WOMEN'S REFUGE

NCIWR's submission to the Law Commission on the Third Review of the Evidence Act 2006 (IP50)

Introduction

Thank you for the opportunity for the National Collective of Independent Women's Refuges (NCIWR) to submit on the third review of the Evidence Act 2006. NCIWR is a non-governmental organisation that has been delivering services to women, children, and whānau affected by family violence in Aotearoa for the last 50 years. In 2021/22, our network of 40 affiliated refuges supported 52,000 clients and provided 59,000 nights in safe houses. During this time, children made up 50 percent of all clients who accessed safehouses across the country.

As in any submission made by NCIWR, we represent the victims of family violence, specifically wāhine and tamariki, who are the primary groups subjected to and impacted by family violence. In Aotearoa, one in three women who have ever partnered with a man report experiencing family violence,[1] and men are most commonly the perpetrators.[2] The prevalence of family violence is significantly more pronounced for wāhine and tamariki Māori,[3] bisexual women, gender minorities,[4] and disabled people.[5]

We submit feedback on the issues paper as subject matter experts in family violence. We are not legal experts and as such acknowledge the limitations of the input we can provide on legislative specificity. As such, we sought the support and expertise of Paulette Benton-Greig (AUT law) – an academic expert in law – to inform our analysis and feedback. Our submission therefore builds upon the points made by Paulette in her submission (which is endorsed by others with expertise in law, family violence, and sexual violence). We endorse the points she explains in her feedback.

Throughout our submission, we use the terminology 'victim' and 'perpetrator' to denote the roles of each within a dynamic characterised by the use of violence by one person against another. This violence includes but is not limited to specific violent offences or to specific roles in the justice system, which is why we prefer these terms over those of 'defendant', 'complainant', 'applicant', or 'respondent'. Our feedback focuses on several of the questions raised in the Law Commission's issues paper that relate to family violence cases. We comment specifically on issues relating to:

- Hearsay evidence;
- Veracity evidence;
- Trial process; and
- Peripheral issues of privilege and confidentiality, expert evidence, and evidence related to contrived concepts such as 'parental alienation syndrome'.

Our feedback is informed by Women's Refuge-specific data, research, and evidence. As the largest and principal family violence organisation aimed at supporting victims' safety, we have access to comprehensive data relating to hundreds of thousands of family violence victims. In addition, NCIWR publishes specialist research on family violence, risk, and safety in Aotearoa New Zealand. Some recent examples include:

- Economic abuse (2017);
- Intimate partner stalking (2019);
- Children and family violence (2021);
- Risk assessment in family violence (2023);
- Digital abuse tactics in intimate partner violence (Forthcoming);
- Family violence and digital health records (Forthcoming); and

- NCIWR's child advocacy pilot evaluation (Forthcoming).

To better comprehend the breadth of family violence-related harm in the lives of women and children victims, NCIWR recently launched a new risk assessment instrument which is now used with every client during their initial contact with NCIWR. It captures a wider scope of the (often insidious and unseen) risks to the viability of women's (and their children's) safety, lives, and futures that result from perpetrators' use of family violence. Since its introduction, it has been used with nearly 2,000 new Refuge clients, and the aggregated data informs our understanding of the reach and longevity of family violence-related risk. As with any field of expertise, this understanding continually evolves in response to the growing evidence-base on family violence, risk, and safety.

We consequently foreground our feedback with a brief explanation of the most current and evidence-led understanding underpinning risk and safety imperatives in family violence. Our submission then responds to particular feedback questions relating to hearsay evidence, veracity evidence, and trial process, and concludes with key recommendations about the harmful use of therapeutic records and the consideration, use, and application of family violence information by decision-makers.

Theoretical framing of family violence imperatives

The aetiology of family violence is multifaceted and complex. Our understanding is informed by concepts such as coercive control,[6] and social entrapment,[7] that explain perpetrators' accrual and subsequent misuse of power over victims, and by our awareness of gendered inequality and colonisation as key drivers of its prevalence and perpetuation. The current state of knowledge on family violence, risk, and safety gives rise to the following conclusions, which collectively inform our feedback on this document.

1. Perpetrating family violence is always a choice.
2. Disparities of power engendered by unequal and oppressive systems (especially gender inequality, colonisation, and racism) lay the foundations for family violence against wāhine and tamariki through the social and institutional condoning of men's violence and de-prioritisation of the safety of wāhine and tamariki.[8]
3. While family violence does "transcend all communities, ethnicities and social classes",[9] the harm it causes is unevenly distributed. Victims impacted most by oppression, exclusion, and systemic inequalities also suffer the most devastating impacts of family violence, and these forms of risk and harm are mutually reinforcing.[10]
4. Family violence is a pattern of behaviour, characterised by abusive, coercive, and controlling tactics that cause cumulative harm. The significance of each episode or tactic of family violence is predicated on past, current, and anticipated or threatened episodes and tactics, including prospective retaliatory violence from the perpetrator and/or their networks. At any point, the victim's perception of the viability of safety is oriented by everything the perpetrator has done to them (and prevented them from doing for themselves) and how they anticipate this continuing in the future.
5. Perpetrators' violence is strategic, experimental, and evolves in response to attempts to limit their abuse, so that perpetrators can maintain and extend their reach over (and into) victims' lives.[11] For example, they often use technology to monitor victims and command continuous contact, or use litigation to force ongoing engagement with them and deplete victims' financial, mental, emotional, and institutional capacity.
6. For every act of family violence by a perpetrator, there is also an act of resistance by the victim (or protective parent, who is almost always the mother). When taken at face value, resistance

may be perceived as victim complicity or as aggression. However, victims resist in overt and covert ways to protect their (and their children's) safety and dignity in whatever ways are most viable for them at the time. Their resistance becomes increasingly subtle and covert as the risks posed by perpetrators and by harmful systems responses increase.[12]

