

Submission in response to the review of the Family Court '*Reviewing the Family Court: A public consultation paper*', Ministry of Justice, September 2011

To

Review of the Family Court
Ministry of Justice
DX SX10088
Wellington
Email: familycourtreview@justice.govt.nz

From

Associate Professor Nicola Gavey
Department of Psychology
The University of Auckland
Private Bag 92019
n.gavey@auckland.ac.nz

Dr Vivienne Elizabeth
Department of Sociology
The University of Auckland
Private Bag 92019
v.elizabeth@auckland.ac.nz

Associate Professor Julia Tolmie
Faculty of Law
The University of Auckland
Private Bag 92019
j.tolmie@auckland.ac.nz

2 March 2012

Our background

As academics representing three disciplines – law, sociology and psychology – we have been researching women’s experiences of disputes over child custody for the past six years. Although our research did not set out specifically to focus on the Family Court, we ended up gathering detailed information about the way some mothers experience different aspects of the court system. The findings from our research give cause for concern about current policy and practice.

Our study included in-depth interviews with 21 women, carried out alongside comprehensive reviews of the international research. We have published six articles, with another one currently in press, and others in the pipeline (see References). We have also presented numerous conference papers and invited talks locally and internationally.

Our work shows that the Family Court and family court professionals struggle to recognise and respond appropriately to the ongoing gendered nature of the heterosexual family as a social institution. The gendered character of heterosexual families is revealed in continued gender differences in patterns of responsibility for childcare and paid work, as well as in gendered patterns of coercive control, abuse and violence. Our research suggests that family law professionals regularly downplay the significance of women’s childcare work and expertise, and their past and present exposure to coercive control, leading to decisions that reduce the wellbeing and safety of women and children.

We would stress that a focus on the reduction of the costs of resolving care and contact issues should not come through the instigation of court processes that do not afford enough protection for vulnerable parties. In this regard, it is important to adopt a cautious stance with respect to alternative dispute resolution mechanisms (counselling, mediation and so on). Research both here (Elizabeth et al, 2011) and overseas (Trinder & Kellet, 2007; Trinder, Firth & Jenks, 2010) indicates that power differences between parties are frequently glossed over in alternative dispute resolution processes, and problems like poor parenting skills, coercive control, drug and alcohol misuse that present safety concerns are frequently minimised and marginalised. This research also casts doubt on the notion that decisions made through alternative dispute resolution mechanisms are really the result of consensus. Furthermore, the capacity to document and publicly scrutinise alternative dispute resolution processes is even further removed from what is possible in the courtroom. While the adversarial nature of family court hearings is well recognised, legal representation can offer important protections to vulnerable parties. Thus we would argue that any radical reform of the Family Court system should be informed by careful consideration of the substantial body of local and international research.

Response to the review of the Family Court

Although the proposed reform is being driven largely by economic factors, we are pleased that the review will provide an opportunity for wider issues and problems in the functioning of the court to be addressed. The consultation paper raises many complex issues. At this point we will comment only on a few points that relate directly to our research.

We are pleased to see in the consultation paper, recognition of the following important issues:

- *Problems with an 'individual rights' focus*

Under the Care of Children Act 2004, disputes about the post-separation care of children are supposed to be resolved with primary attention given to the wellbeing of the child(ren). Over the past decade or so, arguments about parental rights (more specifically 'fathers' rights') have come to dominate public debate around care and custody issues, and to influence family court practice. The consultation paper rightly notes (on page 13) that attention to the 'natural justice rights' of parents can occur at the expense of children's welfare. We agree that this is not an appropriate focus for family court proceedings.

While it will always be important to resolve disputes over care and contact arrangements in relation to the specifics of any particular case, the consultation paper rightly notes the vagaries of the welfare and best interests of the child principle means that family court professionals are offered little guidance for decision-making. We strongly support the use of pre-separation parenting arrangements as a starting point for post-separation parenting arrangements to remedy the uncertainties created by current practice (page 33). Research continues to demonstrate that the work of caring for children, as opposed to sentiments of care, remains highly gendered in most intact families (see Tolmie et al 2010b). Even though many mothers now engage in considerable levels of paid work and fathers have increased their contribution to childcare, mothers in general retain primary responsibility for childcare and housework, and often remain children's primary attachment figures too. When family court professionals treat men's sentiments of care as a sign that they possess the necessary practical, emotional, and relational skills for undertaking the work of work they unnecessarily reduce the quality of care children receive. Moreover, a failure to properly recognize the history of care labour operates as Martha Fineman (2000-2001, p. 1040) states as a 'perverse affirmative action scheme in which men are excused from nurturing and caretaking norms and are permitted to devote their major energy and attention to their careers and extra-familial activities, without risking adverse consequences when they decide they want to assert claims to control their children post divorce'. Importantly, given the concerns highlighted in the consultation paper, a move to instantiate pre-separation parenting arrangements as the starting point for post-separation parenting arrangements is likely to reduce conflict between parents, and, as a corollary, costs.

