waves
Waitakere Anti-Violence Essential Services
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Justice and Electoral Select Committee

Submission on the Family Court Proceedings Reform Bill, 2012

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

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

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

WAVES Trust provides**:**

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

- Contract management of interagency projects and contracts
- Access to current, relevant research
- Monitoring of community initiatives such as the Waitakere Family Violence Court
- An overview of information deficits and initiation of local research

WAVES Trust is a charitable trust. Governance is vested in the Board chaired by trustee Waitakere Family Violence Court Judge David Mather. There are 5 trustees including David Mather, Penny Hulse (Deputy Mayor, Auckland Council), Howard Dawson (CEO, Man Alive), Steve Kehoe (Waitakere Police Area Commander) and Tiaria Fletcher (Manager, Lifewise Family Services).

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

Background

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

Our submission has been developed in consultation with representatives from our network in the course of our day-to-day communications with them and with other interested parties. There are **over 55** Waitakere services in the WAVES network including statutory agencies, family violence victim support services, stopping violence programme providers, and child protection agencies.

During 2011, 2012 and 2013 we held three consultation meetings open to professionals and interested parties to discuss aspects of the Family Court Review and the Family Court Proceedings Reform Bill. We also discussed aspects of the upcoming Family Court Review at a public meeting about centralisation of the Family Court in May 2010. These meetings have resulted in an email distribution list of 87 individuals and services including 18 from the wider Auckland region or representing national bodies. Participants include members of the WAVES network, Family Court counsellors and lawyers, Auckland City Council Local Board members and interested parties from parliament and statutory organisations.

The following individuals/agencies have asked that we directly acknowledge their participation in these consultations:

Family Action, Waitakere
Man Alive, Waitakere
Waitakere Community Law Service
Community Waitakere
Westside Counselling, Waitakere
Te Ukaipo, Waitakere
Women's Centre, Waitakere
Friendship House, Manukau

As a result of these discussions we have compiled a list of priorities for the Family Court held by these stakeholders. They support:

- Mandatory attendance at a Parenting through Separation course for parenting dispute applicants to the Family Court.
- Improving screening for family violence and detection of family violence across all court activities.
- Improving education on family violence among professionals working within the court and who contract services to the court.
- Enhancement of Family Court counselling practices with a focus on conciliation not reconciliation, and some support for limiting access to funded counselling to only those who intend to apply for court intervention.
- Full implementation of the Care of Children Amendment Act, 2008.
- Development of safe child-inclusive processes in counselling and mediation.
- Restorative justice processes for families with historic family violence.
- Use of collaborative law models of practice by lawyers.
- Improving qualifications and experience for those able to be appointed as lawyer for children.
- Moderation in the use of expensive reports.

Our submission follows below. Because of the size of this Bill we have chosen to limit our comments to those aspects of the Bill that we wish to see changed or removed.

SECTION ONE: SUMMARY AND COMMENTS

Whilst there are some welcome clauses in this Bill, we have challenged significant portions of it and are very concerned about its potential impact on the court's ability to protect children and vulnerable people, including victims of family violence.

In our submission which follows, we have raised concerns about a number of aspects of this Bill. Our submission is based upon critique of the Bill using three main comparators:

1. Whether amendments were discussed in the 2011 Family Court Review and, if not, whether there has been adequate consultation.
2. Protection and promotion of the court's protective functions with regard to children and vulnerable people at risk including whether the legislation is adequate to provide for the safety of victims of family violence.
3. The Ministry's specified goal 'to ensure a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective.'[1]

We have raised a number of concerns about the Bill and recommended that significant sections be removed from it. The main themes of our submission are below.

Counselling for parenting disputes

In the following submission we have not supported amendments to remove Family Court counselling from the Care of Children Act or otherwise reduce access to it. Our network members and participants at consultation meetings endorsed appropriate counselling services for parenting disputes as a key feature of a modern family court system which, with some legislative change to enable development of new modes of practice such as child-inclusive models, have the potential to further reduce the numbers of disputes proceeding to court.

Family Court counselling is recognised as providing 'de-facto' screening for both family violence and child abuse, although referrals pathways for parties disclosing family violence are not well defined under the current system.[2] Requiring disputing families to find and fund resolution services independently of the Court will remove vital support for high risk families, which could potentially result in them having greater reliance on intensive and expensive intervention through the Court.[3] Such an unintended consequence would raise rather than lower the costs of the Court as well as having serious social consequences for families and children.

We have recommended removing from the Bill or altering clauses 6, 7, 8, 9, 17, 26, 31, 32, 64.

Legal representation in the Court

We have not supported amendments to any of the Acts referenced in this Bill that would reduce or restrict access to legal representation in the Family Court. Wholesale removal of legal representation was not a feature of the original Family Court Review, which focused instead on the use of collaborative models of practice, reduction of the role of adversarial

[1] Family Court Proceedings Reform Bill Explanatory Note, p.1.
[2] J. Vivian, *Screening and Risk Assessment in the Family Court*, Wellington, 2012, p.2, http://www.nzfvc.org.nz/sites/nzfvc.org.nz/files/family-violence-screening-tools-vivian-2012_0.pdf (Accessed 12 February 2013).
[3] Vivian, p.3.

processes in court, and the use of 'in-house' lawyers for children. We have discussed a number of concerns about removing access to legal representation for parties and their children. The main concerns are that this would:

- Increase imbalances between parties where one party has access to more resources than the other, and in cases of family violence create opportunities for one party to use the court to abuse another.
- Reduce opportunities for the court to identify and respond to children at risk.
- Increase the reliance on Family Court Coordinators to identify safety concerns for parties or their children, which is impractical in the current climate where resourcing for these roles is considered inadequate.[4]
- Opens opportunities for parties to a dispute to be exploited by lobby groups that seek to use their case to make a political point.

We have recommended removing or altering clauses 5, 53, 70, 71, 73.

Protection of children's welfare and best interests

The Bill proposes significant changes to the Care of Children Act's principles guiding the Court in its assessment of the welfare and best interests of children and its ability to protect children living with family violence. In addition the Bill proposes repeal or replacement of a number of the Care of Children Act sections, including Section 60, that are lauded overseas as 'a practical and effective model for tackling domestic violence and ensuring contact [with children] is safe.'[5]

Changes to the meaning of these principles and the apparent reduction in the court's powers to intervene to protect children in relation to family violence were not described in any detail in the Family Court Review. We argue therefore that consultation has been inadequate, having not been signalled in the media releases about the Bill and with only limited time over Christmas break for submissions to be developed. The proposed changes pose risks to children that have not been adequately identified or assessed and there is a clear requirement on the Ministry to consider and mitigate such risks before proceeding, as was outlined in the recent High Court decision to declare the Ministry of Education's closure of Salisbury School unlawful.

We have recommended removing from the Bill or altering clauses 4, 5, 12, 53, 73, 76.

In addition we have argued for inclusions to strengthen the Family Court's response to children living with family violence by amending clauses 4, 5, 6, 14, 27.

Protection order respondents

We have raised concerns in our submission that some of the wording of changes to the Domestic Violence Act is likely to reduce the imperative on the court to refer protection order respondents to stopping violence programmes and remove the court's responsibility for oversight of those respondents other than ensuring they attend an assessment. This is most

[4] Vivian, p.4.

