WOMEN'S REFUGE
National Collective of Independent Women's Refuges Inc
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NCIWR Submission on the Family Court (Supporting Children In Court) Legislation Bill

Introduction

1. The National Collective of Independent Women's Refuges (NCIWR) is a non-governmental organisation delivering services to women and children affected by family violence in New Zealand. NCIWR receives over 50,000 crisis calls per year (nearly 140 per day), and provides support, advocacy, legal, and health services to over 26,000 clients annually.

2. Of the clients whom we support in safe houses, 52 percent are children.

3. Most care of children arrangements that are formalised through Family Court proceedings are preceded by some form of family violence. We thank the Select Committee for their attention to the way that this family violence backdrop influences how children experience safety. Our submission emphasises how the other amendments in this Bill can be safety-promoting by putting the safety and wellbeing of children at the centre of every process they participate in.

4. The NCIWR is best placed to offer both child-appropriate and family violence specialist commentary, given our over 40 years of experience in supporting women and children in the aftermath of family violence and our novel 2021 Aotearoa-specific research into children's experiences of safety and support services after family violence exposure. This research is titled '*Kids in the Middle*'.

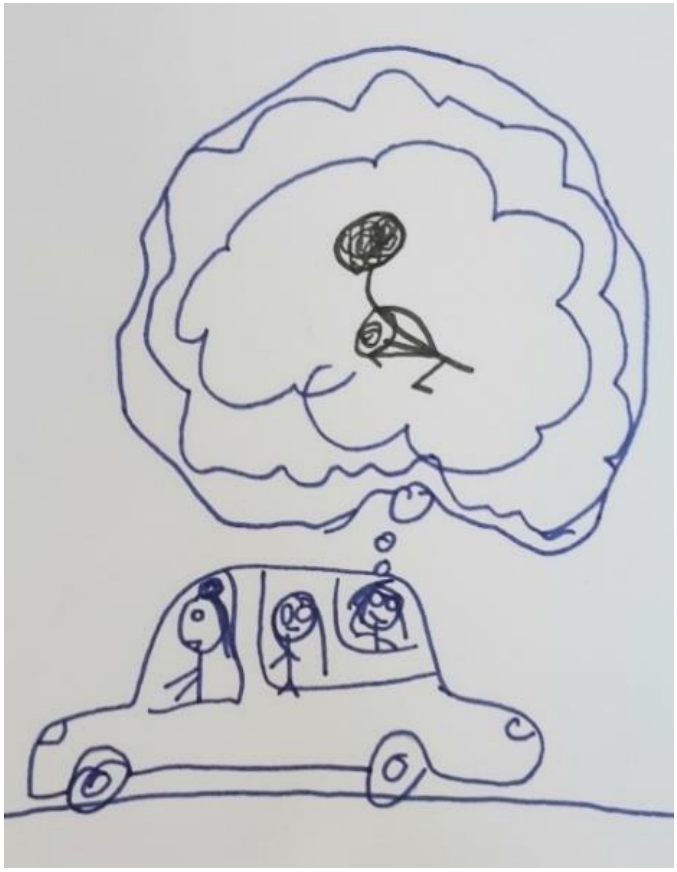
5. Given the emphasis that this Bill gives to children's views and input, it is imperative that the design of how children will give input in the future is predicated on what children have already said about what they need after family violence. They have asked us to use what they say to improve the experiences of future children; accordingly, we act as a conduit to express their views in this submission.

6. Please note we wish to appear before the Select Committee for this Bill.

Foreword

Meet Ana. Ana is 12 years old, and she and her mother recently stayed in one of our safe houses to seek safety from family violence.

Ana:	**That is us in the car coming down to [place name].**
Interviewer:	*That is you in the car coming down to [place name]?*
Ana:	**Yeah.**
Interviewer:	*And what is happening?*
Ana:	**I'm thinking 'how are we going to do this?'**
Interviewer:	You're thinking 'how are we going to do this?'
Ana:	**Yes.**
Interviewer:	What is in your thought bubble?
Ana:	**Me dragging me across the ground.**



This Bill aims to improve the experiences of children in court, including by giving greater emphasis to children's views. We therefore prefaced our submission with one child's voice, and continue to give weight to children's expressions of their views and experiences throughout this submission.

The introduction of the Bill is timely for us. We are in the final stages of a two-year research project ('*Kids in the Middle'*) into how children experience support and safety after family violence. To do this, we conducted a narrative inquiry with 19 children aged between five and thirteen years. '*Kids in the Middle'* effectively accomplished what this Bill aims to make possible for children in Court – the safe and significant expression of children's views. Relatedly, a key finding was that supporting children to express their thoughts, feelings, experiences, and perspectives is never simple. Designating a time for input and asking them adult-framed questions cannot lead to the meaningful expression of their views.

How adults invite, support, and hear children's contributions is pivotal in whether these contributions are recognised and integrated into decision-making. Children are capable and complex social actors who can proficiently communicate, but only if:

1. The children are confident that the person listening understands the nuances of the ongoing risks to their safety and wellbeing, and will not put them at further risk;
2. The preconditions to them accessing a sense of emotional safety, trust, and confidence to speak are met; and
3. The people listening to them are sufficiently equipped to recognise when and how they are communicating, and to hear what they are saying.

