MINISTRY OF JUSTICE
Tāhū o te Ture

9 October 2012

***Family Court review: regulatory impact statement* (July 2012)**

This regulatory impact statement should be read in conjunction with the accompanying Cabinet papers:

- Cabinet paper: *Family Court review: proposals for reform* (July 2012)
- Cabinet paper: *Family Court and legal aid reform: overview* (July 2012)
- Cabinet paper: *Changes to the Legal Assistance (Sustainability) Amendment Bill* (July 2012)

Certain sections of this regulatory impact statement that were previously withheld under the Official Information Act 1982 have now been released. These sections focus on the impact that options for reforming the Family Court will have on legal aid.

FAMILY COURT REVIEW: REGULATORY IMPACT STATEMENT

Agency Disclosure Statement

The Ministry of Justice prepared this Regulatory Impact Statement. It analyses policy options that aim to create a modern, accessible family justice system that is responsive to children and vulnerable people. The focus is on cases under the Care of Children Act 2004 as that is where there is greatest potential to improve responsiveness to children while also addressing cost pressures.

The key gaps, assumptions, dependencies and significant constraints, caveats or uncertainties in the policy analysis include the following.

Significant constraints

Given the overall fiscal situation, urgent steps must be taken to lower the cost of the current justice system while, at the same time, delivering more effective and efficient court services. This means the options we have considered must be able to be implemented quickly.

Gaps and/or uncertainties in policy analysis

Although some research on New Zealand families and their involvement in the family justice system is available, it is limited. As a consequence some of the proposals are based on evidence from Australia and the United Kingdom.

There is insufficient historical fiscal and statistical data to accurately predict the average costs of performing some tasks associated with Family Court processes. There was insufficient time for piloting proposed processes or for undertaking an historical file review (ie, looking at court documents) to obtain further data than what is recorded in the electronic case management system.

There has been extensive consultation on identifying the issues facing the Family Court and the options for reform. Consultation included meeting with stakeholders, a public consultation paper and an online questionnaire for court users. However, because of the timeframe, there has been limited opportunity to discuss the final proposals with stakeholders. There will be an opportunity for consultation at the select committee stage of the future legislation.

Assumptions

Assumptions were developed based on experience with cases in the Family Court now. The assumptions we have made to estimate the financial impact of proposals include assumptions about:

- the type of cases that would be eligible for Family Dispute Resolution
- the number of cases that would resolve at Family Dispute Resolution
- the number of cases that would proceed to the Family Court and down each proposed case track (simple, standard, without notice)
- how often the Family Court would extend lawyer for child appointments beyond the maximum hours
- the percentage of user charges that would be collected for professional services

- the percentage of cases in which the Court would appoint lawyer for child in each proposed case track
- the number of court events required to resolve a case if parties represent themselves in parts of proceedings
- the time required to support self-representing parties.

Where possible, assumptions have been drawn from historical Family Court data. Some assumptions about human behaviour – the choices people, including lawyers and parties, make about family disputes – are unable to be drawn from existing data.

Government Statement on Regulation

The *Government Statement on Regulation* requires there to be a particularly strong case made for any regulatory proposals that are likely to override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee guidelines).

An option considered is to disallow parties with disputes suitable for out of court resolution proceeding to Court. This option is not recommended and is likely to be inconsistent with the fundamental common law principle that the citizen is entitled to have access to the courts.

Otherwise, the policy options align with the commitments in the *Government Statement on Regulation*.

Sarah Turner
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Date:

Executive Summary

1. The reforms aim to create a modern, accessible family justice system that is responsive to children and vulnerable people.

2. There has been considerable change in New Zealand society and family structures since the Family Court was created in 1981. The Family Court's jurisdiction has expanded, as have the number of professionals who work within it. The Court has become the centre of the family justice system. The Court:

    - is too often used for matters that would be better resolved out of court
    - has complex processes and procedures, which contribute to delays and expense for parties
    - has had a huge growth in costs while the overall number of applications has remained relatively stable.

3. We have identified eight levers to address the issues facing the Court, focusing particularly on reform in care of children cases:

    - providing an out of court dispute resolution system
    - modifying the role of, and principles guiding, the Family Court
    - modifying the role of lawyers for parties
    - targeting the use of professional services to those who need them most
    - introducing fees and user contributions
    - improving court processes
    - improving information resources
    - improving the response to domestic violence.

4. Each lever contains options that have potential to improve responsiveness to children and vulnerable people, encourage individual responsibility for resolving parenting disputes and make the family justice system more accessible, efficient and effective.

Status quo

5. The Family Court was established as a division of the District Courts in 1981. The Family Court has specialist Judges and refers parties to support services, including social workers, child psychologists, counsellors, and mediators. The Court has a therapeutic function as well as a court's traditional adjudicative function and many cases that come to the Court do not proceed to a final hearing.

6. The Family Court's jurisdiction has increased from eight to 23 Acts covering diverse family issues, such as mental health and the protection of personal and property rights. Currently there are 59 Family Courts in New Zealand.

7. The proposals for reform focus largely on the resolution of parenting disputes under the Care of Children Act 2004. These disputes make up the largest single category of applications filed in the Court (approximately 39 percent), and are the main driver of increasing costs.