[5] Hilary Saunders, *Twenty-nine Child Homicides: Lessons Still to be Learnt on Domestic Violence and Child Protection*, England, 2004, p.35, http://www.judiciary.gov.uk/JCO%2FDocuments%2FFJC%2FPublications%2Ftwenty_nine_child_homicides.pdf (Accessed 12 February 2013).

concerning as research shows that mandating attendance at programmes prior to an appearance in criminal court is more effective in preventing future family violence offences.[6]

We have recommended removing/amending clauses 40, 43, 44.

Reducing the court's protective functions

We have argued against reducing access to legal representation for protection order applicants, respondents and their children under the Domestic Violence Act. We have also expressed concern about amendments that appear to amalgamate responses to family violence matters under the Domestic Violence Act with family disputes under the Care of Children Act. We must not trivialise family violence as simply another form of family dispute.

We recommend amending/removing clauses 53, 54, 57, 58, 73.

Lack of mechanisms to identify and respond to family violence

The introductory material of the Bill is lacking in detail about how the changes proposed will all 'hold together' in a cohesive system that both protects the vulnerable and enables good outcomes for parenting disputes. We do not consider that the Family Court Review Discussion Document provided that context because many of the changes proposed by the Bill were not explicitly discussed in the Review.

We have raised concerns in our submission about the lack of mechanisms to differentiate between family disputes and issues of safety related to family violence. The Bill's proposed amendments only heighten those concerns by removing the public's access to counselling and the additional support this service provides, and removing access to legal representation which provides the court with clarity and relevant information, and support when the court's protective functions are required.

Retaining the name of the Family Courts Act

We have argued against the proposed name change to the Family Courts Act to the Family Disputes (Resolution Methods) Act. In our view, the proposed change does not adequately reflect the Court's range of activities. Amalgamating the very important protective functions of the court under the title of Family Disputes (Resolution Methods) trivialises and minimises the very important protective functions of the Family Court as simply 'family disputes'.

We have recommended removal of clause 58.

Final Comments

We are concerned that the Bill promotes numerous, wide-ranging changes without any reference to similar models elsewhere or providing evidence, research or evaluations showing that the changes promoted will meet the stated goal of 'a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective'.

Many of the changes proposed have not been clearly presented to the community with adequate time for proper consultation. We fear that if this Bill is passed in its present form

[6] Anna Walters, 'Questioning Accountability: A Statistical Description of Programme Effectiveness as an Intervention through the Waitakere Family Violence Court', BHSc Thesis, Massey University, 2010, pp.70–1.

these changes will present an undue risk to the safety of children and vulnerable people, of which Waitakere has had first-hand experience from the chaos resulting after centralisation of the Waitakere, Warkworth and North Shore Family Courts to the Auckland District Court.[7]

We recommend in our submission that if the Ministry wishes to proceed with removing counselling and legal representation from the Family Court it should undertake a properly funded pilot in a small area and have this evaluated to support building a new system that is adequate to the purposes of the Family Court and is properly constructed to minimise adverse consequences for children and vulnerable people.

There are also long-standing issues around the Family Court and family violence that are well documented but unaddressed in this Bill. We would like to remind the Select Committee that these matters are still outstanding:

- There is considerable variation in understanding of family violence among Family and District Court professionals across the country that could be addressed by having a set of *Family Violence Best Practice Principles* such as that recently adopted by the Australian Family Court.[8]
- Changes proposed in the Domestic Violence Reform Bill 2008 (which has yet to come before Parliament) still need to be addressed, particularly around Section 47 of the Domestic Violence Act relating to the court's responsibilities when discharging protection orders.
- Family violence services would like to see improved information-sharing between the Family Court and the Family Violence or criminal jurisdiction of the District Court enabling the Family Court to better protect victims of family violence and their children.
- In Waitakere the Community Victims' Service provides support to victims during Family Violence Court proceedings which we would like to see extended to support victims through Family Court proceedings.

[7] See for example 'Papers reveal costly chaos of Family Courts', 2 December 2012, http://www.familylaw.org.nz/__data/assets/pdf_file/0003/59439/Stuff-021212-Papers-reveal-costly-chaos-of-Family-Courts.pdf (Accessed 12 February 2013); Sunday Star Times, 'Family Court "seeing the wheels falling off"', 26 August 2012, p.A12, http://www.familylaw.org.nz/__data/assets/pdf_file/0013/55210/Sunday_Star_Times_-_260812_-_Family_Court_seeing_the_wheels_falling_off.pdf (Accessed 13 February 2013).

[8] Family Court of Australia, *Family Violence Best Practice Principles*, 2011, http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf (accessed 1 February 2013)

SECTION TWO: BILL CLAUSE BY CLAUSE

Part 1: Amendments to the Care of Children Act 2004

Clause 4:

> *New section 4*, which provides for the paramountcy of a child's welfare and best interests, makes it clear that, in respect of a person who is seeking to have a role in the upbringing of a child, account may be taken of that person's conduct to the extent that it unnecessarily delays decisions, is obstructive, or is otherwise relevant. [Transcribed from the Bill]

The clause proposes an amendment to Section 4(2)(b)(iii) which should, in our view, refer to the welfare and best interests of the child since this is standard against which consideration of any other relevant issues is measured within this section of the Act.

We recommend amending clause 4 as it relates to Section 4(2)(b)(iii) to read as follows (our insertions italicised):

> '(iii) is otherwise relevant *to the welfare and best interests of the child*.'

> New section 5 simplifies and reorders the principles relating to a child's welfare and best interests in existing section 5 of the Act. Listed as the first principle is that a child must be protected from all forms of violence.

We agree with the intention in the Bill to reorder the principles relevant to children's welfare and best interests to bring to the fore protecting children from violence. However, the wording changes proposed in the new Sections 5(a), (d), and (e) go further than that signalled in the Bill's description above and are beyond the scope set out in the original Family Court Review, meaning that the implications of those changes have not been fully consulted upon.

We suggest that the existing Section 5 presents the participation by parents and wider family and kin in children's lives as an ideal. We see no useful purpose in narrowing these principles to exclude such statements and fear that removing references to their participation could have unintended consequences detrimental to children.

We also note that the word 'safety' is used in this and later sections but there is no definition of safety provided in either the principles of Section 5 or in the definitions provided in Section 8. Later in our submission (in the discussion about clause 6) we have recommended a definition of 'safety' be included.

We recommend in relation to the changes proposed in clause 4 of the Bill to Section 5:

Section 5(a): the amendment rewords the original section 5(e) but removes the the phrase: '(whether by members of his or her family, family group, whanau, hapu, or iwi or by other persons)'. In the absence of public consultation over changing the meaning of this section we believe that this phrase should not be removed from Section 5 by this Bill.

We suggest also that the wording of the remainder of the amendment too narrowly focuses assessments of children's safety on violence defined by the Domestic Violence Act, which could potentially mean that the court cannot consider the impact on children's wellbeing from

exposure to violence perpetrated by or on individuals outside a family/whanau, biological or other kind of domestic relationship. We recommend rewording Section 5(a) to say:

> 'a child's safety must be protected and, in particular, a child must be protected from *exposure to* all forms of violence ~~as~~ *including that* defined in section 3(2) to (5) of the Domestic Violence Act 1995 (whether by members of his or her family, family group, whanau, hapu, or iwi or by other persons)'

Section 5(d): the proposed amendment rewords some of the original Section 5(b) but does not include the bracketed phrase: '(in particular the child should have continuing relationships with both of his or her parents)'. Again, in the absence of any consultation over its removal from the principles relevant to the child's welfare and best interests, this phrase should remain within the Act until such consultation has been undertaken.

