Summary of submissions in response to *Reviewing the Family Court: A public consultation paper*

April 2012

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Introduction

Background

In April 2011 the Government directed the Ministry of Justice to undertake a review of the Family Court.

The Family Court Review aims to ensure court resources are focused on the children, families and vulnerable people that most need its help. It will also ensure that the processes of the Family Court are straightforward and its decisions are fair, timely and durable.

On 20 September 2011 the Government released a public consultation paper seeking views on the issues facing the Family Court and possible areas for reform. The submission period closed on 29 February 2012.

Submissions received

209 submissions were received on the consultation paper. Submissions were received from the following groups:

Academics	8	Lawyers	19
Counsellors	38	Mediators	3
Court staff	1	Non-governmental organisations	25
Court users	76	Psychologists	7
Government	6	Social workers	19
Judiciary	4	Other	3

Some submitters provided full answers to all the questions posed in the consultation paper, while others focused on their particular areas of interest or their personal experiences in the Family Court. Appendix 1 is a list of submitters.

The areas submitters commented on most were:

- who should obtain a child's views (93 submissions)
- whether any changes should be made to the welfare and best interests of the child principle in the Care of Children Act 2004 (79 submissions)
- whether parent education should be compulsory (67 submissions)
- what role counselling should play in an alternative dispute resolution system (82 submissions).

In general, fewer responses were received on court processes than other issues.

Process for summarising submissions

This summary provides an overview of the responses to the questions in the consultation paper. Although it was not possible to include every response, every

submission was read and key points were recorded for the purpose of preparing this summary of submissions and to inform policy development. If a submitter did not answer the specific questions, their views were recorded, and are discussed, in relation to the most relevant questions.

The summary of submissions follows the structure of the consultation paper. Submitters have only been named if they have made their submissions publicly available.

Court user questionnaire

An online questionnaire for people who have been through the Family Court or sought legal advice on family law matters: *Reviewing the Family Court - A Questionnaire* was also released. The responses to the questionnaire are summarised in a separate report available at www.justice.govt.nz.

Next steps

The feedback and submissions received will inform the development of advice to the Minister of Justice on reform of the Family Court. The Minister will report to Cabinet on the review later in the year, including any proposals for new legislation. If legislation is proposed, you will also have an opportunity to make submissions to a parliamentary select committee on the content of the Bill.

Limitations

The submissions represent the experiences and views of the submitters and do not necessarily represent the views of all of those who access and provide Family Court services.

1. A Court under Pressure

Issues facing the Family Court

The consultation paper described a number of issues facing the Family Court including its financial sustainability, delay, confusing processes and a focus on the rights of adults rather than the needs of children.

The consultation paper asked whether the issues it outlined were the main issues facing the Family Court and, if not, what other issues the review should consider.

A number of submitters raised other issues they thought were important or disagreed with the issues the review is focusing on. Some of the more common themes were:

- concern about performance of judges and lawyers, including calls for greater accountability mechanisms for judges and an independent complaints system for Family Court professionals

  > The intention behind the Family Court is good but currently some lawyers and Judges are acting poorly causing greater delays, increased costs and destroying children's lives and destroying families. – Counsellor

  > I have had lengthy personal experience showing that effectiveness [of the process for making complaints against lawyers] is very limited as it is run by lawyers protecting mates. Lawyers should not be running this process. – Court user

- allegations that the Court is biased, particularly in favour of women or mothers but also in favour of fathers

- that too much emphasis on efficiency could be at the expense of other aims and some proposals aimed at efficiency could cost more in the long run

  > . . . the rights, interests and welfare of children should not be compromised in the name of efficiency and cost-effectiveness. – Children's Commissioner

- the impact of proposed changes to legal aid and a possible increase in self-represented litigants

- concern that the current legal aid regime and benefit system drive Family Court litigation

- there was not enough emphasis in the consultation paper on the need to keep people, particularly women and children, safe

- the Family Court can be very stressful for families

- concern that there is insufficient data to support change.

Training for Family Court professionals

49 submitters commented on the skills and training of Family Court professionals.

Submitters most commonly recommended training for Family Court professionals in:

- recognising and addressing domestic violence issues

  > I feel that if there was a greater understanding of the effects and symptoms of emotional abuse the outcome may have been better for my son. – Court user

- working with children

- greater sensitivity and skill in working with people from different cultures, the elderly and people with a disability.

  > Many Family Court issues are social in fundamental nature rather than legal. The backgrounds of lawyers and judges mean that many of them do not have the social skills of some other professionals to produce the best available outcomes for family issues after separation. – Court user

Nine submitters recommended the introduction of formal standards or competencies. Seven submitters suggested formal courses should be introduced. Some submitters suggested formal training and accreditation for all court professionals, with particular regard to understanding complex family dynamics and domestic violence.

A number of submitters recommended improved training for lawyer for the child.

Reconciliation or conciliation?

Under the Family Proceedings Act 1980 the Court, lawyers and counsellors must promote reconciliation, or if that is not possible, conciliation. The consultation paper asked whether the law should continue to focus on reconciliation or whether the duty should focus only on conciliation. 50 submitters commented on this issue.

15 submitters suggested the focus should be on conciliation only. 16 submitters suggested keeping the focus on reconciliation.

The remaining submissions contained a variety of views, such as that both reconciliation and conciliation are inappropriate if there is domestic violence. Some submitters were also concerned that the current duties were not well known or complied with.

> I think the family court should focus on conciliation. . . Support for reconciliation should be the responsibility of the two parties involved to source. – Court user

> Couples need to have made a serious attempt to reconcile and to understand the implications of separation not just at that time, but also in the future. – Court user

> The State has a role in enabling and encouraging families to resolve their private disputes. It is our belief, underpinned by research, that early self-resolution, out of court, achieves better outcomes for children and their families. – Mediators

2. The Changing Family Court

Impact of social changes

The review needs 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. The consultation paper asked submitters what they considered would be the most important social, economic and environmental changes that may affect the Family Court over the next five to ten years.

37 submitters commented on social changes that may affect the Family Court.

13 submitters thought financial pressures on families would affect the Family Court. Particular concerns included increased poverty, unemployment and people on low incomes, constrained social services, less ability to pay for lawyers and more self-represented litigants. Submitters suggested that, as a consequence, the Family Court would need to provide more accessible information and be prepared to deal with more complex cases.

> By their very nature self-represented litigants drive up costs by taking up the time of Registry officers and Judges . . . The fact they do not pay lawyers' costs also takes away a settlement motivator. – Auckland District Law Society.

Eleven submitters noted the Family Court would need to deal with increasing cultural diversity. In particular there would be a greater need for services and resources that meet diverse cultural needs, extended family having a greater role caring for children and more children who identify with multiple cultures.

Submitters also raised the impact of:

- family relationships becoming increasingly complex and dynamic
- the aging population – including the likelihood of more cases under the Protection of Personal and Property Rights Act 1988
- increasing incidence, or reporting, of violence, alcohol and mental health issues
- more technology – including pressure on the Court to adapt its processes and the need for good online information.

Jurisdiction of the Family Court

Since it was established in 1981, the jurisdiction of the Family Court has expanded from eight Acts to 23 Acts covering diverse family issues. The consultation paper asked whether any changes should be made to the Family Court's current jurisdiction.

37 submitters commented on this issue. Lawyers, the judiciary and academics tended to give the fullest responses.

Property matters

23 submitters commented on whether the Family Court should continue to hear relationship property cases. 10 submitters did not support any change.

> I am adamantly opposed to shifting relationship property back into the High Court. This would be a grave retrograde step. Often these cases have other issues attached, eg child support and maintenance, which are normally Family Court matters. However, they can also deal with matters that have knock-on effects for child care and especially accommodation. – Academic

Most of the other submitters that commented on this issue were concerned that the Family Court did not have the time or expertise to deal with relationship property cases, especially if they raised trust issues. Others thought that moving relationship property cases out of the Family Court could allow the Family Court to focus on other cases.

Two submitters supported a move to the District Court or a "separate division". Eight submitters supported an increased role for the High Court in hearing relationship property cases. Four submitters, including the Chief Justice, supported allowing an applicant to choose whether to file in the High Court or the Family Court (concurrent jurisdiction). Other views included that:

- the test the Family Court uses for transferring a relationship property case to the High Court should be less strict
- the High Court should deal with all relationship property cases
- the High Court should hear cases if it is also hearing related trust matters.

No submitter supported a change to the Family Court's jurisdiction to deal with deceased estate matters under the Family Protection Act 1955 or Law Reform (Testamentary Promises) Act 1949.

Nine submitters commented on the Family Court's jurisdiction to deal with trust cases. Five submitters supported some expanded jurisdiction, three submitters did not. One submitter supported the Family Court having specialist judges to hear trust matters.

