Seen and not Heard

Children in the New Zealand Family Court

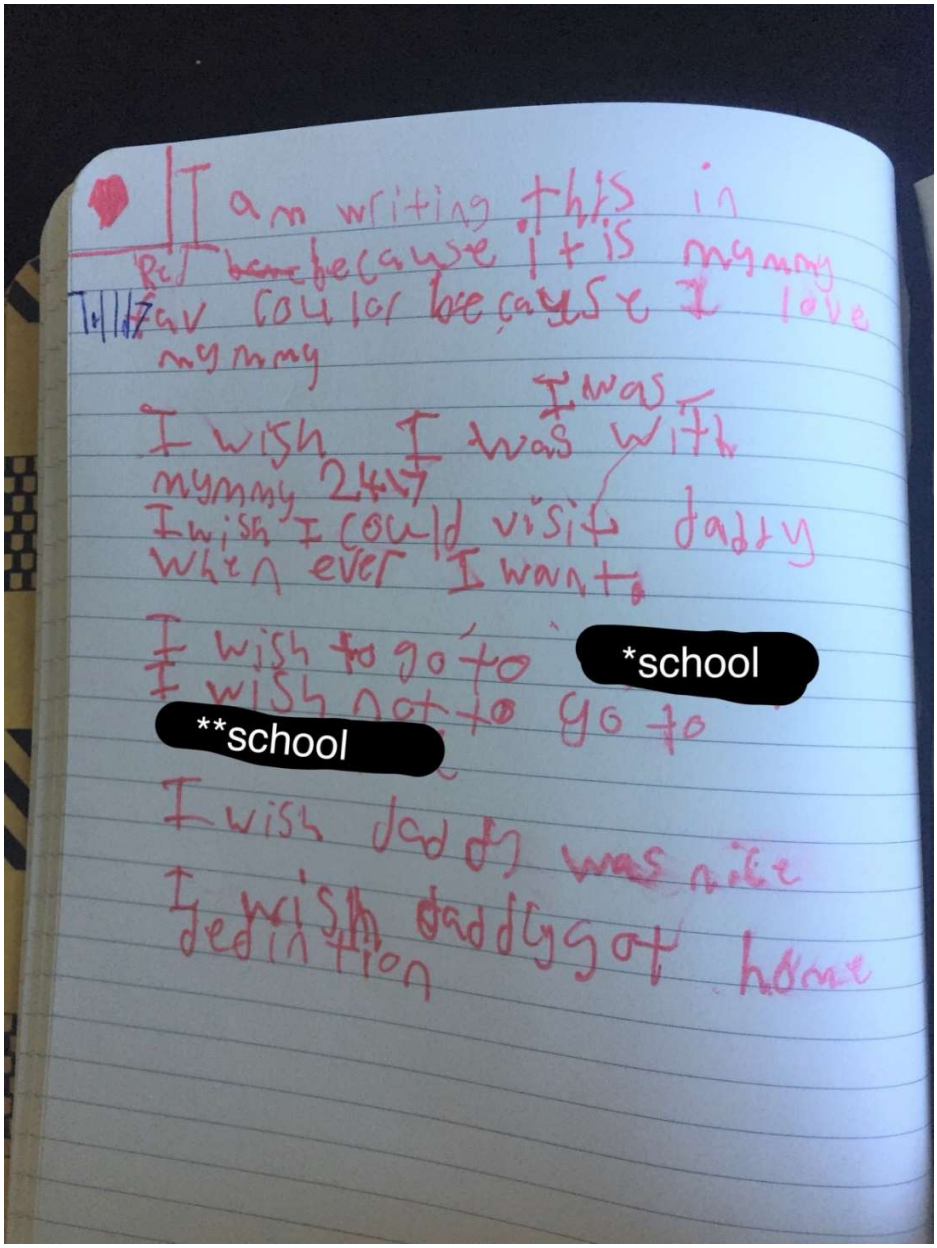
Part Two - Lawyer for Child?

The Backbone Collective

Published May 2018

Written by Ruth Herbert and Deborah Mackenzie

Infographics created by Ciara Byrne using Piktochart



Letter from a child involved in Family Court proceedings shared with Backbone

Dedication

Backbone would like to dedicate this report to all the children who have bravely told their stories of violence and abuse to Lawyers for Child over the years. Many of you were not listened to and the Family Court has forced you into contact with the person who abused you. We hope that this report shines the light on how the people who are given the job of representing you are failing you and helps to make sure there is change to this system soon. Your voices are precious, you matter, and you have a right to be heard and to be safe. Kia Kaha.

Violence against women and children is everybody's issue - it goes against women and children's right to be safe and it impacts heavily on individuals, society and the economy. Therefore, when violence against women and children happens, New Zealand needs a response system that has the greatest and most positive impact on as many cases as possible to reduce the immediate and long-term effects of the violence and abuse.

In July 2014 we independently published a comprehensive report entitled 'The Way Forward: An Integrated System for Intimate Partner Violence and Child Abuse and Neglect in New Zealand.[1] The purpose of that report was to share our ideas for a new way of working, assisting everyone to 'come to the table' with a shared understanding of why a change in approach is needed in New Zealand. We proposed the establishment of a new evidence-based model to more effectively address the epidemic of violence against women and children and provided a comprehensive business case to support that proposal.

The Way Forward report is Backbone's founding document and material in this report should be read in the context of that earlier work.

Any system is only as strong as its weakest point – if one part of the system fails then the whole system fails. Therefore, we need multiple quality control mechanisms in place across all points of the system to ensure everything possible is being done to achieve the overall objective of keeping the victims/survivors safe and supporting them to rebuild their lives and of holding abusers to account.

Backbone believes women and children who have experienced violence and abuse are best placed to tell us where the system is and isn't working. New Zealand needs a safe and independent conduit through which their voices can be heard - where their views can be collected and analysed, and then used to identify where impactful and constructive improvements need to be made to improve the system response.

If New Zealand had a continuous improvement mechanism operating for the entire system that responds to violence and abuse - if this was maintained in a consistent and sustained way – if continual improvements were made as soon as problems were identified – then over time the incidence of violence and abuse of women and children, the social consequences, the economic costs and the intergenerational transmission would be reduced.

The Backbone Collective was set up early in 2017 to enable women and their children to safely tell those in authority where the current system is and isn't working and how they need the system to respond in order for them to be safe and rebuild their lives.

Ruth Herbert and Deborah Mackenzie
Co-founders
The Backbone Collective

[1] http://theimpactcollective.co.nz/thewayforward_210714.pdf

Contents

Executive summary

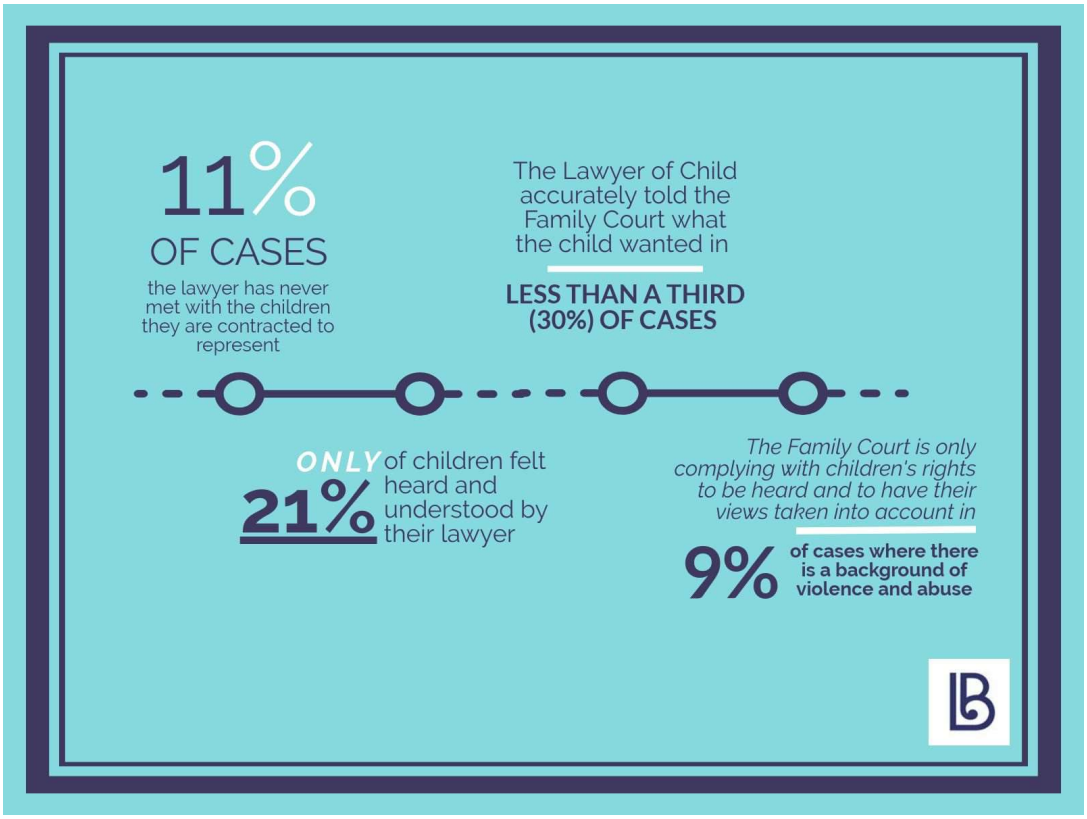
Children who have experienced violence and abuse need safe and competent representation in the Family Court. New Zealand's domestic legislation and the international conventions which we are signatory to, insist that the views of children must be both heard and taken into account when decisions are being made about them. There has been provision for Lawyer for Child in New Zealand's courts for decades but strong criticism of how this role has been enacted for over 35 years. New Zealand's Law Commission reported on the criticism of the role 15 years ago and yet it appears no one has stepped in to take a closer look and make much needed changes.

Backbone has uncovered a raft of problems with current Lawyer for Child practice and problems with the model itself, and these issues are not new. The Lawyer for Child service is costing the New Zealand taxpayer ($32 mill pa) and yet there appears to be little or no accountability for how effectively this money is spent, whether it is being delivered in accordance with the legislation and United Nations Convention on the Rights of the Child (UNCROC) and what the Government of the day has contracted these lawyers to provide. We ask when will someone take responsibility for the failures and take action? Children are suffering.

In this second report in Backbone's 'Seen and Not Heard' series we place Lawyer for Child under the microscope and investigate how this important component of the overall system is operating. After surveying hundreds of women who have children and are involved in New Zealand Family Court proceedings, we have gathered an enormous amount of information about women and children's experiences of Lawyer for Child from all over New Zealand. We have collected, analysed and inquired in our effort to get to fully understand the Lawyer for Child role.

Our investigation has highlighted that New Zealand prides itself on being signatory to the United Nations Convention on the Rights of the Child (UNCROC) and on its progressive view of children in the Care of Children Act legislation. But New Zealand definitely cannot pride itself on the way those two key platforms have been operationalised by the Lawyer for Child service of the New Zealand Family Court.

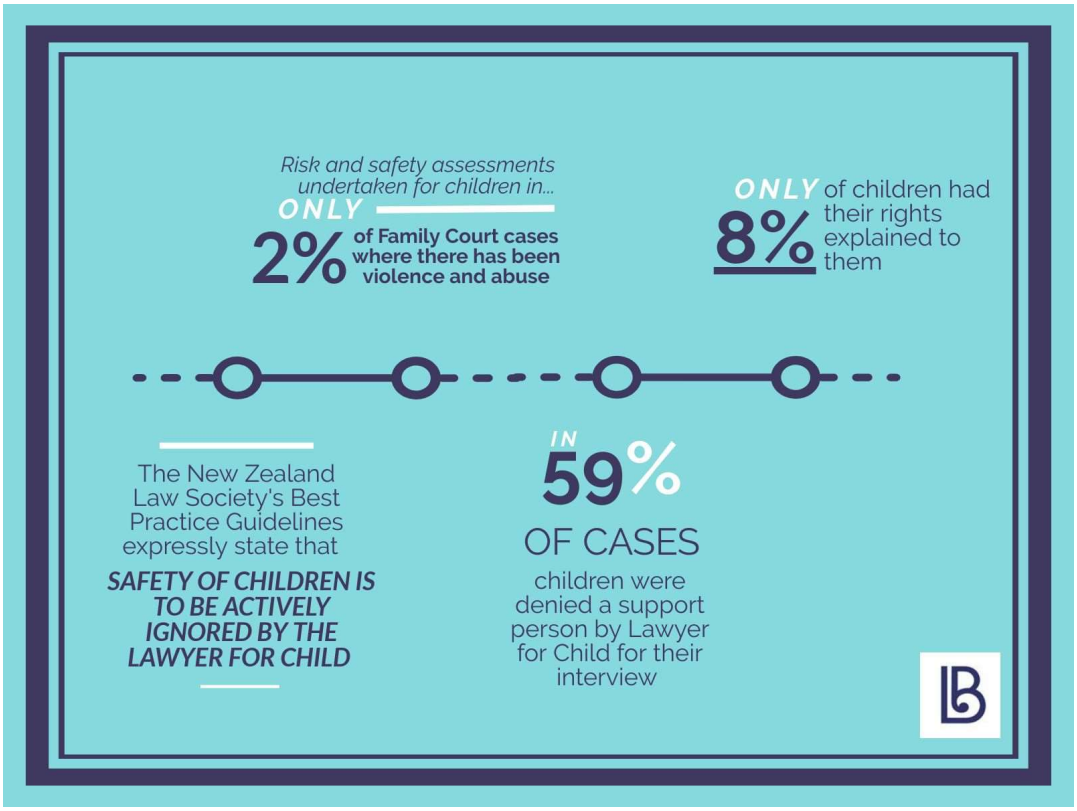
Both UNCROC and the New Zealand legislation clearly require that all children who are party to Family Court proceedings have a right to be heard – to express their views, and they **must** be given reasonable opportunities to do this on any matters that affect them. The New Zealand legislation and UNCROC are also both clear that merely gathering children's views is not sufficient – their views must be presented to the court and must be taken into account by the court.



UNCROC and the New Zealand legislation also both obligate the Family Court and Lawyer for Child to protect children from all forms of violence. This is particularly critical for those children who have already suffered considerable trauma as a consequence of the violence and abuse they have experienced in their home life.

We were shocked to find that the New Zealand Law Society's Best Practice Guidelines for Lawyer for Child expressly state that safety of children is to be actively ignored by the Lawyer for Child. We cannot imagine why the authority responsible for accrediting and regulating the performance of lawyers would take such a stance, but it may help to explain why so many children and their mothers are reporting more harm than good from having a Lawyer for Child. We also found that individual Lawyer for Child's practice is in many cases resulting in them not responding to children's safety concerns, minimising their experiences of violence and abuse, blaming mothers for the violence and abuse, accusing mothers of parental alienation and recommending unsafe care and contact for children with abusive fathers.

The child's right to have their welfare and best interests taken as the primary concern is a further area where the Lawyer for Child service is failing to meet UNCROC and the New Zealand legislation. We found many examples of this including 59% of children not being allowed to have a support person with them when they were interviewed by their Lawyer for Child – which is one of the fundamental rights for everyone, particularly children.



It is difficult to fathom why a legal service such as Lawyer for Child would fail to comply with their own legislation in such a systematic way. It is almost as difficult to comprehend why a service that is supposed to represent traumatised and vulnerable children would not uphold the international rights of those children. But it is almost impossible to understand why a service that costs the New Zealand taxpayer $32 million each year can be operating without checks and balances to ensure taxpayer funds are not being spent on a service that places children in greater danger.

Some of the failures we have found are clearly due to the failure of individual Lawyers for Child to do their job as the legislation and operational guidelines stipulate. Some may be due to confusion between different pieces of legislation and other failures may be because the way the legislative and international child's rights have been operationalised -into the Practice Note and the Best Practice Guidelines - do not reflect international evidence about what is best practice for lawyers for child.

However, we believe most of the problems can be explained by failings in the model, the structure and the operational practice of the Lawyer for Child service as a whole. These all contribute directly to the failure of individual Lawyers for Child and how they undertake the role. The failings of individuals and problems with the model are inextricably linked - it is impossible to attribute responsibility for the failings at the feet of individuals when they are not working under a robust and effective system and vice versa.

The cost to children's safety of a failing model is enormous and lack of training, accountability, monitoring and regulating, and the failure to meet the legislation or Best Practice Guidelines result in each of the child rights discussed above being undermined.

Mothers rely on Lawyer for Child to advocate for their children, to help them be safe when there has been violence and abuse. Children desperately need an advocate in the adult centered environment that is the Family Court, but Lawyer for Child is not the competent choice to fulfill that role; they may know the law, but they do not know how to work with children and how violence and abuse impacts on children.

We have titled this report Lawyer for Child? because we believe the while the Lawyer for Child service is set up to serve children, the selection, appointment, briefing and accountability of these lawyers is up to individual Family Court judges and we argue this creates a conflict between the intent behind the role and its actual enactment.

We show that the NZ Law Society is deeply compromised in its ability to regulate individual Lawyers for Child. We liken their involvement to the fox guarding the henhouse. Backbone asks how one agency can be wearing so many hats - representing lawyers, accrediting lawyers, forming half the panel appointing lawyers to the register of Lawyer for Child in Family Court, being the regulatory body (writes the practice standards) and being responsible for policing the practice of the lawyers. How can one single agency possibly juggle all these roles and effectively provide independent monitoring and evaluation of the practitioners involved.

Sadly, it appears that the only people benefiting from the Lawyer for Child appointments are the lawyers themselves.

While there are many problems with the Lawyer for Child model, at its heart is the autonomous power that the judiciary hold in the Family Court. Even with the best will in the world there is little an individual Lawyer for Child could do to rally against the singular power of the New Zealand judges. These judges stand outside of any public, government or media scrutiny. Backbone has shown in previous reports that the Family Court lacks overall accountability and regulation. It functions behind closed, locked doors which mean that judges are rarely challenged and when complaints are made they are reviewed by other judges. For this reason, we are reinforcing the call we have been making for nearly a year – for a Royal Commission of Inquiry into the Family Court.

Our investigation of the Lawyer for Child role in this report adds to the weight of evidence from Backbone's four previous Family Court reports[2] that showed there are widespread systemic failures in the New Zealand Family Court and serious damage is being done to the children who have experienced violence and abuse and who are involved in the Family Court.

[2] https://www.backbone.org.nz/reports/

Children are not being heard and do not believe that Lawyer for Child is making them any safer. Something must be done urgently to rectify this. Three changes that Government could make reasonably quickly and that are strongly supported by international evidence are to:

1. Establish a national network of independent, specialist trained children's advocates to provide safety assessments for the judge and to work alongside children who are involved in the Family Court to represent the welfare and best interests of children and to ensure their voices are heard.
2. Give children access to free trauma counselling if they have experienced violence and abuse.
3. Establish an independent complaints system where children can go if they are not being heard or feel unsafe in the Family Court.

These services could be funded by either ceasing the Lawyer for Child service all together or reconfiguring it, so the lawyer **only** provides legal advice and no longer ventures into territory they are not trained or skilled in – the safety, welfare and best interests of children.

If the Lawyer for Child service is to continue in any form there needs to be urgent training in domestic and sexual violence and the introduction of evidence-based practice for all professionals working in the Family Court.

New Zealand please take notice. Children are suffering, and we are all paying for that either through the tax funded Lawyer for Child system or in the horrendous health impacts and social outcomes these children suffer as a result of their experience of violence and abuse and the New Zealand Family Court's dangerous and inappropriate response to that.

KEY FINDINGS

CHILDREN'S RIGHT

	Backbone's Rating:
Right to be Heard	2/10
Right to have views taken into account	1/10
Right to be protected from all forms of violence	1/10
Right to have best interests and welfare as a primary concern	2/10

THE PROBLEMS AND FAILINGS WITH THE MODEL ARE...

#1: The Legislation is not being implemented as intended
#2: Professional boundaries have become blurred
#3: It is unclear who the Lawyer for Child's client is
#4: Best practice guidelines are not robust or evidence-based
#5: Training is inadequate
#6: There is no independent quality management
#7: The complaints model doesn't work

Recommendations

- Royal Commission of Inquiry
- Child advocates and trauma counselling
- Specialist legal services
- Risk and safety assessments
- Evidence based practice
- Training
- Independent body accountable for all 'specialists'
- Quality management and continuous improvement
- A new model for children in Family Court

Introduction

Women and children who experience violence and abuse are the 'service users' of a vast public 'system' – a system that places a heavy burden on the New Zealand economy through direct and indirect costs. It is essential that tax payer's money is being used effectively to provide service users with the products and services they need. Backbone believes that in cases where violence and abuse is alleged, the primary purpose of the Family Court should be to ensure the victims are made safe and supported to rebuild their lives and the abusers are held accountable for their behaviour. In order to ensure it achieves this goal the Family Court needs to hear from the people who use its services.

The primary purpose of Backbone's work is to collect and report on the voices of women and their children, so their experiences can inform the quality management and continuous improvement of the response system. Any successful business regularly conducts customer feedback surveys to gather and respond to what their customers have to say about their business and to ensure they are providing their customers with the products or services they need. Traditionally this has never been done in the public sector. Those in authority decide what the public service user needs and how that service should be delivered. Rarely if ever do publicly funded agencies ask those who use their services whether those services were having the desired impact for them. Therefore, Backbone is venturing into relatively new territory by asking service users about their experiences and reporting on those and it will not be surprising if for many of those in authority, hearing what service users have to say is somewhat affronting.

However, there are no longer any excuses available to those who are funded to deliver billions of dollars of tax payer funded social services in New Zealand to continue to ignore their 'customers' – to those for whom those services are designed. The technology is available for us to interact with hundreds of service users and gather and report their voices not as an academic exercise – it would be inappropriate to study them as research subjects, but as a way to improve our response to them. It is appropriate and timely for those who plan, implement, deliver and monitor the system, to listen to what service users have to say, in the same way a business would listen to their customers.

While Backbone doesn't undertake this service user feedback as formal research, the co-founders and authors of this report, Deborah Mackenzie and Ruth Herbert, both have directly relevant academic qualifications and research experience.[3] We use applied research methods and frameworks to guide our analysis of the vast amount of quantitative and qualitative data collected from service users. We draw on information from multiple sources to cross check and validate what service users tell us. Backbone now has an extensive data set containing thousands of individual data items from the comprehensive surveys that have been completed by many hundreds of women. We have also collected detailed case stories from hundreds of women and reviewed extensive documentation that corroborates what women are telling us. We are also well placed to contextualise what we are hearing and reading because between us we have had over 35 years' experience working in New Zealand's system response to violence against women and children – doing research, strategy, policy, service delivery and advocacy work – for the public service, NGOs and in a voluntary capacity.

[3] See Appendix One for their bios

As a result, Backbone believes the analysis that has been undertaken is methodologically robust and hence the material contained in this and other Backbone reports is an accurate reflection of what is happening for women and children who have experienced violence and abuse and are involved in the New Zealand Family Court.

In December 2017 Backbone released the first in a series of reports based on the findings of the 'Children and the Family Court' survey, 'Seen and Not Heard: Force'.[4] In that report we showed that children who have experienced violence and abuse fare very poorly when the Family Court is involved in their lives. Most mothers reported negative experiences of how those working in the court had responded to their children's experiences of violence and abuse. For most children their experience was not believed, was minimised, was excused or told it happened too long ago to mention.[5] Only 8% of mothers told us that their children were believed, and the Family Court responded to make the child/ren safer.

