Family Mediation – Evaluation of the Pilot

Prepared for the Ministry of Justice by

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April 2007

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First published in April 2007 by the
Ministry of Justice
PO Box 180
Wellington
New Zealand

ISBN 0-478-29033-0

Foreword

I am pleased to release this report on the Family Mediation Pilot. Many people have contributed to the pilot and I would like to thank you all, especially the families who participated, in making it a success.

Family Mediation was developed in response to the Law Commission's 2003 report *Dispute Resolution in the Family Court.* The Law Commission was keen to see greater use of alternative dispute resolution mechanisms in the Family Court. It is against this background that the Ministry sought funding in Budget 2004 to pilot the use of lay mediators in the Family Court.

Readers will note that Family Mediation was highly successful at resolving the types of family disputes that were referred to it. Also, importantly, the overwhelming majority of Family Mediation participants found the experience to be positive and empowering.

Non-judge led mediation is a feature of family courts in many foreign jurisdictions. The Family Court of Australia has offered it for many years, and there has been strong interest in seeing it introduced to New Zealand.

Decisions about the future of family mediation remain to be taken; however, this report makes an important contribution to debates about the role of alternative dispute resolution in the New Zealand Family Court.

Belinda Clark
Secretary for Justice

Acknowledgements

Many people have contributed to this evaluation. We especially thank Family Court staff at the four pilot sites. They made us welcome on our visits, collected data specifically for us and answered our queries promptly. The mediators were reflective and generous contributors as were the Lawyers for the Child and counsel for parties we consulted. Our particular thanks go to the parties to mediation who responded to our survey and talked to us about their experiences. Without them neither the pilot nor the evaluation could have gone ahead.

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1. Introduction

The family mediation pilot was part of the Government's response to the Law Commission's 2003 report *Dispute Resolution in the Family Court*, which recommended that non-judge-led mediation be introduced into the Family Court as part of a new conciliation service.

Family mediation comprised an initial pre-mediation process followed by a mediation session. The pre-mediation included the mediator making at least one contact with each party, with the lawyer for child, and with any other people who are to attend the mediation by agreement. The mediation usually comprised one meeting, sometimes more than one, between the mediator, parties, lawyer for child, children (by agreement), third parties (also by agreement), followed by a report to the court.

Family mediation tried to assist parties to develop their own solutions in relation to their children's care; to resolve disputes faster; and to provide for the participation of children in the decision-making process. This study was undertaken to enable the Ministry of Justice to identify any implementation issues, assess the costs of the pilot, and assess the experiences of the various participants, including their satisfaction with the process. It considered matters such as referrals and attendance, immediate outcomes of mediation and returns to court by the parties.

Family mediation was piloted in North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.

2. Mediation activity

Referral to mediation

The pilot was scheduled to start in March 2005, but a shortage of accredited mediators in Hamilton delayed the start there for four months. North Shore and Porirua made a slow start as court staff developed systems and processes for family mediation as it was not included on the Ministry of Justice's Case Management System (CMS). Christchurch, with a larger Family Court and experience in offering counsel-led mediation, began referring to mediators almost immediately.

The four pilot courts adopted different practices with respect to referral. In Christchurch, referral to family mediation was the 'default' option, and the referral was discontinued if it was subsequently determined to be not appropriate. This court completed by far the most mediations. In the other pilot courts the practice tended to be that cases were identified as appropriate for family mediation by the Family Court Coordinator (FCC) using the guidelines provided, or were referred by judges, or were recommended for family mediation by counsel or counsellors. In these three courts FCCs and other court staff took some time to develop

confidence in their assessment of which cases should be referred to family mediation, and in the mediation process itself.

Along with identifying appropriate cases for referral, delay getting the consent forms back from applicants and respondents was the biggest contributor to the unexpectedly slow implementation of the pilot. Following legal advice from the Ministry of Justice that initial consent could be given verbally but that signed consent was essential before mediation could begin, one court decided to refer cases to mediators on the basis of a verbal indication from parties' counsel that they agreed to be referred. In these cases the written consent was completed at pre-mediation if this process involved a face-to-face meeting, or alternatively at the start of the mediation itself. This proved to be effective and no participants in the process reported that it created any problems.

From March 2005 to June 2006, 540 Family Court cases were offered family mediation and of these, 380 (70%) were referred to mediators. There were several reasons that courts did not refer cases to mediation including:

- applications had been withdrawn
- the matter had been resolved by consent
- it was to proceed to formal proof
- the case had been 'discontinued' or 'struck out'
- information (domestic violence or sexual abuse) had come to light which led to a reassessment of the appropriateness of referral to mediation.

Pre-mediation

Of the 380 cases referred to mediation, 354 (93%) entered pre-mediation, and 321 (84%) completed pre-mediation. The reasons that cases failed to complete pre-mediation were usually that the matter had been otherwise resolved, or that one party withdrew consent to mediation.

Of those who completed pre-mediation, 284 cases (88%) proceeded to mediation, and 37 (12%) did not. The main reasons for cases not proceeding to mediation at this point were that the parties settled matters before the mediation took place or one party was reluctant to proceed.

Pre-mediation commonly involved the mediator contacting both parties and the lawyer for child. Between 65% and 70% of parties had some face-to-face contact with the mediator during pre-mediation. Just over a quarter of parties had pre-mediation by phone only.

Time frames

The *Guidelines for Mediators* indicate that mediation should take place within five weeks of referral to the mediator, and 60% of mediations were convened within this time frame, with another 15% convened within six weeks. In almost 70% of cases a mediation report was received within the six weeks prescribed in the mediator guidelines.

3. Establishment and implementation

Recruitment of mediators

The mediators selected for the pilot included 17 women and 10 men. One woman and one man, the only mediator selected who was not a NZ European, had to withdraw because of other work commitments. Of the remaining 25, nine were legally trained and 16 had backgrounds in mediation, counselling and facilitation. Mediators had to be members of either the Arbitrators and Mediators Institute of New Zealand (AMINZ), or of LEADR, an association of dispute resolvers.

Training

The launch of the mediation pilot coincided with the implementation of the Care of Children Act 2004 which was in some ways unfortunate as it meant FCCs and other staff were already facing an additional workload.

The mediation process itself, and material for participants and for mediators, was finalised only shortly before the pilot was due to commence. Court staff found they had little or no time to become familiar with the documents and processes before they were required to explain them to mediators. Despite this, most mediators were positive about the induction and training, although the evaluation found that the training needed to provide more information about the law, the Care of Children Act, the Family Court and its processes for mediators who had no background in these matters.

Administration

With the very slow rate of referrals at the beginning of the pilot, two courts were reluctant to make use of the administrative support resource which accompanied the pilot. However, eventually administrative support was in place in all courts, although the way courts used the administrative hours varied. In some courts the hours were used by a person already working in the court who attended to family mediation matters in amongst other work. In other courts a person was employed solely to provide administrative support to the project.

Time and fees

Initially, mediators found that referrals were taking more time than anticipated. As the pilot proceeded and participants became more familiar with the process and revised their practices, the time involved reduced to some extent. The *Guidelines for Mediators* indicate a fee for service of $310 for the pre-mediation process and a report to the Family Court. This proved to be insufficient for mediators, particularly in Auckland, to complete pre-mediation face-to-face. Many mediators thought it better practice to conduct pre-mediation face-to-face but recognised that they continued the practice at their own cost.

The fee for a completed mediation and final report is $465. This was generally sufficient for those who had their own rooms and did not need to travel to mediation – but less adequate for those who incurred the time and cost of travelling to rented rooms.

Costs

Data supplied by the Ministry of Justice based on an analysis of direct costs to the end of April 2006 showed that:

- the average cost of a mediation was $777.16
- in 7% of cases the cost of mediation exceeded $800
- in 56% of cases a lawyer for child was appointed for the mediation (in addition many cases referred to mediation had a lawyer for child appointed already)
- the average cost of lawyer for child appointed for the mediation was $943.48
- administration costs at the courts have consisted of an approved 0.2 FTE coordinator at each pilot site.

Establishment costs are difficult to determine because most costs were absorbed as part of internal ministry budgets.

Capacity

The family mediation pilot was to a large extent devolved to the pilot courts. The initial concept and process were designed at a national level but once the pilot was underway, each court was largely left to make decisions for itself about matters of process. Common agreements were subsequently reached among courts about how to manage some of these issues. The pilot really needed a champion in each court – someone who could publicise and promote it to counsel, answer questions and make decisions on issues that were unclear. Christchurch was able to do this, but the other smaller pilot courts struggled to give the process the time and attention that would have enabled it to have maximum impact.

Interim agreements and reviews

Interim agreements with provision for review have been relatively common outcomes of mediation through the pilot. This was not foreseen when the process was designed and no provisions were made for how reviews should be conducted or funded. A range of ways of approaching review has been tried all of which have implications for both funding and process.

4. Mediation process

Mediators completed case forms on most completed mediations for the evaluation. These described the process and outcomes of mediations which reached agreement and those which did not.

Attendance at mediation

Family mediation was designed to be an inclusive process in that children and extended family could be involved, and by mutual agreement, parties were able to bring support people to the mediation. A lawyer for child was appointed in every case and parties could choose whether or not to have their own lawyers attend the mediation. The pilot also made provision for a cultural advisor or an interpreter to take part.

In about a third of mediations only the mediator, parties and the lawyer for child were present, and the majority of mediations involved more than that minimum. However, where other people attended, they were far more likely to be a lawyer for one of the parties than a family member, child or support person. Lawyers for one or both parties attended about half the pilot mediations, and other support people attended about a quarter of the mediations.

Children attended only about 6% of mediations for at least some of the time.

Participation

Mediators reported that the large majority of applicants and respondents were very active participants in the mediation. Lawyers for children were also actively involved. Counsel for parties tended to be less actively involved in mediations than the parties themselves or the lawyer for child. Where other family members were present their contribution was usually modest.

The youngest children to attend mediations, both under seven, took no active role. According to mediators, eight others took 'little' part, while three children, all aged 12 or over, took 'some' part in the mediation. In mediators' opinions the children's views or interests were 'very well' presented by the lawyer for child in about three-quarters of the mediations they reported on.

Length of mediation

The length of mediations ranged from 1.5 hours to 7.5 hours. According to mediator case reports, just under a third of mediations were completed within three hours and almost half took between three and four hours. This means that three-quarters of all mediations were completed within four hours, one hour longer than anticipated in the guidelines.

Adjournments

At least 22 mediations completed under the pilot were adjourned with an arrangement for or expectation of a second session to complete the mediation. Of these, three were still waiting to reconvene at the end of the data collection period. In three of the 11 cases that resumed, the second session took place within three weeks and in eight it took place after the recommended three weeks. In six cases, the parties resumed mediation and came to an agreement.

5. Participants' experiences of mediation

Each of the parties to a family mediation was sent a survey form when mediation was completed. Participation in the survey was entirely voluntary and those who did return the form could choose whether or not to be interviewed further about their experience. As at 30 June 2006, 109 participants had returned their survey form and 32 interviews were completed.

Adequacy of information

Eighty-seven (80%) of participants said they had all the information they needed before the mediation. They included 11 who had not received any extra information, beyond what the mediator told them. Seventeen would have liked more information.

Attendance at mediation

Participants reported that there appeared to be little discussion about whether children, particularly young children, would attend. The assumption by parents, lawyers for children and mediators was that they would not. Participants had a range of views about the appropriateness of children at mediation.

Presentation of views

Of the 109 participants who responded to the survey, 84 (77%) felt they were able to say what they wanted at the mediation; 25 – 12 men and 13 women – did not.

Again, around three-quarters thought the children's views were quite well or very well presented by the lawyer for child. The people who thought the children's views were presented very well or quite well appreciated the lawyer for child's efforts, balance and fairness. Just over a fifth thought that they were not well or were poorly presented. They were mostly concerned with the brevity of contact, the lack of time to establish a relationship and the fact that the lawyer saw the children when they were in one parent's care but not the other's.

Outcomes

Two-thirds of respondents to the participants' survey were satisfied or very satisfied with the outcome of their mediation. A third of respondents were not satisfied.

Other points

Overall, survey respondents were positive about their experience. A number appreciated the opportunity for mediation rather than facing a court fixture. They particularly appreciated being in a less formal, more relaxed yet secure situation.

Suggestions for improvement included a speedier process, more time for the mediation session itself, and more caution about proceeding to mediation where there has been a history of domestic violence. A number of people were uncertain what to do if the agreements made at mediation did not hold.

Responses from the six Mäori and three Mäori/NZ European participants at mediation were virtually indistinguishable from those of other participants. They had a similar range of experiences and were no more or less likely to come to agreements than other parties to mediation.

6. Outcomes of mediation

Of the 257 completed mediations, agreement was reached on all matters being mediated in 59%, and agreement was reached on some matters in a further 30%. The most common reason for achieving only partial agreement was that the level of trust between the parties was so low that one or both required evidence that the other party was prepared to make agreements work, before they were prepared to make concessions on all disputed issues.

Consent orders were sought in 68% of cases in which all or some agreement was reached. Mediators reported that there were no obvious features that distinguished mediation agreements for which consent orders were sought from those for which no consent orders were sought. It simply depended on the parties' preference for the status of their agreement.

In only 13 mediations (5%) was no agreement reached. In most cases, mediators believed that this was because one party was unwilling to compromise or to put the children's needs ahead of their own.

The intangible outcomes are less easily captured. Mediators, lawyers for children, lawyers for parties and participants themselves all recognised the potential benefits of meeting in a managed situation away from the court. They observed that mediations can provide a structure for clarifying issues and lead to improved communication between parties. In a well-managed mediation, parties are able to leave feeling that they have been heard and their concerns have been treated with respect. They become more willing and able to listen to the other party's views as a result, and may become more confident about managing their own affairs.

The time available for mediation, and the option to adjourn if need be, can enable parties to move from entrenched positions and make concessions with grace. Opportunities to have trial periods with a range of review options increase parties' willingness to try new arrangements and build a basis for trust.

7. Overview

In all, 540 Family Court cases were offered family mediation during the pilot of which 380 (70%) were subsequently referred to a mediator. Of those offered mediation 321 cases (59% of 540) had completed, and a further 33 (6%) were still involved in, pre-mediation at the end of the pilot. Of the cases that entered pre-mediation 284 (53% of 540 cases offered mediation) proceeded to mediation, and of these, 257 (48% of 540) mediations had been completed by the end of June 2006.

8. The future for family mediation

Key informants interviewed for this research saw family mediation as a valuable addition to the range of options available to the Family Court. Participants in the pilot courts were able to access mediation as quickly or more quickly than people had accessed comparable services in those courts prior to the family mediation pilot. Most mediations ran smoothly, agreements were reached in the majority of cases, and parties to mediation along with others involved reported positively on the process.

Unexpected was the low number of referrals to mediation in three of the four pilot courts, compounded by the off-putting effect of a complex process for gaining consent to mediation. For family mediation to be successful in lightening judges' mediation load, courts will need to be encouraged to see family mediation as the 'default' option and processes for gaining consent will need to be simplified. This may be difficult while family mediation sits outside courts' case management system.

The pilot used only trained and accredited mediators which will have contributed to the high rate of outcomes and the satisfaction expressed with the process. There are unlikely to be enough trained and accredited mediators available outside the main centres for family mediation to be offered from every court. It may be that such a service could be delivered regionally.

More work will need to be done to make family mediation the inclusive process that it was envisaged to be. Very few children participated in mediation although the process had been designed for them to do so. No use was made of the budget to provide interpreters for non-English speaking parties. Some Mäori and Pacific parties participated in family mediation although few adaptations had been made to the process to make it culturally appropriate for them.

All those who contributed to the evaluation wanted family mediation to continue as an avenue for families to resolve their differences. They saw it as an empowering and cost effective way of managing family matters, while freeing up court time for cases that could not be resolved without judicial intervention.

1 Introduction

1.1 Background

The family mediation pilot was part of the Government's response to the Law Commission's 2003 report *Dispute Resolution in the Family Court*, which recommended that non-judge led mediation be introduced into the Family Court as part of a new conciliation service.

The pilot mediation service operated in addition to the services being offered in the Family Court. These include counselling and judicial mediation conferences to assist parties in resolving their disputes. Judicial mediation conferences are available for parties who have filed applications for maintenance, separation, guardianship, custody (now termed 'day-to-day care' under the Care of Children Act 2004 which came into force on 1 July 2005), and access (now called 'contact'). Judicial mediation conferences usually take place once parties have attended counselling if issues remain outstanding. Mediation conferences are chaired by a Family Court judge. Parties may request a judge-led mediation, or the court can direct them.

Family mediation comprised an initial pre-mediation process followed by a mediation session. The pre-mediation included the mediator making at least one contact with each party, with the lawyer for child, and with any other people who are to attend the mediation by agreement, and a brief report to the Family Court. The mediation itself consisted of normally one meeting, occasionally more than one, between the mediator, parties, lawyer for child (and children if agreed) and agreed third parties, and a report to the court.

In the pilot, family mediation was available to parties involved in day-to-day care, contact and guardianship proceedings. Family mediation was designed as an inclusive model, in that children and extended family were able to be involved, and by mutual agreement, parties were able to bring support people to the mediation. Provision was also made for cultural advisers and interpreters to attend the mediation, where appropriate. A lawyer for child was appointed in every case and parties could choose whether or not to have their own lawyers attend the mediation.

1.2 Evaluation aims and objectives

Family mediation aimed to assist parties to develop their own solutions in relation to their children's care; to resolve disputes faster; and to provide for the participation of children in the decision-making process. This study was undertaken to enable the Ministry of Justice to identify any implementation issues, assess the costs of the pilot, and assess the experiences of the various participants, including their satisfaction with the process. It considered matters such as referrals and attendance, immediate outcomes of mediation and returns to court by the parties.

The study has sought to provide information on:

1. ***Establishing the mediation service***
   - The establishment of a list of mediators in each pilot court, including the selection of mediators, criteria used, qualifications and experience of mediators, information and training provided to mediators, and any issues that arose.
   - The provision of training/information to court staff.
   - The provision of information to lawyer for child.

