Background Paper

Overview of the 2014 family justice reforms

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Contents

The 2014 Family Justice System Reforms

1. This paper provides background information on the 2014 family justice system reforms which may help you in making a submission to the Independent Panel examining the changes made in 2014. This paper:

   - provides contextual and background information about the Family Court of New Zealand and earlier reviews
   - describes the specific changes made by the 2014 reforms, and
   - outlines what is known about how the reforms are working.

The Family Court and earlier reviews

Establishment of the Family Court

2. The Family Court was established in 1981 to provide a forum for resolving issues relating to family matters in a private and less adversarial way, following a report of the Royal Commission on the Courts. The Commission concluded that the Family Court should have a two-fold jurisdiction, both judicial and therapeutic, as each complemented the other.

3. Counselling and judge-led mediation were introduced. Counselling originally focussed on reconciliation and, if that was not possible, conciliation. At counselling, parties were encouraged to put aside their animosity towards each other and focus on their role as parents of their children. Judge-led mediation was an optional part of the court process offering parents an opportunity to try and resolve issues with a judge, who could then make orders if the parties agreed.

4. The assumptions underpinning the conciliation model recognised that, where appropriate, parents coming to mutually agreed decisions about the care of their children was the best approach. The Royal Commission also noted that there were economic benefits to parties and the state in discouraging litigation.

Concerns with the system led to a number of reviews

5. The Family Court was intended to provide a conciliation service with a court appearance as a last resort, rather than a court with a conciliation service. However, all conciliation services were accessed through the court. Over time, concerns were expressed that counselling lacked focus, the results were variable and that conciliation had become a step in the legal process rather than the preferred option.

6. The court had become the focus of the family justice system and was facing issues that compromised its ongoing sustainability and effectiveness. Judicial determination of disputes over children had increased markedly and the Court was increasingly being used as a first option for resolving disputes, resulting in cost and delay. Unrestricted access to the court was thought to be favouring its use, even where out-of-court approaches might be better. There were no mechanisms for filtering out cases that would be better dealt with elsewhere.

7. In response to these issues, the Family Court has been subject to numerous reviews and reports, including: *Review of the Family Court* (1993), led by Judge Boshier and *Dispute Resolution in the Family Court* (2003), led by the Law Commission. Each of these reviews considered similar issues and proposed similar solutions, including a focus on encouraging alternatives to litigation by promoting of out-of-court mediation.

8. The report *Review of the Family Court* recommended a separate Family Conciliation Service distinct from the Family Court that would provide mediation by contracted mediators. Unless exempted according to certain criteria, all disputes would be dealt with at mediation prior to an application being made to the Court. The report also proposed a stronger role for judges in managing cases when they came before the court.

9. The second review undertaken by the Law Commission looked at what changes might be appropriate in the Family Court's administration, management and procedures to resolve disputes early. The Law Commission's report *Dispute Resolution in the Family Court* recommended introducing non-judicial mediation out-of-court to divert less complex family disputes away from formal court proceedings and to resolve them quickly and inexpensively.

10. In response to the Law Commission's recommendations, the Ministry of Justice undertook a family mediation pilot using accredited mediators[1] in four Family Courts over 2005/2006. Based on these findings and international experience it was considered that family mediation should be a permanent service.

The Family Courts Matters Bill

11. In 2007, the then Labour Government introduced the Family Courts Matters Bill which would have enabled:

    - family mediation for disputes relating to care and contact arrangements and guardianship matters both in-court and out-of-court
    - children's participation in mediation, and
    - counselling for children to help them clarify their views before family mediation, and where a judge considered a child to be in exceptional need of assistance in accepting the terms of a court order or in adjusting to any changes because of the order.

12. The Family Courts Matters legislation was passed in September 2008. However, the above provisions in the Care of Children Amendment Act 2008 were not brought into force and were repealed in 2014.

The Early Intervention Process

13. In 2010 the Early Intervention Process (EIP), a judicial initiative, was introduced. Under EIP cases were triaged as those needing early intervention by a judge (urgent track) and those that were more likely to respond to alternative methods of dispute resolution such as counselling and mediation (standard track). On the standard track, lawyers to assist the court were

[1] The mediators had to be members of either the Arbitrators and Mediators Institute of New Zealand (AMINZ) or of LEADR, an association of disputes mediators.

appointed to mediate parenting disputes once counselling was complete. EIP was replaced by the changes to court processes in 2014.

Background to the 2014 family justice system reforms

14. In April 2011, the previous Government directed a Ministry of Justice-led review of the Family Court. Issues prompting the review included:

    - insufficient support for people to resolve matters out-of-court
    - parties and court processes losing sight of the needs of children
    - complex processes and procedures, and misaligned incentives which cause delays
    - increasing expenditure on Family Court services even though the number of applications remained relatively stable, and
    - questions about the appropriate role of the state in family disputes.

Review Process

15. The development of the 2014 reforms involved extensive consultation with academics, judges, lawyers, non-government organisations, professional groups representing those who provide services to or through the Family Court, social service providers, men's and women's interest groups and government agencies. A public discussion document was released and submissions were sought.