Hague child abduction applications

Four submitters supported allowing Hague child abduction applications to be filed in the High Court rather than the Family Court. Seven submitters, including the Chief Justice and the District Court Judges, did not support the change.

Family violence

19 submitters commented on whether family violence cases should be heard in the criminal jurisdiction of the District Court rather than the Family Court. 15 of those did not support moving family violence cases to the criminal jurisdiction.

> The role of attending to Domestic Violence proceedings is central to the Family Court role of protecting children and familial members. The [submitter] does not believe it would be appropriate for this role to be dealt with in any other court – Community law centre

One submitter supported establishing a special court to deal with family violence matters. Three submitters supported the criminal jurisdiction of the District Court dealing with all family violence cases.

Education matters

Five submitters commented on the possibility of the Family Court dealing with some education matters, such as reviews of decisions to exclude a child from school and truancy. Currently truancy matters are dealt with in the criminal jurisdiction of the District Court and reviews of decisions to exclude a child from school are dealt with by way of judicial review in the High Court. Two submitters supported expanding the Family Court's jurisdiction in education matters, while three did not.

Other suggestions for changes to the Family Court's jurisdiction

Other suggestions for changes to the Family Court's jurisdiction, each raised by one or two submitters, included:

- enforcement of Family Court orders should be dealt with in another court
- Care of Children Act cases should be moved from the Family Court to a disputes tribunal
- the Family Court should deal with some criminal matters
- the Family Court should deal with all matters relating to children
- mental health work should be removed to another independent, suitably qualified body with a right of appeal to a Family Court judge.

An open Family Court?

The consultation paper noted that currently Family Court hearings are held in private and asked whether the Family Court should become an open court. 52 submitters commented on this question.

31 submitters did not think the Family Court should be an open court. Submitters were concerned about protecting the privacy of individuals, especially children. A number of submitters were also concerned about the impact opening the Court would have on victims of family violence and other vulnerable people. Other people in the Court could intimidate vulnerable people or vulnerable people could be dissuaded from seeking the Court's assistance.

> Family Court proceedings more often than not involve children and other vulnerable parties who require the Court's intervention. Transparency... is not always appropriate and may in fact discourage parties from seeking the very protection/resolution they needed. – Community law centre

13 submitters supported the Family Court becoming an open court. Some of the reasons given included to:

- increase the accountability of lawyers and judges
- expose those that lie to the Court and other forms of bad behaviour
- allow kin and whanau to be more involved
- improve the transparency of decision-making

> Yes, the Family Court should be an open Court, the benefits would be huge. . . I doubt if there would be any risks because there would be little to no problems because the lawyers would be accountable. – Court user

Other submitters either noted some of the advantages and disadvantages of an open or a closed court without reaching a clear conclusion or supported some greater openness but not an open court.

Transparency and accountability

The consultation paper asked how else the Family Court's transparency and accountability could be promoted.

23 submitters commented on this question. Nine of those commented on the need for more Family Court decisions to be published, especially online.

> If the two parties have different information about the likely decision that could be made in court, then there is a high chance of an extended and contentious dispute. . . . Many judgements are not supplied to legal publishers, so that the ones that are, become seriously misleading. – Court user

There were a number of other ideas, including:

- a media campaign aimed at educating the public
- improving processes for complaints about judges and other Family Court professionals
- providing Family Court users with information to assist them with the court process
- open days in the Family Court
- surveying client outcomes.

> We support improved provision of information. We agree that people should be provided with information that emphasises the benefits of resolving issues early and out of court. Accountability could be established by measuring client outcomes against time frames and against a finite service. . . . Service user "level of satisfaction with legal and court services" survey. – Non-government organisation

3. Focusing on Children

Managing parental conflict

The consultation paper noted the damaging effect parental conflict following separation has on children. The paper asked what measures could be used to manage and reduce conflict between parents following separation. 54 submitters commented on this question.

23 of those submitters mentioned counselling, particularly free counselling available to couples under section 9 of the Family Proceedings Act 1980, as an important way to reduce conflict.

> Section 9 Counselling is an excellent resource for couples and families who could not otherwise afford to pay for counselling privately.
> It is often these couples who struggle the most in their relationships because of finances and raising young children as the demands of raising children and paying the bills often take a toll on relationships.
> If this service is cut, this leaves these couples and their children vulnerable to the effects of separation. – Counsellor

Eleven submitters mentioned mediation or other forms of alternative dispute resolution. Seven submitters mentioned the Parenting through Separation programme.

Some submitters focused more generally on the need to keep people out of the adversarial court process wherever possible and resolve parenting disputes quickly.

> This is simple - encourage the resolution [of] all child and property issues asap. Unfortunately the current system does not promote this instead allowing, and often causing, the delays that are part of the Review. – Court user

Four submitters thought that greater certainty about the care arrangements that work best for children, or what the Court would decide, would reduce conflict. Suggestions included a rule that a child spend equal time with each parent or that people reach agreements about the care of their children at the start of their relationship. These ideas are discussed further below. Two submitters suggested establishing a parenting co-ordinator system, such as is used in some parts of the United States.

Providing for children's voices

Currently children usually only become involved in the dispute resolution process when a case goes to Court. But research suggests children want to be involved in decisions about care arrangements and that involving children can help parents focus on the child's needs rather than the parent's needs.

The consultation paper asked how can we ensure children participate earlier in the decision making process and what safeguards could enable this to happen. 50 submitters commented on this question.

25 submitters suggested child-inclusive alternative dispute resolution. Most of these submitters envisaged a counsellor talking to children but others thought children could

be involved in mediation. Safeguards mentioned included the importance of ensuring that those talking to children had proper training, the need to emphasise that children should not be asked to make a decision and that children should not be involved if there are any safety issues. Some of these submitters specifically supported the provisions enacted as part of the Care of Children Amendment Act 2008 that have not yet been brought into force.

> The essence of the dispute resolution is to support the parents in their receptivity to their child's emotional position. The children are not asked what they want, (as in court processes), but are attended to in terms of expression of how they are feeling (affect). This information / feedback is proven to shift parents to positions of cooperation and thus lowered conflict. – Counsellor

> My sincere hope is that children like ours will be listened to - and heard - before such cases get to court hearings and, hopefully, that cases such as ours can be resolved in intelligent discussions out of court . . . – Court user

Eleven submitters suggested that a skilled person should talk to the child, such as a counsellor, social worker or psychologist.

Four submitters suggested encouraging parents to talk to their children, including through the Parenting through Separation programme. One submitter also suggested running a separate course for children alongside Parenting through Separation.

Compulsory child-inclusive mediation

The consultation paper went on to ask whether child-inclusive mediation should be compulsory before an application is filed in the Court. 56 submitters responded.

24 submitters supported child-inclusive mediation being compulsory before an application is filed in Court, while 20 did not. Most other submitters focused on particular circumstances in which it should not be compulsory. Concerns included that it would not be the best use of resources, it would not be effective or appropriate in high conflict cases or if the child does not want to participate and concern about safety issues.

> For some parents/caregivers, the extent of the conflict or age of the children would prevent useful outcomes from a compulsory service and could potentially put children at risk. – Counsellor

Who should pay for child-inclusive mediation?

The consultation paper also asked to what extent parents should contribute to the costs of child-inclusive mediation. 40 submitters responded.

17 submitters thought that child-inclusive mediation should be free of charge, generally to ensure people can access the service.

18 submitters supported some form of means testing, partial user contribution or combination of the two. Submitters thought means testing or requiring a contribution offered a balance between the need to provide access to this service and recognising

fiscal constraints. Some submitters thought paying for, or contributing to, a service gives people a greater sense of ownership.

> I submit that this provision of family facilitation be means tested and partly funded by the users. This recognises the current fiscal constraints on the Ministry of Justice budget and also adds a commitment to the process. – Counsellor

Only two submitters supported the user paying the full cost of the service. One submitter thought the person who initiated the process should pay for it.

Obligation to consult with children

48 submitters commented on whether there should be an obligation on parents to consult their children about important decisions.

12 submitters supported the proposal. Some of these submitters also noted it would be important children were not pressured to make decisions and that there would be a risk of a parent manipulating the child's views.

> There should be an obligation on the part of parents to consult with their children in regards their opinions or wishes, but children should not feel pressured to make decisions, that should in fact be made by adults. – Court user

25 submitters did not support an obligation on parents to consult their children.

> In some cases I have been involved in this would be an invitation to parents to be involved in discussion that could be very damaging to children. In my view, children should not feel they are responsible for the arrangements... – Counsellor

Of the 11 submitters that did not express a firm view, some were concerned about the risks of introducing an obligation to consult children, some preferred that a person with specialist skills talk to children and some agreed with the idea in principle but did not think it was the best way to ensure parents consult their children.