Problem definition

8. The family justice system, including the Family Court, is facing the following issues.

Insufficient focus on children and vulnerable people

9. Some court processes work against the interests of children and vulnerable people by providing too many opportunities to unnecessarily delay and protract litigation, which often exacerbates parental conflict. In some complex care of children cases there have been more than 30 adjournments.[1]

10. Research shows that prolonged exposure to frequent, intense, and poorly resolved parental conflict is associated with a range of psychological risks for children.[2] Poor outcomes for children can include anxiety, depression, aggression, hostility, and low social competence.[3]

11. Some of the most vulnerable people in the Family Court are victims of domestic violence. The Court's response to domestic violence could better focus on the needs of the particular families in which domestic violence occurs:

    - Effective domestic violence services have great potential to reduce the level of family violence in the longer term, and assist victims to keep themselves safe. But programmes in the Family Court take a "one size fits all" approach and may not be as effective as they could be. Attendance rates for programmes for protected people are very low.
    - Some applications for protection orders for economic abuse may be declined as economic abuse is not explicitly included in the definition of domestic violence.

Lack of support for people to resolve their parenting dispute out of court

12. Most people already resolve post-separation arrangements themselves. There are no New Zealand statistics but a comparison can be made with the United Kingdom, where research shows that only 10 percent of family disputes go to Court.[4] We expect there to be a similar trend in New Zealand. Of those that come to Court in New Zealand only approximately 12 percent go to a defended hearing. This suggests that many of the cases that come to Court could be resolved out of court with appropriate support. Currently there is little formal encouragement from the justice sector for Family Court parties to resolve their own disputes independent of the Court. People need to approach the Court to access state-funded counselling.

13. International experience and research highlights that the adversarial court system can be harmful for families. Family law reforms in Australia (2006), United

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[1] In a case file sample of 173 complex care of children cases, 10 cases had more than 30 adjournments. The average number of adjournments across all 173 cases was 14.

[2] Hunt J. and Trinder L. (2011) *Chronic litigation cases: Characteristics, numbers, interventions.* A report for the Family Justice Council; Tolmie J. Elizabeth V. and Gavey N. (2010) Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand. *New Zealand Universities Law Review* 24 136; Cummings E. and Davies P. (1994) *Children and marital conflict: The impact of family dispute and resolution.* New York and London: The Guilford Press; McIntosh (2003) Enduring conflict in parental separation: Pathways of impact on child development. *Journal of Family Studies* 9(1): 63-80.

[3] Hunt J. and Trinder L. (2011) *Chronic litigation cases: Characteristics, numbers, interventions.* A report for the Family Justice Council.

[4] Family Justice Review Interim Report (March 2011) 142.

Kingdom (2011 – only proposed at this stage), and British Columbia (2011) focused on a shift to early out of court resolution for family disputes. Evidence suggests that families achieve better and more durable outcomes when they resolve their disputes themselves, as early as possible; and by focusing on the needs of their children.

Complex and confusing court processes

14. The multiple pathways that a case may follow compromise the Court's efficiency and cost effectiveness and contributes to delay. Even though the Family Court tries to keep its processes straightforward, many parties perceive court processes as needlessly complicated, drawn out, and costly. For example, each application type follows its own procedures and there are no standard steps cases must follow.

High use of professionals in the Family Court

15. Professionals involved in the delivery of the Family Court's services include lawyers for parties, counsellors, mediators, lawyers for child, lawyers to assist the Court, and specialist report writers. The high use of professional services does not always produce the best outcomes for children and raises the following issues.

    - The role of each professional is not always clear. For example, there is duplication between the roles of lawyer for child, counsel to assist and parties' lawyers.
    - Professionals are used more than they need to be. For example, lawyers for child must be appointed unless it would serve no useful purpose. In practice, they are almost always appointed.
    - Meeting professionals' requirements is causing delay. For example, specialist reports take anywhere from a few weeks to six months to prepare and reports often need to be updated by the time a matter is set down for hearing.
    - Children are required to tell their story to multiple professionals.

Increasing expenditure on Family Court services and legal aid

16. Since 2005/06, direct operating costs in the Court have increased by 26 percent and professional services by 46 percent.[5] Yet application numbers (across all case types) are effectively static overall.

17. The most significant contributor to the increasing expenditure is proceedings under the Care of Children Act 2004. The number of new Care of Children Act applications increased 26 percent over the last five years from 20,845 in 2005/06 to 26,281 in 2010/11. A critical feature of Care of Children Act proceedings is the high professional service cost associated with them. Costs of lawyer for child appointments for care of children cases increased from $16.4 million in 2005/06 to $25.3 million in 2010/11.

18. As outlined in the Regulatory Impact Statement to the Legal Assistance (Sustainability) Amendment Bill, the current growth in legal aid expenditure is not sustainable. Expenditure on family legal aid increased by 93 percent between

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

2006/07 and 2010/11. Although a number of measures have been, or are about to be, undertaken to address this increase in expenditure, further measures are required.

Objectives

19. The objectives of the Review are to create a modern, accessible family justice system that:

    - is responsive to children and vulnerable people
    - encourages individual responsibility, where appropriate
    - is efficient and effective.

20. In a modern family justice system people should be able to readily access the information they need, understand the services they can expect, and be able to navigate the system easily. It should also reflect the reality of current family structures in New Zealand.

Levers for reform

21. We have identified the following eight levers for reform to achieve those objectives.

    - **An out of court dispute resolution system** – to support parties to reach agreement without going to Court and improve responsiveness for children.
    - **Resetting the role of, and principles guiding, the Family Court** – to focus on the needs of children and vulnerable people.
    - **Reconsidering the role of lawyers in proceedings** – to manage increasing expenditure on legal aid and reduce the cost of proceedings for parties.
    - **Targeting the use of professional services** – so that lawyer for child, counsel to assist and specialist reports are only used when they are needed.
    - *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]* **user contributions** – to encourage parties to take responsibility for resolving their parenting disputes.
    - **Improving court processes** – to reduce complexity, delay and expense, demystify the court process and focus on children and vulnerable people.
    - **Information resources** – to support people to focus on the needs of their children and reach agreement without going to court.
    - **Addressing domestic violence** – to improve responsiveness to vulnerable people.

