

The role of law in family disputes

Dr Rob George *

What is the role of the law in resolving disputes between family members? What is the role of the court in adjudicating on those disputes? In various ways, the answers to these questions have been subjected to significant challenge in recent years, with numerous policies, both overt and otherwise, which appear designed to limit both the place of law and the role of courts in the family context.

I first wrote about this issue in 2012 in *Ideas and Debates in Family Law*,¹ which opened with a short essay in which I discussed the idea of ‘justice’ in the field of family disputes. The essay posited that we should resist the idea that family disputes are not within the field of ‘law’, and that we should defend the value of seeking justice in the family area. That chapter forms some of the background to this article, which seeks to analyse some challenges and developments – and some challenging developments – in the field of family justice in New Zealand and in England.²

It is worth setting out some context for the original essay, entitled *Family Law and Family Justice*. There have not been many times over the last 40 years or so when there has not been some kind of challenge to the role of the courts in family disputes. New Zealand was, in some senses, ahead of the game in this regard, with the Family Courts Act 1980 (NZ) creating a unified, specialist family court in New Zealand long before many other countries, including England, followed suit. Indeed, it took until 2013 for England to have a court called the Family Court,³ though of course family cases were determined in courts by other names.⁴

The Family Courts Act (NZ) 1980 came at a time when there was, in general, notably more public and policy confidence that the court was a suitable place for family disputes to be resolved in the absence of agreement.⁵ By the mid-1990s, the general confidence

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¹ R George, *Ideas and Debates in Family Law* (Hart Publishing, 2012) – hereafter, *Ideas and Debates*.

² ‘England’ is used here as a short-hand for the legal jurisdiction of England and Wales, though in fact in some material aspects the Welsh Assembly now has delegated powers to make separate law for Wales connected to the family justice system, and has done so in legislation such as the Social Services and Well-being (Wales) Act 2014. Scotland and Northern Ireland have separate legal systems, which are beyond the scope of this article.

³ Crime and Courts Act 2013 (Eng).

⁴ The High Court, the County Court, and the Family Proceedings Court (a court of lay magistrates) all had jurisdiction in relation to some areas of family work prior to the 2013 Act.

⁵ This general attitude of confidence in the court system is well reflected in Melvyn Murch’s book, *Justice and Welfare in Divorce* (Sweet and Maxwell, 1980).

once held in the family court system had, in England at least, begun to shift, and challenges to the appropriateness of the courts were strengthening, both practically in terms of case resolution and philosophically in terms of the role of the law.⁶

The Position in England

While the situation had been developing for some twenty years, the situation in England in the immediate aftermath of the commencement of the Cameron government in 2010 was particularly challenging. The UK's leading commentators on family justice, Mavis Maclean and John Eekelaar, referred to this as 'uncertain times',⁷ with Maclean elsewhere calling the landscape created by our Legal Aid, Sentencing and Punishment of Offenders Act 2012 'hard times'.⁸ Jo Miles and I put it as 'ever more challenging times in family justice'.⁹ All of this is an exercise in British understatement.

The primary focus of these challenges has been in terms of financial resources. Legal aid was cut by over a third,¹⁰ including major restrictions on the types of cases that were eligible for legal aid at all.¹¹ Local children's services departments – responsible for all care and protection work in England – had their budgets slashed.¹² The courts themselves have faced enormous funding problems, stemming from a cut to the Ministry of Justice's overall budget in excess of 25% over 7 years.¹³ Unsurprisingly, this led to enormous backlogs of cases in the courts, and the development of social work practice that now all-but ignores cases until there is the need for urgent protective intervention.

⁶ See generally G Davis, S Cretney and J Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (OUP, 1994); J Eekelaar, 'Family Justice: Ideal of Illusion? Family Law and Communitarian Values' (1995) 48 *Current Legal Problems* 191.

⁷ J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart Publishing, 2013).

⁸ M Maclean, 'Family Law in Hard Times' (2011) 33 *Journal of Social Welfare and Family Law* 309.

⁹ J Miles, R George and S Harris-Short, *Family Law: Text, Cases, and Materials* (OUP, 4th edn, 2019), p v.

¹⁰ Non-criminal legal aid has been cut by over 36% since 2011: House of Commons Library, *The Future of Legal Aid: Summary* (31 October 2018), online at <https://researchbriefings.files.parliament.uk/documents/CDP-2018-0230/CDP-2018-0230.pdf>, p 4.

¹¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Eng).

