

United Nations Convention on the Rights of the Child



A Thematic Paper from The Backbone Collective For New Zealand Review

Committee on the Rights of the Child
Simplified Reporting Procedure
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Children's rights are being breached via Family Courts in New Zealand

New Zealand [NZ] ratified the UN Convention on the Rights of the Child [UNCROC] in March 1993. Legislation in NZ partially reflects these rights, through the Care of Children Act 2004¹ [COCA], the Domestic Violence Act 1995 [DVA], and its recent replacement, the Family Violence Act 2018 [FVA]. However, these laws are only partially fit-for-purpose for family violence [FV] and are being widely misapplied by some practitioners of the NZ Family Court [NZFC], and associated government agencies resulting in serious breaches of rights for NZ children who have been exposed to or experienced violence and abuse and are involved in NZFC proceedings.

This thematic paper discusses the breaches happening in NZFC and in particular, the UNCROC Article: Child's right to be protected from all forms of violence (Articles 19.1 and 19.2)²

This paper draws on data collected by Backbone from three surveys and information collected via Official Information Act requests and other relevant published research.³

Background

NZ is widely accepted to have some of the worst rates of Family Violence [FV] and child abuse and neglect [CAN] in the developed world.⁴ The FV and CAN issues have been discussed at a state level for many years. The absence of an effective and safe response can be largely attributed to state actions/inactions and power structures that have prevented a response system that is accountable to victims, linked up, informed by evidence-based practice and has independent monitoring systems

¹ <http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html>

² We have focussed on this one article due to the word limit for the thematic paper however two other child rights are being systematically breached for children involved in NZFC proceedings when violence and abuse have been an issue. The breaches of these rights - Child's right to have their best interests as the primary concern (Article 3.1) and Child's right to be heard and to have their view taken into account in matters which affect them (Articles 2.2 and 2.1) and the way these rights are responded to in the NZFC is significantly connected to the breaches of children's right to be protected from all forms of violence. Backbone will provide more information on these breaches in September 2020.

³ **Survey 1.** Backbone's May 2017 survey on the Family Court where we asked women to tell us about their experiences in the Family Court. There were 496 valid responses and the report of the findings was released in June 2017.

Survey 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 from mothers who collectively have 591 children involved in Family Court proceedings.

Survey 3. Backbone's February 2020 survey which was designed to provide updated information about children's experiences in the Family Court to inform this paper. The survey was not widely released and we heard from 55 mothers of 111 children, all of whom had been involved in active NZFC proceedings since the 2017 surveys (2018, 2019, 2020)

⁴ Please see <https://nzfvc.org.nz/sites/nzfvc.org.nz/files/The-Way-Forward-2014.pdf> pg 16

in place. Nowhere is this system failure more evident than with the NZFC's response to cases where there is violence and abuse.

The Backbone Collective

The Backbone Collective launched in 2017 as an independent and unfunded organisation focussed on continuous improvement of the FV response system. We run online surveys to collect anonymous feedback from women survivors (service users) and assist women to have their say on policy developments, intended legislation, issues discussed in the media etc. From the survey responses and communications with women we then write reports, submissions and media articles to identify where impactful and constructive improvements need to be made.

The New Zealand Family Court [NZFC]

NZ's justice system is based on the Westminster System which holds judiciary independent from Parliament. Judges are not accountable to government or its agencies. It is impossible for the public to scrutinise the courts, unsafe and/or unlawful for court users to speak out and difficult for media to report on cases. There is no independent authority tasked with monitoring and overseeing NZFC and reviewing or regulating its outcomes.⁵

There is no authority responsible for overseeing the safety and rights of children who are subject to NZFC proceedings.⁶

A poor and unsafe response to FV and CAN in NZ

Failures in the NZFC have been flagged for many years.⁷ However, the Government has never collected data pertaining to the numbers of children involved in NZFC proceedings where FV is an issue or reported on the outcomes for these children.

Until Backbone's inception, there was no mechanism to shine a spotlight on women and child FV victims' collective experiences of the NZFC. Women and children have reported to Backbone that when they approach the NZFC the interventions and decisions made serve to place them in more danger rather than less.

Child's right to be protected from all forms of violence

Children's rights to be protected from all forms of violence (Articles 19.1 and 19.2) are reflected in COCA S5(a) "a child's safety must be protected and, in particular, a child must be protected from all

⁵ The NZFC, incepted in 1980, is predominantly a closed court. Media attended 14 NZFC hearings in 2016 - .002%.⁵ A similarly small percentage of NZFC decisions are published online by the Ministry of Justice [MOJ] and these are handpicked by a judicial panel.

⁶ The NZ Children's Commissioner is legislatively prevented from overseeing children involved in COCA or FV Act proceedings.