22. The following table considers each of these levers, including:

    - the status quo and problem definition
    - the range of options that have been considered during policy development for each lever
    - the impact and financial implications of each option, and
    - any risks.

23. There is a wide variety of options that could be considered under each lever. We have focused on key options that could contribute to the objectives for reform.

Lever 1. Providing an out of court dispute resolution system				
Status quo Most people manage to resolve parenting disputes themselves, but for those that do not there is limited state support independent of the Family Court. Only approximately 12 percent of cases that come to Court go to a defended hearing, suggesting many of these cases could be resolved more quickly and cheaply out of court with appropriate support.				
Options	**Description**	**Impacts**	**Financial implications**	**Risks**
Mandatory Family Dispute Resolution prior to Court **(recommended)**	Mandatory out of court family dispute resolution (FDR): • entry to Court only if have a report from an FDR provider • FDR providers must meet certain minimum standards. FDR would be subsidised for those who meet the income threshold (FDR providers will determine the rate for people who do not meet the income threshold for a subsidy). Establishing FDR requires the development of more information resources.	About 1200 cases will be kept out of the Court from a pool of about 6300 cases that would be required to attempt FDR. This estimate is based on the existing success rates of counselling and mediation provided through the Court, which is considered a proxy for the likely success rate of FDR. Strongly encourages parties to take responsibility for their disputes. Resolving appropriate disputes out of court reduces conflict and is better for children. Fewer applications would be made to Court, saving professional services costs and legal aid. FDR is an additional cost for people above the income threshold but it is consistent with the objective of encouraging individual responsibility. In most cases FDR is less costly for parties than going to Court.	The ongoing cost of administering FDR would be approximately $0.5 million per year. The ongoing subsidy cost would be $4.4 million per year. There would be some savings in professional services costs, such as lawyer for child, due to the reduction in volumes. This has been factored into estimated costs and savings below, where indicated.	FDR practitioners may attempt to resolve matters that should be referred to Court (eg. cases involving violence). Training will mitigate this risk. There may be too few FDR providers nationally or a lower than anticipated success rate. The Ministry will work with relevant professional groups to ensure supply and quality of service. Some people above the income threshold may still find it difficult to pay for FDR and therefore access the Court.
Mandatory FDR instead of Court	Parties suitable for FDR cannot proceed to Court even if FDR is unsuccessful.	Significantly fewer applications would be made to Court, saving professional services costs and legal aid. Parties could be forced to agree to, or put up with, unsafe arrangements. People would want to claim an exemption from FDR. Raises rule of law, New Zealand Bill of Rights Act 1990 compatibility and access to justice concerns.	Set up costs of the system would be the same as above. There would be a greater saving in professional services costs within the Court.	Outcomes for children and vulnerable people could be worse. FDR may be undermined by too many people requesting an exemption. If FDR is unsuccessful a person may try to enter the court system by applying for other orders, such as to remove the other parent as a guardian.

Lever 2. Modifying the role of, and principles guiding, the Family Court
Status quo The Family Proceedings Act 1980 requires the Court to promote reconciliation (ie, restoring parties' intimate relationship) or, if that is not possible, conciliation (ie, reaching an amicable agreement). The Court fulfils this obligation by providing court-funded counselling. Counselling costs the State approximately $9.7 million per year. Promoting reconciliation and conciliation may not be the best use of the Court's limited resources. The primary expertise of judges is adjudicating disputes. A reconciliation and conciliation function can contribute to delay and may be better dealt with in the community. The welfare and best interests of the child is the paramount consideration in care of children matters. In deciding what is in the child's welfare and best interests the Court must take into account the principles listed in section 5 of the Care of Children Act. The number of principles can make assessing the welfare and best interests a lengthy and complicated task and it can be difficult for parties to predict the outcome.

Options	Description	Impacts	Financial implications	Risks
Court focuses on adjudicative function **(recommended)**	Repeal the existing obligations and replace with a focus on the court carrying out its primary function in a way that produces the best outcomes for children and vulnerable people. No court-funded counselling.	New principles can support reforms and the likelihood of success. There may be a financial impact on counsellors as fewer people may attend counselling if they have to pay for it themselves. This option combines well with the option for mandatory FDR. It avoids duplication between the out of court resolution system and the Court's adjudication function. Mandatory FDR would also mitigate the impact on counsellors as some counsellors would be able to become FDR providers.	Savings of $9.7 million based on 2010/11 expenditure for all court-funded counselling.	It is important for any obligations and principles to be consistent with the other reforms to avoid any confusion. If not combined with FDR, there would be less support for parties to resolve disputes themselves.
Court focuses on adjudication and conciliation	Shift Court's focus to conciliation. Retain court-funded counselling for resolving parenting and guardianship disputes. No counselling for relationship issues. A maximum of four hours could be fully funded at the existing rate (ie, $110 GST exclusive per hour).	This option would reduce the cost of counselling services. Counselling may divert a small number of applications from the Court. If combined with mandatory FDR, there would be some duplication and, potentially, unnecessary delay.	Based on 2010/11 expenditure, there would be a net saving of about $8.2 million because of reduced expenditure on existing counselling services.	