2. ***Resource materials for participants***
   - An assessment of the resource materials developed as part of the project, including their appropriateness for Mäori and Pacific participants.
   - Any suggested improvements.

3. ***Delivery***
   - Information on what staff have done at each site to support and prepare parties for mediation.
   - Information on the flow of cases through the process.
   - Information on, and an assessment of, the services provided by mediators.
   - The extent to which the mediation involves children in decision-making, whether through their presence or through representation by lawyer for child.
   - Information on the degree to which participants think that children's needs or views have been articulated at mediation.
   - Information on the involvement of other parties in mediation, including parties' lawyers and third parties, such as grandparents, other extended family or support people.
   - Whether mediation results in resolution of disputes without judicial intervention.

4. ***Outcomes/Impacts***
   - The immediate outcomes of mediation.
   - Short-term impacts of non-judge led mediation on timeliness.
   - Short-term outcomes in terms of court activity.

5. ***Costs***
   - Information on the establishment costs and direct operating costs of the mediation service and on additional resourcing.

6. ***Other issues or impacts***
   - Other issues and impacts that may need to be considered in any review or extension of the service.

2 Methods

2.1 Data collection

The family mediation pilot was planned to operate in four Family Courts (North Shore, Hamilton, Porirua and Christchurch) for a 12-month period from the end of March 2005. While three of the courts did begin operating at that time, the fourth, Hamilton, did not begin until the start of August 2005. The evaluation collected data from the beginning of April 2005 until 30 June 2006.

The evaluators used a variety of methods to gather information from these four sites and from national office. These included:

- reviews of information, training and resource material developed for mediators, participants and court staff;
- spreadsheets for court staff to record different aspects of the process using administrative data;
- a case report form for mediators to complete after each mediation, including both factual information and personal observation;
- face-to-face and telephone interviews with key informants, including members of the project team, court staff, judges, lawyers, mediators, and lawyers for children;
- a brief evaluation form to be posted to all applicant and respondent parties by court staff, with the option of a follow-up interview by telephone;
- telephone interviews with participants who expressed their interest in contributing further to the evaluation;
- review of a sample of files to monitor the progress of cases which involved mediation;
- analysis of cost data provided by national office;
- regular visits to the four pilot sites to review progress, carry out interviews and collect data.

A separate piece of work commissioned by the Ministry of Justice conducted by Roger Macky reviewed the impact of the pilot mediations by comparing them to mediations conducted in the same courts prior to the pilot. This is reported in Appendix A.

The range of methods produced different sets of data, which inform the sections that follow. The sources of data are clearly identified in each section and it is important that the reader notes which types of data are being used at each point. The sources of data used in each section are summarised below.

Section	Title	Data set	Data type
1	Introduction		
2	Methods		
3	Mediation activity	Evaluation spreadsheet	data recorded by court staff
4	Establishment and implementation	Evaluation spreadsheet	data recorded by court staff
		Document review	review of material prepared for mediators, participants and court staff
		In person interviews	interviews with court staff, national office staff, judges, lawyers, mediators and other interested parties
		Cost data	cost data provided by national office
5	Delivery and experience of mediation	Mediator case reports	completed by mediators for each mediation
		Participant survey forms	voluntarily completed and returned by parties to mediation
		Interviews with parties to mediation	telephone interviews with parties to mediation
		Interviews with professionals involved in mediation	face-to-face interviews with mediators, lawyers for children, counsel for parties
6	Participants' experience of mediation	Participant survey forms	voluntarily completed and returned by parties to mediation
		Interviews with parties to mediation	telephone interviews with parties to mediation
7	Outcomes	Evaluation spreadsheet	data recorded by court staff
		File study	review of the status of all files relating to a completed mediation in three pilot sites, and of a sample of files in Christchurch
		Participant survey forms	voluntarily completed and returned by parties to mediation
		In person interviews	face-to-face interviews with court staff, national office staff, judges, lawyers, mediators and other interested informants
8	Discussion		

2.2 Amendments to methods

An unexpectedly slow rate of referrals in three of the four courts led to some modifications to the evaluation methods.

Case studies

The original proposal set out our intention to complete 10 case studies over the course of the pilot. We planned to ask the Family Court Coordinators (FCCs) to obtain agreement from parties to be a case study for the evaluation. This would have enabled us to collect key information relating to each case prior to the mediation; observe the mediation; and interview as many participants as possible, including the parents or caregivers, children, the mediator, lawyer for child, lawyers and any other participants, once the mediation was complete. After three months we planned to review each file and complete a follow-up telephone interview with family members to enable them to comment on what had happened since the mediation.

Throughout the pilot, courts experienced difficulties in obtaining agreement to mediation from parties and, in order to remove any additional pressure, we agreed not to ask people to be a case study until the situation improved.

Referrals remained lower than expected in three sites and parties continued to be slow in returning their consent forms. Because of this we adopted a slightly different approach during the last four months of the pilot. We asked all the mediators to seek consent from parties for us to observe their mediation and undertake follow-up interviews. We left it up to the mediators to determine when this would be appropriate. We only achieved three observations through this approach, and even with those cases, we were not able to contact all the parties after the mediation despite their consent and repeated attempts to do so. We have constructed some partial case studies from court information, mediator case reports and participant responses, and used extensive quotes to give a flavour of what took place in mediations.

Interviews with participants

The original proposal also referred to completing interviews with a sample of parties to mediation in each court to supplement the case studies. The proposal allowed for these interviews to be by telephone.

Once a mediation was complete, the Family Court sent all parties a survey form which included an invitation to take part in an interview. Only those who were prepared to be interviewed provided their name and contact details. Others responded anonymously.

From 257 completed mediations 109 people responded; 52 were willing to complete a telephone interview and 32 interviews were completed (i.e. 29% of those who completed a survey form were also interviewed). Up to five calls were made to the remaining 20 people. In three cases, the telephone was disconnected; in the remaining 17 either no contact was made or the time of the call was inconvenient and further calls were unsuccessful. Court staff and mediators regularly cited difficulties with communication by telephone and post as a

reason for delays in obtaining consent to mediation and making arrangements for mediation. Our experience was no different.

Given the voluntary nature of the survey and the fact that it did not ask for the names of all parties, it was not possible to identify the other party to the mediation of the people who volunteered to be interviewed. To do this, the evaluators would have had to match their interview with a file. This would have been unethical because:

- the survey form did not indicate that would happen
- the evaluators would be using respondents' personal information for a different purpose from the original intention
- the evaluators would be asking people for an interview who had already been offered and declined that opportunity.

Court staff were also unwilling to provide contact information for participants who had been sent a survey. Interviews were therefore only completed with participants who returned their survey forms and expressed their willingness to talk further. Many of those who filled out survey forms provided considerable detail on how the mediation progressed and reported their satisfaction or dissatisfaction with what took place then, and what had happened since. Except for the lack of response from Pacific participants, we are satisfied that the information obtained from participants has provided good quality feedback on experiences of mediation.

File study

The proposal included a plan to follow a sample of files in each court to review any action and timeframes or other changes in circumstances. Because of the small number of referrals in three sites, we chose to review all the files in those courts to ascertain which were still active at the end of the data collection period and why. In Christchurch, we reviewed a sample of 25 files, randomly chosen from mediations that took place in the first eight months of the pilot. This timeframe was chosen to allow a reasonable period for change or further activity to take place.

2.3 Areas of little or no data

Children at mediation

While a number of mediations did involve children we were unable to interview any in person to find out how they viewed the experience. No parties to mediations where children were present agreed to a telephone interview and we had no other way of contacting those families.

Cultural advisors and interpreters

None of the mediations involved a cultural advisor or interpreter so we were unable to assess the impact of that on mediations. We were also unable to confirm whether or not the need or possible need for an interpreter or cultural advisor affected court staff's willingness to refer a case to mediation.

In one court the FCC did comment on the significant increase in time and cost if an interpreter was involved. If one or both parties were unable to participate in family mediation without an interpreter, the interpreter had to be available for the pre-mediation stage as well as mediation. It was clear that in at least some cases files were not put forward for mediation because an interpreter would be required and this would take costs beyond budget. A budget was provided for interpreters but Family Court staff did not seem to be aware of this.

Mäori and Pacific people

At six mediations one or both parties were of Pacific origin but no Pacific people returned a survey form. In our view it was unethical to contact the parties in other ways. They had already had an opportunity to respond and had not taken up that offer. We are therefore unable to comment on the appropriateness of mediation for Pacific people. The absence of data on cases which did not proceed to mediation in one court means it is not possible to assess whether Pacific people were more or less likely than other people to consent to family mediation.

Our Pacific team member believes that an approach in writing is likely to be less successful in engaging Pacific people than an approach in person, particularly if that personal approach is by someone known and trusted. This is especially likely to be the case when the matters at issue relate to family and are therefore normally kept private.

Six participants identifying as Mäori and three as NZ European/Mäori returned survey forms. One was interviewed, one could not be contacted and others did not wish to be interviewed. On this very limited sample, their responses were indistinguishable from those of other participants.

3 Mediation activity

The data reported in this section of the report has been drawn from the evaluation spreadsheet each court was asked to keep.

3.1 Issues with the spreadsheet data

A spreadsheet was designed as a data collection tool for the evaluation. It was not foreseen that FCCs would use the spreadsheet as a workflow management tool. Because family mediation sits outside the courts' case management computer system (CMS), pilot courts used the evaluation spreadsheet to keep track of the progress of mediations, and to do that, each court has used the spreadsheet slightly differently, which has posed challenges for data aggregation and analysis. Each court was also asked to submit the spreadsheet monthly to national office confirming for court staff its status as an internal tool rather than a data collection tool for the external evaluation.

The design of the spreadsheet also had some weaknesses. It was not clear whether the date for the return of consent forms should be recorded for the receipt of the first or second consent form. The form made no provision for recording agreements to review the agreement made at mediation. Nor did staff have clear instructions to record any further court activity on the spreadsheet, or on CMS.

Each court used its allocation of administrative hours to support the family mediation pilot differently. In some courts the hours were taken up by a person currently working in the court who completed the family mediation administrative work throughout the week alongside other tasks. In other courts a person came in for one or more days a week to do the administration associated with the pilot. The result was that the sheets were not filled out consistently or completely. Those filling them out did not always know precisely when consents or reports were received at the court, which made it difficult to estimate time frames.

Eligibility for mediation

This evaluation had hoped to explore the differences between cases which were offered family mediation and those which were not. Accordingly, pilot courts were asked to enter on the spreadsheet every file that was 'eligible' for family mediation. Courts did not find this straightforward, and practice in the pilot courts ranged from the court which recorded all applications made under the Care of Children Act to the court which entered on the spreadsheet only those cases referred to a mediator.

The issue of which cases are 'eligible' for family mediation is discussed further in section 4.2 and remains an unanswered question central to this evaluation.

Time frames

One of the requirements of the evaluation was that it should report on the time frames within which mediation occurred. This report contains some information on time frames but the limitations of that data must be understood. While fairly accurate information can be retrieved about the length of time from the beginning of the process (referral to the mediator) to the end (submission of a mediation report), less reliance can be placed on spreadsheet data for the time taken for different stages of the process – for example from referral to the mediator until completion of pre-mediation. It was anticipated that following referral mediators would complete pre-mediation and submit a pre-mediation report before proceeding to the mediation, but clearly some mediators do their paperwork in batches and in many cases the dates of the pre-mediation report and the mediation report are the same. Some data about the time between stages of the process has been retrieved from mediator case reports and is reported in Section 5.

Treatment of the data

It is clear that some fields on the spreadsheet have at times been overlooked by court staff recording the data. For example, there is a column that is to be filled if a pre-mediation report indicates a case is proceeding to mediation. If the pre-mediation report has been received, and subsequent data shows that the mediation has been completed, logic indicates that the column should have been filled. In this example, the overlooked cell is treated in the analysis as though it had been filled.

3.2 Demographics

Gender

Data on gender of applicants and respondents eligible for family mediation was incomplete – 222 records (17%) were missing information about gender. Where information was available, analysis shows that 54% of applicants were women, and 50% of respondents were women.

In 12 cases, including five completed mediations, both applicant and respondent were women. In ten cases, including two completed mediations, the applicant was a woman and the respondents were a man and a woman. In two cases, both completed mediations, both applicants and respondents were couples.

Ethnicity

The pilot courts recorded 638 files as eligible for family mediation. Of the 638 cases, 540 were offered family mediation. Ninety-eight files involving 196 applicants and respondents were not offered family mediation. Courts were much less likely to record the demographic details of parties in cases which were not offered family mediation, and one court entered no details of cases where family mediation was not offered.

Table 1 shows that of the 540 cases offered family mediation at least 67% of applicants and respondents were NZ European.

Table 1 Ethnicity of those offered family mediation

Ethnicity of those offered family mediation	Number	Percentage
NZ European	724	67%
Mäori	83	8%
NZ European / Mäori	10	1%
European	21	2%
Pacific	22	2%
Other*	24	2%
Not recorded	196	18%
Total	1080	100%

Source: Evaluation spreadsheet.
* Includes cells where two ethnicities were recorded per person.

Table 2 Ethnicity of parties offered mediation and parties who completed mediation

Ethnicity	**Parties offered mediation**	**Parties completed mediation**	**Percentage offered who completed**
	Number	Number	Percentage
NZ European	724	396	55%
Mäori	83	37	45%
NZ European / Mäori	10	1	10%
European	21	11	52%
Pacific	22	12	55%
Other*	24	10	42%
Not recorded	196	47	24%
Total	1080	514	48%

Source: Evaluation spreadsheet.
* Includes cells where two ethnicities were recorded per person.

Table 2 shows the ethnicities of applicants and respondents who proceeded to family mediation. As numbers in most ethnic groups are very small, and a quarter of the data is missing, limited conclusions can be drawn from this data.

3.3 The process

In the pilot courts family mediation was offered in 540 cases. In some courts, court staff recorded a brief note of why family mediation was not offered. The reasons are not recorded using consistent nomenclature or in all cases, and are therefore not amenable to quantitative analysis. However, reasons given for not offering family mediation included:

- a protection order was in place
- there were relocation issues
- there were serious domestic violence issues
- sexual abuse allegations had been made
- there was an indication from one party that they did not want family mediation to be offered.

Response to the offer of family mediation

The data indicates that overall in about two-thirds of the 540 cases in which family mediation was offered both parties consented to referral to mediation.

Table 3 shows that in 11% of cases the application did not proceed to family mediation either because it took a different path through the court process, or because the matter had resolved. Reasons given for not proceeding with family mediation after consent had been sought included:

- applications had been withdrawn
- the matter had been resolved by consent
- the matter was to proceed to formal proof
- the matter had been 'discontinued' or 'struck out'
- information (domestic violence or sexual abuse) had come to light which led to a reassessment of the appropriateness of referral to mediation.

Table 3 Response to the offer of family mediation

Of those offered family mediation	Number	Percentage
Both consented	348	64%
One or both did not consent	52	10%
No response from one or both	31	6%
Otherwise resolved/disposed	57	11%
Not recorded	52	10%
Total	540	100%

Source: Evaluation spreadsheet.

Analysis by court (Table 4) shows that the proportion of cases in which both parties consented ranged from 75% in Porirua[1] to 53% in Hamilton.

Of the 348 cases in which consent to mediation was apparently obtained, 12 cases did not proceed to referral to a mediator. This leaves 336 cases in which consent was obtained and a referral was made to a mediator.

In addition to the 336, 44 of the cases in which no information about consent was recorded were referred to pre-mediation making a total of 380 cases referred to mediators. The 44 cases were almost entirely from one court (Christchurch) which had adopted a more flexible policy regarding indication of parties' consent. This court was willing to accept counsel's indication of consent in lieu of written consent from the party as the trigger for making a referral.

1 In this court the spreadsheet was used predominantly for those cases which proceeded to mediation.

Table 4 Response to the offer of family mediation by court

Court	Parties offered mediation	Both parties consented to mediation	Percentage offered who consented
	Number	Number	Percentage
North Shore	104	62	60%
Hamilton	51	27	53%
Porirua	53	40	75%
Christchurch	332	219	66%
Total	540	348	64%

Source: Evaluation spreadsheet.

Referral to a mediator

Of the 540 cases where mediation was offered, 380 cases (70%) were referred to a mediator. Of the 380 cases referred to mediators 93% entered pre-mediation.

Table 5 Cases referred to mediators

Cases referred to mediators	Number	Percentage
Pre-mediation with report	310	82%
Pre-mediation no report	11	3%
Pre-mediation in progress	33	9%
Referral did not reach pre-mediation	26	7%
Total	380	100%

Source: Evaluation spreadsheet.

Pre-mediation was completed for 321 (84%) of cases referred, although in 11 of these cases it is not clear that a pre-mediation report was submitted to the court.

Pre-mediation

Table 6 shows that 88% of cases which entered pre-mediation proceeded to mediation.

Table 6 Outcome of pre-mediation

Outcome of pre-mediation	Number	Percentage
Proceeding to mediation	284	88%
Not proceeding to mediation	37	12%
Total	321	100%

Source: Evaluation spreadsheet.

Case reports provided by mediators discussed in section 5 indicate that the main reasons for cases not proceeding to mediation are that the parties settle before mediation takes place, one party is reluctant to proceed or one party does not respond to the mediator's approach.

Mediation

By 30 June 2006, 257 mediations were recorded as having been completed, although in 18 cases it was not clear that a report had been received by the court. Seventeen cases were in progress within six weeks of referral, and 10 cases were still in progress between six and 12 weeks after referral to a mediator.

Table 7 Immediate outcomes of referral to mediation

	North Shore	Hamilton	Porirua	Chch	Total	%
Completed mediations with reports	29	21	30	159	239	84%
Completed mediations no reports	5	0	1	12	18	6%
In progress < 6 weeks from referral	5	1	3	8	17	6%
In progress 6-12 weeks from referral	1	0	0	9	10	4%
Total	40	22	34	188	284	100%

Source: Evaluation spreadsheet.

