

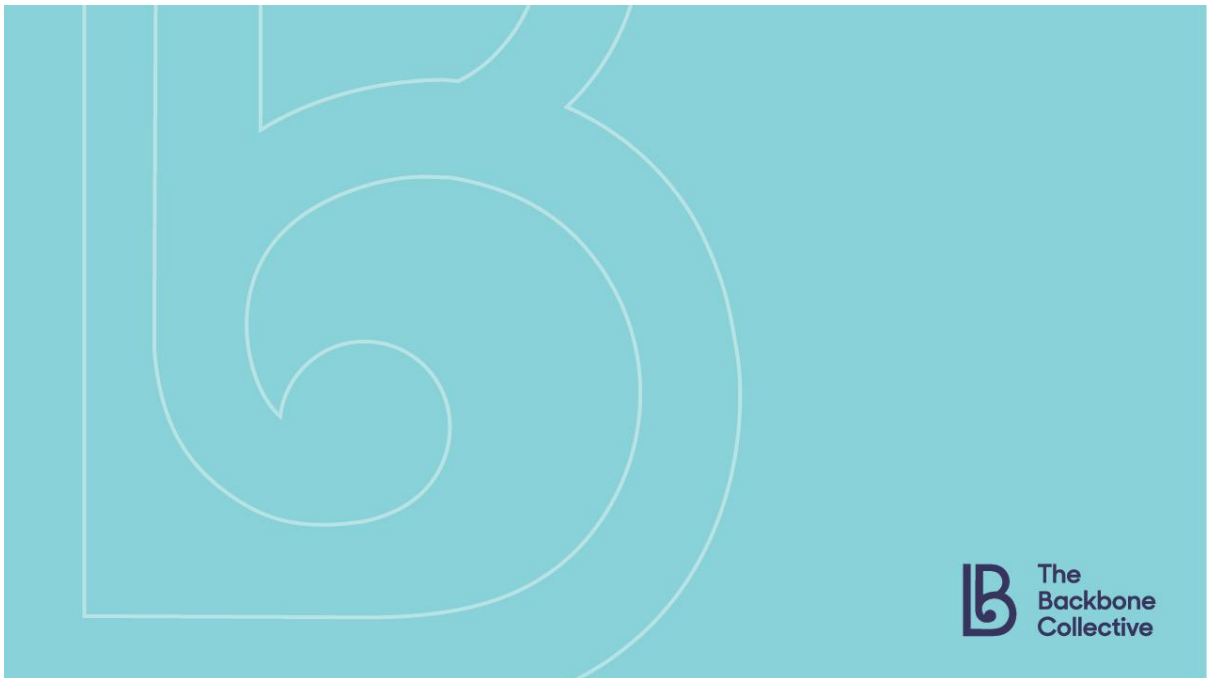
***New Zealand Family Court's response to violence
against women and children***

A submission from The Backbone Collective

to

***the United Nations Special Rapporteur on Violence
Against Women***

December 2022



Introduction

The Backbone Collective (Backbone) is an independent registered charity which advocates for women and children who have been subjected to family and sexual violence (FV/SV). We welcome the opportunity to respond to your request for information on the response of New Zealand Family Court (NZFC) to FV/SV. In our view, the NZFC is dysfunctional and regularly fails women and children, putting them in danger and violating their human rights. The uncritical adoption of the ideology of parental alienation (PA) is a major factor in this.

Our response is based on information from online surveys and one on one communications with women facing litigation in the NZFC. We also draw on our interactions with government agencies, Official Information Act requests, media articles and experiences of our staff over the last thirty years.

1. Types of violence and abuse

Our surveys show that women litigants in the NZFC – and their children – experience a wide range of violence. As Appendix 1 shows, 35% of women have been subjected to litigation abuse: the misuse of the NZFC to further abuse and control them.¹ Allegations of PA are a common form of litigation abuse. Similarly, the children of our survey respondents were reported as experiencing a wide range of violence and abuse (see Appendix 2).

CEDAW's 2018 periodic review recommended that NZ "Review the reliance on the Parental Alienation theory, with a view to limit its usage in child custody disputes" (48,d). However, Backbone continues to hear from many women accused of PA by professionals working in NZFC.

