

**Submission to *Improving Access to Civil Justice: Consultation with the New Zealand community.***

Rules Committee  
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Tena koe.

The following submission is made by the Auckland Coalition for the Safety of Women and Children (the Coalition). Our Coalition was developed in 2006 to strategise and work toward achieving the ultimate goal of safety for women and children in Auckland. The Coalition has fourteen-member agencies and has a special interest in the prevention of violence against women and children. See Appendix one, for more details on those organisations.

Our submission relates only to the experiences of women, who are victims of domestic intimate partner or family related violence<sup>1</sup>, who consider or take appeals regarding Family Court decisions. We are very happy to meet with your committee to discuss our submission and answer questions about it.

Our overarching submission is that the way that the Family Court and any subsequent access to justice process unfolds (such as appeals to the High Court) does not uphold the “Transformational Opportunities” identified for the Ministry of Justice - *addressing family and sexual violence and improving access to justice*, and the organisational values - *respect, integrity, service and excellence*.

The experience of women victim-survivors who attend the Family Court because they are involved in proceedings relating to child custody or contact, relationship property or Protection Orders and other matters with men who have physically and/or emotionally and/or sexually, and/or financially abused and controlled them, and their further experience of the appeals process, is **not** of a system that upholds these values, or that seeks to learn from women’s experiences and appeals/complaints to improve practice, administer justice and address family violence. Rather the Family Court is a system that, in the words of women who have shared their stories with The Backbone Collective, is unsafe, closed and secretive, lacks accountability and transparency and has complaints systems that do not work<sup>2</sup>.

In 2017 the Backbone Collective found that:

- The legal appeals process is not available to all women and has significant barriers as it is costly, requires adequate representation, has a narrow time limit and is only

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<sup>1</sup> Family related violence such as forced marriage and dowry abuse

<sup>2</sup> Backbone Collective (2017) “Don’t Tell Me Your Problems”. *The Family Court complaints and appeals landscape*. Backbone Collective, Auckland. [www.backbone.org.nz](http://www.backbone.org.nz)

available for final (Family Court) orders unless leave is granted by the very same Judge who made the interim decision that is being appealed.

- Many women do not complain due to lack of information available about the complaints bodies and processes, lack of affordability, the trauma they carry as a result of the abuse they have experienced from the abuser *and* the Family Court, and fear – of both the abuser *and* the Family Court.
- Many women do not understand what their or their children’s rights of appeal are to begin with as their rights have not been explained to them<sup>3</sup>.

The Coalition is an independent body with expertise of family and sexual violence. We have read through the suggestions that are being made to amend the rules applicable to appeals. We strongly support making the process less expensive and therefore more accessible to a wider range of people, and support measures to make the appeals process less traumatising. However, from our lens, as family and sexual violence specialists, we hold genuine concern that simplifying processes, relying more on information from previous judgments, having less access to alternative witnesses and relying on Family Court knowledge and skills in relation to understanding the dynamics of violence and abuse will further hinder women’s access to justice. We are also concerned that these processes will further traumatise and impoverish women who attempt to appeal unfair, unsafe and discriminatory Family Court judgments. For example, Section 6E in the document *Improving access to civil justice: Initial consultation with the New Zealand community*, sounds very much like a mediation process. This is contraindicated (and can be potentially lethal) when there is violence and abuse in a relationship.

In the background section below, we discuss domestic and sexual violence against women and the effects of it on women and their children. We will then identify the barriers to justice experienced by women appealing Family Court judgments. We have interspersed some excerpts from women’s cases that our agencies have worked with to show examples of how the current system fails victim-survivors access to justice and thereby safety.

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<sup>3</sup> *ibid*

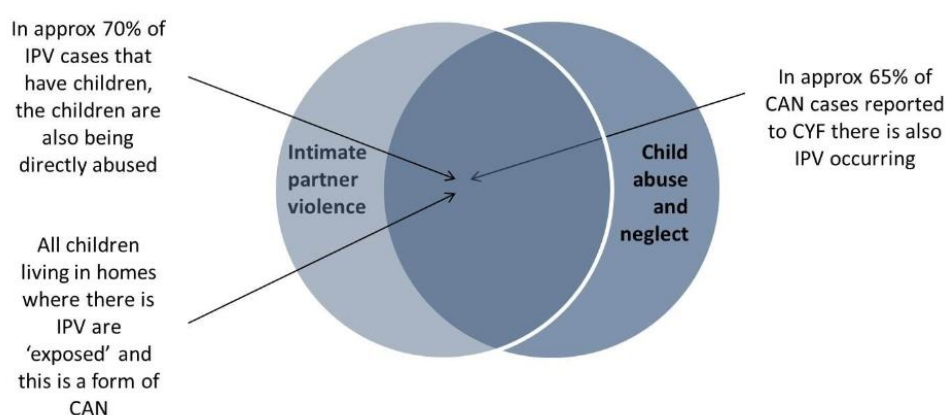
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## Background

Domestic intimate partner or family related violence includes coercive control, emotional, physical, financial abuse or sexual violence perpetrated against a person that one has a family relationship with<sup>4</sup>. Family violence is a gendered crime, primarily perpetrated by men against female partners and their children. However, there is also violence against same sex partners and some female partners abuse men. Prevalence research suggests that one in three New Zealand women will experience domestic violence (physical or sexual) from their male partner during their life-time<sup>5</sup>. There is a high correlation between violence against women and harm to children. See the Figure below which has copied from The Way Forward report.<sup>6</sup>

Figure 5: The co-occurrence of IPV and CAN



#### <sup>4</sup> Meaning of family violence

(1) In this Act, *family violence*, in relation to a person, means violence inflicted—

(a) against that person; and

(b) by any other person with whom that person is, or has been, in a family relationship.