3.4 Time frames

As explained above, the data is not robust enough to give confidence that analysis of time frames between stages in the process would yield a true picture of how long things took. Most robust are the starting point of the process, the date of mediation, and the date on which the mediation report is received by the court. The mediator guidelines indicate that mediation should take place within five weeks of referral to the mediator. Table 8 shows that about 60% of mediations were convened within five weeks of referral to a mediator.

Table 8 Time from referral to mediator until mediation

Time from referral to mediator to mediation	Number	Percentage
< 2 weeks	26	10%
2–4 weeks	76	30%
4–5 weeks	54	21%
5–6 weeks	39	15%
6–8 weeks	28	11%
8–10 weeks	11	4%
10–12 weeks	5	2%
>12 weeks	9	4%
Not recorded	9	4%
Total	257	100%

Table 9 gives the breakdown by court of the time from the referral letter to the mediation.

Table 9 Time from referral to mediator to mediation by court

Time from referral to mediator to mediation by court	North Shore		Hamilton		Porirua		Chch		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
<2 weeks	0	0%	0	0%	2	6%	24	14%	26	10%
2–4 weeks	6	18%	4	19%	10	32%	56	33%	76	30%
4–5 weeks	5	15%	5	24%	4	13%	40	23%	54	21%
5–6 weeks	2	6%	4	19%	4	13%	29	17%	39	15%
6–8 weeks	6	18%	2	10%	7	23%	13	8%	28	11%
8–10 weeks	1	3%	5	24%	2	6%	3	2%	11	4%
10–12 weeks	2	6%	0	0%	0	0%	3	2%	5	2%
>12 weeks	4	12%	1	5%	1	3%	3	2%	9	4%
Not recorded	8	24%	0	0%	1	3%	0	0%	9	4%
Total	34	100%	21	100%	31	100%	171	100%	257	100%

Source: Evaluation spreadsheet.

In 18 cases where a mediation was apparently convened there was no indication that a report on the mediation had been received by the court. However, in almost 70% of cases a mediation report was received by the court within the six weeks prescribed in the mediator guidelines (see Table 10).

Table 10 Time from referral to mediator until mediation report received

Time from referral to mediator to mediation report	Number	Percentage
<2 weeks	15	6%
2–4 weeks	67	26%
4–6 weeks	95	37%
6–8 weeks	31	12%
8–10 weeks	13	5%
10–12 weeks	4	2%
>12 weeks	14	5%
Not recorded	18	7%
Total	257	100%

Source: Evaluation spreadsheet.

Of the 18 mediations that took more than 10 weeks from referral to report, 10 were referrals made in November or December 2005 which may explain the delay in completing the process.

In three courts the numbers of completed mediations are small and percentages must be interpreted with caution. However, Table 13 shows that in North Shore, Hamilton and Porirua around half of the mediations were finalised with a report submitted within six weeks.

4 Establishment and implementation

4.1 Establishing the service

Recruitment and selection of mediators

Family mediation mediators must be current financial members of a professional body recognised by the Ministry of Justice – either the Arbitrators and Mediators Institute of New Zealand (AMINZ), or LEADR, an association of dispute resolvers. Furthermore, they must be current members of LEADR's Panel or Advanced Panel with current accreditation of ongoing practice and training, or member of AMINZ's Panel of Mediators with a current certificate of continuing professional development. Websites indicate that meeting these requirements will cost each LEADR mediator about $450 for initial accreditation plus an annual subscription of $320–$450, and each AMINZ mediator about $1,200 each year.

The mediators selected for the pilot included 17 women and 10 men. One woman and one man, the only mediator selected who was not a NZ European, had to withdraw because of other work commitments. Of the remaining 25, nine were legally trained and 16 had backgrounds in mediation, counselling and facilitation.

Data gathered for this evaluation indicates that the quality of mediations was high, and feedback from key informants suggests that most people would be reluctant to see any relaxation in the requirement for accredited mediators. However, with the number of referrals to mediators being far fewer than anticipated in some areas, mediators who had hoped to make family mediation a significant part of their practice questioned whether they could justify the financial commitment necessary to maintain the eligibility requirements.

In one of the pilot sites there were insufficient accredited mediators for the pilot to be launched at the same time as in the other sites. Should family mediation be rolled out across the country, consideration will need to be given to whether there are sufficient numbers of qualified mediators to support the initiative out of the main centres. Options may include developing a regional service, or alternatively extending the mediation service to cover property disputes and other matters so that mediators have a more consistent flow of work.

Training for court staff and mediators

Family Court staff in the pilot courts were asked to run one day of mediator training in conjunction with the person from national office who had designed much of the process. Staff changes at national office meant that the suite of documents prepared for the pilot was finalised just days before the scheduled training. Court staff expressed frustration that they had no time to become familiar with the processes before they were required to present and explain them to mediators. In one court in particular, where a closure of Wellington Airport

meant the national office person could not get to the training day, court staff felt this got the pilot off to a very poor start as it created an impression that no one really understood the new process.

Court staff also thought it was unfortunate that at the very time they were to be launching the pilot with energy and enthusiasm several of them were heavily committed to providing training and other presentations on the Care of Children Act 2004.

Many mediators were positive about the induction and training. Mediators without legal training were more likely to describe the training as 'rushed'. As the pilot proceeded most mediators became stronger in the view that the training needed to provide more information about the law, and the Family Court and its processes for those who had no background in these matters. Mediators would have found it particularly useful to have some substantive content on the Care of Children Act.

There was no ongoing training provided for mediators. Some but not all the pilot courts convened meetings for mediators throughout the pilot at which they could raise issues and discuss concerns. In the courts where this happened this was extremely valuable, not just for the individual mediators, but in assuring some consistency of practice in issues like who drafted agreements during mediation, and what review mechanism should be considered in the case of an interim agreement.

Administration

As a pilot, family mediation sat outside CMS, the courts' workload management tool, something which had significant implications for the process. Courts had to develop completely independent systems for identifying cases, gaining consent from parties, appointing lawyer for child, referring to mediators, registering the receipt of reports, and ensuring that where appropriate consent orders were sought. Being outside CMS meant that court staff were not prompted to action by the normal triggers that help them guide and prioritise their work.

With the very slow rate of referrals at the beginning of the pilot, two courts were reluctant to make use of the administrative support resource which accompanied the pilot. However, eventually administrative support was in place in all courts and with a person able to give some dedicated time to the pilot, systems ran more smoothly. National office data shows that only one court used the budgeted administrative hours, two did not, and the largest court in the pilot found the allocation of a 0.2 staff person inadequate and has used more hours.

The way the courts used the administrative hours varied. In some courts the hours were used by a person already working in the court who attended to family mediation matters amongst other work. In other courts a person was employed solely to provide administrative support to the project. In one court a person was employed one day a week – which happened to be a Monday – a decision rued by the FCC as so many public holidays fall on a Monday and too often a fortnight could pass with no attention to cases under way with family mediation, and no new referrals to mediators.

There was variation in other administrative practices too. After some initial variations in practice, courts settled on mediators being given copies or being able to get copies of the documents listed in the *Agreement for Referral to Mediation*, which asks parties to allow mediators access to:

- the Agreement for Referral to Mediation
- the Application for access/custody/guardianship
- the Information Sheet from the court file
- the court counsellor's report (if there is one)
- their affidavit (if there is one).

Several mediators said it would be very helpful if the key information such as parties' contact details could be supplied on a single sheet rather than them having to search through the documents to find it. They would also like email contacts for lawyer for child to reduce the incidence of 'phone tag'.

Information for participants

Giving applicants and respondents the information they need to make an informed decision about whether or not to proceed with a referral to family mediation has not been easy.

The pamphlet describing family mediation was not available at the start of the pilot and court staff reported real difficulty in finding appropriate ways to describe the process to applicants and respondents. This eased somewhat with the advent of the pamphlet, but court staff continued to report widespread confusion among applicants and respondents about the difference between mediation and the counselling process many of them had already experienced. It seems that this was in part because some counsellors use the term 'mediation' to describe aspects of their work.

A DVD was prepared for use in the 'Children in the Middle' pilot programme run by the Auckland Family Courts Association. Because of its focus on addressing children's needs the video was made available to assist in the implementation of the Care of Children Act. This video was widely distributed in the North Shore and Porirua Courts to parties who had been referred to mediation and others. It was available free through the Hamilton and Christchurch courts but was not routinely given to parties referred to family mediation. No one who responded to the participants' survey or who was interviewed mentioned the video as a useful source of information.

Prior to being referred to a mediation most applicants and respondents were sent a form through the post which they were to sign to indicate their consent. Most court staff were of the view that this form is too complex for the purpose. It contains information that participants will need to be told, but providing that level of detail when seeking consent to referral is off-putting. The letter is complex and presupposes a high level of literacy. For instance:

> *I agree that this Agreement to Mediate will be given to the mediators together with a copy of the application for access/custody/guardianship, the information sheet on the court file, the court counsellor's report (if there is one), and my affidavit (if there is one)…the lawyer will*

see our child(ren) and will talk with the mediator about how our children's interests can be best represented at mediation.

It is likely that the complexity of the form contributed to the early difficulties in getting the forms returned from applicants and respondents.

The Mäori and Pacific members of the evaluation team have repeatedly indicated that a written form of consent of this nature is not an effective way of encouraging Mäori and Pacific people to participate in family mediation.

Time and Fees

In the early stages of the pilot, feedback from court staff, mediators and lawyers for children was that all stages of the process, from identifying referrals to completing the mediation, were taking more time than anticipated. By the time they had read all the papers provided with the referral, had one or more conversations with the lawyer for child, spoken to both parties at least once, and possibly spoken with parties' counsel, mediators found the time involved in the pre-mediation phase far more than they had expected.

As the pilot proceeded and participants became more familiar with the process and revised their practices, the time involved reduced to some extent. For example, in the early days one mediator reported that she gave parties considerable choice about when the mediation could be held, but having spent a lot of time scheduling and rescheduling mediations to suit all participants, revised her practice. She would ask parties if there were any times they definitely could not manage, taking that into account and identifying two dates that she and lawyer for child were available, then offering parties the choice of the two dates.

The *Guidelines for Mediators* indicate a fee for service of $310 for the pre-mediation process and report. Some mediators who had a preference for pre-mediation in person adopted the practice of pre-mediation by phone, as they found that to complete it in person took the process well beyond budget. This was particularly the case in Auckland, a large city where travelling times can be lengthy. This said, others were so convinced that careful and thorough pre-mediation in person sets the groundwork for sound agreements at mediation that they continued with pre-mediation in person even though it was at a financial cost to them.

The fee for a completed mediation and final report is $465. Mediators who had their own rooms in which they could hold mediations were slightly advantaged in that they did not have to allow time to travel to, and set up the room used for mediation in the way other mediators did. Mediators hiring rooms reported that although the actual mediation may take only three hours, by the time the mediator had reached the room, set it up, and welcomed parties, and reversed the process at the conclusion of the mediation they would have spent at least four and possibly more hours on the mediation. Several mediators also commented on the cost of tea, coffee, snacks and especially cellphone calls, none of which are reimbursed in the fee structure.

Later in the pilot, feedback from court staff at one court indicated that mediators and counsel were finding ways to complete the required processes more quickly and that fewer complaints were being made to the court about the inadequacy of funding.

Agreements

An early issue that had not been anticipated was the reluctance of a few non-legally trained mediators to draft agreements reached during mediation. A written record of agreements reached during mediation is required, and in many cases where consent orders are to be sought the agreements need to be in a form that can be put before the court. Some mediators who are not lawyers lacked confidence to present agreements in such a form.

Following an initiative in one court, the practice spread of lawyers for children drafting the mediation agreement, and subsequently this was added to the brief for the lawyer for child.

Judges differ in what they require from a mediation agreement so that it can form the basis for a consent order. It would be helpful to mediators to have some clarification on this point.

Costs

Data supplied by national office based on an analysis of direct costs to the Ministry of Justice up to the end of April 2006 showed that:

- the average cost of a mediation was $777.16
- in 7% of cases the cost of mediation exceeded $800
- in 56% of cases a lawyer for child was appointed for the mediation (many cases referred to mediation had a lawyer for child appointed already)
- the average cost of lawyer for child appointed for the mediation was $943.48
- administration costs at the courts have consisted of an approved 0.2 FTE coordinator at each pilot site.

Cost information provided by the ministry further noted that establishment costs are difficult to determine because most costs were absorbed as part of internal ministry budgets. This includes the development of guidance and communications materials for courts and the salary costs of providing training, support and project management. A significant establishment cost if family mediation were to be established as a permanent service of the Family Court would be IT system changes. Also, the costs of coordinator time at each court would need to be based on the cost of a reasonably senior staff member. During the pilot administration costs have consisted of an approved 0.2 FTE coordinator at each pilot site. In practice one court has used this, two have not, and Christchurch has found 0.2 inadequate and has used more hours. Other costs would include establishing a national list of approved mediators, the preparation of revised guidance and communications materials and training for staff, mediators etc.

4.2 Significant implementation issues

Need for a champion

The family mediation pilot has to a large extent been devolved to the pilot courts, although it was not entirely clear to courts at the outset that this was to be the case. The initial concept

and process were designed at national office, as were detailed process documents and guidelines for court staff and mediators. These were supported by templates for letters and agreements. However, once the pilot was underway, each court was largely left to make decisions for itself about such things as who should be referred to mediation, the best way to get the required consents, whether or not counsel should be informed of the referral to mediation, and who should draft the agreements reached during mediation. Common agreements were subsequently reached among courts about some of these issues.

Pilot courts with fewer Family Court staff struggled to find the time and attention that would have enabled the pilot to have its maximum impact. A small amount of extra administrative time was provided to each court, and generally this was adequate to manage cases through the process, ensuring time frames were met and necessary reports were filed. However, the pilot really needed a champion in each court – someone who could publicise and promote it to counsel, answer questions and make decisions on issues that were unclear. This was a feature in the largest court in the pilot, which has a much larger Family Court staff, and was a significant factor in the comparative success of the pilot in that court. In the other courts, FCCs were strongly supportive of the pilot and very keen to see it succeed, but they simply did not have the time that was needed to publicise and promote as well as manage the new process. Court staff in the smaller courts told us that they felt thrown in the deep end with the pilot with little preparation and without much support.

Eligibility and referral

As detailed in section 3 of this report, 380 cases were referred to mediators between March 2005 and June 2006, far short of the 60 cases per month across the four courts that was estimated prior to the pilot. Of the 380, a total of 257 mediations was completed by 30 June 2006.

Determining why the number of referrals fell so far short of what was estimated has become a major focus of this evaluation.

The *Guidelines for Mediators* prepared in March 2005 say this:

> *All guardianship, access and custody cases that are not resolved after Family Court counselling, or where for some reason counselling is not appropriate, will be considered for the family mediation pilot. Family mediation will be offered in all cases unless, on the assessment of the case by Family Court staff, there is a specific reason <u>not</u> to offer it.* (Guidelines pg 3)

This clearly indicates that referral to family mediation was to be the 'default' position unless there was reason not to refer. However, the next paragraph suggests that Family Court staff would implement a reasonably comprehensive assessment in order to determine whether reasons existed which would make referral to family mediation inappropriate:

> *When deciding whether mediation is appropriate or not, court staff will consider the circumstances of the case, any recommendations made by the court counsellor, and may consult the parties' lawyers.* (Guidelines pg 3)

The Guidelines go on to suggest that Family Court staff have to make an assessment of each person's ability to participate constructively in mediation before proceeding with referral.

> *In particular the following factors will be taken into account in assessing each party's ability to participate constructively in mediation:*
>
> *Domestic violence*
>
> *Serious mental ill-health*
>
> *Serious drug or alcohol abuse*
>
> *Sexual abuse.* (Guidelines pg 3)

The evaluation found two distinct practices with respect to referral. In one court referral to family mediation was the default option, and the referral was discontinued if it was subsequently determined to be not appropriate. This court completed by far the most mediations. In the other pilot courts the practice tended to be that cases were identified as appropriate for family mediation by the FCC using the guidelines provided. FCCs and other court staff took some time to develop confidence in their assessment of which cases should be referred to family mediation, and in the mediation process itself. By the end of the evaluation period court staff in two of the four courts were referring many more cases to family mediation than they had earlier in the pilot.

The guidelines and the associated flow chart also strongly imply that referral to family mediation was to be the decision of the FCC. The evaluation found that this was not the case and that referrals were made through a number of different routes. As well as being identified by the FCC, cases for mediation were:

- identified by case managers
- referred by judges
- recommended for family mediation in reports from court counsellors
- the subject of request by counsel
- self-referred by parties.

In part, it was difficult for courts to have family mediation as a default option as the process sat outside CMS and a completely separate system had to be established, first to start cases on the track to mediation and then to follow their progress once parties had been referred. Court staff used the return of the counselling report to trigger referral to family mediation, but at least one of the pilot courts reported high numbers of cases where counselling was waived.

Court staff in some courts found it hard to decide what level of domestic violence or mental ill-health made a party unsuitable for referral to family mediation. As one FCC said:

> *If we ruled out everybody who had domestic violence, drugs or alcohol or mental health problems, truly there would be no one left to refer.* (Interview)

As the pilot proceeded and more and more successful agreements were negotiated with few mediations breaking down, court staff gained confidence that the process could work for a wide range of parties and found it easier to make decisions about who should be referred.

Cases involving domestic violence were referred to mediation in all four courts, but usually only if the perpetrator had attended an appropriate programme or the violence was historical. However, feedback from participants indicate that some mediations involved parties with a history of domestic violence, and that some women had felt uncomfortable at being in such close proximity to a violent ex-partner. Cases known to involve allegations of sexual abuse were not considered appropriate for family mediation in any of the pilot courts. Anecdotal information suggests that mental health issues were present in a number of the cases in which mediation was unsuccessful.

In some courts staff were uncertain about whether only new applications should be referred to family mediation or whether it was appropriate for other cases as well. Practice varied and it would be helpful if this were clarified.

Consents

Along with identifying appropriate cases for referral, delay getting the consent forms back from applicants and respondents was the biggest contributor to the unexpectedly slow implementation of the pilot.