Obtaining children's views in proceedings

The Care of Children Act provides that children must be given reasonable opportunities to express their views in Family Court proceedings. Currently this is done by appointing lawyer for the child. The consultation paper asked who should be responsible for obtaining a child's views on the Court's behalf. This was the question that received the most responses, with 93 submitters commenting.

18 submitters considered that lawyer for the child should continue to have this role. These submitters were almost all lawyers, academics and non-government organisations. Some of these submitters also thought that lawyer for the child needs to liaise with other professionals and social agencies more than they do now or that they could benefit from more training.

> If children want the parents to stop fighting and listen to what they have to say the lawyer can talk with both parents and try to persuade them to put aside their personal antagonisms and reach an early consent arrangement for the child's care and upbringing. Counsellors do not usually have this advantage and while court appointed psychologists do, it is not their role to

> attempt to engineer an agreement, and they cannot engage in shuttle diplomacy aimed at reaching agreement. – Lawyer

> In the courtroom itself, our volunteer lawyers are adamant that lawyers for the child are necessary if children's views are to be properly promoted in the Family Court. Their experience tell them that non-legal professionals will not effectively navigate the court for their child clients. – Community law centre

The majority of submitters thought that someone with expertise in child development should interview children. 43 submitters favoured psychologists, social workers, counsellors, a combination of those or a child specialist. Eight submitters thought a "child advocate" should interview children. Nine submitters did not say who should interview children, other than it should not be lawyer for the child. These submitters were generally concerned about the performance, skills or training of lawyers for the child.

> It remains concerning that children continue to be interviewed by counsel for child prior to specialist report writers interviewing them, and that they may also be interviewed by a judge. There is a need for those who interview children to be trained in child development and forensic interviewing of children. – Psychologist

> Lawyers are not the right people for this job. In my case the lawyer for child was intimidating. Lawyers do not have a human response and are adversarial in their approach. – Court user

Six submitters thought there should be flexibility to appoint a different person depending on the particular circumstances. Other submitters gave diverse views or comments.

Using other professionals to obtain the views of children

Similarly, 35 of 47 submissions explicitly supported using other professionals to obtain the views of children. A group of academics, the Children's Commissioner and the District Court Judges did not support using other professionals as they preferred that lawyer for the child obtains the child's views.

> In my view, it is important that lawyers for the child retain their current statutory brief under COCA to represent the views of the child. This ensures that the children's views are directly presented from the lawyer's bench, rather than the witness box, and enables the child's lawyer to examine the evidence of witnesses and report writers on the child's behalf. – Children's Commissioner

Should children choose?

The consultation paper went on to ask whether children should be offered a choice about how their views are obtained. 17 submitters commented on this question.

Eight submitters supported children being given a choice. Four submitters did not support it. Other comments from submitters included that it should depend on a child's age.

> The child must be given the right to decide whether, when and how to participate in the court process as the [United Nations Convention on the Rights of the Child] grants participation rights to the child. Parental separation, care proceedings under the Children, Young Persons and Their Families Act 1989 and Court processes are stressful and confusing for children and

> adults. Giving the child the same control over their involvement may create an environment that will enable them to participate. – Academics

When should lawyer for the child be appointed?

Lawyers for the child are currently often appointed early in the court process. The consultation document asked what criteria could be used to decide whether and when to appoint lawyer for the child. 39 submitters commented on this question.

Nine submitters considered it was important to appoint lawyer for the child early in the court process, such as on application or when a defence is filed. Two of those submitters noted the role lawyer for the child can have in bringing about an early resolution.

> Lawyer for the child has traditionally been very effective in bringing about the resolution of cases by assisting parents in focussing on the needs of their children and what outcome is most beneficial having regard to their welfare and best interests. It is the experience of the judges that a great many cases are resolved without judicial intervention simply because lawyer for the child has been appointed. That being so, the savings in cost are obvious. – District Court Judges

Four submitters thought that lawyer for the child should be appointed when the Court thought it was necessary. The New Zealand Law Society commented that the Court should retain the discretion to appoint lawyer for the child early in the Court process.

Six submitters thought lawyer for the child should only be appointed when the matter proceeded to a defended hearing. Nine submitters thought lawyer for the child should be appointed in certain kinds of complex cases, such as when there was violence or high conflict. Two submitters thought lawyer for the child should be appointed when the parents' had lost sight of the child's interests and were focusing on their own needs.

One submitter thought that the Court should also be able to appoint lawyer for the child in property proceedings.

Role of lawyers for the child

38 submissions commented on the tasks lawyers for the child should undertake in proceedings. Most submissions focused on whether lawyer for the child should advocate the child's views, their best interests or a combination of both. A small number of submissions favoured restricting lawyer for the child's role to either views or best interests. 17 submitters thought lawyer for the child should have a role advocating both a child's views and their best interests, but gave different views on how the tension between the two should be resolved.

> The confusion over the role can be resolved by an amendment to s 7 of COCA to make it clear that the role of Lawyer for the Child is to advocate an outcome in the welfare and best interests of the child informed by the child's views. – New Zealand Law Society

District Court Judges thought that in some cases lawyer for the child's role could be restricted to reporting on views only.

Several submitters thought lawyers for child should concentrate on legal tasks as opposed to straying into areas more suitable for social workers. Other views included that the role of lawyer for the child needs to be better defined, both in legislation and in the briefs lawyer for the child is given by the Court.

In-house lawyers for children

18 submitters commented on whether lawyers for children should be provided in-house. Submitters were divided on this point. Seven supported the proposal, six did not. The remaining five submitters expressed some reservations or conditional support but did not give a firm view.

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

Only eight submitters commented on whether a separate litigation guardian needs to be appointed for children, in addition to lawyer for the child. Three of those submitters thought that it was necessary to also appoint a litigation guardian, at least for young children.

Promoting children's best interests

Under the Care of Children Act, the Court must make decisions based on what is in the welfare and best interests of the child. Decisions can be tailored to a child's individual circumstances but it may make it difficult to know in advance what a court is likely to decide.

The consultation paper asked what changes, if any, should be made to the welfare and best interests principle and how more certainty may be achieved.

A diverse range of responses were given to this question from 79 submitters. There were also diverse views on the effect of the current principles.

The most common views expressed related to whether there should be a presumption or rule that children spend equal time with each of their parents. 15 submitters expressed support for the idea, while 29 submitters expressed concern about it. Some of the submitters in favour of equal time felt that the Court currently favoured mothers and an equal time presumption would counteract that.

Other submitters felt that the Court already placed too much weight on ensuring that children spend equal, or substantially equal, time with each parent, even when it was not appropriate. Several submitters supported the idea that the pre-separation arrangements for care of a child should be used as a starting point.

> A presumption of shared care is a no brainer. It gives a clear signal that fathers are expected to be involved in raising their children and starts with a situation that research suggests is beneficial for children. – Court user

> I find it difficult to ascertain how any child living out of a suitcase every week experiences any virtue of normalisation as a child. – Court user

> We strongly support the use of pre-separation parenting arrangements as a starting point for post-separation parenting arrangements to remedy the uncertainties created by current practice. Research continues to demonstrate that the work of caring for children, as opposed to sentiments of care, remains highly gendered in most intact families. – Academics

There was no significant support for any other single change to the welfare and best interests principle. Nine submitters supported a principle that delay in determining proceedings is likely to prejudice the child's welfare. 10 submitters supported some form of a "no order" principle, that a court order should only be made if it positively promotes the welfare of a child. Other submitters expressed concern about these possibilities. Several submitters thought that it would be helpful to have some kind of draft orders or information for parents on age appropriate arrangements that can be individualised to meet a particular child's needs.

Other ideas included:

- a protected person should have sole responsibility for some guardianship matters
- greater emphasis should be given to a child's safety
- there should be greater emphasis on contact with extended family
- reconsidering the appropriateness of sections 5(b) and (d) of the Care of Children Act as they may detract from looking at the particular child in their particular circumstances.

4. Supporting Self-Resolution

Providing access to information

The consultation paper asked how to improve the provision and delivery of information to those who need it, especially children. 46 submitters commented on this question.

The majority of submitters believed there was a need for improved provision of Family Court information, particularly if there are to be changes to Family Court services.

