible rule may not be in the child's best interests, providing greater clarity in the law will assist parents to resolve matters themselves and provide greater guidance to judges in deciding cases.

What do you think?

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?

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?

114. This chapter has highlighted the benefits to children in reducing parental conflict and re-focusing parents on the interests and needs of their children. A key theme from the research is that getting children's voices heard earlier outside of court may assist parents to focus on the needs of their children and resolve the situation themselves rather than pursuing unnecessary and potentially damaging litigation in court.

115. The benefits of supporting early self-resolution are explored further in the next chapter.

[58] In determining the welfare and best interests of the child, the Court is guided by a number of principles. Section 5(e), the only mandatory principle, says that a child must be protected from all forms of violence, (physical, sexual, psychological). This requirement therefore might also include protecting a child from ongoing parental conflict.

[59] For a comprehensive overview of the issues involved in relocation cases and more information concerning this proposal, see Henaghan (2011).

5. SUPPORTING SELF-RESOLUTION

A culture shift away from litigation and towards early resolution outside of Court is now required.

116. Decisions agreed through participative processes such as mediation are generally more durable and lasting. This chapter considers how the role of information, parent education, and legal advice could be improved to assist people to resolve their disputes, where appropriate, early and out of court.

5.1 Providing access to information

It is important that people have easy access to an appropriate range of information and services as early as possible.

117. Most people resolve post-separation arrangements themselves. However, many stakeholders considered that the current information provided to families is not sufficient to support them to resolve their disputes.

118. Stakeholders suggested that to improve the provision of information a comprehensive information strategy is needed to ensure sufficient self-help information is available to families. They also suggested that people should be provided with information that emphasised the benefits of resolving issues early and outside of court, as well as:

- more information on types of disputes and the services available, including alternative dispute resolution (ADR) options
- more information for parties on the benefits of self-resolution, the disadvantages of going to court, the effects of conflict on children, and what the Court takes into account when making a decision
- information about court processes.

119. There should also be:

- more information and links to other service providers about family violence, mental health, and alcohol and drug issues
- better information for children to help them understand and cope with their feelings, and to explain the court process to them
- greater support and information for people who choose to represent themselves in court
- more culturally responsive material
- more gender specific information for men and women on how to cope with separation and conflict.

120. The Court also should take a more customer service approach to the provision of information and facilitate easy access to the Court by:

- using online tools including dispute resolution tools, dissolution applications, and legal information
- redeveloping applications so that they are simple and in plain English
- establishing a telephone helpline.

121. There were mixed views as to whether it is the Court's role to provide information and help for resolving family disputes. Some stakeholders felt that information is best distributed in partnership with a range of government agencies, such as the Ministry of Social Development, and community agencies, such as community law centres and iwi groups. Community agencies and iwi are often more in touch with the communities they serve and are frequently better placed to provide and manage the distribution of information.

122. Many of these suggestions would involve considerable time and cost to implement. It is important to consider the benefits of investing more in information and its effectiveness in keeping people out of the court system. Such an investment would need to be considered in conjunction with other out-of-court services such as parenting programmes, counselling, and mediation services.

> **What do you think?**
>
> How can we improve the provision and delivery of information to those who need it, including children?

5.2 Parent education

Parents who have attended parenting programmes are more able to reach an agreement and prioritise their children's needs over their dispute.

123. Since May 2006 a free information programme for parents called Parenting through Separation (PTS) has been provided by the Ministry of Justice. The programme is voluntary and assists parents to understand how separation affects children and the importance of keeping children away from adult conflict. Parties are encouraged to attend the programme as part of the Early Intervention Process.

124. While the evaluation of PTS did not specifically include an evaluation of the effectiveness of the programme for Māori as significant users of Family Court services, there was almost universal agreement that the programme was highly effective.[60] The programme was also highly regarded by stakeholders who mentioned it in our consultation process.

125. Despite its apparent success, uptake of PTS is relatively low, with approximately 2300 participants each year between 2005/06 to 2009/10. The average number of parenting order applications filed each year over the same period was 11,554. To address this low uptake stakeholders have suggested that improvements could be made to enhance the delivery of the programme such as expanding its content and developing multilingual options. It was also suggested that PTS attendance should be compulsory either as an element of an ADR process or before applying for any court order.

126. If the PTS programme is to be considered as part of a wider strategy to support early and out-of-court resolution it would be important to also consider:

- how it could be linked in with other parenting programmes offered by government agencies such as the Ministry of Social Development (MSD) and community agencies
- the option of voluntary referral to Māori designed, developed, and delivered programmes, consistent with a whānau ora approach
- whether MSD, as the government agency concerned with the welfare of families, should provide the programme to wider audiences in the community
- whether it should be accessed via the Court or directly through the community
- how it should be funded, including whether requiring participants to contribute to its cost might also encourage a greater commitment to the programme by attendees.

> **What do you think?**
>
> Should attendance at PTS be compulsory before making an application to the Court? What might be the risks and benefits of such an approach?
>
> Should PTS be provided more widely in the community?
>
> Should parties be required contribute to the cost of PTS?

[60] Robertson and Pryor (2009).

5.3 Legal advice

Legal advice can determine the approach taken to resolving a dispute but some lawyers' behaviour may exacerbate conflict and encourage litigation.

127. A key component of an effective early resolution system is the role of lawyers. For many people a visit to a lawyer is their first contact with the family justice system. Lawyers have a statutory duty to ensure that their clients are aware of the facilities that exist for promoting reconciliation and conciliation and to take whatever steps they consider may assist in promoting reconciliation or, if that is not possible, conciliation.[61]

128. Experienced family lawyers will advise their clients of the relative advantages and disadvantages of the options available to them, including resolving matters themselves, negotiating an agreement with or without their lawyer's help, seeking the services of counsellors or mediators, or litigation. However, not all lawyers act in this way.

129. To encourage best lawyer practice, other jurisdictions such as the United Kingdom and Australia, have introduced accreditation schemes for family law lawyers. The purpose of these schemes is to promote high standards in legal service provision. The schemes can be voluntary or mandatory, and ensure that consumers, courts, statutory bodies and other professionals are able to identify legal practitioners with proven competency in family law. Members are regularly reviewed to maintain standards of competency and expertise. It may be timely to consider accreditation of New Zealand family lawyers.

There can be a tension between the ethical obligations of lawyers to their clients and the best interests and welfare of children.[62]

130. The rules of professional conduct require lawyers to act on their clients' instructions and to promote their clients' interests.[63] Lawyers have a responsibility to advocate for their client's position and, if they take a too conciliatory approach, they may lose the confidence of their client. Client confidentiality also means that a lawyer for a party has no obligation to disclose information that may be harmful to their client's case even if this has an impact on the children.

131. Some overseas jurisdictions have stronger legislative provisions which encourage lawyers to promote early resolution. In British Columbia, proposed amendments to the Family Relations Act 1978 include obligations on lawyers (and other professionals) to screen for family violence and provide people with information about dispute resolution options.[64] In Australia, the disputing parties must make a genuine effort to resolve their dispute by ADR before they can make an application to the Court.[65]

132. In discussions with stakeholders, we sought views on how we may encourage lawyers to assist in resolving their client's dispute as early as possible and away from the Family Court. Ideas for encouraging early resolution suggested by stakeholders are not mutually exclusive and include:

- obligations on lawyers to work cooperatively
- ensuring binding agreements
- obligations to use best endeavours to settle.

133. We examine each of these suggestions in turn.

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[61] Family Proceedings Act 1980, s8. This duty applies to proceedings under the Care of Children Act 2004 and the Family Proceedings Act 1980.

[62] Firestone and Weinstein (2008).

[63] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[64] White paper on Family Relationship Act Reform 2010, British Columbia: Ministry of Attorney General.

[65] Family Law Act 1975 (Cth), s60I.

Working co-operatively

Strengthening lawyers' obligations to work collaboratively is best for children and families.

134. It was suggested that in cases involving children, there should be a new legislative obligation on lawyers involved in parenting disputes to work collaboratively with the other party's lawyer, and that both lawyers must prioritise the children's welfare and best interests over their obligations to their respective clients.

135. This would be a controversial change and many would see it as cutting across the current obligations lawyers have to their clients. However, if we are to take a child-centred approach to reform then it is important to ask that, given the evidence that unnecessary litigation can be harmful to children, whether we require a different set of obligations on lawyers to ensure that children's welfare and best interests are the paramount consideration in this area of family law.

136. A further suggestion to protect the interests of children following parental separation is to encourage the development of the 'collaborative law' model. This overseas model of dispute resolution, recently introduced in New Zealand, involves specially trained lawyers advising and assisting their clients to negotiate an agreement.

137. The process is assisted by the involvement of specialist advisors such as accountants, valuers, and child counsellors. Parties are assisted with communication skills, managing their emotions, and developing parenting plans that meet the needs of their children. Collaborative lawyers also undertake that if either party decides to go to court they will not represent their party. This provides an additional incentive for parties and lawyers to settle out of court.

Binding parenting agreements

Private agreements reached between parties out of court should be enforceable.

138. Some separating parents enter into formal written agreements negotiated by their respective lawyers. These agreements depend upon the goodwill of parties to work successfully and some parents have the terms of their agreement made into a court order so that it can be enforced if necessary. However, the Court will only make an order in these circumstances if it is satisfied it is in the welfare and best interests of the child to do so. Rather than relying on the agreement itself, some judges appoint lawyer for the child to investigate the child's circumstances.

139. Several stakeholders remarked that there should be a simpler process for recognising written agreements between parents when these are drawn up by the parties' lawyers. One of the suggestions made is that an agreement drawn up between lawyers should be certified by the lawyers concerned that its terms are in accordance with the welfare and best interests of the child. Such an agreement would be recognised as if it were an order of the Court. The certification could be similar to that undertaken in agreements under s21 of the Property (Relationships) Act. An alternative suggestion was for these types of agreements to be registered in the Court. In neither of the situations was it thought necessary to appoint lawyer for the child.

Genuine steps obligations

Currently there is no obligation for lawyers or parties to use their best endeavours to resolve matters outside of a court process.

140. In Australia separating parents must attend mediation with an accredited family dispute resolution practitioner (FDRP), unless one of a number of exceptions to this approach applies. If mediation is unsuccessful an application cannot be made to the Court unless it is accompanied by a statement signed by the FDRP that the parties have taken genuine steps to try to resolve the dispute.

141. Currently in New Zealand a lawyer must certify that they have carried out their obligations to promote reconciliation and conciliation when making a written application to have a matter set down for a hearing. However, as the majority of these applications are made orally, certification does not often occur in practice.

142. Stakeholders suggested that there should be clearer expectations on both lawyers and parties to attempt to resolve matters themselves outside of court. This could be achieved by including an obligation in legislation to require lawyers to certify what steps they had taken to resolve matters prior to making an application, and by providing greater incentives to parties to attempt to settle early and outside of court. Such an obligation would require lawyers to more critically assess cases, especially whether to file on notice or without notice.

143. It was also suggested that lawyers could assist in the dissemination of information to parties and should routinely outline the cost, (both financial and personal) of going to court, and the adverse impact of conflict and court processes on children. Obligations need to be robust to avoid the risk of becoming mere tick-box compliance and consideration should be given as to whether penalties should be imposed on lawyers if they have not complied with legislative requirements.

What do you think?

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?
- be obliged to work collaboratively in the interests of children rather than their clients?
- be encouraged to assist their clients to resolve their issues without using the court system?
- 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?

What would be the impact of changing lawyers' professional responsibilities on the way lawyers practice, and on their clients?

144. This chapter suggests that better use of quality information, parenting programmes, and strategies to encourage lawyers to assist parties to resolve their disputes early in the process and out of court. The following chapter builds on this by discussing the role of ADR services.

6. FOCUSING ON ALTERNATIVE DISPUTE RESOLUTION SERVICES

Court processes based on the adversarial system can be harmful for children and families. An application to the Family Court should be the very last resort or reserved for cases that are urgent or not suitable for alternative dispute resolution.

145. This chapter considers how we can encourage people to use co-operative methods of dispute resolution instead of going to court. Evidence suggests that having parties actively involved in decision-making processes ensures that agreements reached are workable and take into account particular circumstances. Participative processes can also be modified to better respond to the needs of Māori, Pacific and other cultures by being inclusive of the wider family.

146. A key issue is whether access to the Court should be restricted and parties expected to participate in out of court dispute resolution. However, if access to the Court was to be restricted to only those cases where there is a clear need for State intervention, then the question is whether the State has an obligation to provide some level of ADR services to families.

6.1 Counselling

The growth in the demand for and cost of counselling services provided by the Court is rising and cannot be sustained.

147. Currently free confidential counselling is available on request under s9 of the Family Proceedings Act. This service is able to be accessed ahead of Court proceedings and is the primary mechanism for people to get assistance with their relationship issues outside of the Court process.[66]

148. The number of requests for counselling prior to the filing of proceedings has increased by 23 percent from 12,131 in 2004/05 to 14,895 in 2009/10. Expenditure on s9 counselling has increased by 74 percent between 2004/05 and 2009/10 from $4.49 million to $7.79 million.[67]

149. Access to s9 counselling is not predicated on any intention to file an application in the Family Court and we do not have any information about how many couples who attend counselling were considering going to court. From 1999-2009/10 there were 130,685 s9 requests for counselling. Of these, 23 percent of applicants requesting counselling[68] (30,010) had subsequent applications under either or both the Care of Children Act (and its predecessor the Guardianship Act) and the Domestic Violence Act.

150. Some data provided by a service provider highlights the range of issues people accessing court counselling services need assistance with. Of this sample of court counselling referrals (including court directed counselling) 11 percent of people identified mental health issues, 16 percent raised violence issues, 33 percent indicated other forms of conflict were an issue, 44 percent of people were contemplating separation, and 45 percent involved discussions about arrangements for children.[69]

151. Some stakeholders supported the ongoing use and government funding of counselling, and thought it should be made mandatory before filing an application for a parenting order. They noted that underpinning many disputes are personal and emotional issues rather than legal concerns and that counselling provides parties with an opportunity to understand each other's perspective better, and be more open to resolution.

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[66] Free counselling is obtained by making a request to the Court. It is distinct from court ordered counselling that parties may be ordered to attend once they have begun court proceedings.

[67] The increase in requests for counselling accounts for a significant portion of the increase in spending in this area in addition to the impact of standardising payment rates for all counsellors.

[68] Counselling under s9 of the Family Proceedings Act 1980.

[69] These issues are coded by counsellors who record the 2-3 most prominent issues so any case might be present in multiple categories.

152. However, some stakeholders were ambivalent about the current counselling function in the Family Court, noting that:

- The term 'counselling' is a misnomer as, although there may be therapeutic aspects involved, the counselling provided is really about assisting people to reach an agreement about the care of their children and other relationship matters. However, it was queried whether counsellors have the necessary skills and training to successfully conclude such agreements.
- Currently parties are entitled to six sessions but it was suggested most counsellors know within two or three sessions whether counselling is going to work for parties in reaching a resolution of their dispute.
- Counselling has an uncertain focus. It is unclear what is being provided and to whom. There is also currently little evidence of its effectiveness in assisting people to resolve their dispute.
- It may not be appropriate for this service to be accessed through the courts because, if it does not help to resolve the dispute, people may think court is the next step.
- It is inappropriate for the State to fund this service, particularly for people who can afford to pay, or for those couples using the service who do not have dependent children.

153. The most critical consideration is whether this type of service should be funded by the State at all, and whether parties seeking support to resolve their relationship issues should be asked to contribute to or pay for that service. If counselling was to continue to be supported in some way by Government it would be important to address the uncertain focus of the service and the number of sessions that should be provided. In addition, given parenting cases are driving most of the volume and cost in the system, we need to consider whether this service would be best targeted to support low income people or those with dependent children.