It is difficult to know just how widespread the use of PA is in child custody cases because few court cases are published. Moreover, the terminology has morphed in ways that make identifying accusations of PA very difficult. That is, after the concept of *Parental Alienation Syndrome* came under strong scientific critique, it tended to be referred to as *parental alienation* and later, to *alienating behaviour*. More recently, other terms have been used: *resist-refuse*, *enmeshment*, *coaching or poisoning a child*, *gatekeeping* or *over-anxious mothering*. We see the use of these terms as a strategy of plausible deniability: that is, advocates for abusive men, judges and other professionals who adopt the analysis can deny use of a discredited syndrome and argue that they are simply focusing on behaviour.

This argument might stand if there was a sound assessment of the abuser's behaviour. However, our survey respondents tell us that thorough risk assessments, including assessments of past violence and abuse and its impact on mothers and children, are rarely carried out by the NZFC.² Unless such assessments are conducted, allegations of PA are typically accepted at face value.

In Backbone surveys, 55% to 62% of mothers said court professionals accused them of PA. Rather than believing these victim-survivors, court professionals tend to deny that abuse occurred, or reframe it as minor, historical, irrelevant, situational or their fault. As a result of

¹ Such court-facilitated control by the abuser can continue for many years. In our 2017 report, *Out of the frying pan and into the fire: women's experiences of the New Zealand Family Court*, 87% of survey respondents reported being involved in Family Court litigation for more than 7 years. <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf>

² Women responding to our 2017 survey reported that a safety and risk assessment had been carried out in only 2% of cases in which there had been violence and abuse. See Herbert R. & Mackenzie, D. (2018). *Seen and not Heard: Children in the New Zealand Family Court: Part Two - Lawyer for Child?* Available at <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf> at page 3.

the Court diverting from legitimate abuse allegations to claims that the mother is vengeful or over anxious and influencing the child, mothers sometimes lose day to day care of the children (including very young children) on the grounds that their “unreasonable” anxiety over the children’s safety with the father is psychologically abusive and that only removal from their care will render the child willing to have a relationship with the father.³ In Appendix 3, we have set out some trends evident in the outcomes of NZFC proceedings involving the use of PA.

2: Factors driving the increased use of allegations of PA

Regressive legislative reforms are likely implicated in the increased use of PA. A rebuttable presumption against giving a violent parent unsupervised access to a child and mandatory risk assessments introduced in 1995 were repealed in 2013. The watered-down provisions currently in force mean the NZFC seldom conducts the sort of structured enquiry that would expose false allegations of PA.

This was confirmed in our second survey. Risk assessments of dangerousness and lethality had **not** been undertaken in 98% of cases and 89% of children received **no** follow up interviews or reviews after orders were made placing them in the unsupervised care of the abuser. The Court regularly uses its discretion to cut itself off from the information that would expose the cynical and unjustified use of PA. Moreover, the lack of any systematic follow up means the damage that can be done when abusive fathers are given unsupervised access to their children remains hidden from the Court’s view. And finally, the higher courts rarely get to hold the NZFC accountable for its dangerous decision making because few women can afford to appeal its decisions.

Feedback from our surveys show that the Court will often accept accusations on face value and award custody and/or more contact to the father and punish the mother for her assumedly false accusation. This suggests that accusations of PA made against women often “work” for abusive and controlling men. The more the tactic is shown to be “successful”, the more it is likely to be emulated by other litigants and their legal advisors.