Section 5(e): the amendment rewords some of the original Section 5(d) but excludes the phrase: 'those members should be encouraged to participate in the child's care, development, and upbringing'. Again, in the absence of any consultation over its removal, we feel that this phrase should remain within the Act until such consultation has been undertaken.

Clause 5

> replaces section 7 with new sections 7 and 7A.
>
> New section 7 provides for the appointment of a lawyer to represent a child in proceedings. An appointment may be made in any case where the court has concerns for the safety or well-being of the child and considers that an appointment is necessary. This differs from existing section 7, which requires the court to appoint a lawyer to represent a child in every parenting dispute that appears likely to proceed to a hearing unless it is satisfied that the appointment would serve no useful purpose.
>
> Existing section 7(3) and (4), which are about what a lawyer appointed to represent a child may do, are dealt with in new section 9A of the Family Disputes (Resolution Methods) Act 1980 (inserted by clause 61).

Our network members and others from community and legal services with whom we have consulted have serious concerns that clause 5 proposes amendments to Section 7 and a new Section 7A which could curtail the court's abilities to identify and respond to safety issues for children. We draw the Committee's attention to one recent example of the court intervening to protect children in the midst of a parenting dispute, see the NZ Herald article titled: 'Horrified judge rescues children'.[9]

Family Court lawyers inform us that it is not unusual for court investigations involving lawyer for the child or counsel to assist the court to identify serious issues that result in notifications to Child Youth and Family Services (CYFS). Matters affecting the safety of children are not always identified before the commencement of a hearing. If parties to the dispute prepare and provide their own applications and evidence, and 'represent themselves without independent investigation on behalf of the children, and where evidence put before the court will occur without reference to legal provisions regarding rules of evidence, the

[9] NZ Herald, 15 December 2012, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10854196 (Accessed 22 January 2012).

system is opening up the way for many abusive situations to slip through the net. Constantly in court the judge makes referrals for investigation and Family Group Conferences to CYFS, so without evidence in court for the judge to make those calls, this will not happen.'[10]

We foresee that removing the right to legal representation will place greater onus on screening for family violence performed by Family Court coordinators. In Auckland workloads for these coordinators are already substantial and the recent centralisation of suburban courts to the Auckland and Manukau District Courts has exacerbated existing backlogs.[11] Therefore, we recommend that the Ministry should develop a pilot to see how these changes will impact the functioning of the court before proceeding to embed such extreme changes in legislation.

Section 7: the proposed change to this section downgrades children's right to representation from most cases involving the role of day-to-day care or contact with a child likely to proceed to a hearing, down to only those where there are identified concerns for the safety or wellbeing of the child.

We do not support this change for four reasons:

1. The proposed amendment to Section 7 is inconsistent with Section 6 of the Care of Children Act, which states that in matters of guardianship, day-to-day care or contact children 'must be given reasonable opportunities to express views on matters affecting [them]' and their views must be taken into account.[12] We note that there is no provision elsewhere in the Bill that would provide other mechanisms for children's views to be heard by the court.
2. The proposed amendment and the lack of any other provision enabling children's views to be heard by the court contravenes New Zealand's obligations under the United Nations Convention on the Rights of the Child: Article 12, which states that children have the right to express their views on matters affecting them.[13]
3. The wording of the proposed amendment Section 7(a) presumes that the court is well equipped to identify safety concerns for children before proceedings begin. Family Lawyers tell us that Lawyer for the Child and Counsel to Assist contribute to those processes by conducting independent investigation into the issues affecting the child. Reducing children's access to these appointments to only those whose parents have identified safety concerns in their applications to the court will remove vital access to justice and to safety for many children.
4. The problems associated with lack of legal representation will be further compounded by the lack of legal support for disputing parties in the proposed new Family Court process (either self-funded or utilising legal aid). Without access to good legal advice some parents may fail to understand the importance of bringing safety issues to the fore in their submissions or simply be unaware that they can ask

[10] Communication received from Judith Surgenor, Barrister, West Auckland Barristers Chambers, 19 December 2012.
[11] See for example 'Papers Reveal Costly Chaos of Family Court', http://www.familylaw.org.nz/__data/assets/pdf_file/0003/59439/Stuff-021212-Papers-reveal-costly-chaos-of-Family-Courts.pdf (Accessed 31 January 2013).
[12] Care of Children Act, s.6(2)(a)–(b)
[13] For discussion on this Article and its legal implications see Gerison Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, Chapter 2, http://www.unicef.org/adolescence/files/Every_Childs_Right_to_be_Heard.pdf (Accessed 23 January 2013).

the court to consider issues of economic and psychological abuse as well as physical abuse.

We recommend that the proposed changes to Section 7(1) and (2) be removed from clause 5. Our comments in relation to Section 7(3) and (4) are addressed later in this submission in comments on the changes to the Family Courts Act.

We further recommend that if the decision is made to proceed with changes to Section 7 then we recommend that section 7(a) is changed to say (our changes are italicised):

> '*finds it necessary to ensure that the court has full information as it impacts on the child, or* has concerns for the safety or well-being of the child; and'

> New section 7A provides that a lawyer may act for a party to proceedings under the Act only in certain circumstances. These circumstances are where—
>
> • a proceeding has been commenced without notice:
>
> • a proceeding has been commenced under subpart 4 of Part 2 of the Act (international child abduction):
>
> • the party is the Crown:
>
> • a defended proceeding is to proceed to a hearing:
>
> • a child is a party to a proceeding and a lawyer has been appointed to represent the child.
>
> New section 7A(6) defines act.
>
> New section 7A(7) clarifies that new section 7A does not prevent a lawyer from giving legal advice to a party or preparing a document for a party.

Network members and other stakeholders have serious concerns about the proposed new Section 7A for the following reasons:

1. The proposed changes promote power imbalances between the parties to a dispute by making legal advice optional and keeping this behind the scenes which will disadvantage those who are unable to fund legal consultation.
2. The exceptions in Section 7A(2) allowing legal representation for some types of applications are focused on pre-identified safety concerns overlooking that the proposed new processes will reduce rather than enhance opportunities to identify those concerns — for example legal representation is at times key to identifying and clarifying issues of family violence for the court.
3. Removing the right to legal representation (and legal aid) means that vulnerable parties may seek free advice elsewhere opening opportunities for lobby groups to use parties to promote a political agenda which may not necessarily intend to gain good outcomes for the party.
4. Finally, the Family Court for all its differences from other courts is still a legal forum which decisions carry legal consequences and those appearing are entitled to legal advice and representation.

We recommend that all of Section 7A be removed from clause 5 of the Bill.

We also recommend that if the Ministry of Justice wishes to implement such substantial reshaping of Family Court processes then they should conduct a properly researched and implemented pilot programme from which outcomes for families are evaluated to assess the

merits of undertaking such a fundamental change in processes and to ensure that unintended consequences and safety issues are identified and addressed within any new system.

Clause 6:

amends section 8, which is the interpretation provision, to insert definitions of—

- approved counselling organisation, counselling, and counsellor for the purposes of new sections 46E to 46H (inserted by clause 9); and
- parenting information programme for the purpose of new section 47A (inserted by clause 10).