(2) In this section, *violence* means all or any of the following:

(a) physical abuse:

(b) sexual abuse:

(c) psychological abuse.

(3) Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse, and that may have 1 or both of the following features:

(a) it is coercive or controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person):

(b) it causes the person, or may cause the person, cumulative harm.

(4) Violence against a person may be dowry-related violence (that is, violence that arises solely or in part from concerns about whether, how, or how much any gifts, goods, money, other property, or other benefits are—

(a) given to or for a party to a marriage or proposed marriage; and

(b) received by or for the other party to the marriage or proposed marriage).

New Zealand Government. (2018). Family Violence Act 2018. Parliamentary Counsel Office, Wellington.

<sup>5</sup> Fanslow, J., & Robinson, E. (2004). Violence against women in New Zealand: prevalence and health consequences. *New Zealand Medical Journal*, 117(1206), 1-12.

<sup>6</sup> Herbert, R. and Mackenzie, D. 2014. The way forward - an Integrated System for Intimate Partner Violence and Child Abuse and Neglect in New Zealand. Wellington, The Impact Collective.

Sexual violence is “any act (verbal or physical) which breaks a person’s trust and/or safety and is sexual in nature. The term sexual violence includes: rape, incest, child sexual assault, marital rape, sexual harassment, exposure and voyeurism.”<sup>7</sup> Sexual violence occurs primarily between people who know each other, and there are high rates of sexual violence in domestically abusive, intimate partner relationships. It is a gendered crime experienced disproportionately by female victims. Victims are aged from birth to very old age. Perpetrators are overwhelmingly male.<sup>8</sup>

In New Zealand, domestic and sexual violence are understood from a number of perspectives. There is general agreement that they are crimes that can cause long-term harm to the victims.<sup>9</sup>

The New Zealand Law Commission has discussed the impact of family and sexual violence as follows.<sup>10</sup>

NZLC-R13 describes the harms, complexities and victim responses to sexual violence in an intimate partner relationship (among others). This report identifies that:

Most perpetrators of sexual violence are known to their victim and many are in a personal or family relationship with their victim. The victim may be reliant on the perpetrator for social or economic support...Sexual violence can occur in an ongoing, long-term relationship, often in concert with other kinds of violence and abuse (physical, emotional and psychological). In such cases, sexual violence is a form of intimate partner violence perpetrated in the context of a pre-existing domestic relationship, which is also likely to be characterised by economic dependence and emotional manipulation

A related point is that, although sexual violence can have a number of distinctive impacts on its victims, there is no “typical” victim response. Victims may behave in one of many different ways to cope with the psychological impact of offending both at the time of the incident and afterwards. Some of these may appear counter-intuitive, yet they are established by research to be common responses. When tested at trial, however, the diverse and sometimes counter-intuitive nature of victims’ responses may appear to be, or may be presented as, evidence that an incident of sexual violence did not occur...

NZLC- R139 describes the current understandings of family violence and talks about myths and misconceptions.

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<sup>7</sup> Auckland Sexual Abuse Help. Sexual Violence and Prevention. Accessed from [www.sexualabusehelp.org.nz](http://www.sexualabusehelp.org.nz)

<sup>8</sup> <https://toah-nnest.org.nz/what-is-sexual-violence/who>

<sup>9</sup> NZLC - R13 - The justice response to victims of sexual violence: Criminal trials and alternative processes  
NZLC R139 – Understanding family violence: Reforming the criminal law relating to homicide  
Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi & Rafael Lozano (eds), (2002) World report on violence and health. World Health Organisation

<sup>10</sup> NZLC - R13 - The justice response to victims of sexual violence: Criminal trials and alternative processes  
NZLC R139 – Understanding family violence: Reforming the criminal law relating to homicide

We identified...persisting misconceptions, including the belief that a primary victim of family violence can avoid further violence by leaving an abusive relationship; that fear of future violence is irrational or unreasonable; and, if the primary victim used violence in the past, her fear was not real. We discussed the need to understand family violence as a pattern of harmful behaviour with a cumulative effect and a form of entrapment. Victims' responses must be considered in the context of: the manner in which their choices have been constrained by the violence they have experienced; what the past responses to their help seeking have been; and the wider structural constraints of their lives, including the structural constraints of their families, whānau and communities (p. 75)<sup>11</sup>.