16. An expert External Reference Group was established comprising of Family Court professionals, including a judge, lawyers, clinical psychologists, a representative from the New Zealand Association of Counsellors, and a social worker representative. Their report broadly supported key aspects of the reforms, with the key exception of the removal of access to lawyers.

Overriding principles and objectives informing the policy process

17. The objectives of the 2014 reforms were to achieve a modern and accessible family justice system that:

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

18. The reforms focussed on reducing parental conflict and lessening the damaging effects of adversarial court processes on children and families. Considering the relevant research at that time, and New Zealand's obligations under the United Nations Convention on the Rights of the Child, the reforms looked at how children could be better protected from parental conflict and a greater emphasis placed on children's views.

19. There was also a re-emphasis on parental responsibility, and encouraging and supporting parents to resolve matters out-of-court where appropriate. This approach was consistent with reforms in other jurisdictions that focussed on a culture shift towards early, out-of-court resolution for family disputes (including in Australia, the United Kingdom and British Columbia).

Key Principles

20. The review was underpinned by some key principles informed by research and evidence about what works for children and families.

Protecting children from conflict

21. Research indicated that parental separation did not necessarily mean poor outcomes for children.[2] However, the period following separation was identified as a particularly vulnerable time for children and prolonged exposure to frequent, intense and poorly resolved conflict was associated with a range of psychological risks for children. Poor outcomes can include anxiety, depression, aggression, hostility and low social competence.[3]

22. Research also showed that:

- there was no one arrangement that works best for children[4]
- children did better if they have continuing and frequent contact with both parents who can communicate and have low levels of conflict,[5] and
- it is the quality of the parent/child relationship that most affects good outcomes for children, not the amount of time spent with each parent.[6]

Providing for children's views

23. Studies showed that when asked, children wanted to participate in decisions about their future care arrangements, but that most children were not told about the reasons for their parents' separation or how the separation will affect them.[7] Studies also showed that children wanted to:

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

24. Giving children an opportunity to be heard, but not putting them in the position of having to decide or choose between parents, was found to have a positive impact on children and could reduce conflict between the disputing parents.[8] Evidence suggested that children coped better with the effects of separation if they had been consulted, and that children's involvement in decision making was linked to better mental health outcomes.[9]

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[2] Gluckman (2011).
[3] Gluckman (2011); Hunt and Trinder (2011)
[4] Wallerstein and Blakeslee (2003)
[5] Pryor and Rodgers (2001).
[6] Amato and Gilbreth (1999); Pryor and Rodgers (2001).
[7] Kelly (2006) Dunn, Davies, O'Connor and Sturgess (2001); Parkinson, Cashmore, and Single (2005); Gollop, Smith, and Taylor, (2000).
[8] Wallerstein and Kelly (1980); Graham and Fitzgerald (2010).
[9] Lauman-Billings and Emery (2000); Smith and Gollop (2001); Kelly (2002).

Reducing the harmful effects of adversarial processes

25. The court has an important function in protecting vulnerable people. However, there was a consensus expressed during consultation that the adversarial process can be a harmful way for families to resolve disputes about child care arrangements. This was reinforced by international research. Concerns were raised that, by focusing on parties' natural justice rights to pursue their case in court, sight had been lost of the need to protect children from the damaging consequences of litigation.

Concerns about adversarial court processes for family disputes highlight that they…	**Out of court resolution was considered likely to be better than an in-court resolution because…**
are often not durable because decisions are imposed on the parties	an agreement is more likely to suit parties better and be more durable [10]
do not focus sufficiently on children's needs and can polarise parties	agreements are more flexible and easier to vary in response to changing circumstances
exacerbate and entrench conflict (which negatively impacts on the children and the parents' future relationship)	helps parents communicate and develop skills necessary to maintain ongoing relationships they must have with each other
take too long, and are expensive	reduces the emotional and financial costs to parties
can be an inappropriate and disproportionate response to issues that need to be resolved.	where appropriate, an out of court process is a quicker and a more proportionate response to resolving disputes.

Financial sustainability

26. The 2014 reforms coincided with significant changes to legal aid and needed to address financial pressures in the family justice system and wider Government. The reforms restricted when parties can be represented by a lawyer in proceedings under the Care of Children Act 2004 (CoCA), largely due to the amount spent on family legal aid in these proceedings. Expenditure on family legal aid had increased by 93% between 2006/7 and 2010/11. The most significant cause of this was the increased cost of proceedings under CoCA.

27. The Family Court was increasingly being used to resolve lower level matters regardless of a dispute's merits. CoCA proceedings accounted for 40% of the court's activity and were a key driver of increasing costs across several areas. The changes to legal aid and availability of legal representation aimed to strike a balance between the financial viability of the legal aid scheme and access to the Family Court.

[10] Research findings indicate that shared care arrangements entered willingly by parents are two and a half times more stable than that their counterparts over time: McIntosh (2009).

