Giving Evidence of Family Violence Amendment Bill

From the National Collective of Independent Women's Refuges (NCIWR)

Introduction

We would like to thank the Justice Select Committee for the opportunity to submit on this Bill. The National Collective of Independent Women's Refuges (NCIWR) is a non-governmental organisation with 41 member agencies, that has delivered services to women, children, and whānau affected by family violence in Aotearoa for 50 years. We represent victims of family violence, specifically wāhine and tamariki, who are the primary groups subjected to and impacted by family violence.

Our feedback is informed by Women's Refuge-specific data, research, and evidence, by the decades of experience of our senior practitioners in supporting women and children who experience family violence, and by insights from other relevant research.

Overall NCIWR feedback on the bill

Overall, we strongly support this bill. It is a step towards achieving the vision of Te Aorerekura, the national strategy for the elimination of family violence and sexual violence, that will make the family justice system safer for victim-survivors' participation.

We do, however, make three recommendations in this submission to help ensure the Bill will meet its purpose of reducing the risk of harm to victim-survivors of Family Court proceedings – particularly victim-survivors who are targeted by persistent and determined abusers who use legal means to continue their psychological violence, harassment and financial abuse post separation.

Why NCIWR supports this bill: Large numbers of victim-survivors are involved in Family Court proceedings

Local and international research[1] strongly indicates that in Family Court proceedings involving care of children, the majority of women (mothers) and children involved are victims of family violence (including sexual violence). This is certainly the case for almost all

[1] For example, see Kapiew et al (2015) and Gollop et al (2019) below.

cases involving protection orders. Usually the perpetrator of the violence is the other parent and party in the case; it is highly likely that the majority of Care of Children Act proceedings coming before the New Zealand Family Court will involve allegations or confirmed accounts of family and/or sexual violence or child abuse and neglect. Often, mothers are involved in Family Court proceedings in an effort to protect children from further violence and abuse.

Only a small percentage of women who experience family violence apply for a protection order, and only a relatively small portion of those have the order granted. All Women's Refuge clients are victims of serious violence as we know, for example, that 55% who believe their perpetrator could kill them, 46% who have been strangled or suffocated, and 55% who have been held hostage. Our frontline kaimahi report that many of our client who are at the highest risk of homicide opt to ***not*** apply for protection orders, because of the risk of escalating violence, combined with risk of financial disadvantage and the belief that it would not increase their safety, often based on past experience with police and the justice system, or because their partner has an extensive criminal record already.

While the Family Court does not collect specific data on the incidence of family and sexual violence cases in relation to the Care of Children Act (COCA[2]) or relationship property proceedings, research in Australia found that 54% of families in court to make parenting arrangements reported physical violence, and 85% reported emotional abuse – higher levels than for those who made parenting arrangements without going to court (via mediation or lawyers).[3] A New Zealand study found that families were more likely to have their parenting arrangements determined by the Family Court when there were safety concerns; and family violence acted as a particular barrier in terms of parents being able to come to their own arrangements.[4]

In other words, families whose histories involve violence are more likely than other families to appear before the Family Court. Abusive fathers/ex-partners often use parenting arrangements and custody litigation after separation as an opportunity to continue abuse.[5]

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[2] Family violence data is collected in relation to Family Violence Act proceedings. However, not all victim/survivors involved in COCA proceedings will have applied for a Protection Order as there are a number of barriers/reasons not to do so. In Backbone's first Family Court survey we found that , 30% of the 496 women victim-survivor participants had **not** applied for a Protection Order even though they were involved in the NZ Family Court due to family violence.

[3] Kaspiew et al., (2015) Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies. Table 2.2

[4] Gollop, M., Taylor, N., Cameron, C., & Liebergreen, N. (2019). Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms –Parents' and caregivers' perspectives–Part 1. Research Report for the New Zealand Law Foundation. Dunedin, New Zealand: Children's Issues Centre, University of Otago

[5] Justice Select Committee (2023) Report re Victims of Family Violence (Strengthening Legal Protections) Legislation Bill; see also Backbone Collective (2017). *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*. Backbone Collective NZ. See also Gutowski, E.R., Goodman, L.A. (2022). Coercive Control in the Courtroom: the Legal Abuse Scale (LAS). Journal of Family Violence https://doi.org/10.1007/s10896-022-00408-3

Family Court currently exacerbates trauma and danger for victim-survivors

The success of community family violence services, like Women's Refuge and our Kōkihi Ngā Rito child advocacy service, in supporting safety, wellbeing and healing for adult and child victim-survivors is frequently limited by the failures of the family justice and child protection systems. Our 2023 Evaluation of Kōkihi Ngā Rito (child advocacy pilot) states, "..the data from kids, Mums, and KT (Women's Refuge child advocates) also reveal the limitations of how effective KNR can be while the safety of tamariki is actively undermined by more powerful systems. Many KNR tamariki were failed by these systems at the most critical point in their journeys, condemning them to known, continuous, and anticipatable risk of harm from family violence."[6]

Family Court cases involving family violence are often referred to as 'high conflict' or 'complex' cases. The use of these terms masks and distorts the family violence dynamic, and makes it sound like an issue common to both parties rather than behaviour of one party that targets and harms the other party, and the children. This results in responses that view the parties as bearing equal responsibility for their inability to resolve matters, and ignores the dynamics of violence, abuse, and coercive control and the need for protection of the adult victim and the children from further abuse to be prioritised in court decision-making.