Both reports discuss the physical and emotional harm caused by experiencing sexual and family violence. The impacts of sexual and family violence are detailed The Way Forward Report, as shown in the Figure below copied from that report.<sup>12</sup>

**Figure 7: Immediate effects of IPV**

| Physical Health   | Personal and Social Wellbeing   | Intimacy and Relationships   | Mental and Emotional Health   | Other Impacts   |
|---|---|--|---|---|
| <ul style="list-style-type: none"> <li>• death</li> <li>• physical injury</li> <li>• permanent disability (blindness, deafness, epilepsy, loss of mobility)</li> <li>• hospitalisation for physical injuries of gynaecological problems</li> <li>• sexually transmitted infections (STIs)</li> <li>• unwanted pregnancies</li> <li>• chronic, long-term illness</li> <li>• losing an unborn baby, or having a baby with birth defects</li> <li>• infertility</li> <li>• treatment for broken teeth, cuts, headaches, concussion</li> <li>• bruises, pain, trauma</li> </ul> | <ul style="list-style-type: none"> <li>• feeling worthless</li> <li>• loss of community and culture</li> <li>• self-blame</li> <li>• hurting others that are close</li> <li>• copying controlling and violent behaviour</li> <li>• withdrawing from family and friends</li> <li>• bad relationships with children</li> <li>• feeling whakama/shame, guilt or embarrassment</li> <li>• feeling out of control</li> <li>• a distorted sense of reality</li> <li>• low self-esteem and loss of confidence</li> <li>• loss of energy, feeling apathetic</li> <li>• isolation (staying home so people don't see the bruises; being avoided by others)</li> <li>• hating or being ashamed of your body</li> <li>• sexual promiscuity</li> </ul> | <ul style="list-style-type: none"> <li>• living in constant fear</li> <li>• not being able to have healthy sexual relationships</li> </ul> | <ul style="list-style-type: none"> <li>• mental illness</li> <li>• anxiety and worry</li> <li>• eating and sleeping disorders</li> <li>• depression</li> <li>• feeling suicidal/committing suicide/self-harm</li> <li>• violent thoughts or actions</li> <li>• Post Traumatic Stress Disorder (PTSD)</li> </ul> | <ul style="list-style-type: none"> <li>• alcohol and drug abuse</li> <li>• inability to hold down work</li> </ul> |

A further consequence of leaving an abusive relationship is that many women will be poorer. The wider literature about gender and poverty agrees that after separation most women will experience lower income and higher debt. This is exacerbated for women leaving abusive/violent relationships.<sup>13</sup> Women's Refuge (New Zealand), identify that women leaving abusive relationships will have difficulty maintaining employment and will

<sup>11</sup> NZLC R139 – Understanding family violence: Reforming the criminal law relating to homicide

<sup>12</sup> Herbert, R. and Mackenzie, D. 2014. The way forward - an Integrated System for Intimate Partner Violence and Child Abuse and Neglect in New Zealand. Wellington, The Impact Collective.

<sup>13</sup> Eldin Fahmy, Emma Williamson and Christina Pantazis, (2015). *Evidence and policy review: Domestic violence and poverty. A Research Report for the Joseph Rowntree Foundation*. University of Bristol School for Policy Studies

frequently have poorer quality housing, including for some being reliant on friends and family for accommodation<sup>14</sup>.

Women's Aid UK,<sup>15</sup> from their 2019 client survey, say:

- “A third of respondents had to give up their home as a result of the abuse or leaving the relationship and nine found themselves homeless as a result of leaving
- 43.1% of respondents told us they were in debt as a result of the abuse and over a quarter regularly lost sleep through worrying about debt
- 56.1% of our sample who had left a relationship with an abuser felt that the abuse had impacted their ability to work and over two fifths of all respondents felt the abuse had negatively impacted their long-term employment prospects/earnings.” (paragraph 9).

Ayesha Scott's forthcoming (2020) paper based on interviews with women victim-survivors and their experiences of financial abuse and the Family Court in New Zealand, highlights the critical impact financial abuse and the Family Court's role in addressing it.<sup>16</sup>

*Consequences [of financial abuse] include poverty, debt, lost income, unemployment and poor mental health. Its influence is a key barrier to leaving an abusive relationship. As financial violence does not require physical proximity, it is able to continue after a relationship has ended, with financial control and stalking behaviours often worsening post-separation. This final point, that financial abuse continues post-separation, means the Family Court has a role to play in recognising and addressing this evasive and invasive form of violence.*

In summary, there are many long term and significant impacts of violence – and of leaving a violent relationship. These impacts, as identified in the NZ Law Commission reports, make it difficult for women to function and to present as credible witnesses in court. Yet, over and over again, the Family Court is ignoring this and failing to believe women's testimony of abuse against themselves and their children, refusing to acknowledge their fear of the perpetrator and his ongoing violence and abuse, their bravery for leaving, the stress caused by their dire financial circumstances and, for many, the racism and bigotry they are experiencing from Judges and court staff<sup>17</sup>

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<sup>14</sup> Jury, A., Thorburn, N., & Weatherall, R. (2017). *Women's Experiences of Economic Abuse in Aotearoa New Zealand*. Women's Refuge.

<sup>15</sup> UK Women's Aid. (2019) *The nature and impact of domestic violence*.

<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/the-nature-and-impact-of-domestic-abuse/>

See also: Marilyn Howard & Amy Skipp, (2015). *Unequal, trapped & controlled Women's experience of financial abuse and potential implications for Universal Credit: Exploratory research by Women's Aid for the TUC*. England. TUC

<sup>16</sup> Ayesha Scott (2020) Forthcoming – draft received from the author. Hidden Hurt: The Impact of post-Separation Financial Violence in Aotearoa New Zealand. *New Zealand Family Law Journal* 10. 27 – 35. See article included with submission.

