

# Introduction

1. The National Collective of Independent Women’s Refuges (NCIWR) is a non-governmental organisation delivering services to women and children affected by domestic violence in New Zealand. NCIWR provides support, advocacy, legal, and health services to over 26,000 clients annually. Forty-seven percent of these are women, and 53 percent are children.
2. We support the purpose of this review, and see this as a timely opportunity to address both recent and longstanding challenges faced by families going through the Family Court; in particular, victims of family violence and their children.
3. We comment specifically on the issues of Family Dispute Resolution and the requirement for family violence to be identified for an exemption; the Family Legal Advice Service and the removal of legal aid-funded representation; and the problematic distinctions between urgent and non-urgent pathway processes. We also provide comment on lingering issues with the Family Court that are perpetuated despite the 2014 reforms, including judicial subjectivity in family violence cases; the consideration of power and control in both Protection Order and Care of Children Act decisions; difficulties in accessing legal aid, and the power differential that results in Court; and the need for decisions concerning the care of children to be based on international best practice and on safety from exposure to the violent parent.

# The case for change

1. The benefits of strengthening our responses to issues before the Family Court are twofold: they create safety that is life-changing for every victim and at-risk person (usually, children and their protective parent), which has the potential to alter their trajectories of physical, emotional, and social wellbeing; and they add weight to the efforts to foster sustained change to our cultural norms that permit, implicitly condone, and replicate violence against women and children. It is then imperative that this be led by the Family Court, and that both the condemnation of abusive behavior and the support offered to victims is consistent (and coherent) across the criminal and family courts (irrespective of whether an individual victim is seeking protection or recourse through one or both).
2. Early onset and/or frequent and long-term exposure to intimate partner violence (IPV) amongst children has inimical impacts on their neurological processes; in other words, exposure to violence from one parent towards another changes the way that children think, act and feel for the rest of their lives. These may include mental health impacts (including suicide), transmission of the abuser’s belief patterns and consequent replication of coercive control tactics, poorer health outcomes, youth or adult delinquency, poorly developed communication and relationship skills, substance abuse, and behavioural problems[[1]](#footnote-1). However, these experiences are variable risk factors – our responses to children’s experiences of violence can shape their likelihood of experiencing adverse impacts.
3. The most crucial elements of this are our efforts to stop the violence, and our input into the maintenance of a positive relationship between children and their protective, non-violent parent[[2]](#footnote-2). Further, we have an obligation to ensure systems are in place to fulfil these functions - it is enshrined in the United Nations Convention on the Rights of the Child (UNCROC) that children have the right for their needs, experiences, and perspectives to be sufficiently heard and considered, including during Court processes; and is also included in the Convention for the Elimination of Discrimination Against Women (CEDAW) that women have a right to justice in domestic matters. In this submission, we set out the ways in which the current enactment of the Family Court is contrary to New Zealand’s commitment to upholding these Conventions and to the principles of the Domestic Violence Act 1995.

# Impacts of 2014 reforms on family violence victims and children

### Family Dispute Resolution (FDR)

1. Family Dispute Resolution (FDR) is deemed inappropriate for families where there has been family violence. This, however, is predicated on the assumption that the family violence is freely identified in order for the exemption to apply. This is problematic – women who are victims of family violence do not always identify themselves as such at the time of abuse or immediately afterward, and participating in FDR in these circumstances may give rise for the opportunity for abusers to continue to perpetuate subtle patterns of power and control specific to the relationship within the FDR process. Further, women who have been victims and recognize these patterns of abuse may not feel comfortable disclosing this to a third party or risking their partners knowing that they have spoken about this abuse, and may be concerned at possible retribution if they speak about it. We do not feel that the existing exemption scheme adequately provides for these scenarios, and recommend that it becomes an opt-out scheme.