154. Ongoing policy work should also ask whether investing in counselling services, even if it was targeted, is appropriate without a greater understanding of whether counselling is effective in helping people resolve their disagreements without further assistance from the Court. It may now be appropriate to support mediation services. Alternatively, given private parenting disputes are increasing court activity and costs, a better investment for Government may be to support the PTS programme that assists parents to focus on their children's needs and which has recently been evaluated and found to be effective.

What do you think?

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

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

Is it appropriate to access counselling via the Court?

Should counselling focus more clearly on conciliation?

6.2 Mediation

Mediated agreements are said to be as good as, and in some cases more effective, than those reached through the legal process.[70]

155. Currently mediation is used privately to resolve family law disputes out of court. Yet to be-enacted provisions in the Family Proceedings Act and the Care of Children Act would enable family mediation to be used for matters that counselling is currently available for. As noted in Chapter 4 child-inclusive mediation has been found to be very effective in meeting the needs of families with children.

[70] Pryor and Seymour (1998).

156. Mediation can be adapted to meet the needs of different cultures, for example, by including extended family in decision-making processes. Many stakeholders thought that the family group conference model used in care and protection matters could be adapted to Care of Children Act matters. This type of approach is particularly supported by Māori stakeholders because it is based on consensual, family-based decision making.

157. There is a trend overseas to use mediation as the primary dispute resolution process.[71] In 2006, mediation became mandatory, if appropriate, for most parenting disputes in Australia and has reduced the number of separating parents going to court.[72] In order to make an application to an Australian court following unsuccessful mediation, the mediator must certify that parties made a genuine effort to resolve their dispute. This approach could be considered for the Family Court in New Zealand.

158. It was suggested that one way of enhancing the status of agreements reached through an ADR process is to register them in the Family Court. This would enable enforcement of the agreement if a party's actions failed to be consistent with its provisions.

159. If we were to propose mandatory mediation, or an ADR process such as arbitration, there are important issues to consider, including:

- ensuring processes are in place so that urgent matters or those not suitable for mediation are identified and directed immediately to court
- identifying those people who are unable or unwilling to participate
- ensuring parties can resolve disputes in a manner consistent with their culture and personal values
- ensuring self-represented parties are not disadvantaged
- ensuring decisions do not reflect an existing power imbalance between the parties
- ensuring durable settlements are reached.

160. A number of issues also need to be considered to support a shift away from resolving disputes in court and introducing an expectation that parties should undertake their best efforts to resolve matters outside of Court before an application can be made, including:

- How would people know which service was best for their needs? Would a co-ordination mechanism or role be required to ensure people adopted the appropriate pathway?
- How could both parties to a dispute be encouraged to engage in mediation without Court oversight?
- How can we ensure that mediation, if it was to be made mandatory, does not become a compliance step that just adds another layer to the existing system?

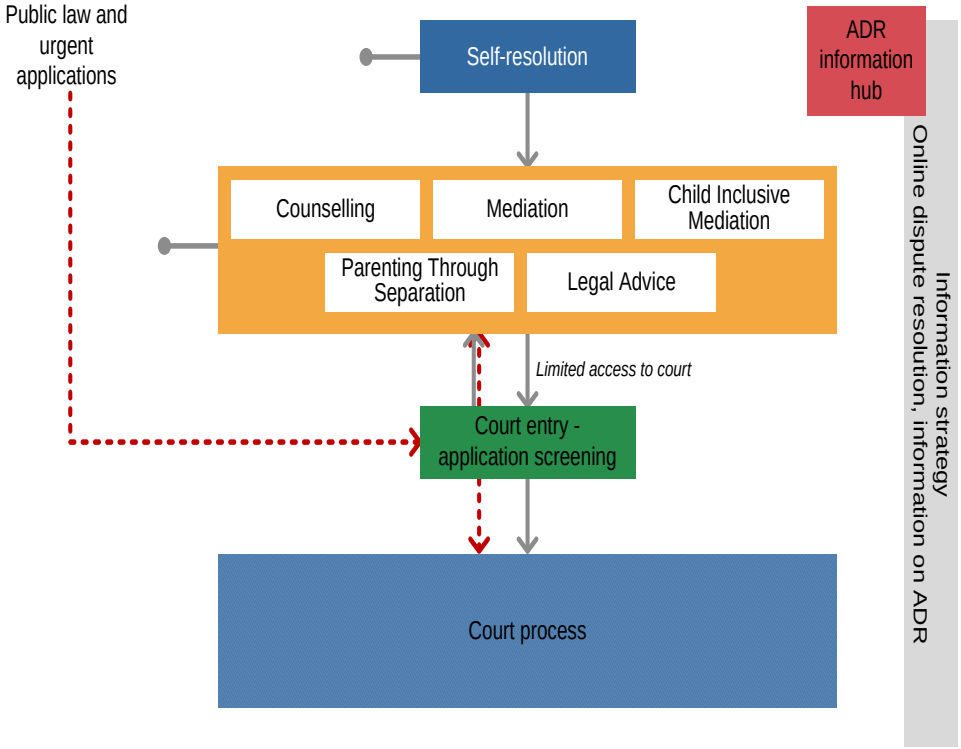
161. Other considerations relate to the role the State should have providing mediation or setting the standards associated with the service. Given the current fiscal environment it may not be appropriate that the State be responsible for funding such an approach and that the onus should be on parties to contribute to or pay for these services. Alternatively, funding could be targeted to low income people by some form of means testing. Stakeholders have said that when people pay for services themselves they are often more committed to the outcome. Other views are that supporting targeted early intervention may be a good investment if we can be certain that such an approach is effective at ensuring fewer people come to court for private parenting or relationship property matters. We welcome your views on these issues.

[71] For example, Australia, England, and British Columbia.

[72] Separating parents cannot go directly to the Court except in certain circumstances, such as family violence or child abuse.

162. A possible structure for resolving standard family disputes is depicted in Diagram 2 below. A first step for private matters such as parenting, relationship property, or estate disputes is for people to attempt to resolve the matters themselves. If that is unsuccessful then parties could apply to the Court for a hearing. The Court will screen applications and parties may be directed to try to resolve the dispute again themselves. Urgent applications would have direct access to the Court. How applications are dealt with after they have been filed is discussed further in Chapter 8.

Diagram 2: A possible structure for resolving disputes



What do you think?

Do you agree some form of ADR should be mandatory before an application can be filed in the Family Court in certain circumstances? What are the benefits and risks in making these processes mandatory?

Who would pay for the parties to attend ADR?

What is the best way to ensure both parties engage in ADR?

How could modes of ADR be developed that are responsive to the cultural needs of Māori, Pacific and ethnic communities?

6.3 A separate forum?

There will always be people who cannot resolve low level disputes, and who will require some support to conclude their case.

163. Rather than focus on parties accessing a range of ADR services ahead of court, some stakeholders suggested that we should consider a new and more informal decision-making forum. This forum would hear low level family disputes about, for example, care arrangements for children where there are no safety concerns, or for simple relationship property cases. Stakeholders noted that:

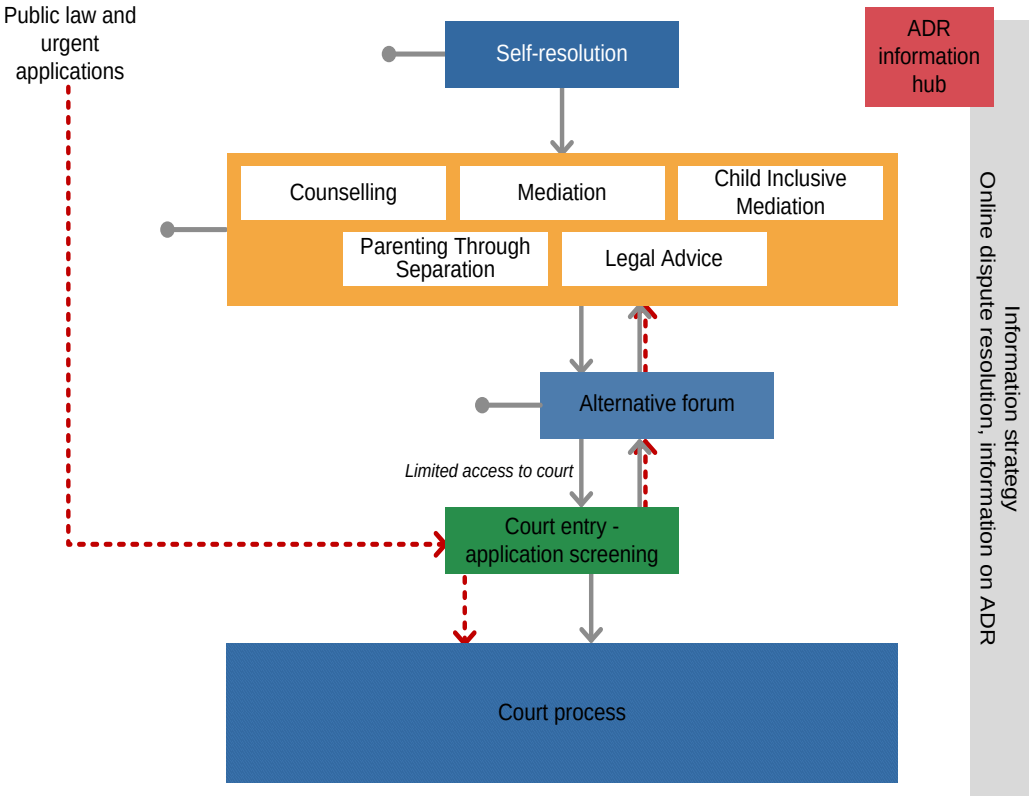
- There will always be situations when the ADR processes fail to achieve an agreement between the parties.
- Given the non-legal nature of some of the disputes currently heard in the Family Court, a formal court hearing is often a disproportionate response.

164. The Employment Relations Authority and the Disputes Tribunal have been suggested as models that may be useful in the family law context. The Employment Relations Authority member hearing a dispute decides what the relevant issues are and engages directly with the parties. There is less reliance on lawyers in this process. The Disputes Tribunal also provides an inexpensive and quick process for decision making. If an attempt to reach agreement is unsuccessful the Disputes Tribunal referee can immediately arbitrate and make a binding decision.

165. Establishing another forum to undertake the Family Court's jurisdiction in some matters might be useful if we could be assured that it would achieve durable outcomes quickly, at low cost to users. However, the Government, in order to resource the forum, would also want to seek savings in Family Court and judge costs and time, because the Family Court would still be required to hear more serious cases.

166. A possible court structure that includes a separate forum is outlined in Diagram 3 below. An attempt at self-resolution is required. If that process is unsuccessful the parties may apply to this forum for a hearing. Applications would be screened and if the matter is considered one that could be resolved by the parties privately they would be directed to try again to resolve it themselves. Alternatively, this forum may either decide the dispute, or refer the dispute to the Family Court if it considers that this is the more appropriate forum.

Diagram 3: A possible structure with a separate forum for low level disputes



167. An alternative approach to a separate forum dealing with low level disputes is discussed later in Chapter 8 and is based on the approach taken in the District Courts Rules.

What do you think?

Do you think a separate forum for resolving low level disputes would be useful? If yes, what types of matters should it deal with?

What are the risks and benefits associated with establishing a separate forum?

168. This chapter has focused on ADR services to assist parties to resolve their disputes ahead of court. We now turn to examine how access to the Court itself could be managed.

7. ENTERING THE COURT

Currently, the Family Court has limited control over which cases come to court, and pays for most services. This situation cannot continue.

169. Once an application is filed, the Court is required to deal with it. While there are some cases that are urgent, or should only be dealt with by a judge (eg, those involving family violence, mental health issues, and alcohol and drug abuse), there are others that could be resolved without judicial intervention. This chapter looks at how the Family Court may have better control over the matters that may be heard in the Court.

7.1 Managing applications

Access to the Court

The Family Court is too accessible and driven by the demands of lawyers and parties.

170. The Family Court plays an important role in protecting the interests of children and vulnerable people. However, as noted earlier, the Review has also highlighted the need to make a clearer distinction between those matters that should be dealt with by the Court and those that could be better dealt with through an ADR process.

171. Throughout the consultation it was suggested that the Family Court has been too accessible. We need to ensure an appropriate balance between providing access to justice and effective use of the Court's resources. Currently the gateway into the Family Court is wide. The Court considers every matter filed regardless of its merits. There are no charges for filing applications and services, such as lawyer for the child and specialist reports, are usually provided at no cost to the parties.

172. If more disputes are resolved earlier this should reduce the flow of new and repeat applications coming to the Court. Stakeholders have suggested a number of ways to manage initial access to the Court, including:

- an assessment of the dispute made in consultation with a lawyer or an ADR provider that it is not necessary for the dispute to be decided by a court
- screening of cases following an application being filed that may result in cases being referred back to parties to consider an alternative means of settlement (screening is discussed further below).

"Have we permitted too many cases to return to court time and time again on the most trivial matters because the Court is seen as having a supermarket capability? Answers are sought from judges on everything from choice of school to choice of surnames."
(Boshier, P 2004)

Reducing repeat applications

The Family Court has limited ability to restrict repeat applications.

173. Currently under s140 and s141 of the Care of Children Act, the Family Court may dismiss proceedings or restrict commencement of proceedings in certain narrow circumstances. Stakeholders commented that the threshold to meet in either of these provisions is too high, making them of limited use in practice. As noted in Chapter 4 introducing a principle that finality in litigation is in the child's best interests may help limit the number of repeat applications.

Some other suggestions to limit the numbers of repeat applications include introducing a rule that they cannot be filed:

- without leave of the judge who decided the original proceedings, or
- within a prescribed period (eg, two years), or

- unless there has been a material change in the child's circumstances, or
- if the Court is being asked to reconsider substantially the same issues as those already considered.

174. The case summary below illustrates the disruptive effect repeat applications can have on children's lives.

Case summary: Josh and Will

Josh and Will's parents separated in 2007 when the children were aged seven and eight. Reaching an agreement about care and contact was difficult. The children's father initiated proceedings in March 2009, when he learnt from his children that their mother was intending to move with the children and her new partner to another city over five hours drive away and then possibly overseas. The children were having regular contact with their father at that time.

The Court made an order for non-removal of the children. The children's mother resented that she was unable to relocate. She made it difficult for contact to occur. The children were made to feel guilty about having a good time with their father. They witnessed arguments between their parents. This had a negative impact on the relationship between the children and their father.

In September 2009 a parenting order gave day-to-day care to the children's mother with contact to their father. Counselling was agreed to help repair the relationship between the children and their father. The family therapist considered that the relationship breakdown between the children and their father was largely attributable to their mother's influence. As a result Josh and Will's father made a successful application to vary the parenting order with day-to-day care reverting to him.

The children's mother moved overseas and made a further application for day-to-day care of the children. At the conclusion of a four-day hearing a parenting order was made in favour of Josh and Will's father, with contact to their mother. Within three months the children's mother filed an application to vary the parenting order seeking day-to-day care in her favour. A further hearing confirmed the order in favour of the children's father.

Josh and Will are still coming to terms with the constant changes in their lives. The ongoing conflict between their parents coupled with their mother's behaviour has resulted in the children suffering from anxiety issues.

175. This case summary provides a clear example of when ongoing litigation is contrary to the best interests of children. Having better mechanisms to assess the merits of applications and an ability to turn down applications in some circumstances should be considered and we welcome your views on how this could be achieved.

What do you think?

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?

Determining appropriate pathways

Applications should be screened to ensure they are dealt with appropriately.