The Bill does not account for these in its current form. Below we use children's voices to illustrate how the proposed provisions may be strengthened to support children to express their views, and submit the following:

- The seeking of children's views must be preceded by family violence-informed systems;
- Mandating consideration of ALL family violence evidence/information is a core facet of this;
- Family violence evidence/information is best used to inform decision-making for children when interpreted by a family violence specialist to give meaning and context to the role of the violence in shaping each individual child's caregiving landscape;
- Key actors (such as lawyers for children) need to be both family violence informed AND engage specialist resources to give emphasis to the safe expression of children's views; and
- The promotion of children's input into decisions concerning their care is crucial, but opportunities to invite children's voices must meet the preconditions that enable them to do so safely and in ways that are meaningful to them (i.e. in settings that are family violence-informed, child-centred, and culturally safe).

Overview

This Bill proposes several changes aimed at improving the experiences of children in the Family Court, including requiring lawyers to promote conciliatory processes for parents, furthering opportunities for children to express their views and giving emphasis to those views, requiring decision-makers to take family violence into account, and matching lawyers' skills and characteristics to children's needs. Each of these is important, and none can bring about more than incremental improvement for how children experience the Family Court unless children's contexts of safety are catered for in the ways that these changes are enacted.

As we explain throughout our submission, a child's caregiving landscape influences every aspect of their participation in and experience of the Family Court[1]. While care of children arrangements are often agreed upon without Family Court involvement, the cases that go to Court are disproportionately likely to have family violence as part of this caregiving landscape[2][3][4]. Accordingly, we focus on how the proposed amendments must be formalised in ways that account for this violence so they can safely and substantively improve children's participation in and experiences of Family Court.

The benefits of strengthening our responses to issues before the Family Court are twofold. First, they have the potential to create safety for each primary victim and at-risk person (most commonly children and their protective parent), which has the potential to alter their trajectories of physical, emotional, and social wellbeing [5]. Second, strengthening Family Court responses to children offers an opportunity to disrupt and change the social norms that perpetuate family violence, such as by instilling a belief in children that exposure to violence is not inevitable, and that statutory systems will support pathways to safety[6].

Children have already voiced that keeping them safer from family violence as important to them: in a 2015 youth voice report, children and young people identified their priorities for policy improvement as "better protection against family violence", "protecting [children] from harm/violence", and "help[ing] [government] recognise family violence."[7] Supporting children's immediate safety, their beliefs about

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[1] Mandel, D. (2009). Batterers and the lives of their Children. In Stark, Evan, and Eve Buzawa. *Violence against women in families and relationships.* Evan Stark & Eve Buzawa, ABC-CLIO.

[2] Gollop, M., Taylor, N., & Liebergreen, N. (2020). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 2. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago

[3] Australian Law Reform Commission. (2019). *Family Law for the Future: Inquiry into the family Law System* (ALRC Report 135). Brisbane: ALRC. www.alrc.gov.au/inquiry/review-of-the-family-law-system

[4] Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. et al. (2015a). *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)*. Melbourne: Australian Institute of Family Studies. aifs.gov.au/publications/experiences-separated-parents-study

[5] Mandel, D., & Wright, C. (2017). *Domestic Violence-Informed Research Briefing*. Safe and Together Institute, United States.

[6] Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J. et al. (2015b). *Evaluation of the 2012 family violence amendments: Synthesis report*. Melbourne: Australian Institute of Family Studies. aifs.gov.au/publications/evaluation-2012-family-violence-amendments

[7] *Our Voices, Our Rights* report coordinated by UNICEF and Save the Children in 2015, and submitted to UNCROC for their 5th periodic report. Retrieved from https://www.savethechildren.org.nz/assets/Uploads/Our-Rights-Our-Voices2.pdf

violence, and their confidence in the Court system to hear them and keep them safe requires us recognising that all family violence is a threat to the safety and wellbeing of children.

Family violence and children's caregiving landscapes

Exposure to violence from one parent toward the other can impact the way that children think, act and feel for the rest of their lives. We have chosen not to give a lengthy catalogue of the potential impacts – it is generally acknowledged that family violence represents risk to children. It is much more useful to focus on how our responses to children's experiences of violence can mediate the likelihood that they will experience adverse impacts[8]. Crucially, these responses must include protecting children from the impact of the perpetrator's actions and relatedly, the opportunity for perpetrators to use their access to children to continue the violence[9]. Responses must also support the relationship between children and their safe, protective parent[10].

Family violence against a primary caregiver *always* impacts their child. It has been established that perpetrating family violence in a child's household constitutes severe child abuse[11]. This is whether children are directly physically harmed, witness physical or emotional abuse within the home, or are not directly present but aware that abuse is happening.[12][13] Children are innocent bystanders in this process, where perpetrating figures (most commonly fathers and stepfathers) make parenting decisions that impact children's immediate and future outcomes.[14] Plainly, the perpetrators' choice to enact violence within the home is a caregiving decision that directly harms children.[15]

Risks to the child extend beyond the emotional harm caused by witnessing episodes of violence; the underlying pattern of abuse impacts household functioning by limiting the mother's capacity to parent safely and without constraint.[16] Family violence, and the associated harm to children who experience it alongside primary victims (usually mothers), does not end upon separation. Rather, separation often catalyses an intensification of abuse tactics, many of which draw upon external mechanisms such as

[8] Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K., … Dunstan, J. (2017). *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*. Sydney: ANROWS.