### The Family Legal Advice Service (FLAS) and funded legal representation

1. The Family Legal Advice Service (FLAS) appears to be effective in reducing the cost of lengthy Family Court cases, however is problematic in that it limits the support available and highlights a disproportionate access to advice based on financial capacity.
2. Many of our clients have accessed the FLAS, but have then acted for themselves based on the limited support the FLAS has offered (i.e. by helping them navigate bureaucratic necessities such as application forms), while their abusive partners or ex-partners, who generally have considerably greater financial capacity, have had counter-actions drafted by lawyers well beyond what is accessible through the FLAS. The consequences of this inequitable use of legal advice are often detrimental to victims of violence, who often require advice that is expert in family violence and that can work closely with their individual situations. The FLAS, while a good starting point for advice, cannot provide actual legal advocacy, thus placing victims who cannot otherwise access legal advice at a disadvantage. We would like to see the reinstatement of legal-aid funded legal representation for all stages of Family Court applications.

### Urgent and non-urgent Protection Order application pathways

1. We support the differentiation between urgent and standard pathways in principle; however, we have seen the unintentional impacts of this policy grow over time. The rate at which applications are now made under the ‘without-notice’ pathway highlights the issues with the standard pathway and the implications of restrictions to legal representation on victims’ selection of the pathway. We recommend that reinstating the accessibility of legal aid for the standard pathway will ease the burden of without-notice applications. However, we would also like to see the progression of all standard applications expedited, as in many cases we observe victims’ partners or ex-partners (who, again, have generally greater access to privately funded lawyers) holding up the process through various means as a way of continuing to exercise control tactics over their victims.

# Ongoing Issues

### Judicial subjectivity in cases involving family violence

1. We have found an alarming level of subjectivity in decision-making in cases involving family violence, and this often illustrates a lack of knowledge about the true dynamics and impacts of all types of abuse on the primary victim and their children. This was particularly illustrated in a Protection Order decision that Women’s Refuge was made privy to last year. In this decision the Judge declined the victim’s application for a Protection Order despite a history of demonstrated violence by the abusive ex-partner, on the basis that the victim did not fit the stereotype of the consummate victim (the Judge specifically named her professional occupation, her level of education, and her access to family support as reasons why the order was declined), thus buying into a harmful and outdated narrative about who constitutes a ‘real’ victim and accordingly, who is in need of state protection.
2. This subjectivity also comes into play when identifying coercive control in patterns rather than specific instances of family violence. The failure to accurately identify the ‘primary abuser’ and ‘primary victim’ in any incident of intimate partner violence is damning for women’s experiences of safety-seeking. In numerous instances, our advocates have supported women whose applications for Protection Orders have been declined on the basis of Judges’ perceived mutuality of the violence, informed by police reports that fail to distinguish between the primary victim and primary perpetrator. Such misapplication of the DVA 1995 was recently the focus of a Court of Appeal ruling, which stated that the Family Court had wrongly interpreted the Act in its denial of a Protection Order application, and should be applying the Act as it is set out rather than relying on subjective and often groundless case law[[3]](#footnote-3).