176. Stakeholders emphasised the importance of efficient management of cases. Some stakeholders have suggested that all cases be screened and follow clear processes, similar to the approach in the District Courts Rules (discussed further in Chapter 8). Currently, only applications under the Care of Children Act are screened as part of the Early Intervention Process and placed on either an urgent or standard track.

"Effective screening will ensure the Court is not cluttered with minor cases."
(Stakeholder)

177. The Family Court could adopt an approach similar to Australia where the screening process places children's cases (not care and protection) into either a standard track (the 'Child Responsive Program')[73] or where there are serious issues raised (eg, family violence) into a programme where cases are intensively managed, sometimes for a significant period of time (the Magellan Program).[74] Stakeholders have suggested that a similar approach in New Zealand would enhance safety, prioritise resources, and improve access to the Court.

Who should undertake screening?

178. Screening raises the obvious question of who should undertake that role. There is a divergence of opinion amongst stakeholders about the necessary skills and experience required. Some stakeholders suggest that persons with a social science background would be more appropriate than persons with a legal background, and that training in areas such as child development and the dynamics of family violence are essential. In the Australian[75] and the UK[76] family courts, people with social science training carry out family violence screening.

179. An important feature of screening is that the role might not only determine the appropriate pathway to progress applications, it could also entail declining an application and advising parties that their dispute should not be progressed through the Court at all but to seek the services of an ADR provider.

What do you think?

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?

Urgent (without notice) applications

Urgent applications may be used too readily in the Family Court, especially in cases under the Care of Children Act, and certification should be required.

180. If the Review results in the expectation that most disputes will be resolved using ADR there is a risk that more people may attempt to use the urgent or without notice processes to have their 'day in court.' This risk would have to be managed because, although the stringent requirements for making without notice applications are set out in the Family Courts Rules, some stakeholders were concerned that these applications are sometimes be misused, particularly in Care of Children Act applications, to gain a tactical advantage. It may now be timely to review the criteria for urgent applications and make them clearer.

181. Without notice applications take parties straight into a court process without the opportunity to try less adversarial ways of resolving disputes. This can be damaging to the ongoing parenting relationship and escalate conflict, especially when later information provided by a respondent suggests that a without notice application was not necessary. Between 2005/06 to 2009/10, 61 percent or 14,294 without notice applications for temporary protection orders were granted with 39 percent or 9247 of these later recorded as either discontinued, dismissed, lapsed, struck out or withdrawn. During the same period 80 percent or 10,485 of 13,150 without notice applications for interim parenting orders were granted with 32 percent of these later recorded as either discontinued, dismissed, lapsed, struck out, or withdrawn.

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[73] The Child Responsive Program involves a series of steps – parents view an educational DVD, attend intake and assessment meetings, and child and family meetings with a Family Consultant. The meetings are not privileged. The process also involves a settlement conference and a 'Less Adversarial Trial.'

[74] The Magellan Program is based on co-operation with government organisations such as child welfare agencies, with intensive case management by an individual judge who can order expert investigation and assessments from State child protection authorities who can also intervene in proceedings.

[75] In the Family Court of Australia, children's matters (excluding those involving allegations of sexual or serious physical abuse) are handled under the Less Adversarial Trials model, which begins with a family consultant carrying out intake and assessment interviews with the parents, including screening for family violence and child abuse. Matters involving serious allegations of sexual or physical abuse are handled in the Magellan case management system.

[76] For private law cases in the United Kingdom, a Children and Family Court Advisory Support and Service (Cafcass) officer carries out safety checks before the first formal court appointment.

182. Currently, without notice applications under the Domestic Violence Act 1995 must be certified by a lawyer that the application meets the requirements of a without notice application, that is, the lawyer concerned has advised the applicant that the affidavit filed in support of the application for urgent orders has fully and frankly disclosed all relevant circumstances, and also that he or she has made reasonable enquiries of the applicant to establish whether the relevant circumstances have been disclosed. The certification requirements are an important reminder of these obligations and it may now be appropriate to include the same requirements for without notice applications made under the Care of Children Act. It is also timely to consider what sanctions or penalties might be imposed on parties and/or their lawyers bringing without notice applications that are later found not to have merit.

What do you think?

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 penalties for making unmeritorious without notice applications? What might be the risks and benefits associated with imposing penalties?

7.2 Focused applications

Affidavit content

The standard of evidence filed in the Court is often poor and the 'any evidence' rule should be amended.

183. Affidavits have been criticised as being too long and full of personal details, hearsay, and inflammatory material which is often irrelevant to the case and exacerbates the conflict between parties. The 'any evidence' rule[77] that allows the Family Court to receive any evidence that it thinks fit, whether or not it would be admissible in another court, was also criticised as being the norm rather than the exception to the stricter requirements of the Evidence Act 2006 (Evidence Act).

"Some divorcing parents hate each other with such an intensity that they are prepared to invest unlimited legal and emotional resources to prove what a terrible person the other parent is."

(Jaffe, Lemon and Poisson, 2003)

184. Some stakeholders suggested that the 'any evidence' rule be amended to require the Evidence Act to apply to Family Court cases unless the interests of justice make it appropriate to receive what would otherwise be inadmissible evidence. It was also suggested that there should be a time limit of 7–14 days to file direct evidence when hearsay evidence is filed in support of an application, including an urgent application under the Care of Children Act or Domestic Violence Act. Such measures would assist in raising professional standards as well as assisting self-represented litigants in providing the Court with the information it needs in order to make a decision.

A focused questionnaire affidavit would ensure the Court receives the best information to make a decision.

185. Internationally, there is a move towards a questionnaire form of affidavit to ensure parties provide only relevant information about the matters in dispute. For instance in Ontario, the affidavit includes questions about the history of the child's care, proposed care arrangements, family violence, and civil and criminal proceedings relevant to the safety or well-being of the child.[78]

[77] Care of Children Act, s128.

[78] Form 35.1 Affidavit in Support of Claim for Custody or Access.

There is also a web-based 'forms assistant' to help people identify the appropriate forms to complete and what is needed to fill them out.[79]

186. It may be useful to introduce a similar questionnaire form affidavit that also includes questions about a child's needs and interests, and the role the other parent and extended family are to play in the child's life. The benefits of this approach include:

- focusing the parties to a dispute on the issues to be decided rather than their own personal conflict
- reducing conflict between parties
- providing the Court with sufficient focused information to appropriately screen and determine an application.

What do you think?

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?

What are your views on a standard questionnaire form of affidavit and what information do you think it should include?

Identification of issues under dispute

Applications should disclose and prioritise the issues to be determined, specify the outcomes sought, and include references to the relevant legislation and rules applicable to the case.

187. If the issues in dispute and those which are agreed to are identified early, the Court is able to deal more efficiently with a case. Early identification helps narrow the areas of disagreement and also reinforces the focus on the best interests of the child where children are involved. Stakeholders considered that lawyers should file joint memoranda anytime a matter was before the Court setting out those matters where there was agreement and what issues needed to be resolved by the Court. This practice would encourage good communication between lawyers, may assist early resolution, and allow the Court to focus on those matters in dispute.

188. A good example of such an approach is in the High Court where an initial Case Management Conference is allocated at the beginning of proceedings.[80] The requirements of the conference are set out in a formal checklist and include:[81]

- identifying the essential issues of fact and law
- the scope and timetable for any discovery
- the timetable for any future events, including the filing of any interlocutory applications and how and when they will be dealt with
- the duration of the hearing
- any proposals for expert evidence
- whether the proceeding is suitable to be placed on a short notice list (ie, suitable to be brought on not less than three working days notice)
- whether the proceeding is suitable as a back-up fixture to be brought on at five working days notice.

189. Introducing a similar approach in the Family Court context, together with a requirement to certify what steps have been taken to resolve issues, may reinforce a focus on the best interests and

[79] https://formsassistant.ontariocourtforms.on.ca/Welcome.aspx?lang=en

[80] High Court Rules, R 7.4.

[81] High Court Rules, Schedule 5.

welfare of the child. Narrowing down the issues under dispute may also contribute to reducing delays.

> **What do you think?**
>
> Should applications be focused on the issues to be determined and the outcomes sought?
>
> Should filing joint memoranda be mandatory?

7.3 Court fees

The costs of running the Family Court are almost entirely met by the taxpayer. In the current fiscal environment this is not sustainable and court fees will have to be introduced.

190. Most New Zealand courts charge a range of fees for proceedings in order to generate some revenue to offset court costs. Fees for certain court proceedings have been perceived as acceptable if the outcome of the court proceedings benefits private parties and not the State.

191. While fees relating to applications and subsequent proceedings heard in the Family Court can be set under provisions contained in the Family Courts Act 1980, the only type of application for which fees are currently charged is the dissolution of a marriage or civil union.[82] In 2009/10 these generated approximately $1.4 million in revenue, offsetting just 5.4 percent of the Court's direct operating costs of $26 million.[83] However, unlike other similar jurisdictions such as Australia and England, for the majority of Family Court proceedings there is no application, setting down, or hearing fee.

192. In all situations, court fees can be waived or reduced by the Registrars where matters of public interest are involved in a case. In the Family Court, examples of such matters might be family violence or mental health issues.

193. In light of the cost pressures the Family Court is operating under, introducing fees is being considered, for example, for applications and hearings under the Property (Relationships) Act, Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955 and for some parenting order applications under the Care of Children Act (refer paragraphs 12 and 13). Applying fees to these proceedings is consistent with the above justification that it is appropriate for private parties to contribute to the cost of their case if they benefit from the Court's decisions. In regard to applications for parenting orders under the Care of Children Act, it is considered that the State should also make some contribution to recognise the State's interest in the welfare of children. An advantage of charging fees is that, when parties consider whether legal action is the best course of action, the cost of court action is more transparent.

194. Previous reviews of court fees, and guidance from Parliament and central agencies, have highlighted that any user contribution to fees or other costs also needs to be considered in view of the following principles:

- Fees should be set at the level of cost recovery, that is, charges should not be more than the actual cost of providing the service.
- Contributions sought from users should reconcile with the private benefit users gain from accessing the Court, and the public benefit that Government and society accrue from having those issues brought to the Court.

195. In setting a fee it is necessary to preserve access to justice. In practice, this involves measures that ensure that low income parties can access the courts, or are not disadvantaged when the other party is better-off financially.

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[82] These applications are made under the Family Proceedings Act 1980.

[83] All costs are rounded to the nearest $ million.

196. The setting of court fees has raised sensitivities in the past. The ideas that stakeholders have canvassed with us to date highlight the diversity of views held on the topic. For example, stakeholders were broadly supportive of application fees for Property (Relationships) Act cases, and there was general agreement that fees may be inappropriate for applications involving vulnerable children and adults. There were some concerns about the use of fees for parenting order applications as some of these applications could involve vulnerable adults (eg, victims of domestic violence). As noted above, legislation empowers Registrars of the Court to waive or reduce fees in certain circumstances. This safeguard would ensure that fees did not impact on the access to justice for vulnerable parties.

Setting down and hearing fees

To improve the Court's efficiency current practices such as lawyers seeking an adjournment on the day of a hearing or even the night before must stop.

197. Some stakeholders endorsed imposing setting down and/or hearing fees as a means of encouraging people to settle before a hearing is necessary, ensure lawyers are prepared and turn up on time to progress the case, and to deter repeat litigants. Imposing a hearing fee for relationship property cases is being considered.

198. Lawyers seeking adjournments within a day of a hearing has been allowed to develop in some Courts. This behaviour means that hearing time is wasted and other cases that could have been heard are not provided with the opportunity to do so. It is critical that Family Court professionals are accountable for their use of public resources. To ensure lawyers are adequately prepared for hearings, it has been suggested that setting down fees should be non-refundable within a defined period of time before a proposed hearing.

What do you think?

In what further circumstances should the Family Court impose application, setting down and hearing fees? What would be the impact of imposing these different fees, and what might be the risks and benefits?

199. In Chapters 5 and 6 we outlined ways of assisting people to resolve their disputes early, and away from the Court. This chapter further endorses this approach by suggesting measures in the Court that would enable it to control who uses the Court and when. The next chapter examines how Court processes could be reformed to better respond to those cases that do require court intervention.

8. PATHWAYS AND PROCESSES IN THE COURT

The public needs confidence that court processes are predictable and consistent and do not unnecessarily add to cost and delay.

200. Although the Family Courts Rules apply when proceedings are filed, there are no prescribed standard steps that all cases must follow. While less prescriptive processes may have the benefit of flexibility, they are also uncertain, less efficient and a cause of delay. Stakeholders were concerned that what happens after an application is filed is largely driven by the Court and lawyers rather than clear rules-based procedures that parties, the Court, and lawyers must adhere to. It is not acceptable that people do not know what to expect in what should be a client-focused service. Stakeholders considered it important that court users know how long their case is likely to take, what steps it will follow, and what it will cost.

8.1 Clearer pathways

Conciliation - inside or outside Family Court processes?

Research has shown that court-based conciliation has a short-term effect, is often followed by further litigation, and has limited impact on making arrangements work for children.[84]

201. When an application is filed, parties have an expectation that a judge will hear their case and make a decision. When they are instead directed to attend counselling or mediation, court users are understandably confused and uncertain as to what will happen and when they can expect a decision.

202. Some stakeholders consider that it is important that there are opportunities within existing frameworks to encourage conciliation and reinforce the message that conflict is damaging to children. Therefore at critical stages parties should be offered an opportunity to resolve issues themselves and opt out of the system. However, current practice goes a step further by directing parties to counselling[85] and mediation.

203. The Ministry was provided with many examples of situations where, given the personalities or hostilities involved in a dispute, stakeholders considered it would have been preferable for the matter to be dealt with by a judge as quickly as possible rather than the parties being referred to counselling or mediation. In 2009/10 only 24 percent of applications exited the court process at the counselling stage or immediately afterwards.[86]

204. Currently the Family Court appoints counsel to assist the Court to act as mediators in proceedings under the Care of Children Act as part of the Early Intervention Process (EIP).[87] Recent Ministry analysis of data relating to EIP indicates that when counsel-led mediation is used it is no more efficient than the pre-EIP approach for deciding applications. The number of disposed applications requiring a judicial hearing increased from 3829 to 4481 for the years ending 31 March 2010 and 31 March 2011 respectively.

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[84] Trinder and Kellet (2007).

[85] These include s10 and s19 of the Family Proceedings Act 1980 and s65 of the Care of Children Act 2004.

[86] Care of Children Act 2004, s65.

[87] Lawyers are generally appointed to assist the Court in reaching a decision about the matter before it, in particular, when the Court is: considering a new or difficult issue of law and requires a perspective not represented by the lawyers for the parties; dealing with a novel issue of law where there is no decided point on this issue; dealing with a difficult point of law on which parties may have a common interest in it being decided in a particular way but the Court is not satisfied that it is the correct legal interpretation, or the right law to apply; and ensuring that the interests of a person affected by the matter in dispute are considered.

205. Some stakeholders were also concerned that lawyers conducting mediations were less likely to be as skilled as private mediators. It was suggested that their training and background as lawyers made it more likely that they would take a positional rather than neutral approach to mediation and that they would be less able to deal with the emotions of parties that may be obstructing resolution of the dispute. Given these issues it has been suggested that lawyers appointed to assist the Court should not conduct mediations.

The Court should be a legal forum

206. Research and feedback from stakeholders indicates that counselling or mediation may not be effective post filing, or in complex cases where issues are very entrenched, or where factors such as mental health or violence are present. If applications to the Court are confined to more serious matters, then counselling and mediation may no longer be necessary. It has been suggested that judicially ordered counselling provisions should either be restricted to assessment only or be repealed. This would essentially confine the role of the court to a legal forum only.