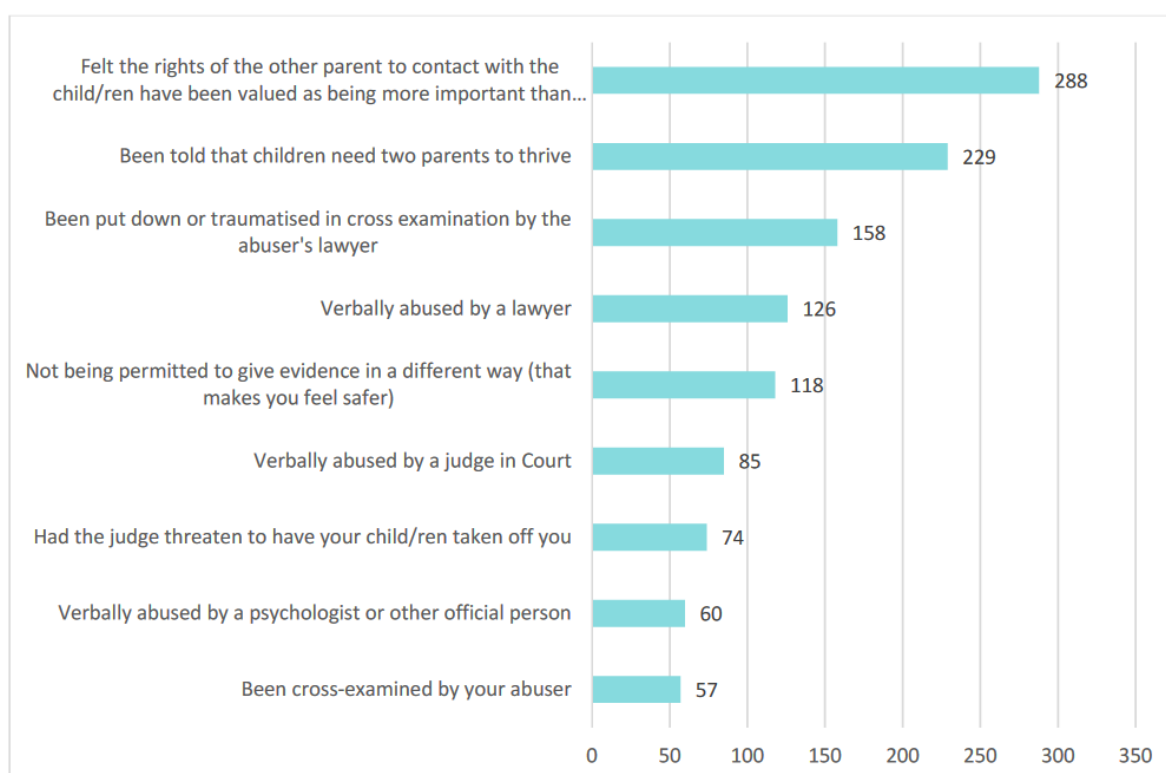
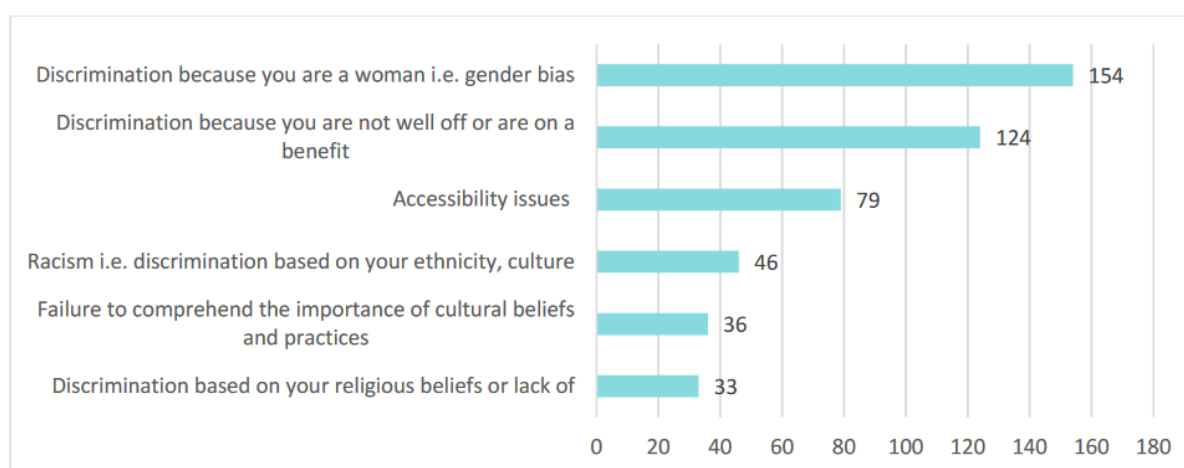
The use of PA accusations is becoming further entrenched through the advocacy of certain proponents of PA. For example, earlier this year, a three-day workshop for Lawyer for Child promoted the concept of PA, albeit under a new term ‘Resist and Refusal’.⁴ Course materials did not include the dynamics of FV/SV or risk assessment: nor did they reference to the government’s 2021 strategy to eliminate such violence. Instead, they emphasise PA-based theories and court-ordered ‘treatment programmes’ for children who resist contact with a parent even when violence has been disclosed.