### False separation of violence towards mothers and impacts on children

1. The Domestic Violence Act (’The Act’) 1995 offers a sound and rights-based blueprint for responding to intimate partner violence. The Act contains the principle that a non-violent parent cannot be held responsible for the abuse perpetrated by the other party, and is premised on the idea that the non-violent parent and their children should be protected from further abuse. These are not being reliably enacted, as shown by the many examples of women’s experiences of attempting to access protection for themselves and safe caregiving arrangements for their children.
2. Currently, in COCA cases, only convictions for family violence are considered, with draft legislation proposing that existing Protection Orders also be mandatorily considered. This assumes homogeneity of access to (and safety from) Protection Orders that does not reflect women’s realities – often, a woman at the most risk of lethal violence from a partner will elect not to exacerbate the abuser’s anger by obtaining a Protection Order and alerting them of her intention to seek safety. Accordingly, many women’s experiences of violence (evidenced by records of police call-outs and health records) are made invisible within COCA decisions. In addition, victims have notified us that their applications for Protection Orders are declined on the basis that parties are perceived as ‘equally violent’, even when violence from an abuser is clearly aggressive while violence from a victim is clearly reactive, or on the grounds that the victim has sufficient social resources to keep herself safe. Both rationales minimise the realities of women’s entrapment in relationships with abusers and the constraints that these relationships pose on women’s social power, and reflect a lack of consistent knowledge and understanding of family violence by decision-makers. If these Orders are denied, and no formal mechanism compels consideration of evidence of violence from other sources, this family violence information is largely disregarded when making decisions about the level of contact between the abusing parent and the child, leading to unsafe situations where the child is cared for by the abusing parent without the presence of a safe parent or other person. The potential for this to occur, and for the child to become more at risk by being with an abusing parent without the presence of a safe person, such as the other parent, is one of the most common reasons our clients decide not to rely on the Family Court and to instead continue to live with the abusing parent, on the basis that at least they can provide a buffer between the abusing parent and the child. We recommend amending this process so that all family violence information (including police call-outs and evidence from support agencies) be included in COCA decision-making to identify patterns of abuse.
3. In our experience, shared care is often prioritized despite current and concerning threats to children’s wellbeing or on-going family violence perpetrated in front of the child[[4]](#footnote-4), and as a result, fathers’ access is prioritized above mothers’ concerns for the safety of their children and sometimes the children’s own worries for their safety, often demonstrating pervasive unconscious bias that is implicitly blaming toward mothers. One of our Advocates recently supported a woman who sought formalised care arrangements for her three children through the Family Court. Her ex-partner had used violence (physical and psychological) against her in the past, and had threatened to hurt her children as a means of maintaining control over her, telling her that if she left, he would be forced to take his anger out on the children. She eventually decided to leave and hoped the Family Court would protect her children from these threats being actualised. The Family Court Judge instead prioritised the children’s relationship with their father, disregarding the history of violence toward the mother as irrelevant. The mother was then faced with a choice – returning to a relationship with escalating violence, or leaving the abuser despite the risks she believed this posed to her children.
4. The situation above is testament to the need for family violence-informed processes to guide all Family Court decisions. The recent report by the CEDAW Committee recognised that the Family Court as it currently stands does not compel adequate consideration of family violence (conversely, they labelled it a “crisis within the Family Court system, reflected in mistreatment of women”[[5]](#footnote-5)). We witness this mistreatment regularly – mistreatment that means women are doubly victimised, first through abuse and then through a lack of responsiveness from systems that are intended to be protective. We urge you to direct particular attention to the following concerns that were raised by the Committee:

*“There are no particular provisions to courts to consider domestic violence, whether directed at the mother or at the child, when deciding on child custody, and judges reportedly recommend shared physical custody even when fathers are abusive to them or to their mothers”;*

and

*“(a) Risk assessment is being performed in only few of the cases where violence is reported by the woman, as a result of the removal of the Bristol Clause during the 2014 reforms.”[[6]](#footnote-6)*

1. Our Advocates have witnessed significant misapplication of the Act: mothers who have been unable to secure arrangements for their children that do not involve the abusing parent having unsupervised time with the child; women who have been deemed in some way complicit in the abuse they have suffered because they have not sought help earlier or have not involved police in incidents, and as such have been denied (especially without-notice) Protection Orders; and mothers whose abusive partners have continued to perpetrate abuse against them by using their often considerably greater financial and social power to prolong and influence Family Court processes without this being recognized and curtailed.
2. Our Advocates also routinely witness harmful impacts of the abusing parent continuing to exercise their disproportionate power over the victim through the Family Court by capitalizing on the impacts of violence on the victim, and on the victim’s constrained access to social and financial resources. We frequently find that the abuser manages to repackage actions or behaviour that in reality speak to the impacts of long-term and insidious abuse (such as anxiety, concealing behavior, or distress) as the victim being ‘crazy’, ‘hysterical’, or ‘unable to parent’. This would not be possible if the Family Court was family violence-informed.
3. Unconscious bias that serves to reinforce and enable abusers’ patterns of discrediting and undermining victims who are mothers is most problematically evidenced through Judges’ use of Parental Alienation Syndrome (or simply allusions toward ‘parental alienation’ that reflect the origins of the supposed ‘syndrome’). This is despite the ‘syndrome’ being found to have been predicated upon harmful sexist beliefs that saw fathers’ abuse toward both mothers and children as inconsequential, and having being widely discredited and invalidated. Recently, one of our clients’ children was put into the day to day care of her father, despite more than a dozen police call-outs evidencing his violence toward the mother, on the basis that she was believed to have influenced the child not to want to see the father – an allusion to ‘parental alienation’ that in no way reflected the actual motivation behind her desire to limit contact between her daughter and a man she knew to be volatile in his parenting. The use of this term makes the valid attempts by victims to shield their children from abusive actions appear to be malicious attempts to restrict parental contact. Accordingly, the CEDAW Committee’s recent report noted its concerns that:

