

# Regulatory Impact Statement: Family Court Associate

## Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet decisions.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Hon Kris Faafoi, Minister of Justice
Date finalised:	9 February 2022
Problem Definition	
<p>People seeking to resolve disputes through the family justice system experience significant delays.<sup>1</sup> This can entrench positions and prolong conflict, with profound effects on child wellbeing, damage to children’s relationships with whānau, and damage to people’s trust in the system. Parents and caregivers consider delay to be one of the most negative aspects of the family justice system.</p> <p>The average age for all family court application types, excluding dissolutions,<sup>2</sup> is currently 175 days. Delay is impacting all levels of cases including those involving issues relating to the Care of Children Act 2004 (“CoCA”). For defended CoCA-substantive applications, which make up 69% of all active CoCA applications, the average case takes 384 days to resolve in the Family Court.<sup>3</sup></p>	
Executive Summary	

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<sup>1</sup> Delay in this paper refers to the avoidable elapse of time. Family justice processes will always involve unavoidable passage of time.

<sup>2</sup> Because these do not require a Judge.

<sup>3</sup> Ministry of Justice data, as at 21 November 2021. In the Family Court the average time to resolve a Care of Children Act (“CoCA”) application is 294 days.

In May 2018, the Government appointed an independent panel to review how reforms made in 2014 had affected the family justice system. The independent panel's report "*Te Korowai Ture ā-Whānau*" ("the Panel") identified multiple drivers of delay in the Family Court which leads to lengthy times to resolve cases.

The Labour Party's 2020 election manifesto included a commitment to implement the recommendations of the Panel to ensure that children affected by Family Court proceedings (including family violence and parental disputes) receive appropriate support, representation, and protection in the justice system. Transformation of the family justice system is a five to ten-year project. Due to the scale of change proposed and the resourcing needed, a phased approach is required.

As delay arises in multiple parts of the system, and for different reasons, multiple initiatives are needed to address it. The Panel recommended introducing a new role to address one of the drivers of delay: the heavy administrative workload of judges,<sup>4</sup> which delays the progress of active cases. The options discussed in this Regulatory Impact Statement (RIS) respond to that recommendation and consequentially focus on this driver of delay.

### **A new judicial officer position in the Family Court**

Following testing and consultation with the judiciary and New Zealand Law Society, which informed the development of the Panel's recommendation, the Ministry-preferred option is a newly created judicial officer, called the Family Court Associate. The Family Court Associate would have the power to undertake administrative judicial tasks, such as appointing counsel, directions for filing evidence and for service, and directions to set matters down for hearing. These are decisions that are largely at the early stages of proceedings. Their powers would encompass registrars' current powers, as well as additional powers relating to more straightforward and uncontested work that is less likely to determine the final outcome of an application/case. This work currently constitutes about 25% of judicial time.<sup>5</sup> The expected level of experience for the role would be 10 – 15 years of family law practice.

### **Benefits**

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<sup>4</sup> Administrative workload in this document refers to tasks such as appointing counsel, directions for filing evidence and for service, and directions to set matters down for hearing.

<sup>5</sup> Using the assumption the role would be 65% as efficient as a Judge, ie they would take longer to do the same tasks due to having less experience.

The Family Court Associate is expected to improve the experience of Family Court users, and mitigate the negative impacts of delay. It will do this by enabling timelier decisions to be made; providing more certainty for children, their parents, and whānau. Timelier justice services will also promote public confidence in the justice system and rule of law. The Judicial Officer model maximises these benefits.

The experience required for the role, and its independence, will support the exercise of a wider range of judicial powers as well as faster and more effective decision-making. Discussions with the judiciary and New Zealand Law Society suggest the role's independence and experience also make it the most likely to have the confidence of judges and lawyers. Without that confidence, the Family Court Associate could effectively be bypassed with their decisions being routinely accepted for judicial review.

### **Gender implications**

Women may face additional barriers accessing the family justice system. Women have, on average, lower incomes and less wealth than men, and this inequality increases after separation. This inequality is more pronounced for Māori, immigrant, ethnic minority, rural, and disabled women.

Most applicants for a protection order (and other protected adults) are female (84% in 2020) and most respondents (and associated respondents) are male (86% in 2020).<sup>6</sup> Delays in court proceedings mean that on-notice applications that may require urgent resolution by the Family Court, such as ones involving unidentified family violence, are delayed and can impact on parties' personal safety. Victims of family violence find court processes re-traumatising and court delay may exacerbate or prolong this trauma.

Timelier decisions may help reduce costs for women, support better mental and physical health outcomes, and help with their safety.

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<sup>6</sup> Notes and trends for 2020, Ministry of Justice, 2021. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/1ayjdr-Justice-Statistics-data-tables-notes-and-trends-dec20-v1.0.pdf>

## Child impact assessment

Delay is felt more profoundly by children and protracted litigation can be stressful for them.<sup>7</sup> The average age of active CoCA applications, 294 days,<sup>8</sup> is a long time in a young child's life. Children exposed to ongoing inter-parental conflict<sup>9</sup> are four times more likely to have social and emotional problems than the general population.<sup>10</sup> Research suggests it is the related conflict that is more emotionally harmful to children than the actual breakup of the relationship.<sup>11</sup>

The effects on children of prolonged family disputes include: fear of an uncertain future; uncertainty about where they will live and go to school; loss of continuity of healthcare provider; loss of social connection with peers and established friendships; shame and/or embarrassment about their family situation resulting in social isolation and withdrawal; and increased risk to mental health and wellbeing.

## Disability implications

Disabled people make up 24% of the New Zealand population and may face additional barriers accessing the family justice system. Disabled people have lower levels of trust in court processes and disabled women are more likely to experience lifetime intimate partner violence than non-disabled women. Court delays can impact significantly on disabled women's and children's wellbeing and ongoing whanau connections. Disabled women may find it more difficult to extricate themselves from abusive relationships because there are no facilities set up to meet their specific needs. Furthermore, the negative impact on disabled children's wellbeing of prolonged family court cases is likely to be more pronounced.

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<sup>7</sup> the Te Korowai report, p 55.

<sup>8</sup> Ministry of Justice data, as at November 2021.

<sup>9</sup> Within this paper, "parental conflict" refers to parents who have separated and can't agree on care of children arrangements, where there are no safety risks for either party or the children.

<sup>10</sup> Bream, V. and Buchanan, A. (2003) "Distress among children whose separated or divorced parents cannot agree arrangements for them" *British Journal of Social Work*, 33:227-238); <https://www.pmcsa.org.nz/wp-content/uploads/Improving-the-Transition-report.pdf> Section 6 p. 181). See also; Trindler, L. and Kellett, J. (2007) *Fairness, Efficiency and Effectiveness in Court Based Dispute Resolution Schemes*, p 326. Available at: <https://academic.oup.com/lawfam/article/21/3/323/951964>.

<sup>11</sup> Office of the Prime Minister's Science Advisory Committee (2011) *Improving the Transition Reducing Social and Psychological Morbidity During Adolescence A report from the Prime Minister's Chief Science Advisor*, p181. Available at: [Improving the transition: reducing social and psychological morbidity during adolescence - May 2011 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](https://www.dpmc.govt.nz/wp-content/uploads/2011/05/Improving-the-transition-reducing-social-and-psychological-morbidity-during-adolescence-May-2011-Office-of-the-Prime-Minister-s-Chief-Science-Advisor-dpmc.govt.nz).

## Risks

As outlined above, the success of the Family Court Associate is contingent on Judges delegating work and supporting the associates to exercise the full breadth of their powers. The Ministry has discussed this with the judiciary and built in factors, such as the level of experience required, to support that confidence. However, some judges may prefer to see a case through from start to finish to minimise any risk of missing any key comments, event, or other information.

Court space restrictions mean that judges and Family Court Associates may not be able to undertake work at the same time; decreasing their effectiveness. Space restrictions may also mean a delay in the roll-out of the Family Court Associate role in some areas where court space is already at full capacity.

The Ministry had concerns that the pool of eligible candidates for the role may be small because of experienced professionals not wanting to leave their practice. This is because it is a long time for an active lawyer to step away from their career, the career progression from the new role to Judge isn't certain, and the role is fixed term. This risk may be more pronounced for the Judicial Officer model which requires more experience. However, the Family Law Section and judiciary were reasonably confident that there would be experienced professionals interested in undertaking the role if the remuneration was sufficient. The Family Law Section reported that there are 173 lawyers with experience between 10-15 years in their database.<sup>12</sup>

To mitigate this risk a phased approach to recruitment (with 4-6 being appointed in the first year, and then 6 -7 in the two years after) is being used, as outlined in the Implementation section below.