What do think?

If the Court is only dealing with serious cases should counselling or mediation be part of court processes?

Should lawyers appointed to assist the Court be used as mediators?

Addressing health and social issues

Some families require a social or health rather than a solely legal response

207. Many of the cases we examined in the Care of Children case file sample coming before the court were characterised with violence, alcohol and drug dependency, and welfare issues. Only 6 percent of these cases had legal matters requiring determination. Research has suggested that serious consideration should be given to recasting these types of issues as public health or social rather than legal issues.[88]

208. In line with this research, stakeholders have also highlighted that the Court is currently operating more like a social agency than a court and is trying to deal with issues best addressed by other agencies such as the Ministries of Health and Social Development. It was further argued that it would be better to link some clients to an agency that can more appropriately manage the wider social and health needs facing the family.

209. Ashleigh's case outlined below is an example of where the Court has assumed an ongoing role in relation to what are essentially health and social matters.

Case summary: Ashleigh

This case commenced in 2004 and remains open. Ashleigh is seven and for as long as she can remember her parents have been unable to agree on who should look after her, with repeated applications for parenting orders being made. As a result, Ashleigh has spent periods living between the homes of her mother, father, and grandparents.

Ashleigh's parents separated shortly after her birth with Ashleigh's mother obtaining a parenting order in her favour. Ashleigh's father did not contest the application as he was not in a position to care for her at that time. After Ashleigh's mother was admitted to hospital because of mental illness and alcohol addiction, Ashleigh's father was granted day-to-day care.

However, Ashleigh's father was battling his own drug addiction and it was agreed that for a period of time Ashleigh would live with her maternal grandparents with court orders to support this. Ashleigh's mother was later discharged from care and after a short period of time resumed Ashleigh's day-to-day care with court orders made in her favour.

Continued over the page...

[88] Trinder and Kellet (2007)

Ashleigh's father, having undergone treatment for his own addiction issues applied to the Court seeking to again become her primary care giver. This application is being defended by Ashleigh's mother and grandparents and is set down for a three-day hearing.

This case highlights the unique and challenging circumstances that can exist in some Care of Children Act cases. During the course of this case there have been four different judges, a change of lawyer for the father, a change of lawyer for Ashleigh, and in excess of 30 adjournments. These events have contributed to considerable delay in addressing Ashleigh's living situation and this has had a negative impact on her well-being. The constant changes in Ashleigh's living arrangements have affected her schooling to the point that her teacher has major concerns. Ashleigh has a low attention span, is easily distracted in class, and has been observed bullying other children in the school playground.

It is important to consider how the Court can function differently so that it can make final orders that provide certainty and stability for Ashleigh, determine the best care arrangement for her, effectively address repeat applications and stop ongoing and unnecessary litigation.

210. There are some legislative provisions enabling referral to, or reports from, the Ministry of Social Development. We now need to consider how we should develop a more systematic approach in these cases so that families might be linked in with, or assisted by, relevant social agencies and only brought back to the Court when a judicial decision is required.

What do you think?

How can we help people with complex social needs? Are proceedings in the Family Court the right response or should social agencies be involved?

8.2 Certainty of processes

The lack of clear processes has compromised the Court's efficiency and cost effectiveness and has contributed to delay.

211. There is a range of different ways cases can be progressed through the Court. Each application type follows its own procedures set out in legislation or the Family Courts Rules and augmented by judicial practice notes. As noted earlier, the approach taken in the District Court Rules might usefully be applied in the Family Court to ensure processes are standardised.

212. Some stakeholders considered there were too many unnecessary 'events' in a linear process of steps or stages to the next key event, and the same process applies regardless of the nature of the dispute. Court staff must follow up with lawyers to ensure that they have complied with their responsibilities at a particular stage in the process, rather than there being incentives or penalties on lawyers or parties for failure to comply with any orders or directions or rules.

213. Some of those consulted had different views on how this situation could be remedied. Their views tended to be consistent with their general view of whether it is desirable to have more or less flexibility in the administration of cases. Some solutions suggested by stakeholders included:

- judges assuming case management responsibility for individual cases
- a prescribed process in the Family Courts Rules, similar to that in the District Courts Rules, setting out pre-court processes, screening, and predictable case pathways.

Processes should be proportionate to the issues to be resolved

214. The duties imposed on the Family Court in Australia to assist in the early identification and resolution of issues might usefully be adopted in New Zealand.[89] These duties include:

- deciding which issues require full investigation and hearing and which may be disposed of summarily

[89] Family Law Act 1975 (Cth).

- deciding the order in which issues are to be determined
- giving directions/orders about the timing of steps that are to be taken in proceedings
- in deciding whether a particular step is to be taken, consider whether the likely benefits of taking the step justify the costs of taking it
- dealing with as many of the aspects of the case as it can on a single occasion.

215. The above duties would be useful as a first set of tools for the Family Court to use at the judicial and settlement conference stages of proceedings discussed later in this Chapter. The Family Court might also adopt some or all of the principles in the Australian Family Law Act outlined below. In deciding how a case is progressed an Australian Family Court judge must:

- consider the needs of the child and the impact that the conduct of the proceedings may have on the child
- actively direct, control and manage the conduct of proceedings
- conduct the proceedings in a way that safeguards the children concerned from violence, abuse and neglect, and safeguard the parties from family violence
- (as far as possible) conduct the proceedings in a way that will promote cooperative and child-focused parenting by the parties
- conduct the proceedings without undue delay, and with as little formality and legal technicality as is possible.

216. The duties and principles contained in this legislation balance a party's natural justice rights with ensuring the Court has sufficient powers to manage proceedings efficiently, particularly in the interests of children and not exposing them to unnecessary litigation. Adopting this type of approach in New Zealand might assist our Family Court to better manage proceedings, provide a proportionate response to a dispute, and protect the interests of children and vulnerable people. We should also design the system so that the matter can be disposed of at any stage.

Each court event should have a purpose and advance the matter towards resolution.

217. Restricting the number of steps in any proceedings is an effective way to manage processes and ensure timely decisions. Under the District Court Rules parties are encouraged to reach agreement themselves out of court. It is during this negotiation process that parties exchange evidence, which, if the claim later goes before a judge, will be the basis for judicial decision making. If an agreement is not reached by the parties, the applicant may bring the case before the Court where it is assessed and either allocated a short hearing or a judicial settlement conference. In short trials hearing time is subject to strict time limits for giving evidence and cross-examination with judicial discretion to extend these.

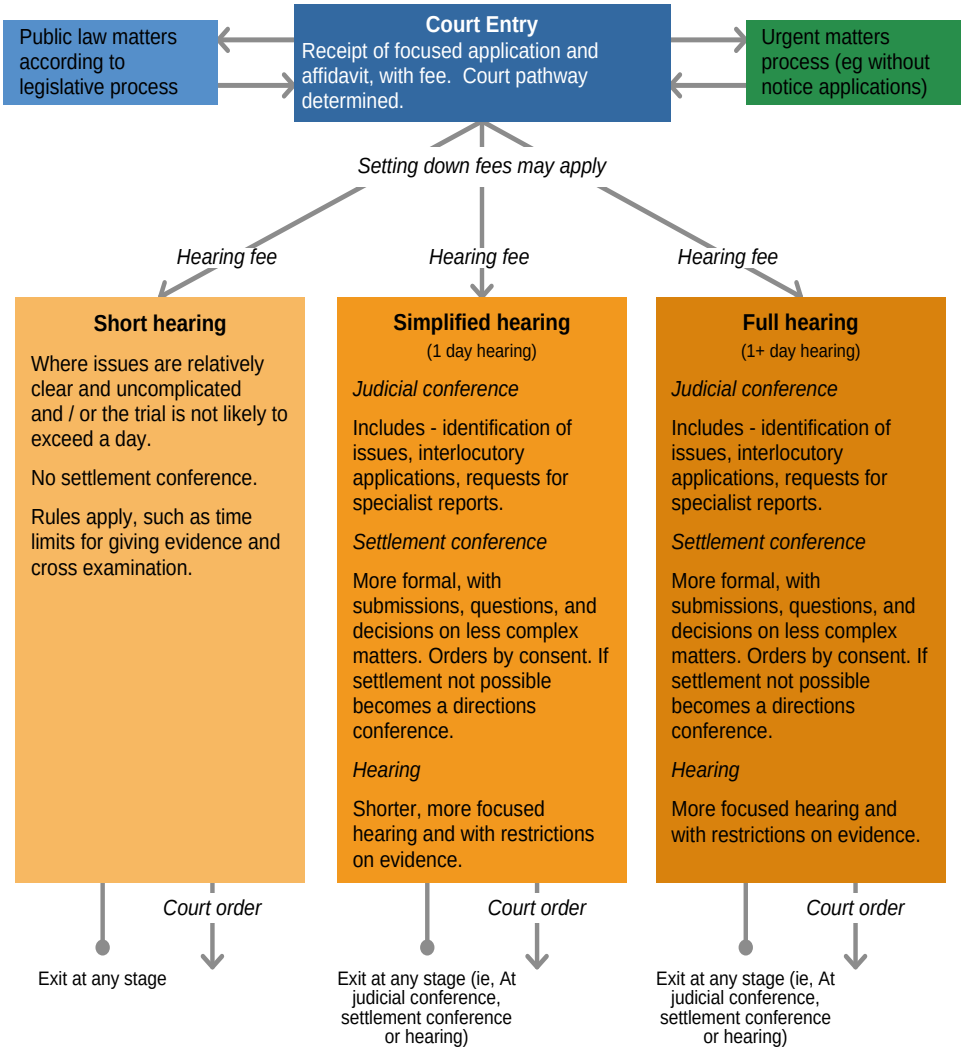
218. In all other cases a judicial settlement conference is held in an attempt to resolve or narrow the issues in dispute. The judge convening the settlement conference will determine whether the matter should be heard at a simplified or full trial if the settlement conference is unsuccessful. Simplified trials are those that can be determined in a day while full trials require more time. The settlement conference can become a directions conference and lawyers for the parties must be well prepared for this eventuality.

A standardised approach will provide consistency and certainty for parties.

219. A standardised approach such as that set out in the District Court Rules should be actively considered for the Family Court. Diagram 4 below outlines three potential process tracks for Family Court proceedings based on the District Courts model. As noted earlier, having all courts adhere to the same processes will mean consistency and certainty for parties. Under the approach simple matters would be dealt with at a short, focused hearing, while more complex or lengthy matters follow a standard three-step process. The judicial conference at the start of the process could follow the approach taken in the High Court which allocates an Initial Case Management Conference as outlined earlier.

220. Parties would be offered the opportunity to settle at each stage of the process with greater powers to a judge at a settlement conference to deal with minor matters and make orders. Unsuccessful settlement conferences would become directions conferences. The introduction of a setting down fee and a hearing fee should also be considered.

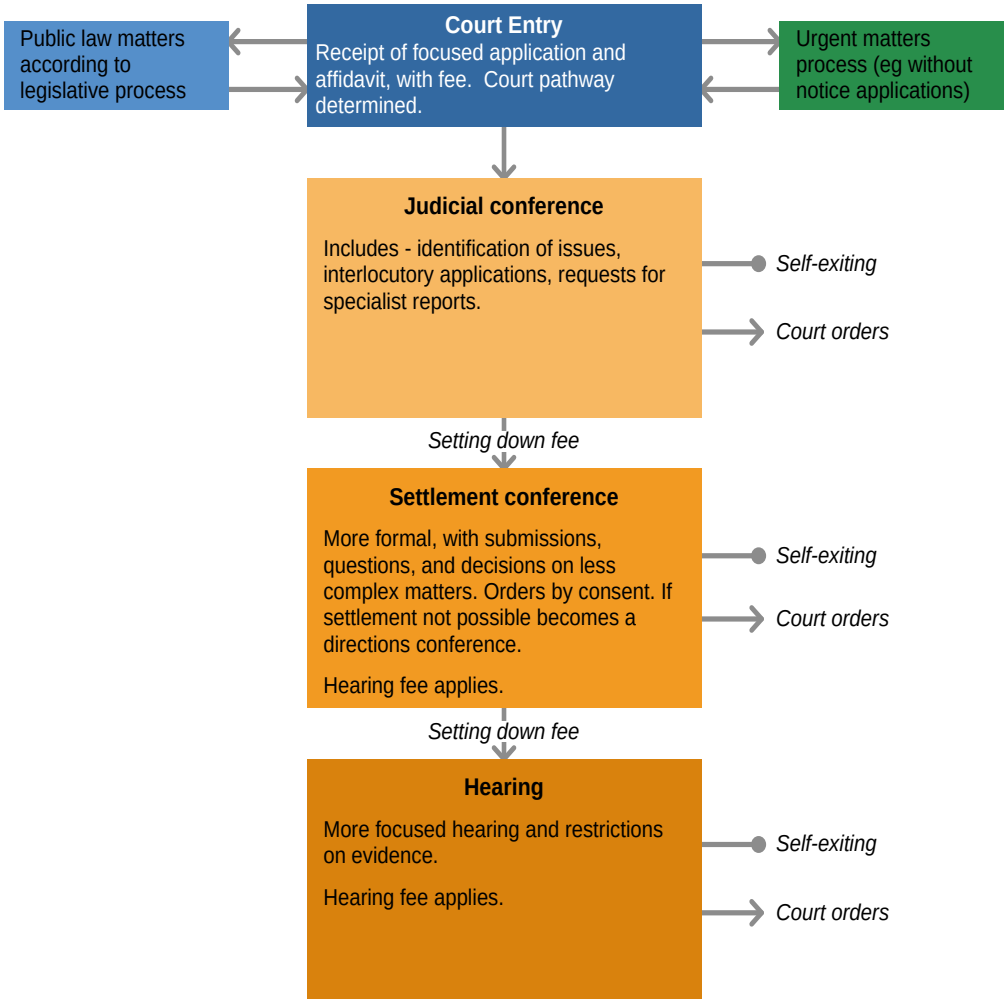
Diagram 4: Potential model based on the approach taken by the District Courts Rules 2009



Assumptions: That vexatious and repeat applications will have been screened out.
Rules apply on interlocutory matters, adjournments and evidence. Penalties and cost orders may apply.

221. An alternative to adopting an approach based on the District Court Rules is to have a standard approach for all cases regardless of their complexity. The number of stages in any proceedings would be restricted to three events: a short, focused judicial conference; a settlement conference; and then a final hearing if matters have not resolved earlier. As with the previous approach, at each stage parties would be offered the opportunity to settle with greater powers to a judge at a settlement conference to deal with minor matters and make orders. Unsuccessful settlement conferences would become directions conferences. Introduction of a setting down fee and a hearing fee should also be considered. In diagram form the process might look like that in Diagram 5 below.

Diagram 5: Standardised approach across different case types



Assumptions: That vexatious and repeat applications will have been screened out.
Rules apply on interlocutory matters, adjournments and evidence. Penalties and cost orders may apply.

222. To ensure delays are minimised it would also be necessary to have a process for the timely management of interlocutory applications, such as having these identified and disclosed at the first hearing. Adjournments might also be limited. Stakeholders raised the issue of lawyers or clients prolonging litigation by calling for unnecessary adjournments or making additional interlocutory applications which prolongs litigation. It has been recommended that failure to comply with court directions, orders or the Family Court Rules should attract automatic penalties unless there is a good reason for non-compliance.

What do you think?

Do you agree that a standard process for hearing Family Court proceedings should be introduced? Could all non urgent cases be dealt with in this way? Should the number of steps in any process be restricted? What would be the impact of this proposal, what might be the risks and benefits?

Do you agree with any of the processes outlined in this paper? If not, why not?