In this second report in the series we focus on Lawyer for Child – a key component of the government funded response system.

Lawyers appointed to represent children are one of the groups of professionals routinely contracted by the Family Court when there are Care of Children Act or Domestic Violence Act proceedings and violence and abuse has been alleged. The role of Lawyer for Child is a critical (although we argue in this report a failing) service to enable the enactment of the relevant legislation in this area (Domestic Violence Act 1995 and Care of Children Act 2004) and New Zealand's commitments under the international conventions it is a signatory to.

Data for this report has been drawn from the following sources to inform the analysis and findings regarding Lawyer for Child:

1. Backbone's May 2017 survey on the Family Court where we asked women to tell us about their experiences in the Family Court, including asking about Lawyer for Child. There were 496 valid responses and the report of the findings was released in June 2017.[6]
2. Backbone's October 2017 survey which was designed to give mothers an easy, safe, and anonymous way to say how the Family Court experience was for their children. We asked them about the Court's use of orders and decisions for care and/or contact arrangements with abusive parents and the impact these orders and decisions are having on these children's lives. There were 291 valid responses[7] from mothers who collectively have **591** children involved in Family Court proceedings. There were **267** women who said they had a Lawyer for Child appointed in their case and those

[4] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

[5] Please see page 26 of Seen and not Heard https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

[6] https://www.backbone.org.nz/reports/report-two-family-court-survey-report201768

[7] Two of the survey participants identified as gender diverse the rest identified as women.

women had **534** children between them. Thirty-five of these 267 women (13%) were Māori mothers of 88 children.

3. Information from Backbone's watchdog report on Family Court complaints and appeals landscape.[8]
4. Extensive qualitative information gathered from women in direct communications and by reviewing documentation they have confidentially shared with Backbone.
5. Legislation, official documentation and other material provided to Backbone under the Official Information Act.

In cases where there had been a Lawyer for Child appointed we were interested to learn about the children's experiences with their lawyer including the processes and outcomes such as:

- Did Lawyer for Child engage with children appropriately?
- Were children's rights observed by Lawyer for Child?
- Did Lawyer for Child respond appropriately to the violence and abuse?
- Did Lawyer for Child make children who had experienced violence and abuse any safer?

We used these questions to guide our survey questions and our analysis of the data. When we began our analysis of the survey responses what we found led us to expand our focus to include how the Lawyer for Child role is upholding, or not, children's rights conventions and legislation.

In Section One of this report we outline the history behind Lawyer for Child, the legislation that defines the role, the relevant international rights of children and the operational practice details that guide the work of Lawyer for Child. In Section Two we report on our findings under four rights-based headings:

1. Child's right to be heard
2. Child's right to have their views taken into account
3. Child's right to protection from all forms of violence
4. Child's right to have their best interests taken as the primary concern

Section Three details what we believe are the problems with the Lawyer for Child model that have collectively contributed to the problems detailed in Section Two. We finish in Section Four with a number of recommendations to address the problems.

Before reading this report, we urge you to go back to the first report in this series 'Force',[9] to remind yourself about the overall situation of the children reported on here.[10] It is important that the reader understands these children's experiences of violence and abuse prior to and since becoming involved in the Family Court.

---

[8] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf

[9] Ibid.

[10] See Appendix Two for a summary of children's experiences of violence and abuse taken from Backbone's Seen and Not Heard report.

Section One – Provision and scope for the Lawyer for Child role

Children's rights in the Family Court

There can be no argument that there are international conventions and national legislation that provide children in the New Zealand Family Court with specific rights. Children have access to the same human rights as all New Zealanders[11] and additional rights because they are children – as defined in the United Nations Convention on the Rights of the Child (UNCROC).[12] New Zealand is a signatory to UNCROC which sets out the rights of children, aged 0 to 18 years, and the responsibilities of governments to fulfil those rights. UNCROC requires governments to ensure that the best interests of the child must come first where decisions, laws or services involve children and includes the responsibilities of parents, governments, and children themselves to ensure the rights of children are met.[13,14] Of particular relevance to Lawyer for Child and the Family Court are:

Article 3.1 - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 12.1 - States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12.2 - For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 19.1 - States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19.2 - Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

---

[11] For example, New Zealand Bill of Rights Act 1990 s27 Right to justice

[12] Ratified by New Zealand on 13th March 1993.

[13] https://www.unicef.org.nz/learn/our-focus-areas/child-rights

[14] The first recommendation in a new report released by the New Zealand Children's Convention Monitoring Group in April 2018 is to 'Develop robust systems and processes to ensure that legislation incorporates, and is consistent with, the principles and provisions of the Children's Convention.'. Available at http://www.occ.org.nz/assets/Uploads/Getting-It-Right-Building-Blocks-Apr-2018.pdf

History of Lawyer for Child legislation

From its establishment in 1980, the Family Court has had provision for a lawyer to help in representing children in court, independent of their parents or guardians. Prior to 2004, the provision for a Counsel for Child was available under section 30 of The Guardianship Act 1968.[15]

In 2004, the Guardianship Act was replaced by the Care of Children Act and the Counsel for Child role was changed to Lawyer for Child under section 7. [16]

Along with the change in terminology, there were fundamental changes to the ways that children were to be responded to between the Guardianship Act (see s23) and the Care of Children Act (see s6). [17] Section 6 was introduced into the Care of Children Act legislation making it legislatively clear that children's views were to be actively sought and must be taken into account in matters pertaining to them.

Antoinette Robinson comments in her 2010 thesis[18] on how children's views are responded to by the Court in New Zealand, that the changes around the understanding of childhood, children's rights and development resulted in legislation that potentially places New Zealand as an international leader in child-inclusive provisions. Robinson argues that the differences between s23 and s6 are marked and important and have the potential for the court to respond to children as individuals with their own views regardless of their age, stage and ability to express those views.

> *s6 is premised on psychological and sociological principles as well as UNCRC Articles which together promote children as autonomous actors in their own right, and as people who play an active role in the construction of their own childhoods*.[19]

Section 159 of the Oranga Tamariki Act 1989[20] provides for the appointment of a lawyer to represent a child or young person who is the subject of any proceedings under Part 2 or Part 3A of that Act. S161 (1) (b) (ii) says, 'A lawyer appointed under section 159 may act on behalf of the child or young person in respect of any matter relating to the detention of that child or young person in secure care, or the care of that child or young person in a residence'. Backbone's understanding is that the lawyers appointed to represent these children are selected from the same register used for Lawyers for Child under the Care of Children Act and subject to the same Practice Note and Law Society Best Practice Guidelines.

Alongside these Acts the Family Court Act 1980 also makes provision for Lawyer for Child. Section 9B was inserted into the Family Courts Act 31 March 2014.[21] From first reading it appears that section 9B offers Lawyer for Child more discretion in how they communicate the child's views to the Court. In particular, if so directed by the judge, the Lawyer for Child does not need to meet the child, in

---

[15] See Appendix Three for the wording

[16] There is provision for a Lawyer for Child to be appointed under a range of legislative Acts. Please see pg. 2 of Practice Note https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

[17] See Appendix Three for the wording
Section 23. Welfare of child paramount-(1) In any proceedings where any matter relating to the custody or

[18] http://www.otago.ac.nz/law/research/journals/otago036312.pdf

[19] Ibid pg. 11

[20] Formally known as the Children's and Young People's Well-being Act 1989

[21] See Appendix Three for the wording

comparison with section 6 of the Care of Children Act which is clear the child's views *must* be ascertained and *must* be communicated to the court. However, Backbone has not been able to determine which piece of legislation would take precedence over the other.

New Zealand legislation and Family Court principles reflect children's rights

The notion of the best interests of the child (UNCROC Article 3.1) is that, 'laws and actions affecting children should put their interests first and benefit them in the best possible way.'[22]

The child's rights to express their own views and have those views taken into account (Articles 12.1 and 12.2) are reflected in the Care of Children Act – articles 6 (2) (a) and (b) and 9B(1)(b),(2) and (3).

The child's rights to be protected from all forms of violence (Articles 19.1 and 19.2) are also reflected in the Care of Children Act. S 5 (a) states, 'a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi'.

It is clear that children's rights are supposed to be a priority in the Family Court. In the introduction to Family Court Caseflow Management Practice Note, [23] the Principal Family Court Judge makes it clear its purpose if to 'promote best practice'. One of the eight principles of that document is:

> The importance of children's rights to be consulted and heard, as set out in various statutes and applicable international treaties, is confirmed and endorsed.

Tangata whenua rights

A further document which guides children's rights in New Zealand is Te Tiriti O Waitangi which is the founding document that guides relationships between tangata whenua and tauiwi. The treaty sets out principles of protection, partnership and participation to which New Zealand is bound. Through the colonisation of Aotearoa, the loss of Māori land, language and culture, great harm has been done to Māori. The justice sector is one critical area where racism towards Māori is experienced pervasively.[24] While the Human Rights Act prohibits racism in New Zealand, Te Tiriti O Waitangi upholds tangata whenua's right to experience the same privileges as tauiwi and have inequalities reduced. Therefore, racism experienced in the Family Court by children transgresses the principles of Te Tiriti O Waitangi and the Human Rights Act and we therefore understand Te Tiriti O Waitangi is a critical document in the children's rights landscape.

Long history of criticism of Lawyer for Child role

As explained above, section 6 of the Care of Children Act clearly states that children *must* be given the opportunity to express their views and once expressed those views *must* be taken into account. However, as reported in the following sections, Backbone has received hundreds of direct communications and survey responses from mothers saying their children's views have neither been

[22] https://www.unicef.org.nz/child-rights
[23] https://www.justice.govt.nz/assets/Documents/Publications/Family-Court-Caseflow-Management-Practice-Note-updated-October-2016.pdf
[24] http://www.stuff.co.nz/national/crime/84346494/new-zealands-racist-justice-system--our-law-is-not-colourblind

sought, nor taken into account and children are being routinely forced into care and contact with abusive fathers against their wishes and in light of serious risk of further harm to those children.[25]

Backbone is by no means the first to report failings in Lawyer for Child practice and the findings in this report are not new. Regardless of its potential for good, it appears that there is long history of criticism of the role and execution of Counsel/Lawyer for Child. People have known about the limitations and discussed the problems with the Counsel/Lawyer for Child role for many years. For example, 15 years ago the Law Commission report to Government about dispute resolution in the Family Court, included consideration of the role of Counsel for Child.[26] They had this to say about a history of criticism of the Lawyer for Child role:

> ….in 1997 the Principal Family Court Judge asked the Department for Courts to review representation of children in the Family Court. The Department commissioned research on current practice, and on the views and perceptions of children and counsel themselves.[178]
>
> Although the research findings supported the claim that children in New Zealand are well represented in Family Court proceedings, they also identified inconsistencies, poor practice and lack of quality assurance. Consequently, two focus committees were set up to look at the role and practice of counsel for the child.[179]

Furthermore, the Law Commission reported on public submissions they had received criticising the Counsel for Child. These criticisms concerned the lack of skill and/or training of counsel to work with children, counsel not representing the children they worked with and not presenting their views to court, failing to meet with children, failing to advise children of court decisions, and showing bias towards one party.

In 2017, Professor Mark Henaghan from Otago University emphasised New Zealand's advanced legislative requirements to listen and respond to children. In the Newsroom story about Family Court ordered uplifts of children to enforce parenting orders he argued,

> *One of the things in the legislation which is required, and we're world leaders in this, but we we're ignoring it here, is that the court is required to take into account the views of the child… the court is required to listen to children.*[27]

In this report Backbone examines whether the Lawyer for Child service is failing, by adding some weight in both quantitative and qualitative data. This report provides more context to what these other commentators have argued, and it provides real examples of the damage being done by Lawyer for Child in cases where there is or has been violence and abuse. We now examine how the requirements of the international conventions and the legislation have been operationalised - the expectations and

[25] For a full discussion on orders impacting on children please see Backbone's Seen and Not Heard Report - Force https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

[26] http://www.nzlii.org/nz/other/nzlc/report/R82/R82-11_.html

[27] August 8 2107 https://www.newsroom.co.nz/2017/08/07/41459/taken-by-the-state

characteristics of the Lawyer for Child role, the Law Society's Best Practice Guidelines,[28] the numbers of lawyers who do this work and the cost of this service to the New Zealand taxpayer.

Operational practice

The Ministry of Justice (MoJ) website states the role and function of the Lawyer for Child is to;[29]

- represent the child in the court process and any negotiations between the other people involved
- explain the court process to the child in a way they can understand
- makes sure the judge is told what the child thinks and is told about all the things relevant to the child's welfare and best interests
- explain the judge's decision to the child and talks with them about how it will affect them.

Appointment

The Family Court Practice Note outlines the way Lawyers for Child are to be appointed and selected.[30] Any lawyer who wishes to be considered for the role of Lawyer for Child submits an application to the Registrar of the Court at which they wish to practice. A Family Court judge convenes a panel of usually four people who consider the applications.[31] The Lawyer may be interviewed, and references may be requested. They must show they have suitable qualifications.[32]

Each Court has a list of approved Lawyer for Child counsel. In addition, each Court keeps a register which records the appointment of each lawyer, the date of appointment, the estimate of fees and actual fees paid, the type of case and the date on which the appointment terminates. These details are to be shared at a bi monthly management meeting of each Family Court.

The Practice Note explains that the judge needs to consider the following things when deciding on a particular Lawyer for Child for a particular case including;

(a) Match of skills to case requirements.

(b) Availability of the lawyer.

(c) Current workload of the lawyer.

(d) Equitable distribution of work among lawyers on the list.

The judge then sets out a brief (list of things s/he wants the Lawyer for Child to look into) and a deadline for a report.

---

[28] https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL_FLS_lawyer_for_child_best_practice_guideliines_23.2.18.pdf

[29] https://www.justice.govt.nz/family/about/lawyer-for-child/\

[30] https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

[31] Practice Note point 9.4 states "This panel will consist of a Caseflow Manager or a Family Court Co-ordinator as chair, two nominees from the Family Law Section of the New Zealand Law Society, and a Family Court Judge nominated by the Regional Administrative Family Court Judge (Administrative Judge."

[32] See section 9 of Practice Note https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

Training

For many years there have been calls for Lawyers for Child to be better trained in both child development/talking with children and domestic violence and its impact on children. The Family Court Practice Note states that one of the qualifications required for the role is 'Relevant qualifications, training and attendance at courses relevant to the role; '[33] It is unclear as to whether or not this requirement would demand Lawyer for Child to have a sound understanding of the dynamics of domestic and sexual violence and its impact on children.

Backbone has reviewed the detailed programme and recommended reading material from one of the recent Lawyer for Child training workshops. This material, together with the New Zealand Law Society website promoting the 2018 training workshop for practitioners who want to become Lawyers for Child, show a noticeable absence of training on domestic violence or presenters from a specialist domestic violence background.[34]

The Law Society Best Practice Guidelines[35] (13.5) outline expected ongoing training requirement as follows:

> The lawyer must undertake a minimum of 20 hours of active lawyer for the child practice and a minimum of 3.5 hours of verified continuing professional development (CPD) and 6 hours of non-verified CPD in areas specific to practicing as a lawyer for the child within each CPD year. A CPD is defined in Rule 3.1(i) of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013.

However, it is unclear how the continuing professional development is monitored as there is no stipulation for that in the current Lawyer for Child Practice Note. The Court is expected to review the Lawyer for Child list every three years but in order to remain on the list there seems to be no expectation on the lawyers themselves apart from their willingness to continue to be on list.[36] Backbone has been unable to establish who monitors the Best Practice Guidelines therefore we cannot determine who monitors professionals development requirements of Lawyers for Child and whether or not each Family Court undertakes this when it updates the list.[37].

Lawyer for Child Best Practice Guidelines

The NZ Law Society has prepared Best Practice Guidelines for Lawyers for Child.[38] The guiding principles in that document are clear that the child must be given opportunities to be heard – must be given reasonable opportunity to express their views and that the views the child expresses must be

---

[33] See Appendix Four

[34] https://www.lawyerseducation.co.nz/shop/Workshops+2018/18LFC.html

[35] https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL_FLS_lawyer_for_child_best_practice_guideliines_23.2.18.pdf

[36] See Practice Note pg. 8 http://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

[37] See Practice Note section 10.4 https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

[38] https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL_FLS_lawyer_for_child_best_practice_guideliines_23.2.18.pdf

communicated to the court and taken into account by the Court. They also clearly state that the lawyer must meet with the child (unless there are exceptional circumstances and they are directed otherwise by the judge) and that should occur at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the Court.[39]

It is expected that the Lawyer for Child will talk with other people to gather more information - with each parent separately and with others who are important in the child's life such as members of the wider family, whānau, teachers or social workers. However, parents are not compelled to talk with the Lawyer for Child.

Numbers

It appears that Lawyer for Child work is popular among family lawyers. The family law section of the NZ Law Society states that it 'represents the interests of approximately 1000 New Zealand family law practitioners.' Information Backbone obtained under an Official Information Act request in 2017 shows there were **568 Lawyers for Child** used by the Court in the previous three years who are still active on the register. This suggests that half the practicing Family Court lawyers are also listed as Lawyer for Child, although this may require clarification by the NZ Law Society. If this is the case it implies that many family lawyers profit from the tax payer funded service. Not only are there a large number of Lawyers for Child, they appear to be very busy. We asked the Ministry for Justice (MoJ) how many reports had been written by Lawyers for Child in the previous year and were told there were 12,148 Lawyer for Child appointments made during the 2016/17 financial year.[40]

If we averaged the yearly number of appointments made in the 2016/17 by the number of current Lawyer for Child, we can deduce the average number of assignments for each Lawyer for Child is 21 per year. MoJ did not provide us with information regarding the type of Family Court application for which each Lawyer for Child had been appointed, nor how many of these appointments are for cases where there has been violence and abuse alleged. However, Backbone understands a Lawyer for Child is typically appointed for the more complex issues. We imagine that cases where violence and abuse cases are some of the most complex cases before the Family Court. This aligns with the fact that most women who completed the Backbone surveys said a Lawyer for Child was appointed in their case (see below).

[39] See Appendix Five for detailed wording extracted from the Best Practice Guidelines
[40] Ministry of Justice – Official Information Act Request made 3 October 2017, reply received 19 December 2017 and 2 February 2018.

Cost

The cost of a lawyer or specialist report writer is based on the time they spend on the case, as well as travel and other expenses.[41] MoJ advised that the current rate for Lawyer for Child services is $130 - $170 per hour including GST. The cost to the New Zealand taxpayer of Lawyer for Child appointments for 2016/2017 financial year was $32,928,428.[42]

This means that on average the annual taxpayer income each Lawyer for Child receives is $58,000.[43]In some cases, the parties are directed to make a contribution toward the cost of the Lawyer for Child. The MoJ website states that the government pays at least one third of Lawyer for Child costs and the parties involved need to pay the rest. The parties can apply to the Court to not be ordered to make a contribution towards the costs under certain circumstances.[44] If a person is receiving legal aid they usually do not have to pay back any costs for a Lawyer for Child. MoJ have advised Backbone that there were 1, 498 orders for cost contribution made in the 2016/2017 year and the average contribution was $685.45 This suggests that parties collectively pay just over $1million to Lawyers for Child.

[41] The Practice Note outlines in point 6.5 "Once the Court has settled the brief for the lawyer, the Registrar will negotiate an estimate for time and cost for undertaking the outlined brief with the proposed lawyer. This will include payment of any disbursements. Once an acceptable arrangement has been reached, the Judge will sign a Minute of Appointment. 6.6 A bill of costs should be rendered in a form agreed to between the Ministry of Justice and the New Zealand Law Society. This will be set out in 6 minute time units calculated in accordance with an agreed hourly rate of remuneration. "

[42] MoJ say this sum was made up of $24,032,369 for COCA appointments and $8,684,697 for Oranga Tamariki Act appointments.

[43] The median, or middle, income for all New Zealanders in 2016 was **$48,800** according to the Government website www. Careersnz.govt.nz

[44] "Contributing to the cost of services will cause your dependent children or yourself serious hardship and/or the circumstances of the case mean that you shouldn't pay the same amount as other parties to the case."

[45] The lower quartile amount was $319 the upper quartile amount $830 and relate only to Care of Children Act appointments.

Section Two - The reality – What women and children are telling Backbone about Lawyer for Child

In 2017 Backbone conducted two surveys about the Family Court. As explained in our introduction we asked respondents to tell us about their and their children's experiences of Lawyer for Child in both of those surveys.

Having a Lawyer for Child appointed in cases where there is or has been violence and abuse appears to be extremely common. In our 'Children and the Family Court' survey, 95% (267) of mothers told us a Lawyer for Child was appointed for their children. Seventy-five percent of these mothers told us their children knew they had a Lawyer for Child. Many women (78%) chose to tell us the name the lawyer appointed for their child/ren. [46]

In this section of the report we explain how the New Zealand legislation dictating the Lawyer for Child role is closely aligned to four significant children's international rights.[47] We assess whether Lawyers for Child are undertaking their role appropriately in cases where there has been violence and abuse (including towards children). In doing this, we have considered the extent to which the Lawyer for Child service as a whole, and individual Lawyers for Child, are meeting the requirements of the legislation, policy and practice standards and New Zealand's undertakings under UNCROC.[48] We used the following four rights as the main four sub-section headings and at the beginning of each section we assign a rating of how well we believe Lawyer for Child is meeting each of these four rights and the relevant legislation:

1. Child's right to be heard
2. Child's right to have their views taken into account
3. Child's right to protection from all forms of violence
4. Child's right to have their best interests taken as the primary concern

Child's right to be heard

Articles 12.1 and 12.2 of UNCROC give all children who are party to Family Court proceedings the right to express their views freely in all matters affecting them and the opportunity to be heard. The Care of Children Act (s6(2)(a)) says the child **must** be given reasonable opportunities to express views on matters affecting the child. The Family Court Act (s9B(2)) says the Lawyer for Child[49] **must** meet with the child or young person. The NZ Law Society's Best Practice Guidelines for Lawyers for Child[50] say, 'a child must be given reasonable opportunities to be heard (either directly or indirectly) and, 'a child must be given a reasonable opportunity to express his or her views'. [51]

[46] A small number of women felt too afraid to name their Lawyer for Child and some names were mentioned by more than one women.
[47] Refer to the beginning of each sub-section to see the details of how the legislation aligns with each right
[48] United Nations Convention on the Rights of the Child
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[49] To facilitate the role as set out in subsection (1)(b)
[50] https://www.justice.govt.nz/assets/Documents/Publications/fc-fls-best-practice-guidelines.pdf
[51] Section 4.2 and 4.3 https://www.justice.govt.nz/assets/Documents/Publications/fc-fls-best-practice-guidelines.pdf

In the following section we discuss how Lawyers for Child are responding to children's right to be heard by showing how and with whom they met with as part of their appointment and find:

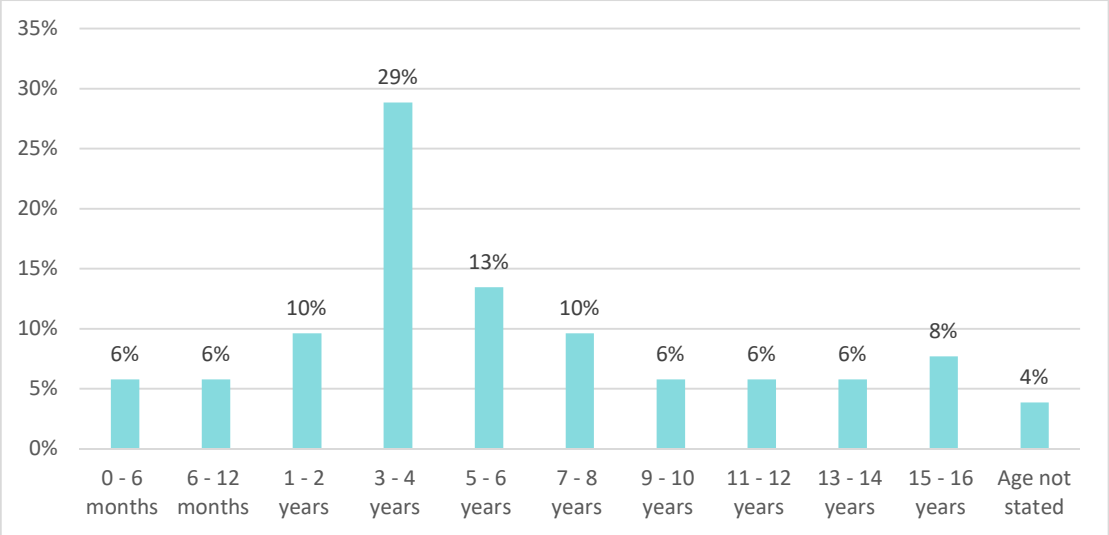
Did the Lawyer for Child meet with the children?