Changes made by the 2014 reforms

28. The reforms made significant changes to the way in which the family justice system assists separating couples to reach agreement about care and contact arrangements for their children. In line with the objectives of the Family Court when it was established, the reforms shifted the focus from court resolution of these disputes to encouraging parents to reach agreement themselves, where this was appropriate.

29. The 2014 reforms restructured the family justice system to encourage people to reach agreements and to prevent disputes from occurring or escalating. The reforms aimed to enable the Family Court to focus its resources on serious and urgent cases that are not suitable for out-of-court resolution. Simplified and streamlined processes were introduced to enable timely and proportionate resolution of care of children disputes. The key changes were:

Out-of-court processes	• Family Dispute Resolution replaced out of court counselling as a means of assisting separating parents to focus on their children and reach agreement about care arrangements • Family Dispute Resolution and Parenting Through Separation (an existing information programme) were made compulsory before an application could be made for a parenting order or to decide a dispute between guardians • Setting up of the Family Legal Advice Service.

In-court processes	• Legal representation was not available in the initial stages of Care of Children Act cases
	• New processes and procedures for Care of Children Act cases, including:
	  ○ case tracks and designated conferences; and
	  ○ one approach to responding to allegations concerning a child's safety.

Role of professionals	• The role of lawyer for the child was clarified so that they could represent both a child's views and best interests • Specialist reports only obtained when it is necessary to decide a case, and a national standard brief for reports was introduced • Limited counselling available in-court.

Information about key changes and how they are working

30. This part describes the main changes that were made in 2014 and what is known about how these are working. The Ministry has been monitoring and evaluating the reforms since their implementation. This discussion refers to various reviews and evaluations done by the Ministry. More information about these reports and links to them can be found in Appendix 1.

Out-of-court Changes

Parenting Through Separation

31. Parenting Through Separation (PTS) is an information programme that aims to help parents minimise the effect of their separation on their children. PTS was available pre-reforms, but has been made mandatory for people wishing to make an application to the Family Court for a parenting order or to resolve a dispute between guardians unless an exemption applies. It is free to participants and usually consists of two two-hour sessions. People and their former partners usually attend separate PTS sessions.

32. Anecdotal feedback suggests that PTS is well-received and a high proportion of people undertaking PTS have no further contact with any other services, including court. However, PTS has been difficult to access in some rural and more remote areas. In addition, it is not clear whether the current content of the PTS programme is useful for others in parenting roles, such as caregivers, grandparents or other extended family members. The content in the sessions has been slightly adapted but is not specifically tailored to the needs of this other group.

Family Legal Advice Service

33. The Family Legal Advice Service (FLAS) provides initial advice and information for parties in dispute over arrangements involving care of children matters. This service is free to people who meet the civil legal aid thresholds.

34. FLAS was introduced as part of the reforms because legal aid was no longer available for CoCA matters prior to filing an application in the Family Court. FLAS has two components: initial advice; and assistance with court forms. These two components are funded on a fixed fee basis, which aligns with the way legal aid is funded.

35. Having a level of legal assistance at this time was intended to improve the prospects of early resolution of cases, provide a ‘reality-check’ for parties, assist in diffusing emotions, and encourage people to focus on the best interests of their children. Many people have been through FLAS since the reforms. Ministry data suggests that many people have had contact with FLAS only and did not go on to FDR.

Family Dispute Resolution

36. Family Dispute Resolution (FDR) is a service aimed at helping separated parents and guardians reach agreement about caring for their children. FDR is intended to be a less stressful and more timely process for resolving care of children disputes than the Family Court. FDR replaced out-of-court counselling.

37. FDR is a mandatory requirement before an application can be made to the Family Court for a parenting order or to resolve a dispute between guardians, unless an exemption criteria applies.[11] This approach replaced pre-court counselling. This shift was largely supported, in principle, by stakeholders.

38. FDR is fully funded (12 hours of mediation and preparation) for people below the civil legal aid thresholds. If a party is not fully funded by the government, they will pay no more than $448.50 each. FDR may take place over several sessions, which may be split over several months. Since implementation on 31 March 2014 to 31 May 2018 some 5,630 mediations have been completed.

39. FDR involves three core activities: assessment, preparation for mediation, and mediation. Assessment involves assessing people's suitability for FDR as well as their eligibility for the full funding.

40. Preparation for Mediation (PFM) is a voluntary service available to help people prepare for FDR by learning tools to manage their feelings and focus on the children so they can participate more effectively in FDR. It is mostly provided by counsellors who are suitably accredited by a professional membership body. Matters discussed at PFM are confidential and they are not reported to a party's mediator.

41. FDR has had achieved some of its goals and had some benefits:

    - interviewed FDR parents and FDR professionals generally support the concept of resolving parenting disputes through out-of-court mediation
    - 65% of completed FDR mediations result in all issues being resolved with another 14% resolving some issues
    - the fastest path through the system was for those parents who remained solely out-of-court, and
    - those people using FDR (and/or other out-of-court services - FLAS and PTS) are more likely to reach an enduring outcome, within a reasonable timeframe, than those who require court intervention.