<sup>17</sup> Wilson, Denise., Mikahere-Hall, Alayne., Sherwood, Juanita., Cootes, Karina., Jackson, Debra. (2019) *Wahine Maori: Keeping safe in unsafe relationships*. Auckland, New Zealand : Taupua Waiora Research Centre, AUT, 2019

In this section we have shown that family and sexual violence is prevalent in New Zealand and is experienced predominantly by women. There is a strong overlap between family violence and child abuse. Family and sexual violence have significant negative impacts on women and must be considered in relation to women's access to justice in this context. The following section outlines the specific barriers to justice encountered by women who are victim-survivors *and* who try to use the appeals process following Family Court proceedings.



## Barriers to justice

### 1. Lack of expertise from those working in the Family Court and High Court regarding family and sexual violence

Our experience, from the testimonies of the many hundreds of women we work with, and the many victim-survivor experiences gathered by The Backbone Collective via their online surveys, is that there is, in the Family Court, an overall lack of understanding and expertise about domestic and sexual violence and the impact of violence on women and children. This lack of expertise is expressed by women's own lawyers, lawyer for child, Court psychologists, Oranga Tamariki social workers and Judges. The lack of understanding often results in unsafe decision making in the Family Court relating to the granting (or not) of Protection Orders, unsafe parenting orders and unjust property relationship orders.<sup>18</sup> Some victim-survivors appeal these decisions via the High Court.

However, appeals of unsafe decisions to the High Court are often met with the same lack of expertise in family and sexual violence, resulting in more unsafe outcomes for victim-survivors and their children. When women appeal to the High Court, Judges in the higher courts often uphold the judgments from the Family Court or re direct the matter back down to the Family Court trusting that follow up action will remedy the issues under appeal. High Court judges appear to wrongly assume that Family Court Judges and others working in the Family Court will have expertise about violence against women - but in many cases, these people do not exhibit any understanding of the dynamics of violence and the ongoing effects of living with coercion and control. Instead professionals working in the Family Court prioritise myths such as parental alienation, that abusers can be good and safe fathers and that children need shared time with both parents despite being at risk of ongoing abuse (and the opportunities that this provides for ongoing violence and abuse against their partners) even in light of extensive research and evidence showing the danger of these beliefs in cases involving violence and abuse.<sup>19</sup> A further way that Judges and other professionals minimise the danger of men's violence is the Family Court's use of "situational violence" to ignore and dismiss domestic/intimate partner violence. There is no such thing as situational violence – it is domestic/intimate partner violence. Categorising domestic/intimate partner violence into a separate category depending on the time at which it occurs is just a device to allow the Family Court to discount it.

Many of the people (Judges, Court staff, lawyers and related professionals) women encounter during the family Court and High Court proceedings seem to have no understanding of the issues identified in, for example, NZLC reports 139 and 13.

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<sup>18</sup> Please see Backbone's report Seen and Not Heard; Force outlining the prevalence and types of unsafe parenting orders being made in the Family Court, <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf>

<sup>19</sup> <http://www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf>

**Therefore, women’s appeals against Family Court decisions are not being heard in a way that enables alternative outcomes – because the Family Court decisions are considered expert. Women are therefore denied natural justice.**

A Coalition member who runs an urban women’s centre providing information and support to women in violent relationships, summed up the appeals process in the following quote.

*It’s very expensive, takes a long time, women are left broke and totally exhausted/stressed many of them are seen as been “difficult” “obsessed” and not just willing to “let it go”, “crazy” as gas lighting continues, distressed children, “ungrateful” if they do have money in the bank but it is totally not equitable in terms of settlement. Ongoing stalking and legal manipulation from the men especially the well-off ones who can keep it going for years some times. Ongoing fear particularly around children and access/custody dragging out in the courts for years, women blaming, the other one is the total control and the difficulty if the guy is overseas and does not have to adhere to NZ law while mother and kids are back here.*

Furthermore, not every decision made in the Family Court can be appealed, even when decisions are based on untrue information as a result of people working in the Family Court not having specialist knowledge regarding family and sexual violence. Appeals must be appealing a question of law not fact – therefore the focus is not on whether a decision was based on fact or the truth but rather ‘was the decision lawful under the current legislation?’ However, The Backbone Collective found in their 2017 survey of 496 women who had been involved in Family Court proceedings many examples of victim-survivors being accused of a range of behaviours or beliefs which impacted negatively on their subsequent proceedings. There was little these women could do if the Judge chose to base their decision on that ‘evidence’.<sup>20</sup>

An appeal is not a re-hearing of the whole case. New evidence cannot be filed except in the strictest of circumstances. Therefore, if a decision has been made in the Family Court based on untrue information or allegations, that information cannot be reviewed in an appeal.

*I often deliberate on the words in one of those judgments by the Judge stating something to the effect of “even her own witnesses testified against her.” That statement by the Judge was repeated again in the High Court and the Court of Appeal. It was taken as given, because it was stated by a Judge, and yet the Judge never pointed to any specific comments made by any of my witnesses, and this is because the Judge’s statement was just simply not true.*

*A domestic violence victim-survivor who has High Court and Court of Appeal proceedings*

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<sup>20</sup> See pg. 22

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

On appeal, factual findings made by the Family Court are often accepted by higher courts, as the latter consider that the Family Court has expertise in family law.

We do not agree with that. As above, the experience of the women and children we work with demonstrates that the Family Court particularly lacks expertise in relation to domestic violence and determining the safest and most appropriate parenting and care arrangements for children.

Here are three examples of that. First, there is a long history of the Family Court minimising and ignoring domestic violence. This is clearly demonstrated by the work of The Backbone Collective and is also apparent from a review of Family Court decisions relating to domestic violence.