It is expected that the Lawyer for Child will meet with the child to ascertain their views and to ensure their right to be heard is met, before writing their report for the court. The first step in our analysis was to determine whether the Lawyer for Child had actually met with the child/ren. Despite the legislation and the Best Practice Guidelines being clear that the Lawyer for Child MUST meet with the child/ren (except in exceptional circumstances), we found that 53 (11%) of children had not met with their Lawyer for Child despite having had one appointed. [52]

Cases where Lawyer for Child did not meet with the child/ren

Backbone was interested to learn more about the children whom the Lawyer for Child **did not** meet with. We expected these children may have been pre-verbal so were surprised to find that the majority were aged over 3 years and nearly half of these children were over the age of 5 years. (see Figure 1).

Figure 1: Ages of child Lawyer for Child has not met with (N = 37 mothers with 53 children)



[52] As noted earlier there were 267 mothers whose children had a Lawyer for Child appointed. Eleven mothers did not say the Lawyer for Child had met the children, but we had insufficient data to confirm this, so these cases were excluded from this analysis. Therefore, it is possible that the percentage not met with is actually higher than the 11% stated.

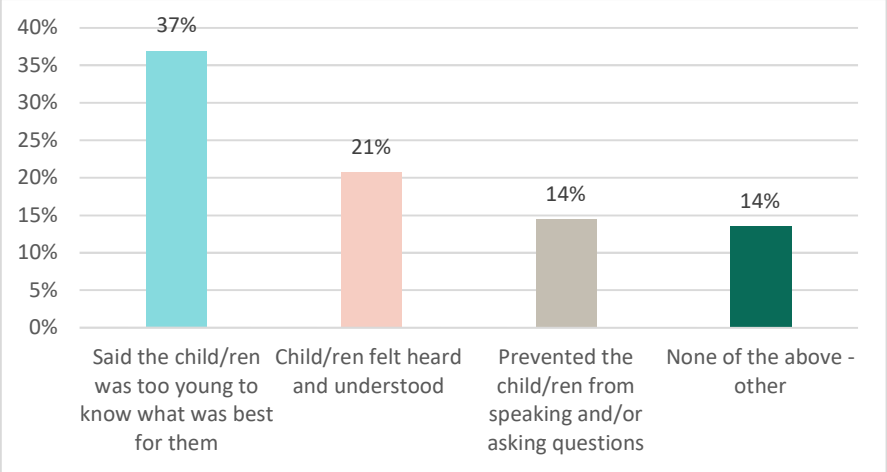
Cases where Lawyer for Child meet with all or some of the child/ren

For the 227 cases where the Lawyer for Child **did** meet with some or all of the children, we found that when and where the Lawyer for Child met with the child/ren and who else was present, varied.[53] In 53% of cases the Lawyer for Child met with their child/ren individually without an adult present and in 18% of cases the Lawyer for Child met with all the children together but without an adult present. Four percent of mothers said the Lawyer for Child met with some children and not others.

Twenty-five percent (57) of mothers who said the Lawyer for Child did meet the children wrote more detail in the free text box telling us about how the meeting took place. They described a range of ways in which the Lawyer for Child met with their child. There were 21 comments where mothers said the Lawyer for Child met their child with their mother present for the interview – in these cases it appeared the children were usually very young. Another common theme was Lawyer for Child meeting the children while they were in the abuser's care which the mothers said had made their children frightened about what to say. There were six comments which described Lawyer for Child turning up at the school and interviewing children without prior notice – in some of these cases the Principal sat in on the interview. Two mothers described having to apply a lot of pressure on the Lawyer for Child to meet with their children at all and two other mothers said the last time the Lawyer for Child met the children was 1 -2 years prior to court proceedings.

Almost all of the mothers (222) where the Lawyer for Child met some or all of their children gave us more information about how the Lawyer for Child responded. We asked mothers about how the Lawyer for Child made sure they heard the child's voice and were somewhat alarmed to find that in only 21% of cases mothers said the children felt heard and reported a positive experience. We also found that even if they met with the child/ren, in many cases the Lawyer for Child refused children's rights to be heard by saying the child was too young to know what was best for them or they actively prevented the children from being able to express their view. (See Figure 2)

Figure 2: Lawyer for Child hearing what children have to say (N = 222 mothers)



[53] There were responses from 235 mothers to this question.

For many mothers the ways that the Lawyer for Child interacted with their child prevented their children from upholding their rights to both be heard *and* have their views taken into account. There were 91 mothers who shared more detail about how Lawyer for Child responded to their children's wishes in a free text option. Many mothers told us that the children were scared talking to the Lawyer for Child, especially when their experiences were not believed. One mother told us her child wet their pants during the interview when the Lawyer for Child yelled at them. Children reported to their mothers that the way the Lawyer for Child interviewed them was 'bad', they talked about being asked leading questions, being pressured into saying bad things about their mother, being rushed in the interview, being asked closed questions, being intimidated and bullied, being asked questions that did not go very deep, and having suggestions made to them in the interview by the Lawyer for Child. Two mothers told us their children disclosed sexual abuse to Lawyer for Child and the Lawyer for Child did nothing with that information. Mothers said the Lawyer for Child in many cases lacked the understanding about the dynamics of domestic violence and therefore failed to understand the children's fear and in some cases inability to talk in the interview. Some said the Lawyer for Child just ticked the box and left.

Who else did the Lawyer for Child meet with?

The MoJ website states that Lawyer for Child may meet with others who are involved in the child's life to assist in writing their report. We asked mothers who else the Lawyer for Child met with besides the child - 203 responded to this question and listed a variety of people including mother, father and some extended family. Common responses included saying the Lawyer for Child:

- met with nobody but the child
- did not meet with the mother at all
- met with teachers and principals of the child's school
- met with the abuser's family members or the abuser's lawyer but not with the mother or her family.

When there has been violence and abuse alleged, Backbone would expect that the Lawyer for Child would at the very least talk with the protective parent to ascertain the level of risk to the child based on what has happened in the past. We were therefore shocked to learn that in many cases the Lawyer for Child had not met with the mother. However, as we will show later in this report many mothers reported that Lawyer for Child did not believe either their own or their children's experiences of violence and abuse and were forming conclusions based on their own assumptions about the case rather than on evidence, regardless of whom they met with.

Child's right to have their views taken into account

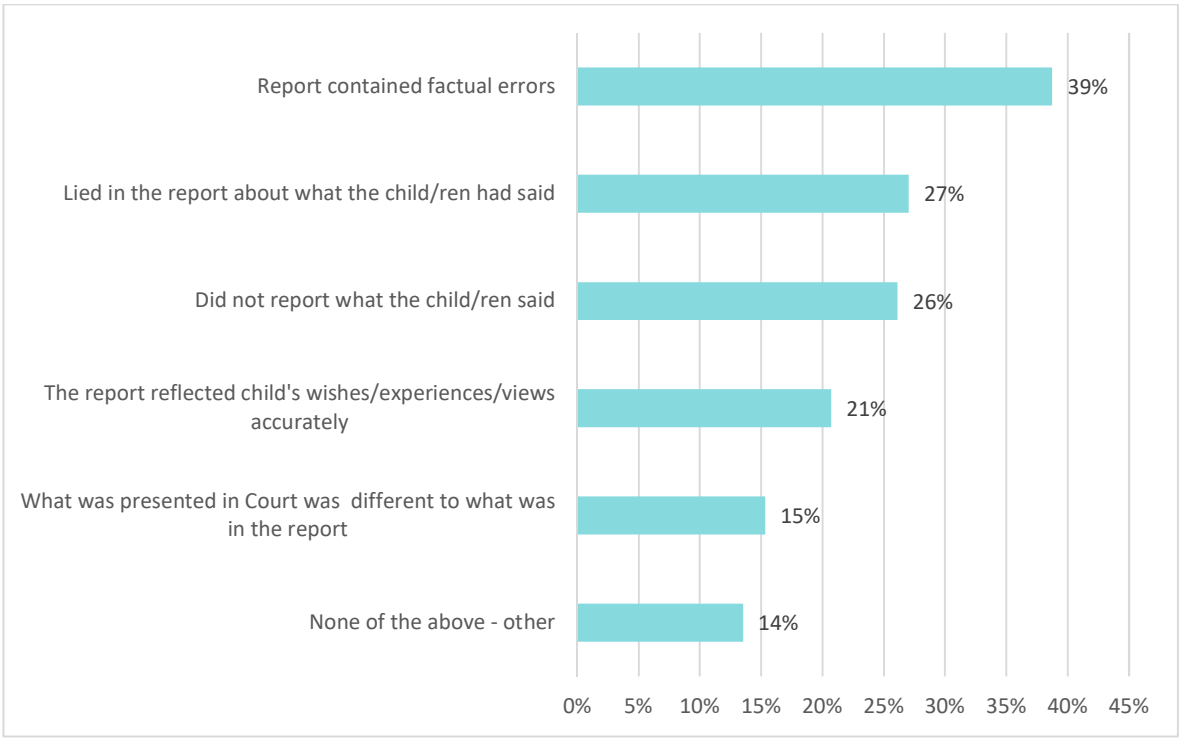
The New Zealand legislation, UNCROC and the Law Society's Practice Guidelines are clear that merely gathering children's views is not sufficient – their views must be presented to the court and also be taken into account by the court. Article 12.1 of UNCROC gives all children who are party to Family Court proceedings the right to have their views given due weight. The Care of Children Act (s6(2)(b)) says, 'any views the child expresses (either directly or through a representative) *must* be taken into account'. The

NZ Law Society Best Practice Guidelines for Lawyers for Child[54] say, 'any views expressed must be taken into account by the Court'. The MoJ website says the Lawyer for Child, 'makes sure the judge is told what the child thinks and is told about all the things relevant to the child's welfare and best interests'.

In this section, we analyse how well Lawyer for Child is upholding children's right to have their views taken into account by discussing how they report and represent children's views to court, respond to children's fear of the abuser and their view as to their future safety. We find:

Firstly, we analysed what the 222 mothers where the Lawyer for Child met some or all of their children, told us about how the Lawyer for Child responded. Figure 3 shows that in 21% of cases the mother said the Lawyer for Child's report accurately reflected their child's wishes/experiences/views. Unfortunately, a greater percentage (26%) said the Lawyer for Child did not report what the child/ren had said.

Figure 3: Lawyer for Child ensuring child's views were taken into account (N = 222 mothers)[55]



[54] https://www.justice.govt.nz/assets/Documents/Publications/fc-fls-best-practice-guidelines.pdf
[55] Respondents were able to select more than one option on the drop-down menu hence the percentages total more than 100%

It is alarming that 39% of mothers said the Lawyer for Child's report contained factual errors and that more than a quarter said the Lawyer for Child had lied in their report about what the child/ren had said. It is also of some concern that 15% said what was presented to the court was different to what was in the Lawyer for Child's report. There does not appear to be any mechanism or process through which the Lawyer for Child report can be reviewed for factual errors before being submitted to the court. Women have told Backbone that they are forced to use the complaints procedure after the fact and often orders have already been made based on the Lawyer for Child's report – the damage has been done. As we explain later in this report the complaints mechanism for Lawyer for Child is controlled by the judge rather than an independent body and is therefore ineffective for addressing inaccuracies or lies reported by Lawyer for Child to court.

Under the free text option 91 mothers described the ways in which their children's views were not being taken into account due to beliefs and practices of the Lawyer for Child. Many mothers said that the Lawyer for Child was working for the abuser and in some cases was the abuser's friend. The overwhelming majority of the comments described Lawyer for Child dismissing their child/ren's views and/or not accurately reporting them, lying in the report about what the child said, minimising the child's views and experiences of abuse and distorting the children's views in ways that reflected what the Lawyer for Child wanted rather than the child. Some mothers told us their children disagreed with the Lawyer for Child report and told their mothers exactly what they had said in the interview and this information was not present in the final report. Many mothers never saw a Lawyer for Child report.

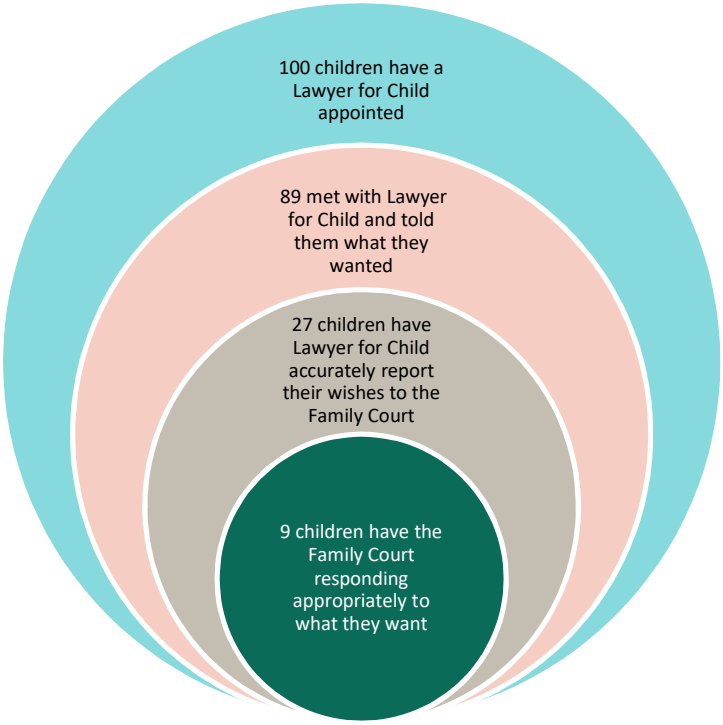
There were only four positive responses in the free text option that explained the Lawyer for Child accurately reporting what the children had said and in one case the lawyer appeared to understand the dynamics of violence and abuse.

As noted above, the legislation requires that not only must children's views be presented to the court, they MUST be taken into account by the court.

In order to cross check the findings presented above and to drill down in more detail to see whether children's views are being taken into account, we analysed data obtained from a section in the survey where we asked mothers to respond for each child individually as we recognise that the outcomes may be different for different children in the same family. Only about half of the respondents answered these more detailed questions. The mothers told us collectively about 195 children who had told the Lawyer for Child how much time they wanted to spend with the abuser. Of these children the Lawyer for Child only **accurately** told the Family Court what the child wanted in 30% of cases.

The story gets more concerning because even when the child gets to meet the Lawyer for Child and is given the opportunity to express their views (in this case on how much time they wanted to spend with the abuser), and when that is accurately reported to the Court, the Family Court only responded appropriately in one third of the cases. Another way of saying this is that the data shows that approximately only one third of all cases successfully transition to the next step in the process as shown in Figure 4.

Figure 4: Ripple effects for children in the Family Court when their rights are not upheld at each stage of the process



As alarming as it is for every 100 children who have a Lawyer for Child appointed only 9% of the children ended up with an appropriate response from the Family Court. This data validates the findings we discussed in the previous section and summarised in Figures 2 and 3. Because the samples and the denominators are different between the two sets of analysis[56] it is not possible to merge the data to provide one single 'truth'. However, jointly they give cause for grave concern and strongly suggest that at best only 9% of children who have experienced violence and abuse and are involved in the Family Court are being heard and are having their views taken into account. Put another way 91% of these children are not having their fundamental rights upheld nor is the legislation being met in their cases.

Child's right to protection from all forms of violence

Under articles 19.1 and 19.2 of UNCROC, children have the right to be protected from being hurt and physical, sexual or mental mistreatment or violence. The Care of Children Act S5 (a) states, 'a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi'. Despite this, mothers are telling Backbone in their hundreds that the involvement of Lawyer for Child and the impact of their reports is resulting in

[56] In the first instance the denominator is all cases where the child/ren met with the lawyer for child (regardless of whether they were given an opportunity to express their views) and in the second instance the denominator is only those children who were allowed to express their views.

parenting orders that are placing children in situations where they are being mistreated and hurt physically, sexually or mentally by abusive fathers.

One possible explanation for this is because there is confusion in the Family Court between what UNCROC and the New Zealand legislation say (as above) about the child's right to be protected from all forms of violence and what they say about the child's right to continue to have a relationship with both parents. Article 9.3 of UNCROC says any child who is separated from one or both parents has a right to maintain personal relations and direct contact with both parents on a regular basis, **except if it is contrary to the child's best interests.** Section 5 (e) of the Care of Children Act says something similar but does not include the caveat of being applicable only if this is in the child's best interests, 'a child **should** continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi **should be preserved and strengthened'**.[57]

The Care of Children Act says that not only should the relationship with both parents continue, but it should be strengthened. This is very different from UNCROC which refers to the ongoing relationship with both parents as a right – hence something the child has a right to, if they so wish. Backbone has heard from hundreds of mothers and many children and young people who have told us they do not want a relationship with the abuser. However, the Family Court is forcing that relationship on them in spite of their fears of further violence and abuse and that forced care and contact is not in their best interests.

The changes made to the Care of Children Act in 2014 have undoubtedly contributed to this situation. The 2014 changes to the Act replaced sections 58 – 62[58] which required a judge to consider the risk to children before making parenting orders with less robust clauses[59] which do not prioritise the safety of women and children.

The following are two of many examples of what community and non-government agencies had to say in their submissions on the Family Court Proceedings Reform Bill (that led to the 2014 amendments):[60]

- Perhaps most worrying is the Bill's intention to delete clauses in the Care of Children Act known as the "Bristol clauses". In response to the murder of three children by their father, the Government in troduced a law requiring judges to undertake careful risk assessment before allowing abusive parents day-to-day care of their children. These measures have been undermined since their introduction and today are often ignored altogether by the Courts. The Bill will abolish these clauses and leave children at risk. Christine Bristol has spoken out against the Bill emphasizing that the law must prioritise children's safety over violent parents' access to their children.[61]
- The effect of the proposed changes would remove the existing presumption against contact for children and young people with carers who have been violent. That is a breach of Aotearoa New

[57] Text bolded by Backbone to show key points
[58] Commonly referred to as 'the Bristol clauses'
[59] The principles contained in section 5 of the current version of the Act.
[60] That foreshadowed the 2014 amendments to Care of Child Act
[61] https://www.parliament.nz/resource/0000253546

Zealand's obligations under Article 19.1 of UNCROC to 'take all appropriate legislative steps to protect children from all forms of physical and mental violence, injury and abuse.[62]

All of the children in our second survey had experienced violence and abuse (591 children) either directly or indirectly. As we reported in our Seen and Not Heard report, [63]

- Many of these children worried about their physical, sexual and psychological safety
- Many of them were forced against their wishes to spend time with the abuser and were suffering further violence and abuse while in his care.
- Most of the children are ordered into unsupervised care and contact with the abuser.
- There is a big difference between how much time the Family Court is ordering children into care and contact with abusers and how much time the children say they WANT to spend with him - 54% of the children are being forced into care and contact arrangements that they do not want.
- These 'forced' children are significantly more worried about what happens at the abuser's house (sexual, physical and psychological safety issues) than children who were not forced.
- Tragically, in many cases, the Family Court's care and contact orders result in terrible health impacts for these children.

When the Lawyer for Child fails to take the child/ren's view into account and writes a report which favours the abusive father's rights to care and contact over child safety, the roll-on effect of the Lawyer for Child report is that judges make unsafe parenting orders in light of them. We asked mothers if the report written by Lawyer for Child in their case led to unsafe parenting orders and nearly half, 46% said yes, 7% said I think so, 20% said I don't know and 27% said 'no'.[64]

When children are forced to spend time with an abusive parent against their wishes, Backbone believes that their right to choose such contact, has been stripped from them and replaced with state sanctioned force. In essence the 'should' in s5(e) principle, 'relationship with both parents…..should be preserved and strengthened' has been prioritised over the 'must' in s5(a) principle, 'a child's safety **must** be protected and, in particular, a child **must** be protected from all forms of violence'. When the child is forced to spend time with an abusive parent against their wishes not only has their right to choose such contact (or not) not been upheld, but their right to be protected from all forms of violence has not been upheld.

[62] http://www.acya.org.nz/uploads/2/9/4/8/29482613/20130213_submission-family-court-proceedings.pdf
[63] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf
[64] There were 239 mothers who answered this question.

Our overall finding in this section is:

Did Lawyer for Child respond appropriately to the violence and abuse?

Sadly, mothers who took part in our surveys told Backbone that Lawyer for Child did not respond appropriately to the violence and abuse experienced by the children or the mother and therefore failed to take children's views regarding their safety into account. In our first Family Court report we explained that as part of the Family Court process the court often appoints people to present the child/ren's view to the court or make assessments on the current circumstances to assist in decisions being made e.g. Lawyers for Child, court appointed psychologists or CYFs representatives.