8.3 Durable clear decisions (orders)

Parties want certainty, clarity and finality in decision making; interim orders result in uncertainty, delay and expense, and can prolong conflict.

223. The Family Court makes decisions based on a family's situation at a particular point in time. However, modern families are characterised by geographical mobility, rapid movement into new relationships after separation, and the establishment of blended families with children from a variety of relationships living in the same household. Situations can change quickly and often in ways that cannot be foreseen. Children's needs and views also change as they grow older and as their situations change.

224. Currently, in attempting to create as much certainty in their orders as possible, judges may:

- make orders dealing with child's situation now but with provisions that will come into effect when a child reaches a certain age (eg, for a preschool child who will soon be going to school)
- make orders dealing with the child's situation now but with additional provisions that will only come into effect if a party meets certain requirements (eg, undertaking alcohol and drug counselling)
- make interim orders that are reviewed and/or varied after a trial period before they are made final.

> ***"It is simply not possible and may never be possible to predict the future, given that circumstances constantly change. Believing that it is, and using the best interests standard to prefer some social science evidence and studies to others, simply masks the moral choices that are being made".***
>
> *Henaghan (2011)*

225. Stakeholders raised concerns about the current approach that attempts to assess a family's future circumstances. One view is that it is impossible to predict a family's situation in the future with any degree of certainty and therefore final orders should be made dealing with the situation as it exists at the date of hearing. Simpler, less expensive processes should be place for parties to vary orders as and when this is required.

The number of interim orders is increasing.

226. In 2005/06, 3741 interim orders were made under the Care of Children Act but in 2009/10, this had increased by 40 percent to 5227. This creates uncertainty and ongoing court involvement that is not in children's best interests. It has been suggested that interim orders be limited and only used in restricted circumstances. Some stakeholders also favoured a default position where interim orders automatically became final after a specified period of time so that parties do not need to come back to court.

What do you think?

Should the Court attempt to make predictive assessments of a family's circumstances or make decisions on the basis of the evidence before them?

How could orders be varied (because a family's circumstances have changed) without the need for a court hearing? What could a simpler process to vary parenting orders look like?

Should the number of interim orders made in any one case be restricted?

Should interim orders automatically become final after a certain period of time?

Sanctions and penalties

Court rules provide for sanctions against lawyers and parties but they are seldom used.

227. Currently the Court can make orders prohibiting the filing of further evidence or defending an application when parties or their lawyers have failed to comply with the Court's directions. However, these provisions are seldom used.

228. In order to streamline court processes so that cases are heard more quickly we need to be able to embed any new changes. It is important to ensure the Court has sufficient powers, and to make use of existing ones, to sanction non-compliance. Failure to comply with court directions or the Family Courts Rules creates delays, intensifies hostility, and adds to the costs of parties. When the delay is not the fault of the parties themselves these sanctions might have to be imposed on lawyers.

> **What do you think?**
>
> 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 can we ensure the sanctions are applied when appropriate?

8.5 Compliance/breach of orders

229. Government has an interest in ensuring orders of the Family Court are complied with, and the number of repeat applications by people unhappy with the Court's decision is minimised. Many stakeholders were concerned that court orders once made could be breached by one of the parties with no apparent consequences. This criticism was mostly directed at applications under the Care of Children Act where responses to breach of orders (eg, a referral to counselling) were felt to be inadequate. While the policy intent behind this type of response is to encourage and facilitate ongoing relationships, many stakeholders queried whether immediate sanctions or penalties might provide greater incentives to comply.

> **What do you think?**
>
> Do you believe that breaches of orders should be subject to greater sanctions or penalties? If yes, what types of sanctions and penalties would be appropriate?

8.6 Particular issues in some types of hearings

230. Stakeholders raised a number of specific issues in respect of certain proceedings in the Family Court. These are discussed below.

Dealing with allegations of violence in parenting disputes

The current processes in the Care of Children Act may not be the most effective way of protecting children from family violence.

231. The Care of Children Act sets out a process to be followed when allegations of physical or sexual violence against children are made in applications under the Act.[90] Section 60 of the Act states that if the Court is satisfied that a party has used violence against a child, it must not make an order giving the violent party day-to-day care or contact, except supervised contact, unless it satisfied that the child will be safe.

232. However, there are different interpretations of s60. Some judges and lawyers consider that s60 applies when an application is filed so that all contact, other than supervised contact, between the

[90] Care of Children Act ss58-62.

allegedly violent parent and the child must be suspended until the Court has determined whether the allegation is proven or not. The alternative view is that contact should only be suspended if this is the outcome reached by the Court after it has considered the matter.

233. A further concern raised by stakeholders was the difficulty caused when parties have agreed to contact or care arrangements between themselves before the Court has determined the issue of the child's safety. By the time of the hearing, arrangements may have been in place for some time but the Court is nevertheless required to determine whether the child is safe in the care of, or to have contact with, the party who is alleged to be violent. This may not be an efficient use of court resources.

234. Stakeholders have suggested that these provisions would benefit from a review of their effectiveness to ensure that they are working as intended.

> **What do you think?**
> Do you consider that the process to be followed in situations where 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 suggestion? What might the risks and benefits be?

Specialist reports

Considerable delays are associated with obtaining a psychologist's report.

235. If a judge needs more information in deciding a case under the Care of Children Act, he or she may ask for a cultural, medical, psychiatric, and psychological report.

236. Psychological reports are the most common type of report obtained by the Court under the Care of Children Act 2004. It is now standard practice for a psychologist's report to be obtained in Care of Children Act cases which are likely to go to a defended hearing, and frequently on appeals against Family Court decisions. Reports are contributing to delay taking anything from six weeks to six months or more to prepare. In addition, expenditure on specialist reports requested by the Court under s133 of the Care of Children Act has increased.

237. In the 2009/10 financial year expenditure on all specialist reports, (not just those under s133) amounted to $5.4 million, an increase of 69 percent on the $3.2 million spent in 2004/05.[91] In 2009/10, there were 1797 specialist reports ordered. Of these, 1516 were ordered under s133. This is a 28 percent increase on the 1184 reports ordered under this section in 2004/05. During the period 2004/05 to 2009/10 the majority of other specialist reports ordered related to care and protection proceedings. During this period there were 1219 requests for s178 psychological reports, 93 s178 psychiatric reports and 19 s187 cultural reports.

238. Some stakeholders suggested that delay and expense of reports may be attributable to the complexity of the brief that is provided to psychologists. It was proposed that briefs could be standardised with fewer, potentially only four, questions needing to be asked in most cases. Another suggestion was that lawyers needed to make a case for obtaining reports and that they should only be asked for where there was a clear need, for example, where there are issues to do with the child's emotional well-being, development or attachment.

239. Some stakeholders were concerned about the reliance on reports by psychologists and considered that there were other service providers who might be better placed to give an assessment of the child's or family's needs, including cultural considerations. Stakeholders suggested that a cultural report might be more appropriate for Māori and Pacific families.

240. Delay in the preparation of reports is a key concern and is exacerbated by delay in allocating a hearing after a report has been obtained. The time between obtaining the report and a hearing date often results in 1 in 4 reports needing to be updated.

241. It has also become increasingly common for a party to obtain another psychological report to critique the report of the Court-appointed psychologist. This adds to delay and extends the hearing time.

[91] All costs rounded to the nearest $100,000.

What do you think?

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, eg, social service providers, provide information to the Court?

Should more use be made of cultural reports? What might be the risks or benefits of using more cultural reports?

Should a critique of a court-appointed psychologist's report be allowed or should parties be limited to cross-examination of the report writer?

Hague child abduction cases

Hague child abduction cases are currently taking too long to resolve.

242. New Zealand is a party to the Hague Convention on the Civil Aspects of Child Abduction (the Convention). Provisions implementing the Convention into New Zealand law are contained in the Care of Children Act.

243. The underlying principle in the Convention is that it is the Court in the country where the child usually resides that is best placed to make long-term decisions based on the child's welfare and best interests. Prompt return promotes the child's interests by supporting continuity in their life including their right to have contact with both parents. Importantly, the principle also acts as a deterrent to child abductions and deprives the abducting parent of any perceived advantage that might have otherwise been gained from the abduction.

244. The Court's role in these cases is summary in nature, that is, the inquiry is limited to making a simple decision: has the child been wrongfully removed from their home country? If so, then the child should be returned so that long-term decisions may be made about their care by that country's courts. However, when an abducting parent raises a defence about why the child should not be returned the inquiry can sometimes become more expansive rather than the question to be determined – jurisdiction and safe return. Lawyer for the child is also often appointed and a specialist report may be obtained. A specialist report may take on average 10 weeks to prepare.

245. Under the Convention cases should be disposed of within six weeks. However, our data relating to applications indicates that the average number of days to dispose of Hague applications for the return of a child abducted to New Zealand averaged 82 days (including appeals) in 2009/10.

What do you think?

How can we improve processes so that Hague cases are dealt with adequately and promptly and meet our obligations under the Convention?

Care and protection cases

Changes are required to care and protection processes.

Review of plans

246. When a child or young person is declared to be in need of care and protection the Family Court may make a range of orders ranging from custody and guardianship orders through to services and support orders. If orders are to be made, in most cases the court must call for a plan. The Court must consider a review of that plan within six months if the child is under seven years old and within 12 months for all other children and young people. Reviews of plan now take up a considerable amount of Court time and by necessity involve caregivers, family, professionals, and sometimes the child coming back before the Court.

247. The original reason why the Children, Young Persons, and Their Families Act required the Family Court to be involved in monitoring plans was to stop children drifting in State care. Child, Youth and Family has significantly improved its management of and planning for children in care. While

there is still good reason for children who are in State or organisational care to have their plans monitored by the Family Court, in many circumstances the child's interests might be better served by the review being considered by the Court on the papers, for example, where the child's circumstances are stable and the new plan agreed between the parties (including lawyer for the child). This would reduce delay and costs and free up time for the Court.

248. Where a child moves from State care into a permanent placement, caregivers usually obtain a parenting order under the Care of Children Act. However, some orders under the Children, Young Persons, and Their Families Act (eg, services or support orders) remain. These orders ensure that children receive the ongoing services and assistance they need as a result of their abuse or neglect. However, it also means that the orders must be supported by a plan which must be reviewed. Continual reconsideration of plans before the Court can have the unintended effect of making permanent arrangements seem capable of being challenged and may stir up uncertainty for the child, the child's caregivers and the child's birth family. It is timely to consider whether in these circumstances the review process is necessary or in the interests of the child.

> **What do you think?**
>
> 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?

Guardianship of children in care and protection cases

Guardianship powers may need to be amended in order to promote stable placements for children in need of permanent care.

249. The rights and responsibilities of guardians include making decisions about important matters in relation to a child, for example, education, non-routine medical treatment, religion, and where a child lives. People who have agreed to become the permanent carers of children who are in need of care and protection are able to obtain additional guardianship orders to enable them to make these sorts of decisions in consultation with the birth parents.

250. Sole guardianship orders may be made in favour of caregivers in very limited circumstances but this has the undesirable effect of removing the birth parent(s) from all aspects of decision making for the child. However, additional guardianship orders can leave the caregivers in the undesirable position of having to contest decision making with the child's natural parents on a range of issues from holidays overseas through to medical treatment. This can destabilise placements or prevent willing and caring people, including wider family members, from choosing to become long-term caregivers.

251. There is no legal arrangement available between additional guardianship on the one hand and sole guardianship or adoption on the other. Sole guardianship orders are rarely made. However, caregivers have clearly communicated to Child, Youth and Family their frustration at not being able to provide stable decision making for children who they are caring for permanently as part of their family.

252. One way of ensuring the care and protection system promotes stable placements for children who require permanent care might be to enable the Family Court to direct which guardianship powers reside exclusively with the caregivers and which are shared with the child's natural parents or other guardians.

> **What do you think?**
>
> Should permanent caregivers be given sole guardianship responsibility for some matters? What might be the implications of this approach?

Cases involving family violence

It is critical that the Family Court's processes respond effectively to family violence to ensure the safety of victims and children.

253. Applicants for protection orders issued under the Domestic Violence Act 1995 are prioritised in the Court system. On average, 3982 urgent applications for protection orders were applied for each year from 2005/06 to 2009/10. Most of these protection orders are usually issued on the papers on the same day. On average, a further 540 protection orders were applied for on notice each year during the same period.

Family violence services

Should Government continue to fund stopping violence programmes for respondents that are not reliably effective, or is it a better investment to focus on victims and children and reduce re-victimisation.

254. Stakeholders were concerned about the need to deliver safe and effective programmes and services such as supervised access programmes.

255. Some stakeholders raised issues with stopping violence programmes for respondents under the Domestic Violence Act 1995. These programmes are therapeutic in nature but are mandatory and have consequences for non-attendance. In 2009/10 $8.7M was spent in providing these programmes and keeping safe programmes for applicants and children (protected persons). The uptake of programmes for protected persons is low.

256. There are mixed views about the effectiveness of stopping violence programmes in preventing reoffending, and international research is equivocal about the ability of these programmes to address violent behaviour. Many of our respondents to a protection order fail to attend these programmes and further money is spent in enforcing attendance. It is critical that these offenders are held to account for the violence they have committed, and it has been suggested that it would be more effective for the system to focus on enforcing breaches of a protection order swiftly and effectively rather than using resources to enforce programme attendance. Attendance should be made voluntary.

257. At the same time, some stakeholders have suggested that it may be better to fund a greater range of programmes to families and whānau to prevent re-victimisation, break the cycles of violence, and assist them in adopting a safe and more positive lifestyle. It has been suggested that these programmes should be provided to families in a flexible manner. These programmes could include the respondent where it is safe and where they are genuinely willing to change. Noted in particular was the value of the whānau ora programmes which enable extended family members to attend a programme rather than just individuals.

258. International evidence is clear that any programmes for families experiencing violence should be linked to other social services to assist in resolving wider needs. One way to do this may be to directly link applicants and respondents of protection orders to social services as is currently provided by Community Link workers providing services to offenders and victims in the criminal Family Violence Courts. A further consideration is whether such an approach should be managed through the Courts or whether it would be more efficient to have these services provided by the Ministry of Social Development or contracted community agencies.

What do you think?

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

Should government investment be refocused on supporting families including providing protection order applicants and respondents with access to social services?

259. In previous chapters we noted that for some private law cases a better outcome for parties can be achieved if they resolve their disputes out of court. However, urgent cases and cases involving vulnerable children and adults will always have to come to court and this chapter discussed some process improvements that could provide a more effective and efficient way of managing cases.

260. In the next chapter we put all of the issues and possible options for reform together and look at potential ways forward for the Court.

9. THE WAY FORWARD

We need to consider which combination of possible options will create a sustainable court that can achieve the best outcomes for children and families.

261. This paper has outlined a range of issues and also some suggestions to ensure the Family Court provides an effective service to the families of New Zealand. Any future reforms will need the support of the Family Court judges and the various professionals involved in the Family Court to ensure their success. After considering the submissions to this consultation paper we will be better placed to determine the best balance of reform options across the system.

Vision for the future Court

262. Our vision for the future Family Court is one where:

- vulnerable people and children are protected and prioritised
- access to the Court is well managed to avoid unnecessary litigation, that is, people are supported to resolve their disputes outside of court and the Court is used only as the last resort
- court processes are simple, clear, consistent and certain, and systems are in place to manage complex cases
- personal responsibility is emphasised, and where appropriate, the costs of accessing the courts are met by users
- decisions are made within a useful and acceptable timeframe and the decision is logical, workable and durable so that people do not come back to re-litigate their cases
- the system is affordable for the Government.