- *Court exacerbated conflict*

The consultation document also discusses the way in which Family Court processes can exacerbate conflict between parents. Our research bore this out. In some cases women told about living with the ongoing stress of a standing threat of 'being taken to court' by the father of their children. They sometimes felt fearful, and under pressure to agree to care arrangements that they didn't believe were in their children's best interests. In some cases it seemed that the court system became a vehicle for extending forms of 'coercive control'¹ (for example, see Stark, 2007, 2009). We agree that it is problematic if repeated, seemingly vexatious applications can be made to the court over matters that are in some cases trivial, and in some cases clear attempts to assert a parental 'right'. We also note that it is important that such applications are distinguished from those where concerns are made about a child's safety and wellbeing by a protective parent. Ironically (and sadly), while applications based on assertions of parental rights appear to be accepted at face value by courts, it is well documented (both in New Zealand and overseas) that family courts too often treat applications concerned about violence, abuse, and coercive control with a degree of scepticism that is unwarranted, leaving children and their mothers in highly dangerous situations in some cases.

¹ Stark defines coercive control as a pattern of behaviour that often involves a combination of physical assaults and other actions that seek to intimidate, isolate, humiliate, regulate and diminish female partners.

- *Counselling*

The consultation document notes that the use of ‘counselling’ as a descriptor for the reconciliation and conciliation work that counsellors do causes some confusion amongst those accessing these services. This was something that we found in our research: a number of women in our study attended family court counselling with an expectation that some of the problems – an unwillingness to participate in parenting or support mothers in their parenting, drug and alcohol abuse, violence and so on – that had led to the breakdown of their relationship and that also posed problems for negotiating care and contact arrangements that protected children’s wellbeing would be addressed. However, to their disappointment they found that this was rarely so. The consultation document also notes that counselling has the potential to address the personal and emotional underpinnings of disputes between parents. As we have argued elsewhere (Elizabeth et al, 2011) the potential for counselling to produce this outcome is undermined by the overwhelming emphasis placed on producing a settlement between parents during counselling. Such an emphasis means that the potential afforded by counselling to address issues of harm, hurt, betrayal and loss are by and large missed. This is unfortunate since properly addressing these issues through counselling would: likely contribute to the creation of more amicable relationships between separated parents; support the resolution of their disputes; and lay the foundation for the capacity for parents to resolve ongoing issues around caring for children without recourse to outside assistance. (See Smart & May, 2004)

- *Mediation and other alternative dispute resolution processes – the need for attention to effectively managing gendered dynamics of power*

We would like to reiterate a statement made in our opening gambit that radical reform of the services provided through the Family Court, including the introduction of new alternative dispute resolution processes, should be informed by national and international research. Research on the strengths and weaknesses of alternative dispute resolution processes, including counselling and mediation, is limited. However, existing research consistently raises concerns about inequalities in the negotiating power of parties participating in such processes. As such, research reinforces the point made in the consultation document that if mediation or other ADRs were compulsory, it would be important to ensure that ‘decisions do not reflect an existing power imbalance between the parties’ (page 42). The findings from our research echo the risks identified here. Women in our study reported that professionals they met during conciliation processes (counselling and mediation) frequently minimised the significance of a history of coercive control, abuse and violence against mothers; permitted fathers to harass and intimidate mothers during conciliation sessions without intervening to limit aggressive behaviour; and departed from the norms of neutrality and impartiality by applying pressure on mothers to accept care and contact arrangements that jeopardised the safety and wellbeing of themselves and/or their children.² On the basis of mothers’ accounts of these sessions, it is clear that such processes must be carried out by highly skilled practitioners, with sophisticated and nuanced understandings of the dynamics of coercive control and violence in order that sessions do not become an occasion for further bullying, abuse and intimidation. When this happens, not only is it potentially undermining of the wellbeing of the person who is being bullied (in the case of our research, this was mothers), but it also is likely to lead to outcomes for children that are driven by a forceful parent’s agenda, rather than by shared concern for children’s wellbeing.