[9] Mandel, D., & Wright, C., *Domestic Violence-Informed Research Briefing*, as at 5

[10] Mandel, D., & Wright, C., *Domestic Violence-Informed Research Briefing*, as at 5

[11] Saunders, D. G., & Oehme, K. (2007). *Child custody and visitation decisions in domestic violence cases: Legal trends, risk factors, and safety concerns.* National Online Resource Center on Violence Against Women. https://www.courts.ca.gov/documents/BTB25-PreConDV-10.pdf

[12] Gregory, A., Arai, L., Shaw, A., MacMillan, H. L., & Howarth, E. (2019). Children's experiences and needs in situations of domestic violence: A secondary analysis of qualitative data from adult friends and family members of female survivors. *Health and Social Care in the Community, 28*(2), 602–614. https://doi.org/10.1111/hsc.12893

[13] MacMillan, H., & Wathen, C. (2014). Children's exposure to intimate partner violence. *Child and Adolescent Psychiatric Clinics of North America*, 23(2), 295– 308. https://doi-org.ezproxy.massey.ac.nz/10.1016/j.chc.2013.12.008

[14] Murphy, C., Paton, N., Gulliver, P., Fanslow, J. (2013). *Understanding connections and relationships: Child maltreatment, intimate partner violence and parenting.* Auckland, New Zealand: New Zealand Family Violence Clearinghouse, The University of Auckland.

[15] Wilson, D. L., Smith, R., Tolmie, J., & De Haan, I. (2015). *Becoming better helpers: Rethinking language to move beyond simplistic responses to women experiencing intimate partner violence.*

[16] Crossa, T.P., Mathews B., Tonmy, R. L., Scott, D., & Ouimet, C. (2012). Child welfare policy and practice on children's exposure to domestic violence. *Child Abuse and Neglect, 36*, 210-2016. DOI:10.1016/j.chiabu.2011.11.004

the victim's financial setting, employment setting, or social setting to continue to perpetrate harm.[17][18][19] The victim's concern for the child therefore continues to be used as a weapon of coercion, even if the victim and perpetrating parent are living separately. When the care arrangement involves unmitigated access by the perpetrator, they often then draw upon additional strategies to control or abuse the primary victim.

Some examples of this can include:

- using the child as an excuse to call or message the victim incessantly or harass them at work or home;
- constantly interrogating the child about the victim's daily life or social activities;
- influencing the child to criticise or feel uncared for by the victim;
- intentionally undermining the victim's parenting decisions or routines, varying care arrangements or times to disrupt the victim's occupational routine or social involvement;
- giving the child digital toys that track the victim's whereabouts or activities;
- threatening to harm the child if the victim does not comply with their wishes; and
- using the child handover as an opportunity to abuse or intimidate the victim.

The child's safety and wellbeing is not separate from this pattern of harm;[20] instead, they become an unwitting participant and continue to experience the instability of the perpetrator's violence.

A family violence-informed context to give effect to the proposed amendments

Children's experiences of the world are shaped by their parents' behaviours and decisions. Ensuring children's safety is therefore dependent on ensuring they are cared for by a safe and protective parent, who positively contributes to the functioning of children's family units. These family units form the basis for children's experiences of safety. Maintaining these cohesive caregiving environments requires nuanced comprehension of how family violence has impacted:

a) the child directly;
b) the safe and protective parent's parenting capacity and parenting authority; and
c) family/household functioning – the safety, stability, resourcing, and predictability of the child's core family unit.[21]

This is unachievable unless all aspects of care of children proceedings are family violence-informed.

The Supreme Court has said that Section 5(a) on the paramountcy of child safety is likely to have decisive weight, because children's safety outweighs the rights of the perpetrating parent to see that

[17] Jury, A., Thorburn, N., & Weatherall, R. (2017). "What's his is his and what's mine is his": Financial power and economic abuse in Aotearoa. Aotearoa New Zealand Social Work, 29(2), 69-82. http://dx.doi.org/10.11157/anzswj-vol29iss2id312
[18] Thorburn, N., & Jury, A. (2018). *Not so romantic: Intimate Partner Stalking in Aotearoa New Zealand*. NCIWR, New Zealand.
[19] Tolmie, Julia Elizabeth, VB ; Gavey, Nicola. (2010). Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions about Current Family Law Practices in New Zealand. *New Zealand Universities Law Review 24*(1):136-166
[20] Mandel, D., & Wright, C. (2017). *Domestic Violence-Informed Research Briefing*. Safe and Together Institute, United States
[21] Ibid

child. That principle cannot be fulfilled if the risk to children's wellbeing is unseen and unrecognised. Without a mechanism to consider family violence information and *have this information expertly interpreted*[22]*,* it is not possible to understand the child's caregiving landscape enough to identify what will give that child safety[23][24][25]. In the past year, many of our clients who have (reluctantly) had to participate in care of children proceedings have found that shared care of their children has been prioritised by the court despite a long history of the other parent perpetrating violence, implying that the use of family violence information falls short of informing safety.

In these cases, the perceived right of the other parent (especially in cases where the physical violence is perpetrated out of sight of the children) to have extensive and unsupervised access appears to be given greater weight than mothers' concerns for their children's safety, and, often, the children's own fears for their safety. In short, when considering family violence information or children's views on their own care, the Court has not deployed specialist resources to ascertaining what this backdrop of violence means about the perpetrator's parenting safety going forward. This is not family-violence informed; nor does it lend itself to children's subjective feelings of safety that would enable them to exercise their voice. The latter cannot occur without the former – safe, family violence-informed processes must precede the seeking of input from children.