> The need for better information, and education, about pathways for resolving family disputes is urgent. If substantial changes occur because of this Review, the need will be intensified further. – Community law centre

Submitters had the following ideas for improving provision and delivery of information:

- courses run through non-governmental organisations, community groups, iwi, social service agencies and other community groups (13 submitters)
- age appropriate material that uses easy to understand language and would appeal and be accessible to young people (10 submitters)
- a comprehensive information provision strategy, including frequent information seminars provided in the community (five submitters)
- improved online resources, including an updated and user-friendly Family Court website, with comprehensive and easy to understand information (seven submitters)
- culturally appropriate information, including access to translation services and easy to understand materials (five submitters).
- using counsellors and social workers to give information to young people in 'child-friendly' environments, such as the school or home of the young person (three submitters).

Parent Education

Compulsory Parenting through Separation

Since May 2006 a free programme for parents called Parenting through Separation (PTS) has been provided by the Ministry of Justice. The programme is currently voluntary. The consultation paper asked whether attendance at PTS should be compulsory prior to making an application to the Court, and what the risks and benefits of such an approach would be. 67 submitters commented on this question.

The majority of submitters had a favourable view of PTS. It is widely seen to be a valuable component of the Family Court system. However there were concerns about making attendance compulsory, and whether all cases would be appropriate for the service.

38 submitters supported compulsory PTS. Five submitters recommended that PTS participants be screened for issues such as domestic violence.

18 submitters thought that attendance at PTS should not be compulsory. However the majority of these submitters thought pre-court PTS should be encouraged.

The reasons for keeping PTS voluntary varied. Three submitters believed that the success of PTS was largely due to its voluntary nature and the desire of parties to engage in the programme. Compulsion may be counterproductive to the effectiveness of the programme.

> PTS gives parents neutral language to use when discussing their children and can focus parents on the children's experience rather than their own. Courses are much more pleasant to run with voluntary attendance and a course can be disrupted by a reluctant and hostile parent. However when the parent is required to come they usually take something from the course. – Psychotherapists

Three submitters held reservations as to the effectiveness of PTS. There was also concern about the cultural appropriateness of PTS.

> These types of group programmes will only be effective for cultures and community that reach out for education and information. Maori and Pacific have different beliefs, and put more value on guidance and mentoring from within the whanau, the kaumatua, the kuia and the elders. – Social worker

Provision of PTS

30 of 36 submitters that commented thought PTS should be provided more widely in the community. Several submitters believed PTS should be more accessible in rural areas where the service is unavailable.

Many submitters believed the main issue with access was a lack of information on the service. Suggestions included promotion and provision of the service through the Family Court website and community agencies.

Several submitters suggested PTS should be provided on marae and extended to target prison inmates and minority ethnic groups. Flexibility would be required in the manner the service is provided in order to be effective for a wide-range of users.

Cost of PTS

PTS is currently free. The consultation paper asked how PTS should be funded and if participants should be required to contribute to its cost. 33 submitters commented on this question.

23 submitters supported the continuation of PTS as a free service.

Several submitters commented that charging for the service would be a barrier to accessing PTS. In particular submitters thought the service should be accessible to low income participants who may be most in need.

> It is part of valuing parenting that learning to improve your skills should be free and the opportunity be available. - Psychotherapists

Nine submitters were in favour of a means-tested contribution. Submitters thought a contribution may improve user engagement and would ensure the service continues to be accessible to all.

> Making a contribution to the cost may increase the respect and attention that some people pay to the course. Equally, we would not want people to be unable to attend because of the cost. – Counsellors

Legal Advice

The consultation paper asked how the professional responsibilities of family lawyers could be better balanced with the needs and interests of children.

Accreditation of Family Lawyers

To encourage best practice, other jurisdictions such as the United Kingdom and Australia, have introduced accreditation schemes for family lawyers. These schemes can be mandatory or voluntary. 55 submitters commented on this question.

Submissions were overwhelmingly in favour of accreditation to promote increased skill and accountability from family lawyers. 45 submitters supported mandatory accreditation, including court users, counsellors, community and interest groups, non-governmental organisations and the District Court Judges.

Many court users cited unsatisfactory experiences with family lawyers. In particular submitters thought lawyers should be more accountable. Submitters also thought lawyers should be trained to communicate appropriately with young people, and to have a greater knowledge of the dynamics of domestic violence.

> We see the difference skilled lawyers make to the clients we meet with, and also see the damage done by those lawyers with very adversarial attitudes and limited knowledge of family violence – Social workers

Four submitters were supportive of voluntary accreditation. Four submitters did not favour accreditation as it may do little to improve lawyer behaviour or would cost too much, and be too difficult, to implement.

Working in the interests of children

The consultation paper noted that there can be a tension between the ethical obligations of lawyers to their clients and the best interests and welfare of children. Submitters were asked whether there should be an obligation for family lawyers to work collaboratively in the interests of children rather than their clients. 44 submitters responded to this question.

34 submitters believed lawyers should be obliged to work in the interests of children rather than their clients. Submitters were concerned that an obligation on lawyers to work in the interest of their clients can have a detrimental effect on children.

> Too often lawyers are determined to win for their clients at all costs. More people working together on the case, the better chance of a good outcome for the children. – Non-governmental organisation

Four submissions opposed requiring lawyers to work in the interests of children rather than their clients.

> It is fundamental to the lawyer-client relationship, not to mention a professional responsibility of a lawyer, to act and advance his or her own client's interests. It would undermine the trust the client reposes in their lawyer - a client must feel that a lawyer is acting in their interests and a lawyer must act on instructions. – Community law centre

Promoting out of court resolution

Some overseas jurisdictions have stronger legislative provisions to encourage lawyers to promote early resolution. 40 submitters commented on whether family lawyers should be encouraged to assist their clients to resolve their dispute without using the court system. Submissions were almost unanimous in support of this idea.

Several submitters thought that currently lawyers are tempted to pursue litigation in order to advance their own interests.

> Family Court lawyers might drive litigation in order to generate more work and therefore more income by fuelling a fight between mother and father. - Court user

Several submissions also noted the need for greater support for lawyers so that they are able to provide quality information to clients.

Two submitters were concerned that lawyers promoting out of court resolution may not be appropriate in cases involving domestic violence.

Demonstrating attempts at resolution

20 of 26 submitters that commented thought that family lawyers should be required to demonstrate that they tried to get the parties to reach an agreement as a prerequisite to filing non-urgent applications in court.

> Lawyers need to focus on resolution and not take a litigious approach as this contributes to delays and matters taking longer than necessary which is usually not in the best interests on the children. – Community law centre

Three of these submissions noted there should be an exception for cases involving domestic violence.

Changing lawyers' professional responsibilities

11 submitters commented on the impact changing lawyers' professional responsibilities, may have on the way lawyers practice and their clients.

The main theme of the comments was that changing lawyers' professional responsibilities would result in a more client and child focused service. Submitters thought lawyers should be obliged to work swiftly in aiding parties to resolve disputes in

an efficient manner. This would lessen the impact of conflict on children involved in the process, while also reducing cost.

One submitter was concerned changes would disrupt the lawyer-client relationship, which would make proper representation and the provision of appropriate advice more difficult.

5. Focusing on Alternative Dispute Resolution

Counselling

Role of counselling

The consultation document suggested that the role of counselling in the Family Court varies greatly across the country, and asked if it should be changed to focus on conciliation rather than reconciliation. 34 submitters commented on this question.

Most submitters disagreed that the role of counselling is unclear, yet submitters' views about the role varied. Views were split between those who believe counselling is primarily therapeutic, focusing on reconciling couples and allowing them to come to terms with change, and those who see it as a form of dispute resolution.

37 submitters commented on whether counselling should be accessed via the Court. 29 submitters supported continued access via the Court, while eight did not support it.

Those who saw counselling as therapeutic tended to think that it should not be accessed through the Family Court.

> Counselling that is unrelated to legal family disputes, and that might have reconciliation or conciliation as a focus, would be better accessed directly through a service such as Relationships Aotearoa. – Community law centre

> Counselling is a highlighter of issues rather than suited to resolving them. Parties expectations of the process can be unrealistic. – Psychologist

Those who saw counselling as a form of dispute resolution tended to believe it should remain within the Family Court, but have clearer guidelines about what counselling involves in the context of the Family Court.

> Family Court counselling is a process more correctly described as dispute resolution with a therapeutic outcome...The close incorporation of counselling services within the Court framework adds credibility and authority to this dispute resolution process. – Counsellors

> Family Court Counselling is a regulated process using counselling and mediation skills to meet the requirements of the Act; ie, exploring reconciliation and the reaching of issues in dispute. – Counsellors

> Counselling has frequently been used as de facto mediation, sometimes with unhelpful consequences. – Mediators

A number of submissions suggested renaming Family Court counselling to clearly demarcate it from other forms of counselling which are wholly therapeutic.

Role in a pre-court ADR system

Free confidential counselling is currently available on request, both before and during proceedings in the Family Court. The consultation paper noted that the demand for, and cost of, counselling services is rising and cannot be sustained. It asked what role

counselling should play in a broader Alternative Dispute Resolution (ADR) system ahead of court.