Section 8: Stakeholders were concerned that the Family Court Review process discussed mandatory attendance at a 'Parenting through Separation' (PTS) course prior to an application being accepted by the Court, but the changes proposed by clause 6 to Section 8 describe a more generic 'parenting information programme'. Most stakeholders agreed in principle to mandatory PTS on the basis that PTS has been well constructed and evaluated. They were concerned that that there had been no discussion in the Family Court Review as to what other kind of programmes would be considered by the Ministry as suitable alternatives. They asked that we express disquiet that the proposed legislative change is not consistent with the original Review.

We recommend the Ministry consult with parenting groups and PTS programme providers when developing criteria for parenting information programmes delivered via the Family Court.

We also note that the words 'safety' and 'safe' are used in both the Bill and the existing Act but are not defined in Section 8, which is a problem given that the Court is asked to assess issues of safety for children but it is not clear what aspects of safety for children the court is being asked to make assessment on.

We recommend clause 6 should include an amendment to Section 8 giving a definition of safety such as:

> '***Safety of a child*** *means that reasonable steps are taken or in place to ensure a child is protected from harm or exposure to harmful experiences including those referenced in Section 14 of the Children, Young Persons and Their Families Act 1989 and Section 3 of the Domestic Violence Act 1995.'*

Clause 7:

replaces section 40(1). New section 40(1) no longer enables a party to an agreement about the care or upbringing of a child to request counselling from the Family Court in respect of a dispute arising from that agreement.

We refer the Committee to our earlier comments about the inconsistencies between the Family Court Review and the Bill. The Family Court Review discussed removing access to counselling as the gateway to the court and did not suggest that the court would remove access to counselling for those who seek support around existing court orders.

In addition we fail to see how removing access to counselling will reduce the numbers of applications to the court, given that counselling offers support to families to resolve issues themselves without application to the court.

We recommend that the clause 7 be removed from the Bill and the Select Committee refer the matter back to the Ministry of Justice to research, implement and evaluate a trial of new processes before proceeding to nationwide changes untested.

Clause 8:

repeals sections 44 to 46.

We do not support the repeal of sections 44 to 46 for the reasons given in our response to Clause 7.

We recommend that clause 8 be removed from the Bill and the Ministry be advised to trial the removal of Family Court counselling in a properly researched and evaluated pilot.

Clause 9:

New section 46E enables a Judge to refer to counselling parties to a guardianship or parenting dispute for the purposes of—

- improving their relationship; and
- encouraging compliance with a subsequent court order or direction.

A referral can, however, only be made if the Judge considers that counselling is the best means of fulfilling these purposes. A direction to attend counselling may be made at any stage of the proceedings, but only once.

New Section 46E: we agree in principle to this addition but see no value in limiting counselling to one session per proceeding (it is not clearly stated how many sessions will be allocated and who makes that decision). We suggest the proposed Section 46E(4)(b) be reworded to say:

‘ ~~once~~ *one referral* only during the course of the proceedings’

New section 46G provides that evidence of a statement made by a party to a counsellor is not admissible in any court.

New Section 46G: we do not approve this change. Whilst we agree with the general principle that counselling is a private matter between counsellor and clients and should not be used to gather evidence for court proceedings there are circumstances when counsellors must observe their ethical obligations to report matters such as child abuse. Counselling privilege is clearly outlined by counsellors’ governing bodies. All those appointed by the court to provide counselling services must be associated with some form of governing body which sets ethical standards of practice. As it stands this amendment is too restrictive and fails to specify that it applies only to repeating in court information received at counselling.

We recommend that Section 46G be removed from clause 9.

Clause 10:

inserts new sections 47A and 47B.
Section 49 of the Act currently requires an application for a parenting order to include a statement about the involvement of other persons in the child's life.
New section 47A re-enacts that requirement. New section 47B adds a requirement for another statement and evidence to support it. The new statement is required in applications for a parenting order and applications to vary a parenting order. The statement is that the applicant has undertaken a parenting information programme or that the applicant is not required to undertake a programme. If a Registrar considers that the evidence provided in support of the statement is not adequate, the Registrar may refuse to accept the application

We recommend that the wording of Section 47B(2)(a) be amended to say:

> 'that the applicant has undertaken a*n approved* parenting information programme within the preceding 2 years; or'

We offer a further comment questioning the feasibility of these changes. We wonder how this new Section 47A will work if a without notice application is made to the Court and then is put 'on notice' as often occurs in the case of protection order applications. Will the applicant then be required to attend a parenting information programme because her/his application is no longer without notice? How will this promote the safety of children which is a primary concern of the Family Court?

We recommend the Select Committee consider whether provisions for dealing with such circumstances should be contained in the Bill.

Clause 11:

repeals section 48(4) to (6). These provisions are now dealt with in new sections 49 and 49A (inserted by clause 12).

See our comments on clause 12 below.

Clause 12:

replaces section 49 with new sections 49 and 49A.
New section 49 provides for the making of interim parenting orders. An interim parenting order may be made by the court at any time before a final parenting order is made.

Stakeholders were concerned that the circumstances in which interim orders are made granting one parent neither day-to-day care nor contact with children are likely to involve serious safety concerns. Whilst our network generally supports that the Court should observe children's timeframes when making interim orders that limit or deny contact between parents and children, they do not support provisions that could operate to finalise parenting orders before matters involving the safety of children have been adequately resolved.

We also point out to the Select Committee that this amendment proposes timeframes that appear inconsistent with the realities of court backlogs in some areas such as Auckland.

We recommend rewording clause 12 relating to Section 49(3) to say:

'If this subsection applies, the court must, as soon as practicable, assign a date for the ~~final determination~~ *review* of the application for a parenting order that is within 3 months of the date of the interim order.'

New section 49A provides for the making of final parenting orders. A final parenting order must be made at the final Family Court hearing, unless made earlier during the proceeding with the consent of the parties.

We do not support the new Section 49A(2). As discussed in relation to Section 49, where concerns about the safety of children are such that an interim order is made denying contact with a parent then the court must not be bound to make a final order before those issues have been clarified and resolved.

We recommend altering clause 12 in relation to the proposed new Section 49A(2) to say:

'When an application for a parenting order is finally determined in the Family Court, a Judge ~~must~~ *may* make a final parenting order.'

Our network does not support the payment of bonds as a condition of a parenting order.

We recommend removing the reference to bonds from clause 12 in relation to the proposed section 49A(3):

'A final parenting order may be made subject to any terms and conditions the court considers appropriate *and in the welfare and best interests of the child(ren)* ~~(for example, a condition requiring a party to enter into a bond)~~.'

Clause 13:

repeals section 51(3), consequential on the amendments to section 48.

We recommend that clause 13 be removed from the Bill. We do not support repeal of Section 60; this section should remain in the Act as should Section 60 (which we will comment on later in this submission).

Clause 14:

replaces section 57. New section 57 provides that parties to a final parenting order may subsequently obtain a variation of that order by filing in court a consent memorandum. Parties who agree to a variation will not have to file a formal application under section 56 and attend court.

We are concerned that this amendment applies to all parenting orders equally and makes no distinction for families where the original order dealt with issues of family violence or child abuse. Stakeholders are well aware that victims of family violence frequently experience pressure from abusers and other family members to agree to changes in parenting arrangements that are unsafe for them and their children and which will operate to increase the abuser's control over them.