Options	Description	Impacts	Financial implications	Risks
Interim option: Limiting funded counselling hours in 2012/13 (recommended)	Limit number of court-funded counselling sessions (currently six) to: • one session of pre-court relationship counselling • three sessions after bringing court proceedings and for pre-court Care of Children Act counselling.	Focuses resources on resolving parenting disputes rather than relationship issues in the short term. Signals the shift to focus resources on resolving parenting disputes.	Saving of up to $3.8 million based on 2010/11 expenditure over two years.	Until the family dispute resolution regime is operating there will be limited state-funded dispute resolution services available without filing an application. There is a risk applications may increase.
Clarify welfare and best interests principles (recommended)	Minor changes to make the welfare and best interests test clearer (sections 4 and 5 Care of Children Act) by: • requiring the Court to take into account parental conduct that is likely to exacerbate conflict or delay to the extent it is relevant to a child's welfare and best interests • reordering the section 5 principles so that protecting a child from harm comes first • simplifying the remaining section 5 principles to reduce repetition and inconsistencies.	Will make the principles clearer and easier to understand and for judges to interpret. Assists in efficient and effective decision making.	Nil.	Even minor changes to existing wording can have unintended consequences in the way the principles are interpreted. Amendments to legislation will be scrutinised through the Select Committee process.
Presumption about what is in a child's welfare and best interests	Introduce a presumption about what is best for children. Only depart from that if it is shown that it would not be in the particular child's welfare and best interests. Possible presumptions are: • equal time with both parents (equal shared care) • using pre-separation arrangements as the starting point.	A presumption could encourage parents to agree to arrangements themselves because they have a clearer idea of what decision the Court would make. But there is no consensus about what is generally in a child's welfare and best interests. A presumption could put pressure on some parents to agree to those arrangements, even if it is not in the interests of their children, as other parents may reject any other options and obtaining a court order is costly.	Nil.	Risk of parents agreeing to arrangements that accord with the presumption, even if it is not in their child's welfare and best interests. Recent experience in Australia highlights risks with equal shared care arrangements (eg, children in shared care arrangements generally report more inter-parental conflict and are less happy with their arrangements).

Lever 3. Modifying the role of lawyers for parties
Status quo Family disputes can be driven by personal rather than legal issues and an adversarial or legalistic approach is not always the best response. Parties to proceedings in the Family Court either represent themselves or have a lawyer represent them. Parties to care of children cases, and people contemplating proceedings, are eligible for legal aid for the whole proceeding if they meet certain criteria, including an income threshold. Expenditure on family legal aid increased by 93 percent between 2006/07 and 2010/11. Legal aid in care of children cases is projected to cost $25 million once the Legal Assistance (Sustainability) Amendment Bill has been passed. The fiscal constraints faced by government mean that there is not currently sufficient legal aid funding available for these matters. Private legal services are also not necessarily affordable (even for those on moderate incomes who are not eligible for legal aid).

Options	Description	Impacts	Financial implications	Risks
Legal aid is not available for some parts of proceedings	Legal aid would not be available for simple track proceedings and up to and including settlement hearings in standard track proceedings. This would only apply to care of children cases. Lawyers could be engaged and privately funded. Legal aid would still be available for without notice proceedings and for standard track proceedings once they were set down for hearing.	This option only affects those parties who, because of their low income, are eligible for legal aid. If they cannot get legal aid, they are likely to be unrepresented. But the opposing party may have a lawyer. This could lead to the represented party's view being put more strongly and create or exacerbate power imbalances between the parties. It may also lead to a perception that access to the court is the preserve of those who can afford it. Manages legal aid expenditure. Some people may have difficulty completing the forms, proceedings may take longer and a judge may feel he or she needs to see the parties in court more often. There is likely to be greater demand for court staff and non-governmental organisations to assist people. Better information resources, clearer court processes and use of support persons (McKenzie friends) would help mitigate these disadvantages. For lawyers, legal aid work would reduce but other work would not.	Reduces the cost of legal aid in care of children cases by $41.3 million over 3 years. This figure assumes proceeding with the mandatory FDR option (fewer cases coming to Court).	More standard track cases could go to a formal hearing if legally aided parties felt they wanted legal representation or judges sent matters directly to a formal hearing. If that occurred, legal aid expenditure may not reduce as much. Without notice applications are likely to increase. This risk would be mitigated by requiring lawyers to certify that a without notice application is appropriate. Legal aid would be withdrawn if the without notice application were dismissed. With no legal assistance for applying, some cases may not be considered by the Court that should be. Existing arrangements may persist even if not in the child's best interests. Some lawyers may not continue as legal aid providers, reducing the pool and quality of those available for other legal aid work.