## Limitations and Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- There are indications that the size of a courts' administrative workload and how that workload is distributed across decision-makers are key drivers of delay, however,

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<sup>12</sup> The Family Law Section do not have all family lawyers in New Zealand in their database therefore there are likely more than 173 lawyers with 10-15 year experience.

there is no quantitative evidence about the effects of these factors on resolution time.<sup>13</sup>

- No full review has been undertaken focussing on the drivers of delay or significance of them. While the Panel found delay was pervasive at every stage of the family justice system, it did not present detailed analysis on the relative effectiveness the different changes would have on reducing delay. There are multiple causes of delay and some are not fully understood. However, in the implementation of the Family Court Associate, focussing on this driver of delay, there is also an opportunity through the planned monitoring and evaluation of this role to better identify and understand other drivers of delay.
- It is a government manifesto commitment to implement the Panel's report. The options to address the problem are based only on the recommendations from the Panel's report, further options were not explored.
- The estimation of benefits does not take account of operational factors such as: there being enough work for a Family Court Associate to be fully utilised in the locations they are placed, how often a Family Court Associate may need to refer a matter on to a Judge, or there being sufficient space to accommodate a Family Court Associate in the Court.
- There are data issues, caused in part by current processes for case management in the Family Court, which is reliant predominantly on email and paper files, that have limited the Ministry's ability to undertake robust data collection. Anecdotal evidence, qualitative research and some Ministry data has formed the basis of understanding of the issues identified, however the Panel acknowledged that data collected by the Ministry system was insufficient in some areas. In particular, it is not possible to compare specific distributional impacts of different options. Available demographic data suggests Māori are disproportionately represented among parties involved in CoCA proceedings, meaning any option that reduces delay would likely have greater positive impact on this demographic group. The monitoring and evaluation planned for the role should enable better evaluation of Family Court issues going forward.
- The Ministry's data shows the average number of days it takes to resolve a case is high and, from anecdotal evidence and the Panel's report, can surmise that there is

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<sup>13</sup> Noonan, R., King, L. and Dellabarca, C. (2019) *Te Korowai Ture ā Whānau: the final report of the Independent Panel examining the 2014 family justice reforms* p14. Available at: [family-justice-reforms-te-korowai-ture-a-whanau.pdf](#). (The Te Korowai Report)

a level of avoidable delay. Modelling based on the amount of judicial time is spent on administrative tasks and early-stage decisions shows the effect the Family Court Associates could have. However, we have not quantified the number of days spent on unavoidable delays or any potential reduction in the time it takes to resolve the entire proceeding as it would require an in-depth analysis into the cause of delay in each individual case.

- In light of the consultation undertaken by the Panel in preparing its report, and to enable work to progress as quickly as possible, the Ministry has undertaken targeted consultation with stakeholders in the development of these options. Evidence about stakeholder views is therefore largely drawn from consultation undertaken by the Panel, which undertook two rounds of public consultation. The first round, in late 2018, heard the experiences of those who had used or worked in the system; the second, in early 2019, tested ideas for change. Since Budget funding was approved, the Ministry has been directed to work towards the legislation being enacted by the end of 2022.

**Responsible Manager(s) (completed by relevant manager)**

Sam Kunowski  
 Courts and Justice Services Policy  
 Policy Group  
 Ministry of Justice



9 February 2022

**Quality Assurance (completed by QA panel)**

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment: A panel within the Ministry of Justice has reviewed the Regulatory Impact Statement. The panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the Quality Assurance criteria. In reaching this conclusion, the panel noted that the Regulatory Impact Statement meets the requirement to be complete within the constraints outlined in the Statement. These include the absence of a full review into the

cause of delays in the Family Court and limiting of options to the implementation of recommendations from an independent panel appointed to review how reforms made in 2014 had affected the family justice system.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem and how is the status quo expected to develop?

#### Recent reform has focused on delay in CoCA matters in the Family Court

1. Extensive reforms of the process for resolving CoCA disputes took effect in 2014. Those reforms sought to encourage individual responsibility and shift the focus from in-court resolution to encouraging parents to reach agreement themselves, through out-of-court processes. The reforms aimed to enable the Family Court to focus its resources on serious and urgent (“without-notice”) applications that were not suitable for out-of-court resolution. A key change in these reforms was removing both the ability to use a lawyer and legal aid funding in the early stages of CoCA proceedings. The exception to this was where proceedings were initiated through without-notice applications; i.e., there was an allegation of urgency because of issues such as family violence.
2. Some reforms did not work as intended. There was a lower than expected uptake of out-of-court resolution services, and a sharp increase in the number of without-notice applications being made.<sup>14</sup> Cases were taking longer to resolve and many of those involved in court processes felt that they were not well supported.
3. In May 2018, the Government appointed an independent panel to review how the 2014 reforms had affected the family justice system (the Panel). The Panel consulted widely in developing their report. Those most intimately affected by the 2014 reforms – children and young people, parents, caregivers, guardians, grandparents and other whānau/family members – were surveyed. The experiences of community and professional providers were also drawn on.

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<sup>14</sup> The proportion of CoCA cases which were filed without notice increased from less than 35% in the years prior to the reforms, to over 65% in the two years following the reforms:  
<https://www.justice.govt.nz/assets/Documents/Publications/Family-Justice-Administrative-review-2017-FINAL.pdf>.



4. In May 2019, the Panel released their report "*Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms*". This identified a range of issues in the family justice system, including pervasive delay.<sup>15</sup> This is discussed below.
5. The Panel made 69 recommendations about the law, policy, and practices that currently govern care of children matters, including a number that it considered would help address delay. One of these was the establishment of the position referred to as "the Senior Family Court Registrar". The Family Court Associate role discussed in this Regulatory Impact Statement is the outcome of that proposal. The Ministry considered, in consultation with the judiciary and New Zealand Law Society, maximising the impact of that role. As the Ministry has developed the nature and scope of the role, the title has been re-named from Senior Family Court Registrar to the Family Court Associate to better reflect the role it will serve in the Family Court.
6. The Labour Party's 2020 election manifesto included a commitment to implement the recommendations of the Panel. This was primarily to ensure that children affected by family violence and parental disputes receive appropriate support, representation, and protection in the justice system.
7. In 2020, the government began implementing several changes responding to the Panel's report and delay in the Court, focusing particularly on issues exacerbated by COVID-19. These included:
  1. reinstating legal representation in the early stages of CoCA proceedings, with legal aid for eligible parties. This has reduced the disproportionate number of without-notice applications, which take more court time to manage and contribute to delay.
  2. several measures to improve people's awareness of the pathways available to them to resolve disputes, and how to access them. These include the establishment of the role of Kaiārahi – Family Court navigators, which is being rolled out in 2021, and improved information, which will be introduced over several years beginning in 2021.
8. While these changes go some way towards addressing the issue of delay, they are not anticipated to fully address the issue.

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<sup>15</sup> the Te Korowai report.

**This Regulatory Impact Assessment assesses options to reduce delay in resolving matters in the Family Court; specifically the judges work burden.**

9. Over a two-year period, about 6% of the population experiences a family or whānau or relationship break up, such as a divorce, difficulties with contact arrangements for children, or family violence.<sup>16</sup> An estimated 16,000 children are the subject of CoCA proceedings in the Family Court each year<sup>17</sup>, and the Court resolves on average approximately 56,000 matters annually.<sup>18</sup>
10. The Family Court is designed to focus on the most serious and urgent applications that are not suitable for out-of-court resolution. People seek its help with issues relating to the care of children (28% of applications and 69% of defended CoCA applications); the care of children at risk of harm (15% of applications); separation and related property issues (14%); family violence (15%), and mental health (12%).<sup>19</sup> Many people seek help with more than one of these issues at a time.

**A number of other initiatives are underway to address issues that touch on the system as a whole**

11. These include:
  1. A review and rewrite of the Family Court Rules by the Ministry of Justice;
  2. A stocktake of best practice for children’s participation in mediation and CoCA proceedings, commissioned by the Ministry of Justice, which will be completed in March 2022. This will include consideration of how the needs of specific population groups should be accommodated, including Māori children, children from cultural minorities, and children with disabilities.
  3. A project to strengthen the technology platform that supports case management in the Family Court.

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<sup>16</sup> Colmar Brunton (2018) *Legal needs among New Zealanders* [Colmar-Brunton-Survey-2018-Legal-needs-among-NZers-TK-355082.pdf \(justice.govt.nz\)](https://www.justice.govt.nz/assets/Documents/Publications/Family-Justice-Administrative-review-2017-FINAL.pdf).

<sup>17</sup> based on data collected for the 2016 Family Justice Admin Review, available at: <https://www.justice.govt.nz/assets/Documents/Publications/Family-Justice-Administrative-review-2017-FINAL.pdf>.

<sup>18</sup> Average taken from Ministry of Justice data on disposals as at December for 2020 and 2021.

<sup>19</sup> Based on Ministry of Justice data on 2020/21 applications.

4. Work has begun on the Chief District Court Judge's vision for the future of the District Court that is based on the te ao Māori concept of Te Ao Mārama meaning, the enlightened world, where all people can come to court to seek justice and be seen, heard and understood and meaningfully participate. Te Ao Mārama will deliver a new way of operating in all aspects of the District Court. At its heart, Te Ao Mārama is about enhancing access to justice for all people. To achieve this, the vision focuses on:

- implementing best practice approaches learned from existing specialist courts, throughout all District Court locations;
- inviting the strength and support provided by local iwi, iwi organisations, and local communities into the court; and
- restoring and rehabilitating all people affected by the business of the court.

The vision includes all people who come to the court including parties, defendants, victims, complainants, witnesses, and support people. It will also apply to all District Court jurisdictions – Family, Youth, Criminal, Civil, and the Disputes Tribunal.