7. Children are always victims of family violence perpetrated against their parent,[13] including in family violence homicides. Violence against a child's parent is always a parenting decision and should be assumed to reflect the relative safety of future parenting decisions. When a perpetrator uses violence against a mother, it is more likely than not that they will also physically abuse the children.
8. Children's experiences of family violence are associated with a range of adverse outcomes in adulthood.[14] However, their voices, preferences, interests, and support needs are rarely weighted or made visible within institutional responses to family violence.[15] The trajectories toward adverse outcomes are potentially mediated by effective responses that offer children:
    a. Sustainable mechanisms for safety from perpetrators' violence that are institutionally implemented and enforced;
    b. Specialist support, stability, and predictability in tandem with their safe and protective parent; and
    c. Meaningful opportunities to express their views to decision-makers in ways that work best for them and are specific to their needs *as children.*
9. Family violence 'risk' entails more than lethality and severity of violence. It extends to all of the ways that abuse and coercion negate victims' safety, capacity, self-determination, dignity, opportunities, and resources. Many of these risks perpetuate harm and precarity in victims' lives even if the violence is stopped.
10. 'Safety' from family violence is achieved when someone is no longer at risk from the violence *or* its impacts, and when the harm to victims' capacity to live freely and well has been fully restored.
11. Accountability for victims' safety must be upheld by people, services, and systems with the most power to safely intervene. System responses to family violence that cause further harm, collude with perpetrators, or inadvertently service perpetrators' interests increase precarity, vulnerability, and risk for victims. Sustained and meaningful safety from family violence is only achievable when:
    a. The perpetrator ends their campaign of violence against an individual or whānau; and/or
    b. Justice pathways or statutory intervention are fit-for-purpose, responsive, and applied to their fullest extent.
12. Perpetrators' tactics of abuse may traverse any/all systems and institutions victims interact with. Effectively combating family violence is possible only when every system and institution consistently enacts a safety response specific to their unique role in influencing either risk or safety from family violence.

Hearsay evidence

I. Overview of feedback on issues with a fear-based approach

Our feedback in this section relates to the following questions:

- Q4: Should the Act be amended to clarify the application of the hearsay provisions?

- Q5: If the Act were amended to introduce a new discretion, [what] should this be?
- Q6: If a new discretion to admit hearsay statements is introduced, what additional safeguards, if any, should be inserted into the Act?

We support Paulette Benton-Greig's feedback, and in particular her point that:

> *"Legislative reform to the hearsay provisions is necessary to protect the safety and wellbeing of victims of family and sexual violence. In summary, we submit that:*
>
> 1. *section 16(2) should be reformed to enable victims to be declared unavailable as a witness in situations where there is an appreciable risk to their safety or psychological well-being,*
> 2. *a fear-based approach should not be adopted. Rather, judicial discretion based on advice from advocates or people with knowledge of the victim's situation should be adopted. Victim safety and well-being should be the paramount consideration,*
> 3. *victims declared unavailable because there is an appreciable risk to their safety or psychological well-being, should be excused from being a witness and not be compellable to give evidence,*
> 4. *the reliability threshold in s 18(1)(a) is an important, and together with the s 8 assessment, an adequate, safeguard to ensure the fair trial rights of defendants."*

We ask that the Commission considers the complexity of a fear-based approach and the importance of contextualising violence as a pattern of cumulative harm when considering the role of fear. NCIWR research and data underlines the dilemma our client population faces when managing their safety and the safety of their children when required to give evidence against their violent perpetrators.

II. How fear orients 'choice' for family violence victims

It is commonly assumed that victims make decisions freely and from a position equivalent to any other person in society, with an equivalent array of resources and options to support their decision-making. In reality, they face numerous and multi-layered constraints to these choices, and any decision they make involves some transaction of relative safeties. Their decisions are as oriented by their lack of options as by the options that are available to them, and they tend to choose the path of the least possible harm from a menu of 'options' that are all inherently harmful to some degree.

While structural inequities and organisational shortcomings often negatively influence victims' decision-making, the most powerful barrier to their self-determination is perpetrators' use of violence – past, present, and future. As we allude to above, family violence is typically predicated on a perpetrator's use of power to control and subordinate their victim, fostering an unequal distribution of relationship authority and coercion that informs every action a victim is free and able to take on her own behalf. Perpetrators often reach outside of the immediate power they can physically command over their victim to weaken the victim's position in other settings, reinforcing their victim's entrapment in the dynamic of violence.

For example, one victim we interviewed recently gave examples of the transactions between different forms of safety that she faced when deciding whether to proceed with charges against her perpetrator or to apply for a protection order. For the former, she knew her perpetrator's first response would be to call Oranga Tamariki and report that she was using methamphetamine, as he had previously persuaded a mutual friend to call and make a similar report during a temporary separation as revenge for her calling the police when he assaulted her. She also believed he would report her for benefit fraud, as he had transferred his mailing address to match hers despite them living separately solely for the purpose of being able to 'prove' she was guilty of benefit fraud by ostensibly living with him. For the latter, on the

other hand, she knew he would respond with retributive violence, and that even if he could not physically get to her, he would make sure she was known as a 'narc', effectively cutting off her connections to and support from whānau.

'Fear', for her, was about more than her life. She was afraid of being hurt or killed, but also afraid of being a solo Mum with absolutely no support, of losing her only income and being unable to feed her children, of being judged and isolated, and of (another) unwanted state intervention that could end with the removal of her children from her care. Articulating these very compelling reasons as the basis for her 'fear' was difficult for her when speaking to us; arguably, it would be even harder for her to convey these to decision-makers representing the state.

The versatility and impacts of such tactics underline the fallibility of an objective threshold for 'fear' based on a single decision-maker's discernment of abuse patterns that so pervasively perpetuate cumulative harm and powerlessness in victims' lives. Accordingly, we submit that a fear-based approach should be rejected. The complexity of family violence is such that assessing based on one (or several) instances of violence can distort the reality of a victim's lived experience, including the temporality, severity, reach, scope, intensity, and frequency of violence and its impacts.

III. Only the victim can accurately assess fear and the basis for it

Fear is both dynamic and subjective. It may be experienced alone and/or collectively, may derive result from actual, perceived, or anticipated violence, and be oriented in part by how the family violence is positioned against the backdrop of any individual victim's life. If the information used to inform decisions about a threshold of victim fear is limited to (documented and/or physical) episodes of violence only, it excludes supplementary or informal information regarding perpetrators' patterns of control and domination and the relative disparities in social power between victim and perpetrator. The basis on which 'fear' is determined then invariably obscures the destructive reality of how family violence is enacted in the lives of victims, and therefore cannot reliably gauge the extent to which they experience fear at any given time.

Parallels can be drawn between how victims choose between options that represent different kinds of risks relating to their participation in criminal proceedings, and how they choose between different kinds of risks when applying for protection orders. As our frontline social workers frequently report, many victims at the highest risk of homicide opt not to apply for protection orders on the basis that the risk of escalating violence combined with the risk of financial disadvantage outweighs the (anticipated) gains to their physical safety. As with victims' decisions to give evidence or not, victims' decisions to apply for protection orders are not based on a single variable that signals a fear threshold, but rather on the constellation of perpetrator tactics, impacts of violence, and the social context in which they experience risk.