¹² Local authorities have seen a 28.6% cut in their budgets since 2010: National Audit Office, *Local Government in 2019: A Pivotal Year*, online at <https://www.nao.org.uk/naoblog/local-government-in-2019/>. It is fair to say that local authorities have, in general, prioritised child protection work, where strong statutory duties are imposed on local authorities. However, this has been achieved with great difficulty, and at the cost of major reductions in non-compulsory children's services like children's centres, parenting programmes and early help, all of which are both important in their own terms and also help to avoid families needing urgent child protection intervention: see generally the report of the Housing, Communities and Local Government Select Committee, *Funding of Local Authorities' Children's Services* (14th report of 2017-19, 23 April 2019), online at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1638/1638.pdf>, p 10.

¹³ Institute for Government, *Whitehall Monitor 2019*, online at <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2019/finances>.

These financial pressures are both real and significant in terms of the ability of a family justice system to perform meaningfully, but my interest in Cameron government's reforms to the family justice system are, in a sense, more existentially challenging than the budget cuts. While the claimed need to reduce public spending was *part* of the reason given by the UK government for cuts to legal aid and the budgets for family and social welfare cases, it was far from the whole picture. Consider these extracts from the government's 2010 Consultation Paper on legal aid cuts:

*There is a range of other cases which can **very often result from a litigant's own decisions in their private life.** ... Where the issue is one which arises from the litigant's **own personal choices**, we are less likely to consider that these cases concern issues of the highest importance.¹⁴*

*[The government is guided by] the desire to stop the encroachment of **unnecessary litigations** into society by encouraging people to take greater **personal responsibility** for their problems...¹⁵*

Similar comments were found in the terms of reference for the wide-ranging review of the family justice system commissioned by the government at the same time, chaired by David Norgrove.¹⁶ Extraordinarily, the government was well aware of the problems that its proposals would cause, as this comment from its post-consultation response paper shows:

*We do accept ... the likelihood of an increase in the volume of litigants-in-person as a result of these reforms and thus **some worse outcomes materialising.** But it is not the case that anyone is entitled to legal representation, funded by the taxpayer, for any dispute or to a particular outcome in litigation.¹⁷*

It is extraordinary that the government identified that there would be 'worse outcomes' as a result of its reforms, but nonetheless proceeded with them without any modification. Indeed, the guidance notes that it issued to the Legal Aid Agency (which administers the legal aid scheme) to set out the meaning of the Act proceeded to narrow its scope to such an extent that the Court of Appeal found them to be unlawful, because they

¹⁴ Ministry of Justice (Eng), *Proposals for the Reform of Legal Aid in England and Wales: Consultations Paper 12/10* (London, HMSO, 2010) – hereafter, 'Consultation Paper' – para 4.19 (emphasis added).

¹⁵ Consultation Paper, para 2.11 (emphasis added).

¹⁶ D Norgrove (Chair), *Family Justice Review: Final Report* (London, HMSO, 2011), p 182.

¹⁷ Ministry of Justice (Eng), *Reform of Legal Aid in England and Wales: The Government Response*, Cm 8072 (London, HMSO, 2011) - hereafter, 'Government Response' – para 3.140 (emphasis added).

frustrated even the limited purposes of the legislation.¹⁸ It seems doubtful that the decisions of your former partner to stop you seeing your children, or to deny you access to a fair share of the family assets, or to subject you to domestic abuse, are properly seen as ‘personal choices’ that you have made. Nor is it obvious that by avoiding court, you will be able to take ‘personal responsibility’ for resolving that dispute. Maclean and Eekelaar said that ‘the idea that justice within families is somehow of lesser significance than elsewhere must be dispelled in the strongest terms’.¹⁹

Elsewhere, Eekelaar wrote that the UK government’s vision of the minimal or even non-existent function of law in relation to private disputes had the effect of ‘depriv[ing] legal rights of all effect’.²⁰ Eekelaar wrote that the government was presenting ‘a diminished concept of what constitutes justice in regard to family matters’ which included, in particular, ‘a startlingly limited view of the role of a court, and hence of the law which courts apply’.²¹

In my earlier work, I linked these arguments to the work of political philosopher John Rawls in his book, *Justice as Fairness*.²² Rawls’ work makes plain that there cannot be any such thing as a ‘private sphere’ if that phrase is intended to mean ‘a place exempt from justice’.²³ I summarised this argument by saying that:

*the principles of justice apply to family life, and it is not possible to assert that these are “private” matters if that is meant to mean that they are beyond the scope of justice, because there is no private domain in that way.*²⁴

Rawls’ conception of justice is nuanced, but I offered a summary within *Ideas and Debates*:

For Rawls, the core of justice is having a society which involves a fair system of social cooperation over time, combined with a clear view of citizens as free and equal persons operating within a society which is regulated effectively by a public conception of fairness. This

¹⁸ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622; *R (Rights of Women) v Secretary of State for Justice* [2016] EWCA Civ 91.