12. The judiciary is also leading a range of initiatives to address delays.

### What is the policy problem or opportunity?

#### There are substantial delays in the Family Court

13. Delay is widespread throughout the family justice system. This assessment focusses on delay in the Family Court. The scale of the problem is illustrated by the following:

1. The time it takes to resolve cases in the Court has been slowly trending upwards for a number of years, with a pronounced increase following COVID-19 related lockdowns. The average time taken to resolve the most common application type – CoCA matters – is 294 days.<sup>20</sup> The time taken for Oranga Tamariki matters (the second highest application type) is 265 days.<sup>21</sup> The average time from application to resolution for all family court application types is 175 days

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<sup>20</sup> Ministry of Justice data, as at November 2021.

<sup>21</sup> Ministry of Justice data, as at November 2021.

(see graph 1 below).<sup>22</sup> As people involved in the court process are often involved in more than one application, they may be engaged in the Family Court for years.<sup>23</sup>

2. The number of cases that have been before the Court for over two years is increasing, and currently make up 13% of CoCA applications and 10% of Family Court applications generally (excluding dissolutions).<sup>24</sup>
  3. Delays were the most frequently identified negative or unhelpful aspect of the Family Court in a recent survey of parents' and caregivers' experiences of seeking the Court's help in making care arrangements.<sup>25</sup> Reduced delay was mentioned most frequently as the improvement that parents and caregivers wanted.<sup>26</sup> Only 18% thought the time taken to resolve their case through the Court was reasonable.<sup>27</sup>
14. Likewise, in a recent set of interviews with Māori who had experience of care and protection proceedings (Oranga Tamariki Act) in the Court, timeliness was identified as one of the areas for change.<sup>28</sup>

#### Graph 1<sup>29</sup>

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<sup>22</sup> Ministry of Justice data, as at November 2021.

<sup>23</sup> Ministry of Justice data, May 2021 analysis.

<sup>24</sup> Ministry of Justice data, as at November 2021.

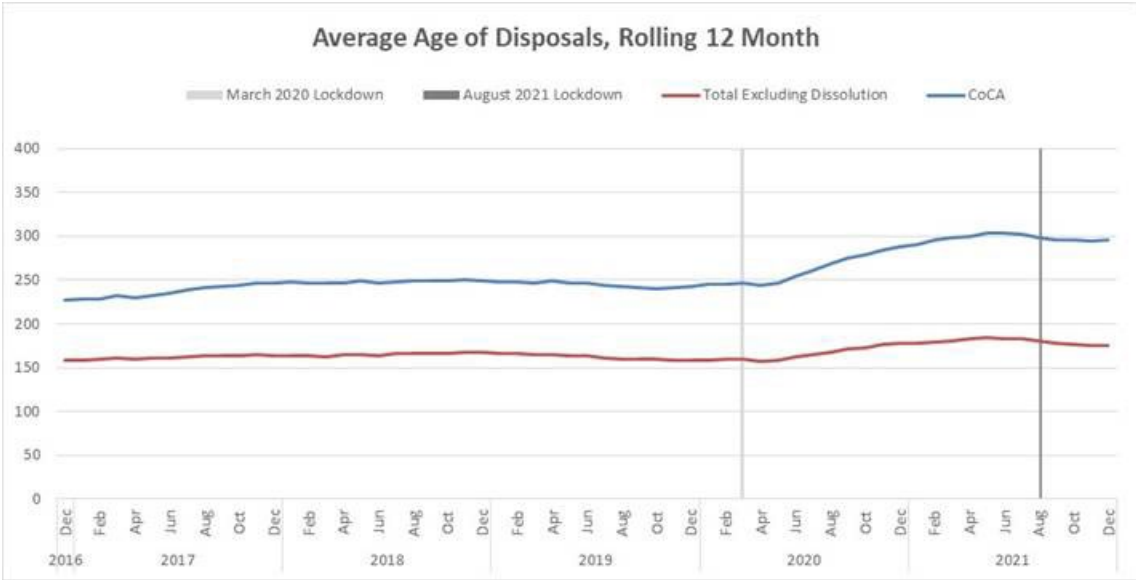
<sup>25</sup> Gollop, M., Taylor, N., & Liebergreen, N. (2020). *Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents and caregivers' perspectives - Research Summary June 2020*. Available at: <https://www.otago.ac.nz/cic/otago739549.pdf>.

<sup>26</sup> Megan Gollop et al., *Parenting after Separation-* (Part 1, xvii).

<sup>27</sup> Gollop, M., Taylor, N., Cameron, C., & Liebergreen, N. (2019). *Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 1*. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago p.47. Available at: [otago739545.pdf](https://www.otago.ac.nz/cic/otago739545.pdf).

<sup>28</sup> Dr Amohia Boulton et al, *Te Taniwha i te ao Ture-Ā-Whānau: Whānau experience of care and protection in the Family Court*, 2020.

<sup>29</sup> Ministry of Justice data, as at November 2021.



## Delay can have profound impacts

15. The Family Court deals with relationships that are fundamental to individual, family and whānau wellbeing. Problems relating to family and whānau are among those that are most commonly rated by New Zealanders as having severe impacts on their everyday life.<sup>30</sup>
16. Delay in resolving such problems in the Court can have profound impacts. They can:
  1. Entrench parties' positions as well as prolong conflict between parties.<sup>31</sup>
  2. Keep people in a state of limbo, where they are unable to make plans or move forward with their lives;<sup>32</sup> this in turn:
    - Increases and prolongs the distress parents already feel at being involved with the courts and facing a degree of uncertainty in their family lives.<sup>33</sup>
    - Causes some children to either have limited or no contact with whānau for significant periods of time. This can cause the relationship to deteriorate which can be detrimental to the child and whānau wellbeing.
    - May keep people in unsafe situations and proceedings, where they are having to communicate with their abuser about their children.
  3. Create greater expense for parties.
  4. Erode trust in the system. As noted above, delay is considered one of most negative aspects of involvement in CoCA matters in the Family Court.
17. Children are disproportionately affected by delay, as their sense of time is slower and their lived experience shorter; so the delay effects a greater portion of their life.<sup>34</sup> Extensive research suggests that high levels of unresolved inter-parental conflict can result in poor outcomes for children, from their health, to their behaviour and

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<sup>30</sup> People encountering different problem types were asked to rate the severity of the impact on everyday life, and those most commonly identified as severe were employment problems (38% of those encountering this problem rated it as severe); money or debt problems (36%); and family, whānau or relationship problem (30%) [Colmar-Brunton-Survey-2018-Legal-needs-among-NZers-TK-355082.pdf \(justice.govt.nz\)](#), p32.

<sup>31</sup> the Te Korowai report, p49. See also: Taylor, N.J., Gollop, M.M., & Liebergreen, N. (2019). *Parenting Arrangements after Separation Study: Evaluating the 2014 family law reforms – Family justice professionals' perspectives*. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago, p xvii. Available at: [otago739547.pdf](#).

<sup>32</sup> UMR (2019) A qualitative study on behalf of the independent panel examining the 2014 family justice system reforms, p29. Available at: [www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-main-report.pdf](#). The UMR report showed that going to Court was a "highly emotional time (with high stress) that is time consuming and unfair".

<sup>33</sup> Buchanan et al, 2001; Freeman and Hunt, 1998; Lindley, 1998; Perry and Rainey, 2006.

<sup>34</sup> the Te Korowai report, p 55.

relationships.<sup>35</sup> Children exposed to ongoing inter-parental conflict are four times more likely to have social and emotional problems than the general population.<sup>36</sup> Research suggests it is the related conflict that is more emotionally harmful to children than the actual breakup of the relationship.<sup>37</sup>

18. Identifying distinctive impacts on other population groups is difficult, as demographic data about users of the family justice system is incomplete and complicated to navigate.<sup>38</sup> Available data suggests Māori are likely to be disproportionately represented among people filing applications relating to CoCA matters,<sup>39</sup> and therefore are likely to be particularly affected by delay.

### **Without intervention, the average time for resolution is expected to increase**

19. Without intervention, timeframes within the Family Court are expected to remain high. Recent reforms (noted above), addressing some of the drivers of delay are underway and are expected to have some positive impact on delay. However, delay arises in multiple different parts of the system for different reasons; consequently multiple initiatives are needed.

### **There are many underlying causes of delay**

20. A range of factors contribute to delay in the Court:

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<sup>35</sup> Bream, V. and Buchanan, A. (2003) "Distress among children whose separated or divorced parents cannot agree arrangements for them" *British Journal of Social Work*, 33:227-238); <https://www.pmcsa.org.nz/wp-content/uploads/Improving-the-Transition-report.pdf> Section 6 p. 181). See also; Trindler, L. and Kellett, J. (2007) *Fairness, Efficiency and Effectiveness in Court Based Dispute Resolution Schemes*, p 326. Available at: <https://academic.oup.com/lawfam/article/21/3/323/951964>.

<sup>36</sup> Bream, V. and Buchanan, A. (2003) "Distress among children whose separated or divorced parents cannot agree arrangements for them" *British Journal of Social Work*, 33:227-238); <https://www.pmcsa.org.nz/wp-content/uploads/Improving-the-Transition-report.pdf> Section 6 p. 181). See also; Trindler, L. and Kellett, J. (2007) *Fairness, Efficiency and Effectiveness in Court Based Dispute Resolution Schemes*, p 326. Available at: <https://academic.oup.com/lawfam/article/21/3/323/951964>.