*“(d) Courts, lawyers for children and social workers are routinely resorting to the Parental Alienation Syndrome theory despite its being refuted internationally.”[[7]](#footnote-7)*

1. The sexist underpinnings of this false ‘syndrome’, which assume that mothers are essentially malicious, hysterical, and convince their children to construct false allegations against fathers, are directly in contravention of the intentions of the DVA 1995, which directs that the Family Court provide protection for all women and children subjected or exposed to IPV. Given the history of this ‘syndrome’ and its function in concealing abuse, the use of the term and the concept of parental alienation should be explicitly disallowed within the Family Court, particularly in instances where there is alleged family violence.
2. We have also supported women through Family Court proceedings where accusations of abuse that manifest in forms other than physical violence were minimized and dismissed, and had seemingly no impact on Judges’ assessments of what parenting arrangements would be best for the child. In a recent example, it was determined that psychological and economic abuse (resulting in social isolation, outstanding debt, and constraints on the mother’s ability to provide safe and healthy housing for her pre-school aged son) was immaterial; conversely, the mother’s display of distress as a result of this abuse and (quite appropriately) of the ongoing stress of the Family Court care of children case was held up as example of unfitness. We contend that *all* forms of family violence be taken seriously and be interpreted as indicative of parenting safety, as per the Domestic Violence Act 1995.
3. There are presently no outcome measurements for the training for judges acting as decision-makers in family or sexual violence cases; thus no way to evaluate effectiveness. A family violence-informed Family Court can only be ensured through consistent national training delivered by recognized victim experts and routine evaluation of competence in understanding and responding to family violence indicators across the judiciary. We argue that this should also be reinforced by way of a service user panel comprised of victims and their supporters, so that those affected by policy can have input into its improvement.

### Impacts of legal aid restrictions

1. The other lingering issue concerns equitable access to quality legal representation. Legal aid entitlement often excludes those with minimal income but shared assets, and results in such debt that the system amounts to a deterrent to access the court system for safety. Declining numbers of legal aid lawyers and inadequate pay rates for legal aid law also means this becomes inaccessible. In rural areas in particular, where there is often a dearth of legal aid-registered lawyers, women are often precluded from accessing representation in Family Court matters. The 2010 changes to legal aid[[8]](#footnote-8) saw the introduction of restrictive criteria regarding who could access legal aid, and determined that people receiving legal aid should be required to repay this in most circumstances.
2. Given that abusers often prolong court procedures to deter victims from pursuing applications against them, victims ultimately bear the brunt of debilitating legal aid debt in a bid to access protection. Those who are ineligible (and this group comprises most working women) and cannot afford to seek legal representation privately end up representing themselves, often with poor results. This is a chronic and concerning example of inequitable access to the machinery of justice. We recommend that this be addressed alongside reform to the Family Court procedures so that funding for legal aid is unlimited, made free from repayment obligations, and means-tested according to accessible income offset by dependents.
1. Crossa, T. P.; Mathews B.; Tonmyr, L.; Scott, D.; Ouimet, C. (2012). Child welfare policy and practice on children’s exposure to domestic violence. Child Abuse and Neglect, 36, pp. 210-2016. DOI:10.1016/j.chiabu.2011.11.004

Campo, M. (2015). Children’s exposure to domestic and family violence: Key issues and responses. CFCA, 36. [↑](#footnote-ref-1)
2. Ibid [↑](#footnote-ref-2)
3. *SN v MN* [2017] NZCA 289 [↑](#footnote-ref-3)
4. Ibid [↑](#footnote-ref-4)
5. CEDAW/C/NZL/CO/8 [↑](#footnote-ref-5)
6. Ibid [↑](#footnote-ref-6)
7. CEDAW/C/NZL/CO/8 [↑](#footnote-ref-7)
8. New Zealand Law Society. (2015). *Legal Aid and Access to Justice* <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-868/legal-aid-and-access-to-justice> [↑](#footnote-ref-8)