¹⁹ M Maclean and J Eekelaar, ‘Family Justice’ [2011] *Family Law* 3. Maclean and Eekelaar return to this theme in their evaluation of the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Eng), *After the Act: Family Justice After LASPO* (Hart Publishing, 2019), especially in the opening chapter and at pp 174-181.

²⁰ J Eekelaar, “‘Not of the Highest Importance’: Family Justice Under Threat’ (2011) 33 *Journal of Social Welfare and Family Law* 311, p 313.

²¹ *Ibid.*

²² J Rawls, *Justice as Fairness A Restatement* (Penguin, 2001).

²³ *Ibid.*, para 50.4.

²⁴ *Ideas and Debates*, p 17.

*vision of justice requires, as a fundamental starting point, a just basic structure which “secures what we may call background justice”. The basic structure is then responsible for removing “bargaining advantages” which appear over time between members of any society, because if these advantages are not regularised then they will be allocated according to people’s power, wealth, or innate capacities, and that approach cannot achieve political justice. In other words, justice demands that the system protect the weaker against the stronger and takes some measures to equalise people’s life chances.*²⁵

Rawls himself is clear that this thesis applies as much to the family as to any other part of society. He explicitly talks about both gendered fairness and intergenerational fairness in terms of society’s responsibility to ensure against discrimination and for the protection and support of children.

The relevance of this today is at least as strong as it was in 2012. Starting with the position in England, the range of attacks on the family justice system has been wide-ranging, and the challenges that this creates for the implementation of ‘justice’ are serious. Perhaps most concerning, the system continues to allow, in the Family Court, alleged perpetrators of domestic abuse to cross-examine their victims, a situation decried by the judiciary as much as by campaign groups.²⁶ The UK government has twice lost legislation that was introduced to respond to this situation when Parliament has been prorogued for elections,²⁷ with a third Domestic Abuse Bill before Committee at time of writing.

This problem is, in a sense, an acute reflection of a wider problem, namely the collapse in legal representation in family proceedings. Whereas in 2012, only 13% of private law family cases²⁸ involved neither party having any legal representation, the figure is now 39%, and whereas previously 45% of these cases involved legal representation on both sides, that figure is now down to 19%.²⁹ While these figures for the court process might be thought to have encouraged an uptake in mediation and other non-court dispute resolution, the ironic effect of pushing parties away from seeking legal advice is that they are now *less likely* to access mediation services. Attendance at mediation

²⁵ *Ideas and Debates*, p 18 (citations from *Justice as Fairness* omitted).

²⁶ Amongst other cases, see the strongly-worded criticisms in *Re A (Fact-Finding: Unrepresented Party)* [2017] EWHC 1195 (Fam), [57]-[62], and *PS v BP* [2018] EWHC 1987 (Fam), [34].

²⁷ The Prisons and Courts Bill 2017 (Eng) and the Domestic Abuse Bill 2018-19 (Eng) were both lost partway through due to elections.

²⁸ In other words, Family Court cases other than those involving care and protection applications brought by children’s services departments.

²⁹ Ministry of Justice (Eng), *Family Court Statistics Quarterly: July to September 2019*, p 7, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857335/FCSQ_July_to_September_2019_2.pdf.

assessments is now at around a third as many as before the 2012 legal aid cuts, while actual mediation is at around half.³⁰

Meanwhile, continuing cuts to local authority budgets has meant that some children's services departments are now effectively bankrupt – many are explicitly operating on an 'essential cases only' basis as they cannot afford to meet any needs beyond the absolute minimum required by law. Social workers in child protection departments are described as 'overwhelmed and drowning',³¹ while the President of the Family Division, Sir Andrew McFarlane P, has said that while it is understandable that people describe the situation in the courts as a 'crisis',³² the truth is that the problems are chronic and constitute 'a continuing open-ended situation' with no end in sight.³³ He has expressly stated that the statutory target of care cases being completed in 26 weeks is no longer the top priority,³⁴ and instead well-being amongst professionals working in the system is the focus, out of fear – presumably – that the whole system would collapse if individuals were left to take the strain any longer.