However, the crucial distinction between these two scenarios of the trade-offs made for safety is who is empowered (and deemed to be equipped) to determine whether the victim's assessment of the safest option for her is valid and correct. Our workforce, despite being family violence specialists, do not presume to have a superior understanding on whether applying for a protection order is the safest option for a victim than what the victim herself does; nor would they consider it safe to decide on her behalf. In contrast, a victim facing significant (and potentially lethal) risks associated with giving evidence against her perpetrator in criminal court has these risks compounded by evidence requirements that do not privilege her safety or her expert assessment of the risks to herself.

IV. Fear is complex, subjective, and constantly evolving – as shown by NCIWR data

We would also like the Commission to consider the inherent challenge of quantifying, determining, or measuring victims' 'fear'. Just as perpetrators' use of violence is rarely static or stagnant, neither is the fear it induces in victims. When perpetrators' tactics of violence are mapped over time, they show trajectories that evolve temporally and spatially. Crucially, these trajectories also show common points of escalation – when perpetrators' violence advances in severity, intensity, reach, and motivation. In this section, we use NCIWR data from the first 500 risk assessments completed with clients using our recently introduced risk instrument.

The principal point of escalation is typically victims' attempts to seek help or justice. At the time of seeking help from Women's Refuge, exactly half (50%) of victims believed their perpetrators may kill them and 61 percent believed their perpetrators might seriously hurt them. Over half (56%) have already experienced an escalation of aggression when they tried to seek safety from their perpetrators.

In addition to these indicators of recency and triggered escalations, the risk instrument data showed that of those 500 victims:

- 44% reported perpetrators had used life-threatening violence;
- 62% reported being stalked by their perpetrator;
- 50% reported being held hostage by their perpetrator;
- 48% reported perpetrators threatening to kill them;
- 42% reported strangulation/suffocation; and
- 40% reported physical assault while pregnant.

These rates underline why taking steps to oppose perpetrators' violence often feels like (and may in fact be) a life-or-death decision. They particularly showcase the immediacy (and physicality) of risk from perpetrators' violence when victims resist the abuse by seeking safety. In addition, victims reported high rates of other aggressive or intimidating tactics that give weight to subsequent attempts at coercion, including:

- Threatening to hurt or kill someone they cared about (52%);
- Threatening to hurt or kill themselves (56%);
- Threatening to harm or kill pets (27%);
- Destroying their belongings (54%);
- Sexually assaulting them in other ways (19%), and
- Driving dangerously with them in the car (39%).

Finally, as well as aggressive and intimidating behaviour that induces situational fear (i.e. the harm has happened and therefore may happen again, as past violence is a predictor of future violence), family violence perpetrators rely on cumulative, psychological, and structurally-bound tactics to gradually grow victims' fear. For example, victims reported their perpetrators:

- Using technology to contact, monitor, track, or access information about them (80%)
- Following them or repeatedly turning up (62%)
- Asking or paying others to follow or stalk them (23%),
- Stalking or checking up on them post separation (57%)

Fear patently cannot be assumed to derive only from experiences of in-person and remarkably traumatic episodes of assault. Digital coercive control and feeling under constant surveillance exacerbates fear. Stalking exacerbates fear, especially when it involves third parties and is insidious in its presentation. In our clients' experiences, having perpetrators' friends or associates (including, at

times, a police officer) 'pay them a visit' while the perpetrator was on remand sent effective messages about the inescapability of risk and imbued every day-to-day activity with relentless fear.

Risk (and therefore fear) encompasses more than simply an imminent risk of death or injury. Many victims experience deeply personal or tapu aspects of violence, enabled by their perpetrators' profound and intimate knowledge of their lives and as such, any potential point of vulnerability. Their most shameful experiences, their involvement in any illicit activity, their family secrets, and their prospective stigmatisation are contiguous subjects of fear, informed by and reinforcing victims' fear for their own and others' physical safety.

Victims' fear may comprise many interconnected parts: fear of death, torture, unpredictability, loss of children, loss of whānau and other connections, loss of housing, loss of income, loss of employment, the likelihood of perpetrators later accusing them of betrayal, impediments to accessing health services, social rejection or exclusion, and so on. What constitutes and perpetuates fear is intricately interwoven with victims' experiences of social precarity, capital, and their experiences of systems and institutions.

One of the primary mechanisms through which this is achieved is through the use of children and within the context of mothering. Our risk assessment data demonstrates how frequently children and parenting relationships are targeted by perpetrators.[16] Of victims who are mothers:

- Almost a quarter (23%) disclosed violence towards their children as well as themselves;
- Almost half (49%) had experienced their abusive partner taking or threatening to take their children away;
- 19 percent disclosed that their violent partners had threatened to hurt or kill their children; and
- Almost all were harmed in front of their children, including physical abuse (74%) and verbal abuse or emotional abuse (84%).

Children were also used by perpetrators to justify and maintain access to victims, such as by using children to find out details about their mothers' lives (29%) and using children to compel women to maintain contact with them (44%). These tactics represent a continued tie to the perpetrator and consequent ongoing risk to both victims and their children.[17][18]

V. Victim fear should be considered in relation to both violence and context

Fear is not simply a mental health consequence of family violence; nor is it simply a signal of the effectiveness of perpetrators' attempts to coerce and manipulate victims. Fear is the most accurate predictor of family violence lethality, outperforming any other variable (and, significantly, any single professional judgement) in its predictive validity. Fear is a valid, essential, contextually bound, and extremely subjective response to:

a.) A perpetrator's use of violence;

b.) The victim's assessment of further harm; and

c.) The likelihood that safety will be increased or decreased by participation in a system.

Accordingly, we argue that instead of a fear-based approach reliant on judicial discernment alone, fear should be considered *within the context* that induced it and with weight given to *what victims' fear represents* by those most equipped to draw out its origin, depth, and significance.

In other words, issues of victim fear should be principally considered with the assistance of family violence subject matter experts, who can contextualise it within the pattern of perpetrator tactics, victim safety responses, and social and structural settings. This approach privileges both the interests of justice and the interests of safety for victims whose participation in this very system is prompted by the violation of their rights.