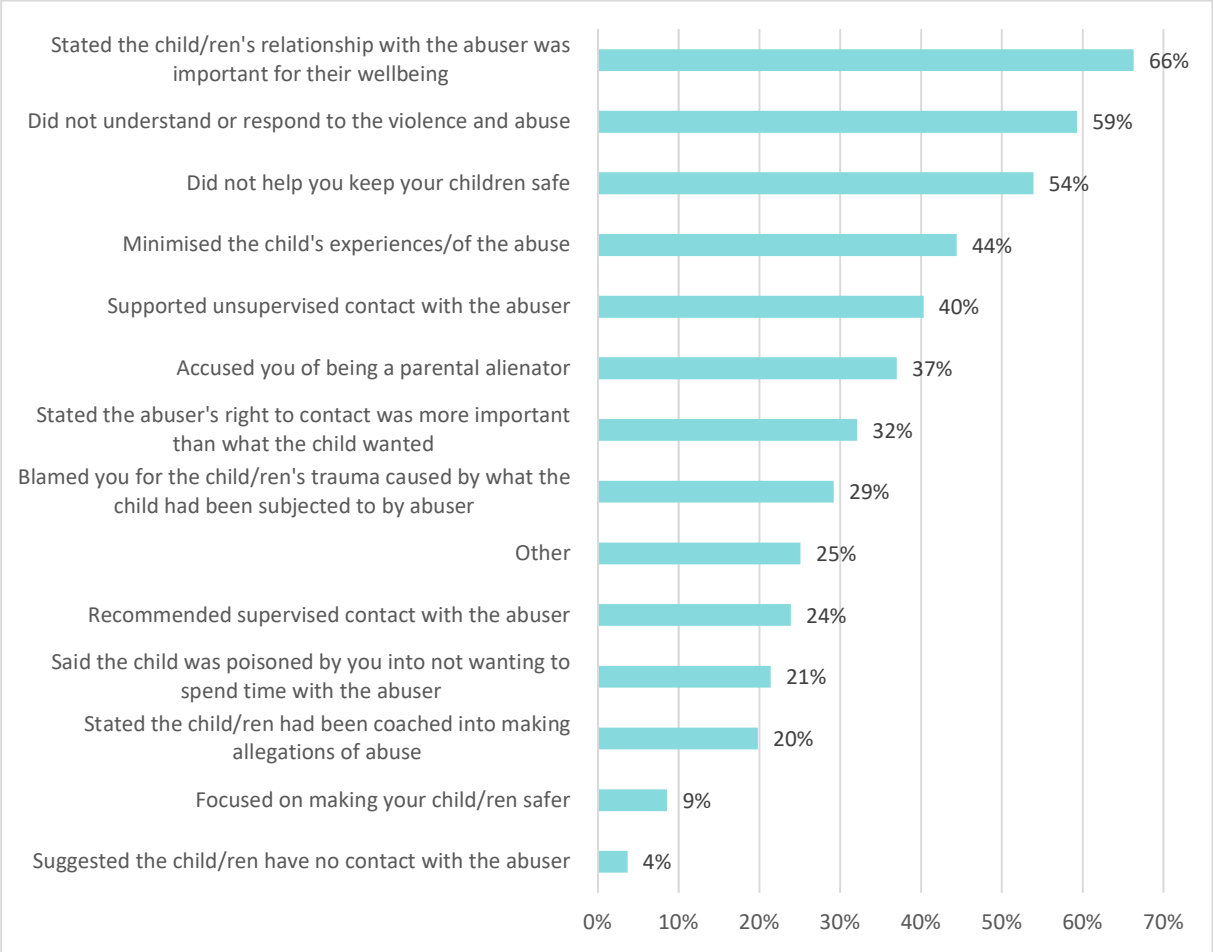
When we asked women if their children had reported that those officials had adequately presented the children's wishes and experiences to the court 226 women told us that those officials had **not** done so. The consequence of officials not listening to or presenting the children's views to the court often resulted in unsafe decisions being made by the court. Women (155) told us that in many cases those unsafe decisions made by the court meant that their children were forced against their wishes to spend time with the abuser.

Lawyer for Child reports minimise violence and abuse

It appears that in many cases the Lawyer for Child report, along with containing errors, lies, and/or omissions, failed to respond in a way that would keep the child/ren safe from further abuse and violence. We asked mothers in our 'Children and the Family Court survey' to tell us what the recommendations were that the Lawyer for Child made in their report for the court. Figure 5 shows that in only a minority of cases the Lawyer for Child placed child safety over contact with the abusive parent.[65]

[65] Only 9% of mothers said the Lawyer for Child focused on making their children safer.

Figure 5: Lawyer for child report recommendations (N = 243 mothers)



There were 61 mothers who described in free text the recommendations Lawyer for Child had made in reports about their children. Of these only five were positive, saying things such as the Lawyer for Child understood and responded to the violence and abuse and safety for the child and had made recommendations, like supervised contact or no contact, based on those safety concerns. Unfortunately, the overwhelming majority of the comments described Lawyer for Child recommendations that often blamed the mother for the child not wanting to have contact with the abuser they were frightened of. Mothers told us about Lawyer for Child blaming them for the child's views, accusing them of coaching the child, poisoning the child, or using parental alienation, accusing them of being anxious and controlling, labelling them as the problem.

Mothers also told us that Lawyer for Child minimised or excused their children's fear and experience of violence and abuse telling us the Lawyer for Child said the child made it up, accused the child's counsellor of poisoning the child, said the child was too young to have an opinion, disregarded the child's safety, did not listen to the children and their fears, minimised the children's fear of their father, said the abuse was historic so was no longer an issue, did not understand the seriousness of the psychological abuse and accused the mother of making up the violence and abuse.

Mothers shared examples with us of bad practice by Lawyer for Child. These examples included the child being coached by the Lawyer for Child and the abuser to say they wanted contact with the abusive father, the Lawyer for Child just didn't care about the child, working with the section 133 specialist report writer to suggest they both follow up on parental alienation accusations against the mother, and Lawyer for Child lying about what the child said in the interview and in one case assaulting the child. Mothers also told us that the recommendations in the Lawyer for Child's report were superficial and inaccurate, did not protect the child, or were that the abuser just had to be a 'good enough parent' rather than a 'good parent'.

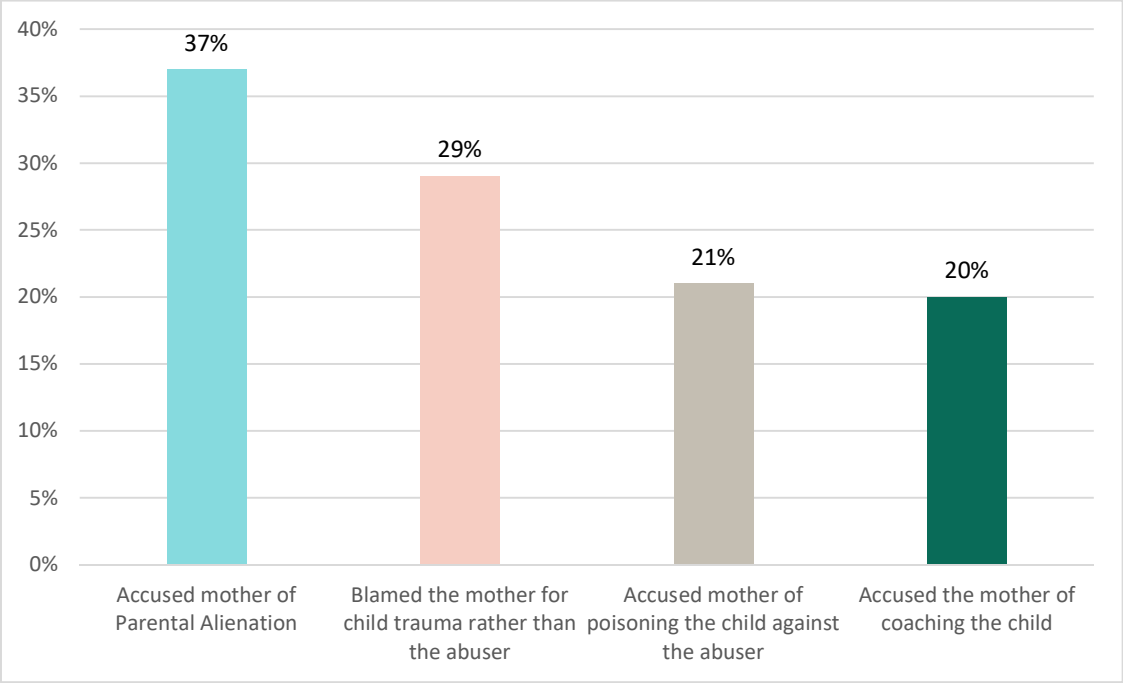
The dangerous use of parental alienation to respond to violence and abuse

One of the significant findings from both our Family Court surveys and our first watchdog report 'All Eyes on the Family Court', has been the use of the concept of parental alienation as way of minimising and denying violence and abuse reported to the Family Court by the mother and/or her children. Instead of responding to the violence and abuse safely, professionals working in the Family Court claim that the mother has coached the child into alleging violence as a way to destroy the child's relationship with the father. We explained in our earlier reports that parental alienation is a theory that has been debunked internationally.[27] Furthermore, even the author of the debunked theory, Richard Gardiner, never intended it to be used in cases where there is domestic violence.[66] Despite the doctrine of parental alienation being internationally discredited for many years it is still being routinely applied by psychologists, Lawyer for Child, social workers and judges in cases of violence and abuse before the New Zealand Family Court.

In Backbone's first Family Court survey 55% of women told us they had been wrongly accused of parental alienation by those working in the Family Court. We wanted to learn more about which professionals were using the debunked theory in their practice, so in the 'Children and the Family Court survey' we asked mothers specifically about professionals' use of the term. Figure 6 highlights how frequently the concept of parental alienation – or other similar notions like poisoning the child, enmeshment, coaching, mother blaming - are employed by Lawyer for Child. While Lawyers for Child were not the worst in terms of numbers of professionals using parental alienation as a response to violence and abuse they were reported to use it by well over a third of women.

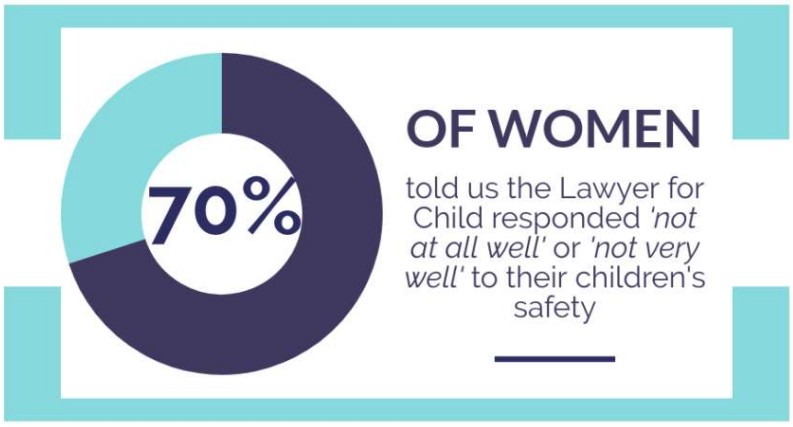
[66] Rita Berg, Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts, 29 Law & Ineq. 5 (2011). Pg. 6 Available at: http://scholarship.law.umn.edu/lawineq/vol29/iss1/2

Figure 6: Mothers accused or blamed by Lawyer for Child for the child not wanting contact[67]



Lawyer for Child did not make children any safer

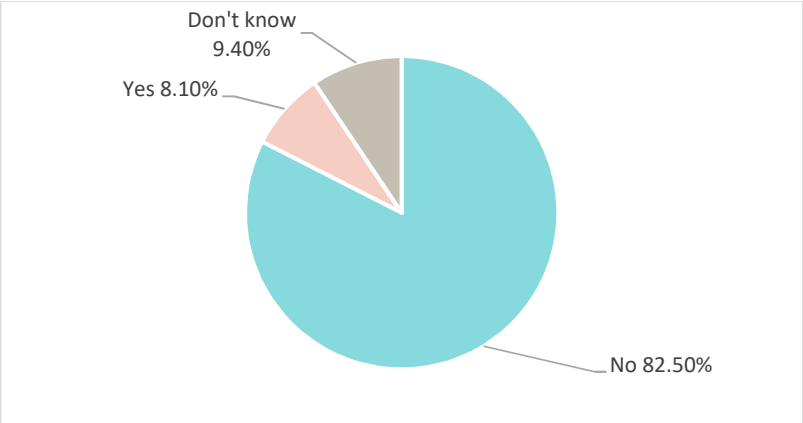
We concluded in our first Family Court report that many of those working in the court undermine women and children's safety. When we asked women to tell us how well those working in the Family Court have responded to their and their children's safety we found that the highest number of women identified Lawyer for Child as responding *not well* or *not at all well* to their safety followed by judges, lawyers and court appointed psychologists and Child Youth and Family. Seventy percent of women told us the Lawyer for Child responded 'not at all well' or 'not very well' to their children's safety.[68]



[67] The question was only presented to mothers in the survey if they answered yes to these professionals being involved and yes to the Judge interviewing their child and the questions were optional.
[68] There were 232 mothers who answered this question in total and 129 answered 'not at all well'.

In our 'Children and the Family Court' survey we asked mothers if their children had been made safer by the Family Court – see Figure 7. Unfortunately, the overwhelming majority of the 223 mothers who responded to that question said 'no' with 83% responding that their children had not been made safer and 9% did not know. Remember, as stated at the beginning of this report 95% of these mothers had a Lawyer for Child appointed in their case.

Figure 7: Has the Family Court made children safer (N = 223) [69]



Lawyer for Child makes matters worse

Many mothers (193) left free text comments about their experiences with Lawyer for Child and the overwhelming message they shared was that Lawyer for Child made things a lot worse (less safe) for their child/ren, seemed to be working for the judge rather than the child, and often colluded with the abuser. Only 23 mothers made positive comments. What was very obvious to Backbone when reading the mother's comments about Lawyer for Child is that:

[69] From Backbone's 'Out of the Frying Pan into the Fire' report Figure 9

It appeared from their comments that the mothers viewed the Lawyer for Child as effective when they understood violence and abuse, listened to the children and accurately reported that information to the Family Court. On the other hand, most of the mothers made very negative comments about the Lawyer for Child. Below is a list of themes that emerged in the 193 comments and the common factor appeared to be a lack of understanding of the dynamics of domestic violence and in particular a failure to believe the abuser was abusive, how to work with children and a penchant for blaming mothers for the abuse. All of the following practices were mentioned multiple times in the responses.

- *No interest in children's safety*
- *Pressured mother to allow contact with abuser although it was unsafe*
- *Lied to the child, and lied about what they said to the court resulting in serious mistrust of professionals by child in future*
- *Valued contact with the abuser over child safety*
- *Bias towards father and talks with father's lawyer frequently*
- *Has not met with mother but formed view of her that is negative*
- *Unprofessional interaction with children*
- *Conflict of interests (relationships with father's lawyer, known to family, lives nearby)*
- *Did not report disclosures children made directly to them (physical and sexual)*
- *Racist towards mother*
- *Taken in by abuser's charming act*
- *Does not address psychological abuse or psychological well-being of the children*
- *Judgmental of* mother
- *Sexist*
- *Did not understand that children could not speak up due to fear of the abuser*
- *Did not believe the mother or children about their experiences of abuse*
- *Humiliated the mother*
- *Blamed the mother for the violence (well you stayed with him…)*
- *Didn't listen to the children*
- *Shared private information with others*
- *Interviewed mother about the violence and abuse when the child was present*
- *Made children cry*
- *Labelled mother with mental disorder*
- *Put down and degraded mother*
- *Did not protect the children*
- *Did not turn up at Court fixtures*
- *Came to the house unannounced*
- *Very poor communication and listening skills*

Has anyone tried to make the children safer?

We asked women if anyone in the Family Court had tried to make their children safer. Of the 90 responses received only four women listed Lawyer for Child as someone who had tried to make a positive difference to their children.

We also asked mothers if anyone in the Family Court had followed up on their children's safety. Of the 226 mothers who answered this question 89% told us that no one followed up on their safety. Five women said someone had followed up and in **2 cases** that was the Lawyer for Child.

Risk and safety assessments are not undertaken

Backbone was shocked to find that the New Zealand Law Society's Best Practice Guidelines expressly state that safety of children is to be actively ignored by the Lawyer for Child and wonder if this guidance was a contributing factor to their poor responses to children's experiences of violence and abuse;

- The lawyer should not accept any brief that requires an assessment of the safety of the child. (9.3)
- It is the role of the Court and not of the lawyer to make findings on safety and the assessment of risk. (12.3)

It is difficult to see how the Law Society thinks a Lawyer for Child could appropriately interview a child who has experienced violence and abuse either directly or indirectly without having a view to the safety or otherwise of that child. We wonder who in the Family Court is tasked with the job of assessing risk and safety and believe it signals a significant gap in Family Court response to cases where there has been violence and abuse. The Best Practice Guidelines state it is the role of the court to makes these findings, however Backbone has discovered that in most cases the court does not do this. In our 'Children in the Family Court' survey only 2% of mothers said a risk assessment had been done for their children.[70] Failure to undertake risk and safety assessments for these children makes Family Court proceedings dangerous in the extreme.

[70] There were 236 mothers who answered this question – 5 had a risk assessment done in their case.

Child's right to have their best interests taken as the primary concern

Under article 3 of UNCROC the best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children.[71] S9B(1)(a) of the Family Court Act says the Lawyer for Child should act for the child or young person in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person. The Law Society's Best Practice Guidelines say the Lawyer for Child:

- has a duty to ensure that all factors relevant to the child's welfare and best interests, are before the Court
- is to provide independent representation and advice to the child in a manner that the lawyer considers promotes the welfare and best interests of the child
- must be aware of, and actively manage, the risk of the child being exposed to systems abuse.

In this section we discuss the ways that Lawyers for Child are currently working with children and show how their practice is often not upholding children's rights to have their best interests as a primary concern; that is Lawyer for Child practices are not child centred. We focus specifically on showing how Lawyer for Child engages with children in interviews, how well the Lawyer for Child communicated with the child, where the interview took place and how long the interview lasted and how many meetings there were. We then move on to discuss the use of support people, how Lawyer for Child explained court outcomes to children and their right to appeal, matters of confidentiality and conflict of interests. Our overall finding in this section is:

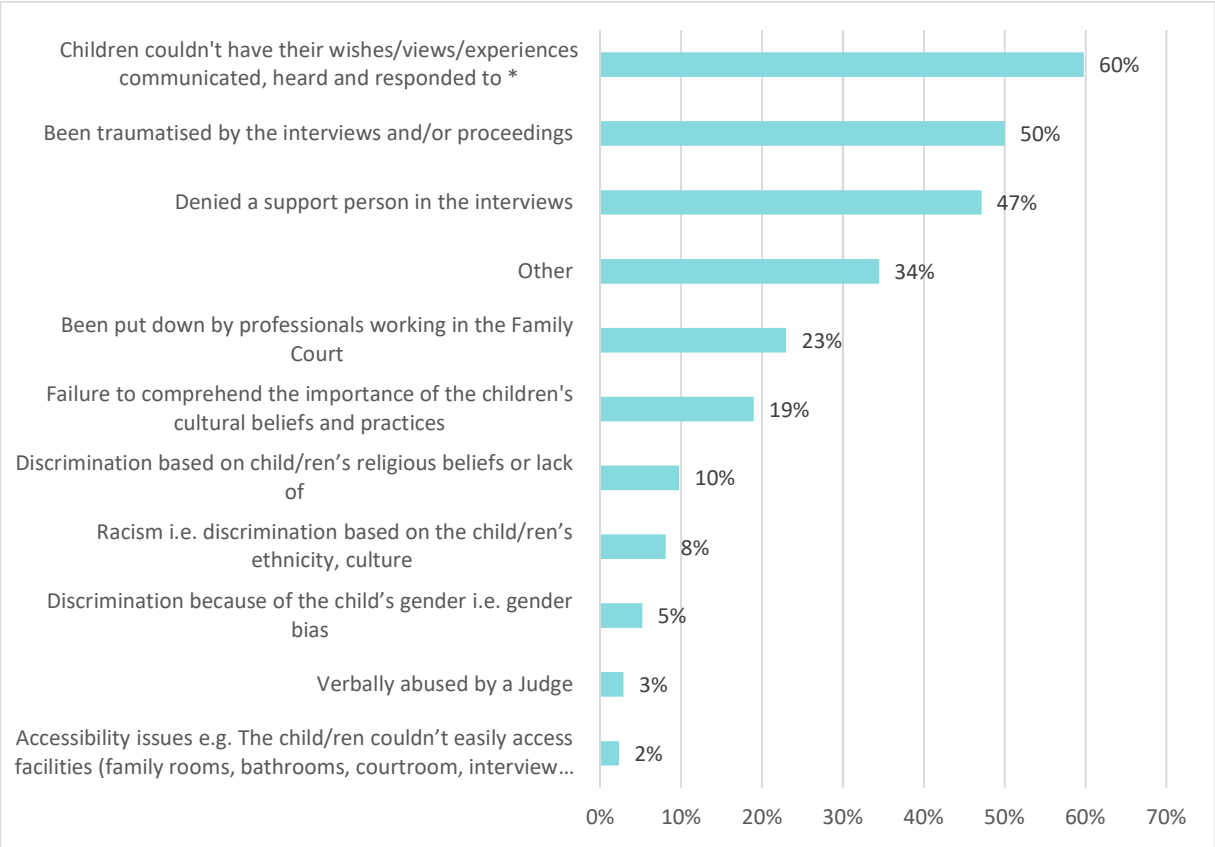
Did Lawyer for Child engage with children appropriately?

There are some overall expectations on Lawyer for Child as set out in the Best Practice Guidelines which explain how these professionals should engage with children (outlined in Appendix Five). In a nutshell there is an expectation that the Lawyer for Child will meet with the child/ren to ascertain their views, maintain professional boundaries at all times, ensure the child's welfare and best interests are represented in proceedings, explain to the child/ren about confidentiality and information sharing, explain the outcome of the case and their rights to appeal.

We asked mothers to tell us how their children had been treated in interviews with professionals working in the Family Court.

[71] https://www.unicef.org/crc/files/Rights_overview.pdf

Figure 8: Things children experienced in interviews with professionals or reports/orders (N = 174 mothers)



* As they were not given access to support people or technologies to enhance their understanding or involvement in proceedings (including assistance in interviews with report writers etc.)

While Figure 8 *only* includes cases where a Lawyer for Child has been appointed our data does not enable us to determine which professional(s) were responsible for each of these experiences. However, we feel it is important to include it in this report because it shows that the overall culture of the Family Court is not upholding particular rights of children to have their best interests and welfare at the forefront of any intervention with them, and they are being harmed by the practices of professionals working in that environment. Furthermore, it appears having a Lawyer for Child appointed is not acting as a protective factor for these children in terms of their experience of systems abuse which we discuss later in this section.

In the following sub sections we discuss some of the elements of Figure 8 including children's inability to take part in proceedings, their experience of trauma and racism, discrimination based on religious beliefs and their denial of a support person in interviews.

Children unable to participate

The legislation and the Best Practice Guidelines require the Lawyer for Child to communicate with children in an age and stage appropriate way and to communicate information about their involvement and the proceedings to the child.[72] Backbone is therefore disturbed to find that 60% of mothers whose children had a Lawyer for Child told us their children's views were not expressed in court because during the interview with the professional they were not given access to support people or technologies to enhance their understanding or involvement in proceedings (including assistance in interviews with report writers etc.).