<sup>37</sup> Office of the Prime Minister's Science Advisory Committee (2011) *Improving the Transition Reducing Social and Psychological Morbidity During Adolescence* p181. Available at: [Improving the transition: reducing social and psychological morbidity during adolescence - May 2011 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](https://www.dpmc.govt.nz/assets/Documents/Publications/Family-Justice-Administrative-review-2017-FINAL.pdf).

<sup>38</sup> In particular, a person can be listed as an applicant and respondent multiple times each and parties have the option to list more than one ethnicity.

<sup>39</sup> An administrative review undertaken by the Ministry in 2016 revealed the following ethnicity of applicants and respondents for all CoCA applications in 2015/2016; European: 43%, Māori: 28%, Unknown: 20%, Pacific Peoples: 5%, Asians: 4%, other ethnic groups: 1%. <https://www.justice.govt.nz/assets/Documents/Publications/Family-Justice-Administrative-review-2017-FINAL.pdf>.

1. Some cases that are not wholly suitable for resolution via a judicial decision enter, and/or progress further than necessary in, the court. This diverts resources from other cases.
  2. Judges have a large workload with a significant portion of it being administrative or decisions that are largely at the early stages of proceedings. There are indications that the size of a courts' administrative workload and how that workload is distributed across decision-makers are key drivers of delay, however, there is no quantitative evidence about the effects of these factors on resolution time
  3. The proportion of defended cases is growing and the complexity of cases is also increasing<sup>40</sup>; these cases require more resource and time to resolve.<sup>41</sup>
  4. Limited workforce capacity within the court and the professional workforces that provide services to the court, such as the limited number of psychologists both generally and those taking on Family Court work.<sup>42</sup>
21. Restrictions associated with the public health response to COVID-19 are also affecting the average age of applications in the Family Court.<sup>43</sup>

### **This Regulatory Impact Statement focuses on judicial workload and resourcing**

#### 22. **s9(2)(f)(iv)**

This RIS focuses on a problem related to the second and, to some extent, the fourth factor outlined above: the scale of judges' more straightforward and administrative workload. This workload can divert scarce judicial resource from the core work that requires the exercise of independent discretion.

23. The Panel found that the administrative workload of judges impacts significantly on the availability of judicial sitting time.<sup>44</sup> Box work (e.g. directions, orders on papers) currently consumes approximately 20% of judicial time. We note there is no quantitative evidence about the effects of these factors on resolution time.

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<sup>40</sup> The Te Korowai Report, p78.

<sup>41</sup> Ministry data analysis indicated that a third of the increase in time taken to resolve cases over the 12 months to April 2021 was attributable to the increase in defended applications, which generally take longer to resolve.

<sup>42</sup> The Te Korowai Report, p90, 107.

<sup>43</sup> The average age across all Family active applications had increased by approx. 6% (an extra 15 days) when comparing applications active on 29-Feb-2020 against 30-Sep-2020.

<sup>44</sup> The Te Korowai Report, p78.



24. Judges' rostered sitting hours have remained fairly stable over time even though the number of defended cases has been rising.
25. Judges in the Family Court are supported by registrars who have a range of powers to undertake administrative work and decisions that are largely at the early stages of proceedings.<sup>45</sup> Many of these powers are not used in practice.<sup>46</sup> The Panel's report suggests two causes:
  1. some registrars lack confidence or experience to exercise the full range of their powers, particularly because of a perceived power imbalance with lawyers, and prefer to refer the more difficult decision making to a Judge, and
  2. some judges are not confident that all registrars have the appropriate training and experience to carry out such work.<sup>47</sup>
26. Registrars are expected to hold a minimum qualification level of NCEA Level 2, with the Ministry of Justice preferring applicants for the role hold a tertiary qualification such as a certificate of administration. Ministry of Justice training for registrars includes a two-day workshop and a comprehensive Registrars' Powers Manual. The long-standing expectation of registrars is that where they can make a decision, they must consider it first. If they feel they can't make the decision, then they must refer it to a Judge.

***A number of stakeholders are affected by delay***

27. The primary stakeholders and their interests are as follows:
  1. Caregivers and whānau affected by a matter before the Court. These people's safety, living arrangements, family relationships, and financial and general wellbeing of caregivers and whānau can be significantly affected by the speed and process by which matters are resolved. As noted above, available data shows delay is the most frequently cited challenge of resolving caregiving disputes through the Court.
  2. Children affected by proceedings. Children are a key interested group. Their safety, living arrangements, family relationships and general wellbeing can be affected by the speed and process by which matters are resolved. A small qualitative survey of children affected by caregiving disputes showed delay and

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<sup>45</sup> Such as setting court dates, hear interlocutory (procedural) applications, dissolve a marriage or civil union, and exercise their discretion in areas such as issue of a summons to witness to produce documents, dealing with requests to access court documents, the waiving of costs, setting and varying hearing dates in relation to a hearing and filing of documents, setting the amount of a bond on arrest of respondent.

<sup>46</sup> The Te Korowai Report, p82.

<sup>47</sup> The Te Korowai Report, p82.

its associated effects were among the things that made their experience of the family justice system harder. They found family justice processes hard when parents behave and communicate poorly, processes aren't timely and are adversarial, and families are divided.<sup>48</sup>

3. The judiciary. Their professional responsibilities and sense of vocation may be affected by the design and effectiveness of family justice services. s9(2)(g)(i)

The Panel identified that delays in the family justice system, particularly the Family Court, was a significant issue for judges, who expressed concern about the time it takes for family disputes to be resolved.<sup>49</sup> As outlined above, the judiciary have worked with the Ministry on the development of the role and are supportive of its introduction.

4. Lawyers. Their professional responsibilities and sense of vocation may be affected by the design and effectiveness of family justice services. As outlined above, the NZLS have worked with the Ministry on the development of the role. The NZLS recommended in their submission to the Panel that the position of Senior Court Registrar be reconsidered, stating "this is a reform that could introduce significant efficiencies in the Family Court."<sup>50</sup>
  5. Other Family Justice Professionals who work in the family justice system and wider social services. Their professional responsibilities and sense of vocation may be affected by the design and effectiveness of family justice services.
  6. Government and wider public. Timely justice responses are a key part of well-functioning family justice system and provide for a greater sense of procedural fairness.
28. Most Māori submitters told the Panel the family justice system didn't serve Māori well and didn't adequately recognise and incorporate tikanga Māori or a Māori worldview.<sup>51</sup>

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<sup>48</sup> UMR (2019) A qualitative study on behalf of the independent panel examining the 2014 family justice system reforms, p7. Available at: [www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-main-report.pdf](http://www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-main-report.pdf).

<sup>49</sup> *Submissions Summary: Independent Panel Examining the 2014 Reforms*, p8. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/Family-Court-Rewrite-Summary-of-Submissions.pdf>.

<sup>50</sup> New Zealand Law Society Submission to the Independent Panel (2018), p23. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/Family-Court-rewrite-submission-New-Zealand-Law-Society.pdf>.

<sup>51</sup> Noonan, R., King, L. and Dellabarca, C. (2019) *Submissions Summary: Independent Panel Examining the 2014 Reforms*, p38. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/Family-Court-Rewrite-Summary-of-Submissions.pdf>.

In another report on whānau experience on care and protection, timeliness has been identified by Māori as one of the areas for change.<sup>52</sup>

### ***Delays give rise to Te Tiriti or Waitangi and Human Rights concerns***

#### *Treaty of Waitangi/Te Tiriti o Waitangi*

29. The Treaty of Waitangi/Te Tiriti o Waitangi (te Tiriti) promised to protect Māori customs and cultural values, and to promote partnership between Māori and the Crown.<sup>53</sup> As noted above, the Family Court deals with matters integral to family life. The Court, and the speed with which it operates, influence how society organises and attributes value to family relationships.<sup>54</sup> It is therefore a system in which Māori values and practices relating to family and whānau should be protected.
30. The current delays in the Court affect the quality of relationships of those involved, and risk undermining whananaungatanga links.<sup>55</sup> Delay may disproportionately affect Māori, who appear to be over-represented in CoCA applications,<sup>56</sup> meaning the issues outlined above may be particularly pronounced for Māori.

#### *Human Rights*

31. Court delays impact negatively on a number of human rights such as the right to justice,<sup>57</sup> and the right to family life.<sup>58</sup> It can infringe on a number of rights guaranteed to children.<sup>59</sup> In some cases delays can affect the ultimate outcome of a case and have long-term damaging consequences for children and their whānau.

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<sup>52</sup> Dr Amohia Boulton et al, *Te Taniwha i te ao Ture-Ā-Whānau: Whānau experience of care and protection in the Family Court*, 2020.

<sup>53</sup> Waitangi Tribunal Report findings and recommendations of the Waitangi Tribunal on an application by Aila Taylor for and on behalf of Te Atiawa Tribe in relation to fishing grounds in the Waitara District \_ Wai 6 (Department of Justice, Wellington 1983) and Waitangi Tribunal Te Reo Māori Report \_ Y11 (Wellington 1986).