263. Our preliminary view is that these will fall across three major policy areas outlined below.

The legislative framework

264. First, is the need to ensure our family law, which forms the framework within which the Family Court operates, is structured in a manner that:

- clarifies the role of the State in family law matters, including most particularly its role in protecting children and vulnerable adults
- empowers families to manage their own affairs
- reinforces that going to Court to resolve some family disputes is an action of last resort
- streamlines court procedures.

265. Subject to the views of submissions, we are likely to address the appropriateness of the focus on reconciliation in the Family Proceedings Act, and the uncertainty caused by the welfare and best interests test in the Care of Children Act. Greater certainty might be achieved if we could provide better guidance in statute for Care of Children Act cases as discussed in Chapter 4.

266. Defining the role of the State is also necessary for other possible policy issues such as whether there should be further fees for certain applications and/or hearings, or how much the State and some parties should contribute to the provision of certain information and/or services.

Encouraging early self-resolution

267. The second policy area is about the need to connect people to information and to a range of dispute resolution processes that will enable them to resolve their own disputes outside of court. This approach, for example, would ensure that parents take responsibility for reducing the negative impact their conflict is having on their children, and for securing an agreed, durable and proportionate solution to their dispute.

268. Future reforms will have to support a significant culture change to the way parties and family law professionals resolve family disputes. We want to see an overarching conflict prevention approach

to all family law disputes – that is, an approach that empowers parties by providing them with the confidence and information to resolve their own disputes, and encourages the professionals who work with families to promote early and durable resolutions.

Improving court processes

269. The third policy area is the need to consider the future role of the Family Court and its capacity to ensure the safety and welfare of children and vulnerable people. An important issue we need to determine is the proper scope of the Family Court's jurisdiction.

270. We also need to improve court processes so that they are predictable and consistent and not unnecessarily adding to cost and delay. Incentives to prolong litigation should be eliminated, as should the tendency for court processes to exacerbate conflict between parties. The suggestion for a questionnaire form of affidavit seems a sensible proposal to consider. New processes such as establishing a comprehensive and effective screening system should also be examined to ensure that cases involving vulnerable people get to court quickly.

271. We must also think through more appropriate and cost-effective roles for well trained professionals in the Family Court. Most particularly we need to encourage the respective professional bodies to continuously seek to improve the knowledge and training of their members to ensure best practices in the Court are maintained. It may also be timely to consider whether lawyers should be accredited to practice in the Family Court.

Important features of reform

272. A number of concerns, however, underpin the three major policy areas, and will form important features of the outcomes we want to achieve in each area. For example, within each policy area we will need to ask how that framework, information, or process can achieve:

- more positive outcomes for children
- a more responsive outcome for Māori, Pacific peoples, and people from other ethnic communities
- a better outcome for the vulnerable persons, such as family violence victims and children in need of care and protection, or people who are unable to manage their personal affairs
- better assistance for self-representing litigants in court.

273. In conclusion, the success of any reforms will require all professionals working in the field including community agencies, service providers, government, the legal profession and the judiciary, to work collaboratively to support a new approach.

274. We welcome your response to the questions listed in chapter 11 or any new ideas or comments you may have.

275. We would also like to thank those stakeholders who contributed their time to outline their ideas on the issues facing the Family Court.

10. HOW TO HAVE YOUR SAY

276. This paper seeks your views on what you consider are the main issues facing the Family Court, and how we can make the Court a better forum for resolving the disputes that come before it. Your feedback will help to shape the final proposals for Government consideration.

277. If the Government decides to make changes to the law, you will have a further opportunity to make a submission to a Parliamentary Select Committee, which must consider any proposed changes before legislation is passed.

278. As well as this consultation paper, a summary paper and a case file summary are also available on the Ministry of Justice website: www.justice.govt.nz.

279. We encourage you to give your views on the questions in this paper (listed throughout the paper and repeated in the next chapter) and to provide any other comments you may have about the matters discussed. If you wish to raise further issues not covered in this document please take the opportunity to do so.

280. If you have sought legal advice or been through the Court, you could complete a court user questionnaire as well as, or instead of, responding to the questions in this paper. The questionnaire is also available on the Ministry website.

281. The closing date for submissions is Wednesday, 29 February 2012.

Please send your submission in writing to:

Review of the Family Court
Ministry of Justice
DX SX10088
WELLINGTON

Or by email to: familycourtreview@justice.govt.nz

What happens to your submission

282. Your submission will be kept by the Ministry of Justice and will become public information. This means that a member of the public may request a copy of your submission from the Ministry under the Official Information Act 1982.

283. Please tell us if there is any part of your submission (including your name) that you do not want to be released. For example, you may not want members of the public knowing about something that happened to you personally.

284. If you do not want all or part of your submission to be released, please tell us which parts and the reasons why. Your views will be taken into account:

- in deciding whether to withhold or release any information requested under the Official Information Act
- in deciding if, and how, to refer to your submission in any possible subsequent paper prepared by the Ministry.

Privacy

The Privacy Act 1993 governs how the Ministry collects, holds, uses and discloses personal information provided in your submission. You have the right to access and correct this personal information.

11. REVIEW QUESTIONS

285. This chapter contains the questions asked throughout the paper. In responding to the Review you can answer some or all of these questions. You do not have to address all of the questions raised if you do not wish to.

CHAPTER 2: A COURT UNDER PRESSURE	
1	Are the issues outlined in Chapter 2 the main issues facing the Family Court? If not, what other issues should we look at? Do you have any evidence that supports your view? Should the law continue to focus on reconciliation or should the duty on lawyers, counsellors, and the Court be on conciliation only? 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?
CHAPTER 3: THE CHANGING FAMILY COURT	
2	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?
3	Should any changes be made to the Family Court's current jurisdiction? If yes, in what way? What would be the impact of changing the jurisdiction of the Court in the manner you suggest? What might its risks and benefits be?
4	Should the Family Court be an open court, what would be the risks and benefits of such a proposal? How can we further promote the Family Court's transparency and accountability? What sort of information could the Family Court provide that would achieve these outcomes?
CHAPTER 4: FOCUSING ON CHILDREN	
5	What measures do you think could be used to manage and reduce conflict between parents following separation? How might these be achieved?
6	How can we ensure children participate earlier in the decision making process? What would you recommend as the crucial safeguards to enable this to happen? Should participating in child-inclusive mediation be compulsory before an application is filed in the Court? To what extent should parents contribute to the costs of such a service?
7	Would an obligation in legislation for parents to consult with their children about care arrangements following parental separation be helpful? What might be the risks and benefits?
8	Who should be responsible for obtaining a child's views on the Court's behalf? Should children be offered a choice about how their views are obtained? What criteria could be used to decide whether and when to appoint lawyer for the child? What are the main tasks that lawyers for children should undertake in proceedings? What are your views on the provision of in-house lawyers for children? What are your views on using other professionals to obtain the views of children? If lawyers are appointed to act for children on an appeal is there a need for a separate litigation guardian?

9	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? 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?
CHAPTER 5: SUPPORTING SELF-RESOLUTION	
10	How can we improve the provision and delivery of information to those who need it, especially children?
11	Should attendance at Parenting through Separation (PTS) be compulsory before making an application to the Court? What might be the risks and benefits of such an approach? Should PTS be provided more widely in the community? Should parties be required to contribute to the cost of PTS?
12	To better balance lawyers' professional responsibilities with the needs and interest of children, should lawyers who specialise in family law: • be accredited? Should accreditation be mandatory or voluntary? • be obliged to work collaboratively in the interests of children rather than their clients? • be encouraged to assist their clients to resolve their issues without using the court system? • 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? What would be the impact of changing lawyers' professional responsibilities on the way lawyers practice, and on their clients?
CHAPTER 6: FOCUSING ON ALTERNATIVE DISPUTE RESOLUTION (ADR) SERVICES	
13	If counselling is to remain, how could it be targeted, for example, to people with children and who cannot afford to pay for it? What role should counselling play in a broader ADR system ahead of Court? Is it appropriate to access counselling via the Court? Should counselling focus more clearly on conciliation?
14	Do you agree some form of ADR should be mandatory before an application can be filed in the Family Court, in certain circumstances? What are the benefits and risks in making these processes mandatory? Who would pay for the parties to attend ADR? What is the best way to ensure both parties engage in ADR? How could modes of ADR be developed that are responsive to the cultural needs of Māori, Pacific and ethnic communities?
15	Do you think a separate forum for resolving low level disputes would be useful? If yes, what types of matters should it deal with? What are the risks and benefits associated with establishing a separate forum?
CHAPTER 7: ENTERING THE COURT	
16	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?

17	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?
18	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 penalties for making unmeritorious without notice applications? What might be the risks and benefits associated with imposing penalties?
19	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? What are your views on a standard questionnaire form of affidavit, and what information do you think it should include?
20	Should applications be focused on the issues to be determined and the outcomes sought? Should filing joint memoranda be mandatory?
21	In what further circumstances should the Family Court impose application, setting down and hearing fees? What would be the impact of these different fees, and what might be the risks and benefits?
CHAPTER 8: PATHWAYS AND PROCESSES IN THE COURT	
22	If the Court is only dealing with serious cases should counselling or mediation be part of court processes? Should lawyers appointed to assist the Court be used as mediators?
23	How can we help people with complex social needs? Are proceedings in the Family Court the right response or should social agencies be involved?
24	Do you agree that a standard process for hearing Family Court proceedings should be introduced? Could all non urgent cases be dealt with in this way? Should the number of steps in any process be restricted? What would be the impact of this proposal, what might be the risks and benefits? Do you agree with any of the processes outlined in the paper? If not, why not?
25	Should the Court attempt to make predictive assessments of a family's circumstances or make decisions on the basis of the evidence before them? How could orders be varied (because a family's circumstances have changed) without the need for a court hearing? What could a simpler process to vary parenting orders look like? Should the number of interim orders made in any one case be restricted? Should interim orders automatically become final after a certain period of time?
26	Is there any merit in introducing penalties to reflect a party's or lawyer's behaviour in proceedings? If so, what sanctions would be useful, and how can we ensure the sanctions are applied when appropriate?
27	Do you consider that the process to be followed in situations where 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 suggestion? What might the risks and benefits be?

28	How might specialist information for the Court be more targeted, focused and timely? What criteria might be used to decide whether to request a specialist report? Should a broader range of people, such as social service providers provide information to the Court? Should more use be made of cultural reports? What might be the risks or benefits of using more cultural reports? Should a critique of a court-appointed psychologist's report be allowed or should parties be limited to cross-examination of the report writer?
29	How can we improve processes so that Hague cases are dealt with adequately and promptly and meet our obligations under the Convention?
30	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 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?
31	Should permanent caregivers be given sole guardianship responsibility for some matters? What might be the implications of this approach?
32	What is your view on removing the mandatory requirement for respondents to attend stopping violence programmes and focus the justice system on swift and effective enforcement of protection orders? Should government investment be refocused on supporting families including providing protection order applicants and respondents with access to social services?
33	Do you believe the breaches of orders should be subject to greater sanctions or penalties? If yes, what types of sanctions and penalties would be appropriate?

APPENDIX 1: TERMS OF REFERENCE

The Review of the Family Court is to consider:

- the assumptions regarding the respective roles of the Family Court versus the roles and responsibilities of private citizens in relation to their personal affairs, that is, the areas of family life and/or family dispute that should be the subject of legal intervention in the Family Court
- the purpose, role and functions of the Family Court, including the extent to which the Family Court should have a therapeutic role as opposed to providing an expeditious application of the law in individual cases
- the role of professionals (lawyers, psychologists, mediators, counsellors, and social workers) in the delivery of Family Court services
- the statutes best administered by the Family Court and the boundaries between the Family Court and the civil jurisdiction of the High or District Courts
- how family law legislation and rules impact on the efficiency of the Family Court, and the delivery of professional services and associated costs
- whether the current structure, approach and processes of the Family Court support durable outcomes and are financially sustainable
- the responsiveness and accessibility of the Family Court to people needing timely access to the Family Court, in particular, vulnerable individuals, children and families
- the incentives to encourage people to resolve their relationship issues themselves where appropriate, rather than bringing them to the Family Court
- the emerging issues, needs and trends within families and critical issues that may influence or even change the role of the Family Court including whether the needs of families may be better addressed through alternative models.

APPENDIX 2: INTERRELATED POLICIES AND WORK

Managing the cost of legal aid

On 13 April 2011 the Minister of Justice announced a package of proposals to reduce expenditure on legal aid by $138 million over four years in response to the rapid growth in legal aid expenditure. The Government is due to consider further proposals to address the remaining funding gap in September 2011.

Many of the changes announced in April require legislative amendment. The Legal Assistance (Sustainability) Bill 2011 was introduced into the House in August 2011 and has been referred to the Justice and Electoral Committee. Submitters are welcome to comment on these legal aid proposals through submissions on the Bill.

Changes that will affect the Family Court include:

- adjusting the number of grants by amending legal aid eligibility, such as the merits test and special circumstances consideration
- reducing the price per grant by establishing fixed fees for most cases
- improving government revenue by re-introducing user charges, creating better incentives for prompt repayment of legal aid through compulsory repayment orders and interest charges
- improving management of court-ordered lawyer for the child services by:
    - extending the quality assurance framework for legal aid lawyers to lawyers for children
    - requiring parties to contribute to the cost of lawyer for the child services
    - reviewing the criteria for appointment of lawyer for the child so that they are only appointed in more serious cases.

As a consequence of the legal aid changes, more self-represented litigants may make applications to the Family Court. Therefore any reform to the Family Court needs to take self-represented litigants' needs into account.

Civil fees review

Earlier this year Cabinet agreed to a two stage review of civil fees. The first stage was a Consumer Price Index (CPI) adjustment to all Ministry of Justice set fees and took effect from 1 July 2011. Prior to the CPI adjustment, most fees had not changed since 2004 when the last review of civil fees was undertaken.

The second stage of the review is a first principles review of civil fees administered by the Ministry of Justice. The Family Court is exempt from this review as the question of fee setting more appropriately falls within the review of the Family Court. Both reviews will be underway in parallel. Ministry officials will work closely together to ensure a consistent approach to the setting of fees.

There are a large number of civil fees with multiple guidelines for fee setting. The review will provide a consistent framework for fee setting in Ministry jurisdictions to ensure fees are set in a principled, consistent and equitable way. The review will also consider whether civil fees are set at the right level. Civil fees should be set at rates that both provide incentives for the efficient use of civil justice services and ensure that costs are not a significant deterrent in achieving access to justice goals. The review will include a public consultation phase with a paper to be put out for public consultation.

Review of the child support scheme

The child support scheme administered by Inland Revenue collects money from parents not living with their child(ren) and provides it to the person caring for the child(ren).

The child support scheme is currently under review. Two primary objectives were taken into account in assessing the need for a package of reforms for the child support scheme:

- The child support system should reflect social and legal changes that have occurred since the introduction of the current system in 1992. Social changes in that period mean that there is now a greater emphasis on separated parents sharing the care of their children. There is also higher participation in the workforce by both parents.
- The welfare of the children, in particular, recognising that children are disadvantaged when child support is not paid, or not paid on time. This disadvantage can take the form of financial difficulties (particularly when the receiving parent is not on a sole parent benefit) and emotional detachment from the parent who is not the primary caregiver. A fairer and more transparent system, with better targeted payment and penalties rules, would encourage (or at least not discourage) parents to pay their child support and therefore help improve the well-being of their children.

Better recognition of shared care, and taking into account the income of both parents and the current expenditure for raising children in New Zealand, would better reflect many of the social and legal changes that have occurred since the introduction of the current scheme. These changes include, in particular, a greater emphasis on separated parents sharing the care and financial responsibility of their children. Taking greater account of the individual circumstances of parents would result in a more equitable outcome and mean more parents are likely to meet their payment obligations.