A large number of submitters commented on this question. The vast majority supported retaining free counselling. Of the 82 submitters who commented on counselling, 51 believed it should be retained in its current form, with a further 10 who thought only minor tweaks were needed. Most submitters thought counselling helps people help themselves, prevents cases going through lengthy litigation and enables people to come to terms with changes in their lives in preparation for the Court's decisions.

> Family Court Counsellors are specialised professionals who assist individuals, couples and to some extent families to resolve conflict. – Counsellors

> Counselling is very necessary for many people going through the family court process. Not everyone has the maturity or capabilities to deal with trauma, grief etc. Some families need guidance to function more happily, particularly, when the outcome is shocking and unjust. – Court user

Targeting counselling

The consultation paper asked if funding for counselling should be targeted to people with children and who cannot afford to pay for it. 41 submitters commented on this issue and views varied greatly. Some submitters thought counselling should remain free for all, while others supported users paying part of the cost or means testing. Some submitters thought that counselling should only be funded for people with children or that it was especially important for people with children.

> People place greater value on things they pay for. – Court user

> The success of this service has to be that it is easily accessible (limited bureaucracy, minimal paperwork, speed of approval, and universal – not means tested). – Counsellor

Out of Court Dispute Resolution

Mediation and mandatory ADR

The consultation paper noted the overseas trend to use mediation as the primary dispute resolution process, and asked if ADR should be mandatory before an application could be filed.

60 submitters commented on the concept of making some form of ADR mandatory before an application can be filed in the Court. 36 submitters supported mandatory ADR.

> Court processes based on the adversarial system can be harmful for children and families....The [submitter] supports a presumption in favour of ADR. – Crown entity

Four submitters, including the New Zealand Law Society and a group of family law academics, did not support mandatory ADR.

A number of submitters were concerned about family violence cases going to ADR. Five submitters only supported mandatory ADR if there was an exception for cases with

family violence. Nine submitters felt that ADR presented too great a risk to these cases to be contemplated without a thorough screening process.

> Asking a victim of family violence to spend time with a violent ex-partner to negotiate agreement is often asking them to compromise their safety and well-being. – Non-governmental organisation

> Existing research consistently raises concerns about inequalities in the negotiating power of parties participating in such processes. – Academics

State's role in funding ADR

The consultation paper asked what the State's role should be in an ADR focused approach, including whether it should fully or partially fund ADR services.

36 submitters commented on whether parties should pay to attend ADR. Two supported parties paying full costs, 19 supported means-testing or a partial contribution, and 12 thought ADR should be free.

> The best way to ensure both parties engage in ADR would be to have them both pay for this service, and to have procedures in place that disadvantage the party refusing to be part of ADR. – Court user

Means-testing was mostly supported as a way to ensure access to the service for low-income families. A number of submitters noted that a partial contribution would help participants invest in the process.

> The State can reasonably ask wealthy parents to pay, but even families in relatively high income brackets would experience the costs of such services as untenable pressure. – Community law centre

> Public funding to ensure accessibility for all will be particularly important for those with low incomes or limited access to funds to pay for services. A contribution from participants to any publicly funded mediation (even if this is modest) may also assist with perceptions of value to be gained from this process. – Mediators

Some non-governmental organisations were concerned that if there was no State funding for ADR they would face an increased burden.

> Costs must not be shifted from government to the NGO sector. If that happens, many NGO services that children and families rely on will collapse. Many are already operating in substantial deficit and facing pressure to reduce services. – Non-governmental organisation

Ensuring parties engage in ADR

22 submitters commented on ways to ensure both parties engage in ADR. Three submitters felt the best way was to inform parties of the benefits of making their own arrangements, preferably through *Parenting Through Separation* or a helpline. Four submitters felt that providing a free service was the best way to ensure engagement. Four submitters thought making ADR mandatory for court entry would ensure engagement, and two thought penalties for non-attendance would be required.

Culturally responsive ADR

The consultation paper asked how modes of ADR can be developed that are responsive to the cultural needs of Māori, Pacific and ethnic communities.

41 submitters commented on how to develop culturally responsive modes of ADR. 24 submitters supported allowing culturally diverse forms of ADR to satisfy court-entry requirements. Particular support was given to the concept of family group conferences that could be held on marae. However, some concerns were raised about whether the reality of family group conferences lived up to the theory.

> These concerns include problematic assumptions such as that the whanau involved in family group conferences are functioning, have knowledge of and respect for tikanga, and will take responsibility for the young person. – Crown entity

Two submitters supported developing specific cultural guidelines for ADR, and six submitters felt that the greatest gains could be made by ensuring that more Māori were employed in the Family Court.

Separate Forum for Low Level Disputes

The consultation paper asked if a new, more informal decision-making forum for resolving low-level disputes would be an inexpensive and quick alternative to the Family Court. 41 submitters commented on the concept of a separate forum. 25 submitters supported the idea and 15 did not.

Many of those who did not support the concept of a low-level dispute forum were concerned about the definition of “low-level”.

> This is about children, if children are involved in parenting dispute of any form then it is important the issues are resolved, there are no ‘low level disputes’ when it involves children are there! – Court user

Several submitters were concerned that a low-level dispute forum would further fragment the Family Court’s jurisdiction. It was felt that ADR providers could deal with low-level disputes, without adding an additional layer to the Family Court system.

> Creating a separate forum could fragment the Family Court system. This goes against the original motivation behind creating the Family Court, and there is a potential danger that it would simply be an additional layer to the current system which is already complex. – Community law centre

Those who supported the concept of a low-level dispute forum focused on the time it could free up in the Family Court, with the Disputes Tribunal identified as a possible model.

> A separate forum would relieve the Family Court from its current role of resolving non-legal, personal and emotional issues within an adversarial structure, allowing the Court to focus on matters that properly require judicial intervention. – Mediator

6. Entering the Court

Managing entry to the Court

Access to the Court

Currently the Family Court has limited control over which cases come before it. 37 submitters commented on limiting access to the Family Court and the possible impacts, risks and benefits.

19 submitters believed access to the Family Court should be limited. Many promoted the mandatory use of mediation or counselling to attempt to resolve disputes prior to Court.

> The Family Court should not be the default process, but rather the forum for determining legal and safety issues and the place of last resort in a limited number of cases, including when parties cannot otherwise reach agreement or there are safety issues. – Mediators

Several submitters suggested greater powers were needed to limit vexatious and repeat claims.

> The benefit is stopping litigious parents filing constant applications and wasting the court, tax payers and main carer's time and often huge amounts of money. – Court user

Nine submitters did not support limiting access to the Family Court. Several were concerned about the effect this may have on vulnerable people and victims of domestic violence. There were also concerns that the Court could become inaccessible to low-income families.

Screening applications

58 submitters commented on whether all Family Court applications should be screened to determine their appropriate pathway.

57 of the comments were in support of screening applications. However several cautioned that screening must be carried out by a suitably qualified person, particularly to ensure cases involving domestic violence are dealt with appropriately.

In addition to domestic violence, several submitters believed screening should identify applicants with complex problems, such as alcohol, drug or mental health issues. Many thought screening would allow cases that did not require the services of the Court to be deferred to appropriate ADR.

Who should screen?

32 submitters commented on what kind of skills and training the person carrying out the screening should have.

Nine submitters suggested training and experience in family violence issues would be most important. Counsellors were suggested by several submitters.

The majority of the other submissions supported someone of a social science or social work background as having the required skills for carrying out screening. An understanding of family law processes was also suggested. It was also suggested a dedicated screening group would be ideal.

> It should not be a one man job but for a group with the relevant skills and expertise – child focused, adult victim experience, legal expertise, person well versed in knowledge and wide network or the systems and what is available outside the court system. – Social worker

Applications

Urgent (without-notice) applications

Without-notice applications take parties straight into the court process without the opportunity to try less adversarial means of resolving disputes. 22 submitters commented on whether the criteria for urgent applications need to be made clearer, and in what way.

13 submitters agreed the criteria should be made clearer. Three submitters suggested urgent applications should only be allowed in cases involving violence. There were concerns about how easily urgent applications are granted. One submitter suggested that a community panel should gauge the merit of applications.

Nine submitters were of the view that the existing criteria are clear enough.

> We believe that the rules are clear... A range of factors can lead to inappropriate applications for 'without notice' orders including lack of access to specialist family law advice, inadequate legal aid remuneration... – Academics

19 submitters commented on whether lawyers should be required to certify that all without-notice applications are appropriate in the circumstances. 16 submitters supported this requirement. Three submitters thought that the process for without-notice applications is already robust enough.