As Crown Law acknowledges, in the Family Court "there may be close physical proximity between the parties, and parties and witnesses. This increases the danger to and stress on victims and witnesses."[7] In Backbone's Family Court survey of victim survivors, 243 of 419 women (58%) said they had been threatened, intimidated, or physically assaulted by their abuser while attending court and court-related appointments/fixtures or hearings.[8] Of those answering another question, an overwhelming 93% (354) said they did not feel safe participating in joint activities with the abuser (including court fixtures).

Some Backbone survey participants said they were accosted by the abuser in the Family Court and threatened. As well as having to appear in a courtroom with their abuser, some women reported being left alone in the court room with their abuser while lawyers meet with Judges in Chambers. Many often have to wait outside the courtroom in the same space as their abuser is waiting and/or the abuser's family and supporters are waiting. This can be for hours at a time, as multiple cases are listed at the same time (most Family Court hearings are listed as starting at 10am and parties are expected to arrive earlier (9am)). Even before entering the court room, victim-survivors can be unsafe when they see their abuser outside the court building, for example in the carpark and/or walking to the court building.

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[6] Arathoon, C., et al (2023). Women's Refuge Evaluation of Kōkihi Ngā Rito, National Collective of Independent Women's Refuges.

[7] Whiting, K. (2024) "Evidence (Giving Evidence of Family Violence) Amendment Bill - Consistency with the New Zealand Bill of Rights Act 1990" letter Ref ATT395/407 Dated 24 March 2024

[8] Backbone Collective (2017). *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*. Backbone Collective NZ.

For many victim-survivors, this is neither physically nor psychologically safe. Some women talked about hiding in the toilets at the Family Court to stay safe, others said they refused to attend the court fixtures as they were so scared of seeing the abuser.

More recently, in Backbone's 2023 consultation with victim-survivors to support the Ministry of Justice review of AVT, victim-survivors again discussed being threatened during court hearings in Family Court by the abuser who used subtle ways to instil fear (gestures, looks and objects). These threats were not obvious to others around the victim-survivor, but greatly impacted on her ability to participate in the proceedings.

In some ways, procedural protection for victims is *more* important in the Family Court than in the criminal courts. Victims in the criminal courts are afforded 'victim' status as soon as the case is brought to court and thereby have police, prosecutors, Victim Advisors and support workers from Victim Support to assist them. Victims of Crime Guidelines support Crown Prosecutions in how to work with victims.[9] Furthermore, physical protections are more easily available while they attend court, such as separate waiting areas, alternative routes to court rooms, alternative bathroom facilities and greater court security in the court room.

However, victims in the Family Court are viewed and treated as an equal party in a civil dispute (in the same way disputing neighbours would be treated) and are not viewed as 'victims' even in instances we know of when one party has previously been convicted of a family violence offense against the other in the Criminal Court. Victims are therefore not provided with advocates or protection and are mostly forced to navigate a complex, hostile system alone with some support from their legal counsel if they are represented, and increasingly many are not. Women's Refuge knows of many cases of our kaimahi and other victims' support people not being allowed into the Family Court room as support people.

Current cross-examination practices do not support the interests of justice

Currently, most victim-survivors are required to stand in the witness box and be verbally cross-examined either by their abusive ex-partner's lawyer in front of their ex-partner, or in some cases by their ex-partner. Even though Section 95 of the Evidence Act sets out that the person who abused a witness or their children is not entitled to personally cross-examine a victim, it happens. In Backbone's survey of victim-survivors with experience of Family Court proceedings, 57 (of 496) reported being cross examined by their abuser.[10] It is unclear why Section 95 is not being upheld in New Zealand Family Courts, but we presume that Family Court judges are not clear that it applies to victim-survivors in all Family Court proceedings and not only Family Violence Act proceedings. For example, it applies to Care of Children Act and Relationship Property Act proceedings.

[9] Crown Law, Victims of Crime Guidance for Prosecutors (2014). PROSECUTION GUIDELINES: NEW ZEALAND
[10] Backbone Collective (2017). *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*. Backbone Collective NZ.

In Backbone's 2023 survey of victim-survivors as part of the MoJ review of the use of audio-visual technology services in court rooms, victim-survivors described in-person cross-examination as extremely traumatising and overwhelming. They reported being fearful, experiencing trauma responses, being unable to concentrate and having difficulty understanding and responding to questions.

This bill will ensure safer options which better support the interests of justice

Currently, victim-survivors involved in Family Court proceedings are not routinely offered the opportunity to give their evidence in alternative ways such as behind screens, via video links or as prerecorded evidence as they would be if involved in Criminal Court proceedings. Yet, for the most part, victim-survivors involved in Backbone's 2023 consultation regarding AV technology in court rooms wanted to be able to give evidence in alternative ways while participating in Family Court proceedings. Most participants said the option of using audio visual services would greatly improve their physical and psychological safety while participating in court proceedings.