As outlined elsewhere in this submission, there are very few appeals from the Family Court relating to domestic violence as the key priority for domestic violence victims is to stay alive and try to keep themselves and their children safe. Victim-survivors also lack the financial and other resources to bring appeals.

The case of *SN v MN* [2017] NZCA 289<sup>21</sup> is a very rare Court of Appeal decision relating to the making of a protection order. We invite the Rules Committee to read this judgment, which plainly shows the lengths to which the Family Court Judge went to deny the existence of a series of events of domestic violence. The Court of Appeal held that the occurrences did comprise domestic violence. The judgment demonstrates the Family Court Judge's complete lack of understanding of domestic violence. It is also extremely concerning that a Judge would engage in such convoluted reasoning to deny domestic violence, when a clear look at the facts demonstrated that domestic violence had occurred. Another indication of the Family Court's Judge's lack of understanding of domestic violence was his view that because the appellant worked full-time in skilled employment, she was not vulnerable. The evidence did not support that view at all.

Secondly, parental alienation is a concept that was developed in the United States but had now been discredited there for decades. However, the New Zealand Family Court continues to apply this so-called syndrome, using it to assert that women (and some children) reporting domestic violence are concocting falsehoods to try and deny fathers access to their children. There have been many studies done about parental alienation, and all of them have concluded that the syndrome does not exist. It is therefore extremely concerning that the New Zealand Family Court persists in applying it in making decisions. Both Coalition members and The Backbone Collective have noted in recent times a move by the Family Court to change the name of the so-called syndrome slightly – this appears to be an effort to keep applying parental alienation but call it something else because research has demonstrated how discredited the notion is.

Thirdly, there has been considerable publicity in the past couple of years about uplifts made by Oranga Tamariki - particularly of Māori children. The focus of the media and of the

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<sup>21</sup><https://forms.justice.govt.nz/search/Documents/pdf/jdo/ca/alfresco/service/api/node/content/workspace/SpacesStore/5eb214e9-8fc5-441a-8f4d-685db9da731a/5eb214e9-8fc5-441a-8f4d-685db9da731a.pdf>

inquiries into uplifts has been on the actions of Oranga Tamariki. However, what is tacitly apparent is that the Family Court has been operating a rubber stamping exercise in relation to without notice uplift applications by Oranga Tamariki. It is apparent that in some cases either the evidence does not exist to found a without notice uplift application, or the evidence was not provided to the Family Court. The fact that orders have nevertheless been granted demonstrates that the Family Court has been failing to apply the law properly. If the evidence does not exist to found an application under the law, then the Family Court should be declining to make the without notice applications sought by Oranga Tamariki. The Office of the Ombudsman on 6 August 2020 released a report titled He Take Kōhukihuki – A Matter of Urgency, which examined Oranga Tamariki’s practices relating to the removal of newborn babies under interim custody orders. The report found that the Ministry used such powers more by routine than by exception.

However, the criticisms in the report focused on Oranga Tamariki and failed to highlight the fact that such removals could not occur if the Family Court was applying the law properly and only granting orders in the circumstances provided for by law. The Family Court should be applying proper and rigorous oversight and declining orders when they are not required.

## 2. There is a short time frame in which to apply for an appeal

Applicants have 20 working days from day of the final decision or 20 days from day after interlocutory decision to apply for leave (permission of the presiding Family Court Judge) to appeal in which to file their applications. This is a short timeframe when women have told our member agency staff that they were traumatised following the Family Court decision. Some have explained that upon receiving the final order they are so triggered they cannot bring themselves to read the final decision for sometimes a number of weeks and need to put safety and support in place prior to reading the decision. The time lag in their ability to read the decision eats into the time they have available to apply for an appeal. In many cases women are unrepresented and have to find a suitable lawyer prepared to represent them in an appeal or women need time to apply to legal aid for assistance and must wait for that outcome before proceeding.

## 3. Cost - Appeals are too expensive for most women

The cost of appealing Family Court decisions is related to paying for legal representation, filing costs and the often extremely costly burden of printing document bundles which are particularly difficult for unrepresented women who have to organise the documents as well as pay up front for the scanning and printing.

As identified above, women who have left abusive men are usually poorer than when in the relationship. They generally leave the relationship with very little, are traumatised and consequently, often unable to sustain full time work.<sup>22</sup> Their abusive partners have ensured that they do not have access to finances to support the legal processes they endure in Family Court, let alone to take an appeal. There is usually little parity in resources between

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<sup>22</sup> See Backbone’s report

<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5f29217f4f222031501a82c5/159653111262/Victim+Survivor+Perspectives+on+Longer+Term+Support+Backbone+report+for+MSD+2020+FINAL.pdf>

men and women in these processes – men usually have far greater resources and therefore access to skilled representation. The UK 2004 Child Poverty Review says:

*Mothers experiencing domestic violence are more likely to become lone parents, less likely to be earning independently, and more likely to report their families getting into financial difficulties, with family incomes sometimes withheld from the victim and child as part of the pattern of abuse<sup>23</sup> (p. 20)*

Many victim-survivors are forced into ongoing Family Court proceedings lasting many years (usually until the child is 16). These proceedings come at an enormous financial burden. Forcing women into ongoing court proceedings has been identified as psychological abuse (Scott 2020 a)<sup>24</sup> and specifically, a form of financial abuse, one which – as it does not require an abuser’s physical presence - continues long after partners have separated (Scott, 2020a). Scott, (2020b) describes the effects of financial abuse as including “*poverty, debt, lost income, unemployment and poor mental health.*”<sup>25</sup>