Following legal advice from the Ministry of Justice that initial consent could be given verbally but that signed consent was essential before mediation could begin, one court decided to refer cases to mediators on the basis of a verbal indication from parties' counsel that they agreed to be referred. In these cases the written consent was completed at pre-mediation if this process involved a face-to-face meeting, or alternatively at the start of the mediation itself. This proved to be effective and no participants in the process reported that it created any problems.

In the early days of the pilot staff in some courts would phone the parties to discuss family mediation before sending each a written offer of referral to mediation. In other courts, staff sent the *Agreement for Referral to Mediation*, and if the consent was not returned they made a follow-up phone call. Usually following separation at least one party will have changed their address – perhaps more than once – and this also presented challenges in getting the offer of mediation to both parties.

Pilot courts tried different ways to encourage applicants and respondents to return the consent forms. In one court, if the FCC did not get a reply within a week, she sent another copy of the *Agreement for Referral to Mediation* form to the parties' counsel (if represented). This proved an effective way to obtain consent. In another court, parties were given a date by which to reply, and a prepaid envelope, and this also improved the rate of return of consent forms. In one court, some of those who did not return signed consents were Pacific people. The Pacific member of the research team has reiterated the view that Pacific people are unlikely to respond in written form, even with a pre-paid envelope. They will almost always respond better to a face-to-face approach.

There was widespread agreement among those interviewed for this evaluation that the written material designed for applicants and respondents was not easy to understand. Their impression of subsequent questions and confusions (e.g. with the counselling process) was that people either had not read the material or had not understood it.

Court staff believed that parties who had no legal representation and may have had minimal contact with the court prior to receiving the offer of mediation could find the forms complex or confusing and may not be confident to approach the court if they were uncertain about whether or not to take up the mediation.

Interim agreements and reviews

The *Guidelines for Mediators* note that:

> *…occasionally, parties may wish to trial agreed arrangements for a longer period [than the three weeks suggested for adjourned mediations] and meet again with the mediator to finalise them. Although this is not ideal, as it may mean that the mediation does not meet the objective of speeding the resolution of the dispute, this arrangement can be accepted.* (Guidelines pg 12)

In fact, temporary arrangements have been relatively common – more so in the practice of some mediators than others. Some mediators are of the view that at times parties will make more concessions, and be more prepared to try new arrangements, if they feel they have the opportunity to review.

The guidelines contain no indication of the process that should be followed for review. A range of ways of approaching reviews has been tried, including:

- lawyer for child keeping an hour's funding in reserve to undertake a review of agreements after a specified time
- using funds from mediations that have come in under budget to pay mediators or lawyer for child to do a review
- scheduling the matter for a registrar's list
- agreeing with parties that they use a review mechanism that sits outside the court process, e.g. referral to counselling
- leaving the onus with the parties to the agreement to seek the help of the court if the interim agreement is not working.

These options have implications for both funding and process. If lawyers for children are to be involved in reviews their brief will need to be extended and they will need to be paid for that time. If interim agreements are referred back to a registrar's list, the next steps must be made clear. Court staff and mediators talked about the need to be careful not to build the court or the mediation process into parties' problem solving mechanisms – accepting that all parents will have issues and problems to resolve as their children grow up.

Generally court staff were not in favour of reviews, and encouraged mediators to negotiate final agreements wherever possible. One Family Court Manager voiced concern about both the principle and practice of reviews:

> *The big issue we are facing is status of the agreements and reviews. This is a philosophical as well as a logistical issue. The original idea is that if family mediation didn't work the case would be referred back to a judge for a judicial mediation or a hearing. I'm very concerned to hear mediators talk as though building in a review is normal practice. It is not*

> *the culture of the court – the court is about decision / action and refer back to parties. The reality is that if it is referred back to the registrar's list it ends up with a case manager. What are they supposed to do with it? They are not experts.* (Interview)

4.3 Other implementation issues

Issues for the court

Family mediation was designed as an inclusive process. Provisions were made for the inclusion of children at mediations, for parties to bring support, for interpreters to be provided if necessary, and for cultural advisors to be involved. In practice, none of these things have happened to any extent and some of them have not happened at all.

Many participants in the process, particularly lawyers for children, had reservations about having children at mediations. These are discussed further in Section 5.

Table 2 in Section 3 shows that people who are not of New Zealand European ethnicity appear to be less likely to proceed to family mediation. It is not clear why this is the case.

Interpreters and cultural advisors have not been used in any mediation. One FCC indicated that she did not refer speakers of other languages to family mediation because providing an interpreter for all stages of the process took the mediation beyond budget. It was not obvious to the evaluators what triggers would alert court staff or mediators to the need to include a cultural advisor and this would merit further investigation.

The guidelines indicate that if mediators consider an interpreter or cultural advisor is needed they must submit a written request to the court outlining why the service is required and court staff will then make arrangements for the service to be provided. It may be that this process is a disincentive for mediators some of whom already feel underpaid and all of whom are trying to work within specified time frames.

Issues for mediators

The slow beginning to the pilot in three of the four pilot courts was unexpected. Mediators in those courts were assured that once the pilot was launched there would be no shortage of referrals to mediation. Some mediators arranged their other work commitments in anticipation of regular referrals. Others investigated hiring rooms and made plans for peer group supervision.

While mediators appreciated the reasons for the delays, some believed that the ministry should have anticipated some of the problems and been more realistic about the likely workload mediators could expect.

Possibly the greatest cost has been a depletion of energy, enthusiasm and goodwill on the part of mediators who may have received only a dozen referrals to mediation throughout the pilot.

Several mediators indicated that they would value feedback on whether consent orders are issued on agreements negotiated in mediation. Without this feedback they were unable to address any deficiencies in future agreements to give them the best chance of a straightforward path through to a consent order.

Some mediators also felt strongly that agreements reached in mediation very often contained valuable commitments that were going to strengthen parties' ability to negotiate with one another in the future. They acknowledged that such commitments were not appropriate for a consent memorandum, but were keen to see them captured formally in some way.

Mediators felt very much in the dark about the progress of the mediation pilot and would have appreciated being kept better informed. For their part, Family Court staff were unclear about whether the information they gleaned about the progress of the pilot was confidential to the courts or could be shared with mediators. At the final field work visits in June/July 2006 mediators in at least two courts had no idea that the pilot was not continuing and that funding for a limited number of mediations had been allocated to each court to use up. This is a problem as the momentum of referrals increased during 2006 and some mediators had once again started to think that family mediation might become a significant part of their work.

Some mediators believe they have, to an extent, been subsidising the pilot given the amount of time required to set up the mediation, contact all parties to the process including liaising with the lawyer for child, and arrange further meetings where extensions are required.

Issues for lawyers for children

The brief attached to the appointment of lawyer for child for a family mediation requires the lawyer for child to:

- speak with counsel for parties, or the parties if they are unrepresented, to ascertain the issues
- meet with the child to:
  - ascertain the child's views about arrangements for their care and access
  - consider the child's needs in relation to their care and access arrangements
  - confirm that the issues presented by counsel and/or parties are accurate
- provide information to the child about the mediation and the process that may follow mediation (e.g. what will happen in the event of full agreement, partial agreement, no agreement)
- discuss, if appropriate, whether the child wishes to attend any part of the mediation
- discuss with the mediator how the child's needs and views could best be presented at the mediation
- prepare the child for mediation if it is agreed that the child will attend
- attend the mediation to represent the needs and wishes of the child and to support the child if s/he attends
- ensure that, if relevant issues arise, s.16B of the Guardianship Act 1968 is addressed (later, the Care of Children Act 2004)
- advise the child of the outcome of mediation.

This is a more limited brief than that which usually accompanies the appointment of lawyer for child in other cases. The most obvious difference is that lawyers for children appointed to family mediation cases are only required to interview the child/ren at the centre of the dispute and are not required to interview their parents. Some lawyers for children interviewed for this research believe that the brief expressly prohibits them from making an approach to their clients' parents. Others recognised the limitations of the brief but believed that without interviewing the parents of the child they were unable to determine the child's best interests or be seen by the parties as a credible advocate for their child(ren). One lawyer for child said this:

> *I have no difficulty with the brief except with the implication that I might not need to meet the parents. I don't hold with that. They cannot trust my advice or my judgement about what's best for their child if they haven't met me.* (Interview)

In some cases lawyer for child had been appointed prior to the decision that a case should go to family mediation. In these situations the lawyer for child was already working to a more comprehensive brief. Some courts gave the lawyers a separate narrower brief for the mediation component of their work. In cases with an existing lawyer for child appointment there was some confusion about which budget should pay the costs of the work the lawyer for child put into the family mediation.

Some lawyers for child think the brief should go further and give the lawyer for child scope to see if they can negotiate an agreement. Others want clarification as to how reviews might be managed and paid for.

Issues for counsel for parties

Counsel for parties interviewed throughout the pilot expressed frustration that at times they had no indication that their clients were participating in family mediation. It was not that they necessarily wanted to be involved in the process, but they felt strongly that they needed to know the process was happening as they were effectively managing their client's application. One counsel said this:

> *Mediators vary in their willingness to keep counsel in the loop. This is very difficult when you are responsible for making a submission to the next registrar's list. It's embarrassing to find that the mediation has already happened and you didn't know*. (Interview)

Another counsel was concerned that her client had been confused by the referral to family mediation and she had not had the chance to clarify that with him:

> *I had a case that had been dragging on for ages and I was of the view that the parties needed judicial intervention. I was going down this path with the client when he got the papers in the mail asking for his consent to be referred to family mediation. He got confused between this and what I was recommending. I was the last to know and it really cut across my work with him.* (Interview)

Initially, in some courts, counsel for parties were not always informed of referral to mediation. In other courts it has been the practice from the start to inform parties' counsel

about referral to mediation. Although the *Agreement to Mediate* asks parties to indicate whether or not they want the court to advise their lawyer of referral to mediation, their response was not always taken into account in courts' practice.

As the pilot became established the consensus in each court was that counsel for parties should be advised of the referral. Views differed on whether the appropriate mechanism was for clients to inform counsel or for courts to inform counsel. Courts increasingly used counsel as a means of securing consent to mediation from parties.

Initially, there were mixed views on whether or not counsel for parties should attend mediation, with some legally trained and non-legally trained mediators holding each view. As the pilot has developed mediators have expressed fewer reservations about having parties' counsel at mediations finding rather that some counsel have a good understanding of the mediation process and can be very helpful in keeping it on track. Counsel often have good relationships with their clients and can really help to move them towards constructive agreements. The evaluation team heard of few instances where counsel had approached family mediation in an adversarial fashion or had been otherwise obstructive or unhelpful.

Issues for judges

Judges in each pilot site were interviewed midway through the pilot, and again at the end. All the judges were supportive of family mediation in principle, the pilot in practice and were keen to see it work.

Along with other participants the judges regretted the slow start to the pilot and expressed some frustration that just as it was gaining momentum in three courts, the pilot had to finish. Some judges felt the pilot had not been sufficiently well promoted to the legal profession and that counsel in turn did not actively promote it to their clients. One judge felt that the slow start in his court had been largely because the court was trying to stick strictly to the guidelines, whereas other courts had interpreted the guidelines more liberally, had made more referrals to mediators and had got the pilot underway more quickly. He was keen that the guidelines should be clarified and practice be more consistent. Another judge indicated that the decision about whether or not to refer to family mediation required judgement and experience and should not be left with case managers.

The delays in consents being returned by parties was of concern to judges who noted that one reason for introducing family mediation was so that arrangements for children could be settled more quickly. Judges supported court staff finding alternative means of gaining consent to family mediation.

Judges had individual preferences for the form in which agreements should be presented to the court if a consent order was sought. One judge requires an agreement reached at mediation to be presented to the court as a memorandum of consent before a consent order could be issued, others were willing to issue consent orders based on agreements drafted during the mediation session.

5 Delivery and experience of mediation

This section covers mediators, lawyers for children and counsel for parties' experiences of mediation, including pre-mediation. The information is drawn from interviews with mediators, lawyers for children and counsel for parties as well as from mediator case reports.

It presents experiences from the perspectives of the different 'players' – mediators, lawyers for children and counsel for parties.

5.1 Information from mediators

The data in this section of the report comes from the case reports returned by mediators. Not all mediators returned case reports to the evaluation team which is why the numbers in this section of the report do not tally with the numbers in Section 3. Furthermore, mediator case reports include feedback on cases which reached pre-mediation and did not proceed further, as well as on those where the outcome was no agreement. The mediator case reports include rich descriptive and analytical data.

Mediators returned 266 case reports describing mediations referred to them. With the exception of the North Shore Court, where the number of reports returned was less than half of the number of completed mediations (see Table 7 in section 3), the number of reports received closely matched the number of cases dealt with in each court.

Table 11 Number of forms returned by pilot site

Case reports returned by pilot site		
Court	Number	Percentage
North Shore	14	5%
Hamilton	19	7%
Porirua	30	11%
Christchurch	203	76%
Total	266	100%

Source: Mediator case reports.

Did not proceed

Thirty-eight (14%) of the 266 returns were for cases that did not proceed to mediation after referral to a mediator. Mediators cited commitment by both parties, along with issues that are amenable to solution by mediation, as the key to mediation success.

In 31 cases, the decision not to proceed was agreed prior to pre-mediation. The main reasons for not proceeding were:

- one party reluctant to proceed (9)
- matters settled by parties (8)
- no response from one party (7)
- concerns re violence or sexual abuse (3)
- counsel or lawyer for child sought a court hearing (3).

In one case the applicant died before the mediation could be arranged; in another, the parties agreed that one issue, whether the applicant could take the children to live out of the area, needed to be adjudicated. Once that decision was made, both parties planned to come back to mediation to discuss how they implemented it.

In seven cases, the parties agreed at pre-mediation to proceed but did not do so because:

- mother believed that father and his new partner's behaviour would put the children at risk
- mother failed to attend two pre-mediation appointments, despite her counsel requesting urgency
- father did not turn up at mediation despite written and text reminders
- father out of country for a month, and the case was referred to court
- mother pulled out two days prior to mediation, stating that she had sorted out arrangements
- parties reached settlement during intervening period
- mother unable to get transport, mediation deferred.

Pre-mediation contact

The pre-mediation stage allows the mediator to assess whether mediation is appropriate, and to determine with the parties, how the mediation should proceed, that is, how to incorporate children's views, whether they or other family members or support people should attend and any special needs. The *Guidelines for Mediators* envisaged that pre-mediation would involve at least one meeting with both parties (in person or, if necessary, by phone) as well as consultation with the lawyer for child about how the child or children's interests would be best represented in the mediation itself.

During interviews, mediators repeatedly stressed the importance of the pre-mediation phase both to identify the main issues and to ensure that parties understand the process. Two commented:

> *I firmly believe that the time spent in pre-mediation is well spent in terms of enabling people to move into meaningful mediation at the mediation session itself. I give the parties a set of guidelines for presenting their views.* (Interview)

> *Ideally I would like more time for this phase. I see it as absolutely crucial to a successful mediation. I already use one to one-and-a-half hours for each party. I use the premed to listen, to understand their perspective. I explain the process and where it fits in the legal*

process. I tell them about the mediation meeting and give some 'pointers' on how to approach the mediation. (Interview)

As Table 12 below shows, pre-mediation contact with parties was generally in accord with the guidelines, with between 65% and 70% of parties having some face-to-face contact with the mediator. Just over a quarter of parties had pre-mediation by phone only.

In one case, the mediator did not contact either parent directly but instead spoke only to their counsel. In this instance the parties were Cook Island Mäori and, in the mediator's view, had built up a good relationship with their counsel, who briefed them about what would happen. The mediator believed this was the most appropriate approach, given the importance of an established relationship for Pacific people.

In two-thirds of cases (68%) mediators contacted the lawyer for child by phone; in just under 20% of cases contact was face-to-face, and both phone and face-to-face in eight cases (3%). In one case, the mediator was unable to contact the lawyer for child before the mediation but did speak to her secretary. The mediation went ahead and was successful.

Other people contacted during pre-mediation included a family member (7), a support person (8), an ex-partner, an access supervisor and a case worker.

Table 12 Contact at pre-mediation

How contact was made at pre-mediation						
Contact with	By phone	Face to face	Both phone & face to face	Unable to contact	Not stated	Total
Party A	70	159	26	4	7	266
Party B	77	150	23	7	9	266
Lawyer for child	182	50	8	1	25	266
Lawyer for party/ies	84	3	1	2	176	266
Other	15	0	3	1	247	266

Source: Mediator case reports.

Length of time between letter of referral and date of mediation

Of cases where we have mediator case reports 228 proceeded to mediation. The numbers in the tables below refer only to these 228 cases.

The *Guidelines for Mediators* indicate that mediation should take place within five weeks of referral (with another week allowed for completion of the mediation report). According to mediator feedback, 147 mediations (64%) did occur within five weeks, while 187 (82%) took place within six weeks of the date of referral. The soonest that a mediation was held was two days after the referral was made; the longest time between referral and mediation was 94 days. This mediation was rescheduled due to the mother giving birth the day the mediation was meant to take place. The average length of time between referral and mediation was 31.6 days. This compares with between 26–33 days waiting time for mediations in the pilot courts prior to the family mediation pilot (see Appendix 1).

Table 13 Time from referral to mediation by court

Time from referral letter to mediation						
Time frame	North Shore	Hamilton	Porirua	Chch	Total	%
<4 weeks	4	4	11	80	99	43%
4–<5 weeks	1	2	8	37	48	21%
5–<6 weeks	4	3	3	30	40	18%
6–<7 weeks	2	3	5	7	17	7%
7+ weeks	2	6	3	13	24	11%
Total	13	18	30	167	228	100%

Source: Mediator case reports.

Attendance

As noted elsewhere, family mediation was designed to be inclusive, in that children and extended family were able to be involved, and by mutual agreement parties were able to bring support people to the mediation. A lawyer for child was appointed in every case and parties could choose whether or not to have their own lawyers attend the mediation. The pilot also made provision for a cultural advisor or an interpreter to take part.

For the cases where we have a mediator case report, the majority (158 or 69%) did involve more than the minimum number of people, that is, the parties, the lawyer for child and the mediator. However, where other people attended, they were far more likely to be a lawyer for one of the parties than a family member, child or support person.