We recommend that where parenting orders have been made in response to allegations of violence or as a result of a without notice application the court should proceed with caution in

relation to variations requested by consent memoranda. Applicants should have access to legal representation and lawyer for the child(ren) should be available.

We recommend that clause 14 relating to Section 57(2) should read:

> 'A party to the final parenting order may, *if the order was not made on an application without notice or involving allegations of violence*, instead of applying under section 56 for a variation of the order, file a consent memorandum seeking an order in terms of the proposed variation.'

> also replaces sections 58 to 62. These provisions currently prevent a court from making an order giving a violent party day-today care of, or contact with, a child unless it is satisfied, after taking into account certain specified matters, that the child will be safe. The court may instead make an order for supervised contact between the child and the violent party. This regime is replaced by the simpler provisions of new sections 58 to 60.
>
> New section 58 is an interpretation provision and defines approved provider and supervised contact.

We recommend improving the current definition of 'allegation of violence' in Section 58 to reflect the range of abuses defined in the Domestic Violence Act 1995, we suggest this definition should read:

> '**allegation of violence**, in relation to a party to the proceedings, means an allegation that that party has ~~physically or sexually abused~~ *committed acts of violence as defined in Section 3 of the Domestic Violence Act 1995*'

We recommend improving the current definition for 'violent party' subsection (b) in Section 58 to better reflect the reality of proceedings where often allegations may not be corroborated but in their entirety are sufficiently concerning to cause the court to review the safety of children, we suggest this definition should read:

> '(b) an allegation of violence is made that, on the basis of the evidence presented by, or on behalf of, the parties to the proceedings (without the court being required to make inquiries on its own initiative), *is accepted by* the court ~~is satisfied is proved~~'

We make this recommendation based upon the comments contained in the *Family Violence Best Practice Principles* of the Australian Family Court which state that:

> *Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.*
> *The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.*[14]

[14] Family Court of Australia, *Family Violence Best Practice Principles*, 2011, p.6, http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf (accessed 1 February 2013).

> New section 59 enables the court to make an order for supervised contact between a child and any person if it is not satisfied that the child will be safe with that person.

In conjunction with the replacement of existing Section 60 and the lack of a definition of safety in Section 8 (which we have recommended should be addressed) the proposed new Section 59 has the potential to limit the Court's focus on children's safety to violence directed against children. There is significant risk that the combined effect of the changes proposed in clause 14 of this Bill (if it is passed in its current form) will reduce the court's ability to protect children living in homes affected by family violence where there is little evidence presented in parties' statements of direct assaults on children.

We recommend the amendment to Section 59 should be removed from clause 14 of the Bill.

We also recommend that clause 14 should include an amendment to the existing Section 59(1)(b) should be strengthened to say:

> 'is not satisfied that the child will be safe *from all forms of violence as defined by the Domestic Violence Act 1995, including witnessing violence,* with that person.*'*

> New section 60, which re-enacts existing section 62, deals with the cost of supervised contact.

We recommend the proposal to replace the existing Section 60 should be removed from clause 14. The clause's proposed new Section 60 should be renumbered to replace Section 62 of the Act.

We also recommend further strengthening the existing section 60(4) by rewording it:

> 'In the situation in subsection (3), the court may make an order in subsection (3)(a) or (b) if, after complying with section 61, the court is satisfied that the child will be safe *from all forms of violence including witnessing violence* while the violent party—'

We recommend that existing Sections 61 and 61A be retained in the Care of Children Act and the repeal of those sections should be removed from clause 14 of the Bill.

Clause 17:

> repeals sections 65 to 67 so that counselling from the Family Court may no longer be requested by any of the following persons in relation to a dispute—
>
> - a party to a parenting order:
> - a party to a parenting agreement:
> - a guardian of a child

We do not support this amendment for the reasons outlined earlier in this submission. There is some support within our network for a more targeted approach to Family Court counselling that would mean the court makes referrals for funded counselling services for those who intend to make an application on the court for proceedings under the Care of Children Act. Our network members and family court counsellors are willing to discuss this further with the

Ministry but are adamant that the wholesale removal of counselling from the Family Court will cause more harm than good.

We recommend that clause 17 be removed from the Bill.

Clause 18:

amends the heading to section 69 and repeals section 69(1)(a). These amendments are consequential on the repeal of sections 65 and 66 (see clause 17).

We recommend that clause 18 be removed from the Bill.

Clause 21:

amends section 131, which provides for payment of the fees and expenses of a lawyer appointed to represent a child or to assist the court. The substantive amendment is to section 131(1)(a), to refer to fees and expenses being determined in accordance with regulations made under new section 16D of the Family Disputes (Resolution Methods) Act 1980 (inserted byclause66).

We have concerns about this amendment which removes from the Act lawyers' right to appeal costs. As one participant in our consultation meetings put it, this has the potential to constrain within a predetermined budget the amount of work able to be done rather than focusing on what work is needed to produce the information required by the court.

We recommend that the regulations be drafted to allow flexibility in funding of court appointed counsel to ensure that the primary goal is to meet the needs of the court in individual cases.

Clause 24:

replaces section 135, which provides for the costs of reports requested under section 133. New section 135(1)(a) provides for the fees and reasonable expenses incurred in the preparation of a report requested under new section 133 to be determined in accordance with regulations made under new section 16D of the Family Disputes(Resolution Methods)Act1980. New section 135(1)(b) provides that these fees and expenses are payable by the Crown. However, under section 135(2), the court must make an order under new section 135A unless the court declines to do so in accordance with that section.

We do not support the proposed new Sections 135(2),(3),(4),(5), and (6) relating to the requirement on the court to recoup costs for reports from parties to the dispute.

We believe that the change proposed in clause 22 provides sufficient limits on the Court's use of reports, addressing the concerns of some participants at our consultation meetings that at times the Court is perceived to 'overuse' external reports. If, having consideration to the new Section 133, the Court is sufficiently concerned about the wellbeing of children to request a report then the cost is a matter for the Ministry to settle with the report writer not one that should be passed on to the parties – who may well have had no say and/or no interest in a report being produced.

We recommend that Sections 135(2), (3), (4), (5), and (6) be removed from clause 24.

New section 135A provides that the court must order the parties to refund a proportion of the amount paid by the Crown for the preparation of a report requested undernewsection133. The proportion will be prescribed by regulations. The court may decline to make an order against a party if it is satisfied that it would cause serious hardship to the party or to a dependent child of the party. The new section sets out definitions of serious hardship and dependent child. Generally, the part-reimbursement of the fees will be shared equally by the parties. However, the court may set a different amount for a party, having regard to the circumstances of the case, including the conduct of the party.

New section 135B provides for the enforcement of orders requiring parties to refund the fees for the preparation of a report requested under new section 133. Such orders may be enforced in the same way as judgments of the court. The provision discontinues the requirement for a further order.

New section 135C authorises a Registrar to enter into an arrangement with a party who has an outstanding obligation to contribute towards the fees for the preparation of a report requested under new section 133. The arrangement may allow the party greater time to pay, or to pay by instalments.

We do not support the imposition of costs for reports on parties to a dispute.

We recommend that new sections 135A, 135B, and 135C be removed from clause 24.