Penalties for making unmeritorious without-notice applications

14 submitters commented on whether there should be sanctions or penalties on parties or their lawyers for bringing without notice applications that are later found not to have merit.

Nine submitters supported the introduction of penalties for unmeritorious without notice applications. However three of those submitters noted a risk of potentially discouraging vulnerable parties from applying. Application of penalties would have to be considered carefully. One submitter also noted that a screening process and appropriate consultation would mitigate the risk of unmeritorious applications.

Five submitters did not think there should be penalties. Four of these submitters were concerned that penalties may discourage victims of family violence from making urgent applications required for their safety.

The District Court Judges submitted that there was little evidence of urgent applications being misused.

> The judges see little, if any, evidence of misuse. There is the risk that the imposition of a penalty would disadvantage any child of the family. It may also detract from the real issues at stake. – District Court Judges

'Any evidence' rule

The 'any evidence' rule allows the Family Court to receive any evidence it thinks fit, whether or not it would be admissible in another Court. 26 submitters commented on the 'any evidence' rule. 15 submitters believed the 'any evidence' rule required clarification.

Several of these submitters were concerned the rule often increases conflict between parties.

> Allowing inflammatory comments and the like goes against all the principles of doing what is best for the children as it prolongs and intensifies any conflict. – Court user

Other submitters described experiences of judges refusing evidence they thought was important. Some submitters suggested there should be a greater emphasis on establishing 'truthful' evidence.

Hearsay evidence

The consultation paper asked whether there should be a time limit to file direct evidence when hearsay evidence is filed in support of an application.

15 submitters commented on this question. 11 submitters supported introducing this obligation. Four submitters recommended the time frame be generous and flexible. The District Court Judges recommended a 21 day time limit.

Four submitters believed a time limit was unnecessary. Clarification of the 'any evidence rule' and the ability of the judge to assess the evidence was said to be sufficient.

Affidavits

35 submitters commented on whether there should be a standard questionnaire form of affidavit, and what information it should include.

26 submitters were in support of a standard questionnaire form of affidavit. The majority of those in support were in favour of a standard questionnaire as it would limit the level of emotional and inflammatory evidence presented in affidavits. Submitters also thought a questionnaire could encourage parties to focus on issues relating to children rather than their relationship. Three submitters agreed that affidavits can often increase conflict.

> Affidavits are negatively focussed and encourage partners to denigrate each other. – Counsellors

Only three submitters did not support using a standard questionnaire form of affidavit. Some thought that the questionnaire should still leave space to provide additional evidence.

Focussing on the issues

If the issues in dispute are identified early, the Court is able to deal with cases more efficiently. The consultation paper asked whether applications should be more focussed on the issues to be determined and the outcomes sought. 17 submitters agreed with that idea. Submitters commented that focusing on the issues to be determined and the outcomes sought would reduce conflict and delay during cases.

> This is the current practice in parenting order applications. In the committee's view it would be helpful to extend this to other pro forma applications, for example in relationship property matters. – Auckland District Law Society

One submitter disagreed, believing an obligation to focus on issues would artificially simplify complex cases needing to be understood by the judge.

Joint memoranda

The consultation paper suggested that requiring lawyers to file joint memoranda, setting out the matters that are agreed and the matters the Court needs to decide, could assist early resolution and efficient court hearings.

Eight submitters supported mandatory joint memoranda. Two submitters believed this would promote a child-centred approach. Two submitters also noted risk in this approach if cases involved domestic violence or intimidation.

Two submitters disagreed with mandatory filing of joint memoranda and one submitter had concerns. The Auckland District Law Society noted reaching agreement on the content of a joint memorandum could be difficult if one party was self-represented.

> It is a balance between competing interests of the benefits of an informal approach, including any evidence in affidavits and a therapeutic venting of issues considered relevant by the parties. In family law situations, we have a danger of imposing our own values on people, and in effect deciding what is relevant to their case for them. This approach is to be avoided, and this is the danger with requiring parties to file joint memoranda. – Community law centre

Court Fees

Most New Zealand courts charge a range of fees for proceedings in order to generate revenue to offset court costs. Currently the costs of running the Family Court are met almost entirely by the taxpayer. 39 submitters commented on introducing fees to the Family Court.

13 submitters supported court fees. The District Court Judges commented that fees could encourage people to resolve low level disputes out of Court.

Several submitters suggested fees should be limited to a modest setting down fee or should be means tested. Some submitters who supported fees also suggested that

some applications should be exempt, such as applications that are urgent, involve violence or are made under the Care of Children Act 2004 or the Children, Young Persons, and Their Families Act 1989.

13 submitters opposed court fees. Many of these submitters were concerned that those who genuinely require the Court's assistance should not be denied access to justice.

> The imposition of court fees when coupled with the other costs of litigation/disputes resolution could result in the cost of family court procedures becoming prohibitive. It is therefore important that safeguards are maintained to preserve access to the court, including:
>
> - the ability to waive or reduce fees; and
> - access to free legal advice and representation for low income earners.
>
> – Crown entity

Several submissions noted the potential for a disproportionate impact on women because a lot of women with young children are not working or are in part-time work. One community law centre was concerned that court fees would compound pressures on low-income families already under significant stress.

7. Pathways and Processes in the Court

Clearer Pathways

Conciliation services within the Court

The consultation paper noted that court-directed counselling and mediation have limited impact on making arrangements work for children and delay judicial decision making. It asked whether counselling and mediation should be a part of the court process if the Court is only dealing with serious cases.

38 submitters commented on conciliation services within the Court. 19 believed counselling and mediation should be available within the Court. A number of submissions stated that the ability to refer oneself out of the Court process is an important exit pathway.

> At all times parties should be able to refer themselves back to mediation and opt out of the Court process. – Mediators

> Even once the case has come into the court process, some parties still have the ability to make decisions given the right setting and support. Access to counselling and mediation can be used as an adjunct to court proceedings to deal with particular issues as directed by the Court. – Counsellors

Four submitters believed that mediation and counselling need not be available within the Court. Four submitters stated that services such as counselling and mediation had no place in the Court if there were allegations of family violence.

> The argument can be made that a clearer line of demarcation between conciliation and the decision making function of the Court may lead to a greater focus by judges and Court staff on that function. – District Court Judges

23 submitters commented on whether lawyers appointed to assist the Court should be used as mediators. Seven submitters commented that lawyers should only mediate if they are accredited mediators, and that this should be through the same accreditation process as for other mediators.

> The actual mediation and counselling skills are more important than whether the person has a legal background. – Non-governmental organisation

12 submitters thought lawyers should not be involved in mediation at all, for a variety of reasons. These ranged from the feeling that lawyers were too adversarial to mediate effectively, to the idea that it would be difficult to keep lawyers' role as neutral mediators separate from their legal role as agents of the Court.

A few submitters commented specifically on the topic of judge-led mediation, and views were split as to its appropriateness.

> Judicial mediation should continue to be available as part of the post-filing armoury aimed at resolution. The value of a judicial presence and indication should not be underestimated within dispute resolution processes. – New Zealand Law Society

> We do not support a continuation of the Judge led mediation within the Family Court. This is not in any way a reflection on the Judges. It is simply that we believe there should be a clear distinction between the Court as a legal decision making forum and informal ADR processes that take place external to the Court. – Non-governmental organisation

Addressing health and social issues

The consultation paper noted that many cases which come before the Court have far more social issues than they do legal issues. It asked if proceedings in the Family Court were the right response for those with complex social needs, or if they would be better referred to social agencies. 44 submitters responded to this question.

24 submitters felt that social agencies were better placed to deal with these cases. A further 14 argued that a model where the Court worked alongside social agencies was preferable.

> The two sectors, social and legal, are not mutually exclusive. This family is a prime example of the need for greater coordination between the Family Court and the social services sector. – Non-governmental organisation

Two submitters argued that the Court's involvement is necessary in these cases, as judges have the authority to ensure adherence to decisions. A number of submitters made the point that although social agencies probably ought to be handling these cases, the Court was doing so because of others' failure to act.

> At present, in the absence of any other satisfactory alternative, the Family Court is providing services and assistance to families which are more properly the responsibility of other agencies. – District Court Judges

> I started from CAB . . . to CYFS to Social workers to Police but they all referred me to the other association . . . I felt so lost in the system . . . – Court user

Certainty of Processes

Standardising processes and restricting the number of events

The consultation paper noted that there is a range of ways that cases progress through the Court, often incorporating unnecessary events which can compromise the Court's efficiency and cost-effectiveness and contribute to delays. It asked if a standard process for all non-urgent proceedings should be introduced, with a restricted number of events which clearly advance the matter towards resolution.