- *The use of punitive tactics to diminish conflict and achieve compliance*

We note with some concern, however, that the consultation document raises the possibility of using punitive tactics with parents involved in disputes over the care of their children to diminish conflict

² This did not of course apply to all professionals in every case, and there were some accounts of encouragingly sensitive practice.

and achieve compliance (pages 28, 38, 59). Several comments in the document (page 28 and 38) seem to be suggesting that a 'friendly-parent' rule should be introduced. International literature from jurisdictions where the friendly-parent rule has been introduced indicates that friendly-parent rules are far from gender neutral in their operation, even if they are gender neutral in their articulation. The ongoing gendered nature of parenting means that it is more likely to be mothers, rather than fathers, who are objecting to increased contact time or relaxed conditions for contact. As such, mothers are at greater risk of appearing to fail the friendly-parent rule, while the actions of fathers that diminish the willingness of mothers to entrust them with the care of their children escape scrutiny.

We are also concerned that the desire to institute more punitive measures in an effort to modify parents' behaviour will be felt more keenly by resident rather than non-resident parents.³ Since it would generally be considered highly undesirable (and impractical) for non-resident parents to be compelled to meet their care and contact obligations, punitive sanctions are more likely to be applied to resident parents who are not making their children available for contact, usually in an attempt to keep their children safe. Rather than viewing the resident parent's actions as evidence that they are meeting their moral obligation to protect their children (which is how we would likely understand similar actions in other contexts), research both here and overseas indicates that family court professionals often understand the non-compliance of resident parents in terms of obstruction and alienation. As we have discussed elsewhere (Elizabeth et al, 2010), fuller attention to the reasons for the non-compliance of resident parents may well reveal that the source of the difficulty lies in the behaviour of the non-resident parent.

Other issues the consultation paper touches on, that we would like the review to consider in fuller detail include:

- *Expanding recognition of what it means to be 'culturally responsive'*

Western law tends to assume that people are self-contained individuals, who exist independently of each other and operate to maximize their own personal interests. While the cultural specificity of this value is often recognized in New Zealand, to the extent that it does not always fit with the experience of Maori, Pacific and Asian peoples (see page 16), we would suggest that the value put on independence as opposed to inter-dependence also blinds us to differently gendered experiences within virtually all families. Actually, inter-dependence of mother and child remains highly valued even in Western culture. It is expected that a mother will prioritize her child's needs ahead of her own. This remains a highly gendered norm (seen most clearly through responses when it is transgressed), despite its disavowal within contemporary (gender neutral) law. Our research showed that when courts do not recognize the gendered reality of family life (and instead make decisions based on aspirational, rather than actual, ideals around equal parenting), they can contravene deeply held values relating to the mother-child relationship, that can end up disrupting or even depriving children of close stable attachments they might otherwise have had. For this reason, as we have noted above, we support the use of pre-separation parenting arrangements as a starting point for post-separation parenting arrangements.

- *The importance of fathers in children's lives – searching for creative solutions*

Everyone agrees that in an ideal world, children will have loving and supportive relationships with both their parents. The importance of children's contact with their fathers, post parental separation must, however, be considered in more creative ways, and balanced against a wider range of

³ And in so doing, through adding pressures to what is already a demanding and stressful situation for resident parents, add new strains on the household, which would likely adversely affect children.

considerations. It is increasingly being recognized that the imposition of shared physical custody by the state is not a good idea. As the consultation paper notes, 'Research literature emerging from Australia and elsewhere advise against presuming equal shared care after separation is best for children as, depending on the circumstances, it can increase the mental health risks for children, particularly when parents are in conflict or when children are very young' (page 33).

There are two points that we would like to see given greater consideration in the ongoing review process. Firstly, there are many issues that need to be considered in determining the best care arrangements for a child. Our research indicates that, contrary to what the law requires and contrary to what research evidence would recommend, courts have been going to extreme lengths to preserve and expand father contact, even where this poses risks to children's wellbeing and/or major costs to maternal wellbeing and mothers' basic human rights. This is most clearly the case in families where a father has been violent or abusive to the children or their mother. It is also, we suggest, what underlies the vulnerability of the court to repeated (and we would suggest vexatious in some cases) applications by fathers for shared physical custody in cases where this is unlikely to be in a child's best interests.