Children traumatised by the proceedings

It is deeply concerning that 50% of these mothers said their children were traumatised by the interview and/or court proceedings. These children have all been the victims of domestic violence – these findings suggest that their involvement in the Family Court has compounded their experience of trauma *regardless* of the Family Court appointing a Lawyer for Child to represent their interests. We assume Parliament's intention was for the professionals working in the Family Court to be doing less harm not more to children. Furthermore, UNCROC is clear that the welfare and best interests of children should be paramount. If children are being traumatised by Family Court proceedings, it suggests the Family Court is not upholding the welfare and best interests of children and the negative health impacts on these children are significant and deeply worrying.[73]

Children experiencing racism

We asked mothers if their children had experienced racism from professionals working in the Family Court. When we isolated cases where a Lawyer for Child had been appointed we discovered that 8% of mothers said their child had experienced racism. Closer analysis of these cases showed:

- In all instances the Lawyer for Child had met with the children concerned
- 13 mothers (with 23 children)[74]
- 54% were Māori (7 mothers with 12 children)
- 2 NZ European/Pakeha

[72] See Appendix Five

[73] Please read Seen and not Heard for health impacts due to Family Court proceedings and decisions for these children.
https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

[74] Note – some women identified with more that one ethnic group. We have assigned a primary ethnicity to each woman based on the following order or prioritisation: Maori, Pacific, Asian, NZ European/Pakeha, European, other.

- 2 'Other'
- 1 European
- 1 Not stated

Therefore, children of Māori mothers are much more likely to experience racism in the Family Court than children of tauiwi mothers. However, this figure may well be much higher due to the way we asked about ethnicity in our survey. We asked respondents what their ethnicity was but did not include a question asking for children's or fathers' ethnicity. Therefore, there may be more children who experienced racism who may identify as Māori but whose mothers do not. We believe that 54% is a minimum figure rather than being absolute.

We also found that 31% of the cases[75] where there the Family Court had failed to comprehend the importance of the children's cultural beliefs and practices were Māori. However, as explained above that is a minimum figure due to the way ethnicity data was gathered. All the Māori mothers who said their children experienced racism, also said there was a failure to comprehend children's cultural beliefs and practices.

In Backbone's first Family Court Survey report we explained that Māori women were more likely to experience racism in the Family Court than tauiwi as 21% of wahine Māori reported experiencing racism compared to 8% of all tauiwi women. Similarly, 24% of wahine Māori told us they felt the Family Court had failed to comprehend the importance of cultural beliefs and practices, compared to only 5% of tauiwi women. We noted in that report that we were not surprised by this difference as the majority of tauiwi were Pakeha/European (78.1%) and therefore were highly unlikely to experience racism as they represent the dominant culture in New Zealand. Similarly, in the 'Children and the Family Court' survey 81% of mothers whose children had a Lawyer for Child appointed, identified as being NZ European/Pakeha and are therefore highly unlikely to experience racism. However, racism is a significant issue for Māori women and their children in the New Zealand Family Court and requires further investigation urgently. Acts of racism breach children's human rights and Te Tiriti O Waitangi.

Children discriminated against due to their religious beliefs

Furthermore, 10% of mothers whose child/ren had been appointed a Lawyer for Child told us that their children experienced discrimination based on their children's religious beliefs (or lack of). When we analysed these 17 responses more closely we found that in 65% of these cases the children's mother was Māori.

Children denied a support person

Backbone believes if practice was child centered professionals would recognise that children (of all ages), especially those who have experienced violence and abuse, would feel safer if they had a support person with them when they are being interviewed by a stranger. The New Zealand Health and Disability Code of Rights (which sets rights of consumers and duties of health professionals) clearly

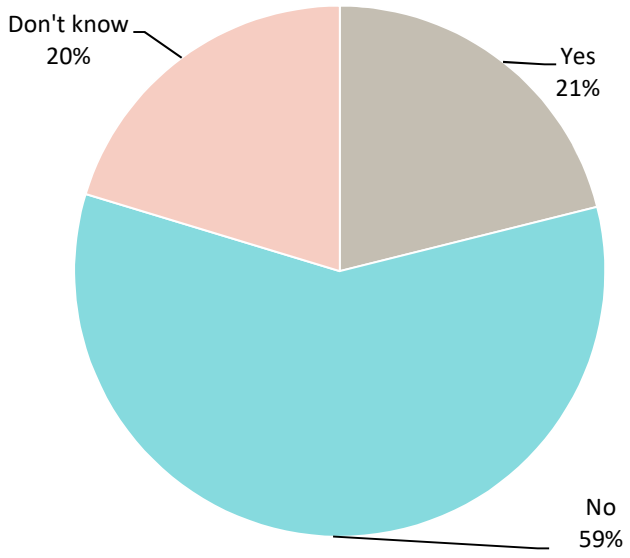
[75] 32 mothers and 68 children in total

articulates peoples' rights to have a support person present.[76] However, it seems that in legal proceedings there are no similar rights or best practice expectations.

We asked mothers specifically if their children were denied a support person in interviews with the Lawyer for Child. The 227 mothers who answered the question collectively had 273 children. We found that 59% of those 273 children were denied a support person by Lawyer for Child (See Figure 9).[77]

We found no ethnic difference in the mothers of these children. However, when we looked more widely at how other professionals in the Family Court were responding to children we found that all of the children who were denied a support person by *any* Family Court professional had a Lawyer for Child appointed to them, which suggests to Backbone that Lawyer for Child is failing to uphold the best interest of children in their own interviews with children and also failing to protect children from harmful practices by other professionals working in the Family Court. For example, of those children who were denied a support person in their interview with Lawyer for Child, 82% were also denied a support person in their interview with the Section 133 psychologist, whom the Lawyer for Child is expected to work closely with.[78] In addition, many mothers also explained in free text boxes that the children were told they were not allowed a support person which made the interview process with Lawyer for Child very frightening.

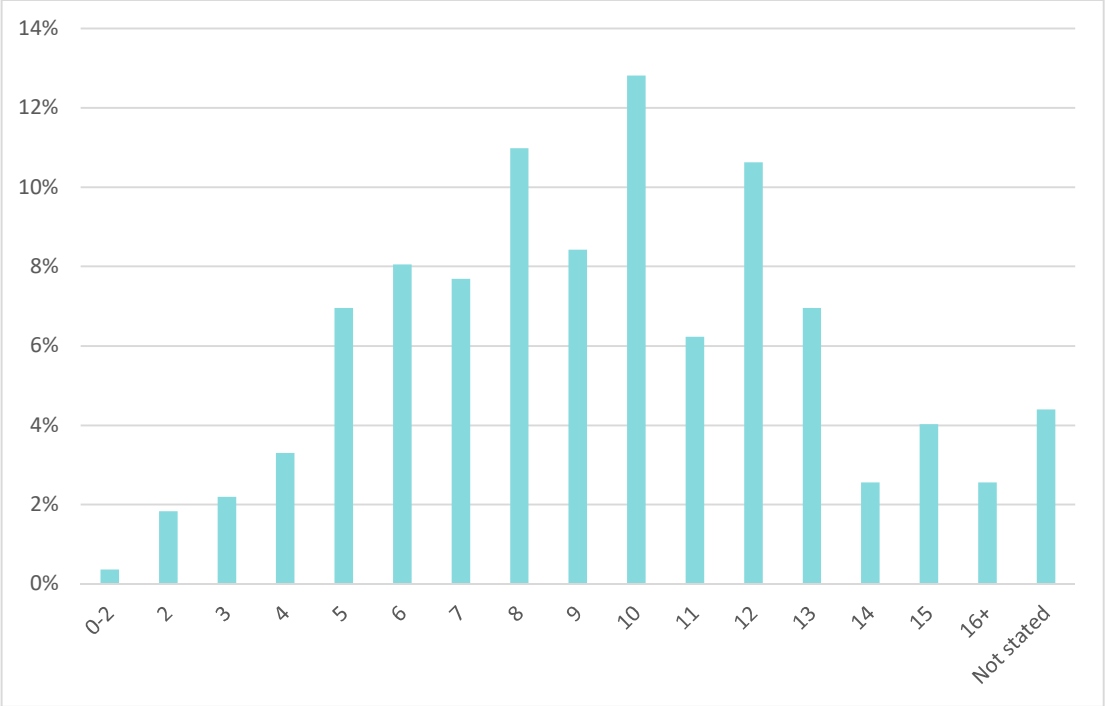
Figure 9: Was the child allowed to have a support person present during interview with Lawyer for Child (N = 227 mothers – with 273 children)



[76] See Right 8 http://www.hdc.org.nz/the-act--code/the-code-of-rights/the-code-(full)
[77] Overall 47% of children were denied a support person in interviews with any Family Court professionals (Lawyer for Child, Section 133 psychologist, social worker, judge) so the result for Lawyer for Child is much higher than the average for all processionals.
[78] See section 14 of Lawyer for Child Best Practice Guidelines

We wanted to learn more about the ages of children who were denied a support person for their interview with Lawyer for Child. We were shocked to see that the majority of these children are younger children – 80% of them were pre-teen.

Figure 10: Age of children who were denied a support person at the most recent interview with Lawyer for Child (N = 273 children)



Other responses

Sixty mothers used the 'other' free text option and told us more about Lawyer for Child. They described practices that in the main involved their children saying that they were not being listened to and that the entire Family Court process was adult focused, and no one considered the needs of the children. Overall, they described a court process that did not reflect or respond to the reality these children were living in – particularly regarding the violence and abuse and the child/ren's subsequent fears due to those experiences.

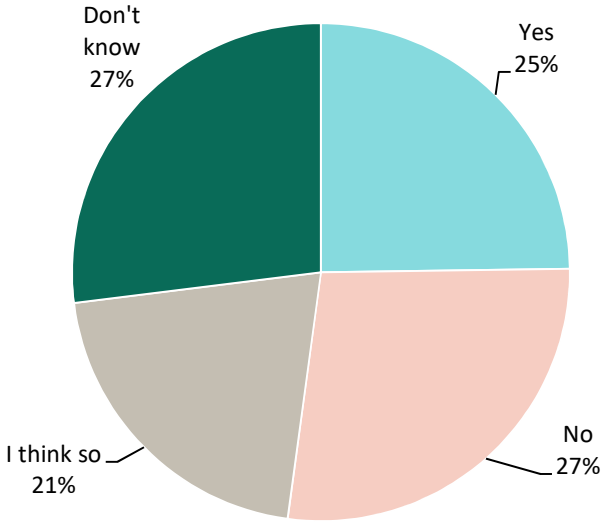
Some mothers talked about children being silenced by the Lawyer for Child saying the child had nothing meaningful to say or not interviewing the children at all. Children were told things that they didn't think were true by the Lawyer for Child, such as the abuser was 'a nice guy', or that they (the child) had to be fair on the abuser and have a 50/50 care arrangement. Children were 'kept in the dark' and Lawyer for Child did not explain things to them.

We now examine the ways Lawyer for Child engaged with the children and the impact of that engagement and show that in many cases Lawyer for Child is not upholding children's rights to have their best interests held as a primary concern.

How well did the Lawyer for Child communicate with the children?

The legislation and the Best Practice Guidelines require the Lawyer for Child to communicate with children in an age and stage appropriate way and to communicate information about their involvement and the proceedings to the child.[79] Many mothers gave us more detail about this – most saying Lawyer for Child communication with the child was not positive. Figure 11 shows Lawyers for Child are extremely variable in whether they explained their role in way the child could understand.

Figure 11: Did the Lawyer for Child communicate their role in a way the child could understand (N = 231 mothers)



Nearly half the mothers who answered this question said they didn't know or thought so (27% and 21% respectively). We suspect this is because most mothers are not permitted to be present in the interview between Lawyer for Child and their child. In addition, many women explained being fearful of discussing the interview with their child due to ongoing allegations that they were coaching, poisoning or alienating the child and so did not want to ask the child questions about the interview in case that was framed as them somehow trying to change their child's views.

Where did the interviews take place?

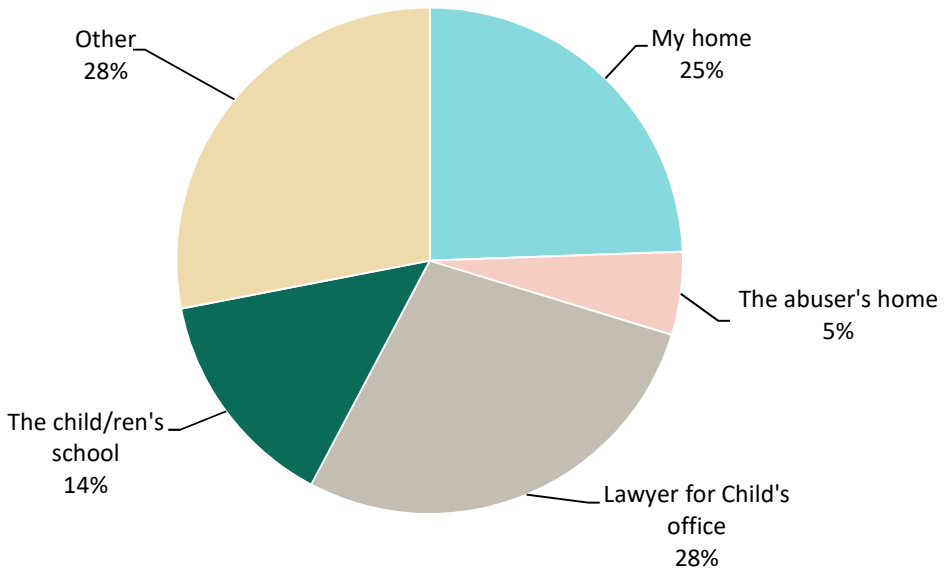
The MoJ website explains that the lawyer will want to talk to the child and that this might take place at home, at school, at the lawyer's office or some other place – **whatever the child is most comfortable with** (our emphasis added). They go on to note that 'the child doesn't have to talk to the lawyer but most children like being able to talk to someone about what's happening.' [80]

Figure 12 shows that 28% of the interviews took place in the office of the Lawyer for Child which although 'neutral' (ie is not mum's house or dad's house) does not seem to be a child focused or friendly environment which would help the child relax and feel comfortable talking about their personal experiences etc., especially if the child is denied a support person. Sixty-two women used the free text

[79] See Appendix Five
[80] https://www.justice.govt.nz/family/about/lawyer-for-child/

box to tell us more. Some children had been interviewed in a social service provider's office, some at daycare or Kindy, some at the court and some mothers did not know where the interview took place.

Figure 12: Location of interview with the Lawyer for Child (N = 226 mothers)



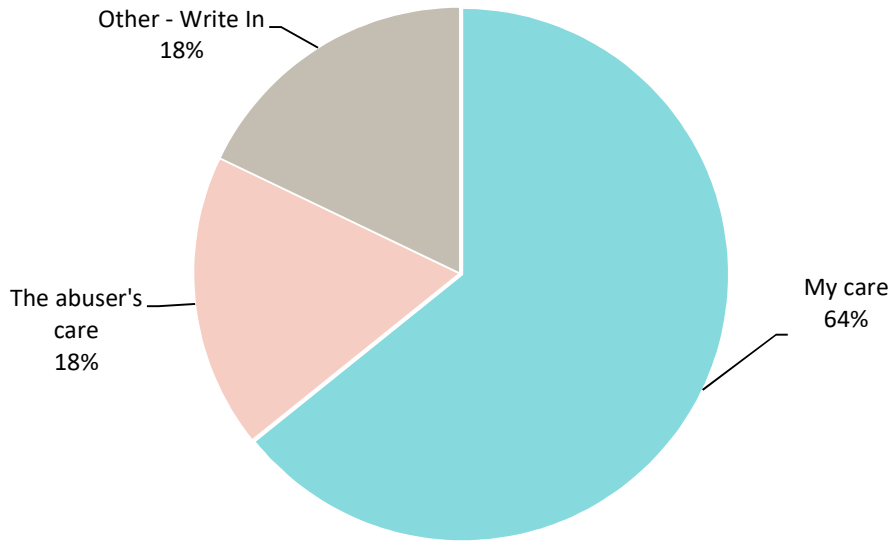
It is interesting to note that 14% of interviews took place at the child's school. While Lawyers for Child might want to meet a child at their school, the Ministry of Education website states that the principal of the school is the only person (or the deputy if the principal is not available) who can consent to a Lawyer for Child meeting with a child at school and that the Principal does not have to give their consent.[81] There is a Practice Note available for Lawyers for Child outlining best practice in their involvement with schools which sets out issues of consent (for the school and the child), information sharing (for the child and parents), and interviewing.[82] The Ministry of Education recommends that individual schools develop their own policies on Lawyer for Child interviews. Unfortunately, Backbone does not have information about the processes that were followed in the 14% of cases where the interview took place at the child's school.

We were relieved to see that many more interviews were conducted in the protective parent's home in comparison to the abuser's home and the children were mostly in the protective parent's care when interviewed. However, some mothers talked about the interview with Lawyer for Child putting the child in danger as they were interviewed with the abuser present or would be going home with the abuser after the interview. International evidence is clear that it is often dangerous and difficult for children to talk about their situation when there has been violence and abuse, for fear the abuser will punish them

[81] http://www.educationalleaders.govt.nz/Problem-solving/Education-and-the-law/Community-whanau-family/Court-appointed-lawyers
[82] http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/2884/c4cprotschools.pdf

or their mother. It can be particularly scary if the child is in the care of the abuser as there are no safety plans in place to protect them after the interview. For this reason, we were most concerned to find that 18% of the children were in the abuser's care at the time they were interviewed (Figure 13) and in 5% of cases the interview had taken place at the abuser's home (Figure 12).

Figure 13: Whose care children were in when interview with Lawyer for Child took place (N = 225 mothers)



How long was the interview and how many times Lawyer for Child met the children

The Best Practice Guidelines do not specify the number of times that the Lawyer for Child should meet with the child – only that they MUST meet them unless there are exceptional circumstances. There was a wide range of responses about how many times the Lawyer for Child met with the child/ren. Most mothers (36%) said the Lawyer for Child met with their child/ren three times or more, followed by twice (29%), only once (24%) and in 10% of cases mothers didn't select from the dropdown options but told us more in the 'other' option.[83]

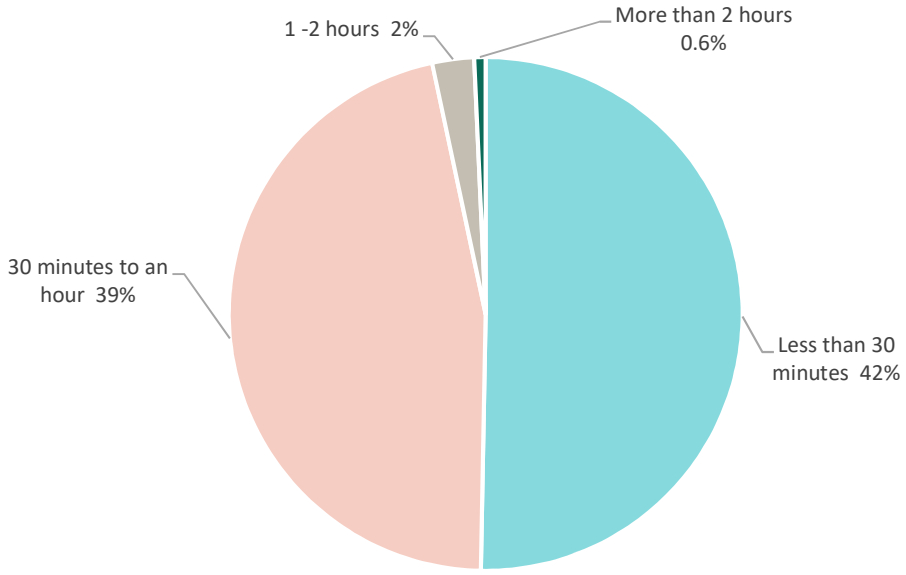
Some of these women told us a meeting had never taken place, some described yearly contact, others four visits or more. Some mothers said there had been multiple Lawyers for Child appointed to the case so their child/ren had met with different lawyers on numerous occasions for each appointment. One woman described the contact as 'constant'.

We also asked how long the children's' interview with Lawyer for Child took. As shown in Figure 14, most (80%) of the interviews lasted for an hour or less. However, of note, 42% of the interviews were less than 30 minutes. It does not seem likely that Lawyer for Child would develop rapport, explain the parameters of their role, establish understanding about confidentiality, interview the child about their current situation and past experiences as well as providing reasonable opportunity for the child to

[83] There were 222 mothers who responded to this question and their responses relate to their multiple children.

express their views, all within half an hour. Second and third interviews might be shorter than the initial interview however we could not establish that level of detail from the survey data.

Figure 14: Length of time of interview between child and Lawyer for Child (N = 179 mothers)

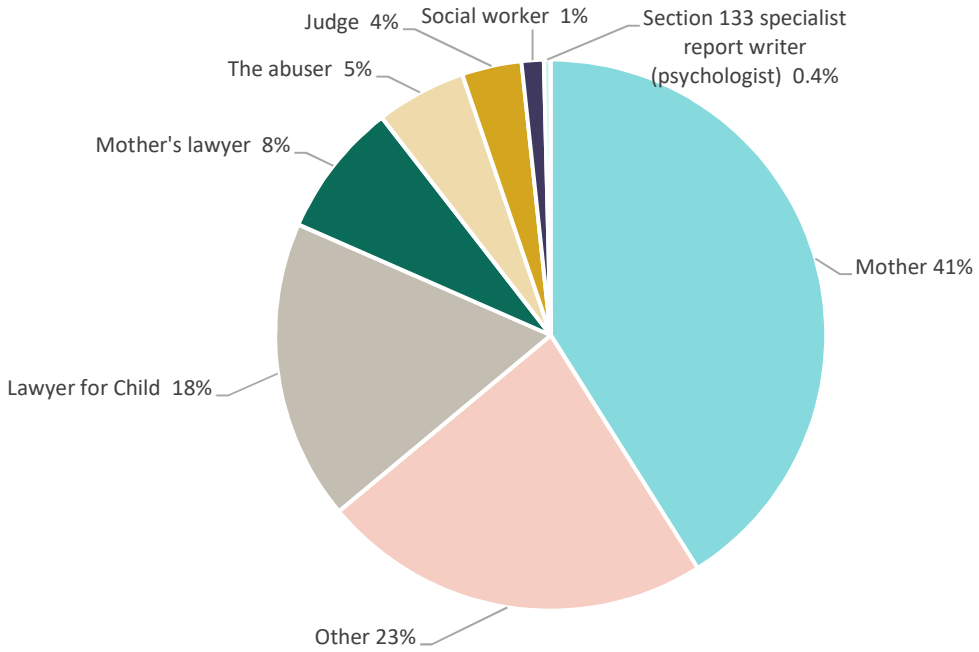


There were 29 mothers who gave more detail about the length of the interview under the 'other' option. Of those mothers most (18) said they did not know how long the interview lasted and some of these women said they were not even aware that the children had met with the Lawyer for Child as they were never told it was taking place. There were four mothers who said the meeting lasted for five minutes only, one lasted for two minutes just to the sight the child, one said the Lawyer for Child refused to meet the child, and others described a meeting lasting between 10 and 40 minutes. One mother told us the Lawyer for Child had a very long meeting with the children's abusive father but had spoken only briefly with the child.

Explaining the outcome of the case to children

In order to uphold children's rights to have their welfare and best interests at heart, it would be important that children understood the outcome of Family Court decisions being made about them. One of the expectations stated in the Lawyer for Child Best Practice Guideline is that they must explain the outcome of court case to the child/ren. However, as shown in Figure 15, the Lawyer for Child did this in only 18% of cases and mothers were left to explain the final court decision to the child/ren in 41% of cases.