So, in England, the family justice system struggles to perform in a way which allows that middle word – justice – to be done. It is a strained and difficult world, and one where the difficulties ahead seem at least as great as those that have been experienced over the last decade. The government has been forced to accept that its guidance on the provision of legal aid was unlawfully narrow, even within the narrow remit of the 2012 legislation, and has accepted that there are egregious injustices in the system – yet it has, so far, done nothing at all about it.

Thinking about access to justice, the reality in England is that people are all too often either being left to their own devices – the weak left at the mercy of the powerful³⁵ – or are forced into the Family Court without the benefit of any legal advice or representation. The withdrawal of justice from the field of family disputes in England remains of the highest concern. The consequences are serious for the victims of

³⁰ Ministry of Justice (Eng), *Legal Aid Statistics Quarterly: October to December 2019*, p 9, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875483/legal-aid-statistics-bulletin-oct-dec-2019.pdf

³¹ <https://www.communitycare.co.uk/2018/11/14/dfc-steps-northamptonshire-social-workers-say-drowning/>

³² The term used by McFarlane P's predecessor, Sir James Munby P: J Munby, *Care Cases: The Looming Crisis* (2016), online at <https://www.judiciary.uk/wp-content/uploads/2014/08/pfd-view-15-care-cases-looming-crisis.pdf>, p 1.

³³ A McFarlane, *Crisis? What Crisis?* (2018), online at <https://www.judiciary.uk/wp-content/uploads/2018/11/Speech-by-Rt.-Hon.-Sir-Andrew-McFarlane-Association-of-Lawyers-for-Children-Conference-2018.pdf>, p 2

³⁴ The average in July to September 2019 was 33 weeks, compared to 30 weeks for the same time in 2018 and 26 weeks in 2016: Ministry of Justice (Eng), *Family Court Statistics Quarterly: July to September 2019*, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857335/FCSQ_July_to_September_2019_2.pdf

³⁵ *Ideas and Debates*, p 21.

domestic abuse, for the denial of children's rights, for parents seeking fair access to their children or partners seeking a fair share of the family assets. The consequences for children and families within the child protection system are serious, as are the consequences for access to justice.

The Position in New Zealand

The New Zealand family justice system has also faced a number of challenges in recent years. The 2014 reforms to the family justice system,³⁶ particularly those designed to divert people away from courts, was preceded by government statements not entirely dissimilar to those seen in England, though with a notably gentler tone. It should be noted at the start of this section that this article was written based on the law as it was at the end of 2019, in preparation for the New Zealand Law Society CLS Conference in Wellington in November 2019, and does not comment on the changes and proposed reforms in 2020.

Regarding the 2014 reforms, the government's General Policy Statement regarding the Bill made the same implications about the role of lawyers and of courts as were seen in the UK government's Consultation Paper: the clear message was that lawyers and courts make conflict worse. This was evident from the very start, when it was suggested that the Family Courts Act 1980 (NZ) be renamed the Family Dispute (Resolution Methods) Act 1980, so as 'to make it clear that Family Court proceedings are only 1 method of resolving family disputes and that **family dispute resolution comes first**'.³⁷ The implication is clear: although the Family Court might resolve family disputes, it is a sub-optimal way of doing so, and 'resorting' to the court implies that you have failed to find a better way to resolve your dispute. As the report goes on to say:

*There will no longer be a Family Courts Act **to which those involved can turn**. Instead, there will be legislation that clearly indicates—*

- *Family Courts are only 1 method for resolving family disputes:*
- *family dispute resolution is the other method and **it comes first**.*³⁸

Encouraging non-court resolution of disputes 'can improve outcomes for children by reducing the likelihood of heightened conflict that often results from litigation',³⁹ the government said, despite the lack of any evidence base to support that claim. Indeed, there is no evidence that supports a claim that having legal advice or representation

³⁶ Family Court Proceedings Reform Act 2013 (NZ), in effect from 31 March 2014.

³⁷ Ministry of Justice (NZ), *Family Court Proceedings Reform Bill: Explanatory Note: General Policy Statement* (2013), p 3 (emphasis added).

³⁸ *Ibid*, p 16 (emphasis added).

³⁹ *Ibid*, p 3.

makes parties more likely to litigate,⁴⁰ and the drop in mediation use in England is attributable to fewer people having access to lawyers who can then signpost them on to mediation at an early stage.⁴¹ Nor is there evidence to say that litigation makes conflict worse: the cases that litigate are the ones that involve high conflict to start with, as well as those feature domestic abuse and drug and alcohol abuse.