Options	Description	Impacts	Financial implications	Risks
Parties represent themselves in some parts of proceedings **(recommended)**	Parties would represent themselves in simple track proceedings and up to and including settlement hearings in standard track proceedings. This would only apply to care of children cases. Lawyers can represent parties at formal hearings and in without notice applications. Legal aid would not be available for processes in which parties represent themselves. For example, a person would not get legal aid for preparing an application or response (except in without notice track proceedings) or for legal advice before commencing proceedings. Legal aid would be available once lawyers could be involved in the proceedings.	Affects all Court users rather than only legally aided people, resulting in more even representation. Reduces costs for parties and focuses legal aid resources where they are most needed. Offers parties an opportunity to resolve matters with the assistance of a judge in a less adversarial setting. Takes a less adversarial and legalistic approach to minor matters and in the early stages of standard track matters. Judges are likely to spend more time on proceedings in which parties are not represented, including managing any power imbalances between the parties. There would be a negative financial impact on lawyers. Other impacts (eg, difficulty completing forms) are the same as above.	As for the above option, reduces the cost of legal aid in care of children cases by $41.3 million over 3 years.	The risks are similar to those for the above option.
Allow legal representation for some parties	This option is a variation on the above option for parties to represent themselves in some parts of proceedings. Parties would generally represent themselves in simple track proceedings and up to and including settlement hearings in standard track proceedings for care of children cases. But the Court would be able to allow legal representation (and legal aid would be available) in some circumstances, such as for: • minors (eg, young parents) • an incapacitated person.	In addition to the above, there would be an additional protection for these particularly vulnerable people. The Court may already appoint a litigation guardian to conduct the proceedings on behalf of a minor or incapacitated person. But litigation guardians are not lawyers and it may be more difficult to find a suitable litigation guardian if they will not receive any legal assistance.	Allowing legal representation in some circumstances would increase the cost of legal aid for care of children cases.	There would be a risk of any exception being broadly interpreted to allow representation where a judge thinks it would assist. To mitigate this risk, the provision would need to be carefully worded.

Lever 4. Targeting the use of professional services
Status quo Currently there are a number of professionals who provide the Court with advice and services: • Lawyer for child: The Court must appoint a lawyer to act for a child who is the subject of any proceedings unless the Court is satisfied it would serve no useful purpose. Compared to practices in other countries, New Zealand has extensive, state funded legal representation of children in family disputes. There is confusion about lawyer for child's role, particularly when lawyer for child's view of a child's best interests differs to the child's own view. Costs of lawyer for child appointments for care of children cases increased from $16.4 million in 2005/06 to $25.3 million in 2010/11. • Lawyer to assist: The Court now appoints lawyers to assist as mediators. In 2010/11 there were 2,777 lawyer to assist appointments for mediation (costing $1.9 million). Other appointments (eg, if the Court is dealing with a new or difficult area of law) have increased from 857 in 2005/06 to 915 in 2010/11 (costing approximately $1.4 million). • Specialist report writers: Judges may request a cultural, medical, psychiatric, or psychological report. In 2010/11, 1285 reports were obtained at a cost of approximately $5.2 million. Reports are sometimes obtained when they are not needed and waiting for completed reports can cause delay.

Options	Description	Impacts	Financial implications	Risks
Targeted use of lawyer for child **(recommended)**	Change the way the Court appoints lawyer for child by: • making it clear that lawyer for child represents a child's views *and* advocates the child's best interests • only appointing lawyer for child where necessary because of serious issues such as violence • introducing an hourly rate and maximum number of hours in care of children cases, subject to a discretion to extend in complex cases.	Avoids appointing both lawyer for child (for views) and lawyer to assist the court (for best interests). Fewer children will have lawyer for child, but those who most need legal representation will have it. Encourages lawyer for child to prioritise their core tasks over tasks that could be done by parties or their lawyers (eg. obtaining information from the child's school). There will be a financial impact on lawyers that practise as lawyer for child in that there will be fewer appointments and they will be paid, on average, less per appointment.	Estimated to reduce lawyer for child costs to approximately $13.1 million per year, a saving of $12.4 million per year based on 2010/11 expenditure. Assumptions have been made about: • proceeding with mandatory FDR • how often the Court will extend appointments beyond the maximum hours • how many lawyer for child appointments there would be in each case track.	Lawyer for child is a judicially-ordered service and costs are difficult to accurately forecast. Lawyer for child may have insufficient time to gather information and assess what is in the child's welfare and best interests. Some lawyers may not continue to provide lawyer for child services, reducing the pool and quality of those available for the remaining work.

Options	Description	Impacts	Financial implications	Risks
Introduce child consultants, reduce the use of lawyer for child	Introduce a child consultant (such as a social worker or counsellor) to report to the Court on the child's views. Only use lawyer for child at formal hearings and in without notice track cases, unless there are serious factors.	Child consultants have better skills for talking to children. But if a case carries on to a defended hearing where a lawyer is needed, children will be exposed to another professional. There would be a financial impact on lawyers that practise as lawyer for child in that there would be fewer appointments.	Preliminary estimates indicated this option would save approximately $12.5 million per year based on 2010/11 expenditure. A child consultant would be paid less than lawyer for child ($80 rather than $150).	Having a child consultant and lawyer for child introduces two people to the child and may cause anxiety for the child. Having both professionals may also lead to confusion and duplication (eg, both professionals would meet with the child but at different times – a child's circumstances and view may have changed).
No lawyer for child - rely solely on child consultants	Replace the role of lawyer for child with child consultants. Children would not have legal representation, even for defended hearings involving serious issues. Child consultants would only report on their views.	Child consultants have better skills for talking to children. There would be a financial impact on lawyers that practise as lawyer for child. That aspect of their practice would cease. The Court may not be in as good a position to decide what is in a child's welfare and best interests as no one would be independently advocating for the child's best interests.	Preliminary estimates indicated this option would save approximately $18.1 million per year based on 2010/11 expenditure.	Judges may be more likely to seek psychologists' reports for assistance, exposing children to another professional, and reducing the anticipated savings. Responsiveness to children may not be as good.
Defining the role of lawyer to assist **(recommended)**	Make it clear what functions lawyer to assist may carry out and that acting as a mediator is not included. Set a maximum hourly rate.	Supports appropriate and sustainable use of lawyer to assist.	Estimated to save approximately $1.9 million per year based on 2010/11 expenditure.	The volume of work and the revised hourly rate may be insufficient for some lawyers to continue seeking such appointments.
Improve the use of specialist reports **(recommended)**	A package of proposals: • Court can only ask for a specialist report when it is necessary and it must consider the impact of possible delay on the child • a standard brief • greater flexibility as to what specialists can do • setting fees and expenses • not allowing parties to obtain a critique of the report from another specialist.	Limits children's exposure to further professionals. Reduces delay. A small financial impact on psychologists due to fewer reports being obtained.	Estimated to save approximately $0.6 million per year, from 2010/11 expenditure of $5.2 million.	