Figure 15: Person who told child of Court's final decision (N = 227 mothers)



The 23% of mothers who selected the 'other' option listed a range of scenarios regarding who told the child about Family Court orders and decisions. Nine said no-one explained the orders to the children, seven said they were prevented from explaining the orders by the judge and/or Lawyer for Child, six said they told their children but some also described how frightening that was for them as they were being accused of being parental alienators by the Family Court and were very nervous about ensuring they explained things to the children in a way that would not be used against them in the future. Two mothers were ordered by the Family Court to tell the children about the decisions, in five cases the mothers told us the children were too young to have outcomes explained to them and in four cases a worker from a support service had explained the decisions. Unfortunately, six mothers told us that they had no idea who had explained the outcome to the children and this was very distressing for them as some of these mothers no longer saw their children as the Family Court had placed them in the abuser's day to day care.

Confidentiality

Children have a right to have their privacy upheld in matters pertaining to them. Interestingly the MoJ website states that a confidentiality agreement exists between the Lawyer for Child and the child, 'What the child says to their lawyer is confidential. The lawyer can't tell anyone else what the child said if the child doesn't want them to; except if the lawyer finds out the child or someone else may be unsafe.'[84] This advice seems completely at odds with The NZ Law Society's Best Practice Guidelines for Lawyers for Child[85] which state that before any view is expressed by the child, the lawyer should tell the child that

[84] https://www.justice.govt.nz/family/about/lawyer-for-child/
[85] https://www.justice.govt.nz/assets/Documents/Publications/fc-fls-best-practice-guidelines.pdf

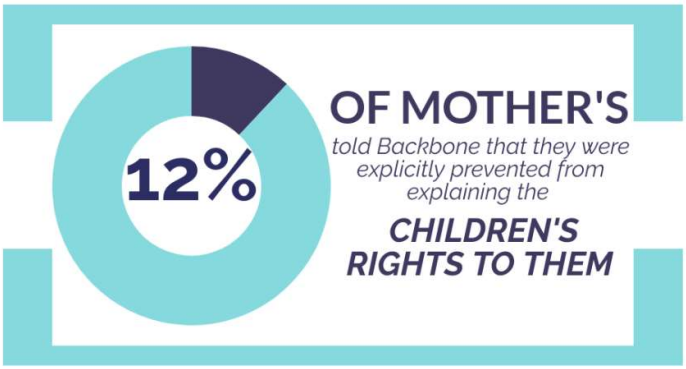
any views they expresses must be communicated to the Court by the lawyer and that Lawyer for Child should, 'consider an appropriate process for disclosure of information the child would prefer to remain confidential'.

Privacy breaches were a common theme in mothers' free text comments. Several told us about Lawyer for Child sharing confidential records with the abuser's lawyer. One mother told us that her child had expressly told Lawyer for Child information that the child did not want reported – it was reported.

Telling children about their right of appeal

Backbone believes that an important part of ensuring that children's welfare and best interests are the primary concern is that someone explains what their rights are in the process. We also believe that when explaining those rights, it is critical that the explanation is delivered in a way the children understand with regard to their age/stage/maturity and ability. In medical practice informed consent from patients is actively sought and provided in a way that ensures the patient understands what they are consenting to. Backbone has found that in most cases children's rights are not explained to them in the Family Court, let alone in a way that makes sense for them.

Shockingly only 8% of mothers said the children's rights had been explained to the children by court professionals. The vast majority (89%) said no one had done that and worryingly 12% of mothers told Backbone they were explicitly prevented from explaining the children's rights to them.[86]



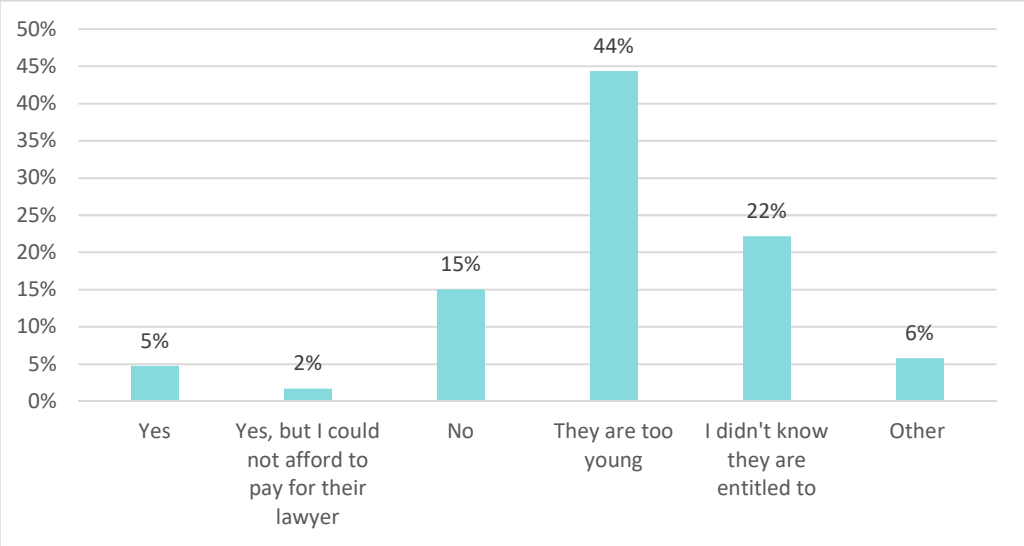
Lawyer for Child Best Practice Guidelines state that the Lawyer for Child MUST provide advice to the child about, 'any right of appeal against a decision of the Court; and the merits of pursuing any such appeal'.

We also asked women in our first Family Court survey if their children had wanted to activate their own proceedings. Most told us that their children were too young or that they were not aware that the children could activate their own proceedings. The women who completed the free text option described children who wanted to challenge the orders made in the Family Court but who were too frightened of their father to do so. (See Figure 16).

It appears that children are not being fully informed by Lawyers for Child about their rights in the Family Court even though it is an expected part of their role. Backbone hopes that more information will be provided to children and protective parents in future about their rights in Family Court.

[86] There were 229 mothers who answered this question.

Figure 16: Did children want to activate their own Family Court proceedings (N = 293 mothers)



Children should have a right to complain

The Ministry of Justice website states that complaining about Lawyer for Child is possible.

- If you think someone is telling the child what to say to the lawyer for the child, you should tell your own lawyer and the lawyer for the child. The court may get specialist help to find out if this is happening.
- If the child doesn't like the lawyer for the child, they can tell the Family Court coordinator or Family Court staff, or you can talk to your own lawyer, the Family Court coordinator or Family Court staff if the child is unable to do this.

Section 12 of the current practice note on the Ministry of Justice website outlines the complaints process for the Lawyer for Child service.[87] This process was outlined to one of Backbone's members as:

> *…. speaking generally, when a complaint is made about Lawyer for Child and the Family Court proceedings are not yet concluded, as a matter of protocol agreed with the Family Court, the complaint is referred to the presiding Judge at the Court that appointed the Lawyer for Child. If the proceedings have been concluded the complaint is made to the Administrative Family Court Judge responsible for the Court where the proceedings were filed. This protocol does not limit the right of the Law Society to consider any complaint about a Lawyer for Child.*

The Law Society also told another Backbone member: 'You have asked 'how does a young child lay a complaint against their lawyer'. In general, complaints against lawyers for children are made by parents of the child or by a third party. Young children would not generally be in a position to lay a complaint themselves'.

[87] https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf

In Backbone's report on the Family Court complaints and appeals landscape, *Don't Tell Me Your Problems*',[88] we reported:

> It is of enormous concern that children involved in Family Court proceedings have no complaints mechanism available to them. We have discovered that The Children's Commissioner is not able to advocate for them and complaints about their Lawyer for Child go directly to the judge and not an independent authority.

In the same report we included a quote from one of our members that reflects much of what women have told us about Lawyer for Child complaint process:

> *I made a complaint about lawyer for child's conduct and had a witness to back it up (in writing) and I was completely ignored. The L4C had the right of response and he lied about everything, but this was accepted at face value despite an external witness.*

Preventing system abuse of children

To uphold children's right to have their welfare and best interests as a primary concern in proceedings children should be protected from being hurt by those proceedings. It is clearly stated in the Lawyer for Child Best Practice Guidelines that, 'The lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse'. However, in both Backbone surveys mothers told us over and over again that in many instances the Lawyer for Child is the cause of, or is contributing directly to, systems abuse of their child through unsafe practice, incorrect reporting, not believing the violence and abuse, blaming the mother for the child's allegations of abuse, using parental alienation as a response to the abuse, failing to meet with the children, and recommending parenting orders that place the child into care and contact with the abuser. These are all forms of system abuse.

Children having to participate in multiple interviews with Family Court Professionals, including Lawyer for Child,[89] contributes to the trauma children experience by re telling their experiences of violence and abuse and particularly when those experiences are not believed or are not accurately reported. This is also system abuse.

The child is now not only abused by the abusive parent, but by the people who are supposed to keep them safe as well. Backbone showed the terrible negative health impacts the Family Court is having on children in our Seen and not Heard report. [90] We are deeply concerned that Family Court proceedings result in systems abuse of many children who

[88] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf

[89] 36% of mothers said their child was interviewed 3 times or more by Lawyer for Child.

[90] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

are already coping with the trauma of experiencing violence and abuse from a parent.

Conflicts of interest

It is especially important that the Lawyer for Child model is structured in a way that ensures the lawyer's legislative requirement to promote the child's welfare and best interests is not compromised by any conflicts of interest with other parties in the proceedings.

In Backbone's first Family Court survey 53 women told us in detail about their experiences with conflicts of interest and in 14 cases these directly involved Lawyer for Child. A common theme among responses was that Lawyer for Child had a close personal relationship with others involved e.g. being old friends with the abuser, or the abuser's lawyer or the judge, or going to the same school in the past, or mixing in similar social circles. Some women explained that the result of the close relationship with the abuser resulted in Lawyer for Child visiting him at home; giving the abuser legal advice or that there was an arrangement between the Lawyer for Child and the abuser's family. We heard cases where:

- Lawyer for Child worked in the same office as the mother's lawyer.
- Lawyer for Child went on to represent the ex-partner in later proceedings.
- Lawyer for Child had represented other children in the family's care in the past who were not related to the mother's children.
- There was collusion between Lawyer for Child and Child Youth and Family.
- Informal conversations between Lawyer for Child and other lawyers outside court had downplayed the violence and abuse and impacted on what happened in court later.

The result of the conflicts of interest for these mothers and their children is that they felt the Lawyer for Child had not adequately and impartially represented the interests of their children nor acted in ways that kept them safe from further abuse.

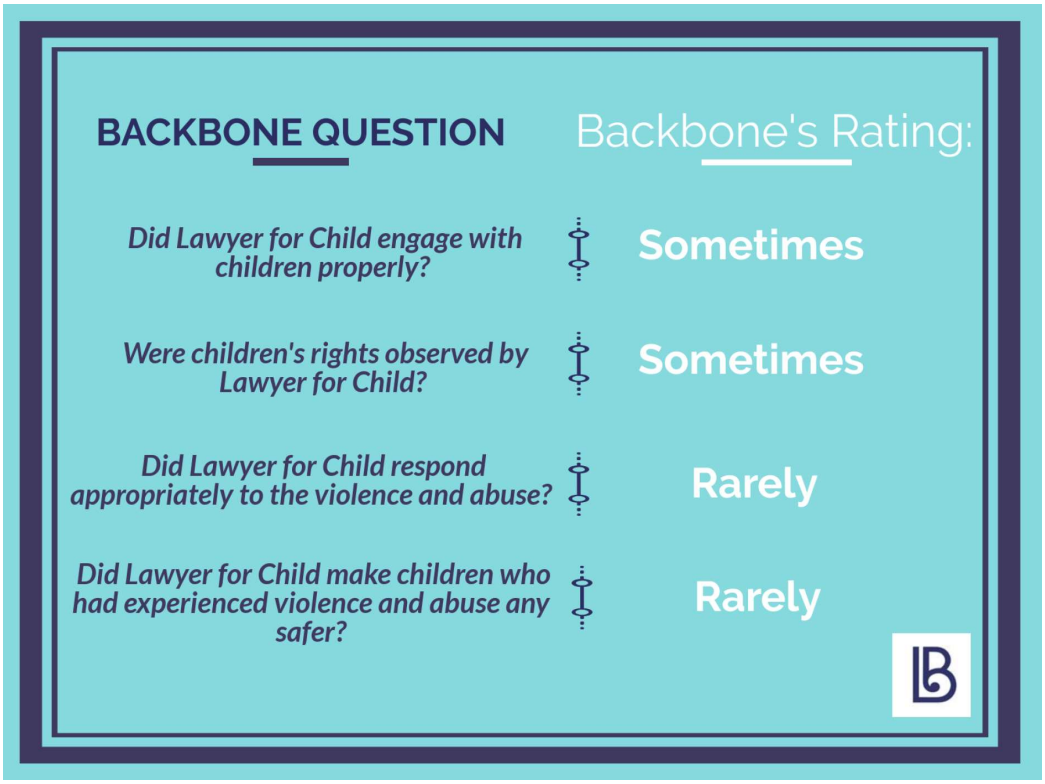
Overall findings

The grim picture we have described in Section Two shows that one key part of the justice system – Lawyer for Child - is failing. Not only is the overall Lawyer for Child service failing, many individual lawyers appointed to represent vulnerable children are failing to comply with the international rights of children, the legislation that defines their role and the Law Society's Best Practice Guidelines. But most especially it is failing those who use these services – children.

Backbone is clearly of the view that the role of Lawyer for Child is not adequate to ensure that when children experience violence and abuse (directly or indirectly) *and* become involved in Family Court proceedings they are made safer as a result. We found that while a small number of Lawyers for Child did a great job as far as engaging with children, most others did a terrible job. Throughout this section we have shown that Lawyer for Child has in many cases created reports that have resulted in unsafe parenting orders and in many cases do not believe or minimise children's experiences of violence and abuse and subsequent fears. Instead the Lawyer for Child has often valued the right of contact of the abuser with the child over that child's safety.

The majority of mothers told Backbone that the Lawyer for Child met with their children, often at the Lawyer's office rather than a child friendly environment, but the majority of children were denied a support person during that interview and the children's views were ultimately not presented accurately in the court reports written. Some mothers told us the Lawyer for Child met their child at the abuser's home; others came unannounced to the child's school. Some never met the children at all or there was a long interval between the meeting and the Court fixture (1 -2 years). Many mothers told us that the Lawyer for Child did not respond appropriately to the violence and abuse and children were made less safe due to their intervention.

When Backbone embarked on analysing all the material we have about Lawyer for Child we wanted to answer four questions. This is what we found:



In this section of the report we have explained how the New Zealand legislation dictating the Lawyer for Child role is closely aligned to four significant children's international rights.[91] We used those four rights as the main four sub-section headings above and assigned each a rating of how well we believe Lawyer for Child is meeting each of these four rights and the relevant legislation:

[91] Refer to the beginning of each sub-section to see the details of how the legislation aligns with each right

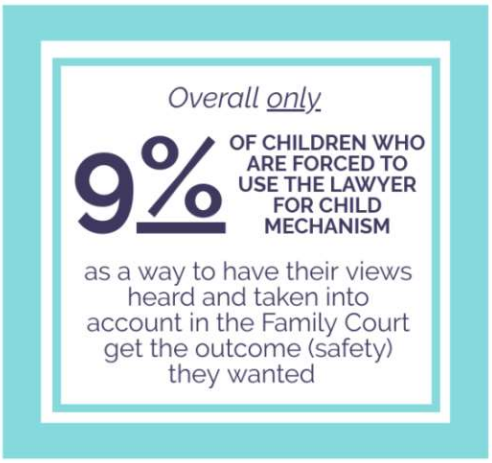
Children's Rights	Backbone's rating	Examples
Right to be heard	2/10	• Did not meet with the child in 11% of cases • Only 21% of children felt heard and understood by their lawyer • 37% of cases Lawyer for Child said children too young to know what was best for them • 14% of cases Lawyer for Child prevented children from speaking and/or asking questions
Right to have views taken into account	1/10	• The Family Court is complying with children's rights to be heard and to have their views taken into account in only 9% of cases with a background of violence and abuse • 27% of cases Lawyer for child accurately told court what the child wanted • 39% said Lawyer for Child's report contained factual errors • 27% said Lawyer for Child lied about what the children said
Right to be protected from all forms of violence	1/10	• Lawyer for Child prevented by Best Practice Guidelines from assessing children's safety • Risk and safety assessments undertaken for children in only 2% of Family Court cases where there has been violence and abuse • Only 9% of Lawyers for Child focused on making child safer • 70% said Lawyer for Child responded Not at all Well or Not very Well to children's safety • 46% of mothers said the report written by Lawyer for Child in their case led to unsafe parenting orders • 44% minimized the children's experiences of abuse • 32% stated abuser's right to contact was more important than what the child wanted
Right to have best interests and welfare as primary concern	2/10	• In 59% of cases children were denied a support person by Lawyer for Child for their interview • Only 8% of children had their rights explained to them • 50% mothers said their children were traumatised by proceedings • 30% of Maori mothers who had a Lawyer for Child said their children experienced racism and/or failure to comprehend the children's cultural beliefs and practices • Lawyer for Child explained outcome of Court proceedings to the child in only 18% of cases • Ministry of Justice and Law Society do not have consistent views on confidentiality between child and Lawyer for Child

Because 95% of respondents said a Lawyer for Child had been appointed to represent their children, it is safe to assume that the failures reported in Section Two and summarised in the table above are widespread among Lawyers for Child– there are not just a few rotten fruit in the barrel.

Backbone has concluded that while the Lawyer for Child role in theory looks potentially very responsive in terms of child inclusiveness and participation, the practice is far from that. There appears to be a wide gap between the positive intent for the role, how the service is being operationalised and the actual outcome for children who have experienced violence and abuse and who have a Lawyer for Child

appointed (see Figure 5). We are deeply concerned that the Lawyer for Child appointments and reports are often resulting in children being placed in greater danger rather than less when there is a history of violence and abuse.

Overall only 9% of children who are forced to use the Lawyer for Child mechanism as a way to have their views heard and taken into account in the Family Court get the outcome (safety) they wanted. Surely this calls into question then the appropriateness of Lawyer for Child in cases where there is violence and abuse.



There is obviously a huge training need for these professionals about the dynamics and impacts of domestic violence for women and children considering close to 60% of mothers told us Lawyer for child did not respond appropriately to the violence and abuse and 54% of mothers said they did not make their child/ren any safer. In our first survey on the Family Court we asked women to tell us based on their experience with Lawyer for Child, how important is it for them to have training on what women and children who experience violence and/or abuse need to be safe. The overwhelming majority of women felt it was *extremely important* that Lawyer for Child receive this kind of training (400 women selected this option). Backbone hopes that the New Zealand Law Society will take note of this finding and ensure this training need is addressed urgently.

Backbone is deeply concerned that Lawyer for Child practitioners are contributing to the systems abuse of children who have already suffered trauma from directly or indirectly experiencing violence and abuse. While the Best Practice Guidelines clearly state that, 'the lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse', mothers are telling us Lawyers for Child are directly contributing to the systems abuse of children.

Section Three – Problems with the model

Some of the failures we have articulated in Section Two and summarised in the overall findings section above are clearly due to the failure of individual Lawyers for Child to do their job as the legislation and operational guidelines stipulate. Some may be due to confusion between different pieces of legislation and others to the fact that the way the legislation and international child's rights have been operationalised into the Practice Note and the Best Practice Guidelines are not in line with the international evidence for best practice for counsel for child.

In Section Three we detail what we believe are problems and failings in the model, the structure and the operational practice of the Lawyer for Child service as a whole.

These all contribute directly to the failure of individual Lawyers for Child and how they undertake the role. The failings of individuals and problems with the model are inextricably linked - it is impossible to attribute responsibility for the failings at the feet of individuals when they are not working under a robust and effective system and vice versa.

The legislation is not being implemented as intended

The types of failures we have reported here do not appear to be about shortfalls in the legislation itself but rather a failure to interpret the legislation as Parliament intended. Backbone agrees with Professor Mark Henaghan from Otago University when he says (as reported in Section One) that New Zealand is a world leader in terms of its legislation in this area, but the Family Court is required to listen to children and take their views into account – and it isn't. Indications are that not only are a significant proportion of Lawyers for Child failing to comply with the legislation, judges are clearly failing to ensure that

Lawyers for Child meet the child and obtain their views and convey those views to the Court and that those views are then taken into account.

It is not clear to Backbone whether it is the Ministry of Justice, as funder, the Law Society, as the regulator, or the judge as the head of each case before the Family Court, that is responsible for ensuring that all Lawyers for Child comply with the legislation. The model is not clear.

What is clear is that it is Government's responsibility to decide whether the legislation needs to be strengthened or other mechanisms put in place to make sure the service is being operationalised as Parliament intended. For example, we have shown in this report that in cases where there has been violence and abuse there is a tension between the principles in the Care of Children Act - children **should** have a relationship with both parents but children **must** be protected from further abuse. Our belief is that those working in the Family Court are honoring the former (section 5 (e)) over the latter (section 5 (a)) which seems contrary to the particular wording of each section (should versus must). However, the result is hundreds of children being forced against their wishes into unsafe care and contact with the abusive parent.

Since Parliament removed the 'Bristol clauses' from the Act in the 2014 reforms, the risk to children has frequently not been considered or not given priority. Instead the implementation of the legislation is see-sawing - most often towards the rights of abusive fathers rather than the rights of children to have their views taken into account and be safe from further abuse. There is an urgent need for Parliament to reconsider whether this is what it intended for children in violence and abuse cases when the 'Bristol clauses' were removed.

Professional boundaries have become blurred in the Family Court

The lines between independence and accountability in the Family Court appear to be blurred. The Westminster system of Government operating in New Zealand requires that judges be completely independent from Government and from each other. Court staff are also independent when exercising their statutory powers as registrars or deputy registrars of the court.[92]

What is unclear to Backbone is whether Lawyer for Child and other professionals engaged by the judge are classified in the same way as 'court staff' and are therefore also independent and answerable only to the judge or are they answerable to another person or agency?[93]

What is clear is that the lawyers acting for the applicant and respondent in the Family Court are taking instructions from them respectively as their clients and are answerable to the Law Society for their professional standards and performance. If a client makes a complaint about their lawyer, it is investigated by the Law Society.

---

[92] https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/representing-yourself-civil-high-court/new-zealands-constitutional/

[93] In the Australian Family Court, Independent Children's Lawyer (ICL) are appointed by the respective state or territory Legal Aid Commission – not by the judge. Refer paragraph 8.54 of 'A Better Family Law System to Protect Those Affected by Family Violence. Available at http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawsystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf

However, the lines are not as clear when we look at Lawyer for Child, psychologist and social worker – all of whom are frequently engaged to have a role in individual Family Court cases.[94] As will be discussed in the section below everything points to the Lawyers for Child seeing the judge as their client – not the child. The judge is the person who has engaged them and who they take their instructions from. If a child (or a parent) makes a complaint about the Lawyer for Child, that complaint doesn't go to their regulatory body (the Law Society), it goes to the judge. The same thing happens with a psychologist or social worker engaged by the judge to have input on any particular case.[95,96] This suggests that all these professionals are in effect at the behest of the judge. Backbone argues that the powerful hierarchy built into this relationship between the judiciary and other professionals prevents a robust and independent operation of services that could ensure safe, independent and effective practice of those professionals.