<sup>54</sup> [The New Zealand Law Commission. Report 82. Chapter 13: Māori Participation in the Family Court..](#)

<sup>55</sup> The High Court has said “the Family organisation of one of the Treaty partners can be seen as one of the things the Treaty was designed to protect, all Acts dealing with the status, future, and control of children must be interpreted as coloured by the principles of the Treaty of Waitangi, whether or not this is made explicit in the legislation” (*Barton-Prescott v Director-General of Social Welfare*, 1997).

<sup>56</sup> Available data is not comprehensive. An administrative review undertaken by the Ministry in 2016 revealed the following ethnicity of applicants and respondents for all CoCA applications in 2015/2016; European: 43%, Māori: 28%, Unknown: 20%, Pacific Peoples: 5%, Asians: 4%, other ethnic groups: 1%.

<sup>57</sup> Bill of Rights Act 1990, s 27.

<sup>58</sup> International covenant on economic social and cultural rights, Article 10; International Covenant on Civil and Political Rights, art 23(1).

<sup>59</sup> Convention on the Rights of the Child, art 8 and 9.

32. Delay is time children can never get back with their family and can represent a significant portion of that child's life-experience. It can stop a child from having contact with members of their whānau for lengthy periods while allegations and issues are resolved. It can prevent a family from moving on and starting new relationships as the dispute remains a live issue that requires ongoing time, attention, and maintenance. Changing valuations over time and the cost of the dispute itself (e.g., lawyers' fees) impact each party's assets following the dispute. This can in turn have ongoing implications for family life; eg the family home needs to be sold, due to the parties no longer being able to afford it.

***There are a number of key assumptions underlying this policy problem/opportunity***

33. We are relying on the findings of the Panel, anecdotal evidence of stakeholders and Māori, and some data on court time to determine the issues outlined above,<sup>60</sup> as drivers of delay.
34. The activity recorded through the Ministry Case Management System (CMS), combined with time set aside for Judges to write reserve judgements has been used to inform assumptions and benefits of the proposed Family Court Associate role, as a judicial officer.
35. We are assuming that judicial decisions that are largely at the early stages of proceedings are taking up time that would otherwise be spent on progressing more significant or complex cases.

***The overarching objective of this work is to improve outcomes for families, whānau and children by reducing the length of time that it takes to resolve matters brought to the Family Court***

36. The Family Court Associate role will reduce judges' workload on decisions that are largely at the early stages of proceedings. We anticipate this will enable them to focus a greater proportion of their time on progressing core judicial work

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<sup>60</sup> At paragraph 20.

## Section 2: Deciding upon an option to address the policy problem

37. In completing its report, the Panel undertook significant public consultation, holding more than 110 meetings and receiving more than 500 submissions. Those most intimately affected by the 2014 reforms – children and young people, parents, caregivers, guardians, grandparents and other whānau members – were extensively surveyed. The Panel’s engagement also included practitioners and providers of family justice services, academics, government agencies, the judiciary, and community groups. The Panel undertook two rounds of consultation; first round, in late 2018, heard the experiences of those who had used or worked in the system; the second, in early 2019, tested ideas for change.
38. As outlined in their summary of submissions, the Panel received one written submission from an identifiable Māori organisation. The Panel also met with several Māori organisations and received submissions from 25 individuals who identified as Māori. They also incorporated early findings from the Children’s Issues Centre research which examined experiences of, and satisfaction with, the reforms and the current family justice system from the perspectives of 364 family justice professionals, and 655 separated parents and caregivers. Most said the family justice system didn’t serve Māori well and didn’t adequately recognise and incorporate tikanga Māori or a Māori worldview.<sup>61</sup> In another report on whānau experience on care and protection, timeliness has been identified by Māori as one of the areas for change.<sup>62</sup>

### *The Ministry has undertaken targeted consultation*

39. Since Budget funding was approved, the Ministry has been directed to work towards the legislation being enacted by the end of 2022. In order to enable the work to progress as quickly as possible, and in light of the consultation undertaken by the Panel in preparing its report, the Ministry has undertaken targeted consultation with the judiciary and NZLSs in the development of options. The following agencies have been consulted on both the

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<sup>61</sup> Noonan, R., King, L. and Dellabarca, C. (2019) *Submissions Summary: Independent Panel Examining the 2014 Reforms*, p38. Available at: <https://www.justice.govt.nz/assets/Documents/Publications/Family-Court-Rewrite-Summary-of-Submissions.pdf>.

<sup>62</sup> Dr Amohia Boulton et al, *Te Taniwha i te ao Ture-Ā-Whānau: Whānau experience of care and protection in the Family Court*, 2020.

Cabinet paper and this RIS: Crown Law Office; NZ Police; Te Arawhiti; Te Puni Kōkiri; the Ministries of/for Social Development, Health, Pacific Peoples, Women, and Business, Innovation and Employment; Oranga Tamariki; Department of Corrections; Department of Internal Affairs; Office for Disability Issues; Ministry for Ethnic Communities; the Treasury; the Family Violence and Sexual Violence Joint Venture Business Unit; Inland Revenue and Department of Prime Minister and Cabinet.

40. Agencies are broadly supporting of this proposal.

**Engagement with the judiciary and the legal profession has been critical for this proposal**

41. As outlined above, the Ministry has engaged with the judiciary and the NZLS on the development of the role; including the appropriate powers and legislative design. This input has helped inform the nature and scope of the Family Court Associate to ensure the best chance of success when implemented.

42. The judiciary and NZLS have both shown strong support for the Family Court Associate role. They were clear in their view that the role would be most effective as a judicial officer (the fourth option outlined in the next section) and noted that, in their view, it would not be appropriate for an officer of the court (the third option outlined in the next section) to make procedural decisions that could have a significant impact on a hearing.

43. The Family Court Associate role, when implemented, will work closely with the Family Court bench and lawyers. The judiciary and NZLS’s ongoing involvement in the development of the role will remain critical to its success.

**A number of criteria capture the impact of the options as against the status quo.**

44. Taking into account the objectives of this work, the criteria for assessing the options are outlined below. Where there are trade-offs to be made between criteria, the most weight is placed on criterion one, supporting the timely and safe resolution of disputes, because timely decisions are the key issue this reform aims to address..

Criterion	What the criterion encompasses	Relevance of criterion
Supports the timely and safe resolution of disputes.  <i>Because timely decisions are the key issue this reform aims to address, this criterion carries the most weight.</i>	The option should support timely, durable, and safe resolution of disputes.  This criterion encompasses how effective the role would be in reducing delay in the Family Court by freeing up Judge time.	<ul style="list-style-type: none"> <li>• Prolonged exposure to poorly resolved conflict can be psychologically harmful, particularly to children.</li> <li>• COCA emphasises consideration of a child's sense of time.</li> <li>• Cases involving family violence should remain with judges due to the</li> </ul>

	<p>The option should ensure that decision-making that affects a child places the child's well-being at the centre, and recognises the child's place within their family, whānau, hapū, iwi, family group, and community.</p>	<p>care needed to be taken in regard to safety</p> <ul style="list-style-type: none"> <li>• Prolonged proceedings can add financial costs to parties.</li> </ul>
<p>Consistent with the separation of powers and independence of judiciary.</p>	<p>In order to maintain accountability and fairness, the three areas of government should be kept separate from each other. By being kept separate, each branch places a check on the others.</p>	<p>Where other roles are taking on judicial work this shouldn't be in breach of this principle. Even though decisions seem minor in the scheme of the case they still have potential to impact the ultimate outcome.</p>
<p>Timeliness of implementation.</p>	<p>The option should have minimum barriers to implementation – factors to consider include time required for legislation to be enacted, appointments to be made, and operational matters to be worked through.</p>	<p>Given the negative impacts of delay it is important that the option is operational as soon as possible to continue to address the issue.</p>
<p>Flexibility</p>	<p>This criterion relates to the ease in which the Ministry is able to make changes to the role (including workload and location) and manage costs long term.</p>	<p>The Family Court's needs will evolve over time and the Ministry should retain some ability (in-line with the separation of powers) to adapt to these needs in order to maintain the efficient operation of the courts and justice system, within budget.</p>

## What scope will options be considered within?

### Four options have been considered in relation to the issue of judges' administrative workload

45. These are:
1. Status quo/no change.
  2. Training for registrars to ensure they undertake the full range of work within the scope of their powers.
  3. Establishment of a new 'officer of the court' role (Ministry of Justice employee) to take on responsibility for some administrative work that sits within judges' areas of responsibility.
  4. Establishment of a new judicial officer role to take on responsibility for more administrative work and other work that is largely at the early stages of proceedings and/or interlocutory, that sits within judges' areas of responsibility.
46. Options Two, Three, and Four seek to ensure the Court's work is resolved by the appropriate level of decision-maker. They could be implemented independently. Alternatively, options Two and Three could be undertaken concurrently, or Two and Four.
47. A further option, increasing the number of judges, was identified but not considered further because the underlying issue the Panel's proposal looked to address was the delay caused by the administrative workload of judges. As part of this the Ministry considered, in line with the Panel's proposal, the level of expertise required from judges is not required in order to undertake all the tasks that are currently judicial responsibility in every case.

#### Option One - Status quo/no action

48. This option would retain current arrangements. Registrars' powers would remain unchanged, and qualifications and training on powers would continue in the manner described above.
49. There would be no impact on the objective of supporting early resolution.