Lever 5. *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]*
Status quo *[Information withheld under section 9(2)(f)(iv) of the OIA 1982]* The Legal Assistance (Sustainability) Amendment Bill requires parties to contribute one third of the cost of the lawyer for child services, unless certain exceptions apply.

Options	Description	Impacts	Financial implications	Risks
[Information withheld under section 9(2)(f)(iv) of the OIA 1982]				
Introduce default requirement to contribute to professional services costs **(recommended)**	Require parties to each pay one third of the cost of all professional services in care of children cases, including lawyer to assist and specialist reports. Parties should not pay if a lawyer is appointed to assist the court, rather than the parties.	Deters prolonged litigation and incentivises people to resolve disputes out of court. Contributes to objective of an accessible family justice system that encourages individual responsibility, where appropriate.	Estimated revenue of $3.2 million over four years.	There is some risk that the more professional services that are subject to a default contribution requirement, the more likely judges will overrule the default requirement out of concern about the growing cost burden on parties.

Lever 6. Improving court processes
Status quo Each family law Act has its own procedures that may be included in the Act itself or in rules or regulations. This results in multiple pathways for cases to proceed through the Court. The current court processes are complex, confusing and expensive for users, and reduce the capacity of the court to improve its efficiency. A formal court hearing may be a disproportionate response to some family disputes.

Options	Description	Impacts	Financial implications	Risks
Improving the quality of initial processes and evidence **(recommended)**	Plain English forms and guidance and a questionnaire affidavit. Obligations about the evidence and memoranda parties should file. In relationship property proceedings, parties must disclose financial information earlier. Clarifying that the Court can obtain criminal records and Child Youth and Family and police checks where necessary to assist the case. For without notice applications: • lawyers must certify applications are appropriate in the circumstances • parties must certify they have disclosed all relevant evidence • follow hearsay evidence with direct evidence where possible.	Helps identify the issues early and ensure the Court has the information it needs. Reduces the amount of inflammatory material in affidavits. Assists self-represented parties. Lifts the quality of without notice applications. Reminds people of the seriousness of those applications and the obligations that go with them.	Implementation costs for recommended court process changes are $1.5 million over four years. These changes, as a whole, should reduce costs to parties and the Court.	
Streamlining court processes **(recommended)**	New purpose provision in the Family Courts Rules to support reform. Judges decide whether an exemption from FDR applies. Introducing three case tracks (simple, standard, without notice). Less rigid process for dealing with allegations of sexual and physical violence in care of children cases.	Case tracks offer a proportionate response to resolving disputes. Without notice matters will continue to be dealt with promptly. Addresses concern that current process for dealing with allegations of violence can negatively affect a child's relationship with one parent and cause unnecessary delay, while still protecting children from harm.	As above.	Some cases may be more complicated than they first appear. But the Court is able to manage this risk as it does currently. If limited information is available, outcomes may be less durable.

Options	Description	Impacts	Financial implications	Risks
Improving case management **(recommended)**	Enhanced judicial powers to direct and control proceedings (eg deal with as much as possible in a single event, require parties to justify seeking an adjournment). Financial penalties for parties and lawyers, who do not comply with procedural obligations. Doing more "on the papers", or by phone or audiovisual link. Court required to consider whether to make a costs order.	Empowers judges to control cases more effectively. Brings the Family Court into line with practices already used in District Court and High Court. Better compliance with Court's rules and directions.	As above.	Judges may still be reluctant to impose penalties and cost orders in case it negatively affects the child.
Making court orders work **(recommended)**	Orders • allow a period to trial arrangements • all orders to be final orders • limit use of orders that predict changes • state how to deal with variations • streamlined process to vary orders. Breach provisions • apply to guardianship orders as well • general discretion to issue a warrant when necessary in the circumstances • contempt provisions in legislation Repeat applications • only where there has been a material change in the child's circumstances • may be dismissed • leave required in some circumstances.	Easier, more proportionate processes for parents who wish to vary arrangements by consent. More certainty and clarity for parties. Reduces repeat applications.	As above.	
An alternative forum	An alternative forum, similar to the Disputes Tribunal, could be set up for low level family disputes.	Shifts applications from the Family Court to the alternative forum. For parties, applications would be determined quickly and the cost would be lower. It would fragment jurisdiction in family matters and does not support the objective to encourage individual responsibility, where appropriate.	As an indication, in 2010/11 the total cost of running the Disputes Tribunal was $10.5 million with 18,816 cases disposed. The cost for family disputes is likely to be higher.	There would be a risk of "net-widening". Parties may bring disputes to an alternative forum that they would not bring to the Family Court. This could be a particular risk for low level relationship property cases, if the alternative forum accepted them.

Lever 7. Information resources
Status quo
Free information to the public about the Family Court's services and processes via pamphlets, booklets, posters, information packs, DVDs and website.
Free voluntary access to Parenting Through Separation (PTS) for parents.