In 70 mediations (31%) only the mediator, parties and the lawyer for child were present. Other family members or support people attended 60 (26%) mediations.

Counsel for parties

The *Guidelines for Mediators* recognise that counsel for parties 'may attend' mediations, while information prepared for court staff[2] states that 'it is not intended that parties' lawyers will usually attend the mediation session'. Together these papers suggest that the Ministry expected that counsel for parties would only be present in a minority of mediations. That has not proved to be the case.

Lawyers for one or both parties attended 126 (55%) mediations for which case forms were received. In 40 mediations (18%) the lawyer for only one party was present; in 86 (38%) lawyers for both parties were present.

Children

The *Guidelines for Mediators* state that 'it is expected that children will be represented by Counsel for the Child at all mediations and that they may also be present in person at many mediations'[3]. In fact, very few attended even though most mediators were open to this

2 Non-Judge Led Mediation Pilot: Process to Refer to Non-Judge Led Mediation.
3 Non-Judge Led Mediation Pilot: Process to Refer to Non-Judge Led Mediation.

happening where appropriate. A number of mediators felt that lawyers for children sometimes discouraged children from attending or did not suggest attending as an option. One mediator was of the view that in the past lawyers for children were trained to think that it is injurious to children to be involved. Mediators generally agreed that while children should not make the actual decision, they do need to be involved in the decision-making process and should be given the option to do so. They felt that there may need to be more exploration of ways in which they can be involved.

Children attended 13 (6%) mediations for at least some of the time. In three, children attended for at least some of the time with the applicant, respondent and lawyer for child; in 10 mediations another family member was present. In seven of the 13 mediations the lawyers for the parties were also present.

Other family members and support people

Relatively few mediations actively involved extended family members other than as an applicant or respondent. It is not clear whether this reflected the parties' family situation and their preference or was due to the lack of time available to explore the involvement of other family members as an option. Other people, including other family members, attended in just over a quarter of cases (60 or 26%) but as discussed in the next section, they tended to play a modest role in proceedings.

Table 14 Attendance at mediation

Attendance at mediation	Number	Percentage
Applicant, respondent, lawyer for child only	70	31%
Applicant, respondent, lawyer for child, other people	24	11%
Applicant, respondent, children, lawyer for child	3	1%
Applicant, respondent, children, lawyer for child and other people	3	1%
Subtotal of cases where no lawyers for parties were present	*100*	*44%*
Applicant, respondent, lawyer for child, lawyer for both parties only	53	23%
Applicant, respondent, lawyer for child, lawyer for one party only	40	18%
Applicant, respondent, lawyer for child, lawyer for parties, other people	26	11%
Applicant, respondent, children, lawyer for child, lawyer for parties and other people	7	3%
Other combination*	2	1%
Total	228	100%

Source: Mediator case reports.

* No lawyer for child was present at one mediation because of another commitment; in the other the respondent did not attend and the mediation was terminated soon after it began.

Cultural advisor or interpreter

No mediations used the services of a cultural advisor or interpreter. The decision about whether parties who might need one of these services should be referred to mediation appears to be made at the referral stage, rather than at pre-mediation.

All the mediators are NZ European. All said that they felt comfortable working with people from other cultures. One mediation did take place where the mediator subsequently considered that a cultural advisor would have been helpful. She did not come to that view at the pre-mediation, and did not consider adjourning the mediation so that a cultural advisor could be appointed. She thought that it would be useful for mediators to have more understanding of how a cultural advisor could contribute to mediation.

Participation

According to the mediators' reports in the great majority of mediations applicants (197 or 86%) and respondents (186 or 82%) were very active participants, with mediators describing them as participating a lot[4]. In two mediations, the applicant was described as participating 'a little', and in one, the respondent took little part.

Lawyers for children were also actively involved, with 172 (75%) taking 'much' part in the mediation, and 37 (16%) having 'some' participation. Three mediators said that the lawyer for child took little part in proceedings.

Counsel for parties tended to be less actively involved in mediations than the parties themselves or the lawyer for child.

In 10 of the 35 mediations where other family members were present, they participated a lot; 13 had some participation and 11 participated little. One took no active part at all.

While children were present for at least some of the time at 13 mediations, the youngest children, both under seven, took no active role. Eight of the children took little part while three children, all aged 12 or over, took some part in the mediation.

In one mediation the father's support worker and access supervisor contributed 'much' to the mediation. Generally support people took little part in proceedings. One mediator commented that in her view, '*They are there for moral support not participation*'. She noted that she had not yet had any support people who played a particular role within the family relevant to the mediation. She added:

> *I have said that people can't bring a support person who will reduce the likelihood of agreement. I would also consider issues of power and gender balance.* (Interview)

4 The scale for extent of participation was: Much, Some, Little, None.

Table 15 Participation in mediation

	Participation					
	Much	Some	Little	None	Not stated	Total
Applicant	197	16	2		13	228
Respondent	186	27	1		14	228
Other family members	10	13	11	1		35
Lawyer for child	172	37	3		16	228
Lawyer for applicant	26	45	21	2		94
Lawyer for respondent	25	86	60			171
Other	4	4	10	10		28
Children 12+ years		3	2			5
Children 7–11 years			6			6
Children <7 years				2		2
Support people	4	4	8			16

Source: Mediator case reports.

Presentation of children's views

In 165 (72%) out of 228 mediations for which we had case reports, the mediator believed that the children's views or interests were 'very well' presented. The mediators considered that they were 'quite well' presented in 49 (21%) mediations, 'not well' presented in seven (3%) mediations and 'poorly' presented in two mediations.

Table 16 Presentation of children's views by lawyer for child

Views presented	Number	Percentage
Very well	165	72%
Quite well	49	21%
Not well	7	3%
Poorly	2	1%
Not stated	5	2%
Total	228	100%

Source: Mediator case reports.

The children's 'views' were not presented at five mediations because they were so young. Instead, the lawyer for child presented what he or she saw as what was in the best interests of the child.

Typical comments where children's views were well presented included:

> *Had clear view of the wishes and views of the children and was neutral in her reality testing of both parties' positions.* (Mediator case report)

> *The lawyer had spoken to the child and elicited very clear and strong views. It was so helpful for progressing positively.* (Mediator case report)

> *Excellent advocacy for the children – lawyer for child clearly had built rapport and had very clear instructions. Fortunately her involvement predated mediation so she knew who the children were and what was important to them; her mediation interviews with children were focused.* (Mediator case report)

> *Lawyer for child expertly put forward child's best interests and [described] her observation of child with father (9 months). All fell on deaf ears – mother resistant.* (Mediator case report)

In cases where children's views were not well presented or presented poorly, the mediator commented:

> *Because the children were only four the lawyer for child felt he could not express their views, but neither was he very strong on expressing what the needs of four year olds might be in relation to what parents were proposing.* (Mediator case report)

> *Lawyer for child aggressive and in my opinion biased to mother's point of view.* (Mediator case report)

> *Children's lawyer could have gone a bit deeper into children's views. As it was he was open to challenge from the father which did not help the process. E.g. Mother's view and children's was that Dad always put work before children. Their lawyer had no answer to the challenge from Dad that children were stating mother's views.* (Mediator case report)

Another comment referred to the lawyer for child's lack of familiarity with mediation as a process:

> *Views of the child put forward and appropriately, but somewhat obscured by counsel's wish to comment on other areas, i.e. to push the parties to settlement, not to 'waste time' etc. In discussion with counsel afterwards there was acknowledgement of lack of clear understanding of the mediation process, and need for some more training for counsel who have been used to the judge-led mediation style.* (Mediator case report)

Several mediators commented on situations where children were present:

> *Lawyer for child presented his view of child's needs well. Child also articulated her views well. Difficult for mother to hear but her lawyer helped with this in caucus.* (Mediator case report)

> *Twelve-year-old daughter of applicant father attended to tell her father she doesn't want to see him.* (Mediator case report)

> *Child was there for first hour then went into another room. She came in a couple of times.* (Mediator case report)

Length of mediation

The *Guidelines for Mediators* allow three hours for the actual mediation session. They also indicate that if parties and mediator agree, the mediation may be split into more than one session within a short time frame (i.e. within a three-week period). The mediator receives the same fee as for a single session.

According to mediator case reports, just under a third of mediations (69 or 30%) were completed within the three hour time frame. Almost half, (103 or 45%) took between three and four hours. This means that three-quarters (75%) of all mediations were completed within four hours, one hour longer than anticipated in the guidelines.

Thirty-five (15%) took between four and five hours, and 21 (9%) took longer than five hours. The length of mediations ranged from 1.5 hours to 7.5 hours.

Table 17 Duration of mediation by pilot site

	Duration of mediation						
	<2 hours	2–<3 hours	3–<4 hours	4–<5 hours	5–<6 hours	>6 hours	Total
North Shore	1	2	4	-	2	2	11
Hamilton	-	4	5	5	4	-	18
Porirua	3	6	10	6	4	1	30
Christchurch	16	37	84	24	2	6	169
Total	20	49	103	35	12	9	228

Source: Mediator case reports.

The majority of mediations (202 or 89%) were completed at one session.

Reaching agreement

Mediators described a range of experiences in reaching agreement:

> *Parties agreed on a new regime of shared care with their children; day-to-day care and special times were covered; parents seemed to develop better communication skills with each other 'for the children', although there is still hostility and resentment and passive resistance present at times.* (Mediator case report)

> *An enduring agreement was reached both in terms of the time spent with children and on issues previously in disagreement. Referral to S19 communication counselling, support services for special needs child and teenage counselling for stepson. Future communication plan integrated into the agreement. Parties reported satisfaction with agreement.* (Mediator case report)

> *Care arrangements in context of family understanding being reached and a degree of reconciliation.* (Mediator case report)

> *The agreement addressed communication problems between parties, and especially communication between them in the presence of, and with the child. Care arrangements for term-time, school holidays and special days were agreed. There was an agreement already in existence. The new agreement is designed for more equitable parenting time. The agreement has a good chance of lasting for the next year to 18 months when the parties have agreed to review it in light of the changing needs of a school-age child.* (Mediator case report)

> *Parties settled some guardianship issues and agreed to increase child's time with father. Parties did not get on at all but were able to discuss important issues and agree on them in spite of this, so prognosis is good.* (Mediator case report)

Twenty-two mediations were adjourned with an arrangement for or expectation of a second session to complete the mediation. Of these, three were still waiting to resume at the end of the data collection period. In three of the 11 cases that resumed, the second session took place within three weeks and in eight it took place after the recommended three weeks.

In six cases, the parties resumed mediation and came to an agreement. The quotes below illustrate some of the change that had taken place to enable that to happen:

> *Two mediations two months apart. Parents able to agree on care and contact after initially being of very different views. Second session was marked by cooperation and reason – father more able to demonstrate appropriate boundaries for children. I think the solution should hold – orders made.* (Mediator case report)

> *As part of the agreement parents worked out a regular communication plan that should ensure support for them in keeping to the parenting plan and making adjustments when necessary. Total time at joint meeting – 7 hours – is an indication of what time might be necessary to a) ensure no coercion, and b) to do justice to parents who reach major settlement changes.* (Mediator case report)

> *Parents have moved on from initial differences and are united in helping their daughter move on as well. Process will not be without challenges but path is paved for a lasting contact agreement.* (Mediator case report)

In three cases, the mediation was adjourned and reconvened but full agreement was not reached. In two cases, no agreement was reached at the second session. The quotes below illustrate both the progress made and difficulties that arose:

> *No agreement reached, adjourned to allow one party to reflect on a possible resolution, resumed for one hour four days later, no further agreement.* (Mediator case report)

> *First mediation, respondent did not arrive. Second mediation, agreed to adjourn and apply for extra time or negotiate and write agreement through mediator and lawyer for child.* (Mediator case report)

> *Mediation was completed. However respondent needed to go away and contemplate proposals; respondent could not agree; lawyer for child took up matter and it proceeded through the channels.* (Mediator case report)

Parties were unable to move from fixed positions despite time to consult lawyers and consider other options. (Mediator case report)

Second mediation resumed on schedule; however a third meeting to write agreement did not eventuate due to breakdown in communication – lawyer for child to apply for urgent judicial conference. (Mediator case report)

Two parties came to an agreement before the second session and four mediations did not resume because one party was unwilling for that to happen. No information was available for two mediations.

Table 18 Mediations completed and adjourned by pilot site

	North Shore	Hamilton	Porirua	Chch	Total
Completed	9	16	25	152	202
Adjourned*	1	2	3	16	22
Terminated	1		1	1	3
Not stated			1		1
Total	11	18	30	169	228

Source: Mediator case reports.

* Adjourned cases are incomplete. They differ from those that are completed but have a proposal for a review at a future date.

Perceptions of the process

Mediators' case reports provided some information on mediators' perceptions of the sustainability of the outcome of the mediation, and allowed mediators to comment on the challenges they faced during the mediation itself.

Progress without full resolution

In some mediations, parties made some progress but not enough to reach a full resolution:

One party refused to enter into any substantive agreement whatsoever until further time had passed to enable that party to assess success of current arrangement…They agreed however to exchange their viewpoints further, in writing, in next week or so and not to initiate any further court application meantime. There was much tough and helpful discussion at the mediation. The hope is that the intransigent party may decide to settle after all as the actual differences between the parties are negligible. (Mediator case report)

Arrangements for six weeks while financial implications are sorted through as well as the transition issues. Both parents would like the arrangements to continue and the review meeting with the lawyer for child will help determine this. The family has a history of disagreeing with each other, and all of the lawyers were pleasantly surprised with the turn of events. Mediation – possibly especially the timing of it – has helped put the family onto a different footing, and it is hoped this is sustainable. (Mediator case report)

For one case, following a four-and-a-half hour mediation involving the parties and lawyer for child, some agreement was reached but the mediator was uncertain about the sustainability of the outcomes:

> *[Parties] agreed to transition arrangement over 2–3 terms of school to increase father contact. On writing up agreement it became clear that at least one party was not committed to it (lots of intricate changing and renegotiation to what had been agreed, which took nearly one hour.) The agreement was not signed, saying legal advice was wanted by the mother first. In my view it was clear that this party was not going to adhere to the agreement.* (Mediator case report)

Mental health and communication issues

In two cases mediators found mental health difficulties caused communications problems. In the mediation described below, only the parties, the lawyer for child and the mediator were present:

> *These parties have a very low capacity to communicate constructively. There is a prior Family Court history. The core issue was whether the mother should change address to be close to the children. She agreed to do so. Other issues, of which there were many, were left to be mediated later (if required) once change of address has occurred.* (Mediator case report)

In the mediation referred to below, both parties' lawyers were present, along with the lawyer for child and the mediator:

> *Father was in poor mental health – severely depressed on sickness benefit. Mother unable to read or write. Financially poor family. Mediation strategy was to work at a basic level, almost paternalistically, to put some crude arrangements in place. One child hostile to father, other child ambivalent. Father wanting to give up on all contact for six months or more.* (Mediator case report)

Role of children

One mediator described what he believed was a positive impact of having a child present at the mediation:

> *[Child] and father met at mediation for the first time in [several] years. Child emotional and angry at father. Lawyers present felt that the meeting will enable the child to move on. Father had been in prison. Useful dialogue and exchanges took place between mother and father. Useful to have both new partners present. Altogether a very significant encounter by all involved, albeit only limited agreement could be reached at this stage. Important point is that mediation provided the basis for future positive change.* (Mediator case report)

Another described a situation where a child's willingness to take part may have led to the cancellation of the mediation. The mediator understood that the child wanted to say things at the mediation that one party did not want to hear. That party withdrew from the mediation.

Role of other family members

In this next mediation, another family member was present, along with the parties, lawyer for child and the mediator:

> *The adults have all agreed to continue the child's access to Dad, reducing the times and supporting the child to understand that he is not the decision maker in the family. I think this is a trust building step that will lead to a constructive rebuilding of all the relationships involved.* (Mediator case report)

> *Power and control issues with vitriolic parents. Poor recognition of the feelings of the children. Father and step-father emerged as the liaison persons. Impassioned plea by lawyer for children enabled one party to see the damage being done. At that point, after 3.5 hours, an agreement began to evolve. Everyone gave some ground – glue very thin. Fragile arrangement.* (Mediator case report)

In one instance, the mediator identified cultural issues with Mäori participants wanting to refer back to whänau. The mediator pointed out that this has the potential to lengthen the mediation process considerably.

One mediator thought there was value in having a mechanism to feed back into the court record matters where progress had been made even though no formal agreement had been reached. Examples included decisions not to use physical punishment and not to denigrate the other parent in front of the children.

5.2 Lawyers for children's experience of mediation

The information for this section is drawn from interviews with lawyers for children who have represented children in family mediations. Over the course of the pilot, interviews were completed with15 lawyers for children.