The Backbone Collective asked women about the financial impact of Family Court proceedings in their 2017 survey of women victim-survivors who had been involved in the Family Court. While two thirds of the women had qualified for Legal Aid, one third had not. Women shared that they had spent up to \$500,000 on Family Court proceedings. Many were in debt due to the proceedings and 70% reported feeling ‘very worried’ about that debt. Women said the financial burden they suffered as a result of Family Court proceedings impacted on their decisions as to whether or not to continue to try and pursue protection for their children via the court. Many women explained that being involved in the Family Court proceedings was like a full-time job and made it difficult for them to take on paid work. Women also said that they felt the abuser was intentionally involving her in long drawn out Family Court proceedings to ensure she was punished financially as part of a strategy to ruin her.

*The financial impact often made it extremely difficult for women to rebuild their lives as they struggled with the compounding effects of spending years in Family Court proceedings experiencing unsafe practices and decision making, mounting debt and the health impacts.*<sup>26</sup>

Furthermore, many women (236) in Backbone’s survey explained that they did not have control over how much was spent on Family Court proceedings and that responding to the abuser’s applications have made them spend more than they wanted to. Women elaborated that while they were forced into debt by the Family Court proceedings, their abuser was not and, in many cases, (70% of the 436 women who answered this question) said the abuser had access to more financial resources than she did. Therefore, there is an

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<sup>23</sup> HM Treasury (2004) *Child Poverty Review*. London: HM Treasury.

<sup>24</sup>Scott, A. (2020). Hidden hurt: The impact of post-separation financial violence in Aotearoa New Zealand. *Australian Journal of Family Law*. 33(3): 282-302. (a)

<sup>25</sup> Scott, A. (2020). Surviving post-separation financial violence despite the Family Court: complex money matters as entrapment. *Australian Journal of Family Law*. 10. 27 – 35 (b)

<sup>26</sup> The Backbone Collective (2017). *Out of the Frying Pan and into the Fire*. Women’s experiences of the New Zealand Family Court.

uneven financial playing field which impacts on the ability of victim-survivor's access to the appeal process (justice).

If women lose their appeals they face the added burden of court costs. For many women, already raising their children in poverty or on very limited resources, this means ongoing opportunities for their partners to pursue/abuse them both through the courts and outside the court processes, including bankruptcy. This further traumatises and stresses women making it even harder for them to recover from violence and abuse.

*I have recently been served with a summons to appear in the High Court to be adjudicated bankrupt by my abusive ex-husband because I have not paid off the nearly \$20,000 of his court costs for his lawyers, which I was ordered to pay when I lost my court cases. I was eligible for legal aid, and if you are under legal aid, you cannot be ordered to pay the other party's costs. But, legal aid had dropped me, stating that they would not fund me because despite the fact that I was financially eligible, I was likely to lose, thus they would not grant me legal aid. Thus, despite my financial circumstances, and the fact that I was now self-representing, I was ordered to pay his costs for his expensive lawyers, which I would never be able to afford to pay.*

*A victim-survivor involved in Family Court proceedings*

#### 4. Lack of representation

Because victim-survivors may have access to very little money (as described above), they often can't afford a lawyer and the appeals process is too hard to undertake as an unrepresented woman. While some women are able to access legal aid, many are not. The Backbone Collective has heard from women who have said that their applications for Legal Aid have been influenced negatively by submissions made by their abusers. In other cases, her application for Legal Aid is declined because the Court does not see that it is likely her appeal will be successful (based on the lack of expertise and understanding regarding family and sexual violence by people working in the courts). However, these women who do not qualify for Legal Aid are still too poor to afford lawyers and legal fees. This leaves many women unable to access funds to take an appeal. We understand that this consultation is not addressing access to legal aid, but it is an important component of the context of women's access to justice and the appeals process.

*Because I had lost 3 court hearings over that year, that fact was able to be used against me "she keeps losing." Thus, legal aid for the appeal was declined, as I would likely lose, and my chances of winning in appeal were reduced.*

*A victim-survivor involved in Family Court proceedings with an abusive ex-partner.*

Some women do attempt to self-represent through the appeals process. However, we have heard that it is extremely difficult to understand information about the process, the forms and the requirements for filing. While the victim-survivor is often experiencing trauma as a

result of violence, compounded by her Family Court proceedings, undertaking the appeal process so soon after the decision being made is psychologically and physically too great. There is no advocacy or support to help her with this process and the High Court Registry is not set up to be able to offer this support.

#### 5. A lack of information about appeals processes

Women report that Family Court lawyers are not informing them about complaints bodies and processes or appeal options. This often means that the time limit expires, so women are unable to appeal.

Many women do not understand what their rights are to begin with as the Family Court process, and their rights in that process have not been explained to them. In Backbone's 2017 survey, 256 women said that their Lawyer had not explained the Family Court process to them and 452 women said no one in the Family Court had explained their rights to them. These women also explained that their children were prevented from activating their own proceedings and that people in the court failed to explain the children's right of appeal to them.