VI. Mandatory diligence to secure victim attendance compounds victim risk and fear

Our feedback in this section relates to the following questions:

Q7: Is the operation of section 16(2)(d) causing problems in practice? If so, should it be amended to:

- prescribe factors that are relevant to determining whether the section 16(2)(d) threshold is satisfied; and/or
- amend the language used in section 16(2)(d) so that it requires "all reasonable steps" to be taken to find the person and/or secure their attendance at court?

We support Paulette Benton-Greig's comments on Q7 (below):

> *"One of the problems with the present situation is that the police are required to effectively harass and stalk victims (paralleling the abuse they may already be suffering or have suffered) in order to demonstrate that they have used due diligence in cases where victims really do not want to give evidence (McDonald, forthcoming). This sets the police up in an adversarial relationship with the victim who they are obliged to protect and exacerbates their lack of safety. Thus, we do not support the adoption of 'all reasonable steps'."*

In our experience, compelling exhaustive action to pursue victims of family violence is antithetical to

a.) The interests of justice;

b.) Establishing beneficial victim perceptions of the viability of reporting future offences; and

c.) Victim safety, dignity, and self-determination.

Many victims already have negative experiences with (and expectations of) state actors and state intervention. For example, our risk data shows that 42 percent of victims reported that their abusers had breached their protection orders or bail conditions. Of those whose protection orders were breached, 39 percent said perpetrators were not charged for any of those breaches.

Negative outcome expectations of justice avenues are particularly pronounced amongst those whose perpetrators have had opportunities to violently abuse them that could have been prevented if prior offending (against them or against other women harmed by the same perpetrator) had led to meaningful accountability or safety.

VII. Recommendations

Family violence victims are justifiably sceptical of a system that purports to be acting in the interests of their rights and their safety, but which so often fails to do so. Negative experiences of court participation for an initial victimisation deter further participation after additional experiences of violence.

We therefore support:

a.) Reforming s 16(2) so judges may, on advice of victim specialists, declare victims unavailable as witnesses due to an appreciable risk to their safety or psychological wellbeing; and

b.) Adopting 'reasonable diligence' or 'reasonable steps' over '*all* reasonable steps' as an adequate threshold for the purposes of declaring witnesses unavailable in cases where family or sexual violence is alleged, and developing a degree of discretion to better serve the interests of justice and to better safeguard the perceived viability of a relationship between victims of family violence and the State in the pursuit of justice.

c.) Introducing a standardised competency framework for all judicial actors based on specialised knowledge of the lifespan of family violence, coercive control, social entrapment, and fear

(inclusive of anticipated future violence, ongoing impacts of past violence, and system responses), developed in conjunction with the specialist sector.

Veracity evidence

I. Background to NCIWR feedback about veracity provisions

Our feedback in this section relates to the following questions:

Q 43: Is there uncertainty as to the application of the veracity provisions to evidence of a single lie? If so, should the Act be amended to address that uncertainty?

We support Paulette Benton-Greig's comments on Q 43 (below):

> *"We submit that there is inconsistency in the treatment of single lies in family and sexual violence cases that needs to be addressed.[1] Single lies do not tend to prove a tendency to lie and thus should be excluded as irrelevant if they do not directly relate to a fact in issue."*

As discussed above, changes to victims' participation in proceedings against their perpetrators (e.g., to initiate, progress, decline, refuse, or recant) are almost always a response to the evolving landscape of family violence risk in their lives and their corresponding experiences of fear. However, they are seldom perceived as such. Instead, victims' evidence in court is, like so many aspects of their participation, relentlessly subjected to prevailing, stigmatising, and misleading misperceptions about gendered roles and behaviour, family violence, and victims.

II. Gendered origins of veracity issues in court and examples of recanting

Widespread adherence to gendered roles and expectations reinforces the subjugation of women and the perceived acceptability or minimisation of violence against them.[19] Despite ample research debunking the myth that women commonly construct malicious lies about men's violence, changes in women's willingness to participate is wrongfully interpreted as indicative of untruthfulness or untrustworthiness, making credible victims with credible accounts of severe family violence easily discredited. Recanting, for instance, exemplifies how a family violence tactic manifests in changed participation that is then almost always attributed to poor character – but which, in reality, is a normative and anticipatable response to evolving risk.

For example, a victim we interviewed recently was subjected to a prolonged and life-threatening assault involving burns to her skin and a traumatic brain injury reported the violence when her partner left the house to get alcohol. She received a disinterested response from police, who told her they did not have time to take her statement before their shift ended. She followed up anyway and went into the station to do an evidential interview. In the time-period between the interview and the eventual notice of a court date, he threatened to kill her several more times and monitored all of her phone calls.

To stay alive, she pretended she had lied about his violence and convincingly argued for the charges to be withdrawn. She was warned at the time that if she later made a complaint of family violence, it would be unlikely to be taken seriously after this 'false complaint'.

III. The safety of 'telling the truth' is shaped by risk of violence and risk of systems

For the client in the above example, as for so many other Refuge clients, her initial complaint (i.e. made at the time police arrived) was the least impeded by subsequent considerations of risk – both the risk

of further violence, and the risk of hostile or unsafe responses from people, organisations, and systems. Both sources of risk can reorient victims' participation in justice procedures and are often experienced as interdependent.

Instances of institutional failure to safeguard, intervene, or facilitate access to justice influences victims' views of the justice system as unviable and potentially dangerous, especially for clients with historic experiences of institutional injustice. These negative outcome expectations (which then become shared amongst communities) then increase the likelihood of recanting or changing their participation to become a 'hostile witness'. These evolving trade-offs between safety and participation are far more likely and common as explanations for victims changing their nature of participation in court than the often-hypothesised explanation that changed participation indicates untruthfulness.

IV. Recommendation

We support Ms Benton-Greig's comments on Q43, *"We submit that amendment to the Evidence Act 2006 (or another appropriate mechanism) should be made to halt the admission of single lies as veracity evidence in relation to complainants of family and sexual violence."*

Trial process

I. Overview of trial process feedback

We comment specifically on compliance with s 88 and the disadvantage occupation-related questioning puts on victims, and on s 92 and the need to reduce the presumptive need to cross-examine on known challenges to evidence. Both of these areas of inquiry relate to the balancing of interests to prevent perpetrators' use of the trial process to purposefully cause further harm to victims, and we explain these in relation to an emerging body of research illustrating the significance and impacts of both inappropriate questioning and the unreasonable extent of cross-examination.