Clause 25:

amends section 137, which provides who may attend the hearing of a proceeding. Subsection (1)(b) is replaced as a consequence of new section 7A (inserted by clause 5), because parties will not always be represented at a hearing. Subsection (1)(c) is replaced as a consequence of new section 7 (inserted by clause 5) and new section130 (inserted by clause 20). Subsection (4)(c) and (5) are repealed because of the repeal of section 138 (see clause 26).

We have requested that the new Section 7A be removed from clause 5 of the Bill, therefore:

We recommend that clause 25 be removed from the Bill.

Clause26:

repeals section 138, which provides for the attendance at hearings of persons involved in counselling. The repeal of sections 65 to 67 (see clause 17) makes section 138 redundant

We recommend that clause 26 be removed from the Bill.

Clause 27:

Inserts new section 139A, which requires the leave of the court to be obtained if it is proposed to commence a proceeding for a parenting order, an order varying or discharging a parenting order, or an order resolving a guardianship dispute that is—

- substantially similar to a previous proceeding; and
- less than 2 years after the final judgment was given in that previous proceeding.

The leave of the court may only be given if, since the previous proceeding, there has been a material change in the circumstances of any party or any child who was the subject of the previous proceed

We feel that this section is too focused upon the behaviour of parties to the dispute and does not allow the Court to provide sufficient protection for children living with family violence or where there are child protection concerns.

We recommend rewording section 139A(4) in clause 27 to say (our changes italicised):

'This section does not apply:

(a) if every party to the new proceeding consents to its commencement.

(b) If the application or proceeding relates to the principle that children must be protected from all forms of violence in Section 5(a) of this Act'

Clause 29:

amends section 147, which provides for the making of regulations. These are all consequential amendments. For example, a new power is inserted to make regulations prescribing the proportion of the amount paid by the Crown for the preparation of a report requested under new section 133 that parties must be ordered to refund under new section 135A (inserted by clause 24).

We support the inclusion of the new Section 147(1)(aa) in clause 29.

We recommend the remainder of clause 29 be removed from the Bill as we have previously recommended removal of the proposed new sections referenced, namely proposed new sections 59, 60, and 135A.

Clause30:

Amends section 148(2). This amendment is consequential on the repeal of sections 66 and 69(1)(a).

We recommend removal of clause 30 from the Bill as we have also recommended removal of clauses repealing sections 66 and 69.

Clause 31:

Amends section 152 to repeal the Care of Children Amendment Act 2008. Although there are a number of provisions in this Amendment Act relating to counselling and mediation that have not yet come into force, these provisions are not to come into force

We recommend that clause 31 be removed from the Bill, reflecting that we have earlier requested clauses affecting access to counselling be removed.

Clause 32:

is a transitional provision for proceedings commenced under the Act before 1 October 2013 but not completed by that date. These proceedings are not affected by new section 7A (inserted by clause 5), new sections 135A to 135C (inserted by clause 24), or by the repeal of section 57 (see clause 14). Also, existing sections 58 to 62 and 147(2)(a)

and (b) continue to apply in any of these proceedings in which an order for supervised contact has been made.

Further, if in any of these proceedings counselling has been arranged or is in progress immediately before 1 October 2013, that counselling may continue (but not beyond 31 January 2014).

We recommend clause 32 be reworded to reflect the earlier recommendations to remove or amend clauses relating to sections 7 and 7A; 57; 58–62; 65; 135 and 135A, B, and C; 137; 147.

Part 2: Amendments to the Domestic Violence Act

Clause 40:

replaces sections 31 to 35.

Section 31: We support the intention of clause 40 to amend section 31 to enable provision of joint programmes to protected persons and respondents. However, we are concerned that the wording of this clause sets the threshold for admission into such programmes too high to be practicable. It is inconceivable that a protection order will be granted to an applicant if there are 'no safety issues' regarding contact with the respondent (reference new Section 31(2)(c)). There will be considerable safety issues for protected persons during programme attendance and indeed in daily life. A key role of a programme provider offering joint programmes is to demonstrate an understanding of those issues and formulate a plan to mitigate or manage these during the course of a joint programme.

We recommend rewording clause 40 in relation to the proposed new Section 31(2)(c) to say:

> 'the programme provider is satisfied that ~~no safety issues exist~~ *safety issues can be managed or mitigated and can demonstrate a plan to do so*; and'

We also recommend that the Select Committee consider how joint programmes will be assessed and approved by the Ministry given the significant safety risks these pose for protected persons. Members of our network would welcome the opportunity to work with the Ministry to develop the standards for approval of such programmes.

Clause 40 proposes replacing the existing Section 32 with a new Section 32 which we do not support.

Our objection relates to the proposed new sections 32(1)(2) and (4) which reword the provisions of the existing section 32 in such a way as to reduce the imperative on the court to refer a protection order respondent to a programme.

We highlight the wording changes to Section 32(1) and (2) which alter the existing wording:

> 'the court must direct the respondent to attend a specified programme, unless the court considers that there is good reason for not making such a direction.'
>
> To:
>
> 'the court must direct the respondent to .... (2) [but] need not make a direction under [the previous subsection] if...'

We view these changes, although relatively minor, as having the potential to reduce the numbers of respondents referred to programmes by the court. This change was not signalled by the Family Court Review and has not had sufficient consultation. It is also counter to the evidence presented by the World Health Organisation which shows that stopping violence programmes are most effective at preventing future violence if mandated and monitored as part of a coordinated response to violence including both criminal and civil responses (e.g. protection orders).[15] Local research indicates that

[15] World Health Organization, *Policy Approaches to Engaging Men and Boys in Achieving Gender Equality and Health Equality*, Geneva, 2010, p.26.

mandating protection order respondents to do programmes is more effective than mandating offenders convicted in the criminal courts.[16]

We recommend the proposed changes to section 32 be removed from Clause 40.

We support the intention of the proposed changes to Section 35 in clause 40. However we are concerned that there is no provision in the new Section 35(2) for record-keeping.

We recommend that clause 40 be amended in relation to proposed new Section 35(2) include as subsection (d):

> 'that provider notices to respondents should be confirmed in writing.'

Clause 43:

> Replaces sections 39 and 40. Currently, section 39 requires a programme provider to notify the Registrar within 7 days if a respondent or an associated respondent fails to attend any programme session. New section 39 requires a programme provider to notify the Registrar if a respondent or an associated respondent fails to undertake an assessment or to attend a programme in accordance with the terms of the direction. New section 40 requires a programme provider to notify the Registrar when a programme attended by a respondent or an associated respondent has concluded. The Registrar must then notify this fact to the applicant or to the applicant's lawyer.

We believe that the new Section 40 proposed by clause 43 is inadequately worded. As it stands the proposed new section 40(1) merely requires providers to tell the court that the 'programme ... has concluded', which has little relevance to the respondent's participation in the programme (for example the programme may have concluded because programmes cease over the Christmas break and the new intake occurs in the New Year). The proposed new wording is extremely dangerous because the court is expected to pass on this information to protected persons, giving the impression that the respondent has engaged in a programme to its completion that may not actually be the case at all.

We recommend rewording clause 43 regarding the proposed new Section 40(1) to keep the focus on the respondent:

> 'When a ~~programme attended by a~~ respondent or associated respondent has concluded *a programme*, the programme provider must notify that fact in writing and without delay to the Registrar of the court.'