#### 6. A lack of clear processes so women are unable to appeal

Many Judges continue to make interim orders so that women can't appeal as there is no final order to appeal against - just ongoing interim orders. If women seek to appeal an interim order they must request leave from the very same Judge who made the interim decision that is being appealed. As many women are afraid of the Family Court Judge and have been traumatised by the court process and the judgments, this is a frightening and potentially retraumatising process, leaving women open to further abuse from her ex-partner and the court.

*During the 5-day hearing the Judge asked me "if this goes against you will you appeal?" I said yes – she made an interim decision. We'd been leading up to this for a year - final supporting submissions were done; the witnesses were fantastic. It took three months for the judgment and it was interim...so I couldn't appeal. She refused my request to appeal.*

*A victim-survivor involved in Family Court proceedings with an abusive ex partner.*

#### 7. The High Court does not make judgments about remedies

In our collective experience, even when women receive favourable outcomes from an appeal in the High Court, they are then sent back to the Family Court for subsequent proceedings to the very Judges that they had appealed against. Women told The Backbone Collective that their subsequent proceedings in the Family Court had not improved and they experienced discrimination in the court for being viewed as vexatious because they had gone to the High Court. Women's proceedings continue in the Family Court for years following the High Court ruling and mostly as a result of litigation abuse from the abusive ex-partner and unsafe decisions and processes in the Family Court. This leaves women in the same position they were in prior to the appeal – but poorer and more stressed as a result of going through the process.



#### 8. Court processes retraumatise women

As many judges fail to understand the traumatising effects of living with coercive control and violence and abuse, and the impact this has on women's stress levels and ability to function and represent themselves credibly, the court process becomes another source of coercion and trauma. This happens particularly if the Judge minimises or ignores women's testimonies about violence against themselves and their children – and the ongoing risk posed by the abusive parent. This further disadvantages women as the stress can make them appear increasingly less credible and reliable. Every court appearance, every affidavit and correspondence they must read acts as a trigger compounding the trauma they may have from their experiences of violence and abuse and the trauma they experience from the system failing to respond safely to protect them and their children. It's a snowballing effect which is not well understood by those working in the courts.

*One mother we are working with has been waiting a long time for an appeal decision regarding the care of her child. She has genuine safety concerns for her child and her ex-husband is still abusing her even though they are separated. It has all had a huge impact on her mental health, she feels she has no control over what she has been directed to do by Judges, she has developed panic attacks, feels completely undermined as a mother, worries endlessly about her child and if her ex-husband will take the child out of New Zealand and she will not see the child again.*

#### 9. Appeals result in punishment in subsequent Family Court proceedings

In their report outlining the complaints and appeals landscape for victim-survivors who use the Family Court, The Backbone Collective explained that in appealing a Family Court decision, women were punished by the professionals working in the Family Court in subsequent proceedings. These women advised that they were framed as vexatious and disruptive or seen as political activists by the presiding Family Court Judge. Their appeal then created a new backdrop against which their allegations of violence and abuse were then interpreted by the court. Their appeal somehow proving that they were trouble-makers and were therefore lying about the violence and the abuse in the first place.

*I lost my children for 2 1/2 years, when they were only young primary school aged children, and they were terrified and distraught. And when I fought through the High Court and the Court of Appeal to get access to my children back, I was punished for doing so.*

*A victim-survivor involved in Family Court proceedings.*



#### 10. The length of time appeals take

Appeals do not proceed quickly. It can take many months to get a hearing date and even longer to be finalised. Backbone has heard from women who have had to wait several months for a decision relating to their appeal after the hearing. Throughout the time it takes for the Appeal to progress women are under severe stress due to their fear about their children's wellbeing, particularly in cases where children have been unsafely ordered into the abuser's day to day care and may be suffering harm that will have significant effects on their health and wellbeing for the rest of their lives.

#### 11. Pursuing further proceedings in the High Court can be unsafe

The court process and environment can be a dangerous place/experience for victim-survivors. Therefore, pursuing court proceedings via appeals to the High Court can elevate the risk to some women and their children and this risk acts as a further barrier to women's access to justice. In their 2017 survey of women in the Family Court, The Backbone Collective found that fifty- eight percent (243) of the survey participants said that they had been threatened, intimidated, or physically assaulted by their abuser while attending court-related appointments/fixtures or hearings. Furthermore, victim-survivors must consider the very real risk that in taking an appeal forward, her ex-partner will retaliate in a physical or psychological way (for example, making false notifications to Oranga Tamariki, making new applications to the Family Court or spreading malicious rumours about her to family, friends and community members). In a Backbone Collective survey, women who had not used the Family Court were asked for the reason. One third of these women said they were too scared to use the Family Court because they were scared of the abuser's retaliation if they did so. Women are therefore forced to weigh up risk to their own and their children's safety against the risk of harm that unsafe Family Court orders will have for themselves and their children when making a decision about whether or not to appeal a Family Court decision (pp. 8 & 24)<sup>27</sup>.

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<sup>27</sup> The Backbone Collective (2017). Out of the Frying Pan and into the Fire. Women's experiences of the New Zealand Family Court.  
<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf>

## Our response to the suggestions in the discussion document

The discussion document *Improving Access to Civil Justice – Initial Consultation with the Legal Profession* at paragraph [2] on page 1 sets out four options being considered by the Rules Committee.