II. s 88 compliance issues

Our feedback in this section relates to the following questions:

Q 60: Is there an issue with low compliance with section 88? If so, how should this be addressed?

Q 61: Should section 88 be amended to protect a wider range of information? If so, what should it include?

We support Paulette Benton-Greig's comments on Q60, Q61 (below):

> *"The bar on questioning about occupation (other than as directly relevant to the facts in issue) is an important aspect of protecting complainant privacy. Improved compliance is therefore necessary.*
>
> *We also submit that the following reforms should be made to the section:*
>
> *1) Made explicit about the applicable timeframes*
>
> *2) Expanded to include all forms of social status*
>
> *3) Made applicable to victims of family violence and other vulnerable witnesses"*

Whether or not questioning about occupation is explicitly for the purpose of determining the facts of the case or for 'warming up' the victim, it represents a diversion away from 'evidence' and toward the

portrayal of a victim heavily textured by the invisible force of family violence and its impacts. Questioning about occupation does not tend to involve the specifics of how, why, and by whose choice a victim came to have a particular employment status or employment position. It therefore produces responses based on the victim's current employment status and present point of their employment trajectory, not the status or trajectory that may have been true for them had they not been the victims of family violence.

III. Misattribution of employment-related stigma

Our support for increased compliance with s 88 is premised on our research and additional data below relating to economic abuse and employment. These illustrate how the information such questions about employment evoke can misrepresent the victim by assuming a much greater degree of autonomy over their employment decisions than what might be possible in a context of family violence and coercion, thus attracting stigma, eliciting shame, and risking stereotype on a faulty basis. In court, victims may feel obligated to answer questions about their occupation that may damage their credibility and character unless their responses can be contextualised within the dynamics of family violence, coercive control, and economic abuse specifically.

When one partner is using violence against the other, work is one site of profound impacts. Economic (and occupational) stability is inextricably linked to how victims experience both risk and safety from family violence, and economic abuse is one of the most common means through which perpetrators of intimate partner violence assume control and exercise power over their victims.[20]

IV. Coercion, economic status, and reputation risk

NCIWR's research on economic abuse found that perpetrators forcing or manipulating a victim's access to money or finances severely impacted victims' employment. Less than half of respondents who had worked full-time prior to a violent relationship had been able to sustain full-time employment during the relationship. Many were unable to choose where and how they are employed, and served their perpetrators' occupational interests before their own to reduce the risk that any shifting in the balance of power would precipitate escalating violence. In addition, perpetrators used victims' income, benefits, assets, and employment as weapons to advance their systematic violence over those victims by:

- Binding victims to the relationship by forcing them to take out loans or incur debt;
- Forcing victims to be accountable for fraudulent behaviour that could be reported if they attempted to separate;
- Forcibly taking victims' money;
- Engineering a division of financial duties to create inequitable spending power; and
- Sabotaging victims' employment or employment prospects.

These experiences illustrate the imbalance of control, influence, and relative social power within the dynamics of family violence relationships. These findings are reinforced by NCIWR's risk assessment data relating to economic abuse tactics, which show the prevalence with which victims are forced into economic situations are not representative of their own behaviour, decisions, or interests. For example, 39.37 percent of clients reported that they were forced or pressured to take out debt or get money in ways they weren't comfortable with. In addition, perpetrators frequently threatened to share stigmatising information about victims with others to ensure compliance; 19.2 percent of clients reported that perpetrators threatened to tell others about their income/benefits to make them comply.

Further, over half (52.2%) of Women's Refuge clients were excluded from decisions about shared or household money, and 45 percent were stopped from having access to their own source of money. The impacts of such economic abuse tactics ultimately influence how victims can engage with services and

systems,[21] and increase their social precarity. The damage to victims' reputation and credibility from economic abuse is long-lasting; it impacts multiple facets of their lives, increases the stigmatisation they experience, restricts their freedom, and, most pertinently, impacts their ability to participate unimpeded from judgement in court settings.

The misinterpretation of the significance of a victim's occupation or employment status can create harmful assumptions and judgements attributed to the victim, instead of being more appropriately attributed to the perpetrator's behaviour.

V. Recommendations

The safest and most reasonable solution to inappropriate questioning about employment is to enforce compliance with s 88, extend it to include both employment status and other forms of social status, and ensure it is applicable to all victims of family or sexual violence and in all court proceedings.

VI. Cross-examination

Our feedback in this section relates to the following questions:

Q 62: Should section 92 be amended to clarify the extent of a party's cross-examination duties? If so, should section 92 be amended to state that the obligation to cross-examine only arises if the witness or the party who called the witness may be unaware of the basis on which their evidence is challenged?

We agree with Ms Benton-Greig's comments on section 92 (below):

> *"We submit that the s 92 duty should be amended to state that the obligation to cross-examine only arises if the witness or the party who called the witness may be unaware of the basis on which their evidence is challenged."*

Cross-examination is almost invariably the most anxiety-provoking and unpleasant aspect of any court proceeding for victims of family violence and sexual violence, and we trust that the inherent injustice and challenges relating to cross-examining victims are made apparent through other submissions. However, we wish to particularly emphasise the importance of this for children in family violence cases. We are currently finalising evaluation research into NCIWR's child advocacy pilot, in which many of the participating children had been forced to participate in both criminal and civil court matters after family violence.

Children communicated to us their drawn out (for months, and at times, years) worry, preoccupation, and distress (at times to the point of physical illness) catalysed by the prospect of being cross-examined. For young children in particular, even being put on the spot in less institutional settings (e.g. with a lawyer for child) is a source of immense stress and anxiety; a pervasive mental weight that is sustained until and even beyond the culmination of the process.

Children also conveyed that while they would never be truly comfortable with the process, the adverse impacts on their wellbeing could be mitigated by the adaptation of processes to suit the needs of children within systems largely designed for adults. For example, having the long-term support of a family violence advocate that could help to prepare them for and demystify the cross-examination, including the framing of questions (such as implied double negatives) helped to fortify them and ease their stress about it.

Children we interviewed talked about being unable to comprehend questioning put to them by lawyers or communicate what they wanted to communicate until they had access to this intensive preparatory support. We concluded that having the support of such specialists is beneficial in supporting children's

confidence: firstly, in their understanding of their own victimisation, and secondly in their ability to voice their family violence experiences in settings that are almost universally intimidating and incomprehensible to them. One child we interviewed recently reflected the crippling anxiety he had felt and the cost of the mental workload required for him to have to formulate the words to describe his experiences. He spent over a year preparing intensively, with the help of a specialist with whom he had a close and trusting bond, and yet retained some of his apprehension about the proceedings for the entirety of that year.