We also recommend the Select Committee give thought amending clause 43 to include in this subsection reference that:

> '*the provider is satisfied with the respondent's participation in the programme, in particular, by completing any tasks set as part of the programme*.'

[16] Walters.

Clause 44:

> Repeals section 41, which is no longer required because of new section 35A (see clause 40)

We support the intention of clause 44 to reduce the bureaucracy around programme delivery. However, we do not wish to see court oversight of respondents' attendance at programmes removed completely. Lack of oversight by the court raises considerable safety issues for protected persons to whom the court has continued obligations under section 40(2). The court should be informed about the status of its referrals particularly in cases where the provider has concerns about a respondent's attendance or participation.

We recommend that clause 44 be amended to repeal only section 41(1)(a) and retain and amalgamate 41(1) and (1)(b).

Clause 45:

> Amends section 41A, consequential on the repeal of section 41 (see clause 44).

We recommend removal of clause 45 from the Bill.

Clause 46:

> replaces section 42 so that it applies only where a Registrar has brought a matter to the attention of a Judge under section 41A(1)(b).

We recommend including in the proposed new section 42(1) reference to section 41(1) for example:

> 'If, under section *41(1) or* 41A(1)(b), a Registrar brings a matter to the attention of a Judge, **subsection (2)** applies'

Clause 47:

> repeals section 42A(2), which is no longer relevant because a variation of a direction cannot be requested under section41 by a programme provider. Section 41 is repealed by clause 44.

We recommend clause 47 be removed from the Bill on the basis that we have argued for retention of some of clause 41 in the Act.

Clause 49:

> Amends section 43(4) to replace references to programme with references to domestic violence support programmes or non-violence programmes, as appropriate.

We recommend rewording the proposed changes to Section 43(4)(a) removing reference to sections 40 and 41 on the basis that we have argued for retention of some of those sections in the Domestic Violence Act.

We support the remainder of clause 49 as it applies to the proposed new sections 42(2)–(5).

Clause 53:

> amends section 81 so that subsections (2), (3), and (4) do not apply in respect of a lawyer appointed to assist the court, or to represent a child, in proceedings under the Act (new sections 9A and 9B of the Family Disputes (Resolution Methods) Act 1980 apply to such appointments). A new sub clause (2A) is also inserted to deal with payment of the fees and expenses of a lawyer appointed to assist the court or represent a child.

This clause causes us concern. We fear its effect will be to align protection order applicants and their children's rights to legal representation with the proposal to reduce parties' rights to legal representation in court in family disputes. This is concerning on two fronts:

1. We have not supported the clauses in this Bill that effect a reduction of parties' rights to legal representation in the Family Court, and
2. Applications for protection orders (although civil matters) should not be considered synonymous with family disputes. In the case of protection orders there are clear safety concerns for both applicants and their children that the court must be adequately resourced to address. In hearing these applications the court must be free to appoint legal counsel for minors, (self-represented) applicants and respondents, and to assist the court whenever it is deemed necessary.

We recommend removal of clause 53 from the Bill.

Clause 54:

> makes consequential amendments to section 127, which is the regulation-making provision.

We recommend removal of the proposed change to section 127(f) from clause 54 reflecting our request to remove clause 53 from the Bill.

Part 3: Amendments to Family Courts Act 1980

Clause 57:

repeals the statement that used to be known colloquially as the Long Title.

We recommend this clause be removed from the Bill and comment further below.

Clause 58:

replaces the title Family Courts Act 1980 with the title Family Disputes (Resolution Methods) Act 1980. The purpose of the change in title is to change the focus of parties to family disputes and those who work with them. There will no longer be a Family Courts Act to which those involved can turn. Instead, there will be legislation that clearly indicates—

- Family Courts are only 1 method for resolving family disputes:
- family dispute resolution is the other method and it comes first.

To emphasise the primary position of family dispute resolution, the Bill inserts Part headings in the Act. Family dispute resolution is in new Part 1 (clause 60), Family Courts are in new Part 2 (clause 60), regulations and rules are in new Part 3 (clause 63), and amendments, transitionals, and savings are in new Part 4 (clause 66). In addition to providing a re-focused title, clause 67 replaces the commencement provision with a new one incorporating references to the new measures introduced by the Bill.

We believe renaming the Family Courts Act to the Family Disputes (Resolution Methods) Act obscures the very important protective functions of the court and minimises its role in protecting vulnerable people. The Family Court deals with a range of application types, which although relevant to families are clearly not always 'family disputes'. Such applications include supporting individuals who lack capacity to care for themselves, child protection matters including guardianship and oversight of children in care, hearing applications for protection orders under the Domestic Violence Act and referring protected persons and respondents to programmes.

Whilst there is general support for parties to family disputes under the Care of Children Act and Property Relationships Act being required to attempt to resolve their issues before having these heard in court, we do not see why the Family Courts Act needs a name change to achieve that goal.

We recommend the change to Section 1 be removed from clause 58 of the Bill.

Clause 59:

> Amends the interpretation section to include definitions of terms associated with family dispute resolution.

We support clause 59.

However, we also raise a question about the wording of the proposed definition of **family dispute resolution** (FDR) that the Select Committee may wish to clarify. One wonders how parties to a family dispute will locate an FDR provider, 'without applying to a court' for the information they need? It seems to us that the system reflected in the extensive changes proposed in this Bill has not been well thought through in terms of identifying and clarifying pathways into the Family Court. We raise, yet again, the need for a properly researched and piloted study of the new model proposed for the Family Court before such sweeping changes are embedded in legislation.

Clause 60:

> inserts a purpose provision into the Family Disputes (Resolution Methods) Act 1980. The first 2 purposes concern family dispute resolution and the second 2 repeat the wording of the old Long Title.

We have concerns about the new section 3D proposed by clause 60 as it relates to families affected by family violence. We argue that requiring applicants to provide an affidavit providing reasonable grounds to believe that domestic violence has occurred places unreasonable impediments on vulnerable people particularly if legal aid is not available to fund the production of an affidavit. We envisage that this will be a significant issue with the new Family Court system given that the Family Court Review recorded that some 51% of Care of Children Act cases sampled contained allegations of domestic violence.

We recommend changing clause 60 in relation to Section 3D(f) to say:

> 'is accompanied by ~~an affidavit~~ a statement providing reasonable grounds to believe that'

We recommend Section 3E be removed from clause 60, for reasons see our comments on clause 9.

Clause 62:

> inserts a new section 12A to combine, unify, and expand provisions about admissible evidence in Family Courts, provisions currently found in the Adoption Act 1955, Care of Children Act 2004, Child Support Act 1991, Children, Young Persons, and Their Families Act 1989, Domestic Violence Act 1995, Family Proceedings Act 1980,

Property (Relationships) Act 1976, and Protection of Personal and Property Rights Act 1988. The legal position is that the admissibility of evidence is determined initially by the Evidence Act 2006. The legal position is stated in the Evidence Act 2006. The expansion referred to in the previous paragraph that new section 12A makes is to state the legal position again so that in future it will appear in both the Evidence Act 2006 and the Family Disputes (Resolution Methods) Act 1980.

We recommend rewording clause 62 relating to new Section 12A(4) to make it consistent with the sections of the Care of Children Act and Domestic Violence Act which it replaces to say:

> 'The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any material, whether or not admissible under the Evidence Act 2006 *or otherwise admissible in a court of law*, that the court considers may assist it to determine the proceeding.'