Options	Description	Impacts	Financial implications	Risks
Improving information provision **(recommended)**	New website and helpline. Improved resources on: • the impact of parental separation on children • how to self resolve a dispute • court processes. Sample parenting plans and agreements. Improved information for children and information for different ethnic groups.	Better equips parties for dealing with their dispute. Reform processes in Australia, Canada and the United Kingdom[6] all proposed more family law information. Better information on court processes is essential if there are no lawyers in the initial stages, except for urgent disputes. Providing and improving relevant information has a positive impact on all policy options.	Propose spending $1.5 million on information resources, including improving delivery of PTS.	If insufficient or poor information is provided, it could reduce the likelihood of parents being able to resolve their disputes without further assistance.
Improving PTS delivery **(recommended)**	Increasing delivery and uptake by: • allowing those in parenting roles, other than parents, to attend the programme, such as grandparents • developing an online version of PTS and investigating options for hard-to-reach communities.	A 2009 evaluation of PTS concluded that it positively contributed to the process of parents separating in a way that did not harm children.	Cost is included in the cost of improving information provision above.	
Mandatory PTS	Requiring parties to attend PTS before they undertake Court proceedings for parenting orders. Some exemptions would apply. Online PTS would be easy to access.	More people would participate in the programme. Applicants must complete another step before applying to Court, but it would be state-funded and easy to access online. Difficult to require respondents to complete PTS so will only affect applicants.	Additional demand for PTS could be met through the online programme.	Online PTS may be less effective for some people than the in person classes.

[6] At this stage the United Kingdom regime is only a proposal.

Lever 8. Addressing domestic violence
Status quo When a protection order is issued under the Domestic Violence 1995, the respondent is required to attend a domestic violence programme. The format and delivery of programmes is heavily prescribed in regulation. Protected people and their children are entitled to attend domestic violence programmes but attendance is very low. Many respondents do not complete a programme. Programme providers and the Court issue warnings or summons the respondent to court in some instances. The maximum sentence for breach of a protection is two years' imprisonment. The current definition of domestic violence does not explicitly include economic abuse, but economic abuse is sometimes accepted as evidence of psychological abuse when applications for protection orders are made .

Option	Description	Impacts	Financial implications	Risks
Providing for tailored, flexible domestic violence programmes **(recommended)**	Improve the format and delivery of stopping violence programmes to enable a greater focus on needs assessment for both protected people and respondents, supported by the ability to differentiate responses. Ability to work together with family and whānau, if safe and appropriate. More streamlined and effective responses to non-attendance at programmes by respondents, by reducing the role of the Family Court in responding to non-attendance.	Evidence suggests the need for a focus on good assessment, supported by differentiation of response. Allowing providers to tailor their services will support effective responses to violence and increase the cost-effectiveness of programmes. Effective domestic violence services have great potential to reduce the level of family violence in the longer term, and assist victims to keep themselves safe.	Cost neutral.	Could lead to national inconsistency in programme delivery. This will be managed by ensuring robust auditing processes are in place and best practice guidelines operate. May increase prosecutions for non-attendance at programmes, which would have cost implications for the Family Court, District Court (Criminal) and NZ Police.
Increasing the sentence for breach of a protection order **(recommended)**	The maximum sentence for breach of a protection order will be increased from two years' imprisonment to three years' imprisonment. This proposal was signalled in the Government's Post-Election Action Plan.	Sends a message that breaches of protection orders will not be tolerated. As a result of the 2009 increase in the maximum penalty from 6 months to 2 years, the average length of custodial sentences increased by 72 percent. The number and rate of people imprisoned for breach of protection orders did not increase.	We expect that a further 24-48 prison beds will be required per annum at an estimated cost within the range of $1.1 - $2.1 million. There may also be a small increase in costs for Vote: Courts as a result of increases to the jury trial threshold.	Increasing the penalty could make some victims more hesitant to report breaches of protection orders. The maximum penalty for breaching a protection order will be higher than other potentially more serious offences. For instance, the offence of 'male assaults female' carries a maximum two year prison sentence.

Option	Description	Impacts	Financial implications	Risks
Including economic abuse in definition of domestic violence	Include economic abuse as an example of psychological abuse in the definition of domestic violence in the Domestic Violence Act.	The amendment supports a broader understanding of domestic violence and will have an educational function. Including economic abuse will strengthen some applications for protection orders on the basis of psychological abuse, which are currently being declined. The granting of protection orders will in some cases provide a useful remedy for people subject to economic abuse.	Cost neutral.	Some people experiencing economic abuse may not find a protection order useful.

Recommended reform package

24. The Ministry's recommended package is:

Lever 1	Introduce mandatory family dispute resolution
Lever 2	Court focuses on its adjudicative function - no court funded counselling
	Interim option: limiting funded counselling hours in 2012/13
	Clarify welfare and best interests principles
Lever 3	Parties represent themselves in some proceedings.
Lever 4	Targeted use of lawyer for child
	Define the role of lawyer to assist
	Improve the use of specialist reports
Lever 5	*[Information withheld under section 9(2)(f)(iv) of the OIA 1982]*
	Introduce default requirement to contribute to professional services costs
Lever 6	Improve the quality of initial processes and evidence
	Streamline court processes
	Improve case management
	Make court orders work
Lever 7	Improve information provision
	Improve PTS delivery
Lever 8	Provide for tailored, flexible domestic violence programmes
	Increase the sentence for breaching a protection order to three years
	Including economic abuse in definition of domestic violence

25. The recommended package provides a balance between the three key objectives. It manages costs without compromising access to the Court for vulnerable people and assists children by encouraging people to resolve disputes without going to Court. The package manages expenditure on legal aid and professional services while maintaining access to those services where it is most needed.

26. The key risks associated with the package are as follows.

- To be successful the recommended reform package would require significant cultural and behavioural changes by families, professionals who work in the Court (particularly lawyers) and judges. Acceptance of the direction of reforms from these groups will be important. New obligations (eg, to certify all without notices are appropriate) will support the behavioural changes.
- The additional steps people would need to take before going to Court, costs associated with going to Court and lack of legal aid for initial stages could mean that some people that should come to the Court do not. Better information, the FDR subsidy and the power to waive fees and user contributions will mitigate this risk.
- Some lawyers may no longer provide lawyer for child or legal aid services, reducing the pool and quality of those available for this work. The Ministry of Justice will monitor supply of these services.

Consultation

27. The Family Court Review has been informed by:

    - 209 submissions received in response to the public consultation paper – Reviewing the Family Court
    - 121 responses to an on-line questionnaire seeking comments from Family Court users
    - consultation with a wide range of stakeholders including academics, legal practitioners, professionals who work in the Family Court, non-government organisations, and court users, and
    - an External Reference Group comprising representatives of the professions (counsellors, judges, lawyers, mediators, psychologists and social workers) that work in the Family Court, chaired by the former chair of the Family Law Section of the New Zealand Law Society.

28. There were mixed views on all the key issues. But, overall, submissions favoured:

    - greater emphasis on out of court dispute resolution, unless there is family violence (recommended)
    - standard court processes and a questionnaire style affidavit (recommended)
    - greater use of Parenting Through Separation, although some submitters had concerns about making it mandatory (we recommend PTS remain voluntary and delivery be improved)
    - a professional, other than lawyer for child, obtain the child's views (not recommended)
    - stronger obligations on lawyers to try to reach agreement before going to Court (recommended)
    - continuing court-funded counselling (not recommended).

29. Further information is available in the summary of submissions and summary of responses to the questionnaire at www.justice.govt.nz.

30. The following government agencies were consulted on this Regulatory Impact Statement and the Cabinet paper: the Ministry of Health, the Department of Internal Affairs, the Inland Revenue Department, NZ Police, Ministry of Social Development, the Ministry of Women's Affairs, Te Puni Kōkiri, Crown Law and Treasury. The Department of the Prime Minister and Cabinet was informed.

31. The Law Commission, the Privacy Commission, the Children's Commissioner and the Families Commission were consulted on the proposals.

Implementation

32. The Ministry of Justice will establish a steering group to co-ordinate the implementation process. The table below outlines some of the implementation requirements.

Task	By Who	When
Legislation. The recommended reform package requires amendments to legislation, regulations and rules. A new family law act providing for an out of court process may be required.	Minister of Justice	Once the new act and the amendments to the current family law acts have been passed (possibly by June 2013) the regulations and rules will need to be amended accordingly, before any legislation can come into force.
Practice Notes. Update or revoke relevant practice notes in light of changes.	Family Court Judiciary	Before the new legislation is brought into force.
Implement new court processes. Update court operational process and training materials, and facilitate Case Management System changes.	Ministry of Justice	Before the new legislation is brought into force.
Training. For judges, court staff, FDR providers, lawyers, Family Court professionals and some non-government organisations.	The Institute of Judicial Studies Ministry of Justice New Zealand Law Society Related professional bodies	Before the new legislation is brought into force.
Information plan. To identify the information resources required for the new regime and how they may be delivered.	Ministry of Justice	Before the new legislation is brought into force. Further information resources may be developed post implementation.
Parenting Through Separation. Redesign programme content to be appropriate for caregivers other than parents. Develop online delivery of the programme	Ministry of Justice	Before the new legislation is brought into force.
FDR providers. Establishing and maintaining processes for quality assurance and listing, reviewing and paying providers.	Ministry of Justice	Before the new legislation is brought into force.

Monitoring, evaluation and review

33. The changes to the family justice regime will be monitored and reviewed by the Ministry of Justice throughout and following implementation. Ongoing monitoring will be through existing monthly reporting of data extracted from the case management system to court managers, Senior Managers in the Ministry of Justice National Office and to the Courts Executive Council, which includes the judiciary. The Ministry of Justice will also report to its Strategic Leadership Team on key measures within 12 months of implementation (by December 2014).

34. The effectiveness of amendments to the delivery of stopping violence services will be monitored through our standard auditing processes with providers.

35. There will be three review streams.

Court processes	Use of court professionals	Out of court FDR process
Measureable outcomes		
The extent to which there is: • reduced delay • fewer adjournments • shorter hearings • reduced costs • compliance with court processes and orders	Durability of outcomes Court professionals used when they are needed Time taken to resolve cases that involve a court professional Whether legal aid expenditure reduces	The extent to which the out of court process reduces the number of parenting and guardianship applications to the Court Attendance at Parenting Through Separation
Examples of what we should measure		
Average time care of children cases take to be resolved through the Court (particularly cases that involve domestic violence) Average number of events to resolve a case Average value of family legal aid claims Ethnicity and gender data on applicants and respondents	Use of without notice orders Number of standard track cases that go straight to a formal hearing (rather than having a settlement hearing) Rate of appointments of lawyer for child and lawyer to assist Costs of lawyer for child and lawyer to assist appointments to parties and the State Number, cost and purpose of specialist and cultural reports	Use of the helpline and website Participation in Parenting Through Separation Outcomes of applications for exemptions from FDR An assessment of the success rate of FDR Cases determined unsuitable for FDR due to presence of family violence