Children are amongst those most at risk of both family violence victimisation and the debilitating long-term consequences of it.[22] Tamariki are always disadvantaged when perpetrators make the decision to use violence against them or against their protective parents and have little power over the way this violence shapes their immediate or future safety or their life prospects. They rely on adults with significantly greater institutional power to shape the terrain of what safety is possible to them; and to carve out a path they can be reasonably expected to be able to navigate within that terrain. Without adequate intervention, family violence undermines children's physical, social, and emotional wellbeing. In some cases, perpetrators' continuation of unimpeded violence results in the death of these children or the death of their protective parent (often in front of them),[23] underlining how paramount it is to get court responses to children right at the earliest possible opportunity.

Children face many and disproportionate barriers to procedural equality in the court system.[24] These include widespread myths about children's experiences of family violence (e.g. that they are distinct and separate from those of their parent). They encounter similarly prevailing myths about what they need in order to communicate their experiences of family violence and what they need now to be safe. Our forthcoming report highlights the following examples of myths and misperceptions that impede children's equitable participation in systems of safety and justice:

- The myth that children's experiences of violence are subordinate to those of adults;
- The myth that children only experience violence as witnesses, not as individual victims with unique and distinct impacts;
- The myth that children are automatically safer from their perpetrator when the victim and perpetrator have separated and they see each parent individually;
- The myth that children are not harmed by family violence unless physical violence is perpetrated against or in front of them; and
- The myth that violence does not represent a risk from the perpetrating parent or an explanation for why their protective parent's capacity is temporarily redirected toward coping.

These harmful myths, and the corresponding gaps in the uptake and application of a family violence-informed understanding of children's needs, render the outstanding risks of family violence in a child's life invisible.

VII. Recommendations

To combat the outstanding risks to children after family violence has been identified, the legislation (and its implementation by decision-makers) must be continuously responsive to the unique risks and needs of children. Amending s 92, as stated above, may offer some protection to children, who are already faced with seemingly insurmountable challenges as those with the least social power and epistemic status in a court setting.

Additional issues

I. Privilege and confidentiality: therapeutic and health records

Access to support to cope with the consequences of violence is imperative for recovery. At the same time, victims' perceptions of the viability of help-seeking are influenced by their perceptions of the integrity with which the information they share will be kept confidential. Yet they are seldom well advised about the potential for the records of their most private and damaging experiences to be turned over to the court. Singular instances of such are then recounted to others and are woven into a shared perception that discourages other victims from seeking (for example) specialist counselling through ACC, assessments for compensation for sensitive claims, support from Women's Refuge advocates, or assessments for potential brain injuries. As victimisation disproportionately falls to certain population groups, the transmission of these beliefs creates a collective barrier to both justice and recovery.

Paradoxically, this information, when focused solely on the offence or sequence of offences before the court, is typically shared *with* victims' consent. When they do not consent, the information then subjected to a court order and turned over to perpetrators' lawyers or to the court rarely holds as much probative value as it does value to perpetrators' campaigns of abuse.

The violation, degradation, and humiliation of that experience is often sufficient to deter victims from continuing to participate in the justice process. For some of our clients, the very first suggestion of these records being requested by their perpetrators' lawyers acts as an immediate catalyst for their decision to withdraw from the process, often in the hope that withdrawing prior to the records being handed over will mean it is no longer necessary for them to be shared.

While health and therapeutic records must be accorded sensitivity in any case, the context of family violence and sexual violence is inherently different to other cases involving violence or physical or mental injury. Violence impacts victims' wellbeing in many and overlapping ways. It may traverse years or decades of victims' lives; so may the pursuit of recovery from it. Family violence also never exists distinctly from the tapestry of victims' lives, meaning information from confidential records is not separately recorded nor practicably distinguishable from other (often deeply personal) information about the victim. The enmeshment of this information is exhibited by the excerpts of the much-publicised 'Mrs P' case, in which historic details of the woman's eating disorder (from many years prior) contained in her ACC file became the subject of accusations of dishonesty, despite being irrelevant to her perpetrator's severe and repeated violence against her.

The prospect of forced disclosure of medical or therapeutic records is a common topic of online, group, or collective discussion of reporting assaults. While this is likely portrayed as a more prevalent practice than it really is, the collective fear of that outcome represents a compelling double-bind for victims: they feel unable to seek support for medical or psychological sequelae of assault, in case it ends up being accessed by perpetrators' lawyers (and by extension, their perpetrators themselves); and they feel unable to report the violence if they can think of anything within their existing records that may conceivably (based on lay perceptions) be requested.

These themes are reflected in our risk assessment data, where clients reported that perpetrators sabotaged their reputation and credibility by sharing or threatening to share information about their:

- Mental health issues (38%);
- Use of alcohol or drugs (22%);
- Previous sexual experiences (13%); and
- Parenting (35%).

Meanwhile, we note an increase in the number of court orders requesting records of Women's Refuge victims, often with very few parameters limiting the scope of what must be provided. Given the likelihood of this representing a powerful mechanism for perpetrators to misuse the power of the court to obtain and share private information as a form of vengeance against the victim reporting their violence, we urge a strengthening of restrictions on what records can be ordered to be disclosed and an extension of privilege to sensitive records.

We second the feedback given by Paulette Benton-Greig's regarding privilege and confidentiality (below).

> *"Victim advocates relay that it is increasingly common for defence counsel and people who have used violence in Family Court proceedings to seek non-party disclosure of counselling, healthcare and medical records pertaining to victims of sexual and family violence in both criminal and civil proceedings. We submit that there are compelling public policy reasons for extending privilege to those records taken in the delivery of therapeutic services, including counselling, substance use treatment, mental health treatment, medical treatment, and the like."*

In addition, we wish to add to the 11 points Paulette Benton-Greig has made about *"extending privilege to those records taken in the delivery of therapeutic services"* by drawing on findings from research we undertook in partnership with the Ministry of Health. Our findings highlight the relationships between family violence, coercive control, and perpetrator behaviour that compromises the quality and integrity of information contained within health records.

Perpetrators often demand access to all online accounts victims have, or obtain access to these covertly as part of their surveillance and isolation tactics. Many victims find (often much later) that their online records have been manipulated by perpetrators, either to paint a false picture of them and depict the relationship on their own terms, or to get advance notice of what is recorded and instrumentalise the information to damage the reputations of victims. This is projected to become increasingly prevalent as medical documentation is increasingly digitised and made digitally accessible to patients.