Pre-mediation

Most lawyers for children commented on the need to adapt to the more restricted brief they were given under the pilot, compared with what they were used to. Some found it difficult to change from their usual practice:

> *I don't really talk with Mum and Dad. This can cause difficulties. The parents can feel disempowered. If I do talk to parents about issues they can coach the children. If I do talk to one I make sure I talk to the other. When I present the child's views I try to give the parents a picture of how I see their child but my preference would be to do more of the normal role of the lawyer for child. It's not necessarily helpful for the mediator to be the only person who has parent information, but the budget doesn't allow for it.* (Interview)

Several lawyers for children felt that they were acting as a mediator under their usual brief and would like to be able to continue doing that. Two suggested that the lawyer for child be given an opportunity to seek a resolution before mediation. One commented:

> *As a lawyer for child (with a full brief) I get all the documents, read them all and spend an hour with each party. We work out interim arrangements. I'm virtually a mediator. When it works, it works brilliantly. We can bring closure. I would like that to continue.* (Interview)

Two believed that parties do not respect the lawyer for child's right to advise them about what is good for their children unless they have met the lawyer and have a sense of them. Others were more relaxed, and felt that the 'narrow brief' is appropriate for the model. In one person's experience:

> *The problem happens if the parties have had previous experience of a lawyer for child and don't appreciate that the brief for lawyer for child in mediation is different from the wider brief they may have experienced before. Counsel for parties also don't understand the different brief and this should be explained to them. If the parties are unrepresented I will see the parties – otherwise I make strenuous efforts to avoid interviewing the parties. Sometimes this is difficult as the party who brings the child to see me usually expects to have an opportunity to give me their views.* (Interview)

The mediation process

Lawyers for children were generally positive about their experiences of mediation. Two had each had experience with several different mediators and acknowledged that they had come to appreciate the mediators' skills. One gave an example:

> *It was a case of a family with an older and very young child. They agreed they would separate the children. Both parents knew where the older child was at. He didn't come although he was prepared to. The mediator took two hours and I was wanting them to get on with it. It seemed laid back and slow. Then they had a break and within half an hour the mediator pulled it all together. All the parties went away feeling they had been heard. Sometimes in Family Court cases you can miss the moment. If mediators are well prepared they can deal with things quickly and seize the moment. Resolving matters is a huge weight off people.* (Interview)

Others stressed the need for mediators to be clear about the difference between counselling and mediation:

> *This is not a therapy/counselling session. People need to understand that we are not there for them – we are there for the children. They need to be dragged back to that all the time.* (Interview)

Some lawyers for children were ambivalent about being expected to give legal advice where parties were not represented and the mediator was not a lawyer. Several felt that mediators without legal training did not fully understand the options available through the Family Court and needed better training.

Children's participation

Lawyers for children recognised the importance of their role at mediation in working alongside the mediator and advocating for and keeping the focus on the children.

They had mixed views about whether or not children should attend mediation, with some being firmly opposed in principle. While most agreed that the option to attend should be offered to older children, i.e. those aged 10 and over, some discussed the possibility with children as young as seven and one nine-year-old did attend a mediation. One had discussed the possibility of attending with three children aged from seven to nine.

> *I explained to them that they could be there. Two initially said they wanted to come, one because she wanted Mum and Dad to get back together. When I explained that that wouldn't happen they didn't want to go. The other one didn't want to come and decided not to when he realised it would involve taking time off school.* (Interview)

In another mediation two children aged 14 and 10 wanted to attend, but both changed their minds as the time drew near. One was anxious because she wanted to express views that she thought her mother would not agree with.

In a third case, a nine-year-old boy was very keen to come but the lawyer for child and the parents decided against it. The lawyer explained:

> *His big issue, and why he wanted to come, was a major beef about his bedtime when he was at his dad's house. If his major issue had been about care arrangements I would have pushed hard for him to be present.* (Interview)

In this case, the parents were not in favour of the child attending and after talking to him and promising to raise his issue in the mediation the lawyer for child and the parents decided the children would not attend. The lawyer for child added:

> *Mediations don't proceed in an orderly fashion – there is lots said that it is just not useful for children to hear. We haven't worked out how to involve them in the process without further embroiling them in the issues. Parents feel very uncomfortable about children coming to mediation. At one level children know the extent of the conflict, after all they live it, but parents don't see that the children have a role in the decision-making. It's actually about what parents want.* (Interview)

Involvement of counsel for parties

Most lawyers for children were relaxed about parties' lawyers being present at the mediation. They indicated that often their relationship with the party can help to move things along to resolution, and it is important that parties have access to legal advice either in person or by phone.

5.3 Lawyers for parties' experience of mediation

Eight lawyers who had been acting for a client who had taken part in a family mediation were interviewed over the course of the pilot.

Providing advice to client

Most of the lawyers were comfortable about attending mediation if that was what their client wanted or being available by phone. Lawyers were very aware of the potential costs for their client.

> *In mediation they got to agreement within five hours. I knew my client was concerned about costs and I'd hoped the mediation would be shorter, especially with earlier work that had occurred between the parties. I wasn't actively involved in the mediation, with the mediator directing questions to the parties. After three hours, my client suggested the lawyers leave the mediation as they weren't involved and it was costing the parties. The other party wanted the lawyers to stay, which is what we did. All the lawyers wrote the final agreement up.* (Interview)

One lawyer said she would decide whether or not to attend on a case by case basis. It would depend on:

- the balance of power between the parties
- who the counsel for child was
- her client's ability to state their case.

Lawyers agreed that if counsel for parties are available by phone they should be consulted once the agreement is reached but before it is signed off.

> *In theory I would be happy to be available by phone although this hasn't happened yet. I wonder if it would be hard to understand the reasoning if you weren't there. If people need a lawyer in the first place maybe they do need the protection of a lawyer in the mediation. Lawyers can give very good support to clients. Lawyers are used to being there and not participating – that is what they do in judge-led mediation.* (Interview)

Other comments

The interviewed counsel for parties were positive about family mediation as an option and some had recommended it to their clients. They liked having a longer time for clients to reach agreement on a range of issues and to have an opportunity to air their views. Clients who had taken part in mediations had given them favourable feedback about the experience. They also appreciated the speed with which a family mediation could be obtained and some could see no reason why an agreement reached in a family mediation would be any less likely to hold than one obtained in a judge-led mediation. As one commented:

> *Holding long term isn't necessarily the sign of success anyway – often people's lives are in turmoil and if an agreement can hold things for three months it allows things to settle while everybody's circumstances settle.* (Interview)

6 Participants' experience of mediation

6.1 Survey respondents

Each of the parties to a family mediation was sent a survey form when mediation was completed. Participation in the survey was entirely voluntary and those who did return the form could choose whether or not to be interviewed further about their experience. This section includes information from the survey forms and telephone interviews but because of the self-selected nature of the sample, the views expressed do not necessarily represent those of all participants.

As at 30 June 2006, 109 participants had returned their survey form and 26 interviews were completed. It was not possible to identify when or whether both parties to mediation returned their form.

Survey responses came from:

- 56 men and 52 women, with 1 not stated
- 52 fathers and 50 mothers; 7 people did not specify their relationship to the child/ren
- 92 NZ Europeans, 6 Mäori, 3 Mäori/NZE, 6 from other ethnicities, including Swiss, South African, American and Persian; with 2 ethnicities not stated.

Twenty mediations had been referred through North Shore, eight through Hamilton, 13 through Porirua and 67 through Christchurch. One person did not say where the mediation took place.

6.2 The mediation experience

Adequacy of information

All but one of those who responded had talked to the mediator prior to the mediation. Eighty-eight had received other information before the mediation, 18 had not and three did not answer.

Eighty-seven participants (80%) said they had all the information they needed before the mediation. They included 11 who had not received any extra information, beyond what the mediator told them. Seventeen would have liked more information. Their comments included:

> *I would have liked to have known how long the mediation would be so I could organise with work.* (Participant survey / interview)

> *I was not told beforehand how long it would take, what was going to be talked about, in what order.* (Participant survey / interview)

> *It would have been extremely helpful if I had been advised exactly who I was allowed to have present at the mediation.* (Participant survey / interview)

> *What was going to happen and what part of the proceedings we were going through was going to be discussed in mediation.* (Participant survey / interview)

Venue

Seven out of 109 participants were uncomfortable with where the mediation took place. Some of these raised their concerns early in the pilot and as a result of their feedback, one mediator changed the room where he held mediations. Others would have liked more 'break out' space:

> *Designated rooms for individual parties would have been good when the mediator and children's lawyer wished to speak privately.* (Participant survey / interview)

Other people at mediation

Thirteen of the 109 parties were uncomfortable with the number of people at the mediation. Three thought that the child/ren should have been present, one because she was very dissatisfied with the way the lawyer for child presented her child's views. Three would have liked other family members to be present and one felt that neither party's lawyer needed to be present:

> *Because the other party's lawyer attended I felt my lawyer should attend also. In reality neither lawyer was needed.* (Participant survey / interview)

In interviews, two people raised the issue of the need for a gender balance. In one case:

> *The mediator was a man, the lawyer for child was a man and my ex is a man against whom I have a protection order. I felt intimidated and outnumbered.* (Participant survey / interview)

Another was in the opposite situation and would have liked a male mediator. One woman became more comfortable as the mediation progressed:

> *With the actual mediation I was dubious at the start about being in a room just with my ex and the lawyer for child. He can be aggressive at times, a bit intimidating. But mediator was brilliant. She defused situations when he started getting stroppy without putting him down or offending him.* (Participant survey / interview)

Attendance

In all the mediations described in the 109 survey forms, both parties and the lawyer for child were present. Lawyers for both parties were present in 35 cases, just under a third of the

total. Only the survey respondent's own lawyer was present in 11 cases and only the other party's lawyer in 12 cases. The proportion of cases where a lawyer for one or both parties was present was very similar to that proportion reported in mediator case forms (53% compared with 55%).

A child or children were present in nine cases (8%), which is a slightly higher proportion than reported in the mediators' case reports (6%). The proportion of mediations covered in the participant survey forms where other family members and/or support people were present was somewhat lower than the proportion reported by mediators – 21% compared with 27%.

Table 19 Those present at mediation

Those present at mediation n=109	Number
Person sending survey	109
The other party	109
Child/children	9
Other family members	9
A support person for survey respondent	14
A support person for other party	12
Lawyer for child/children	109
Both parties' lawyer	35
Survey respondent's lawyer only	11
Other party's lawyer only	12
Other (psychiatric nurse, researcher/observer, other support person)	4

Source: Participant survey.

The interviews explored how decisions were made about who should be present. There appeared to be little discussion about whether young children would attend. The assumption by parents, lawyers for children and mediators was that they would not. One man described his experience:

> *The mediator decided who would attend. I asked for a support person but was told I wouldn't need this. No lawyers attended, other than lawyer for child. I had no say in who attended and there was no talk of the children attending.* (Participant survey / interview)

Another man had a different experience:

> *The mediator, my ex, her lawyer and our son's lawyer for child attended. There was no question of my son attending as he is too young. They gave me an option to bring support but I declined.* (Participant survey / interview)

Two women described their experiences:

> *The mediator rang me and came to see me to talk about it. We talked about the possibility of who might attend – I decided I didn't want a lawyer there and we could sort it out ourselves. My daughter is only three so there was no question of her being there.* (Participant survey / interview)

> *I met with the mediator pre-mediation – he was a lawyer. He tried to persuade me to bring my lawyer but I didn't want to. He told me that all my ex wanted was to sort out some issues – he didn't raise the issue of additional contact. Our child is only three so there was no question of her attending.* (Participant survey / interview)

Four parties with older children said that the mediator discussed whether or not they should be there. In three cases, the parents agreed they should not attend. In the other, where the child was 15, the mediator suggested that it might not be a good idea given the nature of the issues to be discussed and the child made the decision not to attend.

Another man thought his children needed to be present, at least for some of the time, but this was not discussed with him and did not happen. He said:

> *Let the children's views be heard more, but don't let them attend the whole mediation process.* (Participant survey / interview)

One woman also thought the children could have attended:

> *No one raised the possibility of the children attending. I didn't think they could so I didn't raise it with the mediator at the pre-mediation. He didn't raise it either. I told the children about the big meeting and both of them said they wanted to come – they're 10 and 13. They said they had told the lawyer for child that they wanted to come but he didn't follow up on it either so it didn't happen. I'm not sure whether it would have been good or bad although they are both articulate and well able to express their views.* (Participant survey / interview)

In one case where a child did attend, the father did not know this was going to happen:

> *I didn't know my daughter was going to be there until we arrived and she was there. She drove with her grandmother behind us to the mediation – gave me the fingers and all that. I thought that was a bit odd, then when we turned up she was there. She only talked for a little while – mostly to say how much she hated me, and then left. It was OK having her there.* (Participant survey / interview)

Three people had been in situations where more people arrived at the mediation than had been agreed and the mediator had to manage that, in one case by limiting the number for the whole period, and in two cases, by inviting one party's new partner in towards the end of the mediation. One woman said:

> *My partner was invited in when it was evident that his input was required. I would have preferred him to be there for the duration as a support person but the 'other party' would not permit this. The 'other party' was only interested in my partner's presence when he would bring money to the table.* (Participant survey / interview)

Presentation of views

Eighty-two (75%) out of 109 participants who responded to the survey felt they were able to say what they wanted at the mediation; 25 – 12 men and 13 women – did not. Two people did not answer.

Positive comments included:

> *The mediation was in a non-threatening environment, which was good because I was very nervous. If it had been in a courtroom I think I would have been unwilling to say very much at all.* (Participant survey / interview)

> *I personally think the mediation was a success in that the parties were there informally to discuss topics without a set agenda. Because it was informal there was a commonsense approach to the outcome as there was no need for grandstanding.* (Participant survey / interview)

> *I had all the chances I needed to have my say.* (Participant survey / interview)

One woman felt that her concern about the lack of payment of child support for 12 years should have been given more consideration:

> *My concerns were dismissed often by the mediator. I had woken that morning with a migraine and badly wanted to reschedule. Due to the involvement of lawyers and mediators, I felt I could not so I found the whole experience very difficult.* (Participant survey / interview)

One woman took some responsibility for not speaking up more:

> *My fear of my ex-partner meant I didn't speak up as much as I realise I should/could have.* (Participant survey / interview)

Children's views

Nine of the participant surveys indicated that children had attended the mediation. Five children spoke at the mediation; two of the nine who attended did not. Two respondents did not say whether the children spoke or not. One person commented on her child's participation in the mediation and the effect the outcome had on that child:

> *The children were made to feel they had more say than they actually did, so when the outcome was not what one of them in particular wanted she was angry and upset and felt what was the point in having a say when no one listened to her.* (Participant survey / interview)

One hundred and five people said that a lawyer spoke on behalf of the children at the mediation; two said that did not happen. Two did not answer. Around three-quarters (78) thought the children's views were quite well or very well presented. Just over a fifth (24)

thought that they were not well or were poorly presented. Several people did not comment because their children were too young to have views.

Table 20 How well children's views were put forward

	Number	Percentage
Very well	41	38%
Quite well	37	34%
Not well	13	12%
Poorly	11	10%
Not stated	7	6%
Total	109	100%

Source: Participant survey forms.

The 78 people who thought the children's views were presented very well or quite well appreciated the lawyer for child's efforts, balance and fairness. Their comments included:

> *The lawyer for children was very open to both parties and willing to find a solution so the children could see both parents.* (Participant survey / interview)

> *Children's lawyer was fantastic – I felt he really connected with my children and made them feel very comfortable as well.* (Participant survey / interview)

> *Children's views were very clearly expressed and acknowledged by ex- husband. It was great that I didn't have the responsibility to express their views and this was done by their solicitor. It also helped to keep the discussion child focused.* (Participant survey / interview)

> *I felt that lawyer for child was at pains to not seem to be siding with either party. He was able to steer us away from a proposed arrangement that we had agreed as a possible compromise but lawyer for child did not see as being in my son's best interest. He proposed another option that we accepted.* (Participant survey / interview)

> *Having taken the time to talk to my son prior to the mediation the lawyer represented his views in a clear and caring manner.* (Participant survey / interview)

Twenty-four people were dissatisfied with the way the children's views were presented. They were mostly concerned with the brevity of contact, the lack of time to establish a relationship and the fact that the lawyer saw the children when they were in one parent's care but not the other's. Their comments included:

> *The children's lawyer did not have all the facts on my daughter's relevant medical condition as he had only spoken to a 10 year old child and a 13 year old child.* (Participant survey / interview)

> *The children attend counselling through Parentline. I asked that their counsellor be contacted and she wasn't so not all the issues were addressed. I had asked the children's lawyer to contact her but he didn't.* (Participant survey / interview)

> *Lawyer for child did not meet with the children very often. I was concerned he was only doing enough for his $.* (Participant survey / interview)

> *He hardly said anything – based his comments on one meeting with the children in their home environment. He directed very specifically to me that the children were happy and a court would find it hard to remove them. I understand I am emotionally involved, however considering he had had not seen them in my/our home environment, I found this very biased.* (Participant survey / interview)

> *Did not think the lawyer for child was qualified to make recommendations on the children's behalf; line of questioning could be disputed; child psychologist or psychotherapist should be present when the lawyer is questioning the children.* (Participant survey / interview)

One person, who gave no rating, thought that it was 'difficult for the children's lawyer when the children are so young'.

Overall, survey respondents were positive about their experience. A number appreciated the opportunity for mediation rather than facing a court fixture. They particularly appreciated being in a less formal, more relaxed yet secure situation.

> *Found the mediator very relaxing and helpful, had everyone's interests at heart and came up with good ideas. Kept the mediation flowing along while sorting out the important things that needed to be said. Very grateful to have as an option before going to court. We have sorted out an agreement both my son and myself are very happy with.* (Participant survey / interview)

> *Mediator was wonderful; friendly supportive understanding. Any frustrations I still have lie with my son's father not the process. I was pleased there was someone there representing my son.* (Participant survey / interview)

> *I would highly recommend the process. Face-to-face meeting with the mediator and lawyers keeping the situation under control is likely to produce the best outcome, with parties being made to feel more accountable maybe.* (Participant survey / interview)

> *I thought the process was very helpful. Both the mediator and lawyer were kind and caring. The fun and caring comments the lawyer made about our son's visit to him shed a light on the process and warmed us to him. The mediator was very aware of the importance of each party listening to the other and enforced this well. Thank you for the opportunity to view my opinion and for setting up a programme that is very empathetic to everyone's needs.* (Participant survey / interview)

On the other hand, where the mediation was not thought to be well managed, participants were put off the process.

> *I would not do it again. There was not enough structure or conclusion and concerns of the children seemed to be less important that the father's need to be involved. The rule seems to be fathers involved at any cost to the children.* (Participant survey / interview)

> *I believe it is unfair that if one party's lawyer can be on legal aid and the other party has to pay for their own lawyer. I was unable to afford to have my lawyer present as it would have cost in excess of $1000 for the day of mediation.* (Participant survey / interview)

6.3 Participants' suggestions for improvement

Survey participants made a number of practical suggestions and comments.