Clause 64:

> provides for the making of regulations about family dispute resolution.

We support clause 64 but wish to make comment about the proposed new Section 16AA(f) which allows for the setting of a maximum number of hours for attempts at family dispute resolution. We feel that there should be some mechanism, as is the case for counselling, whereby the provider may apply for more hours than the maximum if they feel it is justified to obtain a resolution.

Clause 65:

> amends the heading of section 16B, the current provision on regulations, to make it clear that the provision deals only with court fees. It also removes a regulation-making power about Senior Family Court Registrars that is no longer necessary because there are no Senior Family Court Registrars, and it is no longer intended that there be Senior Family Court Registrars.

We recommend clause 65 be removed from the Bill until such time as it is clear that these positions are not required. As we have commented earlier, there has been no trial of the extensive changes proposed to the Family Court and thus there is no certainty that if passed this Bill will result in a reduction of its workload. Senior Family Court Registrars may well be needed to overcome unforeseen consequences of the Bill. We also note this change was not signalled in the original Family Court Review.

Clause 66:

> Inserts a new section 16D in the Family Disputes (Resolution Methods) Act 1980. The new section provides powers to make regulations on payments to professional people working in the Family Courts. The professionals affected are people appointed as lawyers for children or lawyers to assist the court and people who prepare specialist reports on children. The Acts that provide for the appointment of lawyers for children and lawyers to assist the court are the Care of Children Act 2004, Child Support Act 1991, Children, Young Persons, and Their Families Act 1989, Domestic Violence Act 1995, Family Proceedings Act 1980,
>
> Property (Relationships) Act 1976, and Protection of Personal and Property Rights Act 1988. Each Act currently contains powers to make regulations prescribing the lawyers' fees and expenses.

We recommend this clause include provision for payment of FDR providers. We do not support the intention to make FDR user pays for the following reasons:

1. It is not in the interests of children to have impediments to parents' resolving family disputes themselves.
2. The expectation that parties to a dispute will evenly share costs is unrealistic and may result in abuse of power as one party may withhold payment to ensure that FDR cannot proceed.
3. Fails to recognise that parties are directed to undertake FDR by the court.

Clause 67:

> Adds amendments to section 17. Most of the amendments simplify family law by removing provisions that have been combined and unified.

We recommend removing reference to 'Family Disputes (Resolution Methods) Act' from this clause.

Part 4: Amendments to Legal Services Act 2011

Clause 70:

provides that Part 4 amends the Legal Services Act 2011 (the Act).

Clause 71:

amends section 7, which provides that legal aid may be granted for proceedings in a Family Court. The amendment inserts 3 new subsections in section7. The effect of new subsections (3A) and (3B) is to limit the availability of legal aid in proceedings under the Care of Children Act 2004 in the Family Court. In general, legal aid will be available if a lawyer may, under new section 7A of the Care of Children Act 2004, act in those proceedings for the party (not being the Crown). However, legal aid will not be available in proceedings commenced under the Act on an application made without notice that—

- affects the applicant only; or
- is in respect of a routine matter; or
- does not affect the interests of any other person.

Legal aid may also be granted for legal advice given to a party to proceedings who has been directed by a Judge to obtain legal advice before consenting to an order settling the issues in dispute.

We recommend that clauses 70 and 71 be removed from the Bill.

Part 5 Amendments to other Acts

Subpart 1—Amendments to Child Support Act 1991

Clause 73:

replaces section 226, which provides for the appointment of a barrister or solicitor to assist the court or represent children in proceedings under the Act. There are 3 new provisions—

• *new section 226*, dealing with the appointment of a lawyer to represent children in proceedings under the Act; and

• *new section 226A*, dealing with the appointment of a lawyer to assist the court in proceedings under the Act; and

• *new section 226B*, dealing with the fees and expenses of a lawyer appointed under either *new section 226* or *new section 226A*.

The new provisions refer to lawyer rather than to barrister or solicitor and simplify the wording of section 226, having regard to *new sections 9A, 9B, and 16D* of the Family Disputes (Resolution Methods) Act 1980 (inserted by *clauses 61 and 66*).

We are concerned about the proposed new wording of Section 226(1). The court is already instructed by the Act that it 'may' appoint counsel if deeming the appointment is 'necessary or desirable'; adding the word 'only' to the Act seems superfluous unless the intention is to further restrict such appointments, which is not in the interests of the children the court seeks to protect.

We note also that restricting access to legal support in cases under the Child Support Act was not discussed in the original Family Court Review and there has not been adequate consultation on the implications of this proposed change or whether indeed it is even necessary.

We recommend amending clause 73 to remove the word 'only' from the proposed new section 226(1):

'(1) In any proceedings under this Act (other than criminal proceedings), a court may appoint a lawyer to represent any child who is—

(a) the subject of the proceedings; or

(b) a party to the proceedings.

(2) An appointment under **subsection (1)** may be made ~~only~~ if the court is satisfied that the appointment is necessary or desirable.'

We support the proposed new section 226A.

We recommend (based on our earlier recommendation to remove Section 1 from clause 58) that the proposed new Section 226B(1)(a) be amended to replace 'Family Disputes (Resolution Methods) Act' with the 'Family Courts Act'.

Subpart 2—Amendments to Children, Young Persons, and Their Families Act 1989

Clause 76:

amends section 137, which sets out the orders and directions that a court may make after considering a report filed under section 135 and an accompanying revised plan prepared in relation to a child or young person. The purpose of the amendment is to clarify that the court need not give any person the opportunity to be heard before making an order or direction under this section.

Participants at consultation meetings we held to discuss the Family Court Review were most uncomfortable with the suggestion that Children, Young Persons and their Families (CYF) Act matters could be heard 'on papers' and advocated strongly for continued court monitoring and oversight of children who are the subjects of CYF Act cases. These children are already very vulnerable and the court has a responsibility to ensure their safety and wellbeing. It is not appropriate to place barriers between these children and the court.

We recommend clause 76 be removed from the Bill.

Clause 79

amends section 162, which provides for the payment of the fees and expenses of a lawyer appointed under section 159 or *new section 160*. References to barrister or solicitor are updated and reference is made to the new regulation-making power in *new section 16D* of the Family Disputes (Resolution Methods) Act 1980 (inserted by *clause 66*).

We recommend (based on our earlier recommendation to remove Section 1 from clause 58) that the proposed change to Section 162(1)(a) be amended to replace 'Family Disputes (Resolution Methods) Act' with the 'Family Courts Act'.

Subpart 4—Amendments to Property (Relationships) Act 1976

Clause 94

amends section 37A(2), which provides for the payment of the fees and expenses of a lawyer appointed to represent a child in proceedings under the Act. Paragraph (a) is replaced to refer to the new regulation-making power for these fees and expenses in *new section 16D* of the Family Disputes (Resolution Methods) Act 1980 (inserted by *clause 66*).

We recommend (based on our earlier recommendation to remove Section 1 from clause 58) that the proposed change to Section37A(2)(a) be amended to replace 'Family Disputes (Resolution Methods) Act' with the 'Family Courts Act'.

Subpart 5—Amendments to Protection of Personal and Property Rights Act 1988

We make no comment on clauses 97–104.