In our experience, most of our clients who have children prefer to ensure that their children still have contact with their other parent, even when that parent has used violence against them or against another partner. Many go to extraordinary lengths to facilitate this, often at immense personal sacrifice. However, they also want to safeguard their children against continued harm by putting parameters around this access, and similarly try to arrange this contact in such a way that does not offer the perpetrating parent further opportunities to perpetrate harassing or abusive behaviour against them. Our advocates report that clients almost always try to avoid instigating Family Court proceedings, and generally only do so when their informal attempts to engage the other parent in safe ways have not been successful.

They then turn to the Family Court in the hope that this will offer them some reprieve from the violence, and offer their children some formalised mechanism of safety that circumnavigates the perpetrator's pattern of violence, and, correspondingly, the pattern of adverse impacts to the child's life. However, as outsiders to this caregiving dynamic, recognising how this protective parenting is enacted in response to a perpetrator's pattern of violence is no small task. Accordingly, we next focus on what information is used in Court, and, equally importantly, how it is interpreted.

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[22] Mandel, D. (2009). Batterers and the lives of their Children. In Stark, Evan, and Eve Buzawa. *Violence against women in families and relationships.* Evan Stark & Eve Buzawa, ABC-CLIO.

[23] Wilson, D. L., Smith, R., Tolmie, J., & De Haan, I. (2015). *Becoming better helpers: Rethinking language to move beyond simplistic responses to women experiencing intimate partner violence.*

[24] Thorburn, N., & Jury, A. (2018). *Not so romantic: Intimate Partner Stalking in Aotearoa New Zealand*. NCIWR, New Zealand.

[25] Murphy, C., Paton, N., Gulliver, P., Fanslow, J. (2013). *Understanding connections and relationships: Child maltreatment, intimate partner violence and parenting.* Auckland, New Zealand: New Zealand Family Violence Clearinghouse, The University of Auckland.

Incomplete use of family violence information

Given the prevalence of family violence as a factor in the initiation of care of children court proceedings and the intersections between family violence and direct and indirect harm to children, we make several recommendations regarding the scope of family violence information that is mandatorily considered. We also make recommendations about what resources would support this information being meaningfully considered in terms of the *significance of the information as it relates to children's safety*.

Violence against the other parent has historically been regarded as distinct direct from risks to children. However, as we have signalled above, the conclusive (and continually growing) body of family violence literature attests to how the perpetration of violence causes harm both to the primary victim and to the child. In short, as earlier stated, violence against a partner's child is a parenting decision as much as it is a relationship one[2627].

Legislative change in New Zealand has gradually begun to reflect this paradigm shift, strengthening judicial actors' and service providers' obligations to consider child wellbeing as inextricable from violence perpetrated in or against the child's household. However, recognition of the relationship between violent perpetration against a parent and threats to child wellbeing have not been entirely integrated in legislation or applied by decision-makers in care of children cases.

We do not consider this to be because decision-makers are disinclined to keep children safe. We recognise that both Judges and children's lawyers are committed to making the best possible decisions to support children's safety. Rather, we suggest that they are simply not equipped with access to the necessary resources to do so.

Issues with family violence 'evidence'

While family violence legislation explicitly incorporates provisions relating to children and acknowledges that violence perpetrated by and against adults harms children, legislation aimed at children's welfare generally goes no further than flagging it as harmful. Yet given the centricity of family violence in the majority of care of children cases that go to court, children's safety and wellbeing cannot be fully realised unless decision-makers:

- Are family violence-informed;
- Are given all relevant family violence information, including from clients, from police, and from support agencies; and
- Have access to (and use) resources to inform their decision; namely, a family violence specialist who can expertly identify, interpret, and give meaning to information relating to the pattern of violence in children's caregiving landscapes

[26] Mandel, D. (2009). Batterers and the lives of their Children. In Stark, Evan, and Eve Buzawa. *Violence against women in families and relationships.* Evan Stark & Eve Buzawa, ABC-CLIO.

[27] Mandel, D., & Wright, C. (2017). *Domestic Violence-Informed Research Briefing*. Safe and Together Institute, United States

At present, S.5A of the Care of Children Act titled "family violence to be taken into account" still contains a narrow scope of family violence information that must be considered as part of decision-making regarding the care of children. It relates specifically to guardianship and parenting orders where on party is the respondent of a temporary or permanent protection order, thus excluding the majority of family violence cases, where the primary victim does not have a protection order.

We contend that this is particularly problematic for three reasons.

1. Most victims do not report family violence or pursue charges against the perpetrator;
2. Many evaluate the risk of retribution they perceive would be forthcoming if they applied for a protection order and decide it will either compromise their safety or otherwise be untenable to do so; and
3. Many breaches of protection orders are either not reported, not recorded by police, or are not met with criminal charges. This renders the disproportionate focus on protection orders (and breaches of these orders) as a snapshot of risk indication flawed and unreliable[28].