This leaves us wondering what happens when a judge instructs the Lawyer for Child, or one of the other professionals, to do or not do something that contravenes their own professional standards, or their constitutional and/or legal responsibilities – does the individual follow the instructions of the judge, challenge the judge and refuse to follow those instructions, or seek advice from their employer or their professional body? We are particularly concerned at the limitations that could be imposed on professionals when accepting a judge's brief in a particular case. The brief sets our clearly the parameters of what the professional should focus on (or not). In our view the brief has the potential to compromise the professional's expertise or ethical obligations to the child if the brief is not informed by a robust understanding and adherence to both the rights of the child (as intended by the legislation) and to the complex dynamics of domestic and sexual violence.

Backbone believes that at the heart of the failure of the Lawyer for Child model to respond safely to children when there has been violence and abuse is that they are solely accountable to the Family Court judge and that judge is accountable to no one. It is this autonomous power of individual judges, and it seems the various professionals engaged by them, coupled with the closed and secretive nature of the Family Court which makes it impossible to review, report, challenge or change the unsafe practices unfolding in the Family Court.

While we make recommendations in the following section to improve the Lawyer for Child role we also believe that any changes to the role would largely be ineffectual unless the closed and unaccountable decision making in the court is challenged and reformed.

It is unclear who the Lawyer for Child's client is

While the legislation states that the child is to be represented by a lawyer in proceedings, that lawyer is appointed, briefed and guided by the judge, not the child. The child is not considered a party to proceedings and therefore their voice does not have equal weight in the proceedings. As we have

[94] As defined in Care of Children Act.
[95] Refer findings of Backbone's 'Seen and not Heard' report available at https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf
[96] The same may also be the case when the judge appoints a 'counsel to assist'

shown above the contractual and hierarchical relationship between Lawyer for Child and the judiciary seriously compromises the child's ability to be fairly and safely represented in proceedings.

The legislation says Lawyer for Child must meet with the child and give them reasonable opportunities to express their views and then must ensure those views are communicated to the court. However, Backbone sees a potential conflict in that what the Lawyer for Child talks to the child about and therefore reports back to court is determined by the judge, not the child. For example, if the judge's brief says the Lawyer for Child is only to look into how much time the child wants to spend with their father, a conflict arises if the child is adamant they don't want to see their father at all or only want to see him under formal supervision. Or as a further example, if the child wants to explain to their lawyer about the violence and abuse they have experienced but the judge has excluded this line of investigation from the brief. The Lawyer for Child then becomes one of the mediators through which the child's views are filtered and they therefore influence the outcome for the child to a large extent.

The Lawyer for Child is supposed to represent the child's best interests, welfare and wishes, but mothers have repeatedly told us that the Lawyer for Child is acting as an agent for the judge – not for the children. We have shown throughout this report that there is a disconnect between what mothers and children are telling Lawyer for Child and what Lawyers for Child are recommending in their reports. We assume this is because Lawyer for Child is only expected to report on what the judge has requested NOT what the child's views are even though this practice contradicts legislation and children's rights.

Backbone questions whether a lawyer is the right person to advocate for the child in Family Court proceedings – to work alongside the child to ensure their voice is heard in the court, to ascertain what the child really thinks and to ensure those views are heard by the court and taken into account. Each child definitely needs someone helping them who is independent of both parents – but is a lawyer the right person to do that? Backbone is concerned that Lawyers for Child are not independent in their role (from the judge or the parties) and this therefore compromises their ability to adequately represent children in court. In future reports we will also consider whether the court appointed psychologist and/or Oranga Tamariki social worker is the right person either.

Best Practice Guidelines are not robust and do not reflect international evidence

Throughout this report we have identified a number of concerning process and procedural problems inherent in the Lawyer for Child model. We have listed some of these briefly below and in the following section make a number of recommendations that Backbone believes will go a long way to improving and rectifying these issues.

The Best Practice Guidelines are not fully aligned with government policy. As discussed in Section One 'confidentiality' the Ministry of Justice is saying one thing and the Best Practice Guidelines are saying something quite different regarding the confidentiality of what the child tells the Lawyer for Child.

Currently there is no formal and consistent use of evidence-based practice. The Best Practice Guidelines do not reflect international evidence for best practice of counsel for child. For example:

- Lawyer for Child is unable to undertake a safety assessment.

- There is mostly no follow up on the child's safety after care and contact orders are made.
- There is no way for Lawyer for Child reports to be checked for errors and corrected.
- Children being denied a support person.

The Best Practice Guidelines contain insufficient operational detail to ensure that children who have been exposed to violence and abuse are kept safe. This results in variable, inappropriate and unsafe practice. For example:

- Children being interviewed when they are with their abusive parent and are too afraid to say what they think because they know whatever they say will be reported to the abuser.
- Meeting child with the abusive parent present or when the child will be going home to the abuser's house.

Training is inadequate

All a lawyer needs in order to be appointed as Lawyer for Child is five years practicing as a Family Court lawyer and attendance at a two-day training workshop. Even though many, if not the majority, of the children these lawyers see are suffering the effects of trauma from their repeated exposure to violence and abuse. Anyone working on the front line of domestic violence and child abuse would say there is no way someone without a foundation qualification or many years' experience in working with troubled and traumatised children and domestic violence victims can learn the necessary skills to work safely with these children in two days. Many of the findings in this report point to the lack of adequate training for the role. In addition, it is clear that training in cultural competency is needed to address the experience of racism and a lack of understanding and responsiveness to cultural beliefs and practices particularly for Māori children.

There is no independent oversight, quality monitoring or continuous improvement

The Lawyer for Child service is costing the New Zealand taxpayer ($32 mill pa) and yet there appears to be little or no accountability for how effectively this money is spent, whether it is being delivered in accordance with the legislation and UNCROC and what the Government of the day has contracted these lawyers to provide.

There is virtually no performance and outcome monitoring, no system evaluation, no quality assurance or service delivery audits undertaken in the Family Court.[97] For some years we have advocated for the establishment of quality management and continuous improvement mechanisms for the entire system that responds to violence and abuse – including the Family Court.[98] Had these checks and balances been in place, the failures we have discovered in the Lawyer for Child service would have been identified and changes made, many years ago.

---

[97] The New Zealand health system is far more advanced in this regard. For example, the Health Quality and Safety Commission conducts a range of programmes designed to improve health and disability support services. Refer https://www.govt.nz/organisations/health-quality-and-safety-commission-new-zealand/

[98] http://theimpactcollective.co.nz/thewayforward_210714.pdf https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3c08eae2c483c2490cbfca/1513883894520/Briefing+to+incoming+government+2017.pdf

The Law Society is wearing too many hats, and this is impinging on safe practice. Because there is no independent quality management and continuous improvement mechanism, the Law Society is managing all parts of the Lawyer for Child service. In a panel interview about harassment and bullying in the legal profession in New Zealand on 24 March 2018 Lisa Owen, host of Newshub's show The Nation, referred to this as 'The Fox is Guarding the Hen House'. [99] **T**he Law Society is responsible for:

- representing the interests of Lawyers for Child who choose to be members of the Law Society[100,101]
- issuing practicing certificates including those of the lawyers operating as Lawyer for Child
- nominating two of the four members on each panel that selects lawyers (its members) to be on the Family Court's register of Lawyer for Child[102]
- making the regulations and producing the Best Practice Guidelines that stipulate how the role will be operationalised
- conducting the training for Lawyers for Child according to their Best Practice Guidelines
- monitoring the practice of law in New Zealand including Lawyer for Child
- operating the Lawyers Complaints Service.

In addition, we have found no evidence to suggest that the Law Society monitors Lawyer for Child for any conflict of interest that might be present in particular cases they are assigned to. In contrast, most private businesses and NGOs would require their directors, management and staff to declare conflicts of interest formally and have them duly noted. We found no evidence that the court registrar keeps a register of conflicts of interest when Lawyer for Child has any connection (directly or indirectly) with any party to the case to which they have been assigned.

The complaints model doesn't work

Backbone's report, *Don't Tell Me Your Problems* explains the inadequacies of the complaints system.[103] We have repeated the following text from that report as it articulates what the problems are with the Lawyer for Child complaints process.

Although the Lawyer for Child should be the independent agent acting on behalf of children, the way the Family Court system currently operates does not allow this to happen and many children have not felt their views are being adequately represented to the court. It would therefore seem appropriate for a child to be able to complain about their lawyer - Lawyer for Child. However, having a state appointed

[99] http://www.newshub.co.nz/home/shows/2018/03/the-full-interview-our-panel-talks-widespread-harassment-in-the-legal-profession.html

[100] Over 97% of New Zealand lawyers are members of Law Society

[101] https://www.lawsociety.org.nz/practice-resources/new-zealand-law-society-guide-for-new-lawyers/the-new-zealand-law-society

[102] As stated in Practice Note point 9.4 https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf 'This panel will consist of a Caseflow Manager or a Family Court Co-ordinator as chair, two nominees from the Family Law Section of the New Zealand Law Society, and a Family Court Judge nominated by the Regional Administrative Family Court Judge (Administrative Judge.

[103] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf

lawyer, precludes children from taking any of their own legal action that is not (effectively) sanctioned by the state.

In the case of Lawyer for Child (many women have told Backbone Lawyer for Child has undermined their and their children's safety) the lawyer is selected and given their brief by the presiding judge. The overall circulatory mechanism is once again at play in complaints regarding Lawyer for Child as complaints go not to the Law Society but to the presiding judge who appointed the Lawyer for Child. In addition, the complaint is shared with all parties and the Lawyer for Child and thus in all subsequent proceedings the complaint hangs over the woman and seems to affect her treatment from related parties thereafter.

As noted above the Lawyer for Child is not an independent representative of the child but rather is an agent for the judge. Therefore, children do not have a mechanism for independent complaint via the Lawyer for Child.

Backbone can find no information regarding whether anyone collates and reports about the total number of complaints made about Lawyer for Child and the outcome of those complaints. We asked the Law Society if a complaint is made about a Lawyer for Child to the Registrar at the appropriate Court does the Registrar or the judge have to notify the Law Society of that complaint and its outcome? We also asked for the number of complaints received by the Law Society concerning Lawyer for Child for the year 2016. We received this in response:

> There is no obligation on the Registrar to notify the Lawyers Complaints Service if it receives a complaint. If a complaint is investigated by the Court and the outcome is serious the matter may be referred at that stage to the Lawyers Complaints Service. In relation to your inquiry about numbers of complaints against Lawyer for Child that is not information that is published in our annual report.[104]

We concluded in this report [the *Don't Tell Me Your Problems* report] that there is no authority responsible for overseeing the safety and rights of children who are subject to Family Court proceedings or an appropriate complaints body for children. Complaints made to the Children's Commissioner exclude those children involved in Family Court proceedings and the new agency VOYCE[105] is only for children in state care. [106]

[104] Communication with Law Society dated 30 August 2017

[105] Voice of the Young and Care Experienced – Whakarongo Mai. In 2017 Voyce received initial government funding of $1.2 million to help set-up the new service, with a further $6.9 million to be contributed by the government through to June 2019, to help build its capability. See https://www.beehive.govt.nz/release/minister-welcomes-voyce-%E2%80%93-whakarongo-mai

[106] The Health and Disability Commissioner model is model worthy of consideration for the Justice system. The commissioner is responsible for promoting and protecting the rights of consumers. This includes resolving complaints in a fair, timely and effective way.

Section Four - Recommendations

It has been fifteen years since the Law Commission reported critically on the Lawyer for Child role and there has been no formal evaluation or audit of the service and no improvements made to it in that time that have effectively dealt with the problems identified. Backbone thinks that a service overhaul is long overdue. There is no excuse to continue to do nothing. Ultimately, we believe that responsibility for improvement and action lies at the feet of the Government. The New Zealand Government is responsible for the funding of the Lawyer for Child service. We have shown throughout this report that the service is failing children who have experienced violence and abuse. We therefore believe that if the Government decides to continue to fund the Lawyer for Child model then government must firstly decide if the relevant legislation needs strengthening and clarification to ensure that children's' rights are being properly upheld in the Family Court.

Backbone wrote a Briefing to the Incoming Government in November 2017.[107] Many of the recommendations we made in that report also directly apply to this report. We urge readers to refer to that briefing and to Backbone's earlier reports on the Family Court[108] when considering the recommendations made below.

As we explained in our Briefing to the Incoming Government, Backbone would welcome the opportunity to work with government on designing and implementing changes to the Family Court system to ensure the rights of children are upheld and that they are made safer as a result of their involvement with the Family Court.

Urgently establish a Royal Commission of Inquiry

Backbone remains firmly of the view that the problems and dangerous practices happening in the Family Court (including the Lawyer for Child role) in cases where there has been violence and abuse are of such grave concern that an in-depth inquiry is required to fully and independently investigate the serious failings of the Family Court and to determine what changes need to be made. The required scope of the inquiry coupled with the need to ensure the separation of powers between the judiciary and Parliament means this could only be conducted as a Public Inquiry or a Royal Commission.[109]

> There is now an extensive amount of evidence to suggest there are serious systemic issues occurring in the Family Court's treatment of cases where there has been violence and abuse. These are causing serious long-term harm to women and children. Family Court proceedings and care and contact orders are causing damage to women and children in the same way as violence and abuse does and therefore creating a double whammy effect on their health.
>
> Parliament has a duty of care to these women and children and to the New Zealand public to urgently and comprehensively investigate the harm being done. The only way to determine conclusively whether the failures in the Family Court are accurate and systemic is to conduct an

[107] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3c08eae2c483c2490cbfca/1513883894520/Briefing+to+incoming+government+2017.pdf

[108] Available at https://www.backbone.org.nz/reports/

[109] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a94cc1a9140b78a0a3a5061/1519701025135/Submission+to+Justice+Select+Committee+January+2018.pdf

in-depth formal inquiry into the way the New Zealand Family Court responds to cases of violence and abuse. This paper has shown that such an inquiry needs to be conducted as a Royal Commission and therefore recommending to the Governor-General that a Royal Commission be urgently established is the only responsible step Parliament can take.

Introduce independent child advocates, risk assessment, trauma counselling and specialist legal services

We have established that Lawyers for Child cost the New Zealand taxpayer over $32 million annually and we have established in this report that the taxpayer is not getting value for money – that the model is failing to deliver as intended. We therefore believe this money could be more efficiently spent on a different model – one that can ensure children's rights are met when they are in the Family Court and that improves children's safety.

As an urgent measure to ensure more children are not placed in greater danger by the Family Court, Backbone recommends that a national network of independent children's advocates be established to work alongside children who are involved in Family Court to ensure their voices are heard by the judge, Lawyer for Child, psychologist, social worker and any others involved in the case. These advocates must have specialist knowledge of domestic and sexual violence and its impact on children and they must be completely independent of the Family Court i.e. not appointed by, or answerable to, judges, the Registrar of the court, and any other 'specialists' appointed to have input on an individual case.

Risk and safety assessments to be done in all cases of violence and abuse

Backbone believes that it is critical that risk and safety assessments are a routine practice in Family Court when there are allegations of violence and abuse (as explained in evidence-based practice examples). In these cases, the independent child advocate should complete a specialist Child Risk Assessment to determine the potential risk the alleged abuser poses to the child/ren before any Parenting Orders are considered. To mitigate against the current conflict of roles and relationships we have identified in the 'Problems with the Model' section above, we believe that the risk assessment must be independent of any of the current 'specialists' appointed by the court.[110] There are risk assessment examples available which are being implemented in other countries which New Zealand could emulate such as described in recommendations 2 and 3 of the Australian Parliamentary Inquiry.[111]

Trauma counselling for abused children

Fully funded trauma counselling services should be available to all children who have directly or indirectly experienced violence and abuse, in a similar way that sexual abuse counselling is funded via ACC. These counsellors should have specialist knowledge of domestic and sexual violence and its impact on children. Access to such counselling should not be able to be prevented under orders of the Family

[110] Lawyer for Child, Psychologist or social worker

[111] http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawsystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf

Court[112] and should not be a guardianship issue - either parent should be able to refer their child/ren to this counselling.[113]

Specialist lawyers to support victims of violence and abuse

Protective mothers need support in the Family Court. As we have shown throughout this report the current Lawyer for Child model is not functioning to keep children safe. In addition, we have heard from hundreds of women that their own legal representation is often unable or willing to represent them in a way that keeps them and therefore their children safe from further abuse.[114] However, there are examples of legal services which attempt to provide a specialist approach to cases where there is violence and abuse. In New South Wales, Australia, a new service has been set up to help keep parents and children safer.[115] Media coverage of the launch described the service in the following way:

> The service appoints duty lawyers who have an understanding of trauma to some of the busiest courts that deal with family law matters in the state. The lawyers are on hand to help people navigate family law disputes and deal with their associated legal needs. Legal Aid NSW received Commonwealth funding to establish the FASS under the National Plan to Reduce Violence Against Women and Their Children.[116]

Ensure all practice is evidence based

Backbone is adamant that New Zealand needs an integrated response system for responding to violence and abuse against women and children.[117] The Family Court is one of a range of key services that need to work together in cases where there has been violence and abuse to make women and children safer and hold abusers to account. In order to make the system work in the safest possible way it must be informed by evidence-based practice that has shown to be effective in working with violence and abuse cases. Backbone believes the legislation, policy and practice relating to the Family Court, particularly in all cases where domestic violence is alleged, must be informed by evidence of the safest and most effective response. Evidence needs to be drawn from multiple sources, including (but not limited to), academic research, developments occurring in other countries that are shown to be effective, what service users tell us about what works and doesn't work, effective and potentially transferrable practice models being used elsewhere in the public sector, evaluations of local pilot projects, death reviews and more.

Evidence-based practice is quite a different concept than best practice that is based on the views of a select group of practitioners as in the case of the Lawyer for Child Best Practice Guidelines, which were

---

[112] 20% of women who responded to Backbone's Family Court survey said there were decisions, orders and directions made by the Family Court that prohibited them accessing therapeutic help/counselling for their child

[113] Currently many abusive parents refuse to allow their children to go for counselling

[114] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf

[115] https://www.legalaid.nsw.gov.au/what-we-do/domestic-violence/family-advocacy-and-support-service-fass

[116] https://www.lawyersweekly.com.au/wig-chamber/21133-family-lawyers-welcome-new-measures?utm_source=ADLS+Bulletin&utm_campaign=2c11d9855d-EMAIL_CAMPAIGN_2017_03_16&utm_medium=email&utm_term=0_8c808e4262-2c11d9855d-90773773&mc_cid=2c11d9855d&mc_eid=b6d354f7e2

[117] http://theimpactcollective.co.nz/thewayforward_210714.pdf

written and ratified by the New Zealand Law Society Board.[118] If the Lawyer for Child role is to continue it is imperative that Ministry of Justice and the New Zealand judiciary urgently adopt evidence-based practice for all professionals working on Family Court cases where there has been or currently is violence and abuse. International best practice is clear that cases with a background of violence and abuse need to be seen very differently from cases where there has not been violence and abuse in two key respects:

1. The manner in which court proceedings unfold.
2. The dynamics and situations of risk that need to be considered in order to respond safely to women and children who are victims of violence and abuse.

A great example of an international evidence-based service that New Zealand could use to guide practice in the Family Court is a comprehensive best practice guide for working in family law cases where there is violence and abuse produced by the United Sates Battered Women Project in 2014. The guide is intended for use in all family law cases and to be used by *all* involved (including judges, lawyers and mediators). The purpose of the guidelines is to ensure Family Court responses enhance women and children's safety.[119]

> These practice guides are designed to improve decision-making by family court professionals involved in domestic abuse-related child custody matters. They provide guidance on how to identify, understand and account for the nature, context and implications of abuse at every stage of the family court proceeding by any person who is involved in the case. They promote informed decision-making that focuses upon the lived experiences of family court-involved parents and children.

Comprehensive, ongoing and mandatory training for all Lawyers for Child

Backbone recommends that if Lawyer for Child role is to continue, then immediate comprehensive training be provided to all currently appointed and any subsequently appointed Lawyers for Child. The training must be delivered by a suitably competent trainer and include the impacts and dynamics of domestic violence on children with a specific focus on trauma and the ways abusers use children and the Family Court as a tool of abuse following separation.

We also recommend that cultural competency be included in training modules to address the incidences of racism reported by women and children in the Family Court.

We also recommend that appointment criteria include Lawyers for Child having up to date training records showing competency with regard to violence and abuse and children's experiences of trauma and a system for ongoing audit of Lawyer for Child competence and performance.

---

[118] A modified version of the Best Practice Guidelines was released and signed off by Chair of the Family Law Section as of March 2108.

[119] http://www.bwjp.org/resource-center/resource-results/practice-guides-for-family-court-decision-making-in-domestic-abuse-related-child-custody-matters.html

Establish an independent body accountable for all 'specialists' working with children in the Family Court

One of the major problems with the Lawyer for Child model identified in this report is the blurred lines of responsibility and accountability between the judge and the various 'specialists' the judge wants to engage to contribute to a particular case. Under New Zealand's Westminster system, the role of the judiciary is to interpret and apply the law - judges (and court registrars/deputy registrars) must be free from influence from every person. Backbone assumes that the Westminster system also requires that other parties involved in Family Court cases must also be free from influence from the judge(s).

It is important that in cases where violence and abuse are alleged, the Family Court is supported by appropriate experts. But it is essential that these experts are independent of the judge and of the respective parties **and** that all parties can be assured that these individuals are appropriately trained and audited and are providing independent high-quality expertise.

When the judge in a Family Court case decides that a Lawyer for Child should be appointed (or a specialist engaged to write a report for the case), Backbone believes that the process of appointing/engaging, briefing, managing and considering complaints about these 'experts' needs to be transparent and independent from the judiciary. Until this happens, the professional, constitutional and legislative boundaries will be blurred and the openness, transparency and independence of the Family Court compromised. In the Australian Family Court, Independent Children's Lawyers (ICL) are not appointed by the Court but rather by the respective state or territory Legal Aid Commission.[120]

Backbone recommends that responsibility for appointing/engaging, briefing, quality managing and considering complaints regarding Lawyer for Child (and other specialists) the judge requests, be urgently transferred to an independent body (either existing or established specifically for this purpose). This agency would have staff fully trained in trauma and the dynamics of family and sexual violence. It would hold the register of those eligible for these roles, would receive the judge's brief, identify (based on background information about the case and with input) and contract with the most appropriate Lawyer for Child (or other specialist), and receive and review their report prior to submitting it to the Court. The agency would be independent from both the Court/judiciary and the Law Society.

Establish a quality management and continuous improvement mechanism

One of the eight overall recommendations contained in Backbone's Briefing to the Incoming Government[121] was to establish a continuous improvement framework. The overall objectives of a continuous improvement framework would be:

- To ensure all parts of the Integrated System were operating to best practice levels and achieving optimal immediate and, intermediate outcomes

[120] Refer paragraph 8.54 of 'A Better Family Law System to Protect Those Affected by Family Violence. Available at http://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024109/toc_pdf/Abetterfamilylawsystemtosupportandprotectthoseaffectedbyfamilyviolence.pdf;fileType=application%2Fpdf

[121] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3c08eae2c483c2490cbfca/1513883894520/Briefing+to+incoming+government+2017.pdf

- To collect, collate and disseminate evidence so that learning can occur, and ongoing improvements made over time

Backbone recommends that a quality management and continuous improvement mechanism be established. Given the extensive problems identified by Backbone and others this could begin with a focus on the Family Court, including Lawyer for Child and other 'specialists', and expanded over time to encompass all parts of the integrated system.