42. However, a significant issue facing FDR is the lower than expected attendance and completion rate because of applications to the Family Court and exemptions granted by FDR providers. In the Ministry's small-scale qualitative study, the most common reason for lack of participation was people who refused to take part (40%) or who could not be reached (23%). Cost was cited as the third most common reason for non-participation (14%).

43. Other key issues include:

[11] Exemption criteria include: one of the parties is unable to participate effectively in FDR or a party or child has been subject to family violence or abuse from the other party; an application is urgent or for a consent order; proceedings have already begun or relate to an application under the Oranga Tamaraki Act 1989.

***Safety and adequacy of screening**:* Stakeholders have raised concerns about the adequacy of screening for family violence by FDR providers. They are concerned that some cases are proceeding to FDR where there are concerns about family violence or safety.

Including the views of children: While FDR was intended to enable child-inclusive processes (where the provider had the requisite skills), there are no formal models developed to ensure children's views are heard at FDR.

Responsiveness to cultural and other needs: FDR is meant to be flexible enough to respond to the needs of all participants, however, there are no formal models developed to meet the needs of communities that may be better served by more tailored models (including Māori, Pacific Peoples, migrant communities and people with a disability).

Feeling pressured to reach an agreement: The 2015 evaluation of FDR indicated that some people felt pressured into reaching an agreement at FDR due to time constraints. The time available has been extended to 12 hours in response to these concerns.

Durability and enforceability of mediated agreements: Agreements reached at FDR are not legally binding unless the parties seek a consent order from the Family Court. Some parents have expressed surprise that an FDR agreement is not legally enforceable and that this was not always made clear. Parties see Court mandated arrangements as more desirable due to their enforceability which may be devaluing FDR agreements from some perspectives.

***Inadequate processes to enable court referrals to FDR**:* A judge can direct parties to attend FDR any time before a final determination is made. However, there is no process in CoCA enabling the court to keep track of the progress of the mediation and have the matter brought back to court. Without adequate expectations or timelines in legislation, judges may be reluctant to refer cases back to FDR due to concerns about the impact of delay in the proceedings.

In-Court Changes

Access to legal representation

44. One of the most significant changes was limiting access to legal aid and legal representation in the initial stages of CoCA proceedings. Parties are unable to get full representation unless their case meets one of the exemption criteria.[12]

45. While the change was primarily to address cost pressures on the legal aid scheme, there were also several assumptions behind the proposal including that:

    - it would encourage earlier resolution of disputes out-of-court where appropriate
    - parties would be able to resolve matters with the assistance of a judge in a less adversarial setting and without the expense of legal representation, and
    - most lawyers would come back in the system at a settlement conference or a directions hearing.

46. A more streamlined approach with fewer requirements for proceedings in the simple and standard tracks was considered to help mitigate any risks associated with the proposal. The success of this approach also depended on easy to understand forms and questionnaire affidavits, streamlined court processes, and encouraging the use of McKenzie friends[13] and support people.

Stakeholders' concerns about the change

47. Of all the proposed changes in the 2014 reforms, this one attracted the most submissions (275) during the select committee process. Only five submitters supported the change.

48. Many lawyers and legal academics submitted that lawyers play a crucial role in the Family Court, particularly in supporting and guiding parties and encouraging early resolution. Some of the risks raised at the time were:

    - **Impact on parties:** Many parties (particularly the most vulnerable and disadvantaged) were likely to have difficulty navigating the legal system. Issues may be left unresolved as some people may not be able or willing to represent themselves. Power imbalances were also likely to play out, with some parties unwilling or unable to present in court in front of their ex-partner.
    - **Delay**: self-represented parties may be less likely to settle and more cases would involve a hearing because parties want to obtain legal representation. Self-represented parties' lack of knowledge of court process could also impact on timeliness and quality of evidence, and involve more judicial and registry time.

[12] Lawyers do not act for parties in CoCA proceedings unless: it is a child abduction proceeding; a judge directs a hearing; it is a without notice application (or judge directs on notice application proceed without notice); a party is the Crown; a lawyer for child is appointed where the child is a party to proceedings; there are concurrent proceedings; a settlement conference has been directed at the discretion of a judge. The last two criteria were added during select committee consideration of the Family Proceedings Reform Bill.

[13] McKenzie friends are support people that may sit with self-represented parties in court, take notes, and offer suggestions and advice. The name comes from a United Kingdom case, *McKenzie v McKenzie* [1970] 3 All ER 1034, that confirmed the legitimacy of this role.

- **Effects on the legal profession:** Changes to the involvement of lawyers was predicted to impact on lawyers' earning potential leading to a risk of provider exit.

49. In response to these concerns, the situations in which legal representation was allowed was extended and a Family Legal Advice Service (FLAS) was introduced to assist applicants assess their options and complete court forms. Eligibility for FLAS is set at the same income level for legal aid.

50. Limiting access to legal aid and legal representation in the initial stages of CoCA proceedings (unless parties met certain exemption criteria) led to a significant increase in without notice applications and likely had a negative impact on the timeliness of cases and on other areas, such as attendance at FDR. The removal of lawyers may also have had a disproportionate impact on vulnerable parties, Māori and Pacific Peoples.