The role of 'evidence' in making decisions for children

If victims decide not to apply for a protection order or if these are denied, and no formal mechanism compels consideration of evidence of violence from other sources, the body of evidence capturing parts of a perpetrator's pattern of violence is largely disregarded when making decisions about the level of contact between the abusing parent and the child. Last year, for example, one of our clients had a 13 month old infant with her ex-partner. Despite his violence toward her involving threats to kill, strangulation, threats to kidnap the child, frequent turning up, and property damage in front of the infant, he was permitted regular unsupervised access with the infant, with the Court finding "no evidence of... violence [toward] or risk to the child". Our client had reported more than twelve breaches of the protection order. None were prosecuted, therefore none were used to inform the Court's decision.

Stipulating *how* available evidence is admitted and used to inform decisions is therefore an essential step toward a family violence-informed service. This was previously raised in a report prepared for the Law Foundation[29], which found that for many mothers making care arrangements through family court, the process "made even more challenging for parents and caregivers by ongoing abuse, harassment and breaches of protection orders by the other party" (p. 12).

Much of this continued abuse and harassment (with or without a protection order in place) is not prosecuted or admitted into proceedings, but nevertheless is important information regarding the perpetrator's pattern of violence toward children's mothers. Failing to use this evidence to guide safe-decisions leads to care arrangements that mean for some or all of the time, the child is cared for by the

[28] Thorburn, N., & Jury, A. (2018). *Not so romantic: Intimate Partner Stalking in Aotearoa New Zealand*. NCIWR, New Zealand.

[29] Gollop, M., Taylor, N., & Liebergreen, N. (2020). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 2. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago.

abusing parent without the mitigating presence of their safe and protective parent[30]. This is further underlined by the following case example.

> *A Women's Refuge social worker recently supported her client, Emma, as she attempted to access safety through the Family Court. Emma has two children aged six and nine, and had separated from her husband nine months prior, after numerous physical and sexual assaults against her (and one physical assault against the elder child) and a pattern of controlling behaviour spanning almost a decade. The catalyst to her leaving was witnessing the extent of her children's fear during dinner at home. She described the incident, where the children's father had spoken to her aggressively and using derogatory terms and told her social worker that her children had known that physical aggression was likely to follow. She recalled the terror she saw in her children, who were terrified they might drop food on the floor or fumble their forks, and that he would then blame her and his abuse would again escalate to assault. She had known that he would oppose her leaving, and that it was probable that he would fight her for care of the children to compel her to resume living together, but she did not want her children continuing to be fearful, tense, or witnesses to his treatment of her.*
>
> *The appointed lawyer for child told her she was 'being emotional' when she shared her concerns about how he might use the children to perpetuate his abuse of her. When she raised the possibility of a protection order, the lawyer for child told her "you can if you want, but it won't look good for you. This is about working together for the sake of the kids, not talking about what's happened in the past". There were records documenting his violence toward her, including those held by Police, by Women's Refuge, and by her GP. None were considered by the Court, and the family violence did not feature at all in the hearing. Shared care was awarded; the children's father had them three nights per fortnight. Within four weeks, the elder child tried to refuse to see her father. He reported that his father was telling him to "tell everyone Mum doesn't really care about me, only about her friends", that "Mum split up our family", and that as 'man of the house', he had to "keep an eye on what was going on and let Dad know". The children's father sought amendments to the arrangements six separate times so that Emma would incur debt from lawyers' fees, and said to Emma "let me know when you get bored of this or you run out of money".*

The potential that such arrangements will put children at perpetual risk is one of the primary deterrents to women considering leaving the abuser. In our experience, when a client must choose between living with abuse but feeling certain of their child's relative safety OR seeking long-term sustainable safety for themselves at the expense of day to day safety for their children, most choose to stay.

This is further reinforced by the findings of the report for the Law Foundation, which states that "some participants believed their former partner used dispute resolution services, such as FDR and the Family Court, as a means to continue such harassment and abuse. An ongoing fear of antagonising their

[30] Tolmie, Julia Elizabeth, VB ; Gavey, Nicola. (2010). Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions about Current Family Law Practices in New Zealand. *New Zealand Universities Law Review 24*(1):136-166

former partner and striking a balance between this and managing the risk of harm for themselves and their children was a major challenge for some women."[31][32]

The implications of this are twofold; women remain at risk for the sake of their children's safety, while children learn that living with violence is an inevitability – seeking intervention cannot or will not circumvent the abuser's pattern of violence. This cannot change until care of children proceedings take account of all family violence evidence, and apply this in ways that promote safety.

Shortcomings of proposed S.5

If S.5 is amended as proposed, information that must be mandatorily considered (other than orders themselves) is restricted to *convictions* for breaches or information from service providers reporting on either the safety of the protected person, or the behaviour of the respondent. This Bill does not seek to expand this restrictive list of sources of family violence information, precluding the statement of intention in the Bill's explanatory note ("that family violence should be considered in all decisions about children's care", p.2) from being actualised.

While Clause 5 is clearly intended to address this, no part of the Bill substantively expands the prohibitively narrow scope of what must be considered as 'family violence evidence'. The explanatory note is therefore misleading; it states that the introduction of new clauses into S.5A will "require that where there has been previous evidence of family violence, the court, when dealing with proceedings under the Care of Children Act 2004, must again have regard to the principles set out in S.4 of the Family Violence Act 2018" (p.3). Family violence convictions, protection orders, breaches of orders, and documentation from service providers after a protection order is granted is not indicative, inclusive, or representative of all family violence 'evidence'.