3: Intersectionality

Due to the failure of the Ministry of Justice to collect adequate data on FV/SV cases in the NZFC, it is impossible to determine those women more or less likely to be accused of PA. However, women in our first NZFC survey told us that they had experienced discrimination and unsafe practices by those working in the Court which reflect a collision of sexism, racism, ableism etc. with a serious lack of understanding FV/SV - see graphs below (figures reflect number of individual responses).

³ See *Mazar v Holloway* [2019] NZFC 9520, available at <https://www.districtcourts.govt.nz/>

⁴ Information about this seminar can be found at <https://www.lawyerseducation.co.nz/shop/Books/Family/Advanced+Lawyer+for+Child.html>



Backbone has consistently found that Māori women (wahine Māori) and children (tamariki) are experiencing even greater human rights abuses in the NZFC. It is widely understood that there has been and remains racism inherent in the State's targeting of Māori women and the systemic abuse they have suffered as a result.⁵

4: The role of professionals

Our 2017 survey asked women about the role of three groups of professionals who are supposed to provide non-partisan advice to the NZFC: psychologists, Lawyer for the Child and social workers. All three groups were heavily implicated in perpetuating PA ideology. That is, 50% of the women who had a psychologist involved in their case reported that the

⁵ For a comprehensive analysis of racism within the Family Court, see Boulton, A.F, Wikaira, M., Cvitanovic, L., & Williams-Blyth, T. (2020). Te Kōpū Te taniwha i te ao ture-ā-whānau: whānau experience of care and protection in the Family Court. Kōpū Education. Available at <https://www.whakauae.co.nz/uploads/publications/publication320.pdf?1670877292>

psychologist had accused them of PA. The corresponding percentages for the other groups were 43% for Lawyer for the Child and 33% for social workers.⁶

Each of these professions has a regulatory authority, namely the Psychologists Board, the Law Society and the Social Workers Registration Board. In our view, none of these is providing effective oversight of the relevant professionals in NZFC. This is particularly clear when it comes to handling complaints. To be effective, a complaints regime needs to be accessible, safe and able to resolve issues in a timely manner.

In relation to complaints arising from the NZFC, none of these regulatory authorities provides a process that meets this threshold. A major factor here is that none of them will consider a complaint until the proceedings are completed and, instead, refer the complaint to the very court in which it arose.

5: Consequences

One of the most striking consequences of the NZFC's disregard for the history of FV/SV and the way it often penalises women who make such allegations is that some lawyers and other advocates who support women advise them not to raise the issue of violence at all in court proceedings. This advice is based on the observation that where the Court accepts the abuser's characterisation of the mother as making false allegations to alienate the child(ren) from him, it will sometimes "punish" her by reducing her access to them. While we don't endorse such advice, our survey data provide some evidence of the dynamic on which it is based. That is, we found that professionals advising the Court were twice as likely to recommend that the abuser have unsupervised contact with the child(ren) when the mother had been accused of PA than when the mother had not been accused.⁷

More generally, the failure of the Court to take due regard of FV/SV can have serious implications for the human rights of mothers and children. For example, our 2017 survey of 496 women showed that women often reported that their abuser was able to use the NZFC to further his abuse. The majority of women (58%) told us that they had been threatened, intimidated, or physically assaulted by their abuser when attending NZFC-related appointments or hearings. Most said that they and their children were made less safe as a result of the NZFC outcome.⁸ It is deeply ironic that the institution that should be playing a key role in protecting women and children not only fails to do so: in many instances, it makes things worse.

Alongside the abuse and intimidation, women and children face other restrictions on their human rights. For women, the most common of these were orders relating to residence: that is, some were prevented from moving to where they felt safe and supported while others who had moved were compelled to return to where the abuser resided. Many mothers were forbidden to talk to their children about the abuse and other women were banned from discussing either the violence and/or the proceedings with specified others. These are

⁶ Mackenzie, D., Herbert, R., & Robertson, N. (2020). 'It's not OK', but 'It' never happened: parental alienation accusations undermine children's safety in the New Zealand Family Court. *Journal of Social Welfare and Family Law*, 42(1), 106-117. doi:10.1080/09649069.2020.1701942.