Develop a new model for children involved in the Family Court

Throughout this report and in all of Backbone's reports to date,[122] we have identified areas where the New Zealand Family Court is failing to work safely and effectively with children. In the first report in our series on children in the New Zealand Family Court, 'Seen and not Heard: Force',[123] our findings included:

- Backbone is firmly of the view that the New Zealand Family Court is acting contrary to the legislation which should guide the way we respond to children.
- What we discovered is that children fare very poorly when the Family Court is involved in their lives. These children are suffering at the hands of a largely tax payer funded system.
- These children are being ordered into dangerous situations by the very agencies and institutions that have been set up and funded by the state to protect them.

We have now examined those issues in light of the Lawyer for Child model that is operating within the Family Court. In Section Three we summarised a range of problems with the model and in this section have made a number of recommendations to address those problems.

Given the extensive array of problems we have identified relating to children who have experienced violence and abuse and who are involved in the Family Court, our overarching recommendation is that a new model be urgently developed for these children. Backbone is strongly of the view that cases where violence and abuse are alleged should be processed through the Family Court on a pathway quite separate to cases where there has been no violence and abuse. One of the recommendations contained in our Briefing to the Incoming Government[124] was that measures be introduced to screen all cases in the Family Court for possible domestic and sexual violence and that there be a separate pathway, with a specialist response, for these cases.

This dedicated pathway in the Family Court must be seen as part of, and integrated with, one overall response system for domestic and sexual violence – where all agencies and individuals who are either directly or indirectly involved at all levels operate as one system. Other countries are already taking steps to adopt an integrated system approach.

---

[122] https://www.backbone.org.nz/reports/

[123] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf

[124] https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3c08eae2c483c2490cbfca/1513883894520/Briefing+to+incoming+government+2017.pdf

Any new model for children on this violence and abuse pathway would require changes to the legislation,[125] and new policy, practice and quality assurance and complaints arrangements. The new model will need to address how the lines of independence, responsibility and accountability in the model will ensure that constitutional, legislative and professional boundaries are not compromised. And most importantly the new model will need to ensure that all parts of the model uphold children's rights.

[125] Backbone has noted a number of areas in this report and in our earlier reports where the legislation needs to be amended.

Appendix One - About the authors

Ruth Herbert, Co Founder, The Backbone Collective

Ruth is well known for her work in trying to improve New Zealand's system response to violence against women and children. She has given many presentations and media interviews and researched and written extensively about intimate partner violence, child abuse and neglect and sexual violence.

Ruth has worked in a wide variety of paid and unpaid roles – all focused on improving the domestic and sexual violence system response. This has ranged from being the Director of Family Violence at the Ministry of Social Development and the Executive Director of the Glenn Inquiry to the victim/survivor representative on the independent Ministerial Review Panel assessing ACC's sensitive claims clinical pathway. In 2014 Ruth and Deborah proposed a new model that would build on and strengthen the existing system in New Zealand and established the Backbone Collective to advocate for such change. Ruth has a Master of Public Policy (dist.) and was awarded the Victoria University Holmes Prize in Public Policy in 2008.

Deborah Mackenzie, Co-Founder, The Backbone Collective

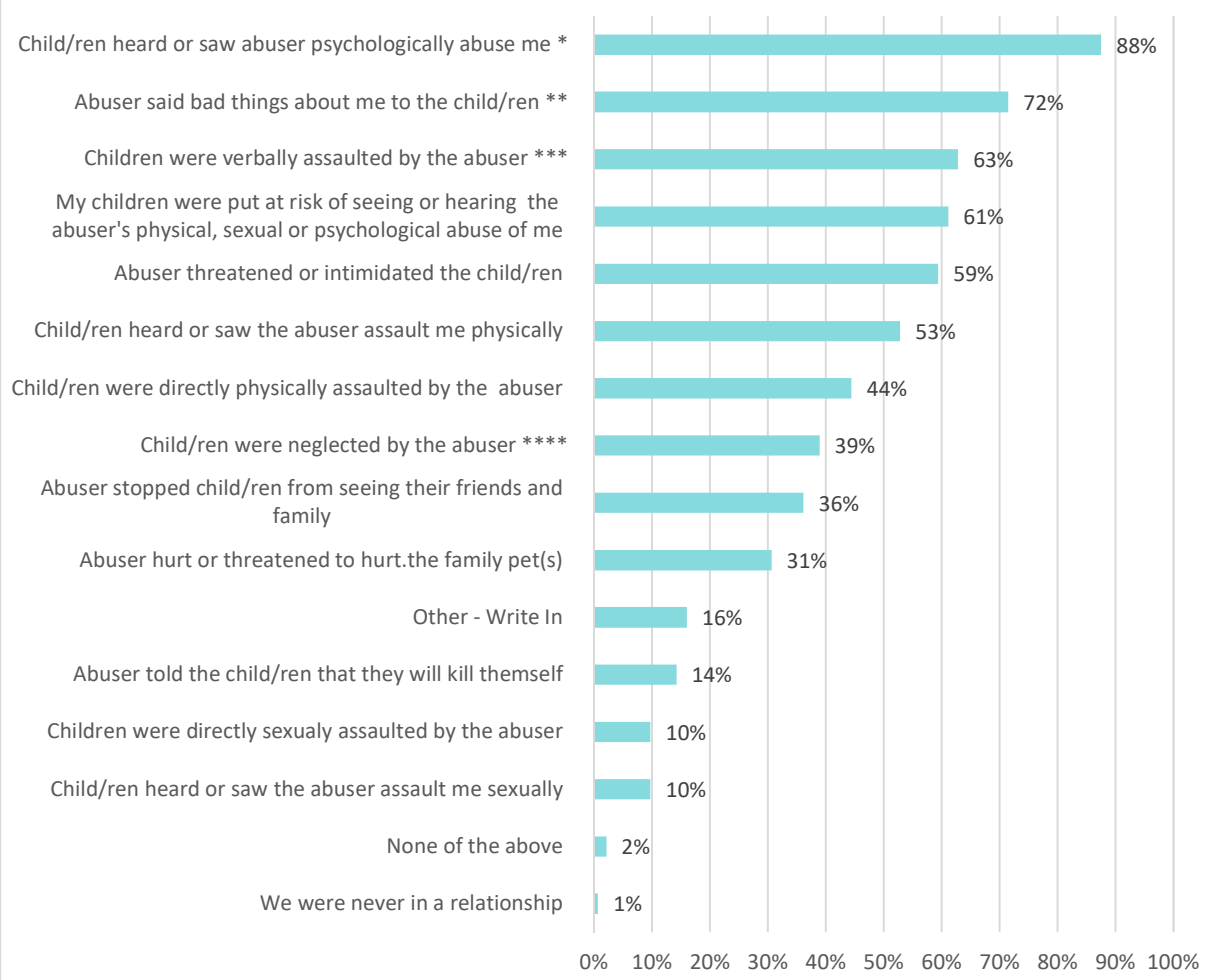
Deborah has worked for many years trying to improve New Zealand's system response to violence against women and children. She has worked in advocate roles and policy positions both in NGOs and within Government (woman's advocate, interagency network coordinator, policy analyst, project manager, and researcher).

Deborah has a special interest in the justice sector response to women survivors including writing in depth reports on specialist domestic violence courts and female offenders. During the last five years she has worked as an independent contractor and managed an NGO. In 2014 Deborah co-wrote The Way Forward with Ruth Herbert which proposed a new model for an integrated response system in New Zealand to respond to violence and abuse. Deborah has significant experience as a trainer, presenter and media commentator. She has a Master of Arts in Education (first class hons).

Appendix Two - Children's experiences of violence and abuse prior to separation and post separation

Taken from Seen and Not Heard: Force report released December 2017

Kinds of violence and/or abuse children exposed to while mother was in a relationship with the abuser (N = 288 mothers)



Notes:

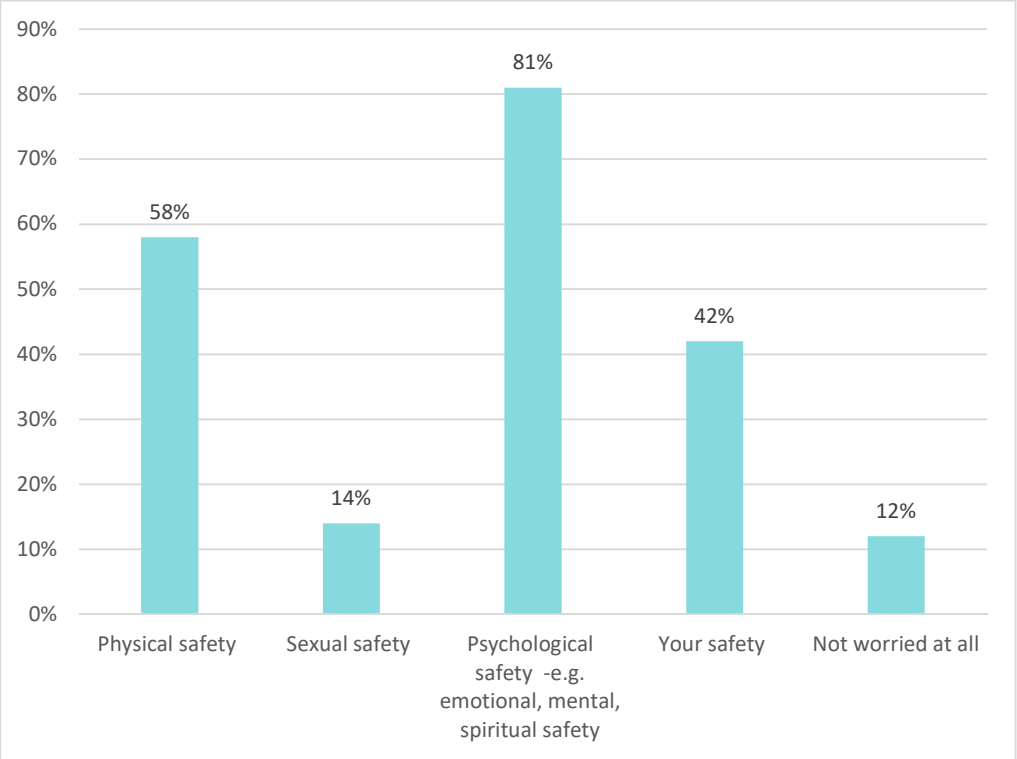
* Verbal abuse, threatening behaviour, breaking things, control that stopped me doing what I wanted to, putting me down etc.

** For example, calling me a bad mother, slut, said I didn't love the children etc.

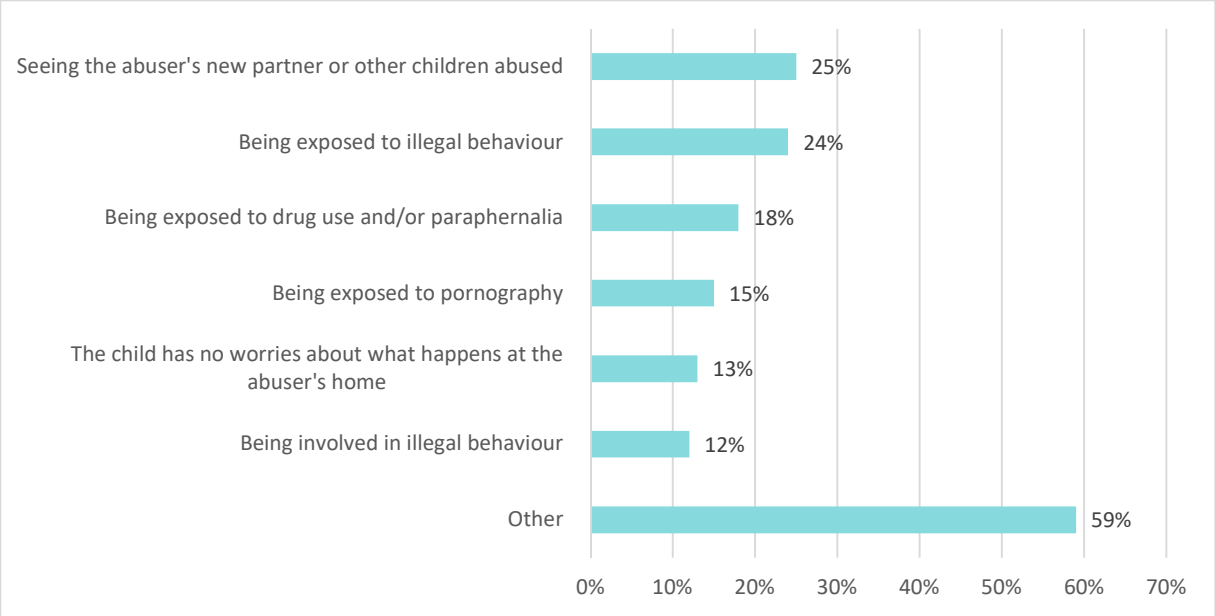
*** Called names, put down, shouted at

**** Denied food, school resources, healthcare

Children's worries while in the abuser's care (N = 402 children)



Things happening at the abuser's home that worry the children (N = 338 children)



The range of things that children worry about are alarming and heartbreaking. These children describe dangerous and traumatic things happening while in the abuser's care and they are very frightened.

Figure 15: What types of things happen at the abuser's house that children worry about

- Mind games
- Being assaulted
- Dad ranting and raving
- Coded messages
- Alcohol abuse
- Rage
- Forces child to watch horror films
- Hurts and kills pets
- Child scared will displease dad
- Driving dangerously
- Told scary graphic stories about mothers dying
- Abused by his new partner
- Neglected
- Left home alone
- Sexual abuse
- Racism
- Sworn at
- Manipulated
- Molested by new partner's children
- Abuser watching child sleep and looks at their body
- Made to wear clothes inside out
- Forced into the water when not safe
- Being strapped
- Abuser threatening to hurt mum
- Not being able to play outside
- Scared to tell abuser problems when in his care
- He makes child feel guilty
- He has multiple partners
- Porn
- Graphic media on show
- Emotional abuse
- No booster seat in the car
- Abuses/assaults the new partner
- Not able to contact mum as given no access to phone or internet
- Parties - child given alcohol
- Child told they are not wanted/loved
- Treated like a slave
- Child is lonely and has nothing to do
- Bullied and picked on
- Locked outside
- Intimidation
- Present while he has sex with new partner
- Not allowed to go home to mum
- Smashing things
- Guns in the house
- Compulsive lying
- Seeing siblings abused
- Forced to sleep in dad's bed or other male family members' beds
- Forced to eat rotten food
- Kept in one room
- Not allowed friends
- Not allowed food
- Shown pictures of naked people
- Abuser getting drunk, not paying attention to them
- Assaulting siblings
- Forced to sign statements
- Being shaken
- Being away from mum
- Being controlled
- Locked in their room
- Being abused by abuser's friends
- Being smacked by other family members
- Scared in general the whole time they are there
- Being told mum will go to jail
- Being put down
- Dad gets angry over little things
- Feeling helpless
- Being dragged around
- Being told things don't happen when they do
- Inappropriate comments and behaviour
- Forced to be violent by abuser

Appendix Three - Wording from the relevant legislation

The Guardianship Act 1968.

Section 23. Welfare of child paramount-(1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child. (2) In any such proceedings the Court shall ascertain the wishes of the child, if the child is able to express them, and shall, subject to subsection (9) of section 19 of this Act, take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.

s30. Solicitor or counsel may be appointed-The Court may appoint a solicitor or counsel to assist it or to represent any child who is the subject of or who is otherwise a party to proceedings under this Act, and where any solicitor or counsel is so appointed his fees and expenses shall be paid by such other party or parties to those proceedings as the Court shall order or, if the Court so decides, shall be paid out of money appropriated for the purpose by Parliament.

Care of Children Act 2004

S6 Child's views

(1)This subsection applies to proceedings involving—

(a)the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or

(b)the administration of property belonging to, or held in trust for, a child; or

(c)the application of the income of property of that kind.

(2)In proceedings to which subsection (1) applies,—

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and

(b) any views the child expresses (either directly or through a representative) must be taken into account.

S7 Appointment of lawyer to represent child in proceedings. A court may appoint, or direct the Registrar of the court to appoint, a lawyer to represent a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act if the court—

(a) has concerns for the safety or well-being of the child; and

(b) considers an appointment necessary.

Family Court Act 1980

9B Role of lawyer appointed to represent child or young person in proceedings

(1)The role of a lawyer who is appointed to represent a child or young person in proceedings is to—

(a) act for the child or young person in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person:

(b) ensure that any views expressed by the child or young person to the lawyer on matters affecting the child or young person and relevant to the proceedings are communicated to the court:

(c) assist the parties to reach agreement on the matters in dispute in the proceedings to the extent to which doing so is in the best interests of the child or young person:

(d) provide advice to the child or young person, at a level commensurate with that child's or young person's level of understanding, about—

(i)any right of appeal against a decision of the court; and

(ii)the merits of pursuing any such appeal:

(e) undertake any other task required by or under any other Act.

(2) To facilitate the role set out in subsection (1)(b), the lawyer must meet with the child or young person and, if it is appropriate to do so, ascertain the child's or young person's views on matters affecting the child or young person relevant to the proceedings.

(3) However, subsection (2) does not apply if, because of exceptional circumstances, a Judge directs that it is inappropriate for the lawyer to meet with the child or young person.

(4) A lawyer appointed to represent a child or young person in proceedings may—

(a) call any person as a witness in the proceedings:

(b) cross-examine witnesses called by any party to the proceedings or by the court.

Appendix Four - Qualifications and Training

Qualifications

Section 9.9 of the Family Court Practice Note[126]

(a) A current Practicing Certificate;
(b) The ability to exercise sound judgement and identify central issues;
(c) A minimum of five years practice in the Family Court;
(d) Proven experience in running defended cases in the Family Court;
(e) A sound knowledge of COCA, CYPTFA, The Domestic Violence Act 1995 and the Family Court Rules 2002;
(f) An understanding of, and an ability to relate to and listen to, children of all ages;
(g) Good people skills and an ability to relate to and listen to adults;
(h) Sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
(i) Relevant qualifications, training and attendance at courses relevant to the role;
(j) Personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
(k) Independence; and
(l) Knowledge, understanding, and a commitment to comply with the Law Society's Lawyer for the Child Best Practice Guidelines.

Training

New Zealand Law Society website promoting the 2018 training workshop for practitioners who want to become Lawyers for Child says:[127]

> An integral part of the New Zealand Family Court system is the state-funded legal representation of children. Lawyers entrusted with these duties must possess a range of skills to enable them to represent children effectively in care and protection cases, in addition to facilitating the new emphasis on children's participation in respect of parenting arrangements.
>
> This workshop has been designed to ensure participants have the opportunity to develop the full range of skills, knowledge and attitudes required to carry out the role effectively.
>
> By the end of the workshop participants should be able to:
>
> - Demonstrate an understanding of the current role of Lawyer for Child and changes to the nature of that role as a result of legislative changes.

[126] https://www.justice.govt.nz/assets/Documents/Publications/fc-lawyer-for-the-child-selection.pdf
[127] https://www.lawyerseducation.co.nz/shop/Workshops+2018/18LFC.html

- Examine their own values and beliefs in a more informed manner and understand how these might affect the way they carry out the role.
- Demonstrate knowledge of the skills required to communicate with children and the ability to put them into practice.
- Show some understanding of child development issues in planning and evaluating their interventions.
- Identify strategies for addressing the potential for conflicts of interest when the views of a child do not necessarily correspond with what the lawyer considers may be in their best interests.

Appendix Five - Lawyer for Child Best Practice Guidelines

The following text has been extracted from the New Zealand Law Society's Best Practice Guidelines.[128]

- A child has the right to competent representation from an experienced and skilled lawyer.
- A child must be given reasonable opportunities to be heard (either directly or indirectly) in any judicial and administrative proceedings affecting them, as provided for by section 6(2)(a) of COCA, sections 5(d) and 11(2) and (3) of the OT Act and Articles 9.2 and 12.2 of UNCROC.
- A child must be given a reasonable opportunity to express his or her views and any views expressed must be taken into account by the Court (section 6(2)(b) of COCA and section 11(2)(d) of the OT Act).
- A child has the right to information about the case in which he or she is involved, including information on the progress and outcome of that case.
- The manner of the discussion with the child shall take into account the child's age, maturity and level of understanding.

The guidelines go on to outline the role of Lawyer for Child:

- The lawyer is to provide independent representation and advice to the child in a manner that the lawyer considers promotes the welfare and best interests of the child.
- The lawyer has a duty to ensure that any views expressed by the child to the lawyer (and not expressed to another person, such as a psychologist, social worker or teacher), on matters affecting the child and relevant to the proceedings, are communicated to the Court.
- Where a lawyer has been appointed to represent a number of children, the lawyer must be alert to the possibility of conflict. The lawyer may be obliged to seek separate representation for one or more children.
- The lawyer has a duty to ensure that all factors relevant to the child's welfare and best interests, are before the Court.
- The lawyer should remember that section 9C of the Family Court Act 1980 does not necessarily mean that a lawyer to assist the court will be appointed for the sole reason that the views expressed by the child may be in conflict with the lawyer's assessment as to the child's welfare and best interests.
- The lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse.

[128] https://gallery.mailchimp.com/78dd4a31ee758d41364cee18d/files/6d77379d-688b-420d-b4fc-80105dd46ed7/FINAL_FLS_lawyer_for_child_best_practice_guideliines_23.2.18.pdf

The guidelines also outline the way the Lawyer for Child should interact with the child/ren:

- The lawyer must meet with the child he or she is appointed to represent unless, because of exceptional circumstances, a judge directs that it is inappropriate for the lawyer to meet with the child (section 9B(2) and (3) of the Family Court Act 1980).
- The lawyer should maintain appropriate professional boundaries with the child.
- The lawyer must meet with the child and, if it is appropriate to do so, ascertain the child's views on matters affecting the child that are relevant to the proceedings.
- In deciding whether or not it is appropriate to ascertain the child's views, the lawyer should consider:
  (a) whether the circumstances are such that the child should not be interviewed on a particular occasion or in a particular environment;
  (b) that having met the child, the issues are such that the lawyer should not attempt to ascertain the views of the child for reasons pertinent to that child;
  (c) that although it is necessary to meet the child (to have an idea of who is being represented), the issues are such that it is not appropriate to ascertain the child's views.
- The timing and venue for such a meeting, and any further meetings, should be at the discretion of the lawyer. However, the lawyer shall meet with the child at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the Court.
- When meeting with the child the lawyer shall:
  (a) emphasise to the child that they do not have to express any view (section 9B(1)(b) of the Family Court Act 1980);
  (b) before any view is expressed by the child, tell the child that any views the child expresses must be communicated to the Court by the lawyer;
  (c) consider an appropriate process for disclosure of information the child would prefer to remain confidential; and
  (d) explain to the child that he or she is not responsible for any decision which will be made by the Court.
- At the conclusion of the case the lawyer must provide advice to the child about:
  (a) the outcome of the case;
  (b) any right of appeal against a decision of the Court; and
  (c) the merits of pursuing any such appeal.