Reliance on these distorts decision-makers' perceptions of actual risk and of the specific nature of the dynamics of family violence as they play out in a child's home context, leaving children inadequately protected[33][34]. Conversely, the bulk of documentation regarding risk and safety relating to family violence within a child's home context is recorded and held by entities other than the family and criminal court; in particular, by police and by specialist family violence providers. There is then a corresponding imperative to mandate consideration of these forms of evidence in addition to court orders and convicted breaches.

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[31] Gollop, M., Taylor, N., & Liebergreen, N. (2020). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 2. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago

[32] Tolmie, Julia Elizabeth, VB ; Gavey, Nicola. (2010). Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions about Current Family Law Practices in New Zealand. *New Zealand Universities Law Review 24*(1):136-166

[33] Gollop, M., Taylor, N., & Liebergreen, N. (2020). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 2. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago

[34] Pond, R., & Morgan, M. (2008). Protection, manipulation or interference with relationships? Discourse analysis of New Zealand lawyers' talk about supervised access and partner violence. *Journal of Community & Applied Psychology, 18*(5), 458-473.

Accordingly, we submit that the insertion of a subsection directing decision-makers to have regard for s.4 of the Family Violence Act 2018 would only meet the stated intention of the Bill if the sources of information mandatorily considered explicitly include (at a minimum) documentation held by the Crown and held by specialist agencies. We further propose that the wording of this Section be amended to state that *all* previous evidence (with direction to decision-makers to consider it on a balance of probability, rather than on conviction) of family violence must be considered in care of children proceedings.

Finally, we propose that an additional provision direct that when family violence information is identified, a family violence specialist be engaged to give context and meaning to that information as it relates to the child's caregiving landscape, and that this input be mandatorily considered in decisions about children's care. We give a further rationale for this specialist role in the following section.

Section 7 amendment: the appointment of lawyers to represent children

As discussed above, the use of family violence information that *is* available in Family Court decision-making is not yet uniform in Aotearoa. This was underscored in the Law Foundation[35] report, as this set out mothers' experiences of having the continued risks to their children minimised or misinterpreted:

> [Mothers] perceived that professionals, in general, lacked adequate knowledge and understanding of family violence and the dynamics involved. Some participants suggested more training was necessary. A common complaint was that their concerns about their own, or their children's, safety were not listened to or believed and that family violence was not taken seriously enough or was minimised. Some reported that, even with evidence, claims of abuse and violence did not appear to be given adequate consideration or weight in Family Court proceedings and, in some cases, were dismissed entirely. There was also concern that psychological and emotional abuse did not seem to be regarded as seriously as physical abuse in the Family Court. Some participants felt that their safety concerns had been twisted and used against them, and that their attempts to protect their children were interpreted as alienating behaviour…. [some found the] Family Court to be abusive, unsafe and harmful to them and their children.

These dynamics of perpetration and victim response are often concealed, are difficult to name, and are often intricately woven into the children's caregiving landscape. For instance, child welfare expert David Mandel[36] examined state actors' responses to parenting situations in the aftermath of family violence, and concluded that perpetrating parents' abuse is rarely acknowledged as causing continuous harm to children even after separation. He summarised this by saying:

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[35] Gollop, M., Taylor, N., & Liebergreen, N. (2020). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and caregivers' perspectives – Part 2. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago.

[36] Mandel, D. (2009). Batterers and the lives of their Children. In Stark, Evan, and Eve Buzawa. *Violence against women in families and relationships.* Evan Stark & Eve Buzawa, ABC-CLIO.

> With the portrayal of the victimised mother as an inadequate parent, it is easy to see how a [perpetrator] may gain custody or the victim lose it in courts that fail to appreciate the gravity of abuse and its effects on parenting.

Aotearoa is not unique in its struggle to reconcile the aim of keeping children safe with the aim of affording both parents the opportunity to care for their children. In the United States, a recent study found that in cases where on parent has been convicted of physical assault against a primary victim, only 60 percent result in the primary victim having majority care arrangements for their child[37], often despite children expressing their fear and concern about their ongoing safety. In 70 percent of cases where the convicted perpetrator has primary or shared care, there are no explicit provisions to safeguard children's care arrangements[38], underscoring how even the admission of family violence evidence does not necessarily equate to family violence-informed decisions. This, and similar findings, reinforce the importance of drawing upon all family violence information, having access to specialist expertise to explain how it relates to the care of a particular child, and putting that understanding at the forefront of how the care of children is decided.

The authors of that study present a state-by-state analysis, concluding that although legal provisions expressly discourage decisions that allow unsupervised care where there is documented family violence, most states presently have no formalised mechanism to introduce *child-centred* expertise regarding the intricacies of family violence dynamics and implications for safe decision-making about children's care. They also conclude that lawyers contracted to obtain and convey children's views and make recommendations based on these are insufficiently equipped to identify risk and to make evidence-informed recommendations[39]. We similarly suggest that lawyers acting for children in Aotearoa, while well-intentioned, are not specialists.

We do not feel that a generalist key actor (such as a lawyer for child) can realistically be equipped to elicit and collate information about enough of the seemingly disparate puzzle pieces of this caregiving landscape to convey an accurate snapshot of the ways that a perpetrator's pattern of violence (and access to the safe parent) harms a child or undermines their potential for wellbeing. This a specialist task.