It is proposed that changes to the rules relating to the payment of child support, the imposition of penalties, and the writing-off of penalties are proposed on the basis that they would improve enforcement and better encourage and facilitate parents to make timely payments of child support for the benefit of their children.

Children's Action Plan

The Ministry of Social Development is developing a Children's Action Plan as a means of aligning work across government and non-government agencies, and to take a long-term, planned and evidence-based approach to preventing poor outcomes for children. The Ministry of Justice is one of many government departments involved in this work.

The first phase involved the development and release of a public consultation paper in August 2011. This paper will signal what direction the Government proposes to take to improve outcomes for vulnerable children and to seek public feedback on the changes and trade-offs involved.

Following an analysis of submissions, a Children's Action Plan will be prepared for the Government's consideration and the actions resulting from this implemented.

Review of trust law

The Law Commission is undertaking a review of the law of trusts and has so far released four issues papers as part of the review. The second issues paper covers trusts and relationship property issues (December 2010), including the relationship between trust law and the Property (Relationships) Act 1976 and the Family Proceedings Act 1980.

Family Court Matters legislation

The Family Courts Matters legislation was passed in September 2008 as 12 Amendment Acts to increase the openness of family proceedings, introduce non-judge led mediation and some counselling for children, establish Senior Family Court Registrars and make changes designed to improve the operation of the Family Courts.

A number of the more technical changes were brought into force by Order in Council in May 2009. The remaining provisions have not yet come into force due to funding constraints. These provisions cover:

- introduction of non-judge led (family) mediation – for relationship disputes and disputes relating to care arrangements for children
- the introduction of counselling for children in some circumstances, such as where the Court considers the child is in exceptional need of assistance to deal with the implications of a court order or where the child has indicated he or she will not comply with an order
- widening of the eligibility criteria for counselling to all parties entering into an agreement about day-to-day care or contact with a child
- allowing counsellors' (and mediators') reports to make recommendations about next steps
- the introduction of Senior Family Court Registrars to relieve judges of some administrative work and thereby increase judges' sitting time in court and reduce delays
- extending government funding for supervised contact to include cases where supervised contact is ordered as a special condition of a protection order under the Domestic Violence Act 1995.

Child and Family Protection legislation

The Child and Family Protection Bill was passed on 16 August 2011. The Bill amended the Domestic Violence Act 1995, the Care of Children Act 2004 and the Adoption Act 1955. The amendments improve the responsiveness of the courts to domestic violence, and enhance the protection of children and families.

Amendments to the Domestic Violence Act and Care of Children Act include provisions to:

- enhance the consistency between the two Acts
- clarify whether children and young people remain covered by a protection order in certain circumstances
- reduce the risk of children being wrongfully removed from New Zealand
- provide for the discharge of orders for the return of children abducted to New Zealand, where either both parties consent or where the Court is satisfied that the child is settled in New Zealand and a discharge is warranted
- clarify the treatment of temporary orders to ensure final orders come into effect immediately.

Amendment to the Adoption Act 1955 includes creating a new offence of improperly inducing consent to the adoption of a child. The offence will have extraterritorial effect (and is extraditable) and is punishable by up to seven years imprisonment.

This is the last legislative change necessary for New Zealand to be able to ratify the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

Domestic Violence Reform Bill

The Domestic Violence Reform Bill was introduced in late 2008 and remains on the Order Paper. Some of its provisions have been included in recent legislation, for example, the Domestic Violence (Enhancing Safety) legislation enabled the District Court to issue Police safety orders. Some other provisions were included in the Child and Family Protection Bill. Eight proposals from the Domestic Violence Reform Bill are outstanding, including:

- requiring the Family Court to consider more carefully whether the protection order is necessary before they discharge it. It allows the judge to call for a specialist report if considered necessary.
- proposing several amendments to domestic violence programmes and a child definitional amendment.

APPENDIX 3: LIST OF CONSULTED STAKEHOLDERS

Academics

Pauline Tapp, Associate Professor of Law, University of Auckland

Dr Nicola Taylor, Senior Research Fellow, Centre for Research on Children and Families, University of Otago

Bill Atkin, Professor of Law, Victoria University of Wellington

Mark Henaghan, Professor/Dean of Law, University of Otago

John Caldwell, Professor of Law, University of Canterbury

Government agencies

Department of Prime Minister and Cabinet

Families Commission

Office of the Children's Commissioner

Ministry of Health

Ministry of Social Development (including the key advisor on the Action Plan for Children and the Chief Social Worker)

Inland Revenue Department

Department of Internal Affairs

Ministry of Women's Affairs

Te Puni Kōkiri

NZ Police

Treasury

Judiciary

Principal Family Court Judge

Administrative Family Court Judges

Non-government organisations

Māori, Pacific, and migrant focus groups

National Network of Stopping Violence Services

Community Law Centres

Union of Fathers

Canterbury Men

Father and Child Trust

Fathering Foundation

Big Buddy

Women's Refuge

NGO Alliance to the Family Violence Taskforce

Māori Reference Group

Pacific Reference Group

Relationship Services

Barnardos

Jigsaw

Catholic Social Services

Presbyterian Support NZ

National Council of Women of NZ

Professional services

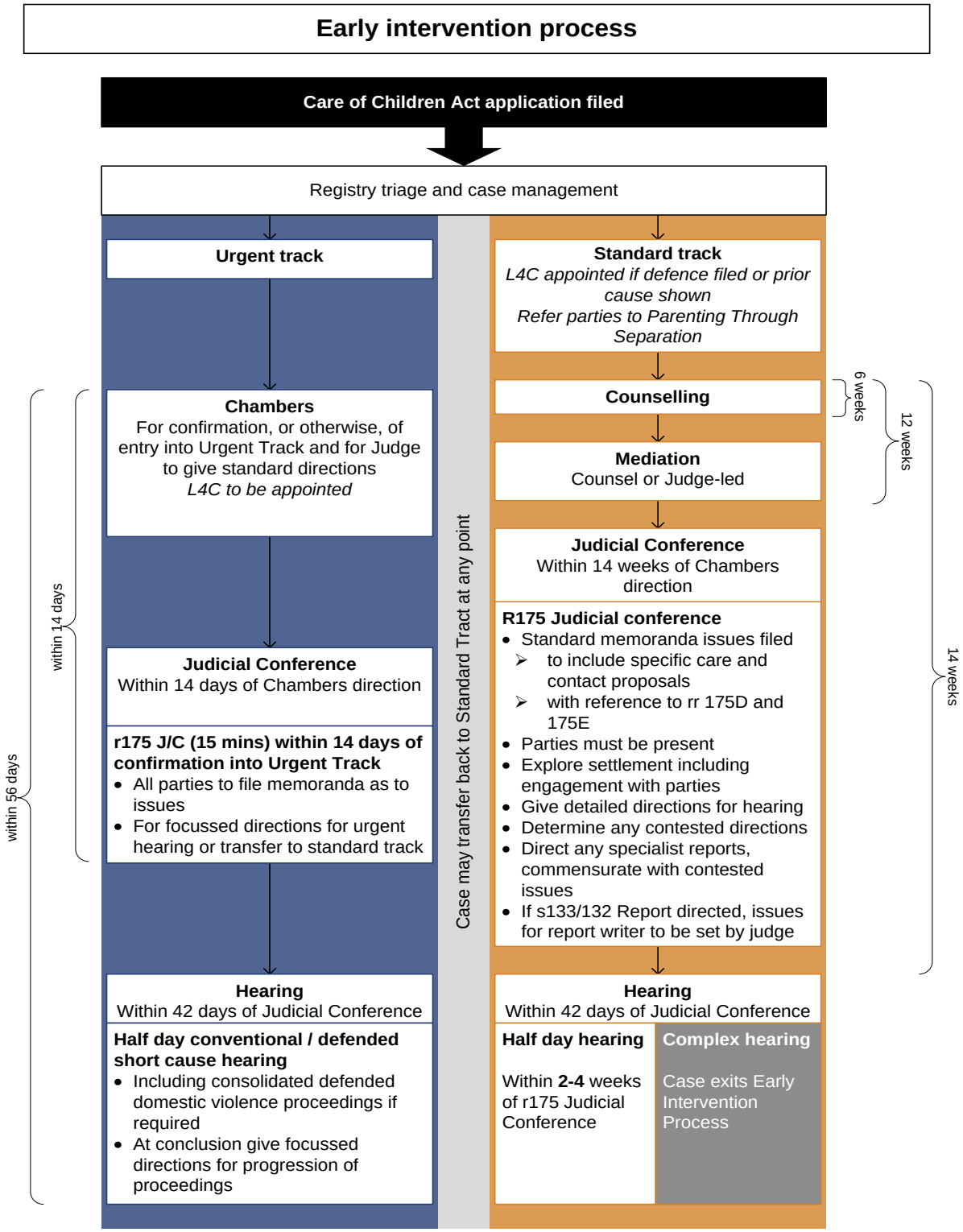
Family Law Section of the New Zealand Law Society
Representatives from the NZ College of Psychologists
Arbitrators and Mediators Institute of New Zealand (AMINZ)
NZ Counsellors Association
LEADR NZ
NZ Psychological Society
NZ College of Clinical Psychologists
Waikato Report Writers Group
Aotearoa New Zealand Association of Social Workers

Other

Some private individuals were also consulted over the Review.

APPENDIX 4: THE EARLY INTERVENTION PROCESS

Outlined below in diagrammatical form is the early intervention process introduced by judges to assist in processing Care of Children Act cases quickly through the Family Court.



APPENDIX 5: FAMILY COURT HISTORY

In 1976 the Royal Commission on the Courts (the Commission) was established to inquire into the structure and operation of the judicial system. The Commission expressed many concerns about how the courts were dealing with family law matters at that time. In its report, the Commission stated: *"We believe it both urgent and essential that a forum should be established which can respond adequately to the present and future needs of the family in New Zealand society."* Some of the features proposed by the Commission for a Family Court included that:

- It should be standalone but still part of the court system, dealing with cases to do with the family.
- It should have specialist judges.
- Support services, including social workers, counsellors, and conciliators should be available.
- Adversarial rules and the more traditional forms of court dress and address should be relaxed so that, when cases have to be resolved in court, the hearing can be conducted in a relatively informal atmosphere.
- The aim of the Family Court should be to help resolve problems with the cooperation of the parties, whenever that was possible, and with a minimum of disruption in all cases.

The Commission debated two views about how any future Family Court should function. One view was that the Family Court should be, first and foremost, a court of law because the serious issues that come before a Family Court demand impartial judges and strict adherence to legal procedures. The other view was that the primary function of a Family Court was to reconcile families. It was thought that if the Court operated on a legal basis, the adversarial system would harden attitudes between parties making agreements much harder to achieve.

The Commission decided that it was desirable to adopt a holistic approach and seek to address both the legal and non-legal problems facing the families that would use the Court. The Commission concluded that the Family Court should have a two-fold jurisdiction, both judicial and therapeutic, as each complemented the other:

> *"The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable."*

Since 1981 the Family Court's jurisdiction has included conciliation services as well as a judicial role. However, the balance between these two jurisdictions has been the subject of continuing debate, and views range on whether the current court has the right balance.

Subsequent reviews

Since its establishment, aspects of the Family Court's operations have been reviewed. In 1993 a report entitled *Review of the Family Court* was prepared by a committee appointed by the then Principal Family Court Judge (the Boshier Report). In 2003 the Law Commission released its report *Dispute Resolution in the Family Court*. Both these reviews were undertaken in response to particular issues at the time and were concerned with responding to matters such as the relative competence and training of court professionals, lack of case management resulting in prolonged litigation, and unacceptable delays in the court system.

A comparison of the 1993 and 2003 reviews' dispute resolution models

The Boshier Report examined the roles of people and services within the Family Court, ways in which the conciliation process could be reinforced and whether and in what ways the inquisitorial role of the Court could be strengthened. The Law Commission report looked at what changes, if any, were necessary and

desirable in Family Court administration, management, and procedure to resolve disputes early. The reviews both discussed how the Family Court's dispute resolution model could be adapted, including the following:

Entry to the system

The Boshier Report recommended a separate Family Conciliation Service – distinct from the Family Court.

The Law Commission considered conciliation should be clearly delineated from processes leading to adjudication, but be accessed through the Family Court. The Law Commission also recommended more up-front information services for potential court users.

Conciliation

The Boshier Report recommended mediation, by contracted mediators, for all disputes prior to application, unless certain criteria applied.

The Law Commission considered mediation, by contracted mediators, should be available to all parties but the Court could direct mediation once the application is filed.

The Boshier Report did not consider anyone should be obliged to undertake counselling.

The Law Commission considered all conciliation services, including counselling, should be available to all parties who apply or by court direction. The Commission also recommended that counselling be made available for a wider range of people and a wider range of situations, and that children should have access to counselling.

Initial assessment and role of lawyers in conciliation

Both reviews discussed a greater role for staff in assessing, classifying and referring applications to appropriate services.

The hearing

Both reports discussed various ideas about tightening the hearing process and strengthening the Court's role. For example, the Boshier Report discussed defining issues early, exploring settlement, determining how the hearing will be dealt with and how to restrict repeat or vexatious applications.

The Law Commission recommended senior registrars perform some tasks undertaken by judges which they consider would free up judges and improve hearing times.

The Boshier Report also discussed more use of fees, awarding of costs and cost recovery.

The Boshier Report discussed some changes to the use of lawyer for the child, such as constraints on time, a good definition of tasks, a clear contract and monitoring of their role and performance.

The Law Commission discussed better practical training and more monitoring of lawyer for the child services.

Government's response to Law Commission report

The Government's response to all of the Law Commission's recommendations included some new initiatives such as providing targeted court user information on its Family Court website and in other materials, and offering the PTS programme. The Government also developed a comprehensive training programme for Family Court staff and piloted non-judge led (family) mediation. The Family Court Matters Bill, passed in 2008, included some provisions that relate to the Law Commission's recommendations, for example, the introduction of non-judge led (family) mediation, introduction of counselling for children in some circumstances, widening of the eligibility criteria for counselling to all parties and the introduction of Senior Family Court Registrars. These provisions are not yet in force.

APPENDIX 6: SELECTED FAMILY COURT DATA

These tables expand on data highlighted throughout the paper and particularly in Chapter 3.

Table 1: Number of substantive applications, requests for counselling, and cases

Case Type	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Adoption	602	585	559	536	459	410
Alcohol & drugs	97	116	94	97	93	99
Child support	368	343	314	347	296	303
Children, Young Persons, and Their Families (CYPF)	11,093	11,898	12,353	11,752	11,662	11,486
Dissolution	10,639	10,342	10,222	10,061	9,267	9,119
Domestic violence	8,123	7,773	7,479	7,789	7,787	7,724
Estates	212	217	248	218	240	243
Family proceedings	1,121	965	801	875	907	953
Care of children	24,955	20,814	22,271	23,877	24,812	25,872
Hague (child abduction)	76	162	178	162	180	160
Mental health	5,337	5,427	5,516	5,820	5,789	5,890
Miscellaneous	23	65	74	77	105	171
Protection of personal and property rights (PPPR)	2,214	2,322	2,091	2,289	2,717	2,573
Property	1,861	1,810	1,795	1,973	1,902	1,973
Total (excluding requests for counselling)	**66,721**	**62,839**	**63,995**	**65,873**	**66,216**	**66,976**
Requests for counselling	**12,131**	**12,931**	**12,969**	**14,018**	**14,575**	**14,895**
New cases for which any new application was filed	**40,952**	**40,948**	**40,455**	**41,238**	**41,536**	**41,988**

Table 2: Court process phase at which Care of Children Act parenting order applications were disposed (excludes applications filed without notice).