#### Option Two - Training for registrars

50. This non-regulatory option would involve training a number of existing Family Court registrars with the aim of giving them confidence to fully exercise their powers. Judges



and the New Zealand Law Society could be invited to assist in the design and delivery of the training, to help build mutual confidence.

#### *Stakeholder views*

51. Public consultation has not been undertaken on this option. However, in submissions to the Panel on the option discussed below, some family justice professionals suggested the priority should be ensuring existing registrars more fully exercise their current powers.<sup>63</sup>
52. Both training for registrars and the establishment of a Senior role (option 3) were recommended by the Panel. Additional policy work was undertaken on the options 3 and 4 after funding was approved for a new role. [s9\(2\)\(f\)\(iv\)](#)

#### **Option Three – Establishment of an officer of the court role**

53. A newly created role could undertake more simple and administrative judicial tasks. Their powers would encompass registrars' current powers, plus additional administrative powers.<sup>64</sup> The expectation is that, while they can do everything a registrar can do, registrars would still be doing the bulk of their work and the new role would be focussed on the extra powers.
54. Modelling, tested with the judiciary, suggests this could free up the equivalent time of 13% of judicial time.<sup>65</sup> Modelling on time saved is explained below at paragraph 63. The scope of this would be constrained by the fact of their connection to government and the preference to maintain a separation of powers.
55. This option most closely reflects the Panel's recommendation.

#### *Stakeholder views*

56. For completeness, stakeholder views on Option Three are discussed below – together with the views on Option Four.

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<sup>63</sup> The Te Korowai report, p.49.

<sup>64</sup> Set out in the comparison table below.

<sup>65</sup> Using the assumption the role would be 50% as efficient as a Judge, due to having less experience so needing to take more time.

#### Option Four – Establishment of a judicial officer role

57. A newly created role could undertake administrative judicial tasks as well as more decisions that are largely at the early stages of proceedings. Their powers would encompass registrars' current powers, plus a wider range of additional powers,<sup>66</sup> relating to more straightforward and uncontested work that is less likely to determine the final outcome of an application/case constituting about 25% of judicial time.<sup>67</sup> Modelling on time saved is explained below at paragraph 63.
58. Expected experience for the role would be 10 – 15 years of family law practice experience. Early testing with the NZLS and judiciary indicated the qualification requirements and independence will go the furthest towards ensuring the role can undertake a greater number of judicial responsibilities and increase judicial availability for trickier matters. These elements are also expected to foster confidence in both the individual and those working with them; in particular judges and lawyers (who could otherwise routinely send the role's decisions for judicial review, losing the benefit of the role). This in turn is expected to free-up judicial time and reduce delays.
59. This option expands the Panel's recommendation and has a better chance at achieving the underlying purpose by allowing more tasks to be undertaken by the role.

#### *Stakeholder views – Options Three and Four*

60. Most of those who submitted to the Panel on the proposal for a senior court registrar supported it and felt that it would improve the efficiency of the Court by helping free up judicial time for core work. Family Court judges, lawyers and court users were among those supporting the proposal.<sup>68</sup>
61. Many (45%) thought the role should be granted the powers necessary to handle administrative and uncomplicated matters. Common suggested competencies were legal skills or qualifications, knowledge of relevant law and processes, understanding

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<sup>66</sup> Set out in the comparison table below.

<sup>67</sup> Using the assumption the role would be 65% as efficient as a Judge (due to having less experience and needing to take longer on decisions as a result).

<sup>68</sup> Forty-two submitters responded to the proposal, and 76% supported establishing a new senior registrar role. The Te Korowai Report, p.48.

of family violence and children's rights, experience in the court, and cultural competence.<sup>69</sup>

62. A couple of family justice professionals submitters questioned whether the option is the best use for limited resources, and could create risks if tasked with complex matters like without-notice applications.<sup>70</sup>
63. s9(2)(f)(iv)

The judiciary have shown strong support for the Family Court Associate. They were clear in their view that the role would be most effective as a judicial officer and noted that it would not be appropriate for an officer of the court to make procedural decisions that can have a significant impact on a hearing. The NZLS also supported the judicial officer model. Judicial input has helped inform the nature and scope of the Family Court Associate role, including the appropriate powers and legislative design, to create a role that has the best chance of fully realising its purpose.

#### *Modelling on the amount of judge time saved*

64. To estimate the amount of judge time saved for option three (13%) and four (25%), we have:
1. Collated the volume and associated time spent (actual durations) on all case events in the Family Jurisdiction within CMS.
  2. Classified CMS case events into categories, and then mapped these against powers and function which the Ministry believe, in consultation with the judiciary, NZLS and agencies, would be appropriate for each type of role to carry out.
  3. Calculated the amount of time spent on FCA eligible events as a proportion of total time spent on Judge events in order to provide a percentage of Judge time an FCA could be able to accommodate.
  4. We anticipate an FCA may not be as efficient or knowledgeable as a Family Court Judge when they first start work. In order to reflect this in the modelling

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<sup>69</sup> Forty-two submitters commented, and most (76%) supported the Panel's proposal to establish a new position. The Te Korowai Report, p.48.

<sup>70</sup> The Te Korowai Report, p 49, 50.

we made the assumption that the role would be 50% as efficient as a judge for an officer of the court and 65% for a judicial officer (a judicial officer would be more experienced than an officer of the court).

5. Modelling estimated that any number above nine judicial officers would be more effective in saving judge time than an officer of the court.

## Comparison of options

	Training for registrars	Officer of the court <sup>71</sup>	Judicial Officer
<b>Key tasks</b>	<p><b>Training for standard registrars</b></p> <ul style="list-style-type: none"> <li>• Would assist in the day-to-day operation of the Family Court to free up the administrative workload of Judges.</li> </ul>	<p><b>Limited additional powers to registrar, focusing on decisions that are largely at the early stages of proceedings</b></p> <ul style="list-style-type: none"> <li>• Without statutory independence, the role would not undertake powers that may influence any decision or hearing/application.</li> <li>• Would assist in the day-to-day operation of the Family Court (such as appointing counsel) to free up the administrative workload of Judges.</li> </ul>	<p><b>Independence from the Executive, enabling greater powers</b></p> <ul style="list-style-type: none"> <li>• Would have more decision-making powers and perform tasks that may have greater influence over the outcome of a hearing/application.</li> <li>• Would undertake a more substantial amount of Family Court work to free up Judge time, which will improve outcomes for court users through faster resolution of cases.</li> </ul>
<b>Additional powers</b>	<p><b>All existing registrar powers, such as:</b></p> <ul style="list-style-type: none"> <li>• setting court dates;</li> <li>• hearing interlocutory (procedural) applications;</li> <li>• dissolving a marriage or civil union;</li> <li>• exercising their discretion in areas such as: <ul style="list-style-type: none"> <li>○ issue of a summons to witness to produce documents;</li> </ul> </li> </ul>	<p><b>All powers of Option 1 plus:</b></p> <ul style="list-style-type: none"> <li>• the appointment of counsel for parties or children;</li> <li>• directions as to reports;</li> <li>• directions for filing evidence and for service;</li> <li>• direction to set matters down for hearing;</li> <li>• directing parties to a settlement conference;</li> <li>• convening over a limited number and range of settlement conferences;</li> </ul>	<p><b>All powers of Option 1 and 2 plus:</b></p> <ul style="list-style-type: none"> <li>• convene over a range of conferences including issues, directions and settlement/mediation conferences;</li> <li>• consider security for costs;</li> <li>• <b>s9(2)(f)(iv)</b></li> <li>• consider objections to attend programmes;</li> <li>• <b>s9(2)(f)(iv)</b></li> </ul>

<sup>71</sup> Officers of the court are Ministry employees that exercise some judicial functions. When they are acting as employees, they can be directed by the Ministry but when acting as an officer of the court they act independently of the Ministry. For example, Court Registrars are officers of the court.

	Training for registrars	Officer of the court <sup>71</sup>	Judicial Officer
	<ul style="list-style-type: none"> <li>○ dealing with requests to access court documents;</li> <li>○ waiving of costs;</li> <li>○ setting and varying hearing dates in relation to a hearing and filing of documents;</li> <li>○ setting the amount of a bond on arrest of respondent.</li> </ul>	<ul style="list-style-type: none"> <li>• considering cost contribution orders;</li> <li>• case management/active monitoring of applications from filing to hearing.</li> </ul>	
<b>Experience</b>	<p><b>Minimum qualification level of NCEA Level 2</b></p> <ul style="list-style-type: none"> <li>• Preference for a tertiary qualification such as a certificate of administration.</li> </ul>	<p><b>Legally trained with approx. 7 years<sup>72</sup> of family law experience.</b></p> <ul style="list-style-type: none"> <li>• Enables a wider range of potential candidates.</li> <li>• Could have less confidence of judiciary and the profession (due to less experience and lower competency), which risks the role not being effective in practice (e.g. increased decisions being reviewed).</li> </ul>	<p><b>10-15years of family law experience,<sup>73</sup> pathway to become a Judge<sup>74</sup></b></p> <ul style="list-style-type: none"> <li>• Would have more confidence and respect of judiciary, profession, and the public – which may be critical to the effectiveness of the role.</li> <li>• More experienced and competent Family Court Associates could increase efficiency and effectiveness.</li> </ul>

<sup>72</sup> This would likely be the upper limit of experience for the officer of the court, as more experienced candidates would not be attracted to the lower overall remuneration, and without judicial pathway. The duties of role would not justify recruiting more experienced lawyers.