The timing of mediation

A few wanted a speedier mediation:

> *The whole process is very slow – it took 4 months till mediation and children suffered as a result.* (Participant survey / interview)

> *Took about 8 weeks to have the mediation from the date it was requested – that's too long. It's also been 4 weeks since the meeting and I have not received the parenting agreement that was negotiated. Agreed further counselling to review the parenting arrangement has not been scheduled so far. Would like these things to happen promptly.* (Participant survey / interview)

Several people felt rushed:

> *In my case the main issues had largely been settled B4 mediation however the time allocated (3hrs) was still pretty tight – can the mediation be spread over a number of sessions?* (Participant survey / interview)

> *There were times when I felt I was not being heard and mediator seemed to be operating on the premise that we had to finalise there and then which made the agreement feel rushed.* (Participant survey / interview)

> *It was difficult to come to decisions, have discussions etc in a short time frame. At times it was very much pushed through. We felt pressured to make decisions and 'get something on paper'.* (Participant survey / interview)

The mediation process

Most participants were happy with the process, only a few suggested some improvements.

> *In first meeting without other party I was told the past was not going to be brought up. In mediation, the other party did bring this up. Questioned mediator, she said no, then OK – she needed to stick to what was said at first meeting. Not prepared for that as mediation was supposed to be about the children, not the past.* (Participant survey / interview)

> *Tea and coffee! I only had one glass of water and it took four hours!* (Participant survey / interview)

> *Both parties need to be listened to. The child's welfare needs to be looked at more closely. It's not a competition to see who wins.* (Participant survey / interview)

> *Parties to be informed about who exactly they can have at mediation.* (Participant survey / interview)

> *No inappropriate joking or off the subject conversations. I felt very uncomfortable with it. Maybe they used it as stress relief?* (Participant survey / interview)

> *Bullet point the concerns of each party. Bullet point the children's views and then go from there.* (Participant survey / interview)

A few of the participants who gave feedback about their mediation wrote and spoke of the difficulties of being in mediation with an abusive partner:

> *A woman with a protection order should not have to face her abuser and who has the power to veto her support person! Opportunities should exist for the mediator to ensure that the abuser and abusee are in different rooms and unable to see or hear each other. To summarise, the other party in my view considering that I had a protection order against him had too much power.* (Participant survey / interview)

> *There had been domestic violence, physical and psychological within the relationship, this was not taken into account.* (Participant survey / interview)

Reporting and follow-up

A number of people were uncertain about what to do if the agreements do not hold.

> *Very pleased but afterwards I think there should be some sort of follow-up after say 3 months, and another meeting (if agreed to by both parties as required) after 12 months. We have set this up ourselves for 12 months time. It may only be required once but it would help us if it was a requirement.* (Participant survey / interview)

> *I think as a whole it was good but I don't think the mediation carried the same weight as a judge mediation. It should be ensured all details are correct and both parties fully understand as in this case my ex-husband didn't. Also the documentation that followed has my occupation incorrect and also my daughter's name incorrectly spelt.* (Participant survey / interview)

> *The closing was rather abrupt and I felt that I did not clearly understand the 'where to from here'. There were a few things that could have been tied up more clearly.* (Participant survey / interview)

6.4 Responses from Mäori participants

Responses from the six Mäori and three Mäori/NZ European participants at mediation were virtually indistinguishable from those of other participants. As the three quotes below illustrate, they had a similar range of experiences and were no more or less likely to come to agreements. Two of the three responses below did refer to cultural matters. They were the only responses from Mäori participants to do so.

One woman described a very positive experience:

> *I was overwhelmed by the way mediation was conducted and the professionalism of the legal team, [the way they] conducted themselves, the techniques and suggestions that were made to both parties in the hope that positive outcomes would come out of this session. This has been a life changing experience for both parties as well as ultimately our children, who were the core reason to undertake such measures to work things out for the good of the children. Well done and thank you.* (Participant survey / interview)

Another woman was much less satisfied. In her survey form she ticked the box to indicate that, in her view, a cultural advisor should have been present at the mediation:

> *I am not happy with mediation at all. The other party had their say and I was not listened to at all. I was stopped most of the time when I was giving my concerns. The Family Court really needs to look more closely at the lawyers they appoint to the children. Not happy with his lawyer. I would never go to mediation again. I felt put down and walked out feeling I had just been through a racist attack.* (Participant survey / interview)

The third response was from a man who commented as follows in his survey form:

> *Having two people in disagreement sometimes needs the input of other family members to put things into perspective – lawyers are just that, lawyers.* (Participant survey / interview)

In an interview he added:

> *All the people were päkehä – they were very focused on moving ahead, business like – these are the issues, what do we do? I would have been much happier with a process that included some looking back and was more respectful of people's emotions and feelings. It didn't feel very inclusive. In retrospect, I would have liked a support person there – someone else from the family. It didn't feel 'warm' enough.* (Participant survey / interview)

7 Outcomes

7.1 Immediate outcomes

The evaluation spreadsheet showed that of the 257 completed mediations, agreement was reached on all matters being mediated in 152 (59%), and agreement was reached on some matters in 72 (28%). In only 13 mediations (5%) was no agreement reached. The outcome of mediation was not recorded in 20 cases (8%). (Table 21)

Table 21 Immediate outcomes of mediation

Outcomes of mediation	Number	Percentage
Agreement on all matters	152	59%
Agreement on some matters	72	28%
No agreement	13	5%
Not recorded	20	8%
Total	257	100%

Source: Evaluation spreadsheet.

The evaluation had no method for collecting data on the issues under mediation, or assessing what sorts of issues were more or less likely to be resolved at mediation.

7.2 Agreement, consent orders, and other outcomes

The practical outcomes of mediations are typically recorded in agreements between parties, some of which are turned into consent orders by the court. Agreement was reached on some or all matters in 224 mediations. Evaluation spreadsheet data indicates that consent orders were sought in 152 (68%) of those cases. Mediators reported that there were no obvious features that distinguished mediation agreements for which consent orders were sought from those for which no consent orders were sought. It simply depended on the parties' preference for the status of their agreement.

The intangible outcomes are less easily captured. Mediators, lawyers for children, lawyers for parties and participants themselves all recognised the potential benefits of meeting in a managed situation away from the court. They observed that mediations can provide a structure for clarifying issues and lead to improved communication between parties. In a well-managed mediation, parties are able to leave feeling that they have been heard and their concerns have been treated with respect. They become more willing and able to listen to the other party's views as a result, and may become more confident about managing their own affairs.

The time available for mediation, and the option to adjourn if need be, can enable parties to move from entrenched positions and make concessions with grace. Opportunities to have trial periods with a range of review options increase parties' willingness to try new arrangements and build a basis for trust.

In some instances, parties are able to meet with members of their ex-partner's family for the first time. In some cases this has been instrumental in making progress towards agreement.

A number of those interviewed believed that these kinds of changes are instrumental in keeping parties out of the court system and able to make arrangements by themselves.

Partial agreements

The original evaluation design did not include examination of the content of agreements reached at mediation. However, after the Ministry of Justice expressed interest in knowing more about the sorts of issues on which agreements were reached, and those on which agreement was more elusive, the evaluation team investigated the mediator reports on mediations in which only partial agreement had been achieved.

The most common reason for achieving only partial agreement was that the level of trust between the parties was so low that one or both required evidence that the other party was prepared to make agreements work, before they were prepared to make concessions on all disputed issues. This comment, in a mediator's report, is about a case in which this was the reason that full agreement had not been reached:

> *Mediation proceeded on basis that only topic for discussion was supervised access for Dad and how that would happen. Mother quite hostile and sceptical that the dad would keep his end of the agreement. I believe that mother will be slow to set up her end of the arrangement, but that if Dad can show he means what he says this time, the Mum will have to agree to more contact.* (Mediator case report)

Other reasons that parties were reluctant to make agreements on all issues were:

- concerns about the other party's use of drugs or alcohol
- concerns about the other party's violence
- concerns about the other party's mental health
- an inability to agree on relocation issues or other living arrangements
- when children had serious health issues.

These are some examples of mediators' comments when reporting on mediations where partial agreement was reached. In this first example the use of alcohol is the issue that stood in the way of full agreement:

> *The parties did not settle matters because they could not agree on one crunch issue. However, they did agree to record for the court all the matters about which they had reached conditional agreement and explain their views on the crunch issue (the drinking of alcohol).* (Mediator case report)

Where anger and domestic violence feature, as in the mediation described below, mothers in particular are often unwilling for children to have much contact with the violent party.

> *Mother alleges father has serious anger problems. Criminal charges against father in relation to mother are pending. Court recently suspended contact of father with child except for supervised contact following alleged violent incident. Lawyer for child says no final contact day-to-day care can be agreed upon without a section 59 hearing. Therefore only interim supervised contact could effectively be discussed at the mediation.* (Mediator case report)

With issues such as relocation or where the child will live there is less room for compromise and agreement can be hard to achieve, as in this example:

> *Some good agreements were reached informally in the area of parenting expectations, what was important for the child etc. However, the principal issues involving day-to-day care and application to relocate remained unresolved. Both parties wished for further time to consult lawyers and because of their respective positional stances felt that they would probably require a judge to make a decision.* (Mediator case report)

Parents are understandably particularly protective of children who are not fully healthy and this can influence their preparedness to reach agreement.

> *One of the children had very severe epilepsy. Mother didn't trust father to properly care for her. Father admitted to being more laid back. Resumption of contact to father agreed upon; overnight for one child but daytime for epileptic child. Father agreed to attend hospital appointments. Parties agreed to meet regularly to discuss children.* (Mediator case report)

Interim agreements and reviews

Only as the pilot developed did it become apparent that many mediations were ending with an intention to review agreements reached. The evaluation spreadsheet was not designed to capture information on how many mediations ended this way or what arrangements were made for review.

The data supplied to the evaluators by mediators (rather than the data kept by the court) shows that 50 (22%) of the 228 mediations that went ahead included provision for a review.

- 25 (50%) did not specify how the review was to take place
- 7 were to be reviewed by lawyers and/or lawyer for child
- 2 agreed a review process, the details were not specified but the process did not involve the court
- 3 mediations had reconvened and reached agreement
- 1 had reconvened and reached no agreement
- 4 were still to reconvene
- 5 achieved a successful resolution by parties without reconvening
- 1 was scheduled for review by the case manager in consultation with the lawyers
- 1 review had been scheduled but did not proceed

- 1 had other matters before the court and it was unclear whether the review would be held.

Mediations where no agreement was reached

Despite mediators' best efforts, some mediations were unsuccessful. In most cases, mediators believed this was because one party was unwilling to compromise or to put the children's needs ahead of their own. In a few cases, one party's lawyer intervened. The quotes below illustrate these situations.

After four hours in a mediation attended by both parties' lawyers as well as lawyer for child, and the mediator:

> *The applicant father decided to go to a hearing to defend against the mother's final Protection Order and both parties decided to ignore the child's needs.* (Mediator case report)

In another case, the mediator took the decision to end the mediation early:

> *I ended the mediation after two hours. Father was unrepresented though he had a lawyer. Father would not consider a proposal for equal sharing even though it is what he had applied to court for. Mother's lawyer was to put proposal to father – perhaps they might settle but I ran out of patience with father's petulance and punitive approach.* (Mediator case report)

A three-and-a-half hour mediation ended unsuccessfully after what the mediator perceived as unhelpful contributions from the lawyer for child and one of the party's lawyers:

> *…We made progress with the controlling parent (father) only to have this completely upended by father's lawyer. She had not attended the mediation but was to be available by phone. When an agreement was forming, father was encouraged to phone his lawyer and did so. He then announced his lawyer had reminded him of all his concerns and that he didn't have to agree to anything and he wasn't to be put under pressure and wasn't going to agree to anything. There was some discussion about reconvening once father gets more information about mother and her new life. Mother's lawyer had a good grasp of mediation and how to be in it and was the main supporter of reconvening. However I expect she will do better with a judge-led process as the father might have to be more flexible in that forum.* (Mediator case report)

One of the outcomes assessed in the separate quantitative study commissioned by the Ministry of Justice was disposal of applications within two weeks of the mediation taking place. In this analysis applications were considered disposed when they were recorded as having achieved a final outcome. The study compared pilot mediations with whatever type of mediation was being used prior to the pilot (see Appendix 1 for details). The results from three pilot courts (excluding Christchurch) showed that there was no significant difference between the pilot mediations in terms of disposing of applications within a two-week period of the mediation. The results from the Christchurch court showed a different pattern. In Christchurch there was a significant difference between the pilot mediations and the counsel-led mediations. Estimates showed that counsel-led mediations were approximately three-and-

a-half times more likely to result in the disposal of applications within a two-week period of the mediation.

7.3 Participants' views of outcomes

Satisfaction with outcomes

Two-thirds (72) of respondents to the participants' survey were satisfied or very satisfied with the outcome of the mediation. A third of respondents were not satisfied.

Table 22 Satisfaction that outcome looks after needs of children

	Number	Percentage
Very satisfied	35	32%
Satisfied	37	34%
Not satisfied	20	18%
Very dissatisfied	13	12%
Not stated	4	4%
Total	109	100%

Source: Participant survey forms.

Many comments indicated that participants felt the mediation had reached a realistic conclusion for all involved:

> *It was the best possible solution, even if it isn't wonderful for the other party or me.* (Participant survey)

> *Within the bounds of what was possible the result was good and far preferable to returning to court.* (Participant survey)

> *It's better than the current arrangement and not as draconian as the one proposed by my ex-wife.* (Participant survey)

> *The concerns for the safety and wellbeing of the children are still an issue for me but I have an agreement from my ex in front of four lawyers.* (Participant survey)

> *The children are so important and having a lawyer representing them was a great way for both parties to see the importance of working things out for the benefit of the children.* (Participant survey)

Dissatisfied respondents often wanted other issues dealt with at the mediation:

> *Mediation serves as a focus on a result, but no one person or party is held responsible or accountable for the problems thus far. It does not (in this case) improve communication or judge one person as inhibitive to allowing fair access to children.* (Participant survey)

> *It only looks after the issues that the parents are disagreeing over.* (Participant survey)
> *Not enough emphasis for their father to be more involved – wishy washy.* (Participant survey)

Others simply did not like the outcome:

> *Children given too many choices; grandparents' access times ignored especially grandmother.* (Participant survey)
>
> *Me, the kids' father, I lost everything.* (Participant survey)
>
> *No one seems interested as to what is in the best interests of the children – all everyone wants is to get it resolved ASAP.* (Participant survey)

One man who was dissatisfied with the outcome expanded on his views in an interview:

> *I proposed 50/50 access but the lawyer for child said there was no way he'd allow that and the mediator went along with that. The final agreement was that I had access 6 to 7 days across a fortnight, which is unworkable. My ex left the room at that stage and we had a discussion between me, the lawyer for child and the mediator. I think it was already set up. I was absolutely shattered by the whole process. I was heartbroken at being accused of being a terrible father. I shouldn't have come away feeling devastated; I should have had a fair hearing. That didn't happen.* (Participant survey)

7.4 Sustainability of agreements

Two methods were used to explore sustainability of agreements. This section also records participants' comments on changes they have experienced since mediation was completed.

At the end of June 2006 the evaluation team followed up files of cases that had gone to mediation in each court to see what evidence could be found for whether agreements reached at mediation had held. Initially, the evaluation was going to track five files a month to see what had happened at the end of the evaluation period. With so few mediations, the method in three pilot courts was changed to reviewing all files of mediations completed at the end of the evaluation period. This method can only give an indication of sustainability. Despite this, there is a fairly consistent picture across the four courts, which is that in over 70% of cases there was no evidence that the court had to be further involved after the mediation, other than to issue a consent order.

In North Shore court, of 29 completed mediations with reports:

- 21 files showed no evidence of further activity after the mediation agreement or consent orders had been sought, although 6 were scheduled for review
- 3 files had been referred for a judicial conference
- 1 file was the subject of a Hague Convention application
- 4 files could not be located during the site visit or had incorrect file numbers entered on the spreadsheet.

In Hamilton court, of 21 completed mediations with reports:

- 20 files showed no evidence of further activity after the mediation agreement or consent orders had been sought, although 4 were scheduled for review
- in one case a lawyer for child has been appointed as parties are expressing dissatisfaction with the agreements reached at mediation.

In Porirua court, of 30 completed mediations with reports:

- 24 files showed no evidence of further activity after the mediation agreement or consent orders had been sought, although some were scheduled for review
- 2 files were in a judge's list to review agreements reached at mediation
- 1 had not reached agreement at mediation and was proceeding through the court process
- the other 3 were complex files – two were waiting for psychological reports, the other had CYFS involved.

In Christchurch, with many more mediations completed, 25 cases (not restricted to completed mediations) were randomly selected for review up until the end of February 2006. This means that the mediation agreements which have held have done so for a minimum of four months and a maximum of 15 months. Of the files selected for review:

- 19 files showed no evidence of further activity after the mediation agreement or consent orders had been sought
- 2 files had had one mediation session and were due to reconvene for a second session
- 2 files had completed pre-mediation and were not progressing to family mediation but were instead scheduled for judicial mediation
- 2 files had had further applications – one to discharge an order preventing removal, the other for a variation of the consent order confirming agreements reached at mediation.

The separate quantitative study commissioned by the Ministry of Justice also looked at the sustainability of agreements. This study compared pilot mediations with judge-led or counsel-led mediation that was being used prior to the pilot (see Appendix 1 for details). The study compared cases where an application before the court is disposed of within two weeks of the mediation and no subsequent applications are made under the Guardianship Act for a further four month period. For both pilot and pre-pilot mediations that resulted in a positive outcome there were hardly any subsequent applications filed within a four month period. There was therefore no quantitative evidence to suggest any difference in the sustainability of outcomes over a four month period.

The information extracted from files and the separate quantitative study both indicate that there are few applications following successful pilot mediations. Further analysis at a later date with a longer follow-up period could usefully be undertaken to provide more robust information on the sustainability of pilot mediation agreements.

Participants' views of changes since mediation

Twenty-three of the 109 survey respondents (21%) reported that something had happened since the mediation to change the outcome or alter their views.