Changes to court processes under the Care of Children Act 2004

51. The 2014 reforms gave judges more powers to actively control and manage cases. Prior to 2014, insufficient judicial and registry powers to actively direct and manage the conduct of proceedings were considered to have compromised the court's efficiency and contributed to delay and additional expense for parties.

52. These changes included the introduction of case tracks for CoCA proceedings: the 'without notice' track for urgent applications; the 'simple' track for consented and undefended proceedings and the 'standard' track for proceedings that are not suitable for either the without notice or simple tracks.

53. A judge can also classify a case on the standard and without notice tracks as a "complex case." This can occur when a judge considers the case requires closer judicial oversight, for example, if the case includes allegations of serious abuse or violence. As far as possible, these cases are dealt with by one judge.

54. Dedicated conferences were also introduced. None of the conferences are mandatory but which conferences are available depends on which track the proceedings are being dealt with on. All five conferences are available on the standard track, but on the simple track only issues conferences are available, and on the without notice track, only directions and case management conferences are available. The conferences are as follows:

    - **Issues conferences** which help the judge decide what issues need to be resolved and whether to hold a settlement conference or go straight to a hearing.

    - **Settlement conferences** which enable the judge to help parties resolve their disagreements.

    - **Directions conferences** which enable the judge make directions and orders that will get a case ready for hearing.

    - **Pre-hearing conferences** which take place after a directions conference and before the hearing to ensure the case is ready for the hearing.

- **Case management conferences** which can be held at any time for complex cases and allows the judge to closely manage how the case is going.

55. In addition to the usual hearings (formal proof, submissions-only and defended) a new hearing type was introduced. A judge can now direct any other kind of hearing to take place. The form of that hearing is something that the judge would decide, based on the circumstances of the proceedings. The precise way in which the hearing was conducted would vary from case to case.

56. The forms to be used by parties in CoCA proceedings are now those approved by the Secretary for Justice rather than prescribed forms in the Family Courts Rules 2002 (FCR). The forms that are issued by the court are in a Schedule to the FCR.

57. These new processes were introduced with the aims of:

    - providing certainty for people using the court so they know what to expect and how to navigate the system
    - ensuring that each court event has a purpose and advances the matter towards resolution
    - ensuring that processes are proportionate to the issues that need to be resolved
    - enabling judges and registrars to drive court processes, and
    - fulfilling the requirement in section 4 of CoCA that decisions affecting a child should be made and implemented within a child's sense of time.

58. Most cases were expected to be dealt with on the standard track. However, seventy percent of applications are now filed without notice. Cases now take an average of twenty-two days longer to decide than prior to the reforms. The Ministry's research suggests that the key drivers for applicants filing without notice are to:

    - **obtain legal representation** – over 80% of applicants interviewed listed the key reason for making a without notice application being that they wanted a lawyer in court.
    - **deal with non-urgent but 'time-sensitive' matters** – there is a misperception that since the reforms it is no longer possible to make an application on notice in conjunction with an application reducing time.[14] Applicants therefore see without notice applications as the only way to get a quick decision.
    - **get a decision** – based on a party's perception of the importance of their case.

59. Changes to court processes were intended to ensure proceedings in the Family Court are dealt with in a timely and proportionate manner, and ensure the court's processes are as streamlined and predictable as possible. However, parties self-representing and the substantial increase in the number of without notice applications has had a negative impact on the timeliness of cases and is an inefficient use of registry and judicial time.

[14] For "time-sensitive" (but not urgent matters) the usual process is to make an application on notice with a without notice application to reduce the time for filing a notice of response.

60. It is difficult to gauge the impact that changes to Family Court processes may have had because of the effect of the large numbers of without notice applications being filed. Without notice cases are now taking up a considerable amount of judge's time, and meaning that cases on the simple and standard tracks are being further and further delayed. Without notice applications can also have a negative impact on the future conduct of proceedings, including worsening existing tensions between the parties with flow on effects for the children.

61. Settlement conferences may also be adding to delay because of the time needed to hold them. Settlement conferences were intended to offer parties a last opportunity to resolve matters and avoid the need for a defended hearing. However, having conciliatory processes as part of an adversarial system may be confusing for some parties who just want to have their dispute resolved by a judge. Research also suggests that court based conciliation may only have some short-term effects.[15]

Children's safety, including when allegations of physical and sexual violence are made

62. Prior to 2014, there was a statutory process for dealing with allegations of physical or sexual violence against a child or against the other party to proceedings under CoCA (ss 58 – 61). The process was reviewed following feedback and the emphasis changed to encourage a broader consideration of all issues impacting on a child's safety.

63. The previous provisions (now repealed sections 58-61 of CoCA)[16] required judges to make a finding on whether allegations of physical or sexual abuse against a child or party to the proceedings were proved, and not make an order giving the violent party day-to-day care or contact, except supervised contact, unless the court was satisfied the child would be safe. These provisions effectively created two separate processes, one for dealing with allegations of physical or sexual abuse, and a second for dealing with any other situations that might pose a risk to a child's safety (such as a parent's mental health issues or drug or alcohol addiction).