The specialism of family violence is equivalent to other specialisms that are commonly drawn upon to offer expert input, such as the assessment of psychological functioning, which is sourced from psychologists. However, people offering interpretation of family violence and its impacts on children's caregiving landscapes in the Family Court are rarely family violence specialists, so while competent at their professions, they offer a lay understanding of violence. Accordingly, even with an expanded range of information that is mandatorily considered, decisions regarding the care of children cannot be family

[37] Roach, A. (2018). Will Data Drive Change? Research Shines a Light on the Family Law System. In *Coalition Chronicles,* Madison, Wisconsin.

[38] Mandel, D., & Wright, C. (2017). *Domestic Violence-Informed Research Briefing*. Safe and Together Institute, United States

[39] Roach, A. (2018). Will Data Drive Change? Research Shines a Light on the Family Law System. In *Coalition Chronicles,* Madison, Wisconsin.

violence-informed – and therefore safe – unless generalist decision-makers access specialist input (i.e. family violence specialists).

It is then the responsibility of these specialists to give context and meaning to the pattern of family violence that shapes the child's caregiving landscape[40]. This must be *as part of*, not in addition to, the exploration of children's views and preferences relating to their care arrangements.

Essential skills and training for key Family Court actors

At present, the lawyer for child is the primary mechanism through which children's views are conveyed to the Court. This poses inherent risk; it is rarely within the scope of their training to set up the physical, relational, and emotional environment that children rely on before they can freely speak as found in our '*Kids in the Middle'* research. As we experienced in our recent interviews, children are skilled at discerning when their environments are (and are not) safe places to speak. Kahurangi (10), for example, was asked what her "favourite thing about Refuge" was. To our surprise, it was her remembered sense of the emotional climate that she chose to draw in response.

In contrast to her descriptions of 'before' accessing Refuge, which were punctuated by memories of fighting, uncertainty, and sadness, her drawing depicts her sense of peacefulness and feeling respected while at Refuge. These were, for her, the preconditions to her being able to share her views openly and thoughtfully, even when these were about difficult topics.

We therefore propose that in addition to the Bill's provision aimed at matching lawyers' individual characteristics with children's individual characteristics, a new provision be introduced that aims to marry the child's family violence setting to the lawyer's knowledge setting – if working with children exposed to violence, this lawyer must be family violence trained. In addition, we recommend codifying

[40] Mandel, D., & Wright, C. (2017). *Domestic Violence-Informed Research Briefing*. Safe and Together Institute, United States

what equips someone as a family violence specialist and *when* a family violence specialist must be engaged by the Court and/or by the lawyer for child.

The capacity to listen to children also represents an important and discrete skill set. The 'Kids in the Middle' research found that although children express their concerns in different ways than adults, childlike expression does not indicate superficiality of feeling. Children's articulation of these emotions may be heard and observed by adults as less meaningful or impactful, an observation made by other authors drawing on child voice[41]. However, our conclusion takes this one step further – the 'problem' of understanding children's input lies predominantly in adults' attunement to children. We argue that to equivalently weight children's experiences is not enough. We must start with the individual child's perspectives, experiences, memories, preferred communication styles, and specific emotional articulation, so we can hear and prioritise their experiences. This is a difficult ask of a generalist lawyer, but is easily lent to the role of a specialist advocate who is trained to work with children.

Children's advocates that are family violence specialists are arguably better placed to safely seek children's input and facilitate the expression of this input to the Family Court, as recommended by the Children's Commission in their submission on the review of the 2014 Family Court reforms[42]. We accordingly recommend that lawyers acting for children are directed to consider family violence based on the input of these specialists.

We support most other aspects of the proposed s.7(2), with particular emphasis on cultural background. As children expressed to us throughout our recent interviews with them, talking about their experiences is 'work'. It represents a mental burden; one that is amplified if the listener is not attuned to their individual context. Children's experiences of violence cannot be extricated from their cultural identity or from their experiences of how that identity is responded to by the people and structures around them.

Promoting the expression of and emphasis on children's views

As signalled above, children cannot be inserted into convenient and time-bound settings and be expected to meaningfully give their input. In '*Kids in the Middle'* we interviewed two particular children, Charlotte (age 9) and Awhina (age 10), whose views are relevant here. They drew us beautiful, simple depictions of how they responded when adults asked them what they were thinking shortly after their exposure to violence. At the time, they had not yet been supported to process and make sense of their experiences. However, the question marks in these drawings do not represent an *absence* of emotions, but rather a lack of being able to articulate them in a manner that adults can easily recognise.

[41] Humphreys, 2011; Houghten, 2015

[42] Office of the Children's Commission, 2018. Their submission stated: "a system-wide mechanism is developed to support children through the family justice system and ensure their views are sensitively and appropriately gathered and given weight. This could take the form of a child advocate who stays with the child throughout the process, or some other child-centred mechanism."

Later, in a place they felt comfortable and with people they felt comfortable with, they easily communicated their experiences of intense upheaval and powerlessness, textured by confusing feelings of loss, relief, and worry, and by complex emotional associations with the perpetrating parent.

When children answer an adult's question with 'I don't know', it often means that they have thoughts and feelings about the question, but they say 'I don't know' because they cannot articulate these to every adult in every setting. This feeling of 'not knowing' enough to feel confident telling adults their views, or of having feelings with 'no words', was shared by many children that we interviewed. These examples highlight two key points regarding children's expression of emotions and perceptions. The first relates to the capacity constraints that children face in articulating their emotional experiences in adult ways. Generally, this capacity evolves over time as part of normative child development – accordingly, children must be able to give input at different paces and according to different children's capacities. The second relates to the role of child-targeted support, and the corresponding extent to which children are supported to communicate their own experiences. Without this targeted support, the complex understandings and feelings they attribute to their own experiences cannot be fully understood and catered for.