27 submitters commented on standardising processes in the Court. 22 supported a standard approach for all non-urgent cases. Two submitters thought that a standard approach was not a good idea – each case must be treated as individual, and dealt with on a case-by-case basis.

14 submitters commented on restricting the number of events in the court process. There was general support for this concept, although a number of commentators noted that it was important to retain judicial discretion over the number and type of events.

> The Law Society recommends practical interventions designed to limit the number of court events. – New Zealand Law Society

> The committee would support introduction of a similar type of process [to EIP], but emphasises the importance of retaining judicial discretion. – Auckland District Law Society

20 submitters commented on the processes described in the consultation paper. One submitter supported a model based on the District Courts Rules, three supported a more inquisitorial approach and three suggested that the same judge should sit on a case throughout.

Two submitters felt that any process introduced needed to be simpler so that non-lawyers could understand what was happening. Three submitters thought that introducing Senior Registrars would help advance cases quickly.

Durable, Clear Decisions

Changing family circumstances

The consultation paper noted that the Court makes decisions based on a family's situation at a particular point in time, but that families are increasingly characterised by rapidly changing circumstances. It asked if the Court should attempt to make predictive assessments, and if parenting orders could be varied without the need for a court hearing.

23 submitters commented on whether the Court should attempt to make predictive assessments. Seven submitters supported this idea, focusing on the need for adaptability.

> Agreements and orders should include future changes to arrangements at a set date, or when a child reaches a certain age. – Counsellor

11 submitters did not support predictive assessments, as they believe it is outside the Court's skill set.

> Prediction in the social science area is a finely developed specialist area and the Family Court judge does not have these skills. – Non-governmental organisation

22 submitters commented on whether parenting orders could be varied without the need for a court hearing. Ideas to make it easier to vary orders included allowing:

- judges to vary orders on the papers (one submitter)
- Registrars or other Family Court staff to vary orders on the papers if there is consent (five submitters)
- variations to be registered in Court after mediation or counselling (six submitters).

> The Family Court Coordinator should have the legal authority to sign off orders where all parties have consented. – Non-governmental organisation

> In appropriate situations the judge could direct that a specified type of variation might be agreed by the parties in writing and registered in writing or, alternatively, might be approved by the Registrar. – Academics

Increasing the durability of interim orders

The consultation paper noted that the number of interim orders under the Care of Children Act is increasing. It asked if the number of interim orders per case should be restricted, and if interim orders should automatically become final after a certain period of time.

11 submitters commented on restricting the number of interim orders per case. Five submitters supported this idea, focusing on children's need for certainty and six did not support it, focusing on the need to protect families experiencing family violence.

> Parties should not have limited opportunities to apply for interim orders...Changes in the family's situation or in the behaviour of an abusive partner require swift alteration or the granting of interim orders. – Non-governmental organisation

20 submitters commented on interim orders automatically becoming final after a certain period of time. 11 supported this concept, while seven were against it. The District Court Judges suggested making all orders, other than those under the Domestic Violence Act, final after a specified time period.

> Having an interim order which enables parties to change is a tool currently well used to encourage that change and secure a better, safer future for the family. – Non-governmental organisation

Sanctions and penalties

The consultation paper noted that while court rules provide for sanctions against lawyers and parties, they are seldom used. It asked if there would be merit in introducing further sanctions or penalties, and how to ensure they are applied appropriately.

45 submitters commented on the use of sanctions and penalties, with 34 supporting increased use for either parties or lawyers.

> The [submitter] advocates increased use of the current sanctions available for the court to impose costs on parties where appropriate. Issues concerning lawyers' conduct can be referred to the New Zealand Law Society. – Auckland District Law Society

The District Court Judges did not support increased use of penalties on lawyers.

> It is important for the Bench and the Bar to work together to achieve desired outcomes and that relationship runs the risk of being undermined if the judiciary is seen to have a disciplinary role. Further, there is the concern that the time taken to consider this issue would impact adversely on available sitting time. – District Court Judges

Compliance with orders

27 submitters commented on whether breaches of orders should be subject to greater sanctions or penalties. Eight submitters did not support this, focusing on the need to

ensure existing sanctions are appropriately used, and on inequities that harsher penalties could bring.

> We are also concerned that the desire to institute more punitive measures in an effort to modify parents' behaviour will be felt more keenly by resident than non-resident parents. Since it would generally be considered highly undesirable (and impractical) for non-resident parents to be compelled to meet their care and contact obligations, punitive sanctions are more likely to be applied to resident parents who are not making their children available for contact, usually in an attempt to keep their children safe. – Academics

13 submitters supported the use of greater sanctions or penalties for breaches of orders, focusing on the tendency for orders to be ignored.

> Often Court orders are treated with indifference and consequently breaches are frequent. The Court must make greater use of the available sanctions. The [submitter] would encourage a review of the enforcement process for breaches of orders, bearing in mind that different types of orders (for example, parenting, violence, property) require different treatment. – Auckland District Law Society

Specific Issues in Certain Proceedings Types

Dealing with allegations of violence in parenting disputes

The Care of Children Act sets out a process to be followed when allegations of physical or sexual violence against children or the other party are made in an application for a parenting order. Day-to-day care or contact orders for the violent party will not be made unless the Court is satisfied the child will be safe. Interpretations of this rule vary. Some judges and lawyers think that unsupervised contact should be suspended immediately. Others think that contact should only be suspended after the Court has considered the allegations. The consultation paper asked if the process needed to be clarified or amended.

42 submitters commented on dealing with allegations of violence in parenting disputes. 24 submitters were in favour of amending the process. A number of submitters favoured repealing the relevant provisions and relying on section 5(e) of the Care of Children Act, which says that the child's safety must be protected.

> The provisions encourage the mechanistic application in truncated hearings of rules based on generalised assumptions. There is research evidence...that women are fearful of disclosing family violence...The process presents a number of dangers for women and their caregivers where there has been coercive controlling violence in the relationship. – Academics

Specialist reports

Under the Care of Children Act a judge can ask for a cultural, medical, psychiatric or psychological report to help them decide the case.

25 submitters commented on the timeliness of specialist reports. Most acknowledged that there were a variety of factors feeding into delays to obtain specialist reports, including the time taken to draft the brief and identify an available report writer and the need to fit observational visits into the schedules of both the family and the psychologist.

New developments after a report is completed but before it is finalised, and fixture dates being unavailable were also highlighted as problems contributing to delay.

Five submitters noted that a standardised brief would increase the timeliness of specialist reports, although some submitters felt that it could better be achieved through training the brief writers.

> The brief for the specialist report writer needs to focus on the real issues that are pertinent for each family, rather than many broad, general questions that overlap and are clearly not well thought out. It would be useful for Lawyers for Child and others who propose briefs to have some training in this area. – Psychologists

It has become standard practice to request a psychologist's report for cases likely to go to a defended hearing. 15 submitters commented on what criteria might be used to decide whether to request a specialist report. Four submitters supported specialist reports for cases where the family had complex needs. Two submitters supported obtaining specialist reports only for cases with family violence. One submitter felt that reports should only be obtained when the judge needed it to decide the case.

> The Law Society recommends a statutory amendment to ss 132 and 133 of COCA to ensure that the discretion to obtain a specialist report is exercised more consistently; and only when a report is necessary for the proper determination of the case. – New Zealand Law Society

29 submitters commented on whether a broader range of people should provide specialist information to the Court. 23 submitters were in favour of using other specialist reports. Suggestions ranged from counsellors and family therapists to school teachers and family doctors.

> We support a broader range of social service providers being able to provide information to the court...In some cases a family assessment would provide the court with a more holistic summary of issues and possible solutions. This work would require highly skilled practitioners. – Counsellors

Four submitters were against the idea, generally because it could cause a conflict of interest for these social service providers.

> Social service agencies and teachers can have a conflict as they may have important information about the children yet they have to continue a relationship with the family. One may find that social service agencies become more closed down if expected to provide evidence directly to the Court. – Psychologists

15 submitters specifically addressed whether cultural reports should be more widely used. 10 submitters were in favour of using cultural reports more, noting it would increase the chances of coming to a solution which takes into account the culture of the parties.

Five submitters expressed satisfaction with the current level of usage, or concerns about using cultural reports.

> We acknowledge that cultural reports can give the Court contextual information and enable the parents to feel that their perspective has been heard, understood and respected. Our concern is that the focus on the welfare and best interests of the child who is a member of a

> family is not diminished by a focus on the wellbeing of the family or by the application of generalisations about the importance of a child being cared for by kin. – Academics

26 submitters commented on whether a critique of a court-appointed psychologist's report should be allowed, or if parties should be limited to cross-examination of the report writer. 16 submitters supported critiques, often because they thought multiple viewpoints were helpful.