A particularly stark manifestation of this hostility to lawyers is seen in the prohibition on lawyers acting for parties. The language used in policy papers and consultation documents took on an almost euphemistic element, whereby ‘targeting the use of professionals (lawyers for parties and for children) in care-of-children matters’⁴² meant, in practice, restricting the rights of parties to obtain legal advice and representation. Permitting lawyers to ‘act for a party to proceedings ... only in certain circumstances’⁴³ appears to risk violating a fundamental tenet of natural justice.

The European Court of Human Rights has said, in the context of quasi-criminal proceedings (representation for prisoners before a prison governor), that Article 6 of the European Convention on Human Rights, which guarantees the right to a fair hearing, includes a right to legal representation of one’s own choosing.⁴⁴ While the European Convention evidently has no direct effect in New Zealand, it is part of the body of international human rights law, and forms part of the understanding of what natural justice entails. For New Zealand, therefore, the relevance is that s 27 of the New Zealand Bill of Rights Act 1990 makes clear that ‘every person has the right to the observance of the principles of natural justice by any tribunal ... which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.’

An unintended side effect of this attack on lawyers is that parties are incentivised to bring applications under the procedural routes which permit advocates to act. A particularly stark example is the use of the ‘without notice’ track for applications to commence, as lawyers are permitted to act in such cases.⁴⁵ Ministry of Justice data show that the proportion of COCA applications (excluding Hague Convention cases) which started on a without notice basis increased from around a third of all cases before the

⁴⁰ In England, the average number of private law cases in the courts before LASPO and after LASPO were broadly the same, other than a dip in the immediate aftermath of the new legislation. The result is not that fewer parents litigate, but that more parents litigate without lawyers: J Miles, R George and S Harris-Short, *Family Law: Text, Cases, and Materials* (OUP, 2019), p 23.

⁴¹ *Ibid*, p 25.

⁴² Parliamentary summary: <https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/50PLLaw20921/family-court-proceedings-reform-bill-2012-2013-no-90-2>.

⁴³ Ministry of Justice (NZ), *Family Court Proceedings Reform Bill: Explanatory Note: General Policy Statement* (2013), p 6.

⁴⁴ *Ezeh v United Kingdom* (2002) 12 BHRC 589, para 106, approved by the Grand Chamber (2003) 15 BHRC 145, para 134. This ruling was accepted by the English House of Lords in *R (Greenfield) v Home Secretary* [2005] 2 All ER 240 (HL).

⁴⁵ Care of Children Act 2004 (NZ), s 7A(4)(a) and (c).

2014 reforms, to over two thirds after the reforms.⁴⁶ One of the key drivers motivating parties to choose this route is clearly identified as the ability to obtain legal representation, which is denied in most cases if the application is made on notice.⁴⁷ While understandable from the perspective of individual litigants, the legislative system positively encourages a violation of basic principles of natural justice – that the court hears both sides before making a decision.

The English Family Court has been clear that without notice applications must be made only in exceptional circumstances, where the remedy sought would be frustrated if the other party were given notice of the application and where this is justified by the nature of the remedy sought.⁴⁸ Thus, applications for orders protecting a party from domestic abuse or preventing the abduction of a child are made on a without notice basis quite often, but a party seeking a parenting order at a without notice hearing would get short shrift from the court and might, indeed, risk a wasted costs order.⁴⁹ Moreover, orders made on a without notice basis must include an on notice court date no more than 14 days after the making of the order,⁵⁰ and the respondent is usually given the right to apply to the court to vary or discharge the order even prior to that listed hearing.⁵¹

Moving away from the 2014 changes themselves, New Zealand has more recently had its May 2019 report of the Independent Panel examining the 2014 reforms. By contrast with both the UK and previous New Zealand governmental language, the report presents a far more positive image of lawyers and of the family court as key players in a just society.

Starting with the Terms of Reference, there are two references to the ‘effectiveness’ of non-court services and of the court processes, which seems an entirely sensible question to ask. There is specific reference to the rise in without notice applications, as already discussed.

Into the report itself, the authors do not shy at all from the use of the word ‘justice’, which they clearly see as a laudable and indeed essential function of the state in the family dispute context. In discussing the principle of setting up the *Korowai*, they say that it will provide ‘a variety of ways for people to access the right family justice service

⁴⁶ N Wehipeihana, K Spee and S Akroyd, *Without Notice Applications in the Family Court: A Research Report Prepared for the Ministry of Justice* (Ministry of Justice (NZ), 2017), p 11, online at <https://www.justice.govt.nz/assets/Documents/Publications/Without-notice-applications-in-the-Family-Court-Final-Report.pdf>.