Digitisation offers greater efficiency, accessibility, and convenience; advantages reflected in the widespread uptake of digital health platforms aimed at universalising patients' access to their own health information. However, it also offers abusive partners greater efficiency, accessibility, and convenience in how they perpetrate violence, extending and amplifying their reach over victims' lives.[25] Further, perpetrators' manipulation of what is reflected in health and therapeutic records is not limited to the use of digital technology. Our findings identified multiple ways that perpetrators manipulated their victims' health information, impacting the integrity of what was (and could ever be) recorded. These included the following examples.

- Contacting victims primary care providers online and via email posing as victims and disclosing false information about mental health, drug use, and other stigmatising information;
- Calling victims' GPs as a 'concerned partner' to give false updates on victims' mental health concerns and use of prescribed medication;
- Monitoring their health updates and reading their online health notes;
- Sabotaging victims' relationships with the primary care providers;
- Accompanying victims to healthcare appointments (and speaking for them);
- Requiring them to ask permission to see primary care providers and then often withholding permission;
- Sexually harming them in ways participants felt too ashamed to disclose; and

- Calling the Police appearing to be concerned about their victim's mental health, so that when the victim contacted Police about the family violence, the Police would suggest they contact mental health instead.

Participants experienced relentless control over their everyday lives, such as perpetrators dictating who they were permitted to talk to, what they were permitted to say, or how they used their phones and computers. They believed these tactics had a greater adverse impact on their health capital than the physical assaults they suffered did. The following quotes demonstrate the implications of family violence on the integrity of their records, underlining the fallibility of therapeutic records as 'evidence' that can be required to be disclosed and can subsequently misrepresent victims and obscure perpetrators' violence in court.

"[Abusers] use [health information] to try and paint themselves out to be a better person. Or a big thing is taking down your character, so what you're saying doesn't hold as much weight." – Ruhia

"I've changed GPs so many times. [I don't know] what's been lost [from my record] along the way, [including] the information I need now to help me in court, because [the abuser] is still trying to say [it was my own medication he drugged me with]." – Bianca

"He'd find all [my appointment] notes ... He could spread [my health info] amongst all the people we knew. He could turn everyone against me… and then I would have been so much more alone." – Bridie

"I wasn't allowed to go to the GP unless [my ex partner] approved it. I could only go the chemist once a week and he had to come with me. In terms of my health, I had no choices… There were [also] times where he called my GP saying 'oh she's acting a bit crazy today, her personality is all weirdo'. I never said he could talk to my doctor." – Bridie

"He always had access to my email…I'd get an email about [my new health notes] which is brilliant when it's just me [accessing this] but...he pretty much controlled everything"– Peyton

The above victim quotes highlight the appropriateness of further feedback given by Paulette Benton-Greig (below):

"We note that the s 69 discretion to exclude confidential communications makes specific mention of society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences (s 69(3)(g)). Thus, Parliament has already determined that there is a heightened confidentially interest in private communications by victims of violent offending."

II. Use of expert evidence in family violence cases

The court's capacity to expertly identify and respond to family violence is constrained by gaps in what evidence is admitted and by *how* that evidence is considered and interpreted. Expanding the scope of what information is used and what resources are drawn upon to interpret significance from that information is a vital measure to support judicial actors in their decision-making.

As discussed throughout this submission, many of the nuanced tactics of family violence are best understood in context. This context is best informed by family violence specialists and those able to give direction on family violence and the intersecting issues, including:

- The facilitation and maintenance of disparate relationship authority;
- Coercion, control, and social entrapment;
- Constraints to victim 'choice';

- Victim fear and how it drives the trade-offs between different forms of 'safety' for victims;
- The access, reach, and influence perpetrators command over victims' digital and administrative lives;
- Perpetrators' use of children to influence victim complicity and advance their pattern of harm;
- The influence that unproductive, risky, and misinformed system responses have on children's trajectories and future willingness to engage with help seeking services or in systems of justice;
- Perpetrators' purposeful and premeditated manipulation of perpetrators over vicitims and the services they interact with;
- The misperceptions about women and children's experiences of family violence and their credibility that pervade helping systems; and
- The attribution of responsibility for harm.

Accountability for those using violence encompasses both social accountability and accountability in the justice system, and is contingent upon both social and justice actors giving visibility to the patterns of abuse tactics that collectively constitute family violence. While this has traditionally been regarded as a straightforward exercise in fact-gathering, a growing body of literature situates the assessment of family violence as a specialist task, equivalent to other recognised sites of specialist assessment such as of psychological functioning.[2627] As recent high-profile cases involving family violence have demonstrated, facts alone are not always sufficient to guarantee a family violence-informed response.

The value of any specialism is based on the advancement of knowledge of a particular topic and how this is applied to give an informed interpretation. In a medical setting, for instance, a set of ultrasound scans of a patient may appear meaningless to the general public, be discernible by a sonographer, signal pathology to a generalist clinician, and be interpreted diagnostically by a specialist physician. Similarly, documentation relating to family violence may be discernible and significant to justice actors who have had family violence education but may not be given expert interpretation unless there is scope for a specialist to give meaning to that data. As with raw data used by other designated specialists, data interpreted at face value only is inherently limited in what it can convey.

Specialist assessment of family violence (and accordant visibility of a perpetrator's pattern of abuse) is held back by the absence of qualifying criteria that designates a practitioner as specialist. Unlike medical specialisms or other occupational thresholds that determine practitioners' expert status, the term 'family violence specialist' has been subjectively utilised to denote anyone with an interest in or familiarity with family violence, irrespective of whether they have evidence-informed and purposeful experience or have simply attended a brief family violence training session.[28]

Limitations to what evidence is introduced as standard practice in family court proceedings constrains decision-makers' capacity to make the best possible decisions for children, perpetuating their vulnerability to family violence. Family violence convictions, protection orders, breaches of orders, and documentation from service providers after a protection order is granted are not indicative, inclusive, or representative of all family violence 'evidence'. Reliance on these distorts decision-makers' perceptions of the nature of family violence dynamics as they play out in a child's home context, leaving children inadequately protected.[2930] Conversely, the bulk of documentation regarding children's risk and safety relating to family violence 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 therefore a corresponding imperative to mandate consideration of these forms of evidence in care of children cases, in addition to court orders and convicted breaches.