⁷ Please see pg 9 - 11 for a sample of reports etc

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

forms of violence (as defined in [sections 9\(2\), 10, and 11](#) of the FVA) from all persons, including members of the child’s family, family group, whānau, hapū, and iwi.”

The unsafe way that professionals working in the NZFC respond to cases of FV and CAN is resulting in decisions/orders that place children at risk of future harm; these children are not being protected from all forms of violence by the orders made about their care and contact.

Backbone surveys found 54% of children were forced against their wishes to spend time with an abusive parent or whanau member and were suffering further violence and abuse while in their care. These ‘forced’ children are significantly more worried about safety at the abuser’s house than children who were not forced.

Some children are physically forced by Police into the unsupervised care of the abuser⁸ - 57 women (survey 2) said NZFC ordered Police to forcibly and traumatically uplift children from the protective parent to enforce parenting orders.⁹ The practice of using Police uplifts, investigated by NZ media in 2017, is causing harm and trauma to children who need protection by the state, not more violence and abuse.¹⁰

Children's worries about their physical, sexual and psychological safety are not being appropriately responded to by the NZFC professionals including Lawyers for Child, section 133 specialist report writers (psychologists), social workers or the Judges. Backbone has reported that in more than half the cases either the children or their mother told professionals working in the Family Court about safety worries they had at the abuser’s house but in the majority of cases (65%), those worries were not reported accurately to the Court or taken into consideration when care and contact orders were made.¹¹

Our key findings from Survey 2¹² highlight that the NZFC is breaching children’s right to be protected from all forms of violence.

- 83% said NZFC had not made their children safer after they left the perpetrator.¹³
- 2% said a risk assessment to determine the risk of dangerousness and lethality had been undertaken.
- 91% of children are ordered into unsupervised care and contact with the abuser.
- 87% said NZFC views the abuser as being safe for the children to spend time with.¹⁴

⁸ Under section 72 and 73 of the Care of Children Act 2004 the Family Court can impose a warrant to uplift children and place them in the care of the parent who under current Family Court orders would ordinarily have the child in their care at that time or whom the court now orders should have day to day care of the child.

⁹ Place them in the unsupervised care of the abuser.

¹⁰ You can watch a short documentary made by NZ media about police uplifts via this link

<https://www.newsroom.co.nz/2017/08/07/41459/taken-by-the-state>

¹¹ See pgs 25 - 27

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

¹²

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

¹³ This number increased to 91% in our 2020 update survey (please note significantly smaller sample size than in 2017).

¹⁴ 63% reported the court saw the abuser as safe for the children to spend time with in the updated 2020 survey (with smaller sample size) and an additional 30% said the court saw the abuser as unsafe but that contact was important regardless. Only 2% said the court saw the abuser as unsafe for the children to spend time with.

- 67% of children of wahine Maori and 54% of children of wahine tauwiwi are being forced into care and contact arrangements they do not want.
- 86% say NZFC has not responded appropriately to their child/ren's wishes/views/experiences and safety.
- 89% of children received no follow up interviews or reviews from anyone working in NZFC after orders were made placing them into care and/or contact with the abuser.
- Many children are exposed to harmful behaviours (pornography, illegal behaviour, substance abuse) and further violence and abuse (towards themselves or to the abuser's new partner and/or children) when in the care of the abuser.
- **37% of children suffered physical injuries while in the care of the abuser.**

NZFC is working contrary to what evidence tells us helps children recover from abuse. The most important factor for recovery and resilience in abused children is that they are believed and protected by a protective parent and protected from further exposure to abuse.¹⁵ Tragically, in many cases, the Family Court's care and contact orders result in very negative health impacts for these children (see annexed report – Seen and Not Heard, Children in the Family Court - Force, 2017). Backbone surveys have revealed that children often remain embroiled in NZFC proceedings for 5 - 10 years.¹⁶

Why is the NZFC responding in unsafe ways to these children?

Backbone has identified a number of explanations for NZFC's unsafe practises. We have raised these points with the NZ Government¹⁷ on many occasions and written about them extensively in our published reports.

Despite corroborating evidence from independent sources, the NZFC view is often that the violence never happened or was unimportant or irrelevant. Even when a protective mother is believed about the occurrence of violence, the NZFC all too often believes that even though her ex-partner is an abusive partner, he's a great dad. In Survey 1 we found that;

- 62% of women were accused of exaggerating or distorting the violence
- 59% were accused of being mentally unwell
- 55% were accused of lying about the abuse
- 54% said the violence and abuse was minimised by NZFC
- 43% said the pattern of abuse was not recognised
- 37% said they were not believed
- 36% said the violence and abuse was excused and were told that is what happens when couples separate
- 30% said the violence and abuse was excluded from the evidence
- 23% were told the violence and abuse happened too long ago to be relevant
- 22% were told not to mention the violence and abuse.