<sup>73</sup> Consultation with stakeholders has indicated there would be a sufficient candidate pool available to recruit candidates with 10-15 years' experience to the expected number of judicial officer positions (s9(2)(f)(iv))

<sup>74</sup> 7 years is a minimum legislative requirement to become a judge and candidates usually have many more years of practice experience before being considered experienced enough for appointment. Anecdotally we understand they usually have around 20 years of experience.

	Training for registrars	Officer of the court <sup>71</sup>	Judicial Officer
			<ul style="list-style-type: none"> <li>• Could assist as a development pathway to the Family Court bench.</li> </ul>
<b>Cost and number of roles</b>	<p><b>Lowest cost option</b></p> <ul style="list-style-type: none"> <li>• Training costs have not been calculated but are assumed to be the lowest cost option.</li> <li>• The number of existing Registrar roles would remain the same.</li> <li>• Certainty of future costs to the Government (degree of and need for ongoing training within the Government's control).</li> </ul>	<p><b>Option would be implemented within the \$15.1 million agreed for the role by Cabinet</b></p> <ul style="list-style-type: none"> <li>• Lower remuneration than option 4 (approx. \$140,000).</li> <li>• More certainty that role will be implemented within budget.</li> <li>• Certainty of future costs to the Government (salary and benefits would be set by the Ministry).</li> <li>• Uncertainty on how attractive the role may be to potential candidates, given lower remuneration.</li> <li>• Budget funding is available for up to 30 roles however, modelling has indicated that only up to 15 would be needed, based on the powers they would be able to exercise.</li> </ul>	<p><b>Option would be implemented within the \$15.1 million agreed for the role by Cabinet</b></p> <ul style="list-style-type: none"> <li>• Higher remuneration <b>s9(2)(f)(iv)</b> would likely attract more experienced candidates.</li> <li>• <b>s9(2)(f)(iv)</b></li> <li>• Expenditure may not occur in the sequence that funding has been allocated in the appropriation.</li> <li>• Uncertainty of future costs (as Remuneration Authority process is outside the Government control).</li> </ul>
<b>Appointment</b>	<b>No appointments would be made under this option</b>	<b>Made under the Public Service Act 2020</b>	<b>Made on the recommendation of the Attorney-General</b>

<sup>75</sup> This is an estimate only, as remuneration would be set by the Remuneration Authority. **s9(2)(f)(iv)**

<sup>76</sup> **s9(2)(f)(iv)**

	Training for registrars	Officer of the court <sup>71</sup>	Judicial Officer
		<ul style="list-style-type: none"> <li>• Would reduce time required to appoint candidates (normal employment contract provisions would apply).</li> <li>• Provides greater flexibility for recruitment and ongoing staff management (such as increasing or decreasing the number of positions).</li> </ul>	<ul style="list-style-type: none"> <li>• Will require more time for candidates to be recommended and considered by the Cabinet Appointments and Honours Committee (extend implementation timeframe by 2-3 months after legislation is enacted).</li> <li>• Less flexibility for ongoing tenure and staff management.</li> </ul>
<b>Location and logistics</b>	<b>Training would not affect where Registrars are located</b>	<b>Located off-site, in close proximity to the court</b> <ul style="list-style-type: none"> <li>• Would be implemented within existing property/implementation budget.</li> <li>• Easier to implement and would not place pressure on existing staff or court buildings.</li> </ul>	<b>Located in the court, where possible.<sup>77</sup></b> <ul style="list-style-type: none"> <li>• Enable the Family Court Associate to be more effective and work close to Judges.</li> <li>• May require more funding dedicated to property/implementation (though still within overall allocation or from baseline CAPEX).</li> <li>• Would create barriers to implementation and may not be possible at some sites with existing accommodation pressures.</li> </ul>

<sup>77</sup> Noting that there are accommodation pressures across the Family Court. Planning and implementation would be required to accommodate the judicial officer, which may include moving existing Ministry roles elsewhere.



*There are some Family Court matters that would not be appropriate for the FCA*

65. There are some matters dealt with in the Family Court that would always remain with judges due to their social significance (impact on people), impact on human rights or complexity. These types of matters include:
1. the granting of injunctions;
  2. final decisions about guardianship and those that materially affect children;
  3. hearings that involve the cross-examination of witnesses (defended hearings);
  4. most proceedings under the Oranga Tamariki Act 1989, including most powers in relation to the Care and Protection System (except for those involving an issuing officer, uncontested review of plans and minor procedural matters);
  5. applications/cases involving family violence (except objections to attend programmes and minor procedural matters like appointment of counsel);
  6. most proceedings under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and the Substance Addiction (Compulsory Assessment and Treatment) Act 2017.
  7. without-notice (urgent) applications that involve immediate risk/harm.

### ***Overseas experience***

66. Registrars in Australia have powers to undertake the various case management functions, procedural hearings and dispute resolution. The following powers and function are of particular importance to the role:
1. presiding over procedural hearings such as directions hearings and court-based resolution events;
  2. determining uncontested divorce applications in the Federal Circuit Court; and,
  3. considering Applications for Consent Orders in the Family Court of Australia.
67. Senior Registrars have power to determine a wide range of substantive interim applications and preside over interim hearings.
68. There has been a trend of expansion of powers delegated to Registrars/Senior Registrars. On 26 September 2020 the ability to undertake interim hearings in the Federal Circuit Court was extended to Senior Court Registrars and additional powers granted to registrars in the Federal Circuit Court. Further expansion came into effect on 1 September 2021.

## How do the options compare to the status quo/counterfactual?

### Key for qualitative judgements:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

	Option 1: No action – status quo	Option 2: Training for registrars	Option 3: New officer of the Court role	Option 4: New judicial officer role
<p><b>Criterion 1:</b> Supports the timely resolution of disputes</p> <p><i>This criterion carries the most weight because timely decisions are the key issue this reform aims to address.</i></p>	<p>0 Cases in the Family Court take an average of 175 days to resolve.</p> <p>For CoCA matters, the most common application type, the average is 294 days. For defended CoCA substantive applications, which make up 69% of all active CoCA applications, the average is 384 days.</p>	<p>Between 0 and +</p> <p>Training may help registrars complete work more efficiently and feel more confident exercising more of their powers. However, it is likely to only produce a small improvement, as the scope of their role is influenced by power imbalances with judges and lawyers arising from differences in qualifications and experience. In particular, a 2010-2011 pilot showed that there was no impact on delay when existing registrars were trialled in a more senior registrar role.</p> <p>Further, some of the courts' time-consuming administrative work, such as box work, would remain outside registrars' powers because of the level of expertise and independence required to exercise those powers.</p>	<p>+ Role could save 13% of judicial time, which could be used to progress cases.</p> <p>Where the decision of the role is not challenged, the improved timeliness would reduce the costs of accessing justice</p> <p>There may be additional costs to parties if the decision is challenged as it would add an additional step in proceedings.</p>	<p>++ Role could save up to 25% of judicial time, which could be used to progress cases. Qualification and/or experience requirements, a broader scope of powers than registrars and a judicial officer role in the appointments process would give judges and lawyers confidence in the role.</p> <p>s9(2)(ba)</p> <p>Where the decision of the role is not challenged, the improved timeliness would reduce the costs of accessing justice.</p>

		A small improvement in timeliness could reduce the costs of accessing justice		There may be additional costs to parties if the decision is challenged as it would add an additional step in proceedings.
<b>Criterion 2:</b> Consistent with separation of powers	0 No impact	0 No impact	- While there is separation between employee management (Government) and decision making (Judicial) in similar roles (eg registrars), for the new role there could be a perception of tension with them being Government employees. This is also likely to impact their effectiveness, as outlined above.	0 The law making (Government) and decision making (Judicial) elements remain clearly separated.
<b>Criterion 3:</b> Timeliness of implementation	0 No impact	Between 0 and - Quick to deliver, doesn't require legislation or recruitment.	- legislative process may delay implementation standard training and recruitment processes required won't take long.	-- This requires more substantive (than option 3) legislative change to implement. Substantial training and recruitment processes also required.
<b>Criterion 4:</b> Ease of management	0 No impact	Between 0 Overall the same management structures would exist.	Between 0 and -  Potential changes to operational management structure but flexibility and Ministerial/executive oversight retained. Potential for cost savings in the future as not all of the budget for the FCA salary may be needed. Separation of powers when the role is undertaking their judicial powers will need to be carefully maintained.	- The roles work will mostly be in the control of the judges. The Ministry will still need to work with the role to maintain the effective management of the court. Salary for the role would be determined by the remuneration authority.
<b>Overall assessment</b> (noting criteria 1 has more weight)	0	Between 0 and +	Between - and +	+

## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

### *Options comparison*

69. We have placed more weight on the first criteria (supports the timely resolution of disputes) as this directly relates to the purpose for which funding has been agreed by Cabinet; to reduce delay in the Family Court and improve outcomes for court users.
70. All options could be better than the status quo in promoting timeliness, however, the judicial officer scores the best on this.
71. As outlined above, the role as a judicial officer position (option four) could free up 25% of current judicial time, once fully implemented. This is premised on the assumption the role would be 65% as efficient as a Judge<sup>s9(2)(f)(iv)</sup>
72. The role as a Ministry of Justice position / Officer of the Court could free up 13% of current judicial time, once fully implemented. This is premised on the assumption the role would be 50% as efficient as a Judge and that there would be 11-15 full time roles filled.
73. While the officer of the court may allow for more flexibility in terms of management and costs and could be implemented faster, its long term impact on delay would be less notable than the judicial officer role. A judicial officer would have greater powers to perform a wider range of Family Court work. It would undertake a more substantial amount of Family Court work; freeing up more Judge time which will improve outcomes for court users through faster resolution of cases. The judiciary have indicated they would be more willing to delegate a wider range of work to a judicial officer and lawyers and the public is likely to have greater confidence in their decisions. For these reasons, the judicial officer (option 4) is the Ministry's preferred option.