Five said that their situation had improved. For example:

> *I decided to appoint my ex-partner as legal guardian. Our parenting relationship continues to improve.* (Participant survey)

> *Ex partner came up with better offer when she realised that both myself and my son wanted the same thing and that was spelt out to her by our son's lawyer.* (Participant survey)

Sixteen people (14%) said that the situation had deteriorated or that the agreement was not upheld.

> *Have not changed their views or taken on any information from the mediator or children's lawyer.* (Participant survey)

> *Two days after the agreement was reached I received a paper dated the day of the mediation advising the other party had applied to Court to change the arrangement.* (Participant survey)

> *My ex-husband has not adhered to arrangement made in mediation, and has harassed me and keeps trying to change what was agreed to.* (Participant survey)

> *My views/feelings are stronger. I continue to collate evidence that he is manipulating the truth. Does not consult, does not communicate, does not support communication. He still does what he wants.* (Participant survey)

> *Ex-partner still believes she is doing me a favour allowing me to see the children. Communication between us has deteriorated more (if that was possible).* (Participant survey)

> *Ex wife said she totally disagrees with everything agreed at mediation.* (Participant survey)

> *It is just as I expected it to be – mediation has not been honoured by other party, who has proceeded to undermine agreements reached. Self-appointed custodial parent knows she holds the whip hand and uses her position for her own emotional needs – mine are not considered.* (Participant survey)

Two made neutral comments:

> *Phone contact for children was not clearly stated.* (Participant survey)

> *During mediation a 3-week roster was agreed upon. However when parenting order was finalised it turns out it's a 4-week roster; something I clearly overlooked.* (Participant survey)

8 Discussion

8.1 Overview

The family mediation pilot took much longer to become established in pilot courts than had been anticipated as systems and processes to ensure a flow of referrals through to mediators were tested and adapted in each court. Christchurch, with a large Family Court and experience of counsel-led mediation prior to the pilot, processed far more referrals to mediation than any of the other three pilot courts. For that reason, the experience of mediation in Christchurch will be over-represented in any aggregated statistics in this report.

In all, 540 Family Court cases were offered family mediation during the pilot of which 380 (70%) were subsequently referred to a mediator. Reasons that cases were not referred included applications being withdrawn or otherwise resolved, one or both parties not giving consent to referral, or information coming to light that led to a reassessment of the appropriateness of referral to mediation. Of those offered mediation, 321 cases (59% of 540) had completed, and a further 33 (6%) were still involved in pre-mediation at the end of the pilot. Of the cases that entered pre-mediation, 284 (53% of 540 offered mediation) proceeded to mediation, and of these, 257 (48% of 540) mediations had been completed by the end of June 2006.

The *Guidelines for Mediators* indicated that mediation should take place within five weeks of referral, and a report should be submitted to the court within six weeks; 156 mediations (61% of 257) were convened within five weeks, and another 39 (15%) within six weeks.

Of the 257 completed mediations, agreement was reached on all matters in 152 (59%) mediations, and on some matters in another 70 (27%). No agreement was reached in 5% of completed mediations.

Mediators completed case reports on 228 completed mediations. Children attended 13 (6% of 228) of these mediations for at least some of the time. This data indicates that the most common length of a mediation was 3–4 hours, and that 202 (89% of 228) were completed in one session while 22 (10% of 228) were adjourned for review at a future date.

Completed survey forms were received from 109 applicants and respondents who were parties to mediation, and these were supplemented by 32 interviews. Most were positive about the experience of mediation: 87 (80% of 109) said they were well informed about the mediation beforehand; 82 (75%) felt they were able to say what they wanted to; and 78 (72%) thought the children's views were well or very well presented.

The data suggests that there were issues about how cases were referred to mediation but that once families reached mediation the experience for most was very positive. All participants in this evaluation saw family mediation as a valuable addition to the options available to the Family Court.

8.2 Project establishment

The evaluation identified three main issues related to the development phase of the pilot:

- family mediation as an inclusive model
- family mediation within the court system
- management of the pilot.

An inclusive model

Family mediation was intended to be a service that would help families involved in care, contact and guardianship proceedings in the pilot sites to resolve their care and contact disputes faster and more amicably. The evaluation was asked to look specifically at the appropriateness of the resources and information for Pacific and Mäori clients but as our Mäori and Pacific team members have pointed out, cultural appropriateness must be evaluated using a much wider lens.

We understand that Mäori and Pacific advisors had no input into the overall design of the project, nor were they consulted in the development of the information materials, consent forms and other documentation. Panels recruited only one Pacific mediator, who subsequently had to withdraw, leaving no Mäori or Pacific mediators available to work with Mäori and Pacific clients. This could reflect a lack of appropriately qualified and experienced Mäori and Pacific mediators, but arguably it also suggests that the project has adopted a model of mediation that sits more comfortably with NZ Europeans than with people of other ethnicities. This is an area which could benefit from consideration before the service is rolled out more widely. None of the courts used Mäori or Pacific staff to approach Mäori and Pacific clients who might be eligible for and interested in family mediation, nor were any cultural advisors used at any stage of the process. It is not clear what would trigger the inclusion of a cultural advisor in the family mediation process or who should make that decision.

The pilot did provide a budget for interpreters but it appears that court staff were not aware of it. Court staff's perceptions of the likely cost was certainly a barrier to their use. So were the practicalities of arranging for an interpreter to be present at all stages, including pre-mediation and mediation. More discussion between Family Court staff, mediators and lawyers for the child may be needed to identify situations where the services of an interpreter would be helpful and how that might occur within budget constraints.

The material prepared for participants was not inclusive. The pamphlet is not available in a range of languages and the consent form is only suitable for someone with a high level of education and good language skills.

The family mediation model provides for children to attend and participate in mediation, but that only happened to a very limited extent. The evaluators found no real commitment on anyone's part to having children involved. We saw some preparedness to do so, but not active commitment or a real belief that attending was in the best interests of the child. It seems that the mediation model envisaged by those who designed the pilot was different from that held by mediators and lawyers for children involved in the pilot. Prior to its implementation there was no shared discussion about children's presence at mediation among mediators, lawyers for children, and Family Court staff.

The number of children attending mediations was far fewer than had been anticipated when the pilot was established. It was not clear who should decide whether or not children would attend mediation. As part of their brief, the lawyer for child is required to discuss with the child whether or not he or she wishes to attend the mediation, which happened in some cases and not in others. The lawyer for child and the mediator also discuss how the child's needs and views can best be presented, and in cases where both the mediator and the lawyer for child had a preference for children not to attend the issue went no further. At the same time, the mediator has discussions with the parties at pre-mediation and as part of that process, discusses who should be at the mediation. It appeared from interviews and participant surveys that children sometimes made the decision about attending by themselves after discussion with the lawyer for child. Sometimes parents appeared to make the decision either before they attended pre-mediation or after discussion with the mediator. In some cases the decision was made by the parents and lawyer for child. It is unclear how much autonomy children actually had in making the decision or how creative lawyers for children were in finding ways for children to express their views.

Family mediation and the court system

A key factor influencing the way in which family mediation was implemented was the tension between a desire to have it as a community-based process similar to counselling and the fact that it was still very much a court-based process. Parties could only be offered family mediation once they had made an application to the court and the court appointed and paid for a lawyer for child. Throughout the pilot period, opinion remained divided over whether family mediation should be available to all families involved in disputes over the care of children, regardless of whether they had made application to the court or attended counselling. Many parties also sought to have agreements turned into consent orders once mediation was completed. There was debate about whether consent orders were necessary or even appropriate given that a signed written agreement has some legal standing as a contract. The lack of clarity about whether this is a community or a court process also led to uncertainty about how reviews could or should be carried out, that is, whether reviews should be conducted under the aegis of the court or outside it.

Management of the pilot

The timing of the pilot was an unfortunate coincidence with the introduction of the Care of Children Act 2004, a major piece of legislation affecting all courts, family lawyers and parties around the country. The family mediation pilot had been planned to begin earlier than it did which would have alleviated some of the problems but perhaps not all. The material was not available in time and court staff felt under-prepared. Perhaps most importantly, there was no

time or provision for discussion between mediators, court staff and lawyers for children to enable them to share their understanding of the process.

This became more of an issue given the extent of devolution of the pilot to the four pilot courts. The pilot was designed, and supporting material prepared at, the national level, but with numerous changes of staff the project had no national 'champion'. As the pilot got underway, court staff did not really appreciate the extent to which they would be required to work out processes and make decisions unilaterally.

Another impact of the devolved process was the absence of clear lines of communication between national office and the pilot sites and between the pilot sites themselves. It took some time and an initiative from one of the pilot sites to establish arrangements for regular contact to discuss issues and resolve inconsistencies. The confusion was particularly evident towards the end of the pilot, when some FCCs' were unclear whether they were able to divulge information they had received from national office about what was likely to happen to mediators and lawyers for the child.

8.3 Referral and delivery issues

Possibly the single biggest issue contributing to the number of completed mediations being far fewer than anticipated was the lack of clarity about who was eligible for referral.

It was not clear whether offering family mediation should be a default position or whether the FCC should make a decision in every case. Some FCCs did not feel familiar enough with mediation initially to do that, although their confidence about who to refer grew as the pilot progressed.

A number of issues relating to delivery will be obviated if it is decided to make family mediation part of the court process and include it in CMS. For example, if the legislation were amended so that consent was no longer required would overcome a significant hurdle.

The evaluation identified some uncertainty about which cases should be referred to mediation, particularly where there had been domestic violence. In these cases, FCCs were required to assess whether mediation was appropriate. Feedback from participants revealed a number of cases where the female applicant or respondent felt uncomfortable about having to be in such close proximity with her former partner, and it would be useful to have more discussion with Family Court staff and mediators to help them assess the appropriateness of mediation for these cases.

In a few instances, cases with CYFS involvement were referred to mediation. This was inappropriate as in such cases parties are unable to resolve matters without CYFS input or agreement. Cases were usually referred because the FCC did not know that CYFS was involved. It is unclear how this situation could be addressed other than through information sharing among government departments.

Counsel for parties have attended mediations more often than was anticipated. If family mediation is confirmed as part of the court process this is likely to increase, and should family

mediation become a community-based service parties may still wish to involve their counsel. Either way, there are implications for legal aid funding.

A number of mediations ended with interim arrangements and proposals for review, often with no clear strategies detailed in reports as to how the reviews would happen. Participants themselves were often unclear about what steps they should take when the review point came. Mechanisms for review will need to be clarified, and the form they will take is likely to depend on whether family mediation becomes a court or community-based process.

At mediation, parties often agree on things that are never going to form part of a consent order. These typically include how they will communicate with each other and their child/ren, how they will manage children's behaviour and a willingness to be flexible about arrangements. Mediators believe it is important for parties that these are captured in a written form, and attention should be given to finding a way to incorporate these into a written agreement alongside matters that will be subject to a consent order.

8.4 Issues for roll out

If family mediation is to be offered more widely, a number of steps will need to be taken to ensure that the service is efficient and effective. The Ministry of Justice will need to:

- work with mediation organisations to develop and accredit a pool of mediators to work in the service, including clarifying provisions for supervision and peer support
- explore the possibility of a regional service, rather than expecting to offer the service from each court
- develop a strategy to publicise and promote family mediation to the legal profession and the public
- ensure that all judges are familiar with the mediation service and the differences between family mediation and judge-led mediation
- clarify who should be referred to family mediation
- simplify the consent procedures
- talk with lawyers for children about the narrower brief for family mediation
- widely debate the involvement of children in mediation
- organise cultural input into the design, promotion and delivery of family mediation
- prepare new material and revise existing material in order that it is inclusive, accessible and informative
- establish whether this is a community-based or a court process. If it is to be a community-based process it could be open to a wider pool of people and cover a wider range of disputes. If it is to sit within the court the management of reviews will need clarification
- review the fee structure for mediators to reflect the actual time involved.

A number of mediators expressed concern that more work was not being done at the national level to develop the pool of mediators, address legislative issues and promote awareness of mediation in anticipation of a wider roll out.

8.5 Conclusion

The family mediation pilot had to deal with a range of practical problems, which is typical in the development and implementation of any new process. For most people involved, particularly the parties who have benefited from the opportunity to use the service, family mediation has been very successful. Parties have appreciated the opportunity to address their differences in a congenial setting outside the court with professional support. The great majority came to agreement on all or some of their matters under dispute and in the process often agreed to improve their communication and level of cooperation in relation to the children.

All those who contributed to the evaluation wanted family mediation to continue as an avenue for families to resolve their differences. They saw it as an empowering and cost effective way of managing family matters, while freeing up court time for cases that could not be resolved without judicial intervention. It is of note that mediators and members of the legal fraternity from every site made separate submissions to the ministry supporting family mediation and urging that it continue.

Appendix A: Comparing pilot mediations with mediations prior to the pilot

By Roger Macky

This appendix sets out a quantitative analysis of the Ministry of Justice CMS database. The aim of the analysis was to investigate outcomes from the pilot mediations and compare these to outcomes from other mediations conducted prior to the pilot.

In three of the pilot courts, namely Porirua, North Shore and Hamilton, judge-led mediations were mainly used prior to the pilot. However, in the Christchurch court, a system of counsel-led mediations was being used.

Since the pilot mediations were compared to whatever type of mediation was being used prior to the pilot, in three of the courts the comparison is with the judge-led mediations, while in Christchurch court the comparison is with the counsel-led mediations.

In order to make comparisons between pilot and non-pilot mediations, it was necessary to identify a set of non-pilot mediations to which the pilot mediations could be compared. For each of the three courts that were practising judge-led mediations prior to the pilot, pilot mediations were randomly matched up with judge-led mediations on a one-to-one basis. This matching was done within each court so that the two cases, of which the pilot mediation and the judge-led mediation were a part, had similar numbers of applications to the Court.

In the Christchurch court, where counsel-led mediations were used prior to the pilot, there were insufficient numbers of counsel-led mediations to be able to match up the two groups in the way described above. Therefore, the group of pilot mediations was compared to the group of counsel-led mediations without the use of one-to-one matching.

The outcome measure

The comparison between pilot and non-pilot mediations was done on the basis of whether outcomes were achieved. The outcomes used were as follows:

Outcome 1: An application before the Court is disposed[5] of within two weeks of the mediation taking place.

Outcome 2: An application before the Court is disposed of within two weeks of the mediation taking place, and no subsequent applications are made under the Guardianship Act for a further four month period.

Both of these outcomes could be measured using the data on the CMS database.

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[5] Applications are considered to be either 'active' or 'disposed'. An application is 'disposed' when it has been marked as having achieved a final outcome. Final outcomes include outcomes such as granted, granted by consent, withdrawn, dismissed and struck out. Where there is no outcome associated with the application or where the outcome is an interim outcome (e.g. granted interim order) the application status is 'active'.

Data on the pilot mediations

As discussed in the body of the report, information on the pilot mediations was collected using a number of Excel spreadsheets filled in by court staff. The primary information necessary for conducting the comparison study was the Family Court file number and the date the mediation took place. If either of these fields were missing or unusable, the record could not be used as part of the comparison study. The file number was used to match up the appropriate record within the CMS database. The date of mediation was needed to calculate whether an outcome had taken place.

At the time of conducting this analysis there was data available on 279 cases that were marked as having proceeded to mediation. Of these, 243 had sufficient information available to be used in the analysis. The following table shows how these mediations were distributed between the four Courts.

Table A1: Number of usable pilot mediations

Court	Number of usable pilot mediations
Christchurch	165
North Shore	29
Porirua	31
Hamilton	18
Total	243

Subsequent to this analysis, data was provided by the courts on additional pilot mediations. These additional mediations and the records that could not be used because of missing information means that the 243 records referred to here will not tally with the number of mediations discussed in the body of the report.

Results

Logistic regression methods were used to analyse the data in the comparison study. Data from the three courts where judge-led mediations had preceded the pilot were analysed in one model, and data from the Christchurch court where counsel-led mediations preceded the pilot were analysed in another model.

Comparison with judge-led mediations

The results from the set of three courts (excluding Christchurch) showed that there was no significant difference in Outcome 1 between the pilot mediations and the judge-led mediations. This means that there was no significant difference between the two mediation methods in terms of disposing of applications within a two-week period of the mediation.

Comparison with counsel-led mediations

The results from the Christchurch court showed a different pattern. In Christchurch there was a significant difference between the pilot mediations and the counsel-led mediations.

Estimates from the logistic regression model showed that counsel-led mediations were approximately three-and-a-half times more likely to result in the disposal of applications within a two-week period of the mediation. The relevant parameter in the logistic model was highly significant (i.e. significant at the 1% level).

Longevity of outcomes

Out of all the mediations examined, from all four courts, there were only two where applications were disposed of within two weeks of the mediation and where subsequent applications were filed within a four month period[6]. This meant that there was no significant quantitative evidence to suggest any difference in the results given above when considering the longevity of outcomes over a four month period[7].

Waiting times

For the comparison study, mediations were excluded where there was no information about when the mediation took place. Also, the nature of the data provided by the pilot courts is not explicit about whether a mediation is still pending or whether it has been cancelled. Consequently, it is not feasible to do any reliable comparative analysis on the waiting times of pilot mediations compared to non-pilot mediations. Nevertheless, the following table provides some indicative time frames for the non-pilot mediations that were used in this study. In the case of judge-led mediations, it is the time between the direction[8] and the mediation, and in the case of counsel-led mediations, it is the time between the commitment being made to appoint counsel and the mediation taking place.

Table A2: Median waiting times for comparison mediations

Court	Median time (days)
Christchurch	29
North Shore	33
Porirua	26
Hamilton	28

Summary

In summary, there appears to be no significant difference between pilot mediations and judge-led mediations in terms of disposal of applications.

There does appear to be a significant difference between pilot mediations and the counsel-led mediations that were being conducted in Christchurch prior to the pilot. In Christchurch, counsel-led mediations were four times as likely to result in the disposal of applications. For all four courts there was no significant quantitative evidence to suggest any difference in the above results when considering the longevity of outcomes over a four month period.

6 One of these mediations was a pilot mediation; the other was a judge-led mediation.

7 There was also no quantitative evidence to suggest a difference in the results when considering longevity over a shorter period (i.e. two and three months).

8 or similar date extracted from the CMS system.