In part, the overreliance on forensic history, rather than social history, of family violence reflects prevailing myths about family violence: the associations between violent perpetration against a parent

and threats to child wellbeing have not been entirely integrated in care of children cases. While it is acknowledged that family violence harms children, court decisions generally go no further than flagging it as generically harmful. We acknowledge that Judges' decisions are made in what they perceive as children's best interests, and that both Judges and children's lawyers are committed to supporting children's safety. However, they are simply not equipped with access to the necessary specialist skill-sets (or use of specialists) to bridge the gap between presupposed and actual safety after family violence.

We do not feel that a generalist key actor (including currently delegated roles such as Lawyer for Child) can realistically be equipped to sufficiently elicit and collate family violence information to convey an accurate snapshot of the ways that a perpetrator's violence harms a child or undermines their potential for wellbeing. This a specialist task. However, people offering interpretation of family violence and its impacts on children's caregiving landscapes in the Family Court are rarely family violence specialists. While competent at their professions, they offer an enhanced, rather than an expert, understanding of family violence and its implications. Accordingly, even if an expanded range of evidence is mandatorily considered, decisions regarding the care of children cannot be family violence-informed – and therefore safe – unless generalist decision-makers access input from family violence specialists to give meaning to that evidence.

As discussed above, maximising 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 report,[31] which 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."*

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. Accordingly, we support Ms Benton-Greig's discussion on the importance of amending the Evidence Act *"to make it clear that a wide range of expertise and evidence is relevant in cases where family violence is a factual issue."*

Finally, in criminal proceedings, myths about family violence and victim behaviour continue to pervade judicial decision-makers' perceptions of what motivates perpetration, how victims should behave in 'legitimate' family violence crimes, and what factors compel victims' continued relationships with perpetrators. As with sexual violence, these necessitate the provision of factual information (such as instructions on the consideration of counterintuitive evidence or the inclusion of expert evidence to explain common themes) to juries in trials, in order for misconceptions about family violence to be combated.

III. Evidence relating to 'parental alienation syndrome'

We note the recent recommendation of the United Nations Special Rapporteur on Violence Against Women and Children, namely that State's should legislate to prohibit the use of parental alienation or related pseudoconcepts in family law cases and the use of so-called experts in parental alienation and related pseudo-concepts.

Discredited concepts such as Parental Alienation are still haphazardly permitted in Family Court proceedings relating to the care of children, despite attracting criticism from the UN human rights committees. The use of this discredited theory is reflective of broader issues about the role of care arrangements in family violence risk and safety. Shared care often remains prioritised despite current and concerning threats to children's wellbeing or on-going family violence perpetrated in front of the child.[32] As a result, fathers' access is prioritised above mothers' concerns for the safety of their children while in the care of their fathers, often demonstrating pervasive unconscious bias that is implicitly blaming toward mothers.

In cases of child sexual abuse in particular, many of our clients report that first disclosure is often made shortly after separation of parents, which changes the landscape of perceived safety of disclosing by making the safe parent seem less bound to the person perpetrating harm. However, despite the evidence validating the timing of these disclosures, they are frequently interpreted as a byproduct or tactic of parental anger, rather than a genuine disclosure of abuse. Subsequent safeguards that may be enacted by the Family Court are then often rejected on the basis that a re-disclosure that may meet the evidential sufficiency threshold for criminal prosecution has not been forthcoming; thus failing to account for how children's willingness and capacity to disclose abuse is continually informed by the safety (or risk) they perceive from individuals' and organisations' responses to their disclosures. Without a clear process that weights children's initial disclosures of abuse as indicative of further risk and harm and enacts these safeguards despite subsequent changes to children's accounts, children are left at risk of revictimisation and their vulnerability is increased as their confidence in a safeguarding response to disclosures reduces.

In addition, many women who are first attempting to apply for such orders through the Family Court are encouraged to accept Undertakings,[33] rather than pursue protection orders. They are told by lawyers or judges that they must accept these, or risk being regarded as obstructive, malicious, or as though they are alienating their children from their other parent. This is 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, using derogatory terms, she 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 his 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."

If a perpetrator's use of violence foregrounds the consideration of protective parenting, both the attribution of responsibility for harm and the attribution of responsibility for safety are more accurate, nuanced, and safety-promoting. Without this safe interpretation of family violence evidence, the potential that such arrangements will put children at perpetual risk will continue to act as one of the primary deterrents to women considering leaving an 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.

The unacceptable admission of 'parental alienation' arguments within family court proceedings enables perpetrators' reliance on pseudo-science to radically change the story in court from 'children impacted by violence' to 'children unfairly kept from me'. It condemns children to continued risk, and undermines every safety effort made by the victim, the children, and their support people/services.

IV. Recommendations for these additional issues

We recommend that privilege be extended to therapeutic records (counselling, mental health, substance use, and medical) or, at a minimum, that a higher threshold be introduced for assessing the probative value of these with respect to the adverse consequences for victims individually and collectively.

We note that in care of children cases, children's safety and wellbeing cannot be fully realised unless decision-makers:

- Are provided with all relevant family violence evidence, including from clients, from police, and from support agencies as standard practice; and
- Have access to (and use) resources to inform their decisions; 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 settings.

We encourage the standardised use of a wider range of evidence being admitted in any case involving family violence to capture information held by specialists and other non-justice sources.

We also recommend amending the Evidence Act to specify that expertise specific to family violence is required in cases in which family violence is a principal factual issue (in both criminal and civil cases).

Overarching recommendations

Promoting safer justice outcomes for victims of family violence on a national scale requires all justice and law enforcement actors to be comprehensively educated in family violence-informed decision-making and have an advanced understanding of risk, safety, and social entrapment. We propose the introduction of a competency framework based on an expert understanding and application of these concepts, developed with the specialist family violence sector.

We also encourage (and underscore the need for) the standardised use of a wider range of information held by specialist family violence safety providers and family violence-informed sources within any case involving family violence.

We also recommend amending the Evidence Act to specify that expertise specific to family violence is required in cases in which family violence is a principal factual issue (in both criminal and civil cases).

We recommend the use of child family violence specialists to support children (as those with the least epistemic status) to navigate adult centric systems, including support to prepare for, interpret for, and give context to their voices in court.

Finally, given the nature of family violence and the evolution of tactics used by perpetrators of family violence, we submit that there is an ongoing need for regular reviews of the Evidence Act 2006, and related legislation.

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