⁷ Herbert R. & Mackenzie, D. (2018). *Seen and not Heard: Children in the New Zealand Family Court: Part Two - Lawyer for Child?* Available at <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf>

⁸ The Backbone Collective. (2017). *Out of the frying pan and into the fire: women's experiences of the New Zealand Family Court*. Available at <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf>

significant limitations to the right to free speech and restrict women's ability to seek out support.⁹

Children often faced parallel limitations to their rights. Overall, 54% of the children were being forced into care and contact arrangements that were different from what they wanted. We appreciate the Court must balance children's wishes against other factors. However, the types of arrangements ordered were significantly at odds with children's wishes: 33% of children wanted **no** contact with the abuser and most others wanted only limited contact (e.g. days visits only; occasional overnight stays). The orders were also often at odds with children's fears and sometimes at odds with children's experiences when in the court-ordered care of the abusers. These included being exposed to pornography, drugs, violence in the father's new relationship and other criminal behaviour.

This discrepancy between children's wishes and the regime imposed on them by the NZFC is vividly exposed when they refuse to visit the abuser – who may then seek a warrant to uplift the child.¹⁰ Because the warrant is usually made without notice, Police typically execute the warrant without warning. These are deeply (re)traumatising events for the child and their mother. They are also quite common: an Official Information Act request made by Backbone in 2021, found that between 485 and 594 warrants were granted each year over the period 2016-2021.

6: Challenges in data collection

The NZFC receives around 60,000 applications each year, half of which involve children.¹¹ Beyond that, no data are collated which could be used to monitor the efficacy of the Court. For example, there is no data collated on the number of applications involving FV/SV and there is none on the outcomes of the applications, either for the parties or for the children. We do not even know how many children are involved.

The lack of data is a major barrier to making the NZFC more responsive to women and children.

7: Strategies for improvement

Legislation passed in 2021 to improve children's participation in NZFC proceedings may go some way to addressing some of the concerns we raise to help ensure that the Court puts greater priority on FV/SV and gives children reasonable opportunities to participate in decisions affecting them. However, the current culture of NZFC to minimise and dismiss FV/SV remains deeply entrenched and supported by the professionals who currently work there.

8: Recommendations

1. Undertake extensive screening of all matters coming before the NZFC for FV/SV
2. Require the Court to carry out a structured risk assessment when determining whether the child would be safe under any proposed order.
3. Provide a specialist and separate response in FV/SV cases, such as an inquisitorial system. In which a judge is assisted by specialists who gather the appropriate evidence and information to support safe and reviewable decision making.

⁹ Ibid.

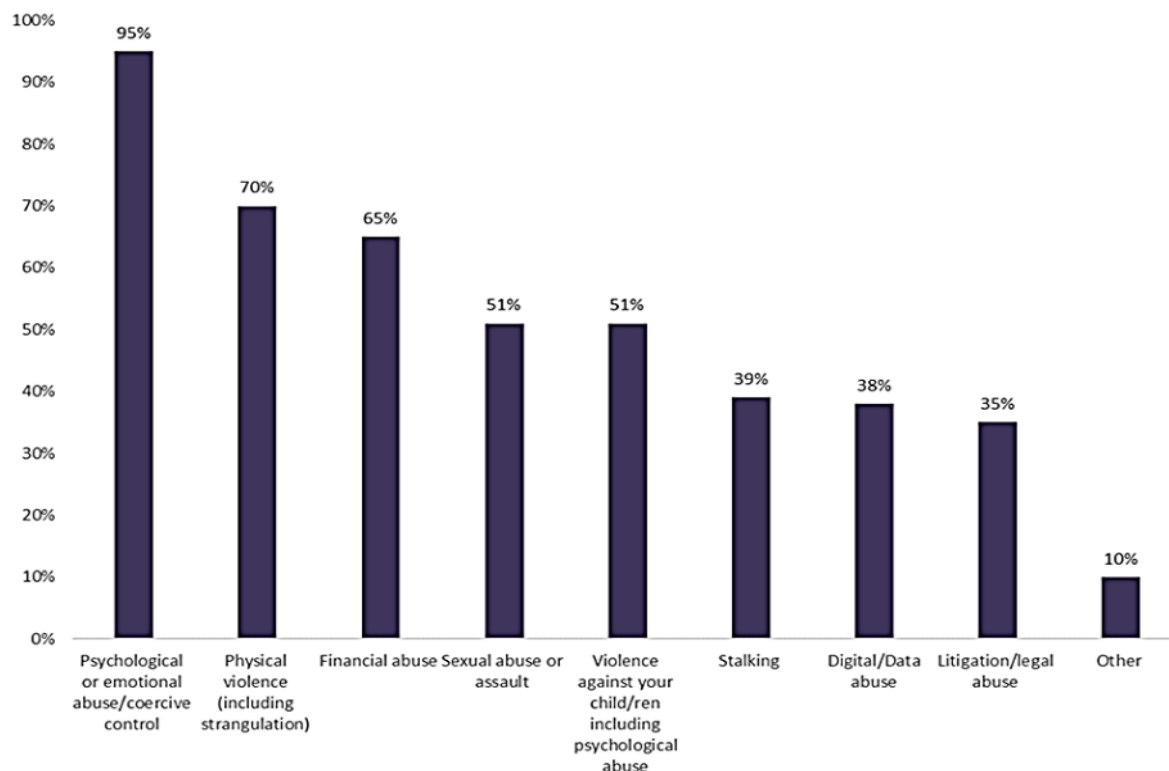
¹⁰ See Care of Children Act (2004), ss 63-77B for provisions relating to the enforcement of parenting orders, including obtaining a warrant empowering the Police to uplift a child.