64. There were concerns expressed about the operation and effectiveness of the provisions including that:

- the provisions only dealt with physical and sexual violence (and in limited circumstances psychological violence) and did not recognise other situations that might pose a risk to a child's safety
- the provisions were a "blunt instrument" that applied the same process regardless of the nature of the alleged violence or the risk that it posed
- the application of the provisions had become mechanical
- a child might be deprived of beneficial contact with a parent because allegations of historic or minor violence can prevent unsupervised contact pending the outcome of the court's enquiry
- a "threshold test" was sometimes applied - the alleged violence had to be sufficiently serious before the process was triggered

[15] Trinder and Kellet (2007).

[16] Sections 58-61 were carried over from the Guardianship Act 1968 when it was replaced by the Care of Children Act 2004.

- vulnerable women were sometimes unable to provide adequate evidence to prove that violence had occurred
- the Court tended to look for evidence of recent physical or sexual violence rather than considering an historical pattern of behaviour that creates risk for a child
- the primary focus was on whether the child would be safe with the violent parent rather than whether unsupervised contact was in the child's welfare and best interests, and priority was given to establishing or maintaining a relationship with a violent parent.

65. In response to these concerns, it was considered that an approach based on sections 4 and 5 of CoCA would enable a broader inquiry into any situation that might pose a risk to a child's safety (e.g. relocation, new partner of a parent, exposure to drug and alcohol abuse or mental illness).

66. Section 4 of CoCA says that the welfare and best interests of the child is the first and paramount consideration in all decisions about a child under the Act. Section 4 carries greater weight than any other provision.

67. Section 5 of the Act introduced a non-exhaustive list of principles to guide the Court's decision-making under section 4. The only mandatory principle says that a child's safety[17] must be protected, and, in particular, a child must be protected from all forms of violence (as defined in the Domestic Violence Act 1995). "Safety" is an expansive concept and is forward-focussed.

68. Other principles in section 5 focus on the importance of continuity and stability of arrangements for a child and the on-going responsibilities and role of parents and extended family in a child's life.

69. The principles provide an important guide to the court of the context in which it must consider the welfare and best interests of the child. In considering a child's welfare and best interests, a court must always consider a child's safety. The Supreme Court has said that if there are issues of safety, section 5(a) is likely to have decisive weight because if a child is at risk, the child's safety is the most important consideration and his or her relationship with the violent parent less important.[18] This is because of the crucial importance of protecting the safety of children when compared with the other objectives at which the other principles are aimed.

70. In 2014 section 5(a) was strengthened by adding new section s5A which requires the court to have regard to whether there is (or has been) a protection order in place and the circumstances in which the order was made and any written reasons for the decision. These provisions will be enhanced by further proposed amendments in the Family and Whānau Violence Legislation Bill currently before the House, which extends the range of matters the Court must consider.[19]

[17] Now sSection 5(a) CoCA (previously s5(e)).

[18] K v B [2010] NZSC 112. Prior to 2014 s5(a) was s5(e). The order of the principles was changed to give more prominence to the safety principle.

[19] These include whether a temporary protection order is in force and, if practicable, all relevant convictions for breaching a protection order or related property order or for any other family violence offence and any relevant safety concerns that an assessor or service provider has notified or advised the court of.

71. As part of the 2014 changes, a judge can now order supervised contact with an approved provider in any situation where a judge is not satisfied a child will be safe with the person having contact. Supervised contact with an approved provider could previously only be ordered where there was a risk of physical or sexual abuse.

72. Family violence advocacy groups consider that the repeal of the provisions has lessened protections for children by removing a safety check when making an order for care or contact with a violent party. Repeal was opposed by those who support systematic assessment of the risk of violence or who generally want less contact with alleged abusers of a child or former partner. Other criticisms include that children's views about contact with a violent parent are not listened to or given sufficient weight and that court processes are not responsive to the needs of applicants alleging violence against children and themselves.

Role of Professionals

Lawyer for the child

73. Prior to the 2014 changes, a lawyer for child[20] could be appointed in CoCA proceedings unless there was reason not to. There were several issues raised in consultation in relation to lawyer for child including:

    - their role - there was some confusion about whether lawyer for child could represent both the child's views and their best interests
    - whether lawyer for the child is sufficiently skilled to undertake all tasks, for example, obtaining a child's views
    - the adequacy of the training programme for lawyer for child, and
    - lawyers for children not meeting with the child they were representing - this decision was not always thought to be justified by the circumstances of the case.

74. In contrast to this, many stakeholders valued the independence of lawyer for child, and the role they played in negotiating agreements between parties to avoid hearings. It was difficult to get anything other than anecdotal information on how successful lawyer for child was at achieving resolution of disputes and avoiding hearings.

75. The 2014 changes sought to better target the use of professionals in the court. One aspect of this was to limit the appointment of lawyers for children to situations where the court has concerns for the child's safety or wellbeing and the court considers the appointment necessary.[21] This ensures that the use of lawyer for child is targeted to cases where they are needed and limits children's exposure to court-appointed professionals.