This showcases the need to carefully construct the opportunities for children to speak before asking them to do so. We note that this Bill intends to give greater effect to Article 12 of the Convention on the Rights of the Child. However, our analysis of themes within the body of international research into the application of Article 12 concludes the following:

1. that privileging children's voice begins with collaboratively building children's understanding of what their input will look like;

2. that children's feelings of safety can only be accessed if both physical and emotional needs are identified and catered for; and
3. that for optimum safety, services must be family violence specialists, child-centred, and culturally safe.

The children we interviewed also pointed out these crucial skills. One nine year old, Charlotte, was especially forthcoming about what she regards as helping or hindering support for children, and what she believes facilitates the opportunity for children to divulge their stories and build relationships with support figures.

Interviewer: *What do you think an advocate would be able to do or help with?*

Charlotte: They would be able to listen… unlike other people, they would be able to listen and actually understand. Because unlike other people, like, when you say like two words, they [other people] immediately think they understand. But they [family violence practitioners] actually listen to every word and try to process it.

Of particular importance here is Charlotte's reference to feeling unheard by 'other people' in her life. She is able to distinguish when adults genuinely listen and engage with her, and articulate her sense of attempting to communicate to those who are unwilling or unable to do this. At age nine, she has already determined that listening to and acknowledging a child's story of violence is pivotal to establishing trust and further self-disclosure. She also touches upon the 'try to process it' aspect of listening and responding to children, suggesting that simply hearing a child's story is not sufficient; this must be accompanied by demonstrated understanding. Charlotte's explanations of what constitutes a 'safe practitioner' emphasise both 'hearing' and 'processing', both of which require a thorough grounding in family violence and in child-centred approaches to communication. This mirrors Lundy's[43] conceptualisation of the enactment of Article 12, where children's participation is not simply about inviting children into adult spaces to give input, but about constructing ways to take part in ways *children* find meaningful, followed by upholding their input through outcomes that reflect *children's* expressed priorities.

Considering 'safety' in how children give input

Above, we outline the role of the physical and relational environment in facilitating children's expression of their views. Few formal mechanisms for child safety, including the Family Court, are equipped sufficiently to make children's expression of their views a child-centred process. Accordingly, inviting children's input in safe ways means drawing on external resources that can offer this safety.

[43] Lundy, L. (2007). "Voice" Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child. *British Educational Research Journal, 33*(6), 927. https://doi.org/10.1080/01411920701657033

Establishing a safe setting for children to speak must precede their involvement, and avenues such as Family Dispute Resolution (FDR) service cannot be presumed to be a safe setting unless it is explicitly family violence-informed. FDR is deemed inappropriate for families where there has been family violence, on the basis that unseen dynamics of violence may be perpetuated throughout this process. Problematically, this exemption criteria is predicated on the assumption that the family violence is freely and consistently identified.

Women who are victims of family violence do not (and cannot) always identify or acknowledge the abuse at the time or immediately afterward, and participating in FDR gives their abusers opportunities to perpetrate coercive control tactics within the FDR process. Further, women who have been victims and recognize these patterns of abuse frequently feel uncomfortable disclosing this to a third party. Some are unwilling to risk their partners knowing that they have spoken about this abuse, and may be concerned at possible retributive aggression if they do disclose it. Providers do not uniformly screen thoroughly for family violence – often, it is not until women subsequently seek help from Refuge that they are even made aware of the FDR exclusion criteria.

This is one such example where to insert greater opportunities for child participation and child voice is well-intentioned, but could place the child at greater risk for the following reasons:

1. There is presently no requirement that FDR providers are trained in how to communicate with children or facilitate their input, and unsafe, untrained practices could put children at risk of further harm or misinterpret their input.
2. Children are (necessarily) subject to the decision-making of adults, and their entire domestic contexts are shaped by the dynamics of their households.
3. Children, like adults, are not immune to internalising and normalising these dynamics, and in some cases children's day to day survival and the maintenance of their self-concept is reliant on their alignment with the abusive parent (who holds the balance of power).
4. Children living with a parent's pattern of violence toward their other parent are doubly vulnerable; the views that they are implicitly allowed to express are constrained by the more powerful person, and their capacity to make sense of their experiences and articulate these in ways understood by adults is restricted by their developmental stage.

Conclusion

In our '*Kids in the Middle'* research, we used a methodological approach guided by the contemporary body of evidence regarding children's participation and expression. Despite this extensive preparation, children's participation still both surprised us and challenged our assumptions about how they express themselves.

Overall, we found that children are inherently capable and willing to articulate their feelings, *if* they are supported to do so, are in a safe environment, and perceive that the listener recognises the validity and

the significance of their expression. In other words, children can and do tell adults how they feel; the onus is on adults to hear them.

In sum, in order to safely facilitate and include the voices of children, their lawyers and/or advocates (as with other Family Court actors) and the Court setting each need to be:

1. Child-centred;
2. Family violence informed/specialist; and
3. Culturally responsive.

We are happy to provide any more information that the Committee would find useful. We thank you for considering our submission, and for the commitment to improving children's experiences of the Family Court.