1. We support the drive to make court processes speedier and less expensive as a way of seeking to ensure that more people can obtain access to justice. At present, very few women and children are able to even try and obtain access to justice in the higher courts as they lack the financial resources to do so. Higher court proceedings are brought overwhelmingly by men, who have greater financial resources than women do. However, we also note our concern that speedier processes could result in domestic violence not being identified or it being ignored. It is extremely difficult for victims to disclose violence and we are concerned that systems that prioritise speedy resolution will result in women not being able to disclose violence.

2. We are prima facie supportive of the suggestion in Option (b) that an inquisitorial process be introduced for the resolution of certain claims in the High and District Courts. However, if this is to be done we strongly urge that all Judges receive training in identifying and dealing with domestic violence. If that does not occur, they will not deal appropriately with disclosures from victims and with the dynamics of relationships between abusers and abused. (See our further suggestions in relation to this below). The poor outcomes related to lack of specialised training/understanding is demonstrated by research relating to the outcomes of sexual violence trials both in New Zealand and in other jurisdictions. Over the past two decades, there have been considerable initiatives both in New Zealand and overseas to improve sexual violence trial processes to provide greater justice for victims. However, reviews of those law changes have showed that they have in practice produced little change in outcomes, primarily because Judges and lawyers continue to use rape myths in Court and conduct such trials in the same ways that they always have done. Until Judges and lawyers receive extensive training and become knowledgeable about sexual assault, that will not change.

### Recommendations

The following list of recommendations are aimed at improving women victim-survivors access to justice via appeals to the High Court. We hope that although some of these recommendations are not strictly related to the 'rules' they will still be given genuine and careful consideration in forming the overall recommendations you make. Women who have experienced violence and abuse (and their children) are severely discriminated against by the current responses from the courts. It should not come as an additional burden on them to fight to access justice; it is surely enough that they are forced to fight for their own and their children's safety.

### Cost

1. There should be **no cost** to victim-survivors appealing a Family Court decision if that decision relates to family and sexual violence or child abuse and neglect.

2. Application and filing fees in the High Court and Court of Appeal should be waived for victim-survivors regardless of their legal aid status.
3. A fund should be made available for victim-survivors to support them with costs related to printing and scanning bundles for High Court or Court of Appeal hearings.
4. There should be no awards of costs made against victim-survivors who appeal a Family Court decision if that decision relates to family and sexual violence or child abuse and neglect.

#### Safety

1. Safe and separate spaces (including toilets) should be available at the High Court for victim-survivors who are appealing Family Court decisions in the same way Victim Advisors provide services for victim-survivors at Criminal Court appeals at the High Court.
2. Independent specialist victim advocates should be available to support women with applications for appeals to the High Court or Court of Appeal. These advocates are not intended to provide legal advice. Rather their role would be to support women to understand the process, complete forms, access funds for printing and scanning bundles, provide specialist support in the hearings, arrange for safety screens etc. support them when the decision is released.
3. Enable risk assessment material to be filed as a companion to the appeal application to ensure that a family and sexual violence lens is placed over the appeal application to ensure a safe and appropriate response from those working in the court.

#### Specialist response

1. Urgent training of all High Court and Court of Appeal judges on family and sexual violence, the overlap in intimate partner violence and child abuse and neglect, the impact of trauma on victim-survivors and their children, the dangerousness of parental alienation concepts applied in family and sexual violence proceedings, dynamics of abusers and risk assessments.
2. Staff who work in the High Court Registry are trained in family and sexual violence and how to respond to victim-survivors – especially women who are unrepresented.
3. Develop an easy to read and understand guide for applications for Appeal including the correct forms, fees and rules and requirements for timing etc for victim-survivors who are unrepresented. Consider creating YouTube video tutorials as well as written guides.
4. Require the Family Court Registry to provide every single victim-survivor with information about how to appeal (recommendation above) when the final order is issued in every case where family or sexual violence and abuse is alleged or confirmed (including, COCA, Family Violence Act, Relationship Property Act)
5. Allow an extension of time for filing for an application to appeal to the High Court or Court of Appeal (40 days instead of 20 days) for victim-survivors appealing a Family Court decision if that decision relates to family and sexual violence or child abuse and neglect. The extension is made due to the trauma attached to victim-survivor's response to the Family Court decision and safety concerns regarding the decision to appeal or not.
6. Provide victim-survivors the opportunity to provide recorded video evidence rather than appearing in person for the hearing.

## Appendix one

### The Auckland Coalition for the Safety of Women and Children

The Auckland Coalition for the Safety of Women and Children (the Coalition) was developed in 2006 to strategise and work toward achieving the ultimate goal of safety for women and children in Auckland. The Coalition has a special interest in the prevention of violence against women and children. Its mission is to progress a gender and intersectional analysis of the underlying determinants of violence against women and children and the policy and practice responses to the issue. The Coalition has undertaken a number of innovative activities including a competition for young people to make a video for you-tube on violence against young women and a community development programme involving small businesses making a commitment to speaking out against violence. It makes frequent representations to Government on matters concerning preventing and responding to sexual and domestic violence.

#### Members:

- Auckland Women's Centre
- Eastern Women's Refuge
- HELP Support for Sexual Abuse Survivors
- Homeworks Trust
- Inner City Women's Group
- Mt Albert Psychological Services Ltd
- North Shore Women's Centre
- Rape Prevention Education – Whakatu Mauri
- Rodney Women's Centre
- Shakti Community Council Inc
- SHINE Safer Homes in NZ Everyday
- The Backbone Collective
- Women's Health Action Trust
- YWCA, Auckland