NZFC similarly minimises, or doesn't believe children's disclosures of violence and abuse. Survey 2 findings:

¹⁵ <https://www.cdc.gov/violenceprevention/childabuseandneglect/aces/fastfact.html>

¹⁶ See pgs 14 - 16

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

¹⁷ See Appendix One for a list of correspondence between Backbone and the NZ Government.

- 46% of children were not believed about the abuse.
- 57% of children had their experience of abuse minimised.
- 23% had medical evidence ignored.
- 59% of women said that reports written by NZFC professionals have been used by judges to make unsafe parenting orders.

Backbone has no evidence to suggest that the responses from NZFC professionals have improved since our 2017 surveys. In a recent survey we asked mothers of children involved in NZFC proceedings since 2018, who had also been involved in proceedings in 2017 or prior, if they thought the response to their own or the children's safety and resulting practices or decision making by people working in the Family Court has improved. Most women described experiencing the same (66%) or worse (18%) practices and responses to violence and abuse from those working in the NZFC. Only 7% said practices had improved, but only slightly.

Misapplication of the law

The COCA best interest principles¹⁸ require a mandatory consideration of the child's safety in s5(a), 'a child's safety **must** be protected and, in particular, a child must be protected from all forms of violence'. All other best interest principles are aspirational only. However, women have told Backbone that professionals working in the NZFC are giving similar, or greater weight to principle s5(e), 'relationship with both parents' which is undermining children's safety.¹⁹

Guardianship rights are not impacted by the use of violence by a parent.

COCA S17²⁰ makes both parents joint guardians under most circumstances. Guardianship rights²¹ are not impacted by the use of violence by a guardian. Children's safety and recovery from abuse are negatively affected by the abusive guardian parent's continued ability to make major decisions about the child. For example, abusers have used guardianship rights to prevent the protective parent and children relocating to somewhere safe (40% Survey 1) preventing children attending a different school (29% Survey 1), preventing children attending therapeutic intervention or treatment to cope with their experience of violence and abuse (28% Survey 1) and preventing protective parents from talking about the violence and abuse with their children (32% Survey 1).²²

The use of parental alienation

Parental Alienation theories are based on the notion that one parent intentionally and systematically poisons a child against the other parent resulting in false allegations of abuse against the 'target' parent. These theories have been scientifically discredited and many academics have argued they

¹⁸ See section 5; Principles relating to child's welfare and best interests

<http://www.legislation.govt.nz/act/public/2004/0090/latest/whole.html#DLM317241>

¹⁹ '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.'

²⁰ <http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317418.html>

²¹ See section 16 of COCA for detail

<http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317414.html>

²² See pgs 30 -34

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

are not appropriate in cases where there has been violence. Parental alienation theories have resulted in dangerous outcomes for these children.²³

In Backbone surveys, 55% to 62% of mothers said they had been accused of parental alienation in the NZFC. Backbone has found that NZFC professionals apply parental alienation theory resulting in them denying that abuse occurred, or reframing the abuse as minor, historical, irrelevant or situational, thus invalidating the children's reality.²⁴

A finding of parental alienation often results in all evidence of abuse being perversely reframed as evidence of alienation. The more children disclose abuse or demonstrate fear of the abuser, the more the mother may be vilified and seen as the abuser. Subsequent judgments reflect the poor understanding of the family violence dynamic and result in further harm to the children.²⁵

Questions to be put to the NZ Government to rectify the breaches of Children's Rights in the NZ Family Court

Based on our research into the existing legislation, policy and practice of the NZFC and after hearing from hundreds of NZ women we recommend the following remedies and have shaped our questions in light of those.²⁶

1. How will the NZ Government ensure that a specialist, evidenced-based response is introduced in the NZFVC to ensure children are protected from further violence?

Backbone's overarching recommendation is that a new model be urgently developed so that cases where violence and abuse are alleged are processed through the Family Court on a pathway quite

²³ Journal of Social Welfare and Family Law, 2020. volume 42 (No. 1). UK.
<https://www.tandfonline.com/doi/full/10.1080/09649069.2020.1702409>

²⁴ 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*, DOI: 10.1080/09649069.2020.1701942

²⁵ Some children may be ordered to participate in "counselling" or "reunification therapy" with their father, with the purpose of changing their minds about their father, and to "give effect to the orders". Thus, without being assessed as safe by a FV expert, the abuser is granted unsupervised contact, increased care of the children or even, day-to-day care. In some cases, orders are made for no contact at all for the child with their safe mother. Backbone has been informed by women that Court orders are being made preventing evidential interviews of some children who disclose abuse by their fathers. In some cases, court-ordered conditions on mother's and sibling's contact may include denying contact at the children's school, prohibiting discussion about the abuse or treatment of the resulting trauma. See pgs 30 - 32 about prohibitive orders
<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf>