Another area where this has, in our view, seen breaches of mothers' basic human rights, is in cases relating to relocation. One participant in our research, for instance, was effectively prevented from returning to her homeland to reunite with her extended family and her sick mother, depriving her of wider support networks, work opportunities and a sense of cultural belonging because she (a recent migrant) was not allowed to take her young child out of New Zealand. As for most mothers, the prospect of leaving the country without her child was completely unimaginable. One has to ask about the consequences for a child whose mother is deprived such liberties.

We endorse the suggestions on page 34 for presumptive pathways in cases where there is domestic violence (for giving sole guardianship over matters like where a child lives to the 'protected person'), and in cases where relocation is at issue (for weight to be given to the proposal when the application is made by the primary caregiver and is well planned and so on).

- *The place of lawyer for the child*

In considering how family court processes might work best in supporting children's best interests, the consultation paper considers the role and responsibilities of lawyers for the child (see chapter 4). Questions are raised about whether lawyers are the professionals with the most appropriate training to be able to obtain the views of children (page 31).

Our research with mothers adds related concerns. A significant number of women we interviewed reported having had a negative experience with the lawyer for the child. Related to the point we raise above about the way in which the importance of fathers in children's lives can be narrowly interpreted, it appeared that an uncritical attachment to formulaic assumptions about how fathers should be involved in children's lives can sometimes lead lawyers for the child to trivialise mothers' concerns. In some cases (as has also been noted in the international research), women's attempts to share evidence in the interests of safeguarding the wellbeing of their children are viewed as 'obstructive'. (Ironically, as Stark [2009, p. 289] notes, mothers may find themselves blamed and negatively judged for sharing the very same evidence that would be prized in other contexts: 'In criminal court, a victim's testimony about abuse is highly valued. If the same woman presses claims of abuse during a custody dispute, she is likely to be labelled uncooperative, selfish, or even vindictive' [Stark, 2009, p. 289]).

More generally, we do agree that questions need to be asked about what is possible for lawyers in this role. The task of determining a 'child's view' in this situation is highly complex, particularly for

young children. If lawyers are to continue in this role they need more extensive training in child development, attachment, and domestic violence/coercive control; and they need to allow adequate time to develop trust and understanding of the child in his or her unique relational and cultural context.

- *Measures to contain the cost of the Family Court: recommendation for a gender audit of any proposal*

The consultation paper highlights the government's concern about the cost of the Family Court. We would urge that an audit be undertaken of the gender implications of any proposal designed to contain these costs. In relation to the possibility of setting court fees, we are pleased to see recognition within the consultation document that the introduction of fees could be inappropriate for vulnerable children and adults, and that it could restrict access to justice for low income parties.

Several issues have come up in our research that suggest that there currently exist financial impediments to many people in accessing adequate support from the court in resolving care and contact matters. Many mothers, particularly sole mothers, are struggling financially. In our research it was not uncommon for women to not be receiving the level of child support that they were entitled to according to the Inland Revenue Department formula. This issue has come up in our discussions with community groups, where anecdotal evidence suggests that it is not uncommon for fathers to pressure mothers into accepting lower 'voluntary' payments (which can also be unreliably paid) 'in return' for not pursuing shared physical care through the court. (An example of how the space of the court can become a mechanism for bullying and coercion.) For those not entitled to legal aid, the cost of retaining a lawyer can be very high; and yet the indirect costs of not being adequately represented can also be high.

Another issue of concern was the standard of legal representation provided to women receiving legal aid. In several cases, women described patchy legal representation – for example, lawyers not being available, not returning calls, not pursuing difficult matters (e.g., relocation) with the resources that would be necessary to win a case, not acting in accordance with their instructions, being asked to draft most of their own affidavits, and so on.

- *The missing voices of mothers*

Fathers' rights groups have been active in many countries like New Zealand, and have a high media profile. They have been widely critiqued for the ways in which they privilege adult *rights*, using the rhetoric of 'fairness', over and above concerns about the *quality of care* that children deserve or, in fact, their safety (see Flood, 2010; Kaye & Tolmie, 1998). Nevertheless they have arguably been quite persuasive in helping to shape perceptions and policies in arena like the Family Court.