> Currently there is a robust protocol which the Family Court follows. We support this practice especially in respect of protection of the children from multiple or invested interviews. – Non-governmental organisation

Four submitters favoured cross-examination only, seeing multiple reports as an unnecessary delay or a tactical ploy by parties.

> It is now not uncommon for there to be a trial within a trial as each party tries to discredit the views of one of the specialist report writers. – Lawyer

Hague child abduction cases

New Zealand is party to the Hague Convention on the Civil Aspects of Child Abduction. Under the Convention cases should be disposed of within six weeks, but the average number of days to dispose of Hague applications in New Zealand is substantially higher than this. The consultation paper asked how we could improve processes so that Hague cases are dealt with adequately and promptly. 17 submitters commented on this question.

14 submitters believed the process for dealing with Hague cases could be improved. Three submitters supported restricting appeal rights to the High Court only. Currently further appeals are available to the Court of Appeal and Supreme Court if the Court grants leave. Other suggestions included greater use of mediation and better resourcing for the Family Court on these cases.

Review of plans in care and protection cases

When care and protection orders are made, the Court must call for a plan which is then reviewed after twelve months (six months if the child is under seven years old). Reviews of plans take up a considerable amount of Court time, contributing to cost and delay.

The consultation paper asked if some reviews of plans for children in State or organisational care could be done on the papers rather than by way of Court hearing. 24 submitters commented on this question. Six submitters did not support reviews being done on the papers. Their reasons centred on the right to be heard in such cases.

> It is important that the basic tenants of our legal system are maintained, and that there is the opportunity for families to argue against CYFS if they believe that they have been unfairly treated. It is important that there is transparency in decision making, while also essential that CYFS, or any agency, does not become a law unto itself. – Psychologists

The District Court Judges suggested a different approach to care and protection cases, with a dedicated arm within the Family Court.

> A better approach would be to establish within the Family Court a clear and defined care and protection arm with dedicated, properly trained staff and carefully designed processes. – District Court Judges

Eight submitters commented on whether reviews of plans should only be at the direction of the Court. Three submitters supported this idea while four were against it, largely due to the monitoring function of the review process.

> Reviews should be the norm in that they provide a monitoring service and a way to assess whether there need to be any changes. – Non-governmental organisation

Guardianship of children in care and protection cases

Currently permanent caregivers and natural parents share guardianship responsibilities for children placed permanently in foster care and must make important decisions jointly. Permanent carers may be made sole guardians only in limited circumstances. The consultation paper asked whether permanent caregivers should be given sole guardianship responsibility for some matters.

23 submitters commented on this issue. 12 submitters supported giving permanent caregivers sole guardianship responsibility for some matters.

> Consultation with parents can be an impossible task if there are personality or mental health issues. This could cover medicinal and education matters, with reports of outcomes being provided to parents especially if children are on minimal visiting (eg, 2-6 visits per annum). – Psychologists

Two submitters felt that this question was outside the scope of the review, and would require a principled review of the relevant legislation. Five submitters did not support giving permanent caregivers sole guardianship responsibility for some matters. Some submitters thought parents and caregivers sharing guardianship responsibilities safeguarded children. Some submitters did not believe that the role of caregivers should be extended.

> Parents will retain guardianship rights. Caregivers are just that and nothing more. – Court user

Cases involving family violence

If a protection order under the Domestic Violence Act is issued, the respondent must attend a stopping violence programme, with consequences for non-attendance. The consultation paper asked if it would be better to make the programmes voluntary, and move the resources elsewhere. The two options suggested for further resourcing were swift and effective enforcement of protection order breaches, and funding a greater range of social service programmes to prevent re-victimisation and break the cycle of violence.

40 submitters commented on removing the mandatory requirement to attend stopping violence programmes, and focusing these extra resources on enforcing protection order breaches. 22 submitters were not in favour of this, commenting on the importance of these programmes.

> Attending stopping violence programmes is vital. Both the victim and the perpetrator need to do courses about understanding domestic violence. It is irresponsible to stop these programmes when children are involved. – Non-governmental organisation

Five submitters supported removing the mandatory requirement to attend stopping violence programmes, questioning the effectiveness of the programmes.

> What research there is would appear to support the view that compulsory attendance at a programme (of any sort) can be ineffective if there is no willingness on the part of the attendee to engage voluntarily...It may therefore be more appropriate for the Court to direct a mandatory assessment of respondents to determine their individual needs...And that assessment need not be limited to respondents; it should include applicants and, where appropriate, children. – District Court Judges

30 submitters commented on focusing resources on funding a greater range of social service programmes to prevent re-victimisation and break the cycle of violence. 13 submitters supported this idea, focusing on the need to do more for victims of family violence.

> Much more needs to be done to support victims of violence rebuild their lives. Part of this includes accessing social services, but we also need to more widely continue to look at the way we treat victims of violence. – Non-governmental organisation

16 submitters felt that both stopping violence courses and programmes to prevent re-victimisation should be funded.

> [The consultation document] suggests a choice must be made between funding stopping violence programmes for respondents or focusing on victims and children. This is a dangerous approach and completely wrong. The Government should be funding programmes for respondents, victims and children. – Non-governmental organisation

Appendix 1: List of submitters

To protect the identity of private individuals, not all of the 209 submitters are listed below. Groups and organisations that made submissions are listed below, as are those individuals who made their submission in a professional capacity (eg, academics) or whose role gives them a reduced expectation of privacy (eg, judges).

- Abuse and Rape Crisis Support Manawatu Inc
- Abuse Prevention Services
- Adoption Action Inc
- Age Concern New Zealand
- Aotearoa New Zealand Association of Social Workers
- Arbitrators' and Mediators' Institute of New Zealand and LEADR NZ Inc
- Atkin, Bill
- Auckland Coalition for the Safety of Women and Children
- Auckland District Health Board
- Auckland District Law Society Inc
- Barnados
- Bay Counselling Therapy Service Ltd
- Brainwave Trust Aotearoa
- Buller Family Violence Network
- Caldwell, John
- Right Honourable the Chief Justice
- Child and Adolescent Therapists' Association, Nelson
- Child and Family Psychology Centre
- Child Poverty Action Group
- Children's Commissioner
- Collaborative Law Association of New Zealand Inc
- Dispute Resolution Service Ltd
- District Court Judges
- Dunedin Community Law Centre
- Families Apart Require Equity
- Families Commission
- Family Violence Death Review Committee
- Friendship House
- Hauraki Family Violence Intervention Network
- Hauraki Women's Refuge and Whanau Support Services
- Home and Family Counselling
- Homebuilders Family Services Inc
- Homebuilders West Coast Trust
- Hunter, Burke and Susan Hawthorne
- Hutt Valley Community Law Centre
- Human Rights Commission
- IHC New Zealand Inc
- Jigsaw Family Services
- Hon Justice J M Priestley (in his individual capacity)
- Kiwilaw Advocates Ltd – Hamilton
- Marlborough Violence Intervention Project
- Mediation Services Christchurch

- National Collective of Independent Women's Refuges Inc
- National Council of Women
- New Zealand Association of Child and Adolescent Psychotherapists Inc
- New Zealand Association of Counsellors
- New Zealand Association of Counsellors, Wellington/Wairarapa Branch
- New Zealand Association of Psychotherapists
- New Zealand Centre for Political Research
- New Zealand Christian Counsellors Association
- New Zealand College of Clinical Psychologists
- New Zealand Federation of Business and Professional Women Inc
- New Zealand Law Society
- New Zealand Psychological Society
- North Harbour Living Without Violence Inc
- North Shore Community and Social Services Inc
- Paediatric Society of New Zealand and Royal Australasian College of Physicians
- Presbyterian Support New Zealand
- Principal Youth Court Judge
- Pryor, Jan and Elizabeth Major
- Relationships Aotearoa
- Sensible Sentencing Trust
- SHINE – Safer Homes in New Zealand Everyday
- South Auckland Family Violence Prevention Network
- Stopping Violence Services Nelson
- Stopping Violence Southland
- Supergrans Charitable Trust
- Tapp, Pauline, Mark Henaghan, Nicola Taylor and Bill Atkin
- Tairawhiti Community
- Taylor Grant Tesiram
- Te Kupenga Whakaoti Mahi Patunga: National Network of Stopping Violence
- Te Rito Rodney
- Waikato Family Court Specialist Report Writers' Group
- Waitākere Anti-Violence Essential Services Trust
- Waitākere Community Law Service
- Wellington cluster Family Courts staff
- Wellington Community Law Centre
- Wellington Regional Child Psychotherapy Group
- Wellington Women's Refuge
- Whitireia Community Law Centre
- Women and the Law, Equal Justice Project (University of Auckland)
- YouthLaw Tino Rangatiratanga Taitamariki Inc