¹¹ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/annual-reports/page-2342/family-court/>

4. Enforce a rebuttable presumption that the principal aggressor shall not have unsupervised contact with the child unless the Court is satisfied that the child would be safe.
 5. Provide a specialist kaupapa Māori NZFC response.¹²
 6. Legislate against the use of PA/S for FV/SV cases including other terms PA/S is known by.
 7. Prohibit Police uplifts to enforce NZFC orders unless the child's safety is at immediate risk.
 8. Establish, as a matter of urgency, a completely independent body (including members from the judiciary and the Law Society) to be responsible for appointing/engaging, briefing, monitoring, quality managing, reviewing decisions and considering complaints regarding professionals working in the NZFC.
 9. Request that the Special Rapporteur on Violence Against Women and Child Protection urgently conduct a country visit to New Zealand to investigate the way the NZFC is treating victims of violence and abuse and their children.
-

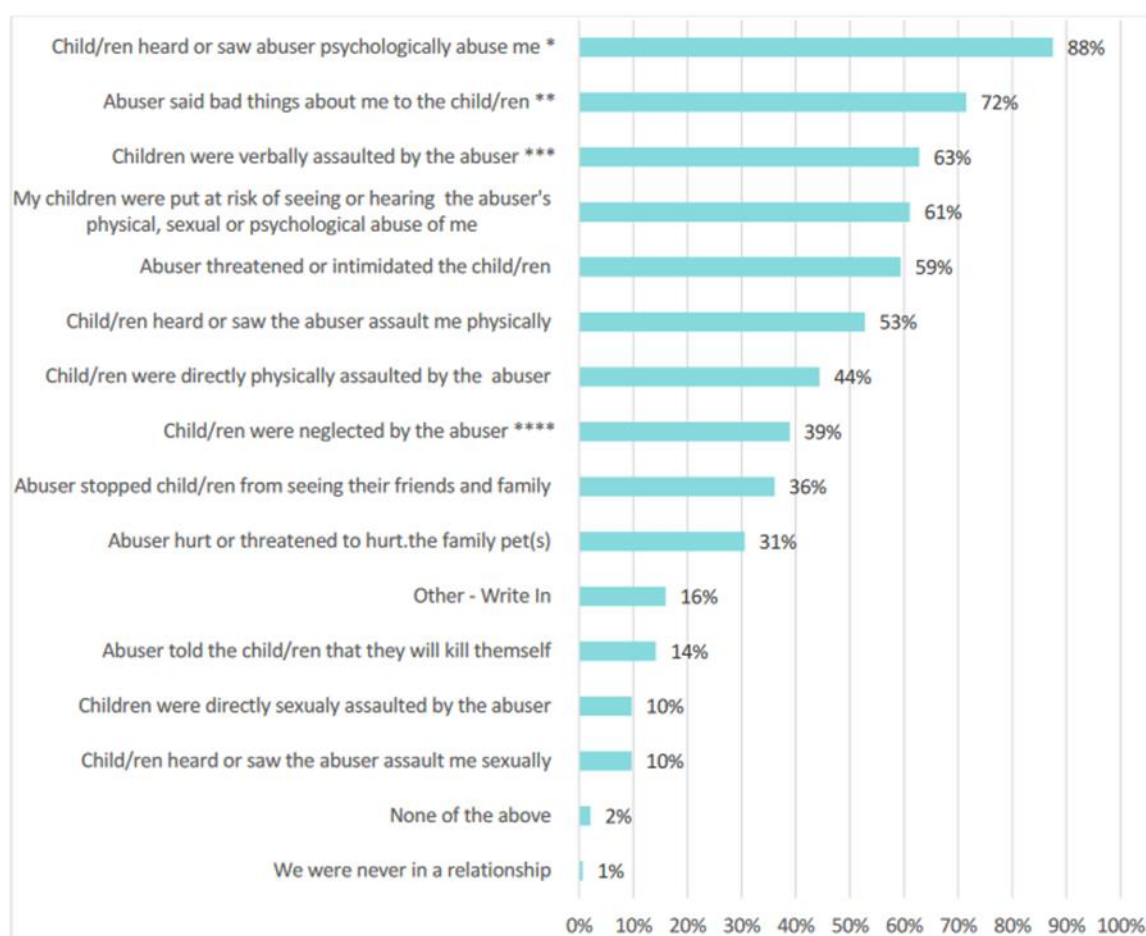
¹² <https://www.whakauae.co.nz/publications/technical-reports/5/>