²⁶ The NZ Government has been advised formally numerous times of these breaches (see Appendix One). They may state that they have undertaken a review of the 2014 Family Court reforms and they have initiated a Joint Venture across state ministries to formulate a whole-of-government approach to FV. This paper does not contain space to address our concerns about these structures; in short, we know they will not rectify the breaches summarised in this paper.
<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5d08818344b01d000105e8fa/1560838532713/Open+Letter+to+Prime+Minister+160619+final.pdf>

separate to cases where there have been no allegations of violence and abuse.²⁷ We recommend a panel of highly qualified independent child advocates to investigate, seek children's views and make decisions based on the most up-to-date research and international best practise. They would do scientifically supported risk assessments. These child advocates would have specialist knowledge about child development, child safety, child trauma, and tikanga Maori. We recommend a separate te ao Maori process.

2. When will the NZ Government put systems in place to collect data on the outcomes for children impacted by FV and CAN in the NZFC?

The NZ Government should immediately adopt a process to quantify and identify the children who are involved in the NZFC who have experienced violence and abuse. Data collection systems should be able to flag the cases where violence and abuse are alleged – not only Family Violence Act 2019 proceedings. There should be some follow-up activity to assess the impact of Court orders on these children that is independent of their mother having to bring further applications to the court.

When will the NZ Government establish an independent body to accredit, monitor and investigate complaints regarding the NZFC?

Backbone recommends that responsibility for appointing/engaging, briefing, quality managing and considering complaints regarding professionals working in the NZFC, be urgently transferred to an independent body established specifically for this purpose. The agency would be independent from both the Court/judiciary and the Law Society.

3. When will the NZ Government uphold the UN CEDAW recommendations that a Royal Commission of Inquiry be held into the NZFC?

In 2018 CEDAW recommended that NZ hold a Royal Commission of Inquiry into NZFC. Minister Little responded shortly after the recommendation was published that a Royal Commission would not take place. We ask that CEDAW's recommendation is upheld to fully investigate the breaches of women and children's rights in the NZFC.

CEDAW also recommended that the Special Rapporteur on Violence Against Women come to NZ to investigate the experiences of women and children who have suffered violence and abuse. The Government has decided not to uphold this recommendation (see Appendix One). Backbone recommends that the Special Rapporteurs 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.

4. What other interim immediate measures to reduce the likelihood of unsafe court orders will the NZ Government urgently implement?

²⁷ The Lawyers for Child model costs the New Zealand taxpayer over \$32 million annually and Backbone has established that the model is failing in cases where there has been violence and abuse. We therefore believe this money could be more efficiently spent on a new model that can ensure children's rights are met when they are in the Family Court and that improves children's safety.

There are a range of other actions the NZ Government could take to urgently improve the outcomes for children who become involved in Family Court proceedings.

- Legislate against the use of PA/S for abuse/violence cases including other terms PA/S is known by e.g. poisoning, coaching/influencing, enmeshment, resist/refuse dynamic, or simply turning the child/ren against the father as recommended by CEDAW in 2018.²⁸
- Legislate against the use of court-appointed psychologists for cases of violence/abuse unless these psychologists can demonstrate specialist knowledge about FV and CAN and its impacts on children to the satisfaction of the independent monitoring body.
- Require all NZFC decisions be publicly published including interlocutory decisions.
- Require a tamperproof audio recording of all NZFC hearings and fixtures which would be available for download by the parties in an unedited form, encrypted to ensure it cannot be copied or shared to other formats.
- Require a tamperproof audiovisual recording of all interviews with children which can be securely stored to assist with complaints against those interviewing children.
- Immediately stop NZFC using children's schools as a place where interviews by NZFC professionals happen.
- No uplifts to enforce court orders unless the child's safety is at immediate risk.
- Immediately stop the practise of police uplifts to force a child to have contact with a parent against whom allegations of violence have been made.
- Require child safety to be the primary consideration in Hague Convention cases.
- Abolish the use of COCA section 68 -77 in cases where there has been violence and abuse.²⁹ These sections allow the court to make orders to reduce or reverse care and contact if protective parents contravene existing parenting orders.
- The NZ government should forthwith sign and ratify the Optional Protocol on a Communications Procedure (OPCP) so that victims have a legal complaint process that goes beyond the NZ court system.

²⁸ See section 48 (d) Review the reliance on the parental alienation syndrome theory, with a view to limiting its usage in child custody disputes.

²⁹ COCA S68-77 provides remedies for parenting order contraventions. These provisions apply regardless of FV/CAN and regardless of the child's views. These remedies are applied ferociously against protective mothers and their children, including criminal prosecution and violent police uplifts in cases where mothers find their children refusing contact because they are scared of their abusive father and/or have been harmed whilst in their father's care. See <http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317651.html>