⁴⁷ *Ibid*, p 16.

⁴⁸ *Practice Guidance: Family Court: Duration of Ex Parte (Without Notice) Orders* (President of the Family Division, 2017), para 7.

⁴⁹ *Re S (Ex Parte Orders)* [2001] 1 FLR 308, para 110.

⁵⁰ *Practice Guidance*, above para 5(ii).

⁵¹ *Ibid*, para 5(vii).

at the right time for them'.⁵² Similarly, in the Final Thoughts of the executive summary, one finds these three achievements which the *Korowai* is said to offer – it will:

improve the well-being of children and young people

enhance access to justice for children, parents and whānau

strengthen respect for and fulfilment of human rights for all who engage with the family justice services.⁵³

Of course, this Independent Report is a very different kind of document from a Government Consultation Paper or a General Policy Statement, but nonetheless the contrast of language could hardly be stronger. The UK government seems genuinely to think that people going to court about family disputes are in some way failing to take responsibility for their own personal decisions;⁵⁴ the New Zealand report calls for an integrated, state-funded service that will enhance people's access to family justice.

A connected theme is the recognition in the report that lawyers perform a vital function in the path to justice for adults and children in family disputes is seen front and centre with the recommendation to '*allow people to have legal representation at all stages of proceedings*'.⁵⁵ Again, the idea that lawyers were removed from court hearings about such vital issues as parents' and children's rights in relation to their family relationships is likely to represent a violation of the principles of natural justice.

The report is explicit in a number of places that its recommendations require additional funding, both directly and indirectly.⁵⁶ This is an important recognition of the value and importance of the family justice system and the professionals who work within it to the well-being and fair functioning of society. The recognition that the people who use the family justice system are a microcosm of New Zealand society⁵⁷ also stands in contrast to the UK government's dismissive language about family court users being, in effect, those who have failed at taking responsibility for their own affairs in the way that they should, and hence presenting issues which were not '*of the highest importance*'.⁵⁸

Conclusions

⁵² *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (May 2019), p 5.

⁵³ *Ibid*, p 20.

⁵⁴ Consultation Paper, para 4.157.

⁵⁵ *Te Korowai Ture ā-Whānau*, p 15.

⁵⁶ *Ibid*, eg pp 8, 20, 40

⁵⁷ *Ibid*, p 33.

⁵⁸ Consultations Paper, para 4.19.

Both England and New Zealand have seen serious challenges to their family justice systems over the last decade. Reforms in both systems have seen both rhetoric and practical reform from the government which question the very existence, and certainly the centrality and importance, of family courts and family justice systems. These attacks are serious, and require a serious response. New Zealand's 2019 Independent Report offers a refreshingly optimistic image of family law, family courts and family justice, recognising the positive contribution that these institutions and individuals can make to families.

The law plays a vital role in family life. The law determines the limitations of what we call 'family' at all, determining what is and what is not adjudicable, determining who does and who does not have rights and responsibilities – these are in themselves questions of law.⁵⁹ Family disputes involve the determination of rights, and the idea that an issue is non-legal because it involves an element of private life is simply untenable. In cases concerning children, the rights in question are not only those of the adults, but also those of the children, in particular (but not limited to) those rights identified and protected by the UN Convention on the Rights of the Child. If a parent has no effective recourse to an unjustified limitation on time with their child, it is not only the parent who is impacted, but also the child. If a spouse or partner has no effective recourse to court to adjudicate a family property dispute, the implications of that often go far beyond the individuals themselves, also impacting children, wider family, and the state in the form of social welfare claims, for example.

Family lawyers perform a wide variety of roles, and relatively little of it is focused on litigation.⁶⁰ In addition to their frequent work as quasi-social workers and counsellors, family lawyers work with their clients to see how raw emotional problems can be resolved within a legal framework,⁶¹ help them to negotiate informally and through correspondence, and advise them about mediation and other services they can access. They perform a vital societal function of achieving fairness, protecting rights and giving voice to the vulnerable. Lawyers can only perform these important roles, though, if there is a legal framework that gives content to the rights being protected and a family justice system that gives people an accessible, accountable and authoritative forum for disputes to be resolved.

⁵⁹ M Maclean and J Eekelaar *After the Act: Family Justice After LASPO* (Hart Publishing, 2019).

⁶⁰ See, for example, J Eekelaar, M Maclear and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000); M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing, 2009).

⁶¹ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.