Disposal phase	2005/06	2006/07	2007/08	2008/09	2009/10
1 Receiving and processing	315 (11%)	507 (8%)	587 (8%)	480 (7%)	425 (6%)
2 Counselling	193 (7%)	281 (5%)	280 (4%)	261 (4%)	222 (3%)
3 Post-process or counselling	781 (27%)	1,507 (25%)	1,599 (23%)	1,589 (23%)	1,603 (21%)
4 Formal proof	456 (16%)	1,002 (16%)	989 (14%)	1,005 (15%)	1,117 (15%)
5 Mediation conference	270 (9%)	849 (14%)	1,001 (14%)	926 (13%)	843 (11%)
6 Pre-hearing	654 (22%)	1,359 (22%)	1,690 (24%)	1,827 (27%)	2,531 (33%)
7 Hearing	160 (5%)	388 (6%)	457 (7%)	458 (7%)	506 (7%)
8 Post-hearing	69 (2%)	205 (3%)	296 (4%)	324 (5%)	360 (5%)
9 Unknown	28 (1%)	25 (0%)	20 (0%)	22 (0%)	26 (0%)
Total disposals: all phases	**2,926**	**6,123**	**6,919**	**6,892**	**7,633**

Table 3: Average number of court events to dispose of applications made under each case type

Case type	2006/07	2007/08	2008/09	2009/10
Adoption	3.74	4.23	4.61	5.08
Alcohol & drugs	1.45	1.39	1.20	1.46
Child support	2.96	3.11	3.57	3.43
CYPF	1.91	1.93	1.87	1.86
Dissolution	1.23	1.22	1.30	1.31
Domestic violence	2.80	2.79	2.91	2.94
Estates	7.45	7.08	8.16	8.47
Family proceedings	4.19	4.63	4.50	4.41
Care of children	3.36	3.46	3.50	3.68
Hague	1.83	1.79	1.55	1.69
Mental health	1.18	1.18	1.19	1.17
Miscellaneous	4.38	5.59	4.71	4.34
PPPR	2.02	2.07	2.14	2.24
Relationship property	6.33	6.31	6.52	6.46
Requests	0.98	1.00	1.00	0.98
Average*	**2.29**	**2.33**	**2.37**	**2.46**
Data is only available from 2006/07 as this is when reliable event analysis begins. *Average is weighted to account for the different share of total applications each case type contributes				

Table 4: Average days to disposal for applications by case type

Case type	2005/06	2006/07	2007/08	2008/09	2009/10
CYPF	100	98	98	93	94
Dissolution	30	30	28	29	29
Domestic violence	124	130	118	115	116
Care of children/Hague	246	249	223	223	230
Mental health	13	14	13	13	16
Miscellaneous	112	118	110	107	117
PPPR	392	394	379	376	391
Relationship property	317	266	251	273	269
TOTAL	**151**	**151**	**139**	**142**	**148**
Note: applications for Care of Children/Hague were only filed from 2005/06 onwards					

Table 5: Percentage split of applicants and respondents by ethnicity and case type 2004/05–2009/10 combined

Case type	Asian	Māori	NZ European / Pākehā	Other	Pacific
Alcohol & drugs	3	8	88	0	1
Adoption	8	13	52	1	26
Child support	2	9	85	2	2
CYPF	2	37	54	1	7
Dissolution	12	7	76	1	4
Domestic violence	6	28	57	1	7
Estates	1	8	89	0	2
Family proceedings	4	19	69	1	6
Care of children	4	25	63	1	7
Hague	5	15	65	4	11
Mental health	6	21	61	2	10
Miscellaneous	5	24	66	0	5
PPPR	2	9	85	0	3
Relationship property	7	6	85	1	2
Requests for counselling	4	14	77	1	4
Note: These proportions represent only a partial count of ethnicities due to incomplete data.					

Table 6: Number of appointments of professional services for all case types

Professional service	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Lawyer for the child/subject	11,639	13,142	14,308	15,083	15,836	16,120
Counsel to assist the court	688	683	740	883	1,237	2,078
Counselling	17,791	18,973	19,690	20,570	21,979	23,337
Specialist reports	1,384	1,502	1,529	1,656	1,711	1,801

Table 7: Average cost per case type for professional services appointed by the Court

Case type	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
CYPF	$ 1,628	$ 1,662	$ 1,733	$ 1,783	$ 1,833	$ 1,905
PPPR	$ 987	$ 1,174	$ 1,248	$ 1,228	$ 1,233	$ 1,286
Guardianship	$ 1,885	$ 1,987	$ 1,984	$ 2,102	$ 2,258	$ 2,305
Domestic violence	$ 1,117	$ 1,271	$ 1,375	$ 1,426	$ 1,438	$ 1,476
Family proceedings	$ 863	$ 1,025	$ 717	$ 900	$ 992	$ 1,181
Requests	$ 395	$ 401	$ 431	$ 434	$ 563	$ 592
Mental health	$ 1,028	$ 1,380	$ 1,269	$ 1,231	$ 1,361	$ 1,278
Hague	$ 4,894	$ 3,547	$ 2,946	$ 2,862	$ 3,194	$ 2,962
Relationship property	$ 2,235	$ 1,538	$ 1,587	$ 1,720	$ 1,463	$ 2,124
Adoptions	$ 1,126	$ 1,177	$ 1,156	$ 1,189	$ 1,627	$ 1,562
Miscellaneous	$ 1,298	$ 949	$ 1,449	$ 1,797	$ 1,073	$ 1,516
Child support	$ 1,849	$ 1,860	$ 1,056	$ 1,393	$ 1,312	$ 1,917
Alcohol & drug	$ 553	$ 474	$ 240	$ 513	$ 836	$ 605
Estates	$ 1,355	$ 2,331	$ 4,514	$ 2,620	$ 2,235	$ 1,801
Dissolution	$ 704	$ 523	$ 1,033	$ 470	$ 859	$ 771

Table 8: Family Court-related expenditure by major cost category

Expenditure	$000s					
	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Direct operational costs	20,362	22,153	22,612	26,157	25,399	26,065
Professional services	37,570	37,749	40,173	48,562	54,370	60,723
Legal aid	26,010	25,362	28,015	29,496	38,581	50,298
Judicial costs	8,571	10,529	11,447	16,325	14,122	12,808
Total	**92,512**	**95,793**	**102,247**	**120,539**	**132,472**	**149,893**

APPENDIX 7: SOCIAL TRENDS AFFECTING THE FAMILY COURT

Increasing diversity of family forms

New patterns of partnering, family formation, relationship breakdown and re-partnering have led to more diverse family forms as well as more frequent changes between family forms. One-parent families and two-parent blended or step-families are becoming much more common as are same sex parent families. A third of women enter a new partnership within two years of marriage breakdown, and one in three marriages is a remarriage for one or both partners. Twenty percent of all children in New Zealand today are more likely to experience a number of different family arrangements and approximately one in three children is currently the subject of a child support agreement administered by the Inland Revenue Department. Changes in perceptions of gender roles have resulted in more men wishing to, and being expected to, play a bigger part of their children's lives following separation. Potential issues are likely to include:

- an increase in disputes and more complex arrangements for the care of or contact with children
- the need to develop alternative ways to enforce orders
- an increased need for ADR processes.

Relationships

Currently fewer people get married, or they marry later in life after having lived with their partner first. More people are in de facto relationships. Both separation and divorce rates have risen over the last 50 years. One in three couples separate within the first 20 years of marriage. Potential issues are likely to include:

- the law and the Family Court being required to find new ways to make relationship transitions easier and less stressful
- more disputes over relationship property.

Fertility

New Zealand's fertility rate has been relatively stable over the last three decades at around replacement level, after peaking in the 1960s. Compared with the 1970s, women are having their children later in life. Fertility rates differ by ethnicity, with Māori and Pacific women having slightly more children than New Zealand European or Asian women. Potential issues are likely to include:

- an increased use of assisted reproduction technologies and related issues (eg, legal parenthood)
- ability of family law to keep up with technological changes related to fertility
- an increase in adoptions outside of New Zealand due to less children available to adopt locally.

Age structure

Our population is getting older and we can expect to see a higher proportion of older people in families in the future. Four-generation families may soon be the norm for most New Zealand families and these changes in families' demographic profiles will impact on the way families function. There will be more emphasis on how we care for elderly people, and an increase in the role of grandparents in families. Potential issues are likely to include:

- a re-examination of the role and responsibility of family to care for aged family members
- an increase in cases of elder abuse
- increased requirements to protect vulnerable persons
- increased rights for grandparents as carers and/or guardians (including during and after parental separation).

Mobility

People are becoming increasingly mobile both within New Zealand and internationally. There are more relationships where one or both parties come from overseas. When relationships end, either or both parties may wish to move to be closer to family or for work opportunities. This can cause problems in making arrangements for children and dividing relationship property. Potential issues are likely to include an increase in the number of relocation disputes.

APPENDIX 8: FAMILY COURT JURISDICTION

Acts administered by the Ministry of Justice

Adoption Act 1955
This Act deals with the legal transfer of all parental rights and responsibilities from a child's birth parents to the adoptive parents.

Adult Adoption Information Act 1985
This Act gives adopted adults and birth parents the right to information about adoption.

Adoption (Intercountry) Act 1997
This Act applies to adoptions under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Care of Children Act 2004
This Act deals with applications for parenting orders about day-to-day care and contact with a child, guardianship, consents to medical procedures, child abduction (Hague Convention on the Civil Aspects of Child Abduction), and recognition and registration of overseas parenting orders.

Civil Union Act 2004
This Act provides for the regulation of civil unions.

Domestic Actions Act 1970
This Act provides for a mechanism to resolve property disputes arising out of agreements to marry.

Domestic Violence Act 1995
This Act deals with issuing protection orders, orders relating to property, domestic violence programmes, police safety orders, the enforcement of protection orders, and recognition of foreign protection orders.

Family Courts Act 1980
This Act established Family Courts as a division of District Courts. The Act sets out the constitution, jurisdiction, powers and procedures of Family Courts.

Family Proceedings Act 1980
This Act deals with paternity, separation, maintenance, dissolution of marriage or civil union, validity of marriage or civil union, and counselling requests/referrals both before and during proceedings.

Family Protection Act 1955
This Act deals with claims by family members under a will.

Human Assisted Reproductive Technology Act 2004
This Act prohibits and regulates activities in relation to human assisted reproductive technology, and establishes an information regime in relation to donors and donor offspring.

Law Reform (Testamentary Promises) Act 1949
This Act deals with claims against an estate where a person believes a promise was made for them to be a beneficiary under a will.

Marriage Act 1955
This Act deals with the law relating to marriage, including consent for minors to marry.

Property (Relationships) Act 1976
This Act deals with how the property of married couples and de facto partners is to be divided on separation or death.

Protection of Personal and Property Rights Act 1988
This Act deals with the protection and promotion of personal and property rights for adults who lack capacity to make or communicate decisions, or to manage their own affairs.

Status of Children Act 1969
This Act provides for the equal status of children regardless of whether their parents are married or not, and recognition of paternity. It also sets out in what circumstances a person is the legal parent of a child, including a child born as a result of an assisted reproductive procedure.

Wills Act 2007
The Act relates to the making, revoking and reviving of wills.

Acts administered by other agencies

Ministry of Health

Alcoholism and Drug Addiction Act 1966
The Act provides for the compulsory detention and treatment of alcoholics and drug addicts at certified institutions.

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
This Act deals with people who have an intellectual disability and are charged with, or convicted of, an offence and who may require compulsory care and rehabilitation. The Family Court is responsible for reviewing orders made under this Act.

Mental Health (Compulsory Assessment and Treatment) Act 1992
This Act deals with the assessment and treatment of people suffering from a mental disorder.

Department of Internal Affairs

Births, Deaths, Marriages and Relationships Registration Act 1995
This Act deals with the registration of the birth of a child, deaths, marriages and civil unions.

Inland Revenue Department

Child Support Act 1991
This Act deals with procedures for managing how parents who are not living with their children provide financial support for the care of their children.

Ministry of Social Development

Children, Young Persons and Their Families Act 1989
This Act deals with the care and protection of, and offending by children and young persons. The Act provides for extended family to be involved in decision making about children and young people at a family group conference.

GLOSSARY

Adjournment	Postpone a scheduled hearing to a future date.
ADR	Abbreviation for 'Alternative Dispute Resolution'. A term applied to methods for resolving disputes other than by adjudication by a judge. For example, mediation is a form of ADR.
Affidavit	A written statement sworn or affirmed before a person who has authority to administer an oath.
Appeal	An application to a higher court to reconsider a decision, order or declaration made in a lower jurisdiction.
Applicant	A person who makes an application.
Application	A request by a party that the Court make an order, direction or decision.
Case	Word used to describe application/s relating to the same parties and legislation. A Family case can be re-opened by the filing of a new application months or years after any previous application/s were dealt with.
Case management	The action taken in relation to the progress of an individual case from filing to disposition.
Caseflow management	The set of rules that helps the Court to proactively supervise the time and events required to move cases from filing to disposition. There are four main aims of caseflow management: • give every case fair access to justice • dispose of cases depending on their characteristics • maintain a high level of quality justice • maintain public confidence in the Court.
Disposal	Word used to describe an application, which applies when a final outcome is achieved. Examples of final outcomes include Discontinued, Dismissed, Granted, Struck Out and Withdrawn.
EIP	Abbreviation for 'Early Intervention Process' which is a judicial initiative introduced on 12 April 2010 to better manage Care of Children Act cases. Cases are prioritised and placed on an urgent or standard track.
Event	A hearing or case review to advance the progress of a case or application. This includes hearings where the parties and/or their lawyers appear before a judicial officer (judge or registrar) as well as matters dealt with administratively by phone or email or on the papers.
Hearing	The examination of a case by a judge who has jurisdiction to deal with it. Commonly used to refer to the consideration of cases before a judge only.
Interlocutory application	An incidental step in proceedings, for example, an application for directions or orders usually in relation to the procedure of a case such as reducing the time within which a defence may be filed.
Judiciary	Term used to refer to judges.

Jurisdiction	The word jurisdiction is used in different contexts to describe: • the distinction between criminal, civil and family jurisdictions • the distinction between the levels of courts (eg, Court of Appeal, High Court, District Court).
Lawyer for the child	A barrister or solicitor appointed by the Court to represent a child or young person in Family Court Proceedings.
Litigant	A party to a court case.
Litigation	Word used to describe the process followed to cause a dispute to be decided in court.
NGO	Abbreviation for 'Non-government Organisation' (organisations which are not funded by the government); for example, Presbyterian Support NZ and Barnardos are both NGOs.
On notice applications	Applications where the other party is notified prior to the Court deciding the application.
PTS	Abbreviation for 'Parenting through Separation'. A free information programme for parents funded by the Family Court. The programme is voluntary and assists parents to understand how separation affects children and the importance of keeping children away from adult conflict.
Reserved decision	Following the hearing of a case the judge may defer giving the decision to a later date or time. Often the decision will then be given in writing.
Respondent	The party called to answer an application, or the opposing party to an appeal.
Self-represented litigant	A party to a court case not represented by a lawyer.
Stakeholders	Agencies, groups and individuals who have a strong interest and connection with the Family Court.
Substantive application	Substantive applications are applications made under the various family law acts and does not include applications made under the Family Court Rules, registrations under the Joint Family Homes Act 1964 and s9 requests for counselling under the Family Proceedings Act 1980.
Without notice applications	Urgent applications that are applied for without notifying the other party involved.

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