Appendix 1: Types of abuse experienced by survey respondents and their children



Source: The Backbone Collective. (2020). *Victim-Survivor Perspectives on Longer-Term Support After Experiencing Violence and Abuse*. Report prepared for the Ministry of Social Development. Retrieved from <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5f29217f4f222031501a82c5/1596531111262/Victim+Survivor+Perspectives+on+Longer+Term+Support+Backbone+report+for+MSD+2020+FINAL.pdf>

Appendix 2: Types of violence and/or abuse children were exposed to while their mother was in a relationship



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

Source: The Backbone Collective. (2020). *Victim-Survivor Perspectives on Longer-Term Support After Experiencing Violence and Abuse*. Report prepared for the Ministry of Social Development. Retrieved from <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5f29217f4f222031501a82c5/1596531111262/Victim+Survivor+Perspectives+on+Longer+Term+Support+Backbone+report+for+MSD+2020+FINAL.pdf>

Appendix 3: Outcomes in cases in which mothers have been accused of parental alienation.

Using responses to our Children in the Family Court survey (2017) Backbone analysed the experiences of mothers who had been accused of PA by at least one professional in the NZFC.¹³ Only 2% of mothers accused of PA felt that the Court responded in a way that made their children safe.

We found that mothers were accused of PA:

- where both they, and their children had experienced serious types of violence and abuse including physical, sexual and neglect.
- when the abusive parent had a conviction for assaulting the child/ren
- when they had a Protection Order in place (which included their children)
- no matter where they lived in Aotearoa New Zealand.

Mothers accused of PA were more likely than mothers not accused of PA to say that:

- the abuser was seen as 'safe' by the Court and this was because the Court did not believe he was abusive and/or accepted he was abusive but thought he was no longer dangerous
- the Court believed the violence was related to the separation only
- they had experienced litigation abuse
- evidence of abuse had been excluded from court proceedings
- they had been advised by their lawyer not to mention the violence and abuse.

Children, whose mothers were accused of PA were:

- more likely to be ordered into care and contact arrangements with the abuser that they did not want
- more likely to be worried about their physical, sexual, and psychological safety while in the abuser's care
- far less likely to have no worries at all about their safety while in the abuser's care.

When a mother was accused of PA, the professionals working in her case were more likely to make unsafe recommendations than in cases in which PA was not alleged. They were;

- roughly twice as likely to recommend unsupervised contact with the abusive parent
- were far more likely to state that the abuser's right to contact was more important than what the child wanted
- far more likely to blame the mother for the child/ren's trauma rather than the violence and abuse the child had been subjected to by the abuser
- more likely to say that the child/ren's relationship with the abuser was important for their well-being.

¹³ Deborah Mackenzie, Ruth Herbert & Neville Robertson (2020): 'It's Not OK', but 'It' never happened: parental alienation accusations undermine children's safety in the New Zealand Family Court, *Journal of Social Welfare and Family Law*, 42(1), 106-117. DOI: 10.1080/09649069.2020.1701942