## What are the marginal costs and benefits of the option?

<b>Affected groups</b> <i>(identify)</i>	<b>Comment</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	<b>Evidence Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
Regulators	Nil	Nil	Nil
Judiciary	Loss of some level of oversight of a case by the presiding Judge.	Low. Mitigated in part by careful consideration around the powers the role has.	Medium. The judiciary have been involved in determining the appropriate powers for the role.
Wider Government	Cost in setting up the role and ongoing operating expenditure.	\$15.1 million for first four years (including set up).	Medium
Children	Nil	Nil	Medium. Dependant on the role being used as expected
Parents and caregivers	Nil	Nil	Medium. Dependant on the role being used as expected.
<b>Total monetised costs</b>		\$15.1 million	
<b>Non-monetised costs</b>		<i>(High, medium or low)</i>	
<b>Additional benefits of the preferred option compared to taking no action</b>			
Regulated groups	Judiciary would be able to spend more time on progressing more complex cases. Lawyers would see a reduction in delay for their clients.	Medium	Low – Medium. Modelling shows up to 25% of judicial time saved. However, we are unable to determine how this time saving will then go onto impact of delay.

Regulators	Nil	Nil	High
Wider Government	Improved sense of procedural fairness by public. Enhanced separation of powers.	Low	Low
Children	Improved mental wellbeing.  Increased safety.	Medium	Low – Medium. As outlined in the limitations section above, there is no quantitative evidence about the effects of the size of a courts' administrative workload and how that workload is distributed across decision-makers on resolution time.
Parents and caregivers	Improved mental wellbeing.  Increased safety.	Medium	Low – Medium. As outlined in the limitations section above, there is no quantitative evidence about the effects of the size of a courts' administrative workload and how that workload is distributed across decision-makers on resolution time.
<b>Total monetised benefits</b>	Using reverse analysis in the Treasury's CBAX tool – for the impact to breakeven - only 1.7% of the children currently affected by CoCA proceedings need to be affected to have	Medium	Low - Medium. the estimation of benefits does not take account of operational factors: such as there being enough work for an Family Court Associate to be fully utilised in locations they are placed, how often an Family Court Associate may need

	this initiative break even. <sup>78</sup>		to refer a matter on to a Judge, or there being sufficient space to accommodate an Family Court Associate in the Court.
<b>Non-monetised benefits</b>	Improved wellbeing of children, parents and caregivers. Improved sense of procedural fairness by the public.	Medium	Low

## Section 3: Delivering an option

### How will the new arrangements be implemented?

#### New judicial officer role

##### *Role development and costs*

74. The role would be developed in further consultation with the judiciary and legal profession, as well as with frontline court staff. This would help to ensure it is effective and has the confidence of key groups who will engage with the role. This will also help inform these key groups about the role ahead of the role becoming operational.
75. The role will be developed and implemented within the \$15.1 OPEX funding provided through Budget 21.
76. It is likely that CAPEX expenditure will be required to accommodate the Family Court Associate within court locations throughout the country.
77. Implementation planning is ongoing and the full needs (e.g.. training, location the roles will be based) and CAPEX expenditure will be known when this planning has been completed.

##### *Onboarding*

78. The Family Court Associate role will be phased in over three years. **s9(2)(f)(iv)**

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<sup>78</sup> The CBAX analysis included the costs and benefits of two other initiatives that did not receive Budget 21 funding.

79. The first tranche of positions will be filled 3-6 months following the enactment of the enabling legislation to allow for the Cabinet Appointment and Honours Committee process. The legislation is planned to be in place by the end of 2022 or early 2023.
80. The judiciary will have a key role to play in developing and delivering training for the Family Court Associate as it is their duties the role will be taking on. The training will need to be specifically developed with the legislative parameters of the new role in mind. The Ministry will provide appropriate support to the judiciary and the Family Court Associates to enable training.

#### *Onboarding - Risks*

81. The role will be located within court houses where possible. There could be delay in implementing Family Court Associates in some locations where court space is already at capacity.

#### *Ongoing management*

82. Managing the Family Court Associates' exercise of judicial powers will not be within the Ministry of Justice's domain as the role has independence in this. However, ensuring smooth operations of the court mean the Ministry will work with the roles as they do Registrars.
83. The new roles will be supported by Ministry of Justice National Office staff, as well as Executive Support.

### **How will the new arrangements be monitored, evaluated, and reviewed?**

84. Detailed planning on evaluation has not yet taken place. The Ministry's initial evaluation planning is noted below but is subject to change.
85. At this stage it is planned that the Family Court Associate will be monitored through a standard monitoring process, with the support of an external evaluator who will do a quantitative and qualitative evaluation. This will enable the service to be adapted as needed (within its legislative parameters) during its staged roll out.
86. The Ministry will compare current state evidence<sup>79</sup> against future state evidence using internal resources to conduct court observations/surveys/focus groups at selected sites using selection criteria developed in advance.
87. To help assess the Family Court Associates' impact on reducing delays we anticipate monitoring court events within the existing court technology (CMS):

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<sup>79</sup> in early 2022/23, before appointments made.



1. The types of activities the Family Court Associate takes on and how long they spend on them;
  2. How much time judges spend on the same activities the Family Court Associates would also undertake. We would expect judges to spend less time on activities that Family Court Associates can undertake and more time on other activities (that the Family Court Associates won't have jurisdiction over).
  3. The average age of applications. We would expect to see this decrease over time, assuming similar volumes.
88. The Ministry will use a formative evaluation method to allow early findings to influence further implementation/ roll out (improvement-oriented rather than judgement-oriented). The evaluation could have two components:
1. quantitative data collection
    - baseline review of existing available data and measures for all Family Courts; and
    - collection of specific measures for the initiative (at the court sites the Family Court Associates will be based at) at 3-monthly intervals.
  2. qualitative data collection (Survey/interview of key stakeholders) - assumes interview of 4-5 people at the sites the Family Court Associates will be based at. This will help determine:
    - whether stakeholders perspectives of the issue of delay in the family court has changed after the Family Court Associate role was implemented. The types of questions we could ask stakeholders include: What implementation issues have emerged; how are they being addressed? How are stakeholders reacting to the changes? Who is influential? What contextual factors are influencing progress towards objectives?
89. If monitoring, using the quantitative data showed unexpected results, eg there was little or no change to how judges were spending their time, the Ministry would explore the causes of that, using the qualitative method outlined above to interview relevant stakeholders on why they think the role has not made an impact.
90. Monitoring and evaluation on the impacts the Family Court Associate has on delay may enable a better understanding of the issue of delay more widely and other Family Court issues going forward.

## Section 4: Conclusion

91. Delay is impacting all levels of cases with a number of negative outcomes; entrenching positions and prolonging conflict. This has profound effects on child wellbeing, damage to children's relationships with whānau, and damage to people's trust in the system. Parents and caregivers consider delay to be one of the most negative aspects of the family justice system.
92. Delay arises in multiple parts of the system and for different reasons. As outlined above, this RIS and the options discussed within it respond to the Panel's recommendation to introduce a new role to address one of the drivers of delay: the heavy administrative workload of judges. The anticipated benefit of reducing this workload is judges spending more time on their core responsibilities and therefore being able to provide timelier decisions for children and their whānau.
93. The Ministry's analysis shows that additional training for registrars to ensure they are exercising the full range of their powers is likely to have limited impact in addressing this driver of delay if implemented alone. This option may benefit from further policy work in the future to assess whether it will work as an additional measure to address delay.
94. Introducing a new role, the Family Court Associate, is likely to be the most effective option. With additional experience and qualifications as a pre-requisite, this role would hold all the current powers of a registrar, as well as additional powers to undertake additional administrative judicial tasks. If the role was a judicial officer the additional powers could also include judicial decisions relating to more straightforward and uncontested work that is less likely to determine the final outcome of an application/case.
95. The Ministry-preferred option is the newly created judicial officer role. The judiciary and NZLS were also clear in their view that the role would be most effective as a judicial officer.
96. The Ministry's analysis shows the judicial officer role, because of the impacts of the additional pre-requisite experience and qualifications on both the roles ability to take on a wider range of work and on stakeholder confidence, has the highest chance of achieving the underlying purpose of the Panel's recommendation.