By contrast, mothers' voices are virtually absent in the public domain. There are no high profile spokeswomen and groups of mothers visibly campaigning for the collective interests of mothers in relation to policies and practices surrounding the Family Court (and issues like Child Support). (It is noteworthy, for instance, that among the non-governmental organisations consulted as relevant stakeholders in the preparation of this consultation paper, there is no organisation specifically representing mothers. The only 'women's organisation' consulted (unless organisations addressing family violence are considered 'women's organisations') was the National Council of Women. By contrast, three organisations appearing to specifically represent fathers' interests were consulted (Union of Fathers, Father and Child Trust, Fathering Foundation) as well as 'men's organisations' like Canterbury Men and Big Buddy.

It is important for bodies like the Family Court to consider why mothers, as a group, are so under-represented in this kind of consultation process, and how this might skew the impressions held about how their interests (and the interests of their children) are served by the court. Many mothers in our study reported being very poorly served by their contact with the Family Court – from lack of respect and being patronized, to receiving misleading information, to in some cases coercive pressure from professionals in the court system (mostly lawyers, counsellors and psychologists).

Although our study was relatively small scale, our findings have repeatedly been echoed in conversations with other researchers, professionals, and community workers working alongside women parenting in difficult post-separation situations. Moreover, upon hearing of our research women continue to share with us their own personal stories or the stories of their daughters, daughter in laws, and sisters, which resonate strongly with our findings. We hope this review will lead to changes in the Family Court that better serve their and their children's interests.

References:

* Relevant articles from our New Zealand research (copies attached)

- *Elizabeth, V., Gavey, N., & Tolmie, J. (in press). The gendered dynamics of power in disputes over the postseparation care of children. *Violence Against Women*.
- *Elizabeth, V., Gavey, N., & Tolmie, J. (2010). Between a rock and hard place: Resident mothers and the moral dilemmas they face during custody disputes. *Feminist Legal Studies* 18(3), 253-274, DOI: 10.1007/s10691-010-9159-9
- *Elizabeth, V., Gavey, N. & Tolmie, J. (2012). "...He's just swapped his fists for the system": The governance of gender through custody law. *Gender & Society*. doi: 10.1177/0891243211434765
- *Elizabeth, V., Tolmie, J., & Gavey, N. (2011). Gendered dynamics in family court counselling. *New Zealand Journal of Counselling*, 31(2), 1-20.
- Fineman, M. (2000-2001). Fatherhood, feminism and family law. *McGeorge Law Review*, 32.
- Flood, M. (2010). "Fathers' rights" and the defense of paternal authority in Australia. *Violence Against Women*, 16, 328-347.
- Kaye, M.R. & Tolmie, J.R. (1998). Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups. *Melbourne University Law Review* 22(1) 162-194.
- Smart, C., & May, V. (2004). Why can't they agree? The underlying complexity of contact and residence disputes. *Journal of Social Welfare and Family Law*, 26(4), 347-360.
- Stark, E. (2007). *Coercive control: How men entrap women in personal life*. Oxford: Oxford University Press.
- Stark, E. (2009). Rethinking Custody Evaluation in Cases Involving Domestic Violence. *Journal of Child Custody*, 6(3-4), 287-321. doi: 10.1080/15379410903084707
- *Tolmie, J., Elizabeth, V., & Gavey, N. (2009). Raising questions about the importance of father contact within current family law practices. *NZ Law Review*, 659-694.
- *Tolmie, J., Elizabeth, V., & Gavey, N. (2010a). Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand. *New Zealand Universities Law Review*, 24(1), 136-166.
- *Tolmie, J., Elizabeth, V., & Gavey, N. (2010b). Imposing gender neutral standards on a gendered world: Parenting arrangements in family law post separation. *Canterbury Law Review*, 16(2), 302-330.
- Trinder, E., Firth, A., & Jenks, C. (2010). 'So presumably things have move on since then?' The management of risk allegations in child contact dispute resolution. *International Journal of Law, Policy and the Family*, 24(1), 29-53.
- Trinder, E., & Kellett, J. (2007). Fairness, efficiency and effectiveness in court-based dispute resolution schemes in England. *International Journal of Law, Policy and the Family*, 21(3), 323-340.