As well as being an end in itself, improved safety would benefit the quality of evidence given, by enabling victim-survivors to better concentrate and answer questions more fully without intimidation, and/or fear of punishment. The benefits of using audio visual services to give evidence, as perceived by participants, included:

- Safety and privacy
- Prevention of distress from facing the abuser
- Improvement of evidence.

The Sexual Violence Act 2021 recognised the responsibility of the Crown, in cases of sexual violence, to legislate to reduce the re-traumatisation and abuse of victims during the court process. The same principle should apply for family violence and sexual violence in the Family Court.

Recommendations

1. **Remove the right to "see" the party or witness from new 106BB clause 1c: "the parties can ~~see and~~ hear the party or witness, unless the Judge directs otherwise".** While everybody needs to be able to hear the evidence, there is no reason for other parties (including abusers) to see the person giving evidence regarding family and sexual violence. New 106BB clause 1b already allows the judge and any lawyers to see the witness and we support that recommendation. The knowledge they can be seen by their abusers can in itself be terrifying for victim-survivors, even if they themselves cannot see their abuser. Enabling abusers to see the victim-survivor can also increase the likelihood and opportunities for stalking by giving the abuser information about victim-survivor appearance or location, and/or giving the abuser

material to taunt the victim-survivor about (for example, unwanted compliments about what the victim-survivor was wearing while giving evidence).

2. **Remove the requirement for 28 days notice from new 106BB clause 4: "Unless a Judge permits otherwise, the notice required under subsection (3) must be given as early as practicable ~~and in any event no later than 28 days before the hearing~~."**
   We are concerned that 28 days is a long and seemingly arbitrary time, during which circumstances and risk are likely to change for victim-survivors so that they need to change the way in which they give their evidence. In addition, any number of days specified makes it less clear that, in the event the proceedings are held under urgency (and arranged within a shorter period than the usual notice period), the right of people to give evidence in alternative ways about family and sexual violence remains. We would be concerned if proceedings under urgency did not support the right to giving evidence in alternative ways.

   We are also concerned that the bill, as currently written, seems to offer the judge no opportunity to override the notice period specified (it's unclear whether or not they have this authority due to the order of the clauses). The judge not being able to overrule the notice period would not be in the interests of justice (some witnesses may decide not to give evidence, rather than have to give it face-to-face with their abuser).

3. **Remove new clause 106BC, i.e. remove the ability for any other party to apply to force the person giving evidence about family violence to give evidence in the ordinary way.**
   If this clause remains, it will be used by abusers to further harass, control and torment victim-survivors. Even if a judge declines the application, the application itself can cause victim-survivors significant distress via:
   - reading any material relating to the abuser's application
   - stress, fear, and uncertainty cause to the applicant by such an application produces about whether or not they will have to appear face-to-face with their abuser in court
   - unfounded accusations by the accuser about the victim-survivor within the application
   - the process of appearing before the judge in chambers (and deciding whether or not to do so)
   - knowing the abuser will also be heard in chambers.

   While such challenges/applications may be required for the right to a fair trial in criminal proceedings, this does not apply to the Family Court as a civil court. On balance, it seems to us strongly counter to the interests of justice as well as victim-survivor safety to include this clause allowing challenges to the right of victim-survivors to give evidence in an alternative (safer) way.

We strongly recommend that the Ministry of Justice's current review and consultation regarding the Courts (Remote Participation) Act are taken into account – it could well be that this new clause 106BC (and potentially other clauses) are already out-of-date, that is, outside of current best practice and prevailing views, and counter-productive to the substantial MoJ work on remote participation. The tenor of the MoJ remote participation discussion document is in regard to how to best promote remote participation for all parties as a default setting as a matter of course (NCIWR believes that the preferences of the victim-survivors should prevail in each individual case). It seems that 106BC may act as a roadblock to this work if it is not reconciled. There may be a case for treating screened and remote participation as other "ordinary" ways of giving evidence for those giving evidence of family violence and/or sexual violence, and only treating video records made before the hearing as an "alternative" way – particularly as the Family Court is a civil court rather than a criminal court, and therefore nobody is on trial.

Closing

It is the responsibility of the Crown and the Courts to minimise the potential of re-traumatisation and risk of harm to victims within the court process. Reducing these risks will enable greater participation of victim-survivors in the family justice system, which will enable better informed family court decisions that will provide safer outcomes for children. This bill will serve the interests of justice, and the safety and wellbeing of victim-survivors – adults and children, and their families and whānau.

When a family violence or sexual violence perpetrator inflicts violence and abuse on family members, we have an obligation as a society to protect adult and child victims from further abuse and help them recover and heal from past violence and trauma.

Passing the Evidence (Giving Evidence of Family Violence) Amendment Bill is a small but significant step towards improving the process for victims of family violence in the Family Court.