76. The role of lawyer for the child was also defined to make it clear that the lawyer for child can present a child's views and promote their welfare and best interests, even if those two things are at odds with each other.

77. Whether the lawyer for the child should meet with the child is now at the discretion of the judge. The lawyer must meet with the child unless, because of exceptional circumstances, a judge directs that the lawyer does not.

78. The Ministry's research reports completed to date have not considered the impacts of the changes to lawyer for the child. In 2017 the Backbone Collective undertook a survey of more than 400 mothers exposed to family violence about their experiences in the Family Court.[22] The resulting report raised several issues in relation to the role of lawyer for child, including that lawyers for child:

    - are not meeting with children, or communicating with them in an appropriate way, or adequately representing their views

[20] Under s 7 of CoCA, the court can appoint a lawyer to represent a child who is the subject of a proceeding or proceedings under the Act. The lawyer for the child is independent of the parties to the proceedings.
[21] The Family Court Proceedings Reform Bill as introduced proposed to limit representation to cases where there were "serious concerns" for child's welfare and best interests. However, the requirement that concerns be serious was removed because of feedback during the Select Committee process.
[22] Herbert and Mackenzie (2018).

- receive insufficient training
- are not responding appropriately to family violence and abuse (including not undertaking risk assessment regarding the child's safety), and
- are not independently supervised and complaint mechanisms do not work.

Specialist reports

79. If a judge needs more information in deciding a case under CoCA, he or she may ask for a cultural, medical, psychiatric, or psychological report. Psychological reports are the most common type of report obtained under CoCA.

80. Prior to the 2014 changes, there were a number of concerns expressed about psychologists' reports, including:

- reports being obtained unnecessarily because they might be helpful rather than because they were necessary/essential for deciding a case
- psychological reports contributing to delays, with some reports taking more than six months to prepare
- the ability for parties to obtain a second opinion or critique of the report adding to delay and hearing time
- psychologists not being able to ascertain the child's views but merely comment on them
- lack of specialists to undertake the work
- parents not allowing the psychologist to see a child with the other parent outside the times stipulated in the court order, and
- unnecessarily complex briefs and protracted negotiations to finalise briefs.

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

82. The 2014 reforms amended section 133 of CoCA to improve the use of specialist reports, including:

- obtaining a report only when it is necessary to resolve the case and the information cannot be obtained from any other source
- having regard to the impact of any delay on the welfare and best interests of the child when ordering a report
- introducing a national standard brief for the report
- clarifying when a report writer may be asked to obtain children's views, and
- enabling a report writer to see children outside the terms of an order.

83. The reforms also included provision for second opinion or critique reports to be obtained in "exceptional circumstances" and enabled release of the report writer's materials (report, notes and other materials) to a party's psychologist. The reforms also enabled release of the report

writer's materials if the court was satisfied that they were necessary to help a party prepare their cross-examination.

84. These latter changes have caused concern and some changes are proposed in the Courts Matters Bill currently before Parliament. An outline of these changes is included in Appendix 2.

Counselling services

85. Before the 2014 reforms, separated couples or couples with relationship problems, regardless of whether they had children, could ask the Family Court to be referred to free counselling. Couples could attend up to six sessions.

86. Though counselling was accessed through the Court, couples did not need to have started proceedings to be eligible for a referral to counselling. It was not mandatory to attend counselling prior to making an application to the Court but there was an expectation that this would occur. A judge could refer parties to counselling and put their case on hold if they had not attended.

87. Counselling was also available (i.e. a party or parties could request it) when there was a dispute about an agreement or court order where one party was contravening (or appearing to contravene) the agreement or order. A judge could also order counselling (enforceable by summons) when an application was made to the court that a party was breaching a court order. This counselling was also free to parties.

88. The 2014 reforms removed relationship and pre-court counselling for separating couples. Counselling for people who wanted help with reaching agreement about care arrangements for children was replaced with FDR.

89. Most in-court counselling was also removed. A judge may still direct parties to counselling but only when deciding an application for a parenting order or a dispute between guardians. Counselling can only be ordered once only where it would help improve the parents' relationship or help them comply with a direction or order made by the court. A Judge cannot direct parties to counselling once proceedings have ended.

Cost contribution orders

90. Cost contribution orders were introduced to require parties to contribute to the cost of lawyer for child, lawyer to assist the court, and specialist reports in proceedings under CoCA except where there is severe hardship. Standard contributions were set at one third of the cost from each party, with the state contributing the remaining third, unless the court adjusts the portion paid by each party.

91. Prior to the 2014 reforms, the fees and expenses for lawyer for the child, lawyer to assist the court and specialist reports were paid by the state. While the court could order a party or parties to contribute to these fees and expense, such orders were rare.

92. The introduction of cost contribution orders recognised the concerns expressed during consultation that the state should not solely carry the financial burden arising from litigation of private family disputes and was an important incentive to resolve matters outside of court.

Appendix 1: Research and Evaluation Reports on the 2014 changes

The Ministry's research and evaluations of the 2014 family justice system reforms can be found at:

https://www.justice.govt.nz/about/news-and-media/news/family-court-research-documents/

Evaluation of Family Dispute Resolution Service and Mandatory Self-representation *(October 2015)*

This evaluation looks at people's experiences of the Family Dispute Resolution service and self-representation and how well these are working.

Administrative Review of Family Justice System Reforms *(July 2017)*

This review looked at whether the 2014 family justice reforms had achieved a number of intended benefits.

Without Notice Applications in the Family Court: Research Report *(July 2017)*

Given the significant increase of without notice applications, the Ministry commissioned a discrete piece of research to better understand the rationale of applicants making these applications and what is causing the increase.

Exemptions from Family Dispute Resolution where a party did not participate *(September 2017)*

Due to the high number of exemptions being granted at FDR, as identified in the administrative review, this small scale qualitative study looked at people's reasons for non-participation.

Family Justice Reforms: An initial cohort analysis *(November 2017)*

The cohort analysis tracked an initial cohort of 15,727 people as they proceeded through the Family Justice System and describes how long it takes to go through the system depending on the pathway taken, and the effectiveness of each pathway on reaching an enduring outcome.

Appendix 2: Proposed amendments to the Care of Children Act 2004

Courts Matters Bill

The Courts Matters Bill makes changes to the Care of Children Act 2004. The Bill has been reported back from select committee and had its second reading. It is currently waiting for consideration during Committee of the Whole House stage.

Section 46E amended (Family dispute resolution mandatory before commencement of proceedings)

Section 46E of the Care of Children Act 2004 (the COCA) provides that family dispute resolution (FDR) is mandatory before making an application for a parenting order or to resolve a dispute between guardians. Section 46E(4) sets out the circumstances where a party is not required to attend FDR. Section 46E(4)(d) says that attendance at FDR is not required if the application is seeking the enforcement of an existing order.

The Bill repeals section 46E(4)(d) as it is redundant. The requirement to attend FDR only relates to making an application for parenting or guardianship orders (as noted above).

Section 47B amended (Mandatory statement and evidence in applications)

Section 47B of the COCA requires an application for a parenting order to include a statement that the applicant has undertaken a parenting information programme within the preceding 2 years, unless exemption criteria apply.

The Bill makes the exemptions for PTS the same as those for FDR. A new exemption has also been added to cover situations where an application for a parenting order is made by an extended family member (or other person) following intervention by Oranga Tamariki, for example, following agreement reached at an FGC.

Section 49A amended (Interim parenting order where parent does not have day-to-day care for, or contact with, child)

Section 49A of the COCA (as amended) sets out the timing within which a hearing date must be set down if a respondent, who is not granted care or contact on a without-notice application for an interim parenting order, seeks a hearing. This reinstates a provision in the Act that was unintentionally omitted in the 2014 changes.

Section 133 amended (Reports from other persons)

Section 133 enables the court to obtain psychological reports when it is necessary to assist with its determination of an application under the COCA. Changes to the Bill provide that:

- a report of a court appointed report writer may be disclosed to a party's psychologist to assist the preparation of cross-examination by the party;

- the court may only permit disclosure of the report writer's notes and other materials to a party's psychologist for the purpose only of assisting cross-examination by the party if there are "exceptional circumstances";
- any information which is released by the court is information relating to the party who is requesting that information and not information about the other party; and
- that any release of a psychologists' materials for the purposes of obtaining a second opinion or to assist a party prepare their cross-examination may be subject to such terms and conditions as the Court thinks fit.

When reporting the Bill back to Parliament, members of the Justice Select Committee considering it, recommended that Parliament consider further changes in the Committee of the whole House to prohibit release of any of the report writer's materials. The Associate Minister for Justice, Hon Aupito William Sio in his speech on the Bill's second reading, indicated that he and the Minister of Justice agreed that this issue was better dealt with by the Panel considering the 2014 reforms as this would ensure appropriate consultation with key stakeholders.

Family and Whānau Violence Legislation Bill

The Family and Whānau Violence Legislation Bill makes changes to the Care of Children Act 2004. The Bill has been reported back from select committee and is waiting for its second reading.

Section 5A replaced (Domestic violence to be taken into account)

The Bill adds further matters the court must take into account when considering a child's safety under section 5(a). These include whether:

- there a temporary protection order is or has been in force;
- all relevant convictions of 1 or more parties to the application for breaching a protection order or related property order, or for any other family violence offence;
- all relevant safety concerns that a service provider has advised the court of including in a completion report to the court of a respondent's attendance at a non-violence programme.

Section 51 amended (Court must consider protective conditions in certain cases)

Currently the Court may impose protective conditions for handover arrangements where there has been physical or sexual violence. This has been extended to include psychological violence.

New section 57A inserted (Power to make incidental temporary protection order)

Sometimes, in CoCA proceedings significant allegations of family violence may be made but no application for a protection order is made. The Bill enables a temporary protection order to be made if the court is satisfied that:

- had an application been made an order would have granted; and
- that orders under the Care of Children Act 2004 alone will not provide sufficient